Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Between:**

**Joyce Beattie**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Aboriginal Affairs and Northern Development Canada**

**Respondent**

**T'Seluq Beattie**

**- and -**

**Nikota Beattie**

**Interested parties**

**Decision**

**Member:** Edward P. Lustig
**Date:** January 10, 2014
**Citation:** 2014 CHRT 1

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## I. The Complaint

[1] This is a decision respecting a Complaint signed by Joyce Beattie (hereinafter referred to as the "Complainant") on January 18, 2011 and received by the Canadian Human Rights Commission (hereinafter referred to as the "Commission") on January 19, 2011. The Complaint was amended on December 8, 2011.

[2] The Complainant alleges in her Complaint that Indian and Northern Affairs Canada (now known as Aboriginal Affairs and Northern Development Canada and hereinafter referred to as the "Respondent") discriminated against her "…in the provision of a service customarily available to the general public and which s. 5(3) and s. 9(3) of the *Indian Act* require the Respondent to provide to "*any person*". In particular, the Respondent summarily refused, based entirely on the prohibited ground of family status discrimination, to give proper and adequate consideration to the facts and law presented to him to establish the Complainant's entitlement to Indian registration and band membership pursuant to ss. 6(1)(c) and 11(1)(c) of the *Indian Act*. The purpose of the complaint is to prevent a continuing contravention of the *Canadian Human Rights Act* by the Respondent in the conduct of his statutory duties pertaining to the Complainant's request of June 2, 2010 for corrective amendment to her Indian registration and band membership." The Complainant further alleges in the Complaint that "…documents and a request for amendment to her registration category to 6(1)(c), which would entitle her to reinstatement in her former and proper Gwichya Gwich'in Band, were delivered to the Indian Registrar on June 7, 2010. By letter dated December 7, 2010, the Indian Registrar summarily rejected the Complainant's request..."

[3] The Complaint cites section 5 of the *Canadian Human Rights Act* (hereinafter referred to as the "*CHRA*") as the discriminatory practice(s) alleged to have occurred on the prohibited grounds of marital status and family status under section 3 of the *CHRA*. The two above mentioned sections of the *CHRA* read as follows;

> **3.** (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a

pardon has been granted or in respect of which a record suspension has been ordered.

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed on the ground of sex.

**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.

[4] The Canadian Human Rights Tribunal (hereinafter referred to as the "Tribunal") was requested by the Commission pursuant to section 49 of the *CHRA* to institute an inquiry into the Complaint by letter dated January 9, 2012.

[5] A hearing into the Complaint was held by me in this matter during the week of September 30, 2013.

## II. Facts

[6] In December of 1949, the *Indian Act*, R.S.C. 1927, c. 98, included the following provisions:

**2.** In this Act, unless the context otherwise requires...

(b) "band" means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal status is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible; and, when action is being take by the band as such, means the band in council; ...

(d) "Indian" means

(i) any male person of Indian blood reputed to belong to a particular band;

(ii) any child of such person; or

(iii) any woman who is or was lawfully married to such person;...

> (g) irregular band means any tribe, band or body of persons of Indian blood who own no interest in any reserve or lands of which the legal title is vested in the Crown, who possess no common fund managed by the Government of Canada, and who have not had any treaty relations with the Crown, ...
>
> (h) "non-treaty Indian" mans any person of Indian blood who is reputed to belong to an irregular band or who follows the Indian mode of life, each of such person is only a temporary resident in Canada;...

[7] The Complainant was born on December 4, 1949, in the community known as Tsiigehtchic, Northwest Territories (formerly known as Arctic Red River). Her biological parents were James Delap Harris and Roselia (or Roaslie) Harris (nee Arruka or Aruke).

[8] James Delap Harris and Roselia (or Rosalie) Harris (nee Arruka or Aruke) married in or around 1938.

[9] On or about December 8, 1949, Norbert Otto Natsie and Bernadette Natsie (nee Coyen) adopted Joyce Beattie at the age of four days old in accordance with Aboriginal custom, as her natural mother could not care for her on account of illness.

[10] At the time they custom adopted the Complainant, Norbert Otto Natsie and Bernadette Natsie (nee Coyen) were Indians pursuant to the provisions of the *Indian Act* then in force and their names appeared on the Treaty 11 annuity pay list for what was then known as the Loucheaux No. 6 Band. The Respondent now recognizes the Gwichya Gwich'in band as the contemporary name of the Loucheaux No. 6 Band.

[11] The Complainant's name was not added to the Treaty 11 annuity pay list for what was then known as the Loucheaux No. 6 Band at the time of the custom adoption.

[12] The *Indian Act* was substantially amended effective September 4, 1951. The *Indian Act*, S.C. 1951, c. 29, included the following provisions:

> **2.** (1) In this Act, ...
>
> (b) "child" includes a legally adopted Indian child;...
>
> (g) "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;...
>
> (j) "member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;...
>
> **11.** Subject to section twelve, a person is entitled to be registered if that person...
>
> (b) is a member of a band
>
> (i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy four have been agreed by treaty to be set apart, or
>
> (ii) that has been declared by the Governor in Council to be a band for the purposes of this Act,
>
> ...
>
> (d) is the legitimate child of
>
> (i) a male person described in paragraph (a) or (b).
>
> ...
>
> **14.** A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that ban, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member.

[13] Section 5 of the 1951 *Indian Act* created an Indian Register "...in which shall be recorded the name of every person who is entitled to be registered as an Indian." Before this time, there was no central Indian Register, and the Respondent instead maintained a separate treaty annuity pay list or band list for each band. As of the coming into force of the 1951 amendments, the

band lists then in existence were to constitute the Indian Register, and a General List was created for persons who were entitled to registration but had no band membership.

[14] On April 6, 1974, the Complainant married Bruce Beattie, who was not registered or eligible for registration under the *Indian Act*. As a result of this marriage, Ms. Beattie lost any entitlements she may have had to registration and band membership, under the "marrying out" provisions of the *Indian Act* in force at the time. Those provisions applied only to Indian women, and not to Indian men.

[15] On March 17, 1975, the Complainant and Bruce Beattie had a son, T'Seluq Beattie.

[16] On June 1, 1976, the Complainant and Bruce Beattie had a daughter, Nikota Bangloy (nee Beattie).

[17] Effective April 17, 1985, the *Indian Act* was substantially amended by *Bill C-31: An Act to Amend the Indian Act*. As amended, the *Indian Act* included the following provisions:

> **2.** (1) In this Act,...
>
> "child" includes a legally adopted child and a child adopted in accordance with Indian custom;...
>
> "Indian" means a person who pursuant to this Act is registered or is entitled to be registered as an India;...
>
> "member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List; ...
>
> **5.** (5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.

