Federal Court  Cour fédérale

Date: 20110125

Docket: T-1375-10
T-1494-10

Citation: 2011 FC 72

Ottawa, Ontario, January 25, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

NATIVE COUNCIL OF NOVA SCOTIA,
NEW BRUNSWICK ABORIGINAL PEOPLES COUNCIL,
NATIVE COUNCIL OF PRINCE EDWARD ISLAND,
MARITIME ABORIGINAL PEOPLES COUNCIL,
CHIEF JAMIE GALLANT,
CHIEF KIM NASH-MCKINLEY
and CHIEF GRACE CONRAD

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants ask the Court to declare that decisions of the Governor in Council and the Minister of Industry regarding the 2011 Census and National Household Survey are

unconstitutional, to enjoin the Government of Canada from administering the 2011 Census and National Household Survey in the format proposed, and to direct the Government of Canada to administer the mandatory long-form census as it did in 2006.

[2] The applicants, Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, and Native Council of Prince Edward Island, are three self-governing organizations representing off-reserve aboriginal peoples in their respective provinces. Each is a member of the Maritime Aboriginal Peoples Council, an aboriginal Intergovernmental Council which advocates at the regional level. Chief Jamie Gallant is the President and Chief of the Native Council of Prince Edward Island. She is a Mi'kmaq and resides off-reserve. Chief Grace Conrad is the Chief and President of the New Brunswick Aboriginal Peoples Council. She is a Wolastoqiyik (Malecite) and a status Indian residing off-reserve. Chief Kim Nash-McKinley is the President and Chief of the Native Council of Nova Scotia. She is a Mi'kmaq and a status Indian residing off-reserve.

[3] The applicants object to the manner in which the Government of Canada has ordered the 2011 Census to be taken and to the questions relating to aboriginal peoples that have been ordered to be asked in the National Household Survey. The decisions under review changed the 2011 Census methodology and format from that used in 2006. The applicants submit that these changes are contrary to the Crown's constitutional and legal obligations to aboriginal peoples, infringe the constitutional and legal rights of aboriginal peoples to equality and non-discrimination, and will result in the Crown being unable to fulfill its duties under the *Statistics Act*, R.S.C. 1985, c. S-19.

[4] For the reasons that follow, this application is dismissed, with costs.

The Census versus a Voluntary Survey

[5] There is a constitutional requirement that a census of the population of Canada be taken by the Government of Canada every ten years: *Constitution Act, 1867*, ss. 8 and 91(6). Since 1971 the Government of Canada, through Statistics Canada, has undertaken a census of the Canadian population every five years: *Statistics Act*, s. 19(1).

[6] The *Constitution Act, 1867* offers no guidance as to the manner of taking the census or the information to be gathered. The first Canadian census of the population was taken in 1871; it recorded name, sex, age, whether the person was born within the last twelve months, country or province of birth, religion, origin, profession, occupation or trade, whether the person was married or widowed or married within the last twelve months, as well as questions related to whether the person was in school or literate, and whether the person was deaf and dumb or blind.[1]

[7] Subsection 19(2) of the *Statistics Act* provides the only direct legislative requirement as to the content of the census format. It provides that the census "shall be taken in such a manner as to ensure that counts of the population are provided for each federal electoral district of Canada." Pursuant to s. 21(1) of the *Statistics Act*, the "Governor in Council shall, by order, prescribe the questions to be asked in any census taken by Statistics Canada under section 19 or 20."

[8] Given the constitutional nature of the census and the requirement that it record every person resident in Canada on the date it is taken, it is hardly surprising that s. 31 of the *Statistics Act* creates

an offence for those who refuse or neglect to answer, or who willfully answer falsely, any census question. It is because of this provision that participation in the census is often described as being "mandatory."

[9] Statistics Canada, which performs the census on behalf of the Government of Canada, is also empowered to perform surveys. Section 8 of the *Statistics Act* provides that "the Minister [of Industry] may, by order, authorize the obtaining, for a particular purpose, of information other than information for a census of population or agriculture, on a voluntary basis" and where such information is requested there is no offence for those who refuse or neglect to answer, or who wilfully answer falsely, any survey question. The fundamental distinction between the census and a survey is that the former is intended to count everyone and it is mandatory that persons in Canada complete it accurately, whereas surveys are voluntary and typically are only sent to a portion of the Canadian public.

[10] In 2006, as in each census since 1971, there were two census forms used. Most households (80%) received the short-form census which contained eight questions on basic topics such as age, sex, marital status, and mother tongue. The remaining 20% of households received the long-form census, which contained the eight questions from the short-form census plus 53 additional questions on topics such as education, ethnicity, mobility, income, employment and dwelling characteristics. Completion of these forms was mandatory and failure to complete them accurately was an offence.

[11] In 2010 the Government of Canada determined that the long-form census would be eliminated but that the mandatory short-form census would continue to be required to be completed

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[1] http://www.collectionscanada.gc.ca/genealogy/022-911.010.010-e.html

by every household in the country. In addition, it was determined that Statistics Canada would conduct a voluntary survey to be called the National Household Survey (NHS) which would be distributed to one third of Canadian households. The questions posed in the NHS, with limited exceptions, will include those that were asked in the 2006 long-form census.

Questions Directed to Aboriginal Peoples

[12] There are no questions regarding aboriginal peoples in either the 2006 short-form census or in the proposed 2011 Census.

[13] The 2006 long-form census contained four questions concerning aboriginal identification and ancestry: Questions 17, 18, 20, and 21. The questions are reproduced in full in Appendix A, however, the questions, in brief, were as follows:

> 17. What were the ethnic or cultural origins of this person's ancestors?
>
> 18. Is this person an aboriginal person, that is, North American Indian, Métis or Inuit (Eskimo)?
>
> 20. Is this person a member of an Indian Band/First Nation?
>
> 21. Is this person a Treaty Indian or a Registered Indian as defined by the *Indian Act* of Canada?

[14] The 2011 NHS will contain four questions concerning aboriginal identification and ancestry: Questions 17, 18, 20, and 21. Again, these questions are also reproduced in Appendix A, however, the questions, in brief, are as follows:

> 17. What were the ethnic or cultural origins of this person's ancestors?

> 18. Is this person an aboriginal person, that is, First Nations (North American Indian), Métis or Inuk (Inuit)?
>
> 20. Is this person a Status Indian (Registered or Treaty Indian as defined by the *Indian Act* of Canada)?
>
> 21. Is this person a member of a First Nation/Indian band?

[15] As noted previously, the applicants object to the elimination of the long-form census and to the wording of the questions directed to aboriginal peoples in the 2011 NHS. These decisions were made in the two orders under review. The Governor in Council, by Order in Council P.C. 2010-1077 dated August 12, 2010, established that the 2011 Census was to take place in May 2011 and set out the ten questions that were to be asked. The Chief Statistician of Canada by order dated July 19, 2010, ordered the NHS and prescribed the 66 questions to be asked.

Preliminary Objection to the Evidence

[16] The applicants filed the affidavits of the personal applicants as well as affidavits from Roger Hunka, Andrew J. Siggner and David A. Binder. Roger Hunka is the Director of Intergovernmental Affairs for the Maritime Aboriginal Peoples Council. Mr. Siggner is a demographer. His training is in sociology and demography. He graduated from the University of Western Ontario with a B.A. in sociology in 1969, and with an M.A. in sociology with a speciality in demographics in 1971. He is a member of the Canadian Population Society and its former secretary-treasurer. Mr. Binder is a mathematical statistician. He has a Ph.D. in mathematical statistics and a P.Stat. accreditation in mathematical statistics from the Statistical Society of Canada.

[17] Prior to the hearing, the respondent moved to strike portions of each of the six affidavits filed by the applicants on the basis that the affidavits were "largely composed of extrinsic evidence not before the statutory decision-maker" and were not confined to the personal knowledge of the deponents, as required by Rule 81(1) of the *Federal Courts Rules*, SOR/98-106, but were "full of opinions, conclusions, speculation and irrelevancies." The ultimate disposition of the motion was left by the case management Prothonotary to the applications judge.

[18] The general rule in this Court is that affidavits are to be confined to the personal knowledge of the deponent. Rule 81(1) of the *Federal Courts Rules* provides that:

81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	81. (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

[19] The applicants submit that Rule 81(1) does not apply to the admissibility of constitutional or legislative evidence. They say that Rule 81(1) reflects the general rule against hearsay but does not displace the common law exceptions to the rule: *Canadian Tire Corp. v P.S. Partsource Inc.*, 2001 FCA 8. Relying on *Westergard-Thorpe v Canada (Attorney General)*, [1999] F.C.J. No. 721 (T.D.), at para. 3, they submit that there are only two limitations on the admissibility of extrinsic evidence in constitutional cases: (i) evidence which is inherently unreliable or offends public policy and (ii) evidence used to aid in statutory construction. The applicants say that the evidence tendered

is necessary and they point to the importance the Supreme Court of Canada has placed on ensuring that there is a proper factual foundation when one is challenging the validity of legislation on *Charter* grounds. In *MacKay v Manitoba*, [1989] 2 S.C.R. 357, at paras. 8 and 9, the Court wrote that:

> Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
>
> Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[20] There is no question that a *Charter* challenge requires a proper factual foundation and I reject the submission of the respondent that the only materials properly before the Court in applications such as these are those that were before the decision-makers when the orders under review were made. However, I agree with the respondent that many of the paragraphs of the

affidavits of the applicants' affiants provide no factual information at all but rather consist of opinion and speculation.

[21] The respondent submits that all or parts of the following paragraphs should be struck from the affidavits:

a. Affidavit of Nash-McKinley: paragraphs 16, 19, 20, 21, 22, 23, 24;

b. Affidavit of Conrad: paragraphs 19, 20, 21, 22, 23, 24;

c. Affidavit of Gallant: paragraphs 19, 20, 21, 22, 23, 24;

d. Affidavit of Hunka: paragraphs 11, 12, 13, 15, 16, 17, 28, 29, 33, 40, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 61, 62;

e. Affidavit of Binder: paragraphs 13, 14, 15, 17, 18, 19, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40; and

f. Affidavit of Siggner: paragraphs 7, 9, 14, 22, 23, 24, 25, 26, 27, 28, 58, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 47, 48, 49, 50, 51.

[22] The Federal Court of Appeal has recently confirmed the circumstances in which the Court ought to strike all or portions of affidavits. In *Canada (Attorney General) v Quadrini*, 2010 FCA 47, at para 18, the Court wrote that:

> As a general rule, the affidavit must contain relevant information which would be of assistance to the Court in determining the application. As stated by our Court in *Dwyvenbode v. Canada (Attorney General)*, 2009 FCA 120, the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions….
>
> [Emphasis in the original].

[23] In general, factual evidence in constitutional cases consists of either adjudicative facts or legislative facts. Adjudicative facts serve as the foundation for facts that concern the parties, which, given their specificity, must be proved by admissible evidence. Legislative facts demonstrate the purpose and the background of the legislation, including its social, economic, and cultural context, and are subject to less stringent evidentiary requirements: *Danson v Ontario (Attorney General)*, [1990] 2 S.C.R. 1086.

[24] Extrinsic evidence is admissible in constitutional cases because often it is the only way to address a constitutional issue, particularly when it concerns want of jurisdiction: see *Gitxsan Treaty Society v Hospital Employees' Union*, [2000] 1 F.C. 135 (C.A.) at para. 13.

[25] Much of what is objected to by the respondent in the affidavits tendered by the applicants can be said to constitute legislative facts because its purpose is to lend context to the constitutional claims. In this regard, the applicants have tendered evidence that the 2006 census data was used by the government and others in making decisions on services for aboriginal peoples, that programs and services provided to aboriginal peoples through registered bands is often not available to those who live off-reserve, and that aboriginal peoples are less likely to complete a voluntary NHS than a mandatory census. The personal applicants state in their affidavits that these are their concerns. I find this to be unobjectionable, although it may be deserving of little weight. The evidence of the two experts offered by the applicants generally addresses the possible impact of the changes in the methodology of the census and NHS compared to the 2006 Census and the possible consequences of the shift to the NHS in place of the mandatory long-form census. I find neither objectionable –

they arguably provide legislative facts necessary for the applicants' constitutional challenge. However, there are occasions where the experts go beyond their expertise, become less than objective, and become too closely aligned with their clients' interests. Those paragraphs will be struck.

[26] The statement that the funding received is inadequate to meet the needs of the off-reserve aboriginal peoples is irrelevant to any issue before the Court in these applications and accordingly paragraph 16 of the Nash-McKinley affidavit is struck.

[27] Paragraphs 11, 12, 13, and 59 of the Hunka affidavit are statements of law and, while appropriate in a written submission by counsel, are inappropriate in an affidavit, especially when there is no evidence that the affiant has any legal training. Paragraphs 29, 33, and 35 of his affidavit are hearsay, being statements alleged to have been made by others, and they are struck. Paragraph 34 is struck as it purports to set out the reason for the resignation of the Chief Statistician. This is a matter that is not within the affiant's personal knowledge and, in any event, is irrelevant to these applications. Paragraphs 43 to 58 speculate as to the consequences of the changes objected to by the applicants; they constitute the affiant's opinion. No basis for these opinions is provided in the affidavit nor is there any indication that the affiant is qualified as an expert on the subjects on which he states his opinion. These paragraphs are struck.

[28] Paragraph 38 of the Siggner affidavit, commencing with the words "in the hopes that …" to the end of the paragraph, and paragraph 39, are struck. These passages speculate on the motives of

the Government of Canada and provide a characterization of its actions which is unwarranted, prejudicial, and beyond the expertise or knowledge of the affiant.

[29] Paragraph 17 of the Binder affidavit is struck as it provides a legal conclusion that is beyond the expertise of the affiant.

[30] Ultimately, given my disposition of this application and the reasons for my decision, the evidence filed by the applicants was of marginal value and little weight was given to it.

Issues

[31] The issues raised by the applicants and respondent are the following:

1. What is the appropriate standard of review?
2. Are the changes to the census contrary to the respondent's constitutional obligations to aboriginal peoples pursuant to s. 91(24) of the *Constitution Act, 1867* and s. 35 of the *Constitution Act, 1982*?
3. Do the changes to the census violate s. 15 of the *Canadian Charter of Rights and Freedoms*?
4. Do the changes to the census violate the *Canadian Human Rights Act*?
5. Do the changes to the census violate s. 9 of the *Statistics Act*?
6. Do the changes to the census result in the respondent being unable to fulfill its duties under the *Statistics Act*?
7. If there is a rights violation, what is the appropriate remedy?

Analysis

Standard of Review

[32] The respondent submits that in making the orders under review the Government of Canada is exercising powers of a legislative nature and accordingly its decisions are entitled to deference from the Court. It is further submitted that the Court should not investigate the motive which caused the Governor in Council to pass the Order in Council as this falls within the Crown prerogative.

[33] I agree that the Court is not a forum to examine the motives of the Government as its motives are irrelevant to the issues before the Court. However, there is no deference owed to the respondent when deciding whether or not the orders under review are constitutionally valid. Section 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11, provides that:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> **52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

The standard of review is therefore correctness. If the orders under review are inconsistent with the Constitution of Canada, then they must be declared to be of no force or effect. If they are not inconsistent with the Constitution, then the Court must not intervene.

Are the changes to the census contrary to the respondent's constitutional obligations to aboriginal peoples pursuant to s. 91(24) of the Constitution Act, 1867 and s. 35 of the Constitution Act, 1982?

[34] The applicants submit that the duties that the Crown owes to aboriginal peoples are derived from s. 91(24) of the *Constitution Act, 1867*, which gives the federal government jurisdiction over "Indians and lands reserved for Indians," and s. 35 of the *Constitution Act, 1982*, which recognizes the "existing aboriginal and treaty rights of the aboriginal peoples of Canada." The applicants say that included in these Crown duties is the "honour of the Crown," as recognized by the Supreme Court in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, which requires the Crown to act honourably in its dealings with aboriginal peoples. Finally, they submit that these Crown duties must be interpreted in light of the *UN Declaration on the Rights of Indigenous Peoples*, which was endorsed by the Government of Canada on November 12, 2010.

[35] The applicants submit that the cancellation of the mandatory long-form census and its substitution with a voluntary NHS will violate the obligations owed by the Crown to aboriginal peoples. They submit that this change will compromise the quality, accuracy, reliability and comparability of data on aboriginal peoples, particularly off-reserve and non-status aboriginal peoples. The applicants argue that census data is a key source of information used by the Government when designing programs and services to fulfill its constitutional duties to aboriginals. In short, the ultimate consequence of the changes, they assert, will be to compromise the programs and services available to aboriginal peoples and, most particularly, to those who live off-reserve.

[36] Section 35 of the *Constitution Act, 1982* provides that:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.	(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.	(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.	(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

[37] In order to demonstrate a violation of s. 35 of the *Constitution Act, 1982*, the applicants must demonstrate that there is an aboriginal or treaty right at stake. They have not done so. The applicants have not suggested that there is any treaty right at issue and they have failed to point to a possible aboriginal right that has been infringed. Instead, they rely on the general duty of the "honour of the Crown" to ground their claim that there has been a violation of a constitutional right.

[38] The applicants submit that the Supreme Court in *Haida Nation* held that the honour of the Crown arises in all of the dealings of the Government of Canada with Canada's aboriginal peoples. In particular, they rely upon paragraphs 16 and 17 of the reasons:

> The government's duty to consult with aboriginal peoples and accommodate their interests is grounded in the honour of the Crown.

> The honour of the Crown is always at stake in its dealings with aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw, supra*, at para. 186, quoting *Van der Peet, supra*, at para. 31.
>
> [Emphasis added]

[39] I am not convinced that the decision of the Supreme Court goes as far as the applicants submit. In my view, the Supreme Court's decision, properly interpreted, does not assert that the honour of the Crown arises whenever the Crown takes an action that may indirectly impact aboriginal peoples. Rather, in *Haida Nation* and other decisions, courts have observed that the honour of the Crown arises when there is a specific aboriginal interest or right at stake in the Crown's dealing. In *Haida Nation*, the right or interest was the assertion of the Haida Nation that it had aboriginal title to all of the lands of the Haida Gwaii and the waters surrounding it. In the *Badger* and *Marshall* cases referred to in the quote above, the individuals were asserting rights given to them through treaties entered into between the Crown and their aboriginal nations. This is evident, for example, in para. 41 of *Badger* where the Supreme Court states:

> … the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.
>
> [Emphasis added]

[40] In *Haida Nation* there was no proven aboriginal right but there was a claim to title supported by a good *prima facie* case that was found by the Supreme Court at para. 35 to be sufficient to engage the honour of the Crown and its duty to consult:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it…
>
> [Emphasis added].

[41] In this case, the applicants have failed to establish any case for the existence of an aboriginal right or title that may be adversely affected by the Government's actions regarding the 2011 Census. Accordingly, I find that the honour of the Crown is not engaged.

[42] Furthermore, I agree with the respondent that although s. 91(24) of the *Constitution Act, 1867* assigns the Government of Canada jurisdiction to legislate regarding "Indians, and lands reserved for Indians," it does not oblige Canada to legislate on all issues concerning aboriginal peoples. In particular, it does not create a positive obligation on the Government of Canada to collect data about aboriginals in Canada at all, let alone in a specific and mandatory long-form census. I concur with the views expressed by Justice Addy in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development*, [1987] F.C.J. No. 1005, at para 54:

> … [T]he provisions of our Constitution are of no assistance to the plaintiffs on this issue. The *Indian Act* was passed pursuant to the exclusive jurisdiction to do so granted to the Parliament of Canada

> by subsection 91(24) of the *Constitution Act 1867*. This does not carry with it the legal obligation to legislate or to carry out programs for the benefit of Indians anymore than the existence of various disadvantaged groups in society creates a general legally enforceable duty on the part of governments to care for those groups although there is of course a moral and political duty to do so in a democratic society where the welfare of the individual is regarded as paramount.

Do the changes to the census violate s. 15 of the Charter?

[43] In *R. v Kapp*, [2008] 2 S.C.R. 483, the Supreme Court rearticulated the test for a finding of discrimination under s. 15 of the *Charter* as originally developed in *Law Society of British Columbia v Andrews*, [1989] 1 S.C.R. 143 and *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. At para. 17 of *Kapp* the Court stated the test as follows: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"

[44] The applicants correctly note that both aboriginality and aboriginality-residence have been recognized by the Supreme Court as prohibited grounds of discrimination: *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. They submit that the changes to the census will result in discrimination on both of these grounds. They say that the changes will result in differential and disadvantageous treatment of aboriginal peoples as compared to non-aboriginal peoples because the changes will cause an undercount of, and the collection of less accurate data about, the aboriginal population, which will deny users of the data the benefit of accurate, reliable, and comparable data about this group.

[45] The applicants claim the problem will be particularly acute for the off-reserve and non-status aboriginal population because the off-reserve population is geographically dispersed and it is difficult to locate, identify, and obtain data about this population without the mandatory long-form census and the Aboriginal Peoples Survey, which is based on the census results. They say that because this data is used to formulate and implement policies, programs, and services for aboriginal peoples, the decrease in the quality of data will likely impact the quality and availability of these programs and services, resulting in unequal treatment vis-à-vis the non-aboriginal population, with an especially egregious impact on off-reserve aboriginals. The applicants essentially allege discrimination on three intertwined but distinct grounds: aboriginality, not having Indian status, and off-reserve residence. The use of multiple comparator groups has been recognized as appropriate where an equality claimant alleges discrimination based on different personal characteristics: *Falkiner v Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 59 O.R. (3d) 481 (C.A.). Accordingly, here, the appropriate comparator groups would be non-aboriginals, status Indians, and aboriginals living on-reserve.

[46] In my view, the applicants have failed to establish that the legislative provisions at issue create a distinction based on aboriginality or aboriginality-residence. The changes to the census do not draw an explicit distinction on any of the alleged grounds of discrimination; what the applicants allege here is, in essence, adverse effect discrimination. Adverse effect discrimination arises where a law which is on its face neutral, as the changes to the census are here, has a discriminatory effect.

[47] The discrimination the applicants allege they would suffer under the new census is the denial of “equal benefit of the law” under s. 15, specifically the benefit of access to accurate data

about their constituents. The problem with this submission is that any decline in data quality that might be occasioned by the changes to the census would not differentially affect the claimant groups. The alleged decline in data quality would affect all Canadians. If, as the affidavit evidence suggests, a number of social groups are less likely to respond to a voluntary survey, the reliability of the data as a whole, not just the data relating to aboriginals, would be impeached. Furthermore, the applicants' submission that data regarding aboriginal peoples will be skewed because aboriginals who respond to the NHS will tend to be educated, literate, of a high socioeconomic status, older, and less mobile does not assist them in establishing a distinction based on aboriginal identity or aboriginality-residence, since these factors would equally tend to influence response rates across the entire Canadian population.

[48] Second, any potential adverse effect on aboriginal response rates stemming from the decision to discontinue the mandatory long-form census and replace it with the voluntary NHS would not be the result of the inherent characteristics of the claimant groups. It would be the result of individual choice. Although this choice may be influenced by social factors affecting aboriginals, lower response rates to surveys is not a true characteristic of aboriginals, non-status aboriginals, or aboriginals living off-reserve. The doctrine of adverse effect discrimination is intended to ensure the equality guarantee in s. 15 of the *Charter* results in substantive equality by recognizing that certain groups' characteristics may result in a distinction even when no such distinction is explicitly drawn by the law in question. Here, the government's action simply does not create a distinction.

[49] The Supreme Court of Canada first addressed the concept of adverse effect discrimination in *Ontario (Human Rights Commission) v Simpsons Sears Ltd*., [1985] 2 S.C.R. 536, where Justice McIntyre, in the context of human rights legislation, wrote, at para. 18:

> A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.
>
> [Emphasis added]

[50] In *Egan v Canada*, [1995] 2 S.C.R. 513, Justice Cory described adverse effect discrimination as follows at para. 138:

> Direct discrimination involves a law, rule or practice which on its face discriminates on a prohibited ground. Adverse effect discrimination occurs when a law, rule or practice is facially neutral but has a disproportionate impact on a group because of a particular characteristic of that group.
>
> [Emphasis added]

[51] In *Eaton v Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 67, the Supreme Court wrote that:

> The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue

> characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. … The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.
>
> [Emphasis added]

[52] This understanding of the indicia of adverse effect discrimination was affirmed in *Law* at para. 36:

> In such cases, it is the legislation's failure to take into account the true characteristics of a disadvantaged person or group within Canadian society (i.e., by treating all persons in a formally identical manner), and not the express drawing of a distinction, which triggers s. 15(1).
>
> [Emphasis added].

[53] The tendency of a certain group not to respond to a voluntary survey cannot be said to be a "true characteristic" within the meaning ascribed to that term by the jurisprudence. The applicants have made no allegation that there is any characteristic of aboriginals, non-status aboriginals, or off-reserve aboriginals which would impede their completion of a voluntary survey, and that as such there has been no failure on the part of the respondent to recognize and accommodate the claimant groups' characteristics. What the applicants argue for is a positive duty on the government to compel participation in the census in order to compensate for an alleged tendency of certain groups not to respond to a voluntary survey. This is a creative submission but it must fail because the adverse effect analysis still requires a distinction in the way the claimant group is treated. As

explained by Justice Fichaud, writing for the Nova Scotia Court of Appeal in *Boulter v Nova Scotia Power Inc.*, 2009 NSCA 17, at para. 77:

> … it remains necessary, even for adverse effect discrimination, that the claimants' group or subgroup be treated differently than the comparator group, whose members do not have the protected characteristic but are otherwise similar to those in the claimant group or subgroup.

[54] Justice Fichaud's pithy description, at para. 81, of the cases where adverse effect discrimination has been established, *Eldridge v British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 and *Vriend v Alberta*, [1998] 1 S.C.R. 493, serves to further clarify why the applicants here are not victims of adverse effect discrimination:

> In *Eldridge* the deaf had no translation and those with hearing did not need translation. In *Vriend* homosexuals had no human rights protection and heterosexuals did not need protection. These were adverse effect distinctions, on protected grounds, between the claimants and comparator groups of persons without the protected trait but otherwise similar to the claimants.
>
> [Emphasis added]

[55] In *Eldridge*, the claimants were treated differently because they could not access medical care. In *Vriend*, the claimants were treated differently because they were not granted human rights protection. Here the claimant groups are able to participate in the voluntary survey, to have their identity reflected in the statistics, and to use the ultimate results. Any decrease in response rates among aboriginals, would not be the result of any distinction or differential treatment, and accordingly would not engage s. 15 of the *Charter*. The alleged tendency not to complete a voluntary survey is not a characteristic of the claimant groups which prevents them from obtaining equal benefit of the law; rather, it is a behaviour existing independently of the changes to the census

procedure. The applicants themselves submit that the response rates will be determined by factors such as education, literacy, socioeconomic status, and mobility. These factors, and the claimant groups' alleged lower response rates generally, are not effects caused by the changes to the census, they are independent social realities. Lower response rates are not the result of the applicants being treated differently. As Justice Iacobucci stated in *Symes v Canada*, [1993] 4 S.C.R. 695, at para. 134:

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.

[56] The above statement was further explained in *Eldridge*, above, at para. 76, where the Court wrote that:

> While this statement can be interpreted as supporting the notion that, in providing a benefit, the state is not required to eliminate any pre-existing "social" disadvantage, it should be remembered that it was made in the context of determining whether the legislation made a distinction based on an enumerated or analogous ground. …

[57] This case, as in *Symes*, concerns determining whether the impugned law draws a distinction based on enumerated grounds. *Symes*, as further explained in *Eldridge*, provides that in providing a benefit, here a census, the state is not required to eliminate pre-existing social disadvantage. The applicants' failure to demonstrate that the changes to the census create a distinction means that they have not met the first branch of the test for discrimination.

Changes in the Wording of the Questions

[58] Although the above comments regarding the honour of the Crown and the lack of a distinction necessary to found a s. 15 complaint effectively dispose of the applicants' claims that the change in the wording of the aboriginal questions adversely affects them, as much of the argument was devoted to this issue, a few comments are warranted.

[59] For ease of reference, I set out again the changes to the questions:

The Aboriginal Identity Question

2006 Census: "Is this person an aboriginal person, that is, North American Indian, Métis or Inuit (Eskimo)?"

NHS: "Is this person an aboriginal person, that is, First Nations (North American Indian), Métis or Inuk (Inuit)?"

The First Nation/Indian Band Question

2006 Census: Is this person a member of an Indian band/First Nation?

NHS: Is this person a member of a First Nation/Indian Band?

The Registered or Treaty Indian Question

2006 Census: Is this person a Treaty Indian or a Registered Indian as defined by the *Indian Act* of Canada?

NHS: Is this person a Status Indian (Registered or Treaty Indian as defined in the *Indian Act* of Canada)?

[60] The applicants' concern with the change of wording in the Aboriginal Identity Question is that the terms "North American Indian" and "First Nation (North American Indian)" will not necessarily be seen to mean the same thing. They submit that the term "First Nation" is primarily used to describe Indian bands registered under the *Indian Act*, whereas the term "North American Indian" would include non-status Indians as well as those residing off-reserve. Accordingly, they submit that the NHS is likely to undercount the aboriginal population as off-reserve and non-status aboriginals are likely to respond negatively to the question. They submit that the wording of the First Nation/Indian Band Question equates the terms "First Nation" and "Indian Band" and this question confirms their view that aboriginals will under-identify in response to the Aboriginal Identity Question.

[61] This view must be balanced against the evidence offered by the respondent. Jane Bedets, the Director of the Social and Aboriginal Statistics Division of Statistics Canada, attests that "extensive qualitative testing" was conducted on questions proposed for inclusion in the 2011 NHS. Specifically, with respect to the Aboriginal Identity Question, she states that testing occurred between October 9, 2007 and June 5, 2008, and that this testing "included about 650 aboriginal and non-aboriginal participants in 23 locations across Canada." She attests that:

> [R]esults for the Aboriginal Identity question recommend the use of the terms 'First Nations (North American Indian)', 'Métis' and 'Inuk (Inuit)' in the question and response categories. It was also recommended that the instruction 'First Nations (North American Indian) comprises Status and Non-status Indians' be included.
>
> …
>
> A fourth phase of qualitative testing for the aboriginal identification questions took place between November 3, 2008 to March 30, 2009 in 22 locations across Canada to test the terminology changes for

> populations living in remote and on-reserve areas. This testing included about 300 aboriginal people.
>
> The results of this testing showed that a majority of participants preferred the use of the term 'First Nations (North American Indian)' and the instruction that 'First Nations (North American Indian) includes Status and Non-Status Indians.

[62] The result of the objective testing performed by Statistics Canada must be preferred over the subjective impression of the applicants' witnesses. In any event, as was noted by the respondent, whether there is an undercount as a consequence of the wording change will only be known after the NHS has been conducted. If it turns out that the change in the wording of the questions results in data that is statistically inaccurate, there is nothing that prevents the Government of Canada from discarding it or conducting another survey with different questions.

[63] The applicants object to the use of the phrase "Treaty Indian" in the Registered or Treaty Indian Question. They say that it is not a defined word and that the question may be confusing and thus result in a skewed response rate. I note that the same term was used in the 2006 Census and there is no evidence before the Court that its inclusion then resulted in any deviation from the expected response.

[64] One can always parse questions and challenge the use of a particular term or phrase and wonder whether a better term or phrase could have been selected. Given that Statistics Canada is in the business of conducting the census and surveys it must be assumed, absent compelling evidence to the contrary, that they do their job with as much accuracy as possible. In short, the Court should presume that Statistics Canada prepared the census and survey questions appropriately, and the

burden is on those who allege otherwise to prove so with objective evidence. None was provided by the applicants and I dismiss their claims that the wording of the questions will result in confusion and under-reporting by the aboriginal peoples of Canada.

Do the changes violate the Canadian Human Rights Act?

[65] The respondent submits that allegations that the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, has been breached fall within the exclusive jurisdiction of the Canadian Human Rights Commission and Tribunal, and submit that judicial review cannot precede the process prescribed under that Act.

[66] Section 40 of the *Canadian Human Rights Act* provides that:

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.	40. (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

[67] Judicial review is a discretionary remedy and where an adequate alternative remedy exists, the Court may decline to exercise its jurisdiction: *Froom v Canada (Minister of Justice)*, 2004 FCA 352, at para. 12, *McMaster v Canada (Attorney General)*, 2008 FC 647, at para. 23, and *Giesbrecht v Canada*, [1998] F.C.J. No. 621 (T.D.), at para. 13.

[68] The Canadian Human Rights Commission is certainly able to deal with complaints relating to alleged discriminatory practices under its Act; it does so on a daily basis. Therefore, there is an adequate alternative remedy available to the applicants with respect to their alleged violations of that Act and, in my view, even if the Court has jurisdiction to issue a declaration that there is a breach of the *Canadian Human Rights Act*, the Court should decline to assume jurisdiction, absent an extraordinary and overriding circumstance.

[69] I am not satisfied that there is any extraordinary circumstance in the facts before me. Given the reasons above, I am not even satisfied that the applicants have established that the changes of which they complain establish a strong *prima facie* case of a breach of that Act. Accordingly, I will not exercise my discretion to consider issuing any declaration involving the *Canadian Human Rights Act*.

Do the changes to the census violate s. 9 of the Statistics Act?

[70] Section 9(1) of the *Statistics Act* provides as follows:

9. (1) Neither the Governor in Council nor the Minister shall, in the execution of the powers conferred by this Act, discriminate between individuals or companies to the prejudice of those individuals or companies.	9. (1) Ni le gouverneur en conseil ni le ministre ne peuvent, dans l'exercice des pouvoirs conférés par la présente loi, établir de distinction entre des particuliers ou des compagnies au préjudice d'un ou plusieurs de ces particuliers ou compagnies.

[71] The applicants acknowledge that there is little jurisprudential assistance as to the interpretation and application of that provision. They point only to *Re Armco Canada Ltd. and*

Minister of Department of Consumer and Corporate Affairs (1975), 8 O.R. (2d) 741 (C.A.), as a decision that references the provision at issue. That decision related to a motion for an exemption from the disclosure requirement in s. 129.3 of the *Canada Corporations Act*, R.S.C. 1970, c. C-32. Justice Kelly granted the motion, in part, and in so doing, in *obiter*, noted the provision of the *Statistics Act* relied on by the applicants and stated:

> From this I would conclude that it is the intention of Parliament that the accumulation of statistical information shall not result in discrimination to the prejudice of anyone. I would feel that, having so provided in the *Statistics Act*, it would not intend that the [*Canada Corporations*] *Act* be so interpreted as to accomplish the discrimination it sought to avoid and tear away the secrecy attached to compliance with the *Statistics Act*. The use of the provisions of the [*Canada Corporations*] *Act* to acquire statistical information would have this effect and to me indicates that it was not the intention of Parliament that the provisions of the Act could be used as a medium for the collation of material having a purely statistical value.

[72] The applicants submit that the analysis for discrimination under s. 9(1) of the *Statistics Act* is substantially similar to that under s. 5 of the *Canadian Human Rights Act* and that the proposed changes discriminate between aboriginals and non-aboriginals and between on-reserve and off-reserve aboriginals.

[73] The respondent notes that the applicants' allegations with regards to s. 9(1) of the *Statistics Act* are virtually the same as those made in the context of its *Charter* challenge, and that in the absence of jurisprudence regarding discrimination under s. 9(1), it is appropriate to turn to the s. 15 *Charter* definition of discrimination in *Kapp* to maintain consistency in the interpretation of the law.

[74] There is no principled basis for the respondent's argument that an analysis of discrimination under s. 9(1) of the *Statistics Act* should import the s. 15 *Charter* definition of discrimination in order to maintain consistency. Following the definition of discrimination in the *Canadian Human Rights Act* and the associated jurisprudence, as suggested by the applicants, would be equally effective in maintaining consistency. Given that the *Canadian Human Rights Act* and the *Statistics Act* are both pieces of legislation rather than constitutional documents, it would seem more consistent not to impose the additional constitutional burden of demonstrating that the disadvantage perpetuates prejudice or stereotyping under that second branch of the *Kapp* test.

[75] Even with this lower standard the applicants have failed to demonstrate a distinction and hence discrimination, for the same reasons as they fail to meet the first branch of the *Kapp* test. Section 5 of the *Canadian Human Rights Act* provides that:

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.	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public : a) d'en priver un individu; b) de le défavoriser à l'occasion de leur fourniture.

[76] There is simply no basis for an argument that there has been any denial or differentiation in the 2011 census or the NHS on the basis of aboriginal identity. Accordingly, even on the applicants' interpretation, there is no violation of s. 9(1) of the *Statistics Act*.

Do the changes result in the respondent being unable to fulfill its duties under the Statistics Act?

[77] The applicants submit that the respondent has duties under the *Statistics Act*, particularly ss. 3 and 22, and that the proposed NHS fails to meet the requirements of these sections as it fails to provide accurate, reliable and comparable statistical data for many of the matters provided for in these sections. In their Notice of Application they also allege that this constitutes a refusal to exercise jurisdiction. Sections 3 and 22 of the *Statistics Act* provides as follows:

3. There shall continue to be a statistics bureau under the Minister, to be known as Statistics Canada, the duties of which are	3. Est maintenu, sous l'autorité du ministre, un bureau de la statistique appelé Statistique Canada, dont les fonctions sont les suivantes :
(a) to collect, compile, analyse, abstract and publish statistical information relating to the commercial, industrial, financial, social, economic and general activities and condition of the people;	a) recueillir, compiler, analyser, dépouiller et publier des renseignements statistiques sur les activités commerciales, industrielles, financières, sociales, économiques et générales de la population et sur l'état de celle-ci;
(b) to collaborate with departments of government in the collection, compilation and publication of statistical information, including statistics derived from the activities of those departments;	b) collaborer avec les ministères à la collecte, à la compilation et à la publication de renseignements statistiques, y compris les statistiques qui découlent des activités de ces ministères;
(c) to take the census of population of Canada and the census of agriculture of Canada as provided in this Act;	c) recenser la population du Canada et faire le recensement agricole du Canada de la manière prévue à la présente loi;
(d) to promote the avoidance of duplication in the information collected by departments of government; and	d) veiller à prévenir le double emploi dans la collecte des renseignements par les ministères;
(e) generally, to promote and develop integrated social and	e) en général, favoriser et mettre au point des statistiques

economic statistics pertaining to the whole of Canada and to each of the provinces thereof and to coordinate plans for the integration of those statistics.	sociales et économiques intégrées concernant l'ensemble du Canada et chacune des provinces, et coordonner des projets pour l'intégration de telles statistiques.
...	…
22. Without limiting the duties of Statistics Canada under section 3 or affecting any of its powers or duties in respect of any specific statistics that may otherwise be authorized or required under this Act, the Chief Statistician shall, under the direction of the Minister, collect, compile, analyse, abstract and publish statistics in relation to all or any of the following matters in Canada:	22. Sans pour autant restreindre les fonctions attribuées à Statistique Canada par l'article 3 ni porter atteinte à ses pouvoirs ou fonctions concernant des statistiques déterminées qui peuvent être par ailleurs autorisées ou exigées en vertu de la présente loi, le statisticien en chef doit, sous la direction du ministre, recueillir, compiler, analyser, dépouiller et publier, en ce qui concerne le Canada, des statistiques sur tout ou partie des sujets suivants :
(a) population;	a) population;
(b) agriculture;	b) agriculture;
(c) health and welfare;	c) santé et protection sociale;
(d) law enforcement, the administration of justice and corrections;	d) application des lois, administration de la justice et services correctionnels;
(e) government and business finance;	e) finances publiques, industrielles et commerciales;
(f) immigration and emigration;	f) immigration et émigration;
(g) education;	g) éducation;
(h) labour and employment;	h) travail et emploi;
(i) commerce with other countries;	i) commerce extérieur;
(j) prices and the cost of living;	j) prix et coût de la vie;
(k) forestry, fishing and trapping;	k) forêts, pêches et piégeage;
(l) mines, quarries and wells;	l) mines, carrières et puits;
(m) manufacturing;	m) fabrication;
(n) construction;	n) construction;
(o) transportation, storage and communication;	o) transport, entreposage et communications;
(p) electric power, gas and	p) services d'électricité, de gaz

water utilities;	et d'eau;
(q) wholesale and retail trade;	q) commerce de gros et de détail;
(r) finance, insurance and real estate;	r) finance, assurance et immeuble;
(s) public administration;	s) administration publique;
(t) community, business and personal services; and	t) services communautaires, commerciaux, industriels et personnels;
(u) any other matters prescribed by the Minister or by the Governor in Council.	u) tous autres sujets prescrits par le ministre ou par le gouverneur en conseil.

[78] The respondent submits that s. 3 of the *Statistics Act* does not require Statistics Canada to obtain data in any specific way and notes that no methodology is mandated as to how Statistics Canada is to "promote and develop integrated social and economic statistics." Similarly, the respondent says that s. 22 of the *Statistics Act* does not prescribe any specific methodology and, in any case, does not mention the aboriginal population. The respondent also notes that s. 8 of the *Statistics Act* authorizes the collection of information on a voluntary basis, other than for a census of population or agriculture.

[79] The respondent argues that these sections do not create a legal duty to conduct a specific type of survey or mandate that there be specific content in the survey, and submits that there is no merit to the applicants' allegation that Statistics Canada is refusing to exercise any jurisdiction or duty. The respondent says Statistics Canada is discharging all its statutory obligations by conducting the 2011 mandatory short-form census and the voluntary NHS.

[80] I agree with the respondent. Neither section of the *Statistics Act* prescribes any particular methodology for collecting statistics and the applicants have not advanced any cogent evidence that

the changes amount to a refusal to exercise jurisdiction. I find that there is simply no basis for the suggestion that the planned 2011 Census fails to meet the requirements of the Act. I note that the questions to be asked in the 2011 Census questionnaire will capture most of the information that was captured in the 1871 census of Canada. Statistics Canada will perform its duties under s. 3 of its Act through the mandatory short-form census and the NHS.

[81] The parties agreed that the successful party should be awarded its costs, inclusive of any costs ordered to date, fixed at $3,700.00.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are dismissed and the respondent is awarded its costs which are fixed at $3,700.00, inclusive of fees, disbursements and taxes.

"Russel W. Zinn"
Judge

APPENDIX "A"

Census 2006 - 2B (Long Form)

Recensement 2006 - 2B (Formulaire long)

17. What were the ethnic or cultural origins of this person's **ancestors**?

An ancestor is usually more distant than a grandparent.

For example, Canadian, English, French, Chinese, Italian, German, Scottish, East Indian, Irish, Cree, Mi'kmaq (Micmac), Métis, Inuit (Eskimo), Ukrainian, Dutch, Filipino, Polish, Portuguese, Jewish, Greek, Jamaican, Vietnamese, Lebanese, Chilean, Salvadorean, Somali, etc.

Specify as many origins as applicable using capital letters.

_____

_____

_____

_____

17. Quelles étaient les origines ethniques ou culturelles des **ancêtres** de cette personne?

Habituellement, un ancêtre est plus éloigné qu'un grand-parent.

Par exemple, canadien, anglais, français, chinois, italien, allemand, écossais, indien de l'Inde, irlandais, cri, mi'kmaq (micmac), métis, inuit (esquimau), ukrainien, hollandais, philippin, polonais, portugais, juif, grec, jamaïquain, vietnamien, libanais, chilien, salvadorien, somalien, etc.

Précisez toutes les origines qui s'appliquent en lettres majuscules.

_____

_____

_____

_____

18. Is this person an Aboriginal person, that is, North American Indian, Métis or Inuit (Eskimo)?

If "Yes", mark the circle(s) that best describe(s) this person now.

○ No → **Continue with the next question**

○ Yes, North American Indian

○ Yes, Métis

○ Yes, Inuit (Eskimo)

Go to Question 20

18. Cette personne est-elle un Autochtone, c'est-à-dire un Indien de l'Amérique du Nord, un Métis ou un Inuit (Esquimau)?

Si «Oui», cochez le ou les cercles qui décrivent le mieux cette personne maintenant.

○ Non → **Continuez à la question suivante**

○ Oui, Indien de l'Amérique du Nord

○ Oui, Métis

○ Oui, Inuit (Esquimau)

Passez à la question 20

20. Is this person a member of an Indian band/First Nation?

○ No

○ Yes, member of an Indian band/First Nation

↓

Specify Indian band/First Nation (for example, Musqueam)

_____

---

20. Cette personne appartient-elle à une bande indienne ou à une Première nation?

○ Non

○ Oui, appartient à une bande indienne ou à une Première nation

↓

Précisez la bande indienne ou la Première nation (p. ex., Musqueam)

_____

21. Is this person a Treaty Indian or a Registered Indian as defined by the *Indian Act* of Canada?

- ○ No
- ○ Yes, Treaty Indian or Registered Indian

21. Cette personne est-elle un Indien des traités ou un Indien inscrit aux termes de la *Loi sur les Indiens* du Canada?

- ○ Non
- ○ Oui, Indien des traités ou Indien inscrit

2011 National Household Survey Questions

Questions de l'Enquête nationale auprès des ménages de 2011

17. What were the ethnic or cultural origins of this person's **ancestors**?

An ancestor is usually more distant than a grandparent.

For example, Canadian, English, French, Chinese, East Indian, Italian, German, Scottish, Irish, Cree, Mi'kmaq, Salish, Métis, Inuit, Filipino, Dutch, Ukrainian, Polish, Portuguese, Greek, Korean, Vietnamese, Jamaican, Jewish, Lebanese, Salvadorean, Somali, Colombian, etc.
Specify as many origins as applicable using capital letters.

_____
_____
_____
_____

---

17. Quelles étaient les origines ethniques ou culturelles des **ancêtres** de cette personne?

Habituellement, un ancêtre est plus éloigné que les grands-parents.

Par exemple, canadien, anglais, français, chinois, indien de l'Inde, italien, allemand, écossais, irlandais, cri, mi'kmaq, salish, métis, inuit, philippin, hollandais, ukrainien, polonais, portugais, grec, coréen, vietnamien, jamaïquain, juif, libanais, salvadorien, somalien, colombien, etc.

Précisez toutes les origines qui s'appliquent en lettres majuscules.

_____
_____
_____
_____

---

18. Is this person an Aboriginal person, that is, First Nations (North American Indian), Métis or Inuk (Inuit)?

Note: First Nations (North American Indian) includes Status and Non-Status Indians.

If "Yes", mark the circle(s) that best describe(s) this person now.

- o No, not an Aboriginal person → **Continue with the next question**
- o Yes, First Nations (North American Indian) → **Go to Question 20**
- o Yes, Métis → **Go to Question 20**
- o Yes, Inuk (Inuit) → **Go to Question 20**

---

18. Cette personne est-elle un Autochtone, c'est-à-dire Première Nation (Indien de l'Amérique du Nord), Métis ou Inuk (Inuit)?

Nota : Première Nation (Indien de l'Amérique du Nord) comprend les Indiens avec statut et les Indiens sans statut.

Si « Oui », cochez le ou les cercles qui décrivent le mieux cette personne maintenant.

- o Non, pas un Autochtone → **Continuez à la question suivante**
- o Oui, Première Nation (Indien de l'Amérique du Nord) → **Passez à la question 20**
- o Oui, Métis → **Passez à la question 20**
- o Oui, Inuk (Inuit) → **Passez à la question 20**

---

20. Is this person a Status Indian (Registered or Treaty Indian as defined by the *Indian Act* of Canada)?

- o No
- o Yes, Status Indian (Registered or Treaty)

---

20. Cette personne est-elle un Indien avec statut (Indien inscrit ou des traités aux termes de la *Loi sur les Indiens* du Canada)?

- o Non
- o Oui, Indien avec statut (Indien inscrit ou des traités)

---

21. Is this person a member of a First Nation/Indian band?

If "Yes", which First Nation/Indian band?

For example, Musqueam Indian Band, Sturgeon Lake First Nation, Atikamekw of Manawan.

- o No
- o Yes, member of a First Nation/Indian band

  Specify name of First Nation/Indian band

  _____

  _____

---

21. Cette personne est-elle membre d'une Première Nation/bande indienne?

Si « Oui » de quelle Première Nation/bande indienne?

Par exemple, Atikamekw de Manawan, Première Nation de Sturgeon Lake, bande indienne Musqueam.

- o Non
- o Oui, membre d?une Première Nation/bande indienne

  Précisez la Première Nation/bande indienne.

  _____
  _____

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1375-10 and T-1494-10
STYLE OF CAUSE:	NATIVE COUNCIL OF NOVA SCOTIA ET AL v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	December 13, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	January 25, 2011

APPEARANCES:

Ann E. Smith and Derek A. Simon	FOR THE APPLICANTS
M. Kathleen McManus and Melissa R. Chan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BURCHELLS LLP Barristers & Solicitors Halifax, Nova Scotia	FOR THE APPLICANTS
MYLES J. KIRVAN Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT