T.D. 12 /96
Decision rendered on December 4, 1996

CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

SARAH LASLO
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION
Commission

- and -

THE GORDON BAND COUNCIL
Respondent

DECISION

TRIBUNAL: Daniel Soberman Chairperson
Norman Fetterly Member
Gregory Pyc Member

Appearances:

Fiona Keith, Counsel for the Canadian Rights Commission

Merrilee Rasmussen for the Respondent

Darren Winegarden for the Federation of Saskatchewan Indian Nations

DATES AND LOCATION OF HEARING: July 24, 1995, and July 8 to 11, 1996, Regina, Saskatchewan

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## INTRODUCTION

In her complaint filed on August 10, 1989, Mrs. Sarah Laslo stated that the Gordon Band Council had discriminated against her by denying her residential accommodation on the Gordon Band Reserve because of her sex, contrary to s. 6 of the Canadian Human Rights Act.

A Pre-Hearing Conference Call was held on December 20, 1994, with Keith C. Norton, then President of the Human Rights Tribunal Panel, acting as Chairperson. Hearing dates were tentatively scheduled for late March 1995. On January 23, 1995, a three-person Tribunal was appointed by Mr. Norton to hear the complaint.

On February 28, counsel for the Respondent requested an adjournment of the hearing pending the outcome of an application by the Respondent to the Federal Court for judicial review, on the grounds that the Tribunal had no jurisdiction because s. 67 of the Canadian Human Rights Act states that the Act does not affect the Indian Act. The request was opposed by counsel for the Commission on the grounds that it was premature and that the necessary facts and argument on jurisdiction should be made before the Tribunal.

The matter appeared to be resolved in a further Conference Call on March 8, 1995, when dates were fixed for the hearing commencing in Regina on July 24, 1995. Counsel for the Respondent agreed to proceed as expeditiously as possible with the application to the Federal Court.

However, further disagreement occurred: on April 25, the Respondent applied to the Federal Court for an interim order to prohibit the Tribunal

from proceeding with the hearing until that Court had decided the question of jurisdiction. This application was denied by Mr. Justice P. Rouleau of the Federal Court on July 13, 1995. On July 19, the Respondent filed a



Notice of Appeal in the Federal Court of Appeal against that decision. The Respondent also gave notice that the Federation of Saskatchewan Indian Nations wished to intervene in the proceedings.

The Tribunal nevertheless convened the hearing on July 24. At the hearing, counsel for the Respondent informed the Tribunal that the Respondent was not prepared to proceed on the merits, but that counsel for both sides had agreed to work toward an Agreed Statement of Facts, which they hoped could be achieved within a few days; it would then become the basis upon which the Federal Court could consider the question of jurisdiction. In addition, the parties agreed to the Complainant's request to amend the complaint to add the grounds of marital status and race. Finally, it was agreed that the Federation of Saskatchewan Indian Nations be granted intervener status. On this basis, all parties consented to an adjournment sine die.

Dates for a hearing before the Federal Court were set for February 21, 1996. However, the parties failed to reach an Agreed Statement of Facts before the hearing took place as scheduled. The application for judicial review was dismissed by Mr. Justice D.R. Campbell on March 13, 1996. He held, "that for the respondents [the Complainant and Commission in the case before this Tribunal] to make proper argument, findings of fact need to be made which can only be done on a full hearing of the evidence". Shortly afterwards, the Tribunal set dates for reconvening the hearing on July 8, 1996 in Regina.

The week before the hearing resumed, by letter dated July 2, 1996, the Respondent requested that:



> the Tribunal take a decision on the jurisdiction matter before proceeding further with the enquiry. We appreciate that the Tribunal may wish to proceed to hear the whole of the matter while it is convened, but must advise that, with the greatest respect, the Band will not participate further in the hearing until the jurisdictional issue is determined.

Shortly before the hearing reconvened, the parties achieved an Agreed Statement of Facts. The hearing commenced with the Respondent introducing evidence and making its argument against jurisdiction, to which the Commission replied. When the Complainant and Commission introduced their case on the merits, the Respondents remained in the hearing room but did not respond or participate in that portion of the case. In particular, counsel for the Respondent did not cross-examine the Complainant, Mrs. Laslo. The Federation of Saskatchewan Indian Nations, although granted intervener status, did not participate further in the proceedings.

THE COMPLAINT

As already noted, on August 10, 1989, Mrs. Laslo filed her complaint, stating that the Gordon Band Council had discriminated against her by denying her residential accommodation on the Gordon Band Reserve because of her sex, contrary to s. 6 of the Canadian Human Rights Act.

The complaint was amended July 14, 1996, by adding marital status and race as further prohibited grounds for denying her residential accommodation. Although the amendment was formally filed after the hearing terminated, notice of the change had been given earlier to the Tribunal and to the Respondent. The change does not materially alter the nature of the evidence and argument submitted by the Complainant and the Commission.



THE FACTS

The Complainant, Mrs. Laslo, is a native woman, born on the Gordon Band Reserve and a member of the Band. In 1962, at the age of 21, she met William Laslo and left the reserve. On November 11, 1978, she married William Laslo who is a non-Native and, pursuant to the Indian Act at that time, she lost her status as member of the band 1.

The following events are set out in the Agreed Statement of Facts and the related exhibits filed by agreement of the Parties:

Pursuant to Bill C-31, which was assented to by the Governor-General on June 28, 1985, but which came into force retroactively on April 17, 1985, Mrs. Laslo was entitled to be reinstated as a member of the Gordon Band. She was informed by a letter from the Department of Indian and Northern Affairs (DIAND), dated October 25, 1985, that she was registered as an Indian in the Indian Register maintained in the Department, and also that she was registered as a member of the Gordon Band.

1. On November 8, 1985, Mrs. Laslo applied in writing to the Gordon Band for the allocation of Band-owned housing on the reserve; she requested a new home. In a letter dated April 23, 1986, the Band stated that her name "was not placed on the proposed priority housing list for 1986-87 building season", meaning that she would not be allocated housing during that year.

1 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 band, but if she marries a man of another band, she thereupon becomes a member of the band of which her husband is a member. S.C. 1985, c. I-5, s. 14.



Further, the letter stated that the Band Council would "not be applying for any housing" that is, it would not apply for any additional funds made available by DIAND to accommodate new applicants, reinstated under Bill C-31, until the Band Membership Committee had developed a "Membership and Residency Code", ratified by Band Members. Nevertheless, the letter also stated that Mrs. Laslo could renew her request for the following year.

2. She did renew her request for a new house (date uncertain, no document filed with the Tribunal) as acknowledged in a letter dated September 24, 1986, from then Chief of the Band, Wayne Morris, to Mrs. Laslo. He noted that the Band:

> is required to establish a Band "Membership Code" prior to June 28, 1987. We have not yet finalized that procedure. When the Membership Code is established it... will provide for those members which are entitled to re-apply for membership and have done so under Bill C-31. Until such time as that is done, the Band Council must proceed under the terms and conditions of the pre-existing legislation. 2 [italics added]
>
> The obligation to provide you with benefits as a result of your obtaining Indian Status rest squarely with the Federal Crown. We suggest that, if you have any problems, you immediately approach the Department of Indian Affairs for whatever assistance is necessary and needed and for any clarification which you may need with respect to your status

3. In an undated letter, agreed by the parties to have been sent to Mrs. Laslo some time in 1987, Chief Morris stated, "As yet we are unable to add your name to the Housing list." He returned her cheque and enclosed the current Housing Policy document. Chief Morris also stated, "Further, this cheque is useless to anyone in any event, it is not made out properly, as you must have been aware when you wrote it." No evidence was provided to the

Tribunal whether this letter was in response to a third oral or written request for housing, subsequent to

2 It should be noted that the letter of October 25, 1985 from DIAND stated that Mrs. Laslo was a "registered as a member of the Gordon Band".



Chief Morris's letter of September 24, 1986, or merely a follow-up to the request in 2., above.

The Housing Policy document attached to the undated letter contains, among its provisions, the following statements:

> WHO GETS PRIORITY...
> 6. In order to qualify for a new house you must have resided on the reserve for at least two (2) years;
>
> WHO WILL NOT LIKELY GET PRIORITY
> 1. Persons living with a non-Treaty person.
> 2. Bill C-31 persons: The Minister of Indian Affairs promised housing to persons in this category, so it is governmental responsibility to provide it.

4. Mrs. Laslo again applied in writing for housing on July 15, 1988, stating that she had special needs because of diabetes and as a result was having eyesight trouble with her left eye. This time she did not request a new house, but just "a house".

Chief Morris replied by letter, dated July 26, 1988, more than a year after the stated deadline for establishing a Band Membership Code. He stated:

> despite council's sympathy for your situation, as yet the department of Indian Affairs has not come to agreement with the Gordon Band regarding residency regulations. Council Cannot anticipate what the final residency code will say.
>
> Under the Department's new restrictions on Bill C-31 housing allocations, yours is a third place priority.

5. Mrs. Laslo applied for housing by a letter dated December 29, 1988 and received by the Band office on January 3, 1989. This time she applied for a new house again and noted that

she was a diabetic and was "going to have surgery for a tumour in the head" She said she "would appreciate your reply as soon as possible."

Chief Morris's reply is dated July 14, 1989. He said:

> As you requested, here are the reasons why we cannot accede to your request for new housing immediately:
>
> 1) During this fiscal year at least, no Bill C-31 housing funding was allocated to the Touchwood File Hills Qu'Appelle District, of which the Gordon Reserve is part.
>
> 2) At the present time, the Gordon Reserve has not yet finalized a membership code, which would allow former members the right that other members enjoy, but would stop short of opening the reserve to homesteading, settlement and eventual ownership by non-Indians.
>
> I trust you appreciate the depth and seriousness of the issue.

Mrs. Laslo's next two applications for housing were made after she filed her Complaint August 10, 1989, with the Human Rights Commission.

6. In her next application, dated December 18, 1989 and stamped received by the Band office on December 29, 1989 she pointed out that she was a "cancer and diabetic patient"; she requested a new house. Neither party provided evidence to the Tribunal that a reply was sent to Mrs. Laslo or received by her.

7. The last application agreed by the parties to have been sent in writing by Mrs. Laslo was dated December 19, 1990. It was for a new home, citing medical reasons of her failing health. Again, we have no reply in writing on record and Mrs. Laslo did not recall receiving a reply.

The following events are set out in the testimony of Mrs. Laslo, some of which is supported by the Agreed Statement of Facts and related exhibits:



8. In her testimony, Mrs. Laslo stated that she applied for housing in writing on two more occasions, once in 1991 and again in 1992. She could not recall receiving replies to these applications. No further evidence was provided on this point by either side.

9. Some time in 1992, Mrs. Laslo, or her son, Steve Pratt, applied to the Gordon Band Council for Mrs. Laslo to be appointed as "caretaker" for his

house. The parties agree that a caretaker is a relative or friend, requested by a band member to care for that band member's house while he or she plans to be absent from the reserve for an extended period, for health reasons, or to pursue education, training or a job. The request needs approval by the Band Council. As noted in the Agreed Statement of Facts, on November 9, 1992, the Council approved Mrs. Laslo's appointment as caretaker and she went alone, without her husband or any of her other children to live, in her son's house.

Mrs. Laslo gave evidence that her son was planning to go to Calgary. However, he appears to have changed his plans and stayed at home with his mother. She stated that he would bring friends home late at night and drink. Three months later, on February 11, 1993, Mrs. Laslo wrote to the Council stating that her son and his friends "drink a lot" and "kick me out every time (Steve] gets paid." She asked to be given another house to live in. She does not recollect receiving a response to her request.

On February 23, 1993, she wrote to the Housing Committee of the Band, "giving Steve Pratt full owner[sic] of the house I was living in," and returned to her former home. Her action was the result of being awakened by her son and a group of friends at three o'clock in the morning; she felt she had to leave at that time even though it was a winter night.



10. The Minutes of the meeting of the Gordon Band Council On April 5, 1994, state that a request by Mrs. Laslo, "to live in Isabel McNab's old house was granted conditional on her accepting it 'as is'." The date of her making the request was not given in evidence. According to Mrs. Laslo's testimony, the house was in "terrible condition", the doors had to be tied shut, "the basement had water about a foot deep in it, and my bathroom was down in the basement", sewer water ran back into the basement, and the smell was very bad. She ate her meals with various neighbours. She tried to clean the house up, but said she couldn't stand it. Within three months she moved out, saying she could not live in it because of the smell.

The following is a summary of Mrs. Laslo's testimony concerning her perception of her treatment by Chief Wayne Morris and the Gordon Band Council

When asked whether she recalled having a conversation with him before or after he sent her the undated letter (agreed to be some time in 1987) quoted in 3., above, she said she could not recall when her conversation with Chief Morris took place but she did remember a telephone conversation. Mrs. Laslo stated:

> And I asked how come they didn't put me -- like add me to the list... for housing. At that time. And that's the time he said that the only way I'd be able to get a house on the reserve is if my husband passed away or if I got a divorce, that's the only way I'd be able to get a house on the reserve.

Her recollection is consistent with her perception that the Band Council would not allow her husband to live with her in housing provided on the reserve. This perception arose several times in her testimony.

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With respect to her 1990 application for housing, Counsel for the Commission asked about her relations at that time with her husband. Mrs. Laslo said, "It was still good. We were happy as a couple." When asked what her choice would be, that her husband come with her to the reserve or not come, she said:

> Well, if they didn't want him out there, I guess he'd have to stay in Punnichy [the location of their current house].."

Nevertheless, when asked by Tribunal Member, Mr. Fetterly, "... would you prefer to have your husband with you, if that was possible?", Mrs. Laslo said, "Yes, I would. Yes."

Further, with regard to her understanding in 1992, about whether or not her husband could live with her in Steve Pratt's house, Mrs. Laslo stated:

> Well, already I got all these letters here stating that I couldn't take my husband on the reserve, he was - that he was a non-Native.

We have seen that Mrs. Laslo applied to the Gordon Band Council for housing on the reserve every year from November 1985 to 1992, that is, for eight years. When asked why she had not applied after 1992, she replied:

> Well, what's the use, I figure. There was no more use for me to apply because they rejected my - my housing needs, so why should I apply again.

She was asked by Counsel, "... how has this affected you, when you got the various letters that have been placed before the Tribunal?" Mrs. Laslo replied:

> Well, it really affected me like - like I was an outcast, like I was rejected by my own people that lived on the reserve. I'm no longer a member of the Band, or the reserve community.



She completed her testimony by saying:

> Well, It's about my absence of not living on the reserve with my family, which I would really like my husband to move on there with me, but I -- it's hard, it's hard.

CONCLUSIONS ON THE QUESTION OF A PRIMA FACIE CASE AGAINST THE RESPONDENT

Have the facts described above established Complainant's and Commission's prima facie case of discrimination against the Complainant on a prohibited ground? In our opinion, the Agreed Statement of Facts, the supporting exhibits, and Mrs. Laslo's testimony establish that:

1. In November 1985, Mrs. Laslo was registered as an Indian and also as a registered member of the Gordon Band in the Indian Register maintained in the DIAND.

2. Her subsequent applications for housing on the reserve were turned down repeatedly by the Gordon Band Council. In particular, she received four explicit rejections, in letters of:

   a) April 23, 1986,
   b) undated but agreed to be during 1987,
   c) July 26, 1988
   d) July 14, 1989

   In addition, letters sent by Mrs. Laslo requesting housing dated December 18, 1989 and December 19, 1990, went unanswered. Finally, Mrs. Laslo's testimony that she also sent letters in 1991 and 1992, both unanswered, was not denied by the Respondent.



3. The reasons given by the Council in writing were:

   a) because she was reinstated as an Indian under Bill C-31, the Council would not allocate a house unless the Department of Indian Affairs

allocated special, additional funds for the purpose of building houses. In other words, Mrs. Laslo would not be eligible for houses built with normal funding. (letter of September 24, 1986)

b) until the Band succeeded in establishing a new Membership Code, it would continue to apply the Indian Act provisions prior to the enactment of Bill C-3 1. In other words, it would ignore rights reinstated by Bill C-31 to Indian woman. (Ibid.)

c) the Council's Housing Policy, sent to Mrs. Laslo in 1986, required applicants for new housing to have lived on the reserve for two years, a condition that Indian women who were reinstated by Bill C-31, were highly unlikely, if at all, to be able to meet. (letter undated, sent some time in 1987)

d) the Council's Housing Policy stated that, "Persons living with a non-Treaty person", were not likely to be given priority in awarding houses on the reserve. (Ibid.)

4. Finally, Mrs. Laslo's unchallenged testimony establishes that: Chief Wayne Morris told her that the only way she could obtain housing on the reserve was if her non-Native husband died or she divorced him.

In our opinion, these facts establish prima facie that Gordon Band Council discriminated against Mrs. Sarah Laslo by denying her residential accommodation on grounds prohibited by the Canadian Human Rights Act. s. 6, that is, because of her sex, her marital status and the race of her husband. It is not denied that Indian men who married non-Native women obtained



housing on the reserve and that their non-Native wives lived with them. On this basis, in the absence of contrary evidence and argument, the Complainant has established her complaint against the Respondent Gordon Band Council.