> **11.** (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if...
>
> (c) that person is entitled to be registered under paragraph 6(1)(c) and ceased to be a member of that band by reason of the circumstances set out in that paragraph;...

[18] Since the Bill C-31 amendments, it has been ss. 6(1) and 6(2) of the *Indian Act* that describe the various persons who are entitled to be registered in the Indian Register. As they stood immediately after the Bill C-31 amendments:

1. s. 6(1) set out categories of eligible persons that include the following:

   all persons who were registered or entitled immediately prior to the effective date of the 1985 amendments (s. 6(1)(c)); and

   women whose names were deleted or omitted from band lists (before September 4, 1951), or from the Indian Register (September 4, 1951 and after) because they married non-Indian men (s. 6(1)(c)); and

   persons who have two Indian parents (s. 6(1)(f); and

2. s. 6(2) created eligibility for persons who have one Indian parent.

[19] Persons who are registered or eligible for registration under s. 6(1) of the *Indian Act* are able to pass entitlement to registration to the children they have with persons who are not registered or eligible for registration under the *Indian Act*. Persons who are registered or eligible for registration under s. 6(2) of the *Indian Act* are not able to pass entitlement to registration to the children they have with persons who are not registered or eligible for registration under the *Indian Act*.

[20] The Bill C-31 amendments allowed a band to assume control of its own membership, and maintain its own Band List, subject to certain requirements (*Indian Act*, s. 10). Until such time as a band assumes control of its Band List, the Band List continues to be maintained in the Department by the Indian Registrar, who can add or delete the names of persons who are entitled

or not entitled, in accordance with the *Act* (*Indian Act*, s. 9). The Indian Registrar is not required to add a name to a band list unless an application for entry therein is made to the Indian Registrar (*Indian Act*, s 9(5)).

[21] The Bill C-31 amendments to the *Indian Act* changed the registration entitlements of the Complainant's biological parents. As a result of the amendments, (i) James Delap Harris became eligible for registration under s. 6(2) and (ii) Roselia (or Rosalie) Harris (nee Arruka or Aruke) became eligible for registration under s. 6(1)(c).

[22] On or around September 1, 1985, the Complainant sent an application to the Office of the Indian Registrar, asking that she and her children be registered under the *Indian Act*.

[23] In 1986, the Respondent registered the Complainant under s. 6(1)(f), based on her descent from her biological parents. It also registered her children under s. 6(2), based on the fact they had one registered parent (the Complainant) and one parent who was not registered or entitled (Mr. Beattie). The Respondent later added the names of the Complainant and her children to the Band List for the Fort Good Hope band (i.e., the band of the Complainant's biological mother), after the Fort Good Hope band decided not to enact its own membership rules.

[24] By letter dated March 10, 1986, the Indian Registrar wrote to the Complainant to advise that she and her children were registered under the *Indian Act*. The letter also explained that (i) if the Fort Good Hope Band decided before June 28, 1987, to assume control of its own Band List, she would have to apply to the Fort Good Hope Band for membership and her children's membership, and (ii) if the Fort Good Hope Band did not assume control of its Band List by June 28, 1987, the Complainant and her children would be eligible for membership in the Fort Good Hope Band, pursuant to s. 11(2)(b) of the *Indian Act*.

[25] The Fort Good Hope Band did not assume control of its own Band List by June 28, 1987. As a result, the Indian Registrar added the Complainant, T'Seluq Beattie and Nikota Bangloy (nee Beattie) to the Band List for the Fort Good Hope Band effective June 28, 1987.

[26] On March 3, 2010, the *Gender Equity in Indian Registration Act* ("*GEIRA*") was introduced to Parliament and given first reading. Among other things, *GEIRA* added a new s. 6(1)(c.1) to the *Indian Act*, which grants registration entitlement to the child of a marriage between a man who is not registered or eligible for registration, and a woman described in s. 6(1)(c) whose name was, because of the marriage, removed from a band list (before September 4, 1951) or the Indian Register (September 4, 1951, and after), where (i) the child was born after the date of the marriage, and (ii) the child has himself or herself had or adopted a child with a person who is not registered or eligible for registration on or after September 4, 1951. *GEIRA* passed third reading in the House of Commons on November 22, 2010, and third reading in the Senate on December 9, 2010. Royal assent was given December 15, 2010, and *GEIRA* came into force on January 31, 2011.

[27] By letter dated April 22, 1993, the Respondent's then Deputy Minister formally acknowledged the following, in accordance with a settlement reached with the Crown concerning treaty annuities:

> "Joyce Wilma Beattie, Nikota Beattie and T'Seluq Beattie's Treaty 11 entitlements are not linked to status but may be linked to other factors, one of which is ancestry. In the case of Joyce Wilma Beattie, Nikota Beattie and T'Seluq Beattie, the annuity entitlements pursuant to Treaty Eleven accrued at birth and thereafter have continued to exist, and are treaty entitlements that have been recognized and affirmed by s. 35(1) of the Constitution Act, 1982."

[28] In a letter to the Office of the Indian Registrar dated June 2, 2010, the Complainant for the first time advised the Respondent of her custom adoption for which she had obtained a certificate of custom adoption from the Northwest Territories Supreme Court recognizing that she was custom adopted legally effective on December 8, 1949. She asked that (i) her category of registration be amended from s. 6(1)(f) to s. 6(1)(c) of the *Indian Act*, based on her custom adoption, and (ii) her band membership to be changed from the band with which her biological mother was affiliated (752 Good Hope), to that with which her adoptive parents were affiliated (753 Gwichya Gwich'in).

[29] In a letter to the complainant dated December 7, 2010, the Indian Registrar stated that, among other things, (i) the Complainant's custom adoption would not entitle her to be registered under s. 6(1)(c) of the *Indian Act*, (ii)"...for your information, the registration categories of an adoptee, adopted by two Indian parents is under the provisions of subsection 6(1)(f) of the *Indian Act* and the registration category a adoptee (sic) adopted by one Indian parent is under the provisions of subsection 6(2) of the *Indian Act*", and (iii) if the Complainant wished to transfer to the band of her custom adoptive parents, she would have to contact INAC's regional office in the Northwest Territories to request an official band transfer.

[30] By letter to the Complainant dated December 16, 2010, the Indian Registrar advised that (i) he was satisfied the Complainant was Northwest Territories custom adopted, (ii) the names of her custom adoptive parents had been noted in the Indian Register, (iii) her current registration category remained s. 6(1)(f) of the *Indian Act*, and (iv) she retained her band membership in the Fort Good Hope Band under s. 11(2)(b) of the *Indian Act*.

[31] T'Seluq Beattie had had one child with Stephanie Beattie (who is not registered or eligible for registration under the *Indian Act*): Theron Beattie, born October 16, 2003.

