Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 5
Date: February 24, 2016
File Nos.: T2055/5614, T2056/5714, T2057/5814

Between:

Bruce Beattie, Joyce Beattie, Jenelle Brewer and the estate of James Louie

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Aboriginal Affairs and Northern Development Canada

Respondent

Decision

Member: Edward P. Lustig

Table of Contents

I. Background

[1] This case involves three Complaints dated March 30, 2012 that were filed with the Canadian Human Rights Commission (the Commission) on April 4, 2012 by Mr. Bruce Beattie. The Commission requested the Canadian Human Rights Tribunal (the Tribunal) institute an inquiry into the Complaints on a consolidated basis on October 1, 2013, pursuant to section 44(3)(a) of the *Canadian Human Rights Act* (the *CHRA*).

[2] Mr. Beattie filed the Complaints on behalf of Ms. Joyce Beattie, Ms. Jenelle Brewer and Mr. James Louie who are alleged in the Complaints to be victims of discrimination by the Respondent on the grounds of their race, national or ethnic origin, by reason of the Respondent's refusal to register certain land documents in the Indian Reserve Land Register (the Register) established under section 21 of the *Indian Act* (the *Act*), contrary to section 5 of the *CHRA*. Ms. Beattie, Ms. Brewer and Mr. Louie, by letters dated August 30 and 31, 2012, authorized Mr. Beattie to act as their representative for the purpose of the Complaints that were filed.

[3] Mr. Louie, who died on March 28, 2015, was a member of the Okanagan Indian Band and a registered Indian under the *Act*. Ms. Brewer is also a registered Indian under the *Act* and a member of the Okanagan Indian Band. Ms. Beattie, who is the spouse of Mr. Beattie, is also a registered Indian under the *Act* but is not a member of the Okanagan Indian Band.

[4] Mr. Beattie, who is not an Indian, has also alleged that he was a Complainant in this case, in addition to acting as the agent or representative of Mr. Louie and his estate, Ms. Brewer and Ms. Beattie. The Complaints do not specify the basis of any alleged discrimination suffered by him.

[5] By way of a letter dated May 8, 2015 the Commission advised the Tribunal and the parties that it was not going to participate in the matter or appear at the hearing after initially participating.

[6] Ms. Beattie attended the hearing but was not called as a witness. Ms. Brewer did not attend the hearing. No one from Mr. Louie's family attended the hearing. Mr. Beattie

attended the hearing as the representative for the Complainants and also gave evidence as a witness for the Complainants. No written proof was provided to the Tribunal confirming Mr. Beattie's authority to represent Mr. Louie's estate.

[7] Section 91(24) of the *Constitution Act* provides Canada with exclusive legislative authority in respect of "Indians and Lands reserved for Indians". The Respondent (known as Indian and Northern Affairs Canada prior to May 2011 and known as Indigenous and Northern Affairs Canada since November 2015) is the Government of Canada department responsible for administering the *Act* including the system of Indian land reserves under the land management provisions of the *Act*. Ms. Sheila Craig, the Manager of Lands Modernization in the Respondent's Lands and Economic Development British Columbia Regional Office, appeared as a witness for the Respondent.

II. Relevant Legislation

[8] The following legislation is relevant to this case and is reproduced below, namely sections 3(1) and 5 of the *CHRA* and sections 2(1)(a), 18(1), 20(1) and (2), 21, 24, 28(1) and (2) and 58(3) of the *Act.*

Canadian Human Rights Act

Prohibited grounds of discrimination

3(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Denial of good, service, facility or accommodation

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.

Indian Act

2 (1) In this Act,

Minister means the Minister of Indian Affairs and Northern Development; (ministre)

reserve

(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and

Reserves to be held for use and benefit of Indians

18 (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Possession of lands in a reserve

20 (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

Certificate of Possession

(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

Register

21 There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

Transfer of possession

24 An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to

> possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.
>
> **Grants, etc., of reserve lands void**
>
> **28 (1)** Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> **Minister may issue permits**
>
> **(2)** The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.
>
> **Lease at request of occupant**
>
> **58(3)** The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

III. Facts

A. Chronology

[9] The lands that are the subject of this case are located within the Okanagan Indian Reserve near Vernon British Columbia and include two parcels described as Lot 170-1 and Lot 175, Block 4, Plan 93082 CLSR in Indian Reserve No.1. These lands were allotted to Mr. Louie by the council of the Okanagan Indian Reserve No. 1 and the allotment was approved by the Minister of the Respondent evidenced by Certificates of Possession (CP) registered in the Register under section 20 of the *Act*.

[10] In June 2007, Mr. Louie and Ms. Beattie applied for a ministerial lease under section 58(3) of the *Act* with respect to Lot 170-1. In January 2008, they applied for a ministerial lease under section 58(3) of the *Act* for Lot 175. These applications were refused by the Respondent on the basis of various interpretations it made respecting requirements it said were not fulfilled by the applications. The requirements it said were

not fulfilled, in its interpretation, included a requirement that a lease had to be provided at fair market value or else a locatee needed to provide a justification to the Respondent; a requirement that a locatee could not lease his own land held subject to a Certificate of Possession, without incorporating; and a requirement that recognized legally adopted children but not custom adopted children.

[11] The refusals of these applications resulted in several complaints under the *CHRA* in 2008 and 2010 in which Mr. Beattie acted as agent for the complainants. All of these complaints were found to have been substantiated on their merits after hearings before the Tribunal, although a judicial review application by the Respondent regarding the implementation of one of the decisions was successful. Ultimately, all of these decisions involving ministerial leases stood, on their merits, as discrimination was found by the Tribunal to have occurred. Decisions of the Tribunal in the matters related to the 2008 complaints were issued by former Member Craig in 2011, 2012 and 2013 (*Beattie and Louie v. Indian and Northern Affairs Canada* 2011 CHRT 2, 2012 CHRT 2, 2013 CHRT 17). Decisions of the Tribunal in the matters related to the 2010 complaints were issued by me in 2014 (*Beattie v. Aboriginal Affairs and Northern Development Canada* 2014 CHRT 1 and *Beattie and Louie v. Indian and Northern Affairs Canada* 2014 CHRT 7). While the lots in question in those cases were the same lots as in this case, the prior cases all involved section 58(3) ministerial leases, unlike this case which involves private leases, without the Crown. None of the interpretations that prompted the Complaints related explicitly to statutory requirements.

[12] As a result of these previous cases, the Respondent reversed some of its interpretations and revised some of its internal practices for issuing ministerial leases. Also, beginning in July 2013, the Respondent's land policies and practices were reviewed and amended to ensure, according to the Respondent, that its new Locatee Policy and Directive provided an enabling process for locatees to lease their lands. The changes, however, did not remove the requirement for the Crown to be a party to a lease nor did the changes require modifications to the Respondent's practice of requiring Crown consent before a lessee could sublet or assign a lease. Nevertheless, over the Summer of 2011, there was extensive correspondence between the Respondent and Mr. Beattie and

several draft ministerial leases were exchanged, however, the parties were not able to reach an agreement on a ministerial lease under section 58(3). So in the latter part of 2011 during the Tribunal's handling of the earlier complaints, Mr. Beattie on behalf of the Complainants changed his approach and departed from using ministerial leases to accomplish the leases in favour of private leases without the Crown.

[13] Two applications for registration, dated July 25, 2011, were submitted by Mr. Beattie to the Registrar. The applications were received on July 27, 2011. Each application attached a lease. One lease, regarding Lot 170-1, named Mr. Louie as lessor and Ms. Beattie as lessee. The other lease, regarding Lot 175, named Mr. Louie as lessor and Ms. Brewer as lessee. Both leases were dated July 25 with an effective date of August 1, 2011.

[14] By letter, dated July 26, 2011, Mr. Beattie wrote to Mr. Sidney Restall, legal counsel with the Department of Justice, and advised him the Complainants had substituted the locatee in place of the Crown as lessor on the Lot 170-1 lease.

[15] By letter, dated July 29, 2011, Mr. Restall wrote to Mr. Beattie that he was not aware of any requirement for registering the lease between Mr. Louie and Ms. Beattie accompanying Mr. Beattie's letter of July 26, 2011. Mr. Restall wrote, "I am not aware of any requirement for such a lease to be registered by the Minister of AANDC." He concluded, "Given your lease initiative, I take it that no further Crown involvement is required."

[16] By another letter dated July 29, 2011, Mr. Restall wrote Mr. Beattie that with respect to Lot 175, "The lease document you have provided involves a different party from the original application. This will have to be reviewed by the Crown. The attached application for registration is likely premature."

[17] An Application for Registration for an Assignment of Lease, signed March 1, 2012 was submitted to the Indian Land Registry by Mr. Beattie. Ms. Brewer was identified in the document as the assignor and Ms. Beattie was identified as the assignee and Mr. Louie signed the document to indicate his consent. The Application indicated that the

Assignment of Lease was intended to assign the lease between Mr. Louie and Ms. Brewer regarding Lot 175 and was received on or about March 7, 2012.

[18] The Assignment of Lease contained three conditions. Condition "A" provides:

> A. Pursuant to the Indian Act, the Premises are lands reserved for the use and benefit of the Okanagan Indian Band (hereinafter "the Band") of which the Assignor is a member, and this Assignment of Lease shall have no effect on the reserve status of the Premises nor shall this Assignment of Lease be construed to diminish or otherwise effect [sic: affect] the lawful authority of the Band to regulate or otherwise govern the use and occupation of the Premises.

[19] Condition "C" of the Assignment states, "...the Parties will submit this Assignment of Lease for registration in the Indian Land Registry on or before the effective date of this Assignment of Lease."

[20] By letter, dated March 7, 2012, Mr. Beattie wrote to Ms. Fiona McFarlane, legal counsel with the Department of Justice. He stated that he had received confirmation that morning that the application to register the Assignment had been received by the Indian Land Registry in Ottawa and asked for a response that same day providing an assurance that counsel had not instructed the Indian Land Registry to suspend or delay consideration of the application.

[21] Ms. McFarlane replied to Mr. Beattie on March 9, 2012. She wrote that the Complainants would be advised of the Respondent's decisions on the Lot 170-1 lease, Lot 175 lease, and assignment of the Lot 175 lease at a later date. Ms. McFarlane noted that the Respondent had two leases for Lot 175 with different lessees--a ministerial lease between the Minister and Mr. Louie dated June 1, 2011 and a private lease without reference to the Minister between Mr. Louie and Ms. Brewer dated August 1, 2011. Ms. McFarlane asked Mr. Beattie for clarification of what he wanted to do with Lot 175.

[22] Mr. Beattie responded to Ms. McFarlane on March 9, 2012. He confirmed that all previous applications (i.e. the ministerial leases) submitted pursuant to section 58(3) of the *Act* were either replaced by the applicants or rejected by the Respondent and that the lease documents had been returned to the complainants. Mr. Beattie also advised that the

only lease acceptable to Mr. Louie for Lot 175 was the lease dated July 25/August 1, 2011 (i.e. a private lease) and assigned to Ms. Brewer with an effective date of March 1, 2012 and that the only lease acceptable to Mr. Louie for Lot 170-1 was the lease dated July 25/August 1, 2011 (i.e. also a private lease). By letter dated March 27, 2012, Mr. Beattie wrote to Ms. McFarlane that no section 58(3) lease existed in respect to Lot 170-1 since April 11, 2011 and the no future section 58(3) lease was anticipated.

[23] The three Complaints in this matter dated March 30, 2012, were submitted to the Commission on April 4, 2012 alleging discrimination by the Respondent against Mr. Louie, Ms. Brewer, and Ms. Beattie on the grounds of their race, national or ethnic origin (as registered Indians), by reason of the denial of a service, customarily available to the public, contrary to section 5 of the *CHRA,* as a result of the refusal of the Respondent to register their private leases and assignment under section 21 of the *Act.*

[24] By letter dated September 30, 2013, Mr. Daryl Hargitt, Lands Registrar, Lands and Environmental Operations of the Respondent advised Mr. Beattie that the Applications for Registration covering the private leases (and the assignment of lease) could not be registered in the Registry because the leases did not indicate Her Majesty the Queen in Right of Canada as lessor, did not indicate the Crown as a party nor had Ministerial approval been provided. Mr. Hargitt noted that he could only locate the March 2012 Application for Registration of the Assignment of Lease but not the actual Assignment itself being received in the Registry. He further stated that as the private lease between Mr. Louie and Ms. Beattie was not acceptable for registration, the subsequent assignment would also not be registrable.

[25] Mr. Beattie wrote to Mr. Hargitt on October 16, 2013 requesting that the rejections of the Applications for Registration be rescinded and assurances provided that the Applications for Registration be completed upon resubmission of the registration documents. He further advised that each of the transactions had a “marketable value of $200,000” and that this would be claimed against Canada in the event that the registrations did not proceed.

[26] The private leases and assignment of lease were all received by the Respondent during the time that the 2006 Indian Land Registration Manual (the Manual) was in effect but the refusal to register the documents took place when the 2013 Manual had come into effect. Under the 2013 Manual aboriginal persons are no longer required to include their racial, national or ethnic (i.e. *Indian Act*) identification on new Applications for Registration.

B. The Land Management System

[27] The *Act* governs all dealings with respect to Indian lands for those First Nations operating under the land management provisions of the *Act.* Some First Nations have assumed responsibility for administering their own reserve lands under the *First Nations Land Management Act* or other arrangements with Canada, however, the Okanagan Indian Reserve where this case took place is administered by Canada pursuant to the *Act.*

[28] The Respondent is legislatively responsible for various aspects of the management of Indian reserve land and the registration of interests in reserve land. As part of this, it administers the Indian Land Registry System (IRLS) and has created the Manual to assist its staff in the process of registering instruments for land transactions on reserves. The current Manual replaced the 2006 version in July of 2013. As noted above, section 21 of the *Act* states as follows: "There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve." According to the Manual, the Register "records instruments respecting lands which are allotted to individual band members (locatee lands) as well as other transactions." The Registrar of Indian Lands (the Registrar) is the title of the person designated to receive, process and enter/register documents.

[29] The Manual provides guidance about the ILRS (and the Register) as follows:

a) Generally

i) "it was established to provide a reliable, internet-based, computerized registry of registered interests in reserve lands in Canada."

ii) "it is a repository of documentation and does not purport to guarantee title or accuracy of documentation filed therein, nor does it give priority to any interests..."

iii) "it records information concerning interests registered against reserve lands." While "the land register provides a list of transactions that affect a parcel of land, the nature of the transaction and the scope of the interest." and "...once recorded, transactions cannot be deleted, thus transactions remain on record as part of the history of the reserve or parcel even though they may be discharged or expired."

iv) "it is guided by a set of interacting procedures designed to govern the registration of rights or interests, claims of interest, or notices of claims of interest in reserve land."

v) "Most provincial systems deal with recording title to lands; however, in the ILRS, title remains with the Crown and transactions in land are registered."

b) Definition of ILRS

> A database of instruments registered in the [ILRS] relating to Reserve Lands and Crown Lands. The ILRS generates Registration Numbers and Evidence of Title (EOT) numbers and is the authoritative source for reserve names. The ILRS allows all users to perform enquiries and generate reports on data in the system. Electronic images of instruments registered in the Indian Lands Registry System can be viewed and printed from the system.

c) Description of the purpose of ILRS

- to fulfill the statutory requirements of the Indian Act,
- to record interests approved and submitted for registration in Indian reserve, Designated and Surrendered lands,
- to safeguard interests that have been registered,
- to provide timely and reliable information to clientele, and to provide safekeeping of original instruments and documents submitted for registration.

d) Definition of Registration

The process of inserting into the record the various transactions and supporting documentation affecting a given parcel of land. The registration of transactions gives public notice regarding the nature of an interest on land; and enables persons interested in a property to determine the rights of all parties with an interest in that particular properly.

e) Definition of Leases

Anyone who Leases land from another acquires a leasehold interest in that land; such an interest is called a “Lease”. The possessor of the interest is the “lessor”, namely Crown Canada, while the person who acquired the interest is the “lessee “.A leasehold interest must have a definable time period, the term, or a time period that can be established. The term of the instrument includes all provisions for renewal or extension of the right or interest. The holder of a Leasehold interest has exclusive rights to use and occupy the land. When the term of the Lease ends, the land reverts to the lessor.

f) Description of basic functions of the registration system

1. *to give notice to the public of all documents registered concerning a particular piece of reserve land.*
2. *to show the historical record of registered interests.*
3. *to display interests that affect reserve land.*

g) The Manual sets out the administrative “...procedures for preparing, submitting and registering documents for the ILRS, in accordance with policy requirements developed in support of the *Indian Act* land management provisions.”

It provides guidance as to, *inter alia*, how to prepare documents for registration, what documents are required, as well as the requirements for registration applications and their content.

h) The Manual describes what an "interest" in land is and the requirements for a "legal document" as follows:

> In the normal course of management of reserve lands, a variety of transactions may affect the rights or interest in the land. The transactions may involve a First Nation, one or more members of a Band, or non-members of a Band. The transactions are described in an "instrument", a legal document that gives effect to the transaction, and describes the parcel of land, the parties to the transaction, and any legal details and specifications required.

i) The Manual includes direction on when to refuse the registration of documents submitted including where "the interest granted by the instrument overlaps or is inconsistent with a previously registered interest" which can include a situation where the "instrument purports to grant a leasehold interest and the instrument is not the proper authority as specified in the *Indian Act*."

j) The Manual provides that the lessor in a locatee lease must be the Crown.

[30] Ms. Craig's uncontradicted oral evidence at the hearing amplifies many of the foregoing facts regarding the ILRS as she testified that:

- The Manual is a document which describes the procedures for preparing, submitting and registering documents in the ILRS. The procedures are designed to govern the registration of rights of interest, claims of interest, or notices of claims of interest in reserve land;

- The Manual provides that the basic functions of the ILRS are to give notice to the public of all documents registered concerning a particular piece of reserve land; show a historical record of registered interests; and display interests that affect reserve land;

- The key purposes of the ILRS are to fulfil the statutory requirements of the *Act*, safeguard registered interests, and provide timely and reliable information to the public, bands and others;

- Documents proposed for registration must first be reviewed and verified to ensure that they meet the requirements set out in the Manual, the *Act*, legal advice, court cases and other relevant policy. Once the documents are reviewed and verified the officer enters the information respecting the documents into the ILRS in accordance with Indian Land Registry Entry Guidelines (the Guidelines);

- A document may be registered if it grants or claims an interest in reserve land; transfers, encumbers, or affects reserve land, designated, or surrendered land; and is submitted to the ILRS in accordance with the *Act* and the Manual;

- An applicant for registration or his agent submits the following documents to the applicable Regional office of the Respondent:

    a. The instrument (details for preparation in Chapter 3 of the Manual);

    b. An affidavit of witness (details for preparation in Chapter 4 of the Manual);

    c. An application for registration (details for preparation in Chapter 5 of the Manual);

    d. The legal land description (details for preparation in Chapter 6 of the Manual); and

    e. All other supporting documents (details for most common documents in Chapter 7 of the Manual).

- In order for a document to be registered it must fulfill certain technical criteria set out in the Manual (such as being properly executed, identifying the parties and identifying the nature of the interest to be registered) and, in the

case of instruments such as leases or permits, Ministerial approval or consent (Minister of the Respondent on behalf of Her Majesty) is required.

- Once a document is submitted for registration, the Registrar (i.e. the Regional office)

  a. assigns a registration number, which is used throughout the process and records the year, month and hour of the registration in the ILRS;

  b. determines if the document is not acceptable for registration following the criteria listed in section 9 of the Manual. If it is not acceptable for registration, the Region will return the instrument, the application and all supporting documents submitted with the instrument;

  c. verifies that the necessary documents have been submitted;

  d. verifies that the instrument meets the criteria set out in section 8.4 of the Manual including, under section 8.4.1(10), that it is signed by the person with the proper delegated authority;

  e. in the case of a locatee, ensures that the locatee specific criteria set out in section 8.4.5 of the Manual are met; and

  f. in the case of a lease, ensures that the lease specific criteria set out in section 8.4.7 of the Manual are met.

- Chapter 9 of the Manual provides guidance to registry staff regarding criteria to refuse registration. It provides that where, in the opinion of the lands officer reviewing the application and related material, identified criteria are not met, the regional office shall not register an instrument. For the purposes of this case, the key grounds to reject an application are: where the instrument being registered does not meet the requirements set out in the Manual and where Ministerial approval is not provided. These requirements were present in both the former and current version of the Manual.

- the ILRS is a document repository. It does not guarantee title or accuracy of the documents filed in the registry. Registration does not give priority to one registered interest over another (other than in cases involving assignments of interest).

- if a locatee wishes to lease his or her possessory title it can be done pursuant to the 2013 Locatee Lease Policy. Pursuant to that policy, locatees can request that the Minister of the Respondent enter into a section 58(3) of the *Act* lease to a range of persons including corporations, other Indians or the locatee him or herself and such a leasehold interest can then be mortgaged to provide financing for development of the land.

- the Respondent has fulfilled the statutory requirements of section 21 of the *Act* by creating the ILRS and setting up a process for entering particulars relating to allocations of lawful possession and other transactions relating to reserve land. In the case of an allocation of reserve land, the Respondent records the band council resolution allocating lawful possession to a band member, which has the effect of creating a folio for that interest. Subsequent transactions relating to that interest, such as a section 58(3) lease of the interest, are registered in the same folio. On page 34 of the Indian Land Registry Line Entry Guidelines, departmental officials are directed to register the band council resolution allotting the land and state that ministerial consent is required before such an interest is registered. Page 43 of the Guidelines lists the four types of leases that are registered in the Indian Land Registry which are Section 53(1) leases of designated land, 58(1)(b) locatee leases of agricultural land, 58(1)(c) band leases of agricultural land and 58(3) locatee leases for non-agricultural purposes.

IV. Threshold/Preliminary Issue: Are the Complaints solely a challenge to or a collateral attack upon legislation and nothing else and therefore beyond the jurisdiction of the Tribunal, as per the *Murphy*, *Matson* and *Andrews* line of cases?

[31] Both parties in their submissions at the hearing identified this as either a "threshold" issue (the Complainants' description) or a "preliminary" issue (the Respondent's description). I agree.

[32] *Murphy* (*Murphy v. Canada Revenue Agency*, 2010 CHRT 9) is a case that involved a Complaint under the *CHRA* concerning the manner that certain tax relief calculations of lump sum payments for retroactive pay to a group of women in a pay equity situation were done by the Canada Revenue Agency (CRA) under the *Income Tax Act* (*ITA*). Former Vice-Chair of the Tribunal Hadjis held that the Complaint was not substantiated. At paragraphs 57 and 58 of his decision he wrote as follows:

> [57] In sum, the source of the alleged discriminatory practice is not, in whole or in part, the CRA's activities, be they a service customarily available to the public or not, but rather exclusively the tax legislation itself. In *Wignall v. Canada (Department of National Revenue (Taxation)*, 2003 FC 1280, at para. 30, the Federal Court noted that the conduct of Revenue Canada cannot be held to be discriminatory under the *CHRA* when what is really being impugned is a provision of the *ITA*.
>
> [58] Accordingly, where the alleged discrimination, as in the present case, arises solely from the legislative language of the *ITA* and not the activities of the CRA, it is not as a result of the provision of services by the CRA, within the meaning of s. 5 of the *CHRA*. Consequently, a *prima facie* case pursuant to that section cannot be substantiated.

[33] The Federal Court dismissed an application for judicial review of the *Murphy* decision in *Public Service Alliance of Canada v. Canada Revenue Agency* 2011 FC 207 and the Federal Court of Appeal upheld the decision of the Federal Court at 2012 FCA 7. A subsequent application for leave to appeal to the Supreme Court of Canada was dismissed (34706). In upholding the decision of the Federal Court, the Federal Court of Appeal held at paragraph 6 as follows:

> [6] This is a direct attack on sections 110.2 and 120.31 of the ITA, based on considerations that are wholly extrinsic to the ITA. As was held in *Forward v. Canada (Citizenship and Immigration)*, 2008 CHRT 5 at paragraphs 37 and 38 with respect to an identical challenge directed at specified provisions of the *Citizenship Act*, R.S.C. 1985, c. C-29, this type of attack falls outside the scope of the CHRA since it is aimed at the legislation *per se*, and nothing else. Along the same lines, the Federal Court in *Wignall v. Canada (Department of National Revenue (Taxation))*, 2003 FC 1280, observed in *obiter* that an attempt pursuant to the CHRA to counter the application of paragraph 56(1)(*n*) of the ITA based solely on its alleged discriminatory impact on the complainant, could not succeed; only a constitutional challenge could yield this result. In our view, the opinion expressed in these cases is the correct one since the CHRA does not provide for the filing of a complaint directed against an act of Parliament (see subsection 40(1) which authorizes the filing of complaints and sections 5 to 14.1 which sets out the "discriminatory practices" against which complaints may be directed).

[34] *Matson* (*Matson et al v. Indian and Northern Affairs Canada* 2013 CHRT 13) was decided by me. *Andrews* (*Andrews et al v. Indian and Northern Affairs Canada* 2013 CHRT 21) was decided by Member Marchildon. Both of these cases involved Complaints under the *CHRA* concerning the registration of Indian status under section 6 of the *Act*. Both Member Marchildon and I dismissed the Complaints. Both of our decisions followed the Federal Court of Appeal decision in *Murphy* in finding that the Complaints were solely a challenge to legislation, namely section 6 of the *Act*, and nothing else.

[35] In *Matson* I wrote the following at paragraphs 57 to 60 inclusive:

> [57] As the definition of "Indian" and subsection 5(5) of the *Indian Act* indicate, entitlement and registration are two separate things. Entitlement is predetermined by the *Indian Act*, regardless of

> registration; whereas registration in the Indian Register is the result of an application process through the Registrar/Department.
>
> [58] The Respondent does not offer to the public the benefit of e*ntitlement to registration* under section 6 of the *Indian Act*, or the corresponding tangible and intangible benefits that may go along with entitlement to registration. It is the *Indian Act* itself that offers the benefit of entitlement to registration and it is Parliament who has applied the entitlement provisions of the *Indian Act* to the public, not the Respondent. What the Respondent may offer as a benefit/service to the public is the processing of applications for registration to determine whether a person should be added to the Indian Register, *in accordance with the Indian Act*. This involves the Indian Registrar receiving applications for registration, reviewing the information in the application to determine whether it is complete and accurate; and, assessing the application to determine whether or not the applicant satisfies the entitlement provisions of section 6 of the *Indian Act*. The Complainants do not allege discrimination in the Respondent's performance of any of these functions. As noted, the result of this process is that either the applicant is added to the Indian Register as being entitled to status as an Indian under the *Indian Act* or he is not. While the processing of an application by the Registrar as described above may be a service, the resulting status or lack thereof is not.
>
> [59] As is clear from the Complainants' submissions, it is not the Respondent's processing of the Complainants' applications that is being challenged in this case. Rather, it is the Complainants' entitlement to registration, pursuant to section 6 of the *Indian Act*, which gives rise to the present complaint. The sole source of the alleged discrimination in this case is the legislative language of section 6 of the *Indian Act*. In reviewing the Complainants' applications for registration, the Respondent's officials did nothing more than apply categorical statutory criteria to undisputed facts. Any issue taken with the application review process is really an issue taken with section 6 of the *Indian Act*.
>
> [60] Therefore, for the above reasons, I would answer the first question in the affirmative and find the present complaint to be a challenge to legislation, namely section 6 of the *Indian Act*, and nothing else.

[36] In *Andrews* Member Marchildon wrote the following at paragraphs 110 and 111:

> [110] Although this reasoning does not lead to a decision in the Complainant's favour, I do not wish to diminish the suffering that Mr. Andrews and his family state to have endured as a result of the government's enfranchisement policies. While the Complainants

> cannot challenge the impugned sections of the *Indian Act* pursuant to the *Act*, they may still choose to do so pursuant to the Charter as per *Murphy*. This was done successfully in the *McIvor* case, for example, for sections 6(1)(a) and 6(1)(c) of the *Indian Act*. The Tribunal is not, however, the appropriate forum to hear this challenge in this case.
>
> [111] I would therefore answer questions A. and B. in the following manner:
>
> A. Do the complaints involve the provision of services customarily available to the general public within the meaning of section 5 of the *Act*; or, are the complaints solely a challenge to legislation?
>
> **Answer: The complaints are solely a challenge to legislation.**
>
> B. If the complaints are solely a challenge to legislation, does the *Act* allow for such complaints?
>
> **Answer: No.**
>
> In light of these answers, I do not need to address questions C. and D., namely
>
> C. Has the Complainant established a *prima facie* case of discrimination? and
>
> D. If so, has the Respondent demonstrated that the *prima facie* discrimination did not occur as alleged or that the practice is justifiable under the *Act*?

[37] These two decisions were judicially reviewed together by the Federal Court in *Canadian Human Rights Commission v. Canada (Attorney General)*, 2015 FC 398. In dismissing the application for judicial review the Federal Court held at paragraph 59 to 62 inclusive as follows:

> [59] A challenge to the way in which that formula is applied is a challenge to the law itself. In the present case, the Complainants are alleging the eligibility provisions of the *Indian Act* are discriminatory. Therefore, applying the mandatory eligibility provisions of the *Indian Act* is an act of enforcing the law, even though the statute provides a benefit. It is the law which denies access to the benefit, not the government agency.

> [60] In my opinion, the findings from *Forward* are equally applicable to the present case. At paragraph 54, referring to *Forward*, the Tribunal found that citizenship under the *Citizenship Act* was not a service, because the sole source of the alleged discrimination is the legislative language of the *Citizenship Act*. *Forward* adopted the obiter from *McKenna* which said that *Druken* was wrongly decided (*Forward*, at paras 32-34).
>
> [61] Moreover, the fact that *Matson* and *Andrews* are analogous to *Murphy* is supported by the fact that the Federal Court of Appeal in *Murphy* specifically addressed *Druken*. I think it is clear that the Federal Court of Appeal intended its conclusions to apply to cases of the government applying the mandatory provisions of a statute, particularly when reading the Court's comments in paragraph 7, as described above. The circumstances of *Matson* and *Andrews* are arguably analogous to those in *Murphy*. In both instances, the legislature set out a mandatory scheme or formula which a government organization applies without discretion.
>
> [62] I think the detailed analysis of the Tribunal is reasonable and I find that the Tribunal's reliance on *Murphy* was reasonable. *Murphy* was a decision by a higher court that legislation was not a "service" as defined in section 5. The interpretation of section 5 from *Murphy* was consistent with the language of section 5 of the *Indian Act*. Further, *Murphy* also addressed the conflicting jurisprudence from *Druken*.

[38] Prior to the hearing in this case, Mr. Beattie brought a motion to strike out parts of the Respondent's Statement of Particulars which invoked the application of the *Murphy*, *Matson* and *Andrews* principle to the present complaint. In my ruling on the motion (*Beattie v. Aboriginal Affairs and Northern Development Canada* 2015 CHRT 16), I summarized the parties' positions on this issue (which were largely repeated in their arguments at the hearing), as per the written materials filed on the motion, at paragraphs 10 and 11, as follows:

> [10] The submissions on the motion by both the Complainant and the Respondent centre on the principle enunciated in *Murphy, Matson* and *Andrews* that legislation cannot be directly challenged pursuant to the *CHRA*. According to the Complainant, section 21 of the *Act* is a service customarily available to the general public to be provided in a non-discriminatory manner mandating the registration of documents covering land transactions between registered Indians of reserve land, without reference to other conditions or provisions of

> the *Act*. The Complainant argues that on a plain and ordinary reading of the words in section 21, the Indian Land Registrar was mandated to register the documents submitted to it in this case, without any reference to whether the transactions described in the documents were "legally valid" by virtue of other sections of the *Act* as interpreted by the Respondent that are not mentioned in section 21. For the Complainant, the engagement by the Respondent of the *Murphy, Matson and Andrews* principle as a defence to the Complaints is irrelevant and beyond the jurisdiction of the Tribunal as his case represents the enforcement of, not a challenge to, mandatory legislation - namely section 21. Hence, the Complainant requests the Tribunal to strike from the Respondent's Statement of Particulars the paragraphs that he says refer to this principle.
>
> [11] According to the Respondent, section 21 of the *Act* is part of a statutory scheme that cannot be read alone without engaging other sections of the *Act*. Reading this section together with the other sections of the *Act*, including subsection 58(3), informs the proper interpretation of section 21. The service offered to the public is really the entire registration process which includes the step of registration detailed at section 21. The service is not limited to the step of registration alone. The Respondent argues that this process is provided for by mandatory legislation that the Registrar of Indian Lands cannot ignore. By registering documents pursuant to section 21 that are rendered invalid by other sections of the *Act*, the Registrar would act in violation of the legislation. As such, the Respondent takes the position that the Complaints seek to challenge mandatory legislation and nothing else, thereby invoking the *Murphy, Matson and Andrews* principle that is a legitimate and key defence to the Complaints. The Respondent's position that it is erroneous to interpret section 21 in the absence of other provisions of the *Indian Act* does not constitute a challenge to legislation and the Respondent submits that, contrary to the Complainant's argument, the *Murphy, Matson* and *Andrews* principle does not apply in this regard. The Respondent further submits that pursuant to the principle, if the Complainant wants to challenge the legislative process, on the basis that is discriminatory, he must do so in a court as a *Canadian Charter of Rights and Freedoms* challenge, as the current legislation is mandatory and can only be changed by an amendment of the legislation, not by a decision of the Tribunal.

[39] I dismissed the motion on the basis that it was premature at that time to determine the issue and grant the relief requested by Mr. Beattie at paragraph 17, as follows:

> [17] It is clear that the Complainant and the Respondent take completely opposite positions in their submissions on this motion

> about a fundamental issue. The fact that both parties have argued the merits of this issue rather than the motion to strike, supports the need for oral argument on this point. I am not persuaded by the Complainant that it would be fair, on a preliminary basis, in the absence of a hearing, to strike the paragraphs requested in the motion from the Respondent's Statement of Particulars, as they constitute a primary defence in this case worthy of being heard. To do so, in my view, would deprive the Respondent of its right to a full and ample opportunity to present evidence and make legal representations on the matters raised in the Complaint.

[40] As a result of the evidence adduced at the hearing, much of which is referred to in Part III of this decision above, and the oral arguments presented on this issue at the hearing, which were essentially the same as on the motion to strike, I am now able to determine this issue on the merits.

V. Analysis

[41] The highly credible evidence of Ms. Craig, referred to in Part III of this decision above, was not contradicted or impugned in any material way during the hearing. In sum, she provided a description of a legislative scheme of interrelated and interconnected rules that form a process or system for land management under the *Act*, of which registration is a part. That system requires the Crown, as owner/landlord, to be a party to leases of the subject lands, in order for the Registrar, without discretion, to be allowed to register (enter) them as Ministerial leases (not private leases) under section 21 of the *Act*.

[42] The legislative scheme of the *Act*, by virtue of sections 2(1) and 18(1), currently vests the subject lands and the title thereto (which are within an Indian reserve still administered by Canada under the *Act*) in the Crown for the use and benefit of the Indian band for whom it has been set aside (the Okanagan Indian Band), as determined by the Governor in Council.

[43] Section 20 the *Act* provides for the council of a band, with the Minister's approval, to allot lawful possession of its reserve land to a member of the band through the issuance of a Certificate of Possession (CP). However, a CP does not confer ownership as it is not an instrument of conveyance (*Tyendinaga Mohawk Council v. Brant*, 2014 ONCA 565 at

paras 21 and 80-84). This is the interest that Mr. Louie has had in the subject lands and CPs covering this right in the subject lands which were registered in his name in the Register.

[44] Section 24 of the *Act* only allows a transfer by a person in lawful possession of lands in a reserve of the right of possession to the lands to the band or another band member and then only with the approval of the Minister.

[45] Section 28(1) of the *Act* deems void a lease by a band member of reserve lands to any person other than a member of that band subject to subsection 2. Section 28(2) authorizes the Minister in writing to authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

[46] Section 58(3) of the *Act* provides that the Minister may lease, for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession of.

[47] Section 21 of the *Act* requires the Respondent to keep in the Register in which shall be entered (registered) the particulars of CPs and Certificates of Occupation and other transactions respecting lands in a reserve.

[48] The Respondent argues that in accordance with the Supreme Court of Canada decision in *Celgene Corp v. Canada (Attorney General)*, 2011 SCC 1 (*Celgene*), at paragraph 21, statutory interpretation involves a consideration of the ordinary meaning of words used and the statutory context in which they are found. As such, the Respondent argues that the context of sections 20 and 24 inform the correct interpretation of section 58(3) of the *Act* that “the Minister may lease” requires that the Minister must be the designated lessor. If not, it is contended by the Respondent, the purpose of sections 24 and 28(1) is redundant. This statutory requirement is reflected in section 10.1.12 of the Manual, which expressly provides that the lessor must be Crown Canada.

