Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Between:**

**Jeremy Eugene Matson, Mardy Eugene Matson and Melody Katrina Schneider**

**Complainants**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

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

**Respondent**

**Decision**

**Member:** Edward P. Lustig
**Date:** May 24, 2013
**Citation:** 2013 CHRT 13

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## I. Complaints

[1] The Complainants, Jeremy and Mardy Matson and Melody Schneider, who are siblings, each filed a complaint pursuant to section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*]. The complaints are made against Indian and Northern Affairs Canada, now known as Aboriginal Affairs and Northern Development Canada (the Respondent).

[2] The Complainants allege discrimination on the grounds of race, national or ethnic origin, sex and family status based on the manner in which they were registered as Indians under the *Indian Act*, R.S.C., 1985, c. I-5 [the *Indian Act*]. The Complainants submit that, due to their matrilineal Indian heritage, they continue to be treated differently in their registration under subsection 6(2) of the *Indian Act*, when compared to those whose lineage is paternal and are registered under subsection 6(1). Namely, registration under subsection 6(2) does not allow the Complainants to pass on their status to their children.

## II. Background

[3] The Tribunal had the benefit of an Agreed Statement of Facts in this case. Along with the submissions of the parties, the background of the present complainants can be summarized as follows.

[4] The Complainants have one Indian grandparent: a woman who lost status when she married a non-Indian before 1985, and who regained her status under paragraph 6(1)(c) of the *Indian Act* with the passage of *An Act to Amend the Indian Act*, R.S.C. 1985, c. 32 (1st Supp.), in 1985. By virtue of those same amendments, the children of her marriage with a non-Indian man (one of whom was the Complainants' father, Eugene Matson) were deemed eligible for status under subsection 6(2) of the *Indian Act*. Since the 1985 amendments only gave their father status under subsection 6(2), and since their mother was a non-Indian, the Complainants were not, at the time of the filing of these complaints, entitled to any status under the *Indian Act*. Subsection 6(2) of the *Indian Act* does not allow a person to pass his or her status to children with non

Indians. As a result, the children the Complainants' have had with non-Indians since 1985 were also not entitled to status.

[5] In November and December 2008, the Complainants filed the present complaints. Along with their complaints, they prepared and delivered a chart that sets out their family and status history as compared to a hypothetical family history that is identical in all respects, save for the sex of their Indian grandparent. In other words, in the hypothetical family history, their Indian grandparent is male instead of female. All dates of births, marriages and deaths are consistent in both scenarios. As shown in the chart, the Complainants in the hypothetical patrilineal scenario would have status under subsection 6(1) of the *Indian Act*. As a result, they would be able to pass 6(2) status to their children.

[6] On April 6, 2009, the British Columbia Court of Appeal rendered its decision in the matter of *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 [*McIvor*], wherein it declared paragraphs 6(1)(a) and 6(1)(c) of the *Indian Act* to be of no force or effect as these provisions infringed the right to equality under section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 [the *Charter*]. The Court found the infringement could not be justified under section 1 of the *Charter*. The declaration was suspended for one year to allow Parliament time to review and consider new amendments to the *Indian Act*.

[7] On November 9, 2009, pursuant to section 49 of the *Act*, the Canadian Human Rights Commission (the Commission) requested the Tribunal institute an inquiry into the Complainants' complaints. Under subsection 40(4) of the *Act*, the Commission also requested the Tribunal institute a single inquiry into these complaints as it was satisfied that they involve substantially the same issues of fact and law.

[8] On November 2, 2010, the Tribunal adjourned the proceedings in this matter. The British Columbia Court of Appeal had extended the deadline for Parliament to comply with its decision

in *McIvor* and legislation was pending before Parliament in response thereto (see 2010 CHRT 28).

[9] On January 31, 2011, the *Gender Equity in Indian Registration Act*, S.C. 2010, c. 18 [the *GEIRA*], came into effect. Among other things, the *GEIRA* amended the registration provisions of the *Indian Act* by adding a new paragraph 6(1)(c.1), which adds an entitlement to be registered for certain persons whose mothers had lost status by marrying non-Indians before April 17, 1985.

[10] As a consequence of the passage of the *GEIRA*, (i) Eugene Matson, the Complainants' father, was deemed to have been entitled to registration under the new paragraph 6(1)(c.1) of the *Indian Act*, and (ii) the Complainants became eligible to be registered under subsection 6(2) of the *Indian Act*.

[11] In May and June 2011, the Complainants were registered as Indians under subsection 6(2) of the *Indian Act*. While they also applied for their children to be registered, the Indian Registrar determined there is no provision in the *Indian Act* to allow for the registration of a person when one of the parents is registered under subsection 6(2) and the other parent is not an Indian as defined by the *Indian Act*.

[12] Following the enactment of the *GEIRA* and the Complainants' registrations under subsection 6(2) of the *Indian Act*, on September 27, 2011, the Tribunal ruled that it would be appropriate for amended Statements of Particulars to be submitted. The Tribunal determined that, while the complaints respecting the Complainants' registration under the *Indian Act* were now moot since they had now been registered, the part of the complaints relating to the opportunity to pass status on to any children with non-Indians was still live (see 2011 CHRT 14).

[13] On January 19, 2012, the Complainants filed a Notice of Constitutional Question (NCQ). The Complainants' NCQ sought to challenge the constitutional validity of section 6 of the *Indian Act* under the *Charter*. The basis of the *Charter* challenge was that section 6 of the *Indian Act* is

in contravention of sections 2 and 3 of the *Act* and sections 1 and 15(1) of the *Charter*, and should be struck down and declared to be of no force and effect.

[14] On July 30, 2012, the Respondent brought a motion for an order striking out the whole of the Complainants' NCQ.

[15] On September 6, 2012, the Tribunal allowed the Respondent's motion and ordered the whole of the Complainants' NCQ to be struck out. The Tribunal determined that the Complainants' NCQ attempted to adjudicate the same facts alleged to be in contravention of the *Act* under the *Charter*. As section 50(2) of the *Act* only provides the Tribunal with the power to decide all questions of law "necessary to determining the matter", namely whether a discriminatory practice has occurred within the meaning of sections 5 to 14.1 of the *Act*, the Tribunal found the constitutional question was not linked to determining whether a discriminatory practice has occurred within the meaning of the *Act*. It was a separate question of law altogether, unrelated to the *Act*'s statutory mandate in this case (see 2012 CHRT 19).

[16] Following the above substantive and procedural background, the Tribunal held a hearing in this matter on January 30th and 31st, 2013 in Kelowna, British Columbia.

## III. Bifurcated Hearing

[17] Pursuant to Rule 5(3)(c) of the Tribunal's *Rules of Procedure* (03-05-04), and upon the consent of the parties, the hearing of this matter is proceeding in two stages. The hearing of the first stage of the complaint on January 30th and 31st, 2013 was to address the following questions:

(a) Is the complaint a challenge to legislation and nothing else?

(b) Is the Tribunal bound to follow the Federal Court of Appeal decision in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7, leave to appeal to S.C.C. dismissed (34706) [*Murphy*], and dismiss the complaint?

(c) Does the complaint impugn a discriminatory practice in the provision of services customarily available to the general public that could be the subject of a finding of *prima facie* discrimination under section 5 of the *Act*?

[18] Before proceeding to the second stage of the hearing, I will address the above mentioned questions.

## IV. Positions of the Parties

### A. The Complainants

[19] The Complainants submit that registration as an Indian under the *Indian Act* is a "service" under section 5 of the *Act*. They claim this service includes the determination of who is and who is not entitled to be registered as an Indian.