[32] T'Seluq Beattie submitted an application for registration dated February 7, 2011, on behalf of his child, Theron Beattie. By letter dated February 7, 2012, the Indian Registrar advised that because T'Seluq Beattie was registered under s. 6(2) of the *Indian Act*, and Stephanie Beattie could not be identified as someone registered or eligible to be registered, he could not determine that Theron Beattie was entitled to be registered.

[33] Nikota Bangloy (nee Beattie) has had two children with Reynold Bangloy (who is not registered or eligible for registration under the *Indian Act*): Jreyden Bangloy, born December 18, 2003; and Brodin Bangloy, born March 26, 2005.

[34] Nikota Bangloy submitted applications for registration dated March 11, 2011, on behalf of her children, Jreyden and Brodin Bangloy. By letter dated February 7, 2012, the Indian

Registrar advised that because Nikota Bangloy was registered under s. 6(2) of the *Indian Act*, and Reynold Bangloy could not be identified as someone registered or eligible to be registered, he could not determine that Brodin Bangloy was entitled to registration. On February 23, 2012, the Indian Registrar sent a letter to the same effect concerning Jreyden Bangloy.

[35] By letter dated December 9, 2012 counsel for the Respondent wrote to advise that the Respondent had changed its approach and was now prepared to recognize that the Complainant had an entitlement to register under s. 6(1)(c). This reversal was made possible because the Respondent had changed its interpretation of the term "child" as used in the 1927 *Indian Act*. Up to this point, the Respondent had interpreted that term as including only biological children of a male Indian. As Ms. McLenachan the witness for the Respondent testified, the Respondent now decided to look at the term "with a different lens", expanding its definition of the term to include custom adopted children. The consequences were as follows:

- The Complainant became an "Indian" on December 8, 1949, as the child of a male Indian (her custom adoptive father);

- The Complainant was entitled to register as an Indian under the 1951 *Indian Act*;

- The Complainant lost her entitlement to register when she married Bruce Beattie in 1974;

- The Complainant was thus a woman who had lost an entitlement before April 17, 1985, due to marrying-out, and therefore met the requirements of s. 6(1)(c) as of that date;

- her children, T'Seluq Beattie and Nikota Bangloy (nee Beattie), were entitled to registration under s. 6(1)(c.1) rather than s. 6(2).

- her grandchildren, Jreyden and Brodin Bangloy, and Theron Beattie, were entitled to registration for the first time under s. 6(2) because their parents became entitled to registration under s. 6(1) (c.1);

- The Complainant and her children retained their existing memberships in the Fort Good Hope Band; and

- The Complainant and her children could apply to transfer their memberships to another band of their choosing, pursuant to s. 12 of the Indian Act.

[36] On January 3, 2013, the Complainant received a letter from the Indian Registrar advising that, among other things, (i) upon further review her entitlement to registration has been amended from s. 6(1)(f) to s. 6(1)(c) of the *Indian Act*, and (ii) she retained her membership in the Fort Good Hope Band, now under s. 11(1)(c) of the *Indian Act*.

[37] On or around January 3 or 4, 2013, the Indian Registrar amended the registration categories of T'Seluq Beattie and Nikota Bangloy (nee Beattie) so that they are now registered under s. 6(1)(c.1) of the *Indian Act*, rather than s. 6(2).

[38] On January 4, 2013, the Indian Registrar (i) registered Theron Beattie, and Brodin and Jreyden Bangloy, under s. 6(2) of the *Indian Act*, and (ii) and added the names of Theron Beattie, and Brodin and Jreyden Bangloy, to the Band List of the Fort Good Hope Band under s. 11(2)(b) of the *Indian Act*.

[39] In a letter to the Indian Registration Administrator of the Fort Good Hope Band dated January 4, 2013, the Indian Registrar provided the following rationale for registering Theron Beattie under s. 6(2) of the *Indian Act*:

> **Rationale:**
>
> Parent category (T'Seluq Beattie) amended from 6(2) to 6(1)(c.1) pursuant to the 2011 amendments to the *Indian Act* - Gender Equity in Indian Registration Act. His mother, JOYCE WILMA BEATTIE nee HARRIS, born on 1949/12/04, registered under section 6(1)(c) of the *Indian Act* under Register No.7520073601. Amended from 6(1)(f) to paragraph 6(1)(c) of the *Indian Act* on 2013/01/03. Original entitlement based on paragraph 2(d)(ii) of the *Indian Act* , R.S.C. 1927, c. 98 which reads that "any child" of a male person is entitled to registration. Therefore, as a child who was custom adopted on 1949/12/08, by a registered Indian she would have been entitled to registration at the time of the adoption. She married BRUCE ALLAN BEATTIE, a non-Indian, on 1974/04/06.

[40] Although the Complainant's registration request had now been addressed, the Respondent continued to refuse to change her statutory band membership. The parties exchanged further particulars dealing with that issue. In its Amended Statement of Particulars the Respondent acknowledged that the Complainant was entitled to have her name added to the Gwichya Gwich'in Band List, but said it could not implement that change because her name was already on the Band List for the Fort Good Hope band, and the only way she could move her name to Gwichya Gwich'in would be "...by transferring her membership pursuant to paragraph 12(b) of the *Indian Act"*.

[41] In letters to the Respondent's counsel dated March 27 and April 18, 2013, the Complainant's representative requested that the Respondent delete the names of the Complainant, Nikota Bangloy (nee Beattie), T'Seluq Beattie, Jreyden Bangloy, Brodin Bangloy and Theron Beattie from the Fort Good Hope Band List.

[42] By letter to the Complainant's representative dated April 29, 2013, the Acting Indian Registrar advised that, among other things, (i) the names of the Complainant, Nikota Bangloy (nee Beattie), T'Seluq Beattie, Jreyden Bangloy and Brodin Bangloy had been removed from the Fort Good Hope Band list on April 29, 2013, and (ii) the name of Theron Beattie would be removed from the Fort Good Hope Band List on April 30, 2013. In doing so the Respondent changed its previous position about not deleting the Complainant and her descendants from the Band List for Fort Good Hope without a "transfer" under s. 12(d) of the *Indian Act*.

[43] It is open to the Complainant and her descendants to apply to have their names added to the Gwichya Gwich'in Band List, if they wish. The Complainant has confirmed that she no longer wants this to happen.

## III. Issues

[44] The Complaint gives rise to the following issues:

a) Has the matter been rendered moot by the amendment of the Complainant's category of registration in January of 2013, and by the removal of her name from the Band List for Fort Good Hope in April of 2013?

b) Have the Complainant and the Commission met their burden of proving a *prima facie* case of discrimination on the basis of family status and/or sex, contrary to s. 5 of the *CHRA*?

c) If there was *prima facie* discrimination, has the Respondent met its burden of proving that it had a *bona fide* justification for its initial refusals to make the requested amendments to the Complainant's category of registration and band membership in June, 2010?

d) If there was *prima facie* discrimination that did not have a *bona fide* justification, what remedies would be appropriate?