[49] Further, the Respondent argues, again citing *Celgene*, that in the absence of case law on section 21 of the *Act*, but based on its language and its statutory context, "other transactions" would include section 58(3) leases.

[50] Mr. Beattie's evidence at the hearing did not contradict Ms. Craig's evidence as to how the ILRS, the Manual and the *Act* interact and are connected with each other. His evidence and arguments are largely based on his views 1) that the *Act* itself is currently anachronistic, paternalistic and discriminatory towards Indians in many respects; and 2) that the Crown is not really the owner of the subject lands but that Mr. Louie was the owner and his estate now is; and 3) that under section 21 of the *Act*, the Registrar is mandated, because of the word "shall" therein and because there is no reference to other sections, to register all leases, including private leases, without regard to the other sections of the *Act*, that provide for the Crown to be the owner of the subject lands and require the Minister to participate in the leases; and 4) that in refusing to register the private leases (which are *also referred to commonly as* "buckshee" leases), between registered Indians under the *Act*, but without the Crown's participation, the Respondent contravened section 5 of the *CHRA* by denying the Complainants a service (i.e. registration of documents) customarily available to the public.

[51] I accept the evidence of Ms. Craig as referred to in paragraph 40 and the Respondent's arguments on this issue as described in paragraphs 38, 48 and 49 herein. In my opinion, contrary to Mr. Beattie's arguments, section 21 of the *Act*, which is at the heart of this issue, does not stand in isolation; rather it is part of an interconnected and interrelated set of provisions. The proper interpretation of section 21 is that it is part of a legislative scheme and is informed by reading it with other sections including section 58(3) mandating that as the Crown is the owner of the lands, the Minister, in Her Right, must be the lessor of locatee leases.

[52] In interpreting legislation like section 21, it is necessary to analyse the scheme of an *Act*. As set out by R. Sullivan, in *Sullivan on the Construction of Statutes*, (6th ed. 2014), at paragraph 13.12;

> When analyzing the scheme of an Act, the court tries to discover how the provisions or parts of the Act work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan. The court's reasoning is described by Greschuk J. in *Melnychuk v. Heard*:
>
> > The court must not only consider one section but all sections of an Act including the relation of one section to the other sections, the relation of a section to the general object intended to be secured by the Act, the importance of the section, the whole scope of the Act and the real intention of the enacting body."

The excerpt from *Melnychuk* was endorsed by the Federal Court in *De Silva v. Canada (Citizenship and Immigration)*, 2014 FC 790, at para. 42.

[53] It does not seem to me that the intention of Parliament under the *Act* and the ILRS was to provide, on the one hand, for the Crown to own the lands in question and to require the Minister to consent to any leases thereof by virtue of the sections of the *Act* referred to in paragraphs 42 to 46 herein and the Manual while, on the other hand, to allow the Registrar to register leases under section 21 that do not comply with these requirements. Not only would that not be a plausible and coherent plan but it would also be contrary to the public interest in terms of properly informing and not misleading members of the public who wish to use the Register for its efficacy.

[54] The words "shall" and "other documents" as used in section 21 of the *Act* must be read in the context of the whole land management scheme as being informed by the other sections thereof referred to above. In my opinion, therefore, section 21 of the *Act* mandates the Registrar, without discretion, to refuse to register the private leases and assignment in this case as invalid documents within the legislative land management scheme of the *Act*. His refusal to register the private leases and assignment in this case is therefore not a violation of section 5 of the *CHRA*. While the whole process of reviewing and eventually registering valid documents or not registering invalid documents may be a

service, the legislative criteria for doing so is not. It is the mandatory land management scheme of the *Act* that is being challenged in the present Complaints and not a service provided by the Respondent.

[55] For the foregoing reasons, I am obliged to follow the reasons in the *Murhpy*, *Matson* and *Andrews* line of cases and find that the Complaints in this case are *solely* a challenge to or a collateral attack upon legislation and nothing else and beyond the jurisdiction of the Tribunal.

[56] As noted above in paragraph 50, Mr. Beattie, in my opinion, is essentially challenging legislation (the *Act*) that he views, in many respects as anachronistic, paternalistic and discriminatory towards Indians. His view in this regard may very well accord with the view that First Nations people ought to be treated on a nation to nation basis with Canada instead of as its ward in a system of land management that renders First Nations subordinate rather than equal. To change this relationship will require a change in the policies of the Government of Canada and the legislation. Alternatively, Mr. Beattie can try to challenge the legislation in a Court under the *Canadian Charter of Rights and Freedoms*.

VI. Order

[57] For the foregoing reasons, the Complaints are dismissed.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
February 24, 2016

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T2055/5614, T2056/5714, T2057/5814

Style of Cause: Bruce Beattie, Joyce Beattie, Jenelle Brewer and the estate of James Louie v. Aboriginal Affairs and Northern Development Canada

Decision of the Tribunal Dated: February 24, 2016

Date and Place of Hearing: September 14, 16, 17, 2015

Cranbrook, British Columbia

Appearances:

Bruce Beattie, for the Complainants

No one appearing, for the Canadian Human Rights Commission

Ainslie Harvey & Marnie Munro, for the Respondent