[20] According to the Complainants, registration as an Indian does not happen automatically, as you must apply. This includes filling out an application form, proving ancestry information, and submitting supporting documentation. Therefore, the Complainants claim the Respondent creates a service relationship between it and those applying for Indian status under the *Indian Act*; and, because of that relationship, section 5 of the *Act* applies to section 6 of the *Indian Act*.

[21] With respect to *Murphy*, the Complainants argue the decision attempts to limit the scope of the *Act* contrary to the principles enunciated by the Supreme Court of Canada for interpreting human rights legislation (*Winnipeg School Division No. 1 v. Craton*, [1985] 2 SCR 150 [*Craton*]; *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 [*Action Travail des Femmes*]; *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*]; and, *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 [*Tranchemontagne*]. Additionally, the Complainants are of the view that the Tribunal is bound,

under the doctrine of *stare decisis*, to follow these decisions of the Supreme Court of Canada and, therefore, should not consider the Federal Court of Appeal's decision in *Murphy*.

[22] The Complainants are of the view that the Respondent's position, that this complaint should be dismissed because it does not arise in the provision of a "service", is contradictory to Canada's membership in the United Nations and its commitments under the *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, and the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007). According to the Complainants, Canada must abide by these international commitments to guide its domestic laws, tribunals and obligations to its citizens.

[23] The Complainants add that Canada has responded domestically to its international commitments by repealing section 67 of the *Act* (Bill C-21, *An Act to amend the Canadian Human Rights Act*, 2nd Sess., 39th Parl., 2008 [Bill C-21]). Bill C-21, at section 1.1, also included recognition for existing Aboriginal and treaty rights; and, at section 1.2, provided for the Tribunal to have regard for First Nations legal traditions and customary laws when interpreting and applying the *Act* in relation to complaints made against a First Nation government. According to the Complainants, the intent and purpose behind the repeal of section 67, and the inclusion of sections 1.1 and 1.2 in Bill C-21, was to open up the whole of the *Indian Act* to full scrutiny under the *Act*.

[24] On this basis, the Complainants also distinguish some of the cases relied upon by the Respondent for the proposition that legislation cannot be challenged under the *Act*, namely *Forward v. Canada (Citizenship and Immigration)*, 2008 CHRT 5 [*Forward*], *Canada (Attorney General) v. McKenna*, [1999] 1 FC 401 [*McKenna*], and *Canada (Attorney General) v. Bouvier*, 1998 CanLII 7409 (FCA) [*Bouvier*]. According to the Complainants, the repeal of section 67 is the distinguishing factor between the current complaints and those cases, which were decided prior to the repeal.

[25] Finally, the Complainants submit the complaints should proceed because of their significant public impact. In the Complainants' view, the amendments to the *Indian Act* brought about by the *GEIRA* did not redress or rectify the distinction between the descendants of Indian women and men. Both before and after the passing of the *GEIRA*, the *Indian Act* does not provide them with section 6(1) status, as would have been the case in their hypothetical comparative patralineal scenario. As such, they are still unable to pass their status along to their children with non-Indians.

[26] According to the Complainants, Parliament had an opportunity to address gender based discrimination in the *GEIRA*, but rejected an amendment proposed by the House of Commons Standing Committee on Aboriginal Affairs and Northern Development that would have provided that "any person born prior to 17 April 1985 and is a direct descendant of a person registered or entitled to be registered under the *Indian Act* may also be so entitled" (Library of Parliament, *Legislative Summary of Bill C-3: Gender Equity in Indian Registration Act* by Mary C. Hurley & Tonina Simeone, Social Affairs Division, Parliamentary Information and Research Service (Ottawa: Library of Parliament, 2010) at 1). This amendment was ruled to exceed the scope of the bill and was therefore inadmissible (*Legislative Summary of Bill C-3: Gender Equity in Indian Registration Act* at 1).

[27] The Complainants state that the total number of individuals potentially impacted by the complaint (maternal grandchildren and their offspring) can be estimated at 108,000-130,500.

## B. The Commission

[28] The Commission submits this complaint is not a challenge to legislation. It challenges the act of applying the discriminatory registration provisions of the *Indian Act* to members of the public. However, the Commission does agree that the impugned provision required the Respondent's officials to reach the conclusions they did concerning the registration entitlements of the Complainants.

[29] According to the Commission, determining eligibility for registration is a "service" within the meaning of section 5 of the *Act*: registration as an Indian provides tangible and intangible benefits, and is held out to the public accordingly, in the context of a public relationship. Furthermore, persons seeking to be registered under the *Indian Act* are required to submit applications to the Office of the Indian Registrar.

[30] That said, the Commission also submits that the *Act* allows for complaints challenging the discriminatory impact of other federal laws. It argues Supreme Court of Canada case law states human rights legislation renders inconsistent laws inoperable (*Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145 [*Heerspink*]; *Craton*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 [*Larocque*]; and, *Tranchemontagne*). According to the Commission, where there is a conflict between human rights law and other legislation, the human rights law will govern as a quasi-constitutional statement of public policy, and will supersede inconsistent legislation, unless the legislature has clearly stated otherwise in express and unequivocal language. In the circumstances of this case, the Commission submits that the Tribunal must give due regard to the Supreme Court's pronouncements concerning the effect and status of human rights laws.

[31] With respect to *Murphy*, the Commission acknowledges that on its face, this decision would be a full answer to the present complaints, which are aimed at government conduct that was mandatory under the registration provisions of the *Indian Act*. However, up until the decision in *Murphy*, the Commission submits that a long line of case law within the federal human rights system had recognized the *Act* as having primacy over other inconsistent laws, consistent with the principles set out in cases like *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne* (*Canada (Attorney General) v. Druken*, [1989] 2 FC 24 (C.A.) [*Druken (FCA)*]; *Gonzalez v. Canada (Employment and Immigration Commission)*, [1997] 3 FC 646 [*Gonzalez*]; *McAllister-Windsor v. Canada (Human Resources Development)*, 2001 CanLII 20691 (CHRT) [*McAllister-Windsor*]; *Canada (Attorney General) v. Uzoaba*, [1995] 2 FC 569 [*Uzoaba*]; the dissenting reasons of Dickson C.J. and Lamer J. in *Bhinder v. CN*, [1985] 2 SCR

561 [*Bhinder*]; and, the dissenting reasons of McLachlin J. and L'Heureux-Dubé J. in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854 [*Cooper*]).

[32] According to the Commission, in *Murphy* the Court did not apply its own jurisprudence describing the limited circumstances in which it is appropriate for one panel to overturn a previous decision by another panel. Furthermore, the Federal Court of Appeal did not deal with or mention contrary Supreme Court of Canada case law like *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne*. In the circumstances, the Tribunal is faced with two contradictory lines of authority from higher decision-makers. The Commission submits that under the principles of vertical *stare decisis* the Tribunal must follow the principles established by the Supreme Court of Canada. The Commission adds, while an application for leave to appeal *Murphy* was dismissed by the Supreme Court of Canada, this does not indicate agreement with the decision below.

[33] According to the Commission, following the Supreme Court of Canada authorities would also keep the Tribunal's jurisprudence in line with other decisions from human rights tribunals and courts from across the country that have found discriminatory legislation to be inoperable.

[34] The Commission also points to the wording and legislative history of several current provisions of the *Act* as demonstrating Parliament's intent that the *Act* apply to the wording of other federal legislation: section 2 and subsections 49(5) and 62(1). According to the Commission, the presumption against tautology dictates that Parliament did not speak in vain when it enacted subsections 49(5) and 62(1) of the *Act*, and that applying the *Act* to the wording of other federal laws was therefore Parliament's intention. The Commission notes, the Federal Court of Appeal did not refer to section 2, nor subsections 49(5) or 62(1), in its decision in *Murphy*.

[35] The Commission also points to the wording and legislative history of the former section 67 of the *Act*. According to the Commission, the former section 67 functioned as a statutory exception to the general principle that human rights laws have primacy. The existence of section 67 implied that, without the exemption, the *Act* would have applied to and affected any

discriminatory provisions in the *Indian Act*. In fact, the Commission submits that Parliament enacted the former section 67 for the purpose of shielding the registration provisions of the *Indian Act* from review under the *Act*. Therefore, in repealing section 67 in 2008, Parliament intended to open the door to human rights complaints challenging discriminatory aspects of those same provisions.

[36] Again, the Commission argues that the presumption against tautology arises with respect to section 67 and its repeal, and that the Respondent's position, that the registration provisions of the *Indian Act* cannot be challenged under the *Act*, violates this presumption. Therefore, to give effect to Parliament's intent, the Tribunal must accept that the granting of Indian status is a "service customarily available to the general public" within the meaning of section 5 of the *Act*.

## C. The Respondent

[37] The Respondent submits that in any complaint it is critical for the Tribunal to properly understand and characterize what the complaint is about. To the extent that the Commission and Complainants attempt to characterize the complaint as involving the review and processing of applications for registration by officials in the Office of the Indian Registrar, the Respondent argues the Tribunal should reject such a characterization. The arguments and supporting evidence are not directed at the conduct of officials in the Office of the Indian Registrar, the exercise of discretion, or at the implementation of departmental policies and practices. According to the Respondent, in reviewing the Complainants' applications for registration as Indians, the officials did nothing more than apply categorical statutory criteria to undisputed facts. Therefore, according to the Respondent, the complaints are directed solely at an Act of Parliament and nothing else.

[38] The Respondent also points to the Complainants' position regarding the changes to the *Indian Act* following the *GEIRA*. According to the Respondent, the fact that a legislative amendment could have potentially resolved the complaint, and not a change in policy or other factors, further indicates that the complaints are directed at legislation. Furthermore, the

Complainants filed a Notice of Constitutional question in this case challenging the constitutional validity of section 6 of the *Indian Act*. In the Notice, they stated "Bill C-3 failed to properly remedy the discrimination found unconstitutional in McIvor". In the Respondent's view, this is another example which demonstrates that the complaints are based on the wording of legislation.

[39] As a result of the application of *Murphy*, and other decisions such as *Forward*, *McKenna* and *Bouvier*, the Respondent submits the complaints should be dismissed. According to the Respondent, those decisions indicate that the *Act* does not provide for the filling of a complaint against legislation.

[40] As opposed to the Supreme Court of Canada cases relied upon by the Complainants and Commission, the Respondent argues that the decision in *Murphy* specifically dealt with and interpreted the *Act*. The Respondent adds, the interpretation of particular legislative provisions of the *Act* by a higher court takes precedence over extrinsic statutory interpretation evidence, such as the sources put forward by the Commission. In this regard, according to the Respondent, it is not open to the Tribunal to overturn a decision of the Federal Court of Appeal, because of the doctrine of *stare decisis*, and it would be an error for the Tribunal to do so.

[41] Even if the *Act* did provide for the filling of a complaint against an Act of Parliament, the Respondent claims the complaint should still be dismissed because it does not implicate a "service". Following the reasoning of the Tribunal in *Forward*, the Respondent argues that entitlement to registration as an Indian is (i) a distinct status granted by the state which has (ii) constitutional dimensions and (iii) to characterize it as a mere service would be to ignore its fundamental role in defining the relationship between individuals and the state. In the Respondent's view, while the processing of applications for registration may constitute a "service", Parliament's criterion for identifying the population enjoying this relationship is not. The Respondent adds, statutory interpretation of the term "services", by giving the term its plain meaning and reading it in conjunction with the rest of section 5 and the entire scheme of the *Act*, leads to the conclusion that entitlement to registration is not a service.

[42] The Respondent also submits the Commission's position is flawed considering the scope of the *Act*'s analytic framework. If the Tribunal were to accept that there is a "service" in this case, it would put the government in the position of having to justify its legislation on the basis of "reasonable accommodation" to the point of "undue hardship" and limited by subsection 15(2) of the *Act* to considerations of "health, safety and cost". According to the Respondent, the legislative provisions at issue resulted from years of study, debate and consultation with Aboriginal groups. They were a balanced compromise between competing interests, and take into account complex demographic and historical considerations. Considerations of health and safety are not part of those factors. This leaves only one possible consideration: cost. According to the Respondent, it is loathe to advance a financial undue hardship justification given its reductive, dehumanizing nature, and the fact that non-monetary factors were important and powerful factors in the choice made by Parliament to delineate who is a status Indian.

[43] The Respondent adds, in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*], the Supreme Court of Canada indicated that the reasonable accommodation standard is not appropriate for evaluating laws of general application and is only helpful where a government action or administrative practice is impugned. Contrary to the Complainants and Commission's argument that *Murphy* is inconsistent with Supreme Court of Canada jurisprudence, the Respondent submits that *Hutterian Brethren* supports the Federal Court of Appeal's decision in *Murphy* that the *Act* does not provide for the filing of a complaint directed solely at an Act of Parliament.

[44] Therefore, the Respondent argues the *Act* does not provide the scope to properly assess certain kinds of government decision-making and action. In the present situation, the Respondent is of the view that the government is entitled to justify the law not by showing reasonable accommodation, but by a section 1 analysis under the *Charter*.

## V. Analysis

### A. Is the complaint a challenge to legislation and nothing else?

[45] Section 5 of the *Act* provides:

> 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.

[46] The first step to be performed in applying section 5 is to determine whether the actions complained of are "in the provision of goods, services, facilities or accommodation" (see *Watkin v. Canada (Attorney General)*, 2008 FCA 170, at para. 31 [*Watkin*]). According to the Complainants and the Commission, the actions complained of in this case occurred in the provision of "services". Within the meaning of section 5 of the *Act*, "services" "…contemplate something of benefit being "held out" as services and "offered" to the public" (*Watkin* at para. 31). Neither the Complainants nor the Commission took issue with the general criteria currently used to determine whether conduct is with respect to a "service" within the meaning of section 5 of the *Act*.

[47] On the other hand, the Respondent argues the present complaint does not take issue with the provision of any "services"; but, rather, is a strict challenge to legislation, the *Indian Act*. In *Murphy*, the Federal Court of Appeal held that "the [*Act*] does not provide for the filing of a complaint directed against an act of Parliament…" (at para. 6). Relying on the Tribunal's decision in *Forward*, and subsection 40(1) ("…which authorizes the filing of complaints…") and sections 5 to 14.1 of the *Act* ("…which sets out the "discriminatory practices" against which

complaints may be directed…"), the Federal Court of Appeal found that attacks "…aimed at the legislation *per se*, and nothing else" fall "…outside the scope of the [*Act*]…" (see *Murphy* at para. 6). With reference to the Federal Court's decision in *Wignall v. Canada (Department of National Revenue (Taxation))*, 2003 FC 1280, the Federal Court of Appeal added: "an attempt pursuant to the [*Act*] to counter the application of [legislation] based solely on its alleged discriminatory impact on the complainant, could not succeed; only a constitutional challenge could yield this result" (*Murphy* at para. 6).

[48] It is within the above context that the Tribunal seeks to determine whether the present complaint is a challenge to legislation and nothing else; or, whether a discriminatory practice in the provision of services, under section 5 of the *Act*, is impugned.

[49] In his Complaint Form, dated November 25, 2008, Jeremy Matson describes his complaint as follows:

> I believe that the [2nd Generation cut off rule] resulting from Bill C-31 is discriminatory towards me and my siblings based both the prohibited grounds of family status and gender under the *Canadian Human Rights Act* in that Bill C-31 continues to distinguish and discriminate against the descendants of Indian women who married non-Indian men by limiting the extension of status eligibility to a certain tier of lineage that would not apply to male Indians of the same heritage.
>
> To clarify, if my grandmother had married an Indian, she would not have been disenfranchised and both my father and me would have been eligible for full status as Indians.
>
> (at p.3)

[50] Following the enactment of the *GEIRA* and the Complainants' registrations under subsection 6(2) of the *Indian Act*, the Complainants revised their Statement of Particulars. Therein, the Complainants described their complaint as follows:

> Although the Complainants are now registered as status Indians, the section under which they are registered does not allow them to pass on their status to their children equally to those status Indians in the comparator group.

> The Complainants were previously denied registration for Indian status and the rights and benefits conferred with such status. It is the Complainants' position that such previous denial and now the s. 6(2) Indian status that has been granted to them have not put the Complainants on the same footing as the paternal Indian grandchildren; this distinction is in contravention of section 5 of the Act.
>
> The nature of this discrimination arises out of the system of registration established pursuant to April 17, 1985 known as Bill C-31 and the consequent amendments to the Indian Act of April 17, 1985 and the current Gender Equity in the Indian Registration Act (Bill C-3/McIvor) as of January 31, 2011. Under the 1985 registration, Nora Johnson was unable to pass on her Indian heritage to her descendants in the same and equal manner to those of her male counterparts while the nature of the status of other Indians was enhanced by the amendments following Bill C-31. Under Bill C-3/McIvor, Nora Johnson is still unable to pass on her Indian heritage to her descendents in the same and equal manner of those of her male counterparts.
>
> (*Revised Statement of Particulars of the Complainants*, dated June 28, 2011, at p. 9)

[51] In the Complainants' written submissions on stage one of this matter, the complaint is described as follows:

> The Complaint alleges discrimination based on the manner in which they were registered as Indians under the *Indian Act* and the benefits and rights associated with such registration.
>
> […]
>
> The Complainants submit that their entitlement to registration as Indians is service as defined in the *CHRA* […]
>
> The Complainants submit that the registration of Canadian Citizen as an Indian under the *Indian Act* is a service, this service includes the determination of who is or who is not entitled to be registered as an Indian.
>
> (*Complainants' Written Submissions*, dated January 14, 2013, at paras. 1, 8)

[52] During oral argument at the stage one hearing, the Complainants also stated the following with regard to the nature of their complaints:

Member Lustig: But what's at issue here is […] the most recent letters that have gone out with respect to the applications of your children and your siblings' children; and, in those letters they're denied registration rights on the basis of the Act as it now stands after C-3; and, I'm trying to ask or I'm trying to find out whether you're questioning that as discrimination in the provision of service or you're questioning the Parliament's establishment of a set of rules that don't include your children as status Indians.

Jeremy Matson: I have to question Parliament, yes, cause Parliament had all the information in front of them, they had witnesses about Bill C-3. I was even going to be a witness before the Senate and I described certain discrimination that we go into this in further detail […] Parliament passed legislation with discriminatory aspects, the Senate told the House of Commons there's discrimination in it; so, yes, Parliament itself is guilty in my mind and the Indian Act and the process of becoming an Indian and so forth.

(*Audio recording of hearing held on January 30, 2013*, at 51:30)

[53] Further on in their oral submissions the Complainants also stated:

Member Lustig: Again, the action in your mind, the action taken, that would be the action of the federal government in not broadening the definition after McIvor to include by legislative changes your children; or, not children, your status so that your children could have that status.

Jeremy Matson: Yes, like we had talked about, that Parliamentary committees, the Senate and other parties, the NDP, the Liberal, Bloc Québécois, all those aboriginal affairs critics and individuals involved in those amendments to Bill C-3 had provided 6(1) status to us and 6(2) status for our children.

Member Lustig: And, if that had happened?

Jeremy Matson: This complaint would have been shut down.

Member Lustig: We would have been finished?

Jeremy Matson: Yes, we would have been finished.

(*Audio recording of hearing held on January 30, 2013*, at 56:00)

[54] Based on all the above statements from the Complainants, I believe the present complaint can properly be characterized as a challenge to legislation, namely section 6 of the *Indian Act*, and nothing else. The essence of this complaint, in my opinion, is that the Complainants are of the view that section 6 of the *Indian Act* needs to be amended, as per the proposed amendment that was rejected by the House of Commons Committee on Northern Affairs and Aboriginal Development, described in paragraph 26 above. In fact, the Complainants have admitted as much, as referred to in the hearing excerpts at paragraphs 52 and 53 above. The criteria entitling a person to be registered, or not registered, as an Indian under section 6 of the *Indian Act* is not a service. It is legislation enacted by Parliament. Pursuant to *Murphy*, legislation is not a service.

[55] While the Commission characterizes the complaint as a challenge to the act of applying the discriminatory registration provisions of the *Indian Act* to members of the public; they also agree that the impugned provisions required the Respondent's officials to reach the conclusions that they did concerning the entitlements of the Complainants. I do not accept this characterization of the complaint. The evidence and argument in this case was not directed at any wrongdoing by the Respondent, but focused on the alleged discriminatory impact of the entitlement provisions of section 6 of the *Indian Act*.

[56] The Respondent does not have any involvement in determining the criteria for entitlement to be registered, or not registered, as an Indian under section 6 of the *Indian Act*. Nor does the Respondent have any discretion in determining entitlement to be registered, or not registered, as an Indian pursuant to the criteria in section 6 of the *Indian Act*. Entitlement has been determined by Parliament, not the Respondent, through section 6 of the *Indian Act*; and, the Respondent must follow this section in processing applications for registration. Sections 2 and 5 of the *Indian Act* make this clear:

> 2. (1) In this Act, […]
>
> "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian; […]

> "Registrar" means the officer in the Department who is in charge of the Indian Register and the Band Lists maintained in the Department;
>
> […]
>
> 5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.
>
> (2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985.
>
> (3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.
>
> (4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.
>
> (5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.

[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.

## B. Is the Tribunal bound to follow the Federal Court of Appeal decision in *Murphy*, and dismiss the complaint?

[61] Having found the current complaint to be a challenge to section 6 of the *Indian Act*, and nothing else, the reasoning in *Murphy* would suggest the complaint should be dismissed as being beyond the scope of the *Act*. However, the Complainants and the Commission argue that *Murphy* is superseded by binding case law from the Supreme Court of Canada, finding that the primacy of human rights laws render inconsistent legislation inoperable. On this basis, it is argued that the *Act* allows for complaints challenging the discriminatory impact of other federal laws; and, therefore, the Tribunal should decline to apply *Murphy*.

[62] In support of its argument, the Commission also points to case law within the federal human rights system, which it claims recognizes the *Act* as having primacy over other inconsistent laws. Furthermore, according to the Commission, following the Supreme Court of Canada authorities would keep the Tribunal's jurisprudence in line with other decisions from human rights tribunals and courts from across the country that have found discriminatory legislation to be inoperable.

[63] In addition, the Commission argues that current provisions in the *Act* demonstrate Parliament's intent that the *Act* apply to the wording of other federal legislation. On top of that, both the Complainants and the Commission claim that by repealing section 67 of the *Act*, Parliament intended to open the door to human rights complaints challenging discriminatory aspects of the *Indian Act*.

[64] Each argument will be addressed in turn.

**(i) Supreme Court of Canada jurisprudence regarding the interpretation and primacy of human rights laws**

[65] As mentioned above, the Supreme Court of Canada cases relied upon by the Complainants and the Commission are: *Heerspink*; *Craton*; *Action Travail des Femmes*; *Andrews*; *Larocque*; and, *Tranchemontagne*.

***Heerspink***

[66] The Insurance Corporation of British Columbia terminated the insurance coverage on Mr. Heerspink's buildings, without reason, after the press reported his committal to trial on a charge of trafficking in marijuana. Section 208 of the *Insurance Act* of British Columbia provided that the Insurance Corporation could terminate the contract upon giving the required notice. Mr. Heerspink filed a complaint under section 3 of the *Human Rights Code* of British Columbia alleging that insurance coverage had been denied without reasonable cause. Section 3 provided that reasonable cause was necessary to deny a person or class of persons a service

customarily available to the public. A Board of Inquiry found that the *Human Rights Code* had been violated.

[67] Laskin C.J. and Ritchie and Dickson JJ (as they then were) agreed with the finding of the Board of Inquiry. Lamer J, writing also for Estey and McIntyre JJ (as they then were) concurred in the reasons of Ritchie, but added the following comments:

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.
>
> As a result, the legal proposition *generalia specialibus non derogant* cannot be applied to such a code. Indeed the *Human Rights Code*, when in conflict with "particular and specific legislation", is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.
>
> Furthermore, as it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.
>
> Therefore, whilst agreeing with my brother Ritchie that "the two statutory enactments under review can stand together as there is no direct conflict between them", I should add that were there such a conflict, the Code would govern. I find nowhere in the laws of British Columbia that s. 5 of the Statutory Conditions set forth in s. 208 of the *Insurance Act*, R.S.B.C. 1960, c. 197, as amended, is to be given any special treatment under the *Human Rights Code*.
>
> (*Heerspink* at pp. 157-158)

[68] These comments speak to conflict between human rights legislation and "particular and specific legislation". While the Supreme Court found that both statutory enactments could stand together; if they could not, the Court indicated that the human rights legislation would govern. However, as opposed to the Matson complaints, Mr. Heerspink's complaint was not aimed at the *Insurance Act* itself, but at the denial of insurance, as a service: "I can see no reason why insurance was not intended by the legislature to be a "service" in the sense in which the word is

used in s. 3 of the Code" (*Heerspink* at p. 159). Nor do the Supreme Court's comments indicate that a complaint challenging legislation, and nothing else, is possible under human rights legislation. The basis of Mr. Heerspink's complaint was that he was denied a "service", contrary to section 3 of the *Human Rights Code*. The potential conflict between the two statutes only arose when the Insurance Corporation argued that it had the right to terminate insurance coverage, without reasonable cause, pursuant to section 208 of the *Insurance Act*.

***Craton***

[69] The *Public Schools Act* in Manitoba allowed for the fixing of a compulsory retirement age for teachers. Ms. Craton, a teacher, was required by her collective agreement to retire following her sixty-fifth birthday. She successfully sought a declaration in the Manitoba Court of Queen's Bench that mandatory retirement contravened subsection 6(1) of the *Human Rights Act* of Manitoba and was invalid, and that her employment therefore could not be terminated. Subsection 6(1) of *The Human Rights Act* provided:

> 6 (1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment or in respect of training for employment or in respect of an intended occupation, employment, advancement or promotion, and in respect of his membership or intended membership in a trade union, employers' organization or occupational association; and, without limiting the generality of the foregoing
>
> > (a) no employer or person acting on behalf of an employer, shall refuse to employ, or to continue to employ or to train the person for employment or to advance or promote that person, or discriminate against that person in respect of employment or any term or condition of employment;
> >
> > […]
>
> because of race, nationality, religion, colour, sex, age, marital status, physical or mental handicap, ethnic or national origin, or political beliefs or family status of that person.

[70] At issue before the Supreme Court was the conflict between the provisions of the *Human Rights Act* and the *Public Schools Act*, which was enacted before and consolidated after the *Human Rights Act*. The Supreme Court found the *Public Schools Act* could not be considered a

later enactment having the effect of creating an exception to the provisions of the *Human Rights Act*. Specifically, the Supreme Court stated:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. Is is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims. In this case it cannot be said that s. 50 of the 1980 consolidation is a sufficiently express indication of a legislative intent to create an exception to the provisions of s. 6(1) of *The Human Rights Act*.
>
> (*Craton* at p. 156)

[71] While the Supreme Court in *Craton* found there was a conflict between the human rights legislation and the *Public Schools Act*, and that the latter did not create an exception to the *Human Rights Act*, that finding is couched in the terms of paragraph 6(1)(a) of the *Human Rights Act*. The basis of Ms. Craton's action was not the conflict between paragraph 6(1)(a) and the *Public Schools Act*, but that her employer refused to continue to employ her because of age, contrary to paragraph 6(1)(a). The conflict between the two statutes only arose when the Winnipeg School Division argued it had the right to enforce mandatory retirement pursuant to the *Public Schools Act*. Again, as with *Heerspink*, the comments of the Supreme Court in *Craton* do not indicate that a complaint challenging legislation, and nothing else, is possible under human rights legislation. The existence of a "discriminatory practice", pursuant to the applicable legislation, was still present.

***Action Travail des Femmes***

[72] Action Travail des Femmes alleged Canadian National Railway Company (CN) was guilty of discriminatory hiring and promotion practices contrary to section 10 of the former *Canadian Human Rights Act*, S.C. 1976-77, c. 33, by denying employment opportunities to women in certain unskilled blue-collar positions. A Human Rights Tribunal found that the recruitment, hiring and promotion policies at CN prevented and discouraged women from working on blue-collar jobs. The Tribunal imposed a special employment program on CN,

including a requirement that CN increase to 13 percent the proportion of women working in non-traditional occupations, and until that goal was achieved, to hire at least one woman for every four non-traditional jobs filled in the future.

[73] Before the Supreme Court, the appeal was to determine whether the Tribunal had the power, under paragraph 41(2)(a) of the former *Act*, to impose upon an employer an "employment equity program" to address the problem of "systemic discrimination" in the hiring and promotion of a disadvantaged group, in this case women. To make this determination, the Supreme Court was required to interpret paragraph 41(2)(a), and stated the following with regard to the "…proper interpretive attitude towards human rights codes and acts" (*Action Travail des Femmes* at p. 1133):

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.
>
> […]
>
> The purposes of the Act would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, *inter alia*, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.
>
> […]
>
> The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at p. 158, where Lamer J. emphasized that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". This

> principle of interpretation was further articulated by McIntyre J., for a unanimous Court, in *Winnipeg School Division No. I v. Craton*…
>
> […]
>
> The emphasis upon the "special nature" of human rights enactments was a strong indication of the Court's general attitude to the interpretation of such legislation.
>
> (*Action Travail des Femmes* at pp. 1134, 1135-1136)

[74] Based on this interpretive approach, the Supreme Court concluded that the order made by the Tribunal was within its jurisdiction under paragraph 41(2)(a) of the former *Act*.

[75] The statements of the Supreme Court in *Action Travail des Femmes* are with regard to the proper interpretive attitude toward human rights legislation. It does not address the issue of primacy or whether a complaint challenging legislation, and nothing else, properly falls within the jurisdiction of the *Act*. While instructive, the interpretive principles enunciated in *Action Travail des Femmes* would only seem to be relevant to the circumstances of this case in so much as they should be considered in the interpretation of the term “services”, within the meaning of section 5 of the *Act* (for example, see *Watkin* at paras. 33-34).

***Andrews***

[76] Mr. Andrews, a British subject permanently resident in Canada, met all the requirements for admission to the British Columbia bar except that of Canadian citizenship. His action for a declaration that that requirement violated subsection 15(1) of the *Charter* was dismissed at trial but allowed on appeal. The questions before the Supreme Court were: (1) whether the Canadian citizenship requirement for admission to the British Columbia bar infringed or denied the equality rights guaranteed by subsection 15(1) of the *Charter*; and, if so, (2) whether that infringement was justified by section 1. A majority of the Supreme Court found the Canadian citizenship requirement to infringe subsection 15(1) of the *Charter* and could not be justified by section 1.

[77] The Complainants rely on the following statement from the reasons of McIntyre and Lamer JJ (as they then were):

> Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law.
>
> (*Andrews* at p. 172)

[78] The sentence following this quote is:

> It is against this evil that s. 15 provides a guarantee.
>
> (*Andrews* at p. 172)

[79] McIntyre J's reasons go on to state:

> The Court in the case at bar must address the issue of discrimination as the term is used in s. 15(1) of the *Charter*. In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1). Certain differences arising from the difference between the *Charter* and the Human Rights Acts must, however, be considered. To begin with, discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities.
>
> […]
>
> Where discrimination is forbidden in the Human Rights Acts it is done in absolute terms, and where a defence or exception is allowed it, too, speaks in absolute terms and the discrimination is excused. There is, in this sense, no middle ground. In the *Charter*, however, while s. 15(1), subject always to subs. (2), expresses its prohibition of discrimination in absolute terms, s. 1 makes allowance for a reasonable limit upon the operation of s. 15(1). A different approach under s. 15(1) is therefore required. While discrimination under s. 15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts, a further step will be required in order to decide whether discriminatory laws can be justified under s. 1. The onus will be on the state to establish this. This is a distinct step called for under the *Charter* which is not found in most Human Rights Acts, because in those Acts justification for or defence to discrimination is generally found in specific exceptions to the substantive rights.

(*Andrews* at pp. 175, 176)

[80] Given the distinction created between human rights legislation and the *Charter* in McIntyre's reasoning, including the statement that it is section 15 of the *Charter* that provides a guarantee against discriminatory measures having the force of law, *Andrews* does not appear to support the argument that legislation, and nothing else, can be challenged under the *Act*. Rather, *Andrews* seems to suggest that, absent a discriminatory practice within the meaning of applicable human rights legislation, it is the *Charter* that deals with discrimination caused by the application or operation of law, as suggested in *Murphy*.

***Larocque***

[81] Mr. Larocque was excluded from the hiring process for a position as a municipal police officer because he did not meet the minimum standard for hearing acuity adopted by the City of Montreal pursuant to the regulatory powers given to it by its enabling Act. He filed a complaint with the Commission des droits de la personne et des droits de la jeunesse, alleging that the refusal to hire him constituted discrimination in violation of sections 10 and 16 of the Quebec *Charter of Human Rights and Freedoms*. The matter was brought forward to the Quebec Tribunal des droits de la personne, who concluded that it could not find the City liable for damages resulting from the application of its legislative and regulatory powers. However, it declared the regulatory standard inoperable in relation to the complainant and directed the City to reconsider the complainant's application in accordance with the hiring process as it was at the time he applied with all of the benefits to which he would have been entitled had he not been excluded. The Quebec Court of Appeal limited the remedy to a mere declaration of the standard's inoperability in relation to the complainant.

[82] Sections 10 and 16 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, provide:

> **10.** Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion,

> political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.
>
> **16.** No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.

[83] The appeal to the Supreme Court concerned the scope of the remedial powers that the Quebec Tribunal des droits de la personne may exercise under the Quebec *Charter of Human Rights and Freedoms*. The Court stated:

> The nature of Canada's constitutional regime must be taken into consideration when establishing the hierarchy of rules governing the actions of legislatures and public entities, such as municipalities, to which legislative powers have been validly delegated. The ultimate source of traditional immunities with respect to the consequences of the invalidity of legislative action is this constitutional regime, a regime in which legislative power is necessarily exercised within the confines of the law, but independently, free of interference from the civil liability rules of the jus commune. The Quebec Charter, a statute with quasi-constitutional standing in matters within the Quebec legislature's jurisdiction, is enforced within this legal framework and is still based on the fundamental organizing principles for public powers inspired by this framework.
>
> (*Larocque* at para. 17)

[84] In this regard, the Court held that "well-established principles of public law rule out the possibility of awarding damages when legislation is declared unconstitutional…" (*Larocque* at para. 19). Therefore, damages could not be awarded against the City for the discriminatory affects of its by-law on Mr. Larocque. However, the Court found that a declaration of inoperability of the City's by-law, and an order compelling the City to reconsider Mr. Larocque's application in accordance with the rules for hiring police officers currently in force, but without taking into account his hearing loss, would be an appropriate remedy under the Quebec *Charter of Human Rights and Freedoms*.

[85] Similar to the situation in *Craton*, the Supreme Court in *Larocque* found there to be a conflict between human rights legislation and a municipal by-law adopted pursuant to legislation. The result was that, to the extent of the conflict, the municipal by-law was rendered inoperable. However, again similar to *Craton*, Mr. Larocque's complaint was couched in terms of "discrimination" pursuant to sections 10 and 16 of the Quebec *Charter of Human Rights and Freedoms*. His complaint was that he was discriminated against in respect of hiring. The City advanced a justification based on its authority under the by-law. The conflict with the human rights legislation was not the complaint itself, but part of the analysis of the complaint. In analyzing the Quebec Tribunal's remedial jurisdiction, the comments of the Supreme Court in *Larocque* do not indicate that a complaint challenging legislation, and nothing else, is possible under human rights legislation. "Discrimination", pursuant to the applicable legislation, was still present.

***Tranchemontagne***

[86] Mr. Tranchemontagne and Mr. Werbeski applied for support pursuant to the *Ontario Disability Support Program Act, 1997* (*ODSPA*). The Director of the program denied their applications. The Social Benefits Tribunal (SBT) dismissed their appeal pursuant to subsection 5(2) of the *ODSPA* based on its finding that they both suffered from alcoholism. In so concluding, the SBT found that it did not have jurisdiction to consider whether subsection 5(2) was inapplicable by virtue of the Ontario *Human Rights Code*.

[87] The question raised by the appeal to the Supreme Court was whether the SBT was obligated to follow provincial human rights legislation in rendering its decisions (see *Tranchemontagne* at para. 1). The majority concluded that the SBT had jurisdiction to consider the Ontario *Human Rights Code*. As the SBT can decide questions of law, it followed that it is presumed to have the jurisdiction to consider the whole law when it decides whether an applicant is eligible for income support. The SBT is presumed able to consider any legal source that might influence its decision on eligibility, including the *Human Rights Code* (see *Tranchemontagne* at para. 40). Therefore, the SBT could not decline to deal with the human rights issue and the case

was remitted to the SBT so that it could rule on the applicability of subsection 5(2) of the *ODSPA* (see *Tranchemontagne* at paras. 52-53).

[88] In reaching its conclusion, the majority of the Supreme Court stated the following with regard to the Ontario *Human Rights Code*:

> The most important characteristic of the Code for the purposes of this appeal is that it is fundamental, quasi-constitutional law… Accordingly, it is to be interpreted in a liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies…And not only must the content of the Code be understood in the context of its purpose, but like the *Canadian Charter of Rights and Freedoms*, it must be recognized as being the law of the people…Accordingly, it must not only be given expansive meaning, but also offered accessible application.
>
> (*Tranchemontagne* at para. 33)

[89] The majority also noted that the Ontario legislature has seen fit to bind itself and all its agents through the *Human Rights Code*, at subsection 47(1); and, has given the Human *Rights Code* primacy over all other legislative enactments, at subsection 47(2). As a result of the primacy clause, "where provisions of the Code conflict with provisions in another provincial law, it is the provisions of the Code that are to apply" (*Tranchemontagne* at para. 34). With regard to the primacy clause the majority stated:

> This primacy provision has both similarities and differences with s. 52 of the *Constitution Act, 1982*, which announces the supremacy of the Constitution. In terms of similarities, both provisions function to eliminate the effects of inconsistent legislation. At the end of the day, whether there is a conflict with the Code or the Constitution, the ultimate effect is that the other provision is not followed and, for the purposes of that particular application, it is as if the legislation was never enacted. But in my view, the differences between the two provisions are far more important. A provision declared invalid pursuant to s. 52 of the *Constitution Act, 1982* was never validly enacted to begin with. It never existed as valid law because the legislature enacting it never had the authority to pass it. But when a provision is inapplicable pursuant to s. 47 of the Code, there is no statement being made as to its validity. The legislature had the power to enact the conflicting provision; it just so happens that the legislature also enacted another law that takes precedence.
>
> Thus whether a provision is constitutionally permissible, and whether it is consistent with the Code, are two separate questions involving two different kinds of scrutiny. When a tribunal or court applies s. 47 of the Code to render another law inapplicable, it is not

> "going behind" that law to consider its validity, as it would be if it engaged in the two activities denied the SBT by s. 67(2) of the OWA. It is not declaring that the legislature was wrong to enact it in the first place. Rather, it is simply applying the tie-breaker supplied by, and amended according to the desires of, the legislature itself. The difference between s. 47 of the Code and s. 52 of the *Constitution Act, 1982* is therefore the difference between following legislative intent and overturning legislative intent.
>
> (*Tranchemontagne* at paras. 35-36)

[90] While *Tranchemontagne* is instructive regarding the interpretation and primacy of human rights legislation, the comments of the Supreme Court do not indicate that a complaint challenging legislation, and nothing else, is possible under human rights legislation. Nor did the Supreme Court implicitly accept that the payment of legislated disability support benefits could be reviewed as a "service" under the Ontario *Human Rights Code*, as the Commission has suggested (*Melody Katrina Schneider, Jeremy Eugene Matson, and Mardy Eugene Matson v. Indian and Northern Affairs Canada (T1444/7009), Written Submissions of the Canadian Human Rights Commission for use at Stage 1 of the Tribunal Hearing (to be held January 30 to February 1, 2013)*, dated January 11, 2013, at para. 56).

[91] Rather, the Supreme Court indicates that it is possible for human rights legislation to render laws inapplicable and that the SBT had the jurisdiction to consider human rights arguments in this regard. However, the Court left it to the SBT to decide the merits of any such human rights arguments. As Lebel, Deschamps and Abella JJ specified in their dissenting reasons: "The issue is not *whether* a party can challenge a provision of the *ODSPA* as being inconsistent with the Code; it is *where* the challenge can be made and, specifically, whether it can be made before the Director or SBT" (*Tranchemontagne* at para. 69).

***Conclusion on Supreme Court of Canada jurisprudence***

[92] Pursuant to the analysis above, in my view, *Heerspink*, *Craton*, *Larocque* and T*ranchemontage* support the Complainants and Commission's claim that human rights legislation can render inoperable, legislation that is in conflict with it. However, that is not to say

that the *Act* allows for complaints that challenge the wording of other laws, absent a discriminatory practice within the meaning of the *Act*.

[93] There are no comments from the Supreme Court in any of these cases that indicate that the primacy of human rights legislation equates to the ability to challenge legislation under human rights legislation. The basis of the conflict between legislation in *Heerspink, Craton* and *Larocque* was couched in the terms of a "discrimination" complaint under the applicable human rights legislation in those cases. The complaints themselves were not challenges to the wording of other laws.

[94] In this regard, *Heerspink, Craton, Larocque* and *Tranchemontagne* are actually consistent with the Federal Court of Appeal's decision in *Murphy*, in the sense that the Federal Court of Appeal required there to be a "service", within the meaning of section 5 of the *Act*, for there to be a valid complaint in that case.

**(ii) Other federal case law recognizing the primacy of human rights legislation**

[95] The Commission claims that, up until *Murphy*, a long line of case law within the federal human rights system had recognized the *Act* as having primacy over other inconsistent laws, consistent with the principles set out in cases like *Heerspink, Craton, Larocque* and *Tranchemontagne*. The Commission relies on the following federal cases: *Druken (FCA)*; *Gonzalez*; *McAllister-Windsor*; *Uzoaba*; the dissenting reasons of Dickson C.J. and Lamer J. in *Bhinder*; and, the dissenting reasons of McLachlin J. and L'Heureux-Dubé J. in *Cooper*.

***Druken (FCA)***

[96] *Druken (FCA)* was a judicial review of a Tribunal decision: *Druken v. Canada (Employment and Immigration Commission)*, 1987 CanLII 99 (CHRT) [*Druken (CHRT)*]. The complainants filed complaints under section 5 of the *CHRA* alleging the respondent had engaged in a discriminatory practice on the ground of marital and family status in the provision of services. The complainants were denied unemployment insurance benefits under paragraphs

3(2)(c) and 4(3)(d) of the *Unemployment Insurance Act* and paragraph 14(a) of the *Unemployment Insurance Regulations* because they were employed by their husbands or by companies, more than 40% of the voting shares of which, were controlled by their husbands. The Tribunal found that unemployment insurance was a service:

> I am guided by the case of Christine Morrell v. Canada Employment and Immigration Commission (1985) G.C.H.R.R. 3021 in which the tribunal found that Christine Morrell was discriminated against when she was denied the continuation of regular unemployment insurance benefits because she was pregnant. I agree with the finding of the Tribunal in the Morrell case that unemployment insurance is not only a service provided by the Respondent and generally available to the public, but it is also a service which most employed members of the public are required by law to participate in. Thus, in the case before me I also find that the Complainants were denied a service customarily available to the public on a prohibited ground of discrimination.
>
> (*Druken (CHRT)*)

[97] Having found that unemployment insurance was a service, according to the Tribunal, it was then faced with the task of considering a practice that is *prima facie* discriminatory, but which is mandated by the *Unemployment Insurance Act* and *Regulations*. In this regard, the Tribunal stated:

> This Tribunal finds it inconceivable that the government did not anticipate a possible conflict between the Canadian Human Rights Act and other federal legislation. The fact that the Canadian Human Rights Act refers to several exceptions in its application suggests otherwise. This Tribunal supports the view expressed by Mr. Justice Ritchie, and Mr. Justice Lamer that in the absence of words contained in the Canadian Human Rights Act which expressly limits its application, such a public and fundamental law must govern over other legislation.
>
> Nevertheless this Tribunal finds that the Canadian Human Rights Act contains provisions that are designed to deal with the potential areas of conflict between the former statute and the Unemployment Insurance Act or other federal legislation.
>
> […]
>
> In other words the Respondent will not be engaged in a discriminatory practice in denying unemployment insurance benefits to the complainants where there is a bona fide justification for such denial.

> The Tribunal therefore finds that the Canadian Human Rights Act and the Unemployment Insurance Act can stand together.
>
> (*Druken (CHRT)*)

[98] The Tribunal concluded that the respondent did not demonstrate a *bona fide* justification for the denial of benefits to the complainants; and, ordered that the respondent cease the discriminatory practice of applying the impugned sections of the *Unemployment Insurance Act* and *Regulations*.

[99] On judicial review, the Federal Court of Appeal stated the issues as follows:

> While they were raised in the Attorney General's factum, arguments that the provision of unemployment insurance benefits is not a service customarily available to the general public and that its denial, by virtue of paragraphs 3(2)(c) of the U.I. Act and 14(a) of the U.I. Regulations, is based on marital and/or family status, were not pursued. The latter proposition seems so self-evident as not to call for comment. As to the former, the applicant appears to have found persuasive the dictum expressed in Singh (Re), [1989] 1 F.C. 430 (C.A.) in which it was said by Hugessen J., delivering the judgment of this Court, at page 440:
>
> > It is indeed arguable that the qualifying words of section 5
> >
> > 5. ... provision of ... services ... customarily available to the general public
> >
> > can only serve a limiting role in the context of services rendered by private persons or bodies; that, by definition, services rendered by public servants at public expense are services to the public and therefore fall within the ambit of section 5. It is not, however, necessary to make any final determination on the point at this stage and it is enough to state that it is not by any means clear to me that the services rendered, both in Canada and abroad, by the officers charged with the administration of the Immigration Act, 1976 are not services customarily available to the general public.
>
> In any event, the tribunal's basic finding of fact that the respondents were victims of a proscribed discriminatory practice was not questioned. The principal arguments concerned whether the tribunal erred in ordering the Canada Employment and Immigration Commission, the "CEIC", to "cease applying sections 3(2)(c), 4(3)(d) and Regulation 14A", thereby effectively declaring them inoperative, and whether it erred in concluding that there was not a bona fide justification for the denial of benefits, thus bringing the discriminatory practice within the exception of paragraph 14(g). The former issue was presented on two bases: (1) that the Human Rights Act is not paramount over another Act of Parliament and (2) that an ad hoc tribunal has not the power to declare or make an order rendering legislation inoperative.

(*Druken (FCA)* at pp. 28-29)

[100] On the first issue, the Federal Court of Appeal found:

> The rule appears to be that when human rights legislation and other legislation cannot stand together, a subsequent inconsistent enactment, unless clearly stated to create an exception to it, is not to be construed as repealing the subsisting human rights legislation. On the other hand, when the human rights legislation is the subsequent enactment, it does repeal by implication the other inconsistent legislation.
>
> The circumstances here seem precisely those which, it was said, would have led to disposition of the Winnipeg School case on the basis of implied repeal. Paragraph 3(2)(c) of the U.I. Act, a provision of Canadian unemployment insurance legislation since 1941, was last enacted in 1971 (S.C. 1970-71-72, c. 48, s. 3(2)(c)). Paragraph 4(3)(d), continuing an exception first adopted in 1955, was enacted in its present form in 1975 (S.C. 1974-75-76, c. 80, s. 2). Neither has been subsequently re-enacted. Both were among "the present laws of Canada" when the Human Rights Act was enacted in 1977 (S.C. 1976-77, c. 33) with the intent expressed in section 2 recited above.
>
> In my opinion, this application is to be disposed of on the basis that, in 1977, paragraphs 3(2)(c) and 4(3)(d) of the U.I. Act were repealed by implication upon the Human Rights Act coming into force. I think it would be quite irregular for this Court to deal with it on the hypothesis that the U.I. provisions were enacted later. The effect would be to give advisory opinions on whether, as they stand, they are sufficiently clear legislative pronouncements to create exceptions to the Human Rights Act and, if not, as section 50 of the Public Schools Act was not, whether the discriminatory practices they mandate are bona fide justified. The objections to the remedies remain.
>
> (*Druken (FCA)* at pp. 31-32)

[101] On the issue of remedies, the Federal Court of Appeal concluded that the Tribunal had the power to declare or make an order rendering legislation inoperative, pursuant to paragraph 41(2)(a) of the *Act* (now paragraph 53(2)(a)).

[102] Consistent with *Heerspink*, *Craton* and *Larocque*, the decisions in *Druken* rendered inoperable, legislation that was in conflict with the *Act*. However, also consistent with *Heerspink*, *Craton* and *Larocque*, and the Federal Court of Appeal's decision in *Murphy*, the basis of the conflict between legislation in *Druken* was couched in a "discriminatory practice" complaint under the *Act*, in the provision of a "service", namely unemployment insurance, as found by the Tribunal and not contested on judicial review. While *Murphy* puts in question the

Tribunal's finding that unemployment insurance is a service, the *Druken* cases are consistent with the *Murphy* reasoning in the sense that a "discriminatory practice", within the meaning of the *Act*, was present for the Tribunal to have jurisdiction over a matter.

***Gonzalez***

[103] *Gonzalez* involved a reference to the Federal Court, by the Attorney General of Canada on behalf of the Employment and Immigration Commission, on the following question:

> Is subsection 11(7) of the Unemployment Insurance Act, R.S.C. 1985, c. U-1, contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, in that it is a discriminatory practice based on family status in the provision of services?
>
> (*Gonzalez* at para. 12)

[104] The Federal Court began its analysis with the following caveat:

> I begin my analysis by stating that Parliament is constantly called upon to make choices, and that the mere existence of a distinction is not evocative of discrimination. Only where a distinction is made on a prohibited ground of discrimination within the meaning of section 5 of the CHRA can it give rise to discriminatory treatment.
>
> (*Gonzalez* at para. 30)

[105] In that regard, the Attorney General argued that the refusal to pay benefits results from the operation of the *Unemployment Insurance Act* and that the denial alleged is not the result of the actions of the Employment and Immigration Commission as a provider of services within the meaning of section 5 of the *Act*. On this issue, the Federal Court concluded that "this issue was rightly conceded by the Attorney General in Druken" (*Gonzalez* at para. 36). The Federal Court added:

> Despite the fact that the Attorney General made no concession on this point in the instant reference, it seems plain to me that the unemployment insurance system is a service customarily available to the general public, and my attention was not drawn to any reason that would allow me to find that this service falls outside the ambit of section 5 on the ground that it is provided by the government.

(*Gonzalez* at para. 37)

[106] The Federal Court went on to find that subsection 11(7) of the *Unemployment Insurance Act* was discriminatory and that the Attorney General could not provide a *bona fide* justification for the discrimination. The Federal Court's declaration that subsection 11(7) was discriminatory was suspended for one year to allow Parliament to remedy the discriminatory treatment. If Parliament did not act within the time allowed, then the Employment and Immigration Commission was ordered to cease applying paragraph 11(7)(a) and the Tribunal hearing Ms. Gonzalez's complaint was ordered to dispose of it on the assumption that the paragraph was contrary to the *Act*.

[107] Like *Druken*, and *Heerspink*, *Craton* and *Larocque*, the basis of the conflict between legislation in *Gonzalez* was couched in a "discriminatory practice" under the *Act*, in the provision of a "service", namely unemployment insurance. Again, while *Murphy* puts in question the finding that unemployment insurance is a service, *Gonzalez* is consistent with the *Murphy* reasoning in the sense that a "discriminatory practice", within the meaning of the *Act*, was present for the Tribunal to have jurisdiction over a matter.

***McAllister-Windsor***

[108] The *Unemployment Insurance Act* placed a 30 week limit or cap on the number of