## IV. Summary of the Commission's Submissions

[45] In her letter dated June 2, 2010, the Complainant asked the Respondent to amend her category of registration from s. 6(1)(f) to s. 6(1)(c), based on her custom adoption, and to remove her name from the Band List for Fort Good Hope Band and add it to the Band List for the band of her adoptive parents the Arctic Red River Band (753 Gwichya Gwich'in NT). At issue is whether, in responding to those requests the Respondent was engaged in the provision of "services customarily available to the general public", within meaning of s. 5 of the *CHRA*.

[46] "Services" within the meaning of s. 5 contemplates something of benefit being held out as a service and offered to the public, in the context of a public relationship. Because government actions are generally taken for the benefit of the public, the "customarily available to the general public" requirement in s. 5 will usually be present in cases relating to government conduct.

[47] Granting the Complainant's requests would have led to the conferral of benefits that were not otherwise available.

[48] The Respondent was engaged in the provision of services within the meaning of s. 5 of the *CHRA* when it processed the Complainant's request and made its determinations about her entitlements to the registration and band membership being sought as it involved an exercise of discretion by the Respondent, in the course of processing an application to determine whether an applicant does or does not meet the registration criteria in the *Indian Act*.

[49] Unlike *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7 ("*Murphy*"); *Matson et al. v. Indian & Northern Affairs Canada (now Aboriginal Affairs and Northern Development Canada)*, 2013 CHRT 13 ("*Matson*"); and *Andrews et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 21 ("*Andrews*"), this is a case where the Respondent had discretion in its processing of the Complainant's request in interpreting the definition of "child" in the 1927 *Indian Act*. In initially choosing a narrower definition of the 1927 *Indian Act* that excluded custom adopted children, the Respondent was exercising discretion in the course of processing the application rather than applying mandatory legislative wording. Its choices in that regard are properly reviewable under s. 5 of the *CHRA*, as matters relating to the provision of services customarily available to the general public.

[50] During the period between the initial request (June 2, 2010) and the eventual amendment of registration category (confirmed January 3, 2013), the Respondent denied the service sought by the Complainant - namely, a proper non-discriminatory assessment of her entitlement to registration under s. 6(1)(c) of the *Indian Act*. This was a denial of a service within the meaning of s. 5(a) of the *CHRA*. In the alternative, during that same period, the Respondent adversely differentiated against the Complainant in the provision of a service. Specifically, in assessing her entitlement to registration under s. 6(1)(c) during this time, the Respondent chose to draw distinctions between biological children and custom adopted children. This was adverse differentiation within the meaning of s. 5(b) of the *CHRA*.

[51] The Respondent maintained its refusal of the Complainant's request with respect to registration for at least two years after *GEIRA* came into force on January 31, 2011. The refusal to amend her registration category had negative impacts on the Complainant's ability to transmit status entitlements to her descendants throughout this time period and ensuring government records properly reflected her custom adoption recognizing the correct parent-child relationship.

[52] In this case, the Respondent has acknowledged that the initial barrier to granting the request to amend registration category was that the Complainant was a custom adoptee, and as such was not treated as the "child" of her adoptive father under the 1927 *Indian Act*, and could only be registered under s. 6(1)(f) or 6(2). In this sense, the Respondent's denial or adverse differentiation was based on the Complainant's status as a custom adoptee - a matter that is captured under the prohibited ground of "family status" under the *CHRA*.

[53] In refusing to give legal effect to the custom adoption within the context of the registration scheme, the Respondent effectively excluded the Complainant for nearly two and a half years from accessing the category of 6 (1)(c) registration, which had been introduced in 1985 to partially remedy the historic sex discrimination in the marrying-out provisions of the *Indian Act*. In this sense, the discriminatory practice identified by the Commission, while rooted in issues of family status, also had an intersecting adverse impact based on the Complainant's identity as an aboriginal woman.

[54] The Respondent's changes in its position on registration and band membership of the Complainant is effectively an admission that the previous exclusionary approach was not "reasonably necessary" within the meaning of the applicable jurisprudence, and that the previous approach therefore did not have a *bona fide* justification within the meaning of the *CHRA* and applicable case law.

[55] The Complaint should not be dismissed for mootness as there are still live remedial claims since the revisions by the Respondent to its position vis a vis registration and band

membership. In order to adjudicate its merits, the Tribunal must, among other things, determine whether the Respondent has or has not engaged in discriminatory practice.

[56] The Tribunal should order under s. 53(2)(a) that the Respondent take measures, in consultation with the Commission on the general purposes of the measures, to prevent the same or similar discriminatory practices from occurring in the future.

## V. Summary of the Complainant's Submissions

[57] The Complainant agrees with and adopts the Commission's submissions.

[58] The Complainant argues that she and her descendants have been denied the administrative services mandated by Treaty 11, in particular, proper treaty band membership, annuity payment and education funding and record keeping.

[59] By amendment of the *Indian Act* entitlement rules in 1985 (Bill C-31), registration is no longer linked to statutory band membership and can have no effect on any existing treaty band membership. As a result, *Indian Act* registration has had no relevance or effect on treaty entitlement since 1982 as a result of the enactment of the *Constitution Act*, and at least since 1985, treaty annuity paylists are not the same as statutory Band Lists and do not determine statutory band membership. Legal entitlement to band membership is based on different personal qualifications. Treaty band membership is constitutional and based exclusively on natural descent from an original treaty adherent and current family status. Statutory band membership is not constitutional and is based exclusively on either s. 11 rules or s. 10 delegated band determined rules under the *Indian Act*, neither of which necessarily require natural descent or any particular family status.

[60] With the repeal of s. 67 of the *Canadian Human Rights Act* in 2008, extended in 2011 to "*...complaints against a First Nations government, including a band council, tribal council or governing authority operating or administering programs and services under the Indian Act*, ." all of the Indian Registry administrative services, including both regular statutory registration as

well as verification of the relevant facts of individual treaty entitlement and treaty band affiliation, are now subject to both human rights principles and constitutional protection of all existing aboriginal, treaty or land claim rights. The constitutional obligation to give primacy to existing aboriginal and treaty rights when applying human rights principles to the *Indian Act* is confirmed as follows:

> **1.1** For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act*, 1982.

