Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Joyce Beattie

- and –

James Louie

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Indian and Northern Affairs Canada

Respondent

Decision

File Nos.: T1703/5811 & T1704/5911
Member: Edward P. Lustig
Date: February 27, 2014
Citation: 2014 CHRT 7

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I. Context

[1] On October 30, 2009, Mrs. Joyce Beattie and Mr. James Louie filed separate complaints against Indian and Northern Affairs Canada (INAC), now known as Aboriginal Affairs and Northern Development Canada (AANDC or the Respondent), with the Canadian Human Rights Commission (the Commission), on behalf of herself and Mr. James Louie (the Complainants). The Complainants allege that in refusing to accept and process Mr. Louie's application for a ministerial lease on Lot 175 of which he is the owner/holder pursuant to s. 58(3) of the *Indian Act*, R.S.C., 1985, c. I-5, the Respondent had discriminated against the Complainants on the ground of their national or ethnic origin and race, contrary to section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (*CHRA*).

[2] The Commission referred both complaints to the Canadian Human Rights Tribunal (the Tribunal) on July 29, 2011, with the instruction that they be heard in a single inquiry as they involve substantially the same issues of fact and law.

II. Relevant Facts

[3] Mr. Louie is a member of the Okanagan Indian Band (the Band) and resides on the Okanagan Indian Reserve No. 1. Mr. Louie is in lawful possession of Lot 170-1 and Lot 175, Block 4, Okanagan Indian Reserve No. 1. This land, known as "locatee land", was allotted to Mr. Louie, the "locatee", by the Band council with approval of the Minister of INAC. Mr. Louie's right of lawful possession of these lands is evidenced by a Certificate of Possession, issued pursuant to s. 20 of the *Indian Act*.

[4] On June 29, 2007, Mr. Louie and Mrs. Beattie, also an Indian as defined in the *Indian Act*, submitted an Application for Use of Land Within an Indian Reserve and an Application for Lease of Locatee Land to the Respondent pursuant to section 58(3) of the *Indian Act* for the creation of a pre-paid residential lease of Lot 170 to the developer, Mrs. Beattie. The proposed lease was to be for a term of forty-nine years with a nominal rent of one dollar. This lease application led to the filing of another, distinct complaint before the Tribunal, which resulted in

Tribunal decision *Louie v. Indian and Northern Affairs Canada*, 2011 CHRT 2, issued January 26, 2011 (*Louie v. INAC).*

[5] On January 23, 2008, Mr. Louie submitted a similar application to the Respondent for the creation of a lease for Lot 175. This lease was between the Minister and Mr. Louie and also stipulated a term of forty-nine years, commencing on March 1, 2008, with the nominal prepaid rent of one dollar. The application specified that the intended purpose of the proposed lease was residential use, including the construction of a single family residence. In order to finance the construction of the residence, it was Mr. Louie's intention to pledge the lease to secure a construction loan from Mrs. Beattie to a maximum of $200,000.00. Mr Louie intended to assign the lease to Mrs. Beattie for the duration of the construction loan, with the remainder of the lease reverting to Mr. Louie when the loan was repaid.

[6] It is this lease application, pertaining to Lot 175, that is the subject of the present decision.

[7] On February 7, 2008, the Respondent sent an email to Mr. Bruce Beattie, Representative of the Complainants, stating:

> Please be advised that INAC has received legal opinion and will not be able to accept and process the Application for Use of Land Within an Indian Reserve dated January 23, 2008 on Lot 175, because the Indian Act does not authorize a leasehold interest to a locatee on his own Certificate of Possession CP land. If Mr. Louie wishes to be a part of the leasehold interest, he will need to incorporate.

[8] The Complainant's Representative replied in an email sent later that day, expressing his disagreement with the Respondent's position. In Mr. Louie's view, the *Indian Act* is silent on whether locatees can hold leasehold interests on lands which they have agreed to vacate to the Crown for the term of a lease. The *Indian Act* also says nothing about requiring a locatee to incorporate in order to hold a lease. The Complainant's Representative informed the Respondent that Mr. Louie was not prepared to incorporate as this would not be of any benefit to him. In

view of avoiding further delays however, Mr. Louie requested amending the 2008 lease application to name Mrs. Beattie as the proposed lessee.

[9] On February 15, 2008, Mr. Louie sent a letter to the Chief and Council of the Band and c.c.ed the Respondent. Mr. Louie stated that, as the Respondent would not create a locatee lease in his name, he would have Mrs. Beattie enter into the lease for Lot 175. Mr. Louie explained that the lease would then be transferred into Mr. Louie's name, either by assignment or sublease. Mr. Louie also stated that his intention for entering into the lease was to increase the land value and facilitate conventional mortgage financing for construction of a new house for himself on Lot 175.

[10] On February 28, 2008, Mr. Louie's representative emailed the Respondent, requesting that they be provided with the legal authorities upon which the Respondent relies to support the position that "the *Indian Act* does not authorize a leasehold interest to a locatee on his own CP land".

[11] On March 5, 2008, Mr. Louie's representative again emailed the Respondent and stated that, in light of the Respondent's lack of response to the February 28, 2008 email, Mr. Louie had decided that he still wanted the lease for Lot 175 to be between the Minister and himself rather than between the Minister and Mrs. Beattie.

[12] On March 19, 2008, Mr. Louie sent a letter to the Minister of INAC, expressing his dissatisfaction with the delay in processing the lease applications for Lot 175, as well as the delays in processing his June 29, 2007 lease application for Lot 170-1. Mr. Louie explained:

> In order to make better economic use of my CP lands, the Indian Act requires me to apply for s. 58(3) ministerial leases. Those leases are clearly intended to provide economic opportunity and benefits for CP holders, but my experience is that the locate lease application process, as it is currently administered in the BC Region, has become so grossly inefficient and racially offensive that it is more likely to inhibit than facilitate economic development. It is quite obvious to me that most of the negative aspects of the existing lease application process derive from an archaic and entrenched racist mindset that perceives all Indians to be

> incompetent to determine their own economic self-interest and who are therefore inherently in need of the degrading paternalism that INAC officials euphemistically call a "special relationship". While I recognize that this perception exists among INAC officials and is incorporated in INAC administrative policies and practices, I do not accept that it has any factual or legal justification. I therefore do not accept that it should have any binding effect on me or how I choose to use my own lands.
>
> […]
>
> I believe that this chain of events clearly demonstrates a level of administrative dysfunction at the BC Regional lands office that can only reflect badly on any commitment you and your ministry have to integrity and honourable treatment of individual Indian land holders. The situation is certainly not conducive to economic development of reserve land, especially where CP land holding is well established and provides the only available opportunity for viable and sustainable economic development.

[13] Mr. Louie alleged that the delays were due to the obstructive conduct of the BC Regional lands office management level officials and requested a departmental investigation into the manner in which s. 58(3) of the *Indian Act* was being administered by officials of the Respondent.

[14] On April 15, 2008, Mr. Louie's representative provided the Respondent with the most recent draft of the proposed lease. The Respondent replied on April 17, 2008, stating that it did not agree with the lease document. The Respondent reiterated its position that Mr. Louie needed to incorporate before the lease could be granted to him. The Respondent also stated that it required more information to ensure compliance with the National Building Code, the *Species at Risk Act* and so as to address other health and safety issues surrounding the lease application.

[15] On April 21, 2008, Mr. Louie's representative sent another copy of the April 15, 2008, draft lease. In his covering email, he stated that Mr. Louie was unwilling to consider any changes to the terms in the draft lease.

[16] On May 15, 2008, the Minister of INAC replied to Mr. Louie's March 19, 2008, letter:

> This is in response to your correspondence of March 19, 2008 regarding your applications for locatee leases on Okanagan Indian Reserve No.1.
>
> As a matter of law, there is a special relationship between a Certificate of Possession holder and Canada. The underlying title to reserve lands remains with the federal Crown, while the benefit of those lands and the right to possess them belongs to the Certificate of Possession holder. This is not the usual case for a private landholder. This is a special circumstance, giving rise to a "special relationship." A fiduciary relationship is created between the Certificate of Possession holder and Canada when Canada enters into Certificate of Possession leases. This is based on Canada's unilateral discretion over the Certificate of Possession holder's Indian interest. Nothing short of legislative reform can extinguish or alter this relationship.
>
> Consequently, with Canada as the first party on any instrument granting an interest in reserve land, careful review of the leasing details must be taken into consideration so that the appropriate terms and conditions can be fully set out in the lease.
>
> Under the Indian Act, the authority to establish the rent lies with Canada and cannot be extinguished by any means except legislative change. This authority extends beyond setting of the rent and a release will not alter Canada's unilateral authority to establish lease terms, which would also include, but is not limited to, environmental provisions.
>
> The leasing process on reserve land is consistent nationally and derived from policy and procedures that are currently in place. Certain requirements must be met before issuing a leasehold interest to any third party on reserve lands.
>
> Options to opt out of the Indian Act for the management of lands are available to First Nation communities through the First Nations Land Management Act, self-government and treaty. The Department encourages First Nation members and councils to work toward long-term regimes that meet their community's needs.

> On March 31, 2008 a draft lease was sent to you for your review. I would ask that you work with the British Columbia regional office so that it may assist you in meeting the requirements for a locatee lease on reserve lands. I will encourage my officials to consult you in the setting of a rent which is economically viable.
>
> Chuck Strahl

[17] On June 20, 2008, the Complainants jointly filed a complaint with the Commission alleging that the Respondent's response to the lease application for Lot 170-1 was discriminatory. This complaint eventually led to Tribunal decision in *Louie v. INAC* where the Tribunal found in favour of the Complainants. The Tribunal ordered that the Respondent, among other things, "reconsider the applications of the Complainants for a locatee lease in accordance with the Tribunal's decision and order" and "cease its discriminatory practices and take measures, in consultation with the Canadian Human Rights Commission, to redress the practices or to prevent the same or similar practices from occurring": *Louie v. INAC* at para. 64.

[18] In a phone conversation between the parties on September 9, 2008, Mr. Louie explained that his intent was to use the lease as security for a new home construction loan. Mrs. Beattie would assign the lease back to Mr. Louie upon repayment of the loan. The Respondent replied in an email dated October 1, 2008, confirming its initial position that the *Indian Act* does not authorize the grant of a leasehold interest to a locatee on his own Certificate of Possession lands and that an assignment of a lease from Mrs. Beattie to Mr. Louie would effectively result in a direct lease to Mr. Louie.

[19] The application process continued until the end of 2008, with further unsuccessful exchanges between the Complainants and the Respondent.

[20] On October 23, 2009, Mr. Louie's representative sent a letter to the Respondent inquiring about the status of the lease application for Lot 175.

[21] On October 30, 2009, the Complainants filed the present complaint with the Commission.

[22] On November 6, 2009, the Respondent reiterated that it could only accept the lease application on Lot 175 pursuant to section 58(3) of the *Indian Act* if the lessee was a corporation. The Respondent also requested the details of the business arrangement between the Complainants so that it could conduct its due diligence with respect to Mr. Louie's ability and competence to enter into the proposed transaction and avoid exposure to future claims of breach of the Respondent's fiduciary duty to First Nations and their members.

[23] On April 17, 2011, following the January release of *Louie v. INAC*, Mr. Louie's representative sent a replacement lease application for Lot 175 along with copies of a draft lease between the Minister and Mr. Louie to the Respondent and asked that the Respondent provide comments. On May 3, 2011, Mr. Louie again sent the replacement Application and a lease between the Minister and Mr. Louie, this time in final form.

[24] On June 2, 2011, the Respondent sent a letter to Mr. Louie's representative, stating that the short form lease provided on May 3, 2011, did not meet the Crown's requirements and had not been signed by the Minister's representative.

[25] In a letter dated July 15, 2011, the Respondent advised the Commission of the following:

> […] please be advised that the Department of Indian Affairs and Northern Development has carefully reviewed the lease application for Lot 175 submitted by Mr. Louie. Please be further advised that the Department has reconsidered its earlier position and is in a position to enter into a lease with Mr. Louie. A lease will be sent shortly to Mr. Louie's representative for Mr. Louie's review and signature.

[26] On November 16, 2011, the Complainants first became aware of the existence of the Respondent's July 15, 2011 letter to the Commission.

[27] To this date, the Complainants have not received the lease from the Respondent.

[28] The Tribunal held a hearing in this matter during the week of October 7, 2013. Mr. Louie did not attend. Mrs. Beattie did attend but did not give evidence. Mr. Beattie, the Complainants' Representative, appeared as a witness at the hearing and gave evidence for the complainant.

III. Legislation

[29] Section 2 of the *CHRA* reads as follows:

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

[30] Section 5 of the *CHRA* reads as follows:

> 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.

[31] Section 28 of the *Indian Act* reads as follows:

> (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.

(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.

[32] Section 29 of the *Indian Act* reads as follows:

Reserve lands are not subject to seizure under legal process.

[33] Section 58(3) of the *Indian Act* reads as follows:

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.

[34] Section 89(1) of the *Indian Act* reads as follows:

(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

IV. Issues

A. Have the Complainants met their burden of proving a *prima facie* case of discrimination on the basis of race and national or ethnic origin contrary to s. 5 of the *CHRA*?

B. If there was *prima facie* discrimination, has the Respondent met its burden of proving that it had a *bona fide* justification for its initial refusal to approve a lease?

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

V. Summary of Complainants' Submissions

[35] The Complainants submit that section 58(3) of the *Indian Act*, which allows the Minister to lease, for the benefit of an Indian, land that is in his or her possession, provides an exception to section 28(1). Section 28(1) of the *Indian Act* prevents a "member of a band" like Mr. Louie, from entering into a lease or any other agreement which would 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". The Complainants argue that since the leasing of private reserve land pursuant to section 58(3) is entirely exempt from the principle of section 28(1), there can be no justification for the Respondent's decision to exclude locatees from participating either as lessor, co-lessor, or lessee, on a section 58(3) lease.

[36] Pursuant to section 29 of the *Indian Act*, reserve lands are excluded from seizure under a legal process and, pursuant to section 89(1) of the *Indian Act*, an Indian may not subject his or her real or personal property on reserve to "charge, pledge, mortgage, attachment, levy, seizure, distress of execution in favour or at the instance of anyone other than an Indian or a band". The Complainants submit that these provisions effectively preclude Indian locatees from entering into otherwise economically beneficial transaction with any non-Indians. In the Complainants' view, the purpose of section 58(3) is therefore to allow private owners of reserve land to enhance its economic value. The Complainants argue that the Respondent's policy requiring Indian locatees to incorporate and act as a surrogate lessee instead of participating in the lease in their personal capacity entirely defeats this purpose. As corporations are not an "Indian or a band" as per section 89(1) and as defined at section 2(1), they do not possess the legal capacity to enter into an enforceable lease on reserve loan transaction which Mr. Louie needed to build a home on Lot 175.

[37] The Complainants rely, in support of this interpretation, on *Louie v. INAC*, which pertained to the Respondent's conduct in processing Mr. Louie's application for a section 58(3)

lease of Lot 170-1. The Complainants argue that in this decision, the Tribunal denied the existence of a fiduciary duty in the exercise of ministerial discretion pursuant to section 58(3) and recognized the right of Indians to independently determine all of their own private interests and to independently act in their personal capacity in any lawful pursuit of those private interests, including any leasing of private reserve land.

[38] The Complainants argue that in the present case, the Respondent's exercise of discretion in deciding to approve a locatee lease was paternalistic and discriminatory. The Respondent's demand that Mr. Louie incorporate, on penalty of the denial of processing his application, was an unlawful abuse of the Minister's authority under section 58(3) and constitutes *prima facie* discrimination against both Complainants on the basis of their racial, national or ethnic origins.

[39] The Complainants reject the Respondent's *bona fide* justification for the discrimination. The fiduciary nature of the relationship between the Crown and Indians does not justify racially discriminatory administrative policies and practices applied by the federal government to control all use of reserve land.

[40] The Complainants ask for compensation for the lost economic opportunity they have each suffered by the unjustified delay caused to their intended loan and new home construction plans pursuant to subsections 53(2)(c) and (d) of the *CHRA*. The Complainants ask for this compensation from the time of the original proposed lease start date of March 1, 2008 until the Complainants abandoned the idea of obtaining a section 58(3) lease on June 1, 2011.

[41] The Complainants also request compensation in the amount of $20,000.00 each for the Respondent's willful or reckless discrimination pursuant to section 53(3) of the *CHRA*. The Complainants allege that the Respondent had continuous access to legal advisors and that its decisions and actions were planned and deliberate and demonstrated a reckless disregard for the consequences of their actions.

[42] The Complainants request that if payment of these amounts is not fully made within 30 days of the order, the Complainants should obtain interest at the rate provided for under Rule 9(12) of the Tribunal's *Rules of Procedure*.

VI. Summary of Respondent's Submissions

[43] The Respondent alleges that neither Mr. Louie's Indian status, nor his membership in the Band, play a role in the processing of his 2008 application. The Respondent maintains that pursuant to section 58(3) of the *Indian Act*, an enforceable and binding lease must create a 'leasehold interest'. As such, the Respondent was merely attempting to meet its statutory responsibilities.

[44] As for the alleged discrimination against Mrs. Beattie, the Respondent submits that she has not established that she was denied a service by the Respondent within the meaning of "service" pursuant to section 5 of the *CHRA* nor, in any case, that the denial of the lease application was on the basis of her Indian status. The denial of the proposal that Mrs. Beattie be the lessee in 2008 was not based on a discriminatory ground but rather, based on the fact that the assignment did not create a 'leasehold interest' recognized under the *Indian Act*. The Respondent notes that the lease application submitted by Mr. Louie did not name Mrs. Beattie as the proposed lessee and that at no time did the Respondent ask whether Mrs. Beattie was a status Indian.

[45] The Respondent submits that since neither of the Complainants have established that they have experienced an adverse impact based on a prohibited ground of discrimination as a result of the Respondent's initial position regarding the lease application, they have failed to demonstrate a *prima facie* case of discrimination as detailed in *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*]. While the Complainants' business and/or commercial intentions may have been impacted by the Respondent's initial position, this was not based on their race or national ethnic origin.

[46] The Respondent argues that if the Tribunal does conclude that the Complainants have demonstrated a *prima facie* case of discrimination, the Respondent possesses a *bona fide* justification for the discrimination.

[47] The unique nature of reserve land, "lands reserved for the Indians", as a matter of federal constitutional authority pursuant to section 91(24) of the *Constitution*, limits the applicability and enforcement of public health and safety and environmental standards established in provincial and municipal regulatory regimes. The Courts have recognized that the possession of lands on a reserve is "of the very essence of the federal exclusive legislative power under s. 91(24)": *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at para. 41, and that any provincial or municipal legislation purporting to regulate the use of these lands would be an invasion of Parliament's exclusive jurisdiction: *Surrey (District) v. Peace Arch Enterprises Ltd.*, (1970) 74 W.WR. 380 (BCCA) at p. 383.

[48] Nevertheless, in processing applications for lease of locatee lands, the Respondent is bound by a number of statutory responsibilities arising from the *Indian Act* and other legislation such as the *Canadian Environmental Assessment Act*. The Respondent, in this regard, has the difficult task of balancing the competing interests including those of the Crown, the public, the Band and the applicant: *Tsartlip* at paras. 41, 47. While bands have the authority to enact by-laws pursuant to section 81 of the *Indian Act*, including by-laws which touch on health and safety, the Band enacted no such by-laws in the present case. The result is that the Respondent, as lessor, and the Band, possesses limited or no means to seek redress or take action if, as lessees, either of the Complainants acted contrary to the law, were disorderly or a nuisance, or constructed a building that was unsafe.

[49] It is to address this regulatory gap, that the Respondent considers what lease terms may be required to establish standards and regulate the proposed use of the land. However, in the present case, Mr. Louie stated several times that the lease terms were non-negotiable. The Respondent submits that a complainant must also play his or her part in the process of accommodation under human rights statutes and has the duty to facilitate the search for

accommodation: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 [*Renaud*] at para. 43. The Respondent argues that in the present case, Mr. Louie failed to fulfill this duty and that allowing the lease application would have resulted in the Respondent entering into a lease that lacked adequate protection for the Crown, the Band and the public. This would have amounted to undue hardship on the Respondent.

[50] Turning to the remedies requested by the Complainants, the Respondent argues that, pursuant to section 53(c) and (d) of the *CHRA*, the Tribunal does not have the jurisdiction to award compensation for economic losses such as the loss of the use of a construction loan and its interest. Section 53(c) and (d) provide that the Tribunal may award compensation for lost wages and any expenses incurred as a result of the discriminatory practice (53(c)) as well as costs of obtaining alternative goods, services, facilities, or accommodation and for any expenses incurred as a result of the discriminatory practice (53(d)). The Respondent submits that principles of statutory interpretation support the view that the Tribunal's jurisdiction to award compensation is restricted to these paragraphs and does not confer a "free-standing authority to confer costs in all types of complaints": *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2010 SCC 53 (*Mowat*) at paras. 37-38, 41. Therefore, in the absence of an explicit provision allowing the Tribunal to compensate for economic losses, the Respondent submits that the Tribunal lacks the jurisdiction to make the award requested by the Complainants.

[51] The Respondent also argues that, in the event that the Tribunal finds that it does have the jurisdiction to award the requested remedies, the Complainants have not met the requisite burden of proof for a claim of economic loss. The Complainants have provided no documentary evidence setting out the terms and conditions of the alleged construction loan, disclosing the rate of interest for the loan, nor demonstrating that the money for the loan was available and, if it was, what use was made of the money in the meantime. Moreover, the Respondent argues that since the interest on the loan is the amount that Mr. Beattie would have *paid* in interest and not *received*, it is difficult to see how this constitutes a loss. As for Mrs. Beattie's claim, she has also provided no documentary evidence demonstrating that she possessed the money for the loan, that

the parties had an agreement and if she had in any way mitigated the loss of interest on the alleged loan.

[52] Finally, the Respondent submits that the Complainants provided no evidence to support their claim for compensation for pain and suffering pursuant to section 53(2)(e) of the *CHRA* and that the facts do not support their claim for compensation due to the Respondent's wilful and reckless behaviour pursuant to section 53(3) of the *CHRA*. The Courts have found that the latter can only be awarded if the Respondent's actions can be characterized as intentionally discriminatory or devoid of caution: *Canada (Attorney General) v. Collins*, 2011 FC 1168 (overturned on other grounds 2013 FCA 105). While the Respondent's policies and practices in place at the time of these applications may have been mistaken, there is no evidence to suggest that they were implemented in bad faith or with the intent to discriminate against the Complainants.

VII. Analysis

Have the Complainants met their burden of proving a prima facie case of discrimination on the basis of race and ethnic or national origin contrary to s. 5 of the CHRA?

[53] The *CHRA* is quasi-constitutional legislation enacted to give effect to the fundamental Canadian value of equality. As identified in s. 2, its purpose is to ensure that individuals have an equal opportunity to make for themselves the lives that they are able and wish to have, without being hindered by discriminatory practices based upon, among other things, race and ethnic origin. The Supreme Court has held on numerous occasions that human rights legislation is to be given a large, purposive and liberal interpretation to ensure the remedial goals of the legislation are best achieved. A strict grammatical analysis may thus be subordinated to the remedial purposes of the human rights law so as to enhance rather than enfeeble it. *First Nations Child and Family Caring Society v. Canada (Attorney General)*, 2012 FC 445 ("*FNCFCS*"); *C.N.R. v. Canada (Human Rights Commission)*, [1987] S.C.J. No. 42 ("*Action Travail*").

[54] Where a Complainant alleges an infringement of s. 5 of the *CHRA*, the Complainant bears the onus of showing a *prima facie* case of discrimination. This generally requires that the following be established on the balance of probabilities:

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

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

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

[55] The threshold for establishing a *prima facie* case of discrimination is low. A *prima facie* case is one that covers the allegations made and which, if believed, is complete and sufficient to justify a verdict in the Complainant's favour, in the absence of an answer from the Respondent. Once a Complainant establishes a *prima facie* case, the Complainant is entitled to relief in the absence of some alternate explanation from the Respondent. *FNCFCS, supra*

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

[57] Services performed by the government are generally deemed to be necessary for and of benefit to the public otherwise they would not need to be performed. A service such as the processing of an application for a ministerial lease under s. 58(3) of the *Indian Act* as applied for by Mr. Louie in this case represents necessary work performed by government employees, on behalf of and for the benefit of the public (i.e. an applicant). Ultimately, if such an application is approved, certain benefits will flow to the applicant such as the entering into of the lease in order to secure financing and allow development and economic activity to occur. Canadians living off reservations do not have to go through a process where lands that they own/and or control cannot be leased or mortgaged without a Minister of the Crown having to lease the lands for them to a lessee or mortgagee for these purposes.

[58] In his decision in *Louie v. Canada* Member Craig of this Tribunal was dealing with the same type of lease application for essentially the same purposes with the same parties as in this case for the adjacent Lot for which Mr. Louie also had a Certificate of Possession. In Parts IV and V of his decision at paragraphs 44 to 50 Member Craig dealt with the questions of whether INAC provided “services” under s. 5 of the *CHRA* and what the correct interpretation of s. 58(3) of the *Indian Act* was. I agree with and adopt his reasons with respect to both of these questions for the purposes of this case. As well, I agree with and adopt his comments at paragraphs 54, 55, 57, 58 and 59 wherein he commented on the same letter from the then Hon. Minister Chuck Strahl of May 15, 2008 referred to in paragraph 16 herein As such it is instructive to reproduce the aforementioned paragraphs from Member Craig’s decision below:

> [44] Extracts from two decisions are pertinent to the question whether all government actions are "services" within the meaning of s. 5 of the *CHRA*.
>
> [45] In *Canada (Attorney General) v. Watkin* [2008] F.C.J. No 710 (C.A.) at page 9, the Court made the following observation:
>
> > "Addressing this question, I agree that because government actions are generally taken for the benefit of the public, the "customarily available to the general public" requirement in section 5 will usually be present in cases involving discrimination arising from government actions (see for example Rosin, supra at para.11, and *Saskatchewan Human Rights Commission v. Saskatchewan*

> *(Department of Social Services)* (1988, 52 D.L.R. (4th) 253 at 266-268). However, the first step to be performed in applying section 5 is to determine whether the actions complained of are "services" (see Gould, supra, per La Forest J., para.60)."

[46] In *Canada (Attorney General) v Rosin*, 1 F.C. 391 (paragraphs 8 and 11), the Federal Court of Appeal determined that a service does not have to be available to all members of the general public in order to be "customarily available to the general public":

> "In order for a service or facility to be publicly available, it is not required that all the members of the public have access to it. It is enough for a segment of the public to be able to avail themselves of the service or facility. Requiring that certain qualifications or conditions be met does not rob an activity of its public character. The cases have shown that "public" means "that which is not private," leaving outside the scope of the legislation very few activities indeed.
>
> " … It is difficult to contemplate any government or branch of government contending that a service it offered was a private one, not available or open to the public. Indeed, it may well be said that virtually everything government does is done for the public, is available to the public, and is open to the public."

[47] INAC is a government ministry which offers numerous services to Indians who have status under the Act. In her testimony in the matter of s. 58(3) locatee leases, Ms. Craig referred to applicants as "clients" and explained the many ways that INAC intercedes on behalf of locatees in arranging leases with potential lessees.

[48] That s. 58(3) entails provision of services to a segment of the public is admitted by INAC's Lands and Trust Services itself, as evidenced by Ms. Davidson's email sent to Mr. Louie on September 24, 2007:

> "I can assure you that Lands and Trust Services is willing and able to work through the locatee process with you. We provide a service to the First Nations in British Columbia and are more than willing to work through the process collaboratively and respectfully."

[49] I conclude that INAC does provide services that are "customarily available to the general public," namely that segment of the public who are status Indians, and that these are beneficial services being "held out" and "offered" to the public.

[50] I am satisfied that the interpretation of s. 58(3) by the Federal Court of Appeal in *Boyer v. R.* [1986] 2 F.C. 393, applies to the facts of this case:

> "15 … The right of a Band member in the piece of land which is allotted to him and of which he has lawful possession, although in principle irrevocable, is nevertheless subject to many formal limitations. The member is not entitled to dispose of his right to possession or lease his land to a non member (section 28), nor can he mortgage it, the land being immune from seizure under legal process (section 29), and he may be forced to dispose of his right, if he ceases to be entitled to reside on the reserve (section 25). These are all undoubtedly limitations which make the right of the Indian in lawful possession very different from that of a common law owner in fee simple. But it must nevertheless be carefully noted that all of those limitations have the same goal: to prevent the purpose for which the lands have been set apart i.e. the use of the Band and its members, from being defeated. **None of them concerns the use to which the land may be put or the benefit that can be derived from it. The land being in the reserve, its use will, of course, always remain subject to provincial laws of general application and the zoning by-laws enacted by the Band council, as for any land in any municipality where zoning by-laws are in force, but otherwise I do not see how or why the Indian in lawful possession of a land in a reserve could be prevented from developing it as he wishes. There is nothing in the legislation that could be seen as "subjugating" his right to another right of the same type existing simultaneously in the Band council. To me, the "allotment" of a piece of land in a reserve shifts the right to use and benefit thereof from being the collective right of the Band to being the individual and personalized right of the locatee. The interest of the Band, in a technical and legal sense, has disappeared or is at least suspended.** ….
>
> "17 … But in any event, I simply do not think that the Crown, when acting under subsection 58(3), is under any fiduciary obligation to the Band. The Guerin case was concerned with unallotted reserve lands which had been surrendered to the Crown for the purpose of a long term lease or a sale under favourable conditions to the Band, and as I read the judgment it is because of all of these circumstances that a duty, in the nature of a fiduciary duty, could be said to have arisen: indeed, it was the very interest of the Band with which the Minister had been entrusted as a result of the surrender and it was that interest he was dealing with in alienating the lands. **When a lease is entered into pursuant to**

> **subsection 58(3), the circumstances are different altogether: no alienation is contemplated, the right to be transferred temporarily is the right to use which belongs to the individual Indian in possession** ...
>
> "18 The conclusion to me is clear. Bearing in mind the structure of the Indian Act and the clear wording of subsection 58(3) thereof, there is no basis for thinking that the Minister is required to secure the consent of the Band or the Band council before executing a lease such as the one here in question. **It seems that the Act which has been so much criticized for its paternalistic spirit has nevertheless seen fit to give the individual member of a Band, a certain autonomy, a relative independence from the dicta of his Band council, when it comes to the exercise of his entrepreneurship and the development of his land."**

[54] INAC's paternalistic conduct toward Mr. Louie was unequivocally endorsed and supported by then Hon. Minister Chuck Strahl in his letter to Mr. Louie on May 18, 2008. The Minister bluntly pronounced that Mr. Louie could not dictate the terms of his sought-after locatee lease, and claimed that "a fiduciary relationship is created … when Canada enters into Certificate of Possession leases. …Under the Indian Act, the authority to establish the rent lies with Canada and cannot be extinguished by any means except legislative change. This authority extends beyond the setting of the rent and a release will not alter Canada's unilateral authority to establish the lease terms, which would also include but is not limited to environmental provisions." (emphasis added)

[55] The Hon. Minister was mistaken. There is no fiduciary obligation involved in the exercise of ministerial discretion under s. 58(3). Moreover, a unilateral exercise of discretion would be injudicious and negate the purpose of s. 58(3), which is intended to facilitate the leasing of land by individual Indian land owners who envision a benefit for themselves (See Boyer, supra).

[57] INAC's refusal to accept that Mr. Louie had the right to determine the benefit that might accrue to him from the commercial enterprise that he and Ms. Beattie had undertaken brought the application process to a standstill. For all practical purposes the Complainants' application for a ministerial lease on the terms that they had agreed upon was rejected by the Minister in his May 15, 2008 letter to Mr. Louie. The Minister's letter exacerbated INAC's discriminatory treatment of the Complainants.

[58] While it was not raised in evidence before me it is noteworthy that on June 18, 2008, little more than a month after writing to Mr. Louie, the then

> Hon. Minister announced that legislation extending human rights protections to all First Nations communities had received Royal Assent. "Passage of Bill C-21, An Act to amend the *Canadian Human Rights Act* marks a significant turning point in the relationship between First nations and the Government of Canada," said Minster Strahl. "It underscores this government's strong commitment to protecting the human rights of all Canadians." The announcement, however, had no apparent effect on INAC's position regarding the complainants' applications. Nothing changed, and the complaint before me is the result.
>
> [59] Since the Act is now subject to the *CHRA*, I conclude that the application process under s. 58(3) must become an enabling administrative function that recognizes and accepts status Indians (other than those who are minors or mentally incompetent) as personally responsible Canadians capable of making their own determinations of anticipated benefits to be derived from leasing their lands, and that ministerial discretion must not be exercised unilaterally.

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

[60] For a complaint to be substantiated under the *CHRA*, the failure to provide the service in a non-discriminatory manner, either through denial thereof or through adverse differentiation, on the basis of a prohibited ground, must be found to have an adverse or negative impact on a person.

[61] The Respondent's initial interpretation, prior to July 11, 2011 was that that Mr. Louie could not be the lessee as there would be no leasehold interest created by such a lease as he was the locatee (even though the Minister would be acting as lessor not Mr. Louie) and that a corporation had to be formed by Mr. Louie to create a different person at law. Further, this interpretation went on to also prohibit Mrs. Beattie from being the lessee (when that idea was floated) even though she was not the locatee, as the Complainants intention was to assign the lease from her back to Mr. Louie, which transaction was then seen by the Respondent as the same type of transaction as a lease to Mr. Louie and was deemed not acceptable. This initial

interpretation did not stem from the wording of the legislation itself but from the Respondent exercising its discretion in the making of an interpretation in the course of processing the s. 58(3) application under the *Indian Act*. As such, both Mr. Louie and Mrs. Beattie were judged by the Respondent to be incapable of being the lessees of Lot 175 to allow a finance and build transaction to take place for reasons that are neither set out in s. 58(3) or supported by an interpretation of s. 58(3) that coincides with human rights principles that should be invoked, according to the cases, in interpretations so as to enable rather than enfeeble the legislation.

[62] The Respondent's initial incorrect interpretation, which was subsequently reversed on July 11, 2011, caused negative impacts for both Mr. Louie and Mrs. Beattie in that they lost opportunities to develop and finance a residence on a lot. Additionally, in my opinion, the initial interpretation deprecated the dignity of both of these status Indians in a manner that would never occur to non Indians off reservations wishing to deal with their lands in the manner proposed by the Complainants in this case.

[63] Section 5 of the *CHRA* requires that services customarily available to the public be provided in a non-discriminatory manner. In making the initial interpretation refusing Mr. Louie's application the Respondent used a restrictive, narrow, legalistic approach rather than a broad, purposive and liberal approach favoured by the courts in cases involving human rights. The Respondent's refusal over a period of several years based upon its incorrect legal interpretation, constituted a denial of a service to status Indians within the meaning of s. 5(a) based upon their race and national or ethnic origin and also constituted adverse differentiation in the provision of a service within the meaning of s. 5(b) in comparing the treatment of these two status Indians to non Indians off reservations.

[64] As such, I find that the Complainants have met their burden of proving a *prima facie* case of discrimination on the basis of race and ethnic or national origin contrary to s. 5 of the *CHRA*.

Has the Respondent met its burden of proving that it had a bona fide justification for its initial approval to approve the lease?

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

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

[67] In this case by virtue of its letter of July 11, 2011 the Respondent has already changed its approach to allowing applications for Ministerial leases under s. 58(3) of the *Indian Act* where the lessee is the locatee. This is effectively an admission that its previous approach was not "reasonably necessary" within the meaning of the applicable jurisprudence, and that the previous approach therefore did not have a *bona fide* justification with the meaning of the *CHRA* and applicable case law.

[68] The Respondent continues, however, to appear to maintain its position that it cannot enter into a lease unless it procures from the lessee (who it now says may be a locatee) terms that address the "regulatory gap" referred to in paragraphs 47,48 and 49 herein. In my opinion, this position perpetuates the paternalistic and discriminatory implementation of s. 58(3) of the *Indian Act* that is not reasonably necessary and is without any *bona fide* justification. Across the rest of Canada off reserves, necessary building, land use and environmental regulations such as the ones referred to in the paragraphs referred to above are not enforced through government leases that would apply only to persons who require leases to obtain security for financing but not to persons who have the money to build or develop without requiring securitization for financing.

Rather than use s. 58(3) as a means of addressing the "regulatory gap" through terms in Ministerial leases on reservations, the Respondent needs to come up with another approach that establishes a fulsome and holistic regime prohibiting building to occur that does not conform to building, zoning and environmental requirements applicable in all cases, whether or not financing of development is required and Ministerial leases are sought therefor.

VIII. Decision

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

IX. Remedies

[70] Section 53(2) and (3) of the *CHRA* includes the following provisions relative to remedies:

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

(*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(*d*) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

Special compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[71] The Complainants seek remedies including economic losses for the value of a construction loan they say would have been made to Mr. Louie by Mrs. Beattie in 2008 to finance the house construction, including the loss of the opportunity for the loan to Mr. Louie and the loss of interest that would have been paid to Mrs. Louie. The loan, of course, was never made and no real evidence of its particulars and documentation therefor was produced at the hearing. I accept the submissions of the Respondent in paragraphs 50 and 51 herein with respect to this request for a remedy in that there is no evidence of the loss actually having been sustained and there is no jurisdiction in s.53(2) of the *CHRA* to allow an award by me for this request.

[72] The Complainants are entitled to special compensation under s. 53(3) of the *CHRA* as I believe on the evidence before me that the conduct of the Respondent in refusing the Complainants applications for a Ministerial lease was done with full knowledge of the consequences and impacts to the Complainants of its actions during the time that the refusal was on going and the Respondent had not changed its interpretation and position. In my opinion, the later interpretation that it chose to make should have been clear to the Respondent from the

outset in keeping with the purposive and liberal attitude that should be adopted in making interpretations of this nature in these circumstances. As such, I find that its conduct in this respect was intentional and wilful and falls within s. 53(3).

X. Order

[73] Therefore, the Tribunal orders and directs that the Respondent, within one month of the date of the Tribunal's decision, pay each of the Complainants the amount of $5000.00 as special compensation pursuant to s. 53(3) of the *CHRA.*

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
February 27, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1703/5811 & T1704/5911

Style of Cause: Joyce Beattie & James Louie v. Indian and Northern Affairs Canada

Decision of the Tribunal Dated: February 27, 2014

Date and Place of Hearing: October 7 & 8, 2013

Cranbrook, British Columbia

Appearances:

Bruce Beattie, for the Complainants

No one appearing, for the Canadian Human Rights Commission

Fiona McFarlane and Shelan Miller, for the Respondent