Although the Respondent chose neither to cross-examine the Complainant nor to introduce evidence to rebut her complaint of discrimination, in the course of presenting facts and argument relating to the jurisdiction of the Tribunal, it claimed to justify its conduct in a manner that might be considered a substantive defence. The Respondent asserted that the Government of Canada did not honour its undertaking to provide sufficient additional funds in order to enable bands to meet the great increase in demand for housing from those reinstated by Bill C- 31. The essence of the argument was that it was the failure of the Government of Canada to provide the funding to meet this new demand for housing that led the Band Council to use tactics to pressure the Government to meet its promises, as perceived in good faith by the Band Council. In other words, the Band Council did not

intend to discriminate against women reinstated by Bill C-31, but only to exert pressure on the Government.

However, once Bill C-31 came into force to rectify a longtime inequality in treatment between Indian men and women, reinstated women thenceforth are entitled to be treated equally in those areas of former inequality. Even if the Government failed to honour funding commitments -- a claim not established before this Tribunal -- that failure would not justify throwing the entire burden onto reinstated Indian women. In our view, and according to the principle established in s. 2 of the Canadian Human Rights Act, "that every individual should have equal opportunity with other individuals... without being hindered or prevented by doing



so by discriminatory practices based on race... sex... [or] marital status", that burden is one to be shared equally by the whole community, men and women. Accordingly, the former status of reinstated Indian women should not be a factor in determining their entitlement in matters such as residential accommodation on reserves. If a band does take their former status into account in making a decision not to allot housing to reinstated women, it discriminates on a prohibited ground under s. 6 of the Act.

JURISDICTION OF THE TRIBUNAL

As noted in the "Introduction", the Respondent submitted that this Tribunal had no jurisdiction to hear Mrs. Laslo's complaint under the Canadian Human Rights Act. S. 67 of that Act states:

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

The Respondent argued in its application before the Federal Court that this section excluded a review of any decision of the Gordon Band Council "made under or pursuant to" the Indian Act, and that refusal to allot housing to Mrs. Laslo was such a decision. Mr. Justice Campbell dismissed the application and held that in order to determine whether there was jurisdiction, it was first necessary that the Tribunal conduct 'a full hearing of the evidence" of the circumstances. We have concluded that the hearing has disclosed sufficient evidence for this purpose.

It is well established that the Canadian Human Rights Act has a special status in our

constitutional scheme, to protect those vulnerable to discrimination, and accordingly, any restrictions on its application should be read strictly so as to interfere as little as possible with the rights that the Act protects 3.
As described in "The Facts" above, the Gordon Band Council made a series of decisions refusing to allot housing to Mrs. Laslo. Keeping in mind the words of Mr. Justice Sopinka in footnote 3, below, we must ask whether each of these decisions necessarily constituted a "provision made under or pursuant to... [the Indian] Act" as described in s. 67 of the Canadian Human Rights Act, and were therefore excluded from the requirements of the latter Act.

S. 81 (1), of the Indian Act states that:

> The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
> (i) the survey and allotment of reserve lands among the members of the band...
> (p. 1) the residence of band members and other persons on the reserve;
> (p.2) to provide for the rights of spouses and children who reside with members of the band on the reserve...

In our view, it is clear that a by-law passed pursuant to any of the subsections of s. 81, quoted above, would constitute a "provision made under or pursuant to" the Indian Act, and accordingly, would fall within the meaning of s. 67 of the Canadian Human Rights Act.

3 "In approaching the interpretation of a human rights statute, certain special principles must be respected. Human rights legislation is amongst the most pre-eminent category of legislation. It has been described as having a 'special nature, not quite constitutional but certainly more than ordinary... One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As a last protection of the most vulnerable member of society, exceptions to such legislation should be narrowly construed.", per Sopinka, J., Zurich Insurance Co. V. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321, at 339.

The only evidence presented to the Tribunal that might be related to by-laws passed pursuant to s. 81 of the Indian Act, was the "Housing Policy" document of 1987. However, we received no indication of how the "Housing Policy' document came into existence: there was no evidence that it was passed as a by-law. With no evidence of other by-laws passed by the Gordon Band Council on this subject, the decisions of the Council not to allot land to Mrs. Laslo were not made pursuant to s. 81.