[61] In accordance with the terms of Treaty 11, the Complainant, her two children and her three grandchildren are all Treaty 11 Indians and have been since the time of each of their respective births, because they have all been officially recognized by Canada to be natural descendants of original treaty adherents and have been officially recognized by Canada to be either Treaty 11 adherents or are children of adherents. They are also all members of the Loucheaux Indians No. 6 Treaty 11 Band of Arctic Red River, because that is the treaty band that Canada has recognized the Complainant to have been a member of as a result of her aboriginal custom adoption and her natural descendants are entitled to be members of that same treaty band which still exists on treaty annuity paylists. All of which has been guaranteed to each of them by s. 35 of the *Constitution Act*, 1982 since April 17, 1982.

[62] Treaty 11 Indian adherents are also constitutionally entitled to be correctly identified in all of Canada's administrative records including treaty annuity paylists and the Indian Register.

[63] After the first annuity payment to any Treaty 11 adherent, records of all subsequent annual payments are maintained as perpetual service provided by the Respondent with no adhesion re-qualification ever required and all family status or band affiliation changes are simply noted on the paylists at the time of each annual payment.

[64] Up to and including the year 2011, the Respondent has provided necessary Treaty 11 administrative services and paid treaty annuity to the Complainant and each of her children for every year of their lives from their respective births. The Complainant and her children have been thereby officially recognized as Treaty 11 adherents and paid treaty annuities based on nothing more than their birth records showing that they are natural descendants of original 1921 Treaty 11 adherents. Official birth records, where they even exist, are all that any descendent Treaty 11 adherent since 1921 has ever been required to provide proof of their treaty entitlement and to be included on the Treaty 11 annuity pay list for the treaty band of their family ancestors.

[65] In 2011, the Complainant's children provided the Respondent with copies of the birth certificates for their natural children and, as heads of their families, requested payment of Treaty 11 annuity for themselves and their children. The Respondent refused to pay any annuity for any of the Complainant's grandchildren on the grounds that they were not registered under the *Indian Act*.

[66] The Complainant argues that the decisions made in 2011 by the Respondent's regional treaty administration official effectively denied goods (treaty annuity) and services (inclusion on annuity pay list), which are the only services offered by the Respondent to facilitate Treaty 11 adhesion, and the denial was based on the irrelevant fact of the grandchildren's *Indian Act* status as "non-registered" children and were thereby arbitrarily deemed not to be descendants of original Treaty 11 adherents. The Complainant argues those administrative decisions have no justification under either the terms of Treaty 11 or any provision of the *Indian Act*, and are therefore infringement of constitutionally guaranteed Treaty 11 rights.

[67] Pursuant to s. 53(2)(b) of the *CHRA*, the Complainant seeks a declaration that the Complainant, her two children and her three grandchildren have all been Treaty 11 Indians from their respective births and are therefore personally entitled to the existing rights, benefits and privileges constitutionally guaranteed to Treaty 11 Indians, including membership in the Complainant's originally named Loucheaux Indians No.6 Treaty 11 Band of Arctic Red River, and to be officially recorded as such on the treaty annuity paylists for that Treaty 11 band.

[68] Pursuant to s. 53(2)(c) and (d) of the *CHRA*, the Complainant claims, for the benefit of her three grandchildren, immediate payment by the Respondent of Treaty 11 annuity arrears for each year of each of their respective lives and reimbursement of all tuition expenses incurred to date to obtain the educational instruction of those grandchildren which the Respondent promised to pay under the terms of Treaty 11 but have withheld pending the outcome of this Complaint.

[69] As the victims of willful and reckless conduct, the Complainant claims that she, her two children and three grandchildren are each entitled to claim additional compensation from the Respondent under s. (3) of the *CHRA*.

## VI. Summary of the Respondent's Submissions

[70] There is no longer a live controversy between the parties relating to the Complainant's registration entitlement as a result of the Respondent's reversal of its position on December 9, 2013 and, as such, this issue is moot.

[71] There is no longer a live controversy between the parties in relation to statutory band membership as a result of the Respondent's reversal of its position on deletion of her and her descendants' names from the Fort Good Hope Band List on April 29, 2013 and because the Complainant has withdrawn her request to have her name added to the Gwichya Gwich'in Band List and, as such, this issue is also moot.

[72] The Complaint is a challenge to legislation, and nothing else, just as in *Matson*. The Complaint addresses interpreting s. 6 of the *Indian Act*, and interpreting the term "child" in the 1927 *Indian Act*.

[73] The Registrar interpreted the word "child" in order to apply s. 6 to determine correctly the Complainant's registration category as an Indian and in so doing, exercised no discretion. When the Registrar subsequently reviewed and changed its interpretation, it also did not exercise discretion (s. 6 affords no discretion regarding the treatment of custom adoptees), but rather corrected an erroneous interpretation of the statute.

[74] The Complainant takes issue, not with the manner in which her application for registration was processed, but rather with the Registrar's statutory interpretation of the word "child" and the eligibility rules prescribed in s. 6 of the *Indian Act*. These criteria, prescribed by Parliament, which has jurisdiction to so under s. 91(24) of the *Constitution Act*, cannot reasonably be termed a "service". Parliamentary law making is not a service.

[75] The term "service" does not contemplate Parliament's definition of "Indian" under the *Indian Act*. A number of specific features militate against such a construal of "service": the reasonable accommodation requirement, the concept of undue hardship, and the factors of "health, safety and cost" which inform the *bona fide* justification analysis. Consideration of these elements demonstrates that a challenge to legislation, as in this Complaint, cannot be appropriately assessed by these mechanisms.

[76] If the Complaint is found to be a challenge to legislation and nothing else then, following *Murphy*, *Matson*, and *Andrews* the Tribunal lacks jurisdiction and therefore the Complaint should be dismissed. In the event that the Complaint is not found to be moot, and is within the jurisdiction of the Tribunal, the Respondent argues that its actions were not discriminatory.

[77] While the Respondent acknowledges that the tests for discrimination by *Charter* cases and human rights cases may differ, the definition of discrimination used by the Supreme Court of Canada in *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143, has been applied by the Federal Court in relation to the *CHRA*. In *Andrews*, Justice McIntyre wrote:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[78] The denial of the Complainant's request to have her registration entitlement changed from being pursuant to s. 6(1)(f) to s. 6(1)(c) of the *Indian Act* did not impose "burdens,

obligations or disadvantages...not imposed upon others" nor did it "limit access to opportunities, benefits and advantages available to other members of society" at the time of her demand nor at the time of the Respondent's response.

[79] The only objective difference between the registration entitlement and band membership that Complainant had and the registration entitlement and band membership that she sought, is that with the remedial revisions to the *Indian Act* made through *GEIRA*, which took effect January 31, 2011, registration pursuant to s. 6(1)(c), would enable the Complainant to transmit registration entitlement to her grandsons. Prior to that there was no difference vis a vis transmission of status between ss. 6(1)(f) and 6(1)(c). Regardless of her registration status, the grandsons could not have been registered as Indians, pursuant to the *Indian Act*, prior to January 31, 2011. Furthermore, by virtue of s. 11 of the *Indian Act* they could not have their names added to the Band List of the Fort Good Hope Band or the Gwichya Gwich'in Band.

[80] The Respondent argues that issues relating to the Complainant's constitutionally guaranteed aboriginal and treaty rights are not within the scope of this Complaint, which relates to registration and band membership pursuant to the *Indian Act*, and have not been proven in any event.

[81] The scope of the Complaint relates to the Complainant's June 2, 2010 request for changes to her registration status and band membership pursuant to the *Indian Act* to reflect her custom adoption. For this reason, compensation or allegations of infringement pre-dating the request are beyond the scope of the Complaint.

[82] Treaty entitlement is tied to band membership in a band that signed or adhered to a treaty. Until the Complainant's grandsons became entitled to band membership in the Fort Good Hope Band or the Gwichya Gwich'in Band, after *GEIRA* came into effect, they had no treaty entitlement under Treaty 11.

[83] If the Tribunal has jurisdiction to hear this Complaint, and the Complaint is not moot, and the Tribunal finds that the Respondent discriminated against the Complainant, the Respondent argues in the further alternative that its actions were justified as *bona fide* pursuant to s. 15(1)(g) and 15(2) of the *CHRA*.

[84] The Complainant's request for a declaration is beyond the scope of the Complaint and beyond the jurisdiction of the Tribunal to make as it does not fall within the scope of s. 53(2)(c) and (d) of the *CHRA*. Furthermore, the evidence heard does not establish that the Complainant's grandchildren had treaty entitlement since birth. The evidence shows that the Loucheaux No. 6 Band is the Gwichya Gwich'in Band and that the Respondent has not kept treaty annuity paylists for the Loucheaux No. 6 Band since 1955.

[85] The Respondent's actions cannot be characterized as intentionally discriminatory or devoid of caution as is required to sustain an Order under section 53(3) of the *CHRA*. There is no evidence to support the finding that the Respondent "intended and perhaps wanted to discriminate" against the Complainant.

[86] In the event that the alleged discrimination is substantiated and a public interest remedy is ordered, the Respondent requests that the Respondent be given 6 months to create and implement the Directive.

## VII. Analysis

### A. Has the matter been rendered moot?

[87] The fact that after initially refusing to do so the Respondent changed its positions with respect to the Complainant's requests of June 2, 2010 to register her under s. 6(1)(c) of the *Indian Act* and to remove her name from the Band List for the Fort Good Hope band and add it to the Band List of the Gwichya Gwich'in band, based on her custom adoption, does not, in my opinion, render moot the issue of whether the Respondent's initial refusal, prior to its change of

positions, constituted discrimination under s. 5 of the *CHRA* and, if so, whether and what remedies flow from such discrimination.

[88] While remedies under s. 53 of the *CHRA* cannot be imposed unless there is a finding by the Tribunal that a Complaint has been substantiated, the contrary is not true. The Tribunal can find that a Complaint is substantiated without imposing a remedy. If a person voluntarily ceases the conduct that is alleged by a Complainant to be discriminatory prior to a hearing being held into the Complaint, the Complaint can still be found to be substantiated by the Tribunal for the period of time prior to the cessation that the conduct took place, notwithstanding that a remedy may not be imposed. Hence a matter does not become moot simply because the person allegedly carrying on the impugned conduct decides to stop the conduct or because no remedial order might be imposed if the Tribunal makes a finding that the conduct was discriminatory while it was carried on and finds that the Complaint is substantiated.

[89] In this case, not only is liability still a live issue respecting conduct by the Respondent before it chose to change its positions but the issue of remedies both personal and public interest also remain live despite the change in positions.

[90] Moreover, as the hearing has been held and the issues fully argued in an adversarial context involving important quasi-constitutional rights, there is no valid argument here in support of saving scarce judicial resources, etc., as per the tests set out for mootness by the case law. (*Borowski v. Canada (Attorney General)*, 1989 SCR 342.)

**B. Has discrimination been established?**

[91] To determine whether the Respondent's conduct during the roughly two and a half year period from the date of the requests to the dates of the change in positions, constituted discrimination under s. 5 of the *CHRA*, on the basis of family status and sex, as alleged by the Complainant in her Complaint, requires the Complainant initially to establish a *prima facie* case on the balance of probabilities.

[92] In order to establish such a case, under s. 5 of the *CHRA*, it must be proved that:

a) The Respondent was engaged in the provision of "services customarily available to the general public", within the meaning of s. 5 of the *CHRA*;

b) the Respondent either denied the service to the complainant, or adversely differentiated against the complainant in the provision of the services; and

c) the denial or adverse differentiation was based in whole or in part on a prohibited ground of discrimination, and/or had a disproportionate adverse impact on persons identified by a prohibited ground of discrimination.

[93] The threshold for establishing a *prima facie* case of discrimination is low. A *prima facie* case is one that covers the allegations made and which, if believed, is complete and sufficient to justify a verdict in the Complainant's favour, in the absence of an answer from the Respondent. Once a Complainant establishes a *prima facie* case, the Complainant is entitled to relief in the absence of some alternate explanation from the Respondent. (*First Nations Child and Family Caring Society v. Canada (Attorney General)* 2012 FC 445 ("*FNCFCS*".))

[94] The Supreme Court has held on numerous occasions that human rights legislation has a quasi-constitutional status and is to be given a large, purposive and liberal interpretation to ensure the remedial goals of the legislation are best achieved. A strict grammatical analysis may thus be subordinated to the remedial purposes of the human rights law so as to enhance rather than enfeeble it. (*F.N.C.F.S., supra*; *C.N.R. v. Canada (Human Rights Commission)*, (1987) S.C.J. No. 42.)

[95] The term "services customarily available to the general public" is not defined in the *CHRA*, however, the case law indicates that "services" within the meaning of s. 5 contemplates something of benefit being held out as a service and offered to the public, in the context of a public relationship. However, a service does not have to be available to all members of the general public" within the meaning of s. 5. It is sufficient if a segment of the public can avail themselves of the service. (*Canada (Attorney General) v. Watkin*, (2008) F.C.J. No. 710; *Canada (Attorney General) v. Rosin*, (1991) 1. F.C. 391.)

[96] Services performed by the government are generally deemed to be necessary for and of benefit to the public otherwise they would not need to be performed. Benefits and services are not necessarily synonymous. A service, such as the processing of an application for registration under the *Indian Act* to determine whether it complies with the legislative requirements for registration represents necessary work performed by government employees, on behalf of and for the benefit of the public (i.e. an applicant). Ultimately, if the work results in the application being approved and registration takes place, certain benefits will be available to the applicant upon registration, such as non-insured health benefits, eligibility to seek funding for post-secondary education, and certain tax exemptions. For a complaint to be substantiated under the *CHRA*, the failure to provide the service in a non-discriminatory manner, either through denial thereof or through adverse differentiation, on the basis of a prohibited ground, must be found to have an adverse or negative impact on a person.

[97] The Complainant was already registered under s. 6(1)(f) of the *Indian Act* when she made her request for a change in registration to s. 6(1)(c) and a change in band membership, after advising the Respondent of her custom adoption for the first time in June of 2010. *GEIRA* had already been introduced and given first reading by the time she made the request, with provisions referred to previously herein, that would allow for her grandchildren to be registered for the first time under s. 6(2) provided that the Respondent recognized her custom adoption for the purposes of her registration under s. 6(1)(c). As such, although she was already receiving benefits available from registration under s. 6(1)(f), by initially denying her requests for the changes in registration and to her band membership, the Respondent, as a result of its incorrect interpretations in processing her request, caused her and her descendants to suffer the following negative or adverse impacts:

i) She did not receive the benefit of being properly recognized as a custom adoptee of the parents who actually reared her from the time she was four days old. While the Registrar was prepared to note the custom adoption in the Complainant's records in December 2010, what the Registrar refused to do at that time was give any legal effect to the custom adoption as part of the Respondent's record keeping regime under s. 6. Failing to give legal effect to her life-long connection to her custom adoptive parents had a negative impact on her as an adoptee by deprecating her dignity. The significance of giving proper recognition to the

parent-child connection of adoption has been held to be a service reviewable under human rights law as it marks a "life-affirming process." (*A.A. v. New Brunswick (Department of Family and Community Services)*, (2004) N.B.H.R.B.I.D. No. 4.)

ii) She did not receive the benefit of being able to have her name removed from a Band List that she was no longer interested in being on by simply requesting the removal of her name, thereby also deprecating her dignity. Neither s. 9 or s. 12 of the *Indian Act* uses the word "transfer" such that someone who is on a Band List and wants to be placed on another Band List (or simply doesn't want to be on any Band List) cannot obtain the removal of her name from the Band List she no longer wants to be on by simply requesting removal of her name, thereby avoiding the unnecessary, demeaning and wasteful exercise of obtaining consents from bands, as initially required by the Respondent in this case.

iii) She did not receive the benefit of being able to transmit s. 6(1)(c.1) status to her children (as opposed to s. 6(2)) and thereby to transmit s. (6)(2) status to their children (who were otherwise not eligible to be registered) when *GEIRA* came into effect on January 31, 2011 thereby denying her children the opportunity to access tangible benefits available to a person registered as an Indian.

[98] *GEIRA* was passed in direct response to the decision of the B.C. Court of Appeal in *McIvor* holding s. 6 inoperative as a consequence of it being contrary to the *Canadian Charter of Rights and Freedoms* and recognizing that the ability to transmit status to one's child was a benefit provided by the *Indian Act*, and indicating that it would be inclined to make the same finding about the ability to transmit status to one's grandchildren as well. *GEIRA* had already been introduced in Parliament by the time the requests were made in June 2010 and no doubt the new provisions were known to all of the parties at that time. In my opinion, it is perfectly understandable that the Complainant did not make the requests for changes to her status until June of 2010 since without *GEIRA* there would have been no tangible benefits available through registration to her grandchildren. As such, her delay in making the requests until June of 2010 and the period between the requests and the effective date of *GEIRA* is of no relevance or significance to this case. (*McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153.)

[99] The *Murphy*, *Matson* and *Andrews* cases are fundamentally distinguishable from this case on the basis that those cases did not involve complaints about anyone's conduct in exercising discretion in applying the relevant legislation. Instead, the Complaints in those cases all were directed at legislation and nothing else. In all of those cases changes by Parliament to the relevant legislation itself was what was really being sought through *CHRA* complaints rather than changes in the way that employees of the government were exercising any discretion in applying the legislation. The Respondent's excellent witness Ms. Linda McLenachan in fact testified that when the Respondent's employees eventually changed their positions on the registration request, they did so by viewing the wording of the same legislation with a "different lens" in their interpretation rather than by changing the wording of the legislation through an act of Parliament. The Respondent has admitted its earlier interpretation was incorrect not that any new legislation was required.

[100] As such, in this case there was clearly a discretion to either interpret the legislation one way or the other with respect to both the change of registration request and the removal of the name from band membership request. Initially, the Respondent refused the requests based on its incorrect legal interpretations but ultimately the Respondent changed its positions without Parliament changing the legislation. In doing so the Respondent obviously knew it had the discretion to change its positions rather than having the legislation amended or it wouldn't have done so. Presumably these changes were based on what may be described as more "flexible, liberal and purposeful" interpretations. The fact that legal interpretations were obtained in this case from the Respondent's legal staff does not change the nature of the work performed by employees of the Respondent, as part of processing an application or request, to anything other than a service to the public, notwithstanding that the initial legal opinions were later found by the Respondent to be incorrect and changed.

[101] In both initially choosing a narrower interpretation of the term "child" in the 1927 *Indian Act* that excluded custom adopted children, and in initially choosing a narrower interpretation of s. 12 of the *Indian Act* that precluded the removal on request of a person's name from a s. 11

Band List, the Respondent was exercising its discretion in the course of providing the service of processing an application or request.

[102] Section 5 of the *CHRA* requires that services customarily available to the general public must be provided in a non-discriminatory manner. Where a statute has ambiguous language that can be interpreted in more than one way, the *CHRA* requires that the administering department choose the interpretation that is most consistent with human rights law principles. (*Hughes v. Elections Canada*, 2010 CHRT 4.)

[103] The Respondent's initial position with respect to the request for registration under s. 6(1)(c) and removal of the Complainant's name from the Band List of her biological parents, were both based upon incorrect interpretations of the *Indian Act* that resulted in negative impacts for the Complainant and her descendants for a period of about two and a half years as described in paragraph 97 herein. In so doing, the Respondent used a restrictive legalistic approach that: (i) did not recognize custom adopted children as falling within the meaning of the word "child" in the 1927 *Indian Act*, (ii) limited persons who were custom adopted before April 17, 1985, but who applied for first-time registration after that date, to registration under ss. 6(1)(f) or 6(2) of the *Indian Act*, and, (iii) did not permit a request for removal of a name from a Band List without obtaining third party consent.

[104] In making these incorrect initial interpretations the Respondent failed to choose the broad, liberal and purposive interpretations referred to in paragraph 94 herein and failed to choose interpretations that were most consistent with human rights principles referred to in paragraph 102 herein. Rather than using a "different lens" in later changing its interpretations, the Respondent instead should have opened its eyes to the correct interpretations in the first place. It would have saved us all considerable time and effort.

[105] The Respondent's initial refusal for two and a half years to amend the Complainant's registration category and allow her to remove her name from the Fort Good Hope Band List, based upon its incorrect legal interpretations, constituted a denial of a service within the meaning

of s. 5(a) of the *CHRA* as the Respondent's actions involved an improper discriminatory assessment of her entitlement to registration under s. 6(1)(c) and to her right on request to have her name removed from a Band List she did not want to be on any longer. As well, the Respondent's actions also constituted adverse differentiation in the provision of a service within the meaning of s. 5(b) as it involved drawing an adverse distinction in its legal interpretations for custom adopted children compared to biological children.

[106] The denial or adverse differentiation in this case was based upon the Complainant's status as a custom adoptee and, as such, falls within the prohibited ground of "family status" under s. 3 of the *CHRA*. The Tribunal and the Courts have held that family status includes the relationship between adoptive parents and children and that adverse distinctions drawn between adopted and biological children are discriminatory on the basis of family status under the *CHRA*. I believe an aboriginal certified custom adoptee is entitled to the same treatment under the law as a legal adoptee. (*Seeley v. Canadian National Railway*, 2010 CHRT 23; *Canada (Attorney General) v. McKenna*, (1998) 1 F.C.J. No. 1501; *Grismer v. Squamish Indian Band*, 2006 FC 1088; *Worthington v. Canada*, 2008 FC 409.)

**C. Does the defence of *bona fide* justification apply in this case?**

[107] Where a Complainant proves a *prima facie* case of discrimination under s. 5 of the *CHRA*, the burden shifts to the respondent to rebut the *prima facie* case, either by showing that events did not occur as alleged, or that it had a *bona fide* justification for its conduct, under s. 15(1)(g) of 15(2) of the *CHRA*.

[108] The defence of bona fide justification under the *CHRA* is to be interpreted and applied in light of Supreme Court of Canada jurisprudence, which establishes that it will only be made out where, among other things, the approach taken by the respondent was "reasonably necessary", in the sense that departing from the approach would have caused undue hardship. (*British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, (1999) 3 S.C.R. 868.)

[109] In this case, the Respondent has already changed its approach, at least insofar as the Complainant is concerned, by (i) amending her category of registration to s. 6(1)(c) of the *Indian Act*, (ii) recognizing her entitlement to be added to the Band List for the band of her custom adoptive parents and, (iii) removing her name from the Band List of the Fort Good Hope band. This is effectively an admission that the previous exclusionary approach was not "reasonably necessary" within the meaning of the applicable jurisprudence, and that the previous approach therefore did not have a *bona fide* justification within the meaning of the *CHRA* and applicable case law.

## VIII. Decision

[110] On the basis of the foregoing reasons, I find that the Complaint in this matter has been substantiated.

## IX. Remedies

[111] Section 53 of the *CHRA* includes the following provisions relative to remedies:

> **53.** (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17;

> (*b*) that the person make available to the victim of discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> (*c*) that the person compensate the victim for any and all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> (*d*) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.
>
> (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensations not exceeding twenty thousand dollars to the victim as the member of the panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[112] As noted in paragraphs 67 and 68 herein, the Complainant seeks remedies of a declaration and an order for payment for breach of individual treaty rights that she alleges arise out of the breach by the Respondent of Treaty 11 rights on behalf of herself and her descendants. In this respect, the Complainant has tried to expand the Complaint beyond what it really was as referred to in paragraph 2 herein, arising out of the refusal of the Respondent of her requests of June of 2010 to change her registration status and to remove her name from her former Band List. I have no jurisdiction to make such a declaration or award such payments both because there was no evidentiary basis presented in support of this position at the hearing and because these allegations and remedies are beyond the scope of the matters at issue at the hearing and the above legislation governing remedies.

[113] The Complainant did not claim compensation under s. 53 (2) (e) under the *Act* for pain and suffering in spite of my specifically asking her representative about this at the hearing. As such, it would be unfair to the Respondent for me to now make an order under that provision

despite my findings of the impacts of its discriminatory conduct. I do feel, however, on the evidence before me, that the conduct of the Respondent in refusing the Complainant's requests was done with full knowledge of the consequences to the Complainant and her descendants of its actions over the two and a half years before it changed its positions. In my opinion, the later interpretations that it chose to make with respect to these requests should have been clear to the Respondent from the outset in keeping with the purposeful and liberal attitude that should be adopted in making interpretations of this nature in these circumstances. As such, I find that its conduct in this respect was intentional and willful and falls within s. 53 (3) above.

[114] As well, I believe that the public interest remedies requested by the Commission are in order, subject to a six months period to create and implement the directives as requested by the Respondent. In this regard I am pleased to know that the Respondent had, at the time of the hearing, already begun the drafting of the necessary directives.

## X. Order

[115] Therefore, the Tribunal orders and directs as follows:

A. That the Respondent cease the discriminatory practices of:

i) refusing to recognize the adopted child of a male Indian as a "child" of the male Indian, as that term was used in the 1927 *Indian Act*; and

ii) refusing to consider first-time registrations for adoptees who were adopted before April 17, 1985, under any provisions other than ss. 6(1)(f) or 6(2) of the *Indian Act*;

B. The Respondent, within six months of the date of the Tribunal's decision,

i) issue a bulletin, directive or comparable document to all staff involved in the processing of applications for registration under the *Indian Act*, advising that (i) the term "child" as used in the 1927 *Indian Act* to be interpreted to include both biological and adopted children, and (ii) persons who were adopted before 1985 may be entitled to be registered as Indians under sections other

than ss. 6(1)(f) or 6(2) of the *Indian Act*, depending on their particular individual circumstances; and

ii) send a copy of the bulletin, directive or comparable document to the Commission, together with confirmation that the bulletin has been issued to all staff involved in the processing of applications for registration under the *Indian Act*.

C. That the Respondent, within one month of the date of the Tribunal's decision, pay the Complainant the amount of $5,000.00 as special compensation pursuant to s. 53(3) of the *CHRA*.

*Signed by*

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
January 10, 2014

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File:** T1771/0112

**Style of Cause:** Joyce Beattie, T'Seluq Beattie & Nikota Beattie v. Aboriginal Affairs and Northern Development Canada

**Decision of the Tribunal Dated:** January 10, 2014

**Date and Place of Hearing:** September 30 to October 2, 2013

Cranbrook, British Columbia

**Appearances:**

Bruce Beattie, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Shelan Miller and Fiona McFarlane, for the Respondent