

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

**Jeremy Eugene Matson, Mardy Eugene Matson
and Melody Katrina Schneider (nee Matson)**

**Complainants
(Respondents on Motion)**

- and -

Canadian Human Rights Commission

**Commission
(Respondents on Motion)**

- and -

**Indian and Northern Affairs Canada
(now Aboriginal Affairs and Northern Development Canada)**

**Respondent
(Moving Party)**

Ruling

Member: Edward P. Lustig

Date: September 6, 2012

Citation: 2012 CHRT 19

I. Motion

[1] This is a Ruling on the Motion of the Respondent dated July 30, 2012 for an Order striking out the whole of the Complainants' Notice of Constitutional Question ("NCQ") dated January 19, 2012.

[2] The Complainants' NCQ seeks to challenge the constitutional validity of section 6 of the *Indian Act*, R.S.C., 1985, c. I-5, under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [the *Charter*]. The basis of the *Charter* challenge is that section 6 of the *Indian Act* is "...in contravention of (a) Sections 2 & 3 of the *Canadian Human Rights Act*; and (b) Sections 1, 15(1) of the *Charter of Rights and Freedoms*, and should be struck down and declared to be of no force and effect." Section 6 of the *Indian Act* deals with the registration of persons as Indians under the *Indian Act*.

II. Background

[3] The Complainants are siblings who are the grandchildren of an Indian woman who married a non-Indian man prior to 1985. The Complainants filed virtually identical complaints under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *CHRA*] that allege that the registration provisions in section 6 of the *Indian Act* discriminate against them based on sex and/or family status in that it does not entitle their children to registration, in contrast to their hypothetical counterparts descended from an Indian grandfather who married a non-Indian woman.

[4] The Respondent's Notice of Motion which includes its Written Submissions says that the Canadian Human Rights Tribunal (the "CHRT") does not have jurisdiction to entertain a *Charter* challenge to the *Indian Act* and the NCQ ought to be struck.

[5] The Canadian Human Rights Commission's (the "Commission") Written Submissions dated August 9, 2012 say that the Commission agrees with the Respondent that the CHRT should decline to consider the *Charter* issues raised by the NCQ in this proceeding.

[6] The Complainants' Written Submissions dated August 9, 2012 say that the CHRT has the jurisdiction to hear and determine its NCQ.

[7] The Respondent's Reply Submissions dated August 23, 2012 say that the Complainants' Submissions are without merit.

III. Relevant Statutory Provisions

[8] The relevant statutory provisions in this motion are as follows:

From the *Charter*:

15. (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

From the *CHRA*:

2. The purpose of this *Act* is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, color, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

39. For the purposes of this Part, a “discriminatory practice” means any practice that is a discriminatory practice within the meaning of Sections 5 to 14.1.

40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

49. (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

50. (2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

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...

67. Nothing in this *Act* affects any provision of the *Indian Act* or any provision made under or pursuant to that *Act*. [Repealed, 2008, c. 30, s. 1]

From the *CHRT Rules of Procedure* (03-05-04)

9. (7) Where a party intends to challenge the constitutional validity, applicability or operability of a statute or regulation before the Panel, it shall serve notice in accordance with Section 57 of the *Federal Court Act* and Form 69 of the Federal Court Rules, 1998.

From the *Federal Courts Act*, R.S.C., 1985, c. F-7

57. (1) If the constitutional validity, applicability or operability of an Act of Parliament ... or of a regulation made under such an Act, is in question before ... a federal board, commission or other tribunal..., the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

IV. The Parties' Submissions

[9] The Respondent's Submissions can be summarized as follows:

- i) The CHRT is empowered by virtue of Section 50(2) of the *CHRA* to decide questions of law, constitutional or otherwise, necessary to determining whether there are reasonable grounds for believing that a particular practice constitutes a "discriminatory practice" within the meaning of sections 5-14.1 of the *CHRA*. There is no jurisdiction to consider questions of law that are unnecessary to the performance of this task, such as whether section 6 of the *Indian Act* violates section 15 of the *Charter*; and, if so, whether it is saved by section 1 of the *Charter*; and
- ii) The jurisdiction to determine questions of law encompasses any constitutional question that arises in the course of the CHRT fulfilling its statutory mandate. As noted by the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para. 34, "the question becomes whether the tribunal's mandate includes jurisdiction to rule on the constitutionality of the challenged provision." The jurisdiction provided in Section 50(2) of the *CHRA* does not include a challenge to Section 6 of the *Indian Act* under Section 15 of the *Charter* as set out in the NCQ; and
- iii) The fact that section 15 of the *Charter* also protects against discrimination does not give the CHRT free-standing jurisdiction to entertain constitutional discrimination challenges to any legislation, any more than the CHRT is empowered to determine whether a particular statute violates sections 2 or 7-12 of the *Charter*. The CHRT can perform its statutorily mandated role of determining whether the impugned provisions constitute a "discriminatory practice" under the *CHRA* without reference to the *Charter*. As a result, the *Charter* question is beyond the scope of the CHRT's mandate as set out in the *CHRA*. Accordingly,

the NCQ should be struck as in *Neubauer v. British Columbia (Ministry of Human Resources)*, 2004 BCHRT 34 and *Hendershott v. Ontario (Community and Social Services)*, 2011 HRTO 482; and

- iv) The repeal of section 67 of the *CHRA* is unrelated to the issue in this motion. Section 67 has no effect on *Charter*-based equality rights raised in court proceedings. *Charter*-based equality rights claims could be brought before the repeal of section 67 and can still be brought after the repeal of section 67. However, the repeal of section 67 did not authorize the CHRT to decide those cases.

[10] The Commission's Submissions can be summarized as follows:

- i) Section 50(2) of the *CHRA* says that in the course of inquiring into a complaint, the CHRT has the power to decide questions of law, including constitutional questions that are necessary to determining the matter under inquiry. In the present case, the CHRT can examine the alleged violations of the *CHRA* without having to decide the *Charter* issues that the Complainants raise in their NCQ. In other words, tracking the language of Section 50(2) of the *CHRA*, it is not necessary to resolve the proposed *Charter* issues in order to determine the matter under inquiry. As a result, the CHRT should decline to consider the proposed *Charter* issues; and
- ii) The ultimate matter under inquiry in a CHRT proceeding must always be whether a respondent has engaged in a discriminatory practice, as defined in the *CHRA*. The CHRT does not have jurisdiction to conduct stand-alone inquiries into whether a legislative provision does or does not infringe the *Charter*; and
- iii) Even where a tribunal finds a *Charter* infringement, it does not have the power to issue a general declaration of invalidity. As a result, the CHRT lacks the

authority to grant the *Charter* remedy that the Complainants seek, namely a declaration that Section 6 of the *Indian Act* is struck down and of no force or effect.

[11] The Complainants' Submissions can be summarized as follows:

- i) The CHRT has the jurisdiction to hear the NCQ of section 6 of the *Indian Act* and there is nothing in the *CHRA* that narrows or restricts its authority to do so; and
- ii) Section 50(2) of the *CHRA* provides the CHRT with the jurisdiction to decide all questions of law, without restriction, including constitutional matters so long as the proper NCQ has been given; and
- iii) The repeal of section 67 of the *CHRA* was intended to expose the *Indian Act* and its provisions to the scrutiny of the *CHRA*, without restriction, including whether provisions of the *Indian Act* violate the constitution and *Charter* as well as the *CHRA*.

V. Analysis

[12] Administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them (*R. v. Conway*, 2010 SCC 22 at para. 78 [*Conway*]). If an administrative tribunal has jurisdiction to decide questions of law, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme (see *Conway* at paras. 81-82).

[13] Section 50(2) of the *CHRA* provides the CHRT with the power to decide all questions of law "necessary to determining the matter". As indicated in sections 2, 39, 40(1), and 49(1) of the *CHRA*, the matter the CHRT has to determine in any given case is whether a discriminatory

practice has occurred within the meaning of sections 5 to 14.1 of the *CHRA*. The Complainants' NCQ attempts to adjudicate the same facts alleged to be in contravention of the *CHRA* under the *Charter*. In this regard, the constitutional question raised by the Complainants is not linked to determining whether a discriminatory practice has occurred within the meaning of the *CHRA*. It is a separate question of law altogether, unrelated to the CHRT's statutory mandate in this case.

[14] The fact that the CHRT's *Rules of Procedure* asks parties to serve a notice of constitutional question in accordance with section 57 of the *Federal Courts Act* does not alter the constitutional jurisdiction granted to the CHRT under the *CHRA*. Nor does the repeal of section 67 of the *CHRA* grant the CHRT jurisdiction to entertain stand-alone *Charter* challenges to the *Indian Act* unrelated to determining whether a discriminatory practice has occurred within the meaning of the *CHRA*.

[15] The Complainants' NCQ also asks the CHRT to strike down and declare section 6 of the *Indian Act* to be of no force or effect. As indicated in section 53(2) of the *CHRA*, the CHRT's remedial jurisdiction is linked to a finding that a discriminatory practice has occurred within the meaning of the *CHRA* and any order made to remedy the discriminatory practice is made "...against the person found to be engaging or to have engaged in the discriminatory practice" (see sections 53(2)(a)-(e), 53(3), 54, and 54.1 of the *CHRA*). There is no indication in the *CHRA*, or otherwise, that the CHRT has the power to strike down legislation or make general declarations of constitutional invalidity.

[16] Having carefully reviewed and considered the Parties' submissions and the authorities in this matter, I agree with the Respondent and the Commission that the Respondent's motion to strike out the whole of the Complainants' NCQ should be allowed. In the circumstances of this case, the CHRT does not have the constitutional jurisdiction to entertain the Complainants' NCQ.

VI. Ruling

[17] On the basis of the reasons above, the Respondent's motion is allowed and I hereby order the whole of the Complainants' NCQ to be struck out.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
September 6, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1444/7009

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

Ruling of the Tribunal Dated: September 6, 2012

Appearances:

Jeremy Matson, for the Complainants

Brian Smith, for the Canadian Human Rights Commission

Sean Stynes, Michelle Casavant, for the Respondent