In the absence of such by-laws does the Council have authority to make decisions to allot housing under other sections of the Indian Act? Two subsections of s.20 of the Act refer to this subject:

> (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of land has been allotted to him by the council of the band. [italics added]
>
> (4) Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may, in his discretion, withhold his approval... [italics added]

By necessary implication from the italicized words in the two subsections above, the Council does have authority under the Act to allot land. Otherwise the subsections would have no effective meaning. In our view, this authority to allot land must include a power to decide whether and when the Council may use its authority. That is, the Council may choose among those band members who will, and those who will not, be granted possession of reserve land. If this were not so, the Council would have to make allotments automatically at the request of a band member, without any decision-making power left to the Council itself. Such an interpretation would be unworkable, especially whenever there were more requests for land allotments than there were lots available. Accordingly, it is our opinion that by necessary



implication, s. 20 recognizes the authority of band councils to decide whether or not to allot land on the reserve; such decisions would be "made under or pursuant to" the Indian Act.

There remains the question of whether such a "decision", although made pursuant to s. 20, would also fall within the meaning of the word "provision" as it is used in s. 67 of the Canadian Human Rights Act. The Commission has argued that "provision" refers only to acts of a legislative nature such as regulations, and does not include specific decisions such as whether to allot land; the latter are not provisions. This issue was considered by the

Federal Court of Appeal in Re Desjarlais 4. Although the complaint in that case was based on a decision to terminate employment, Madam Justice Desjardins, speaking for a unanimous court, discussed in detail the meaning of the word "provision" as used in s. 67. It is useful here to quote her analysis extensively:

> The word "provision" in the expression "any provision of the Indian Act" has a legislative connotation and refers both to the Indian Act and regulations adopted thereunder. This interpretation is confirmed by the French version.
>
> The word "provision" in the expression "or any provision made under or pursuant to [the Indian Act]" cannot have the same meaning as the first word "provision" and cannot refer exclusively to a legislative enactment of general application as counsel for the Commission submits. Such interpretation is made possible by the French version. The word "dispositions" in that version might have the meaning of "mesures législatives" but it encompasses as well the very wide connotation of "décisions", "mesures". So that the words "or any provision made under or pursuant to that Act" mean more than a mere stipulation of a legal character. I interpret such words as covering any decision made under or pursuant to the Indian Act. [underlining added]
>
> With regard to hiring and firing staff, there are no by-laws properly registered under the Indian Act which would have been adopted by... [the respondent]
>
> The adoption of by-laws is however not the only way a band council can make decisions under the Indian Act... Other provisions of the Act indicate that the band council has authority

4 [1989] 3 F.C. 605 (T.D.)



> to take decisions but they do not specify the way in which these decisions are to be expressed. For example... s.20 (1)... dealing with the allotment of land on the reserve... Presumably, the procedure laid out in the Indian Band Council procedure regulations apply. Undoubtedly, in my view any decisions taken by a band council under those sections, would be made under or pursuant to the Indian Act. [underlining added] 5

Although obiter dicta, the underlined portions in the second and fourth paragraphs of the above quotation make it clear that the Court would have found a decision by a council to allot land within the reserve as being a "provision made under or pursuant to" the Indian Act, and thereby excluded by s. 67 from the jurisdiction of a Human Rights Tribunal.

The Court went on to find on the facts in Re Desjarlais, that, in the absence of properly registered by-laws dealing with employment, there was no section of the Indian Act, that gave implied authority to dismiss the Complainant. As result, the Court held that s. 67 of the Canadian Human Rights Act did not preclude the jurisdiction of the Canadian Human Rights Commission to deal with the complaint:

> In the case at bar, the motion of the Band Council... is nowhere expressly or by implication, provided for by the Indian Act; accordingly it is not a "provision made under or pursuant to that Act" ... [underlining added] 6

The Court thus indicated that if it had found that a section of the Indian Act provided for the band council to pass a motion by implication - as was found existed in s. 20, to allot land - the Court would have held it sufficient to invoke s. 67 of the Canadian Human Rights Act.

5 Ibid, at 608 to 10.

6 Aid, at 610.



Accepting the reasoning of Madam Justice Desjardins, we find that decisions made by the Gordon Band Council whether or not to allot land are provided for by s. 20 of the Indian Act, and are sufficient to invoke s. 67 of the Canadian Human Rights Act thereby excluding application of the latter Act to those decisions.

The above interpretation of s. 67 is supported and enlarged upon by Mr. Justice Muldoon in Re Prince v. Dept. of Indian Affairs and Northem Development 7. He found that a decision by the Respondent not to pay extra school expenses for the Complainant's daughter was within the Respondent's authority under s. 115 of the Indian Act, and accordingly, was a "provision made under or pursuant to the Act" as required by s. 67. Moreover he stated:

... it is no concern of the Court whether the Minister and DIAND made an error or not in applying the provisions of the Indian Act and in making policy pursuant to it... [underlining added] 8

Section 67 of the CHRA immunizes not only the legislative provisions of the Indian Act, but also that which is done by the Minister and DIAND pursuant to the Indian Act, legally or illegally. [underlining added] 9

Thus, even illegal decisions, so long as they are made pursuant to the Indian Act, are immune from review by a Human Rights Tribunal. In our view, there is no basis for distinguishing

7 (1993),20 C.H.R.R. D/376 (Cdn. H. Rts. Trib.), affd December 30,1994 (unreported) F.C.T.D.

8 Ibid, Judgment of Muldoon, J., at 13.

9 Ibid, at 15.



between decisions made by DIAND pursuant to the Indian Act and those made by a band council pursuant to the Act: Mr. Justice Muldoon's statement applies equally to both.

The Commission argued that, nevertheless, the Indian Act itself, as amended by Bill C-31, "does not contemplate that these powers [conferred by the Act, including the power to allot land under s. 20] include the power to differentiate adversely against Bill C-31 women on the basis of sex, marital status or race." [emphasis added]. That is to say, it is beyond the powers of a band council, as authorized by the Indian Act, to decide adversely against Bill C-31 women, and therefore, such decisions are not protected by s. 67 of the Canadian Human Rights Act.

The difficulty with this argument is that, on the one hand, as observed by Mr. Justice Muldoon, decisions in general made pursuant to the Indian Act, even if illegal, are within a band's powers "contemplated" by the Indian Act, and they are "immunized" by s. 67; on the other hand, the Commission argues that similar decisions -- if they "differentiate adversely' contrary to the Bill C-31 amendments to the Act -- would be beyond a band's powers "contemplated" by the Indian Act, and would fall outside the scope of the exclusion in s. 67 of the Canadian Human Rights Act. We find it difficult to accept this distinction: if illegal decisions remain within the powers

granted by the Act, so long as the Act authorizes decisions on the specified subject matter, we find it to be inconsistent to conclude that decisions on the very same subject matter, but illegal because they are contrary to the amendments contained in Bill C-31, are beyond those powers.

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This distinction is all the more unsustainable when we acknowledge that the intent of s. 67 of the Canadian Human Rights Act is to exclude from the Act's requirements of non-discrimination "any provision made under or pursuant to" the Indian Act. To accept the distinction proposed by the Commission would mean that all breaches of these requirements of non-discrimination would continue to be immunized from the Canadian Human Rights Act, except those related to Bill C-31. Yet the Parliament of Canada, when it passed Bill C-31, did not choose to repeal or amend s. 67 of the Canadian Human Rights Act, in order to limit the general exemption of the Indian Act to forms of discrimination other than might occur as a result of the new equality provisions. For these reasons, we disagree with the submission of the Commission on this point.

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FINDINGS AND DECISION

As noted in our "Conclusions on the Question of a Prima Facie Case against the Respondent" we found that Gordon Band Council discriminated against Mrs. Sarah Laslo by denying her residential accommodation on grounds prohibited by the Canadian Human Rights Act. s. 6, that is, because of her sex, her marital status and the race of her husband.

However, with respect to the "Jurisdiction of the Tribunal", we have found that decisions made by the Gordon Band Council not to allot housing on the reserve to Mrs. Laslo are provided for by s. 20 of the Indian Act. That is, they were made pursuant to that section, and accordingly are sufficient to invoke s. 67 of the Canadian Human Rights Act, thereby excluding application of the latter Act to those decisions. As a result, s. 67 of the Canadian Human Rights Act precludes this Tribunal from applying to those decisions, the requirements for non-discrimination set out in s. 6 of the Act.

Accordingly, this complaint is dismissed.

Dated this 28th day of November, 1996.

Daniel Soberman

Norman Fetterly

Gregory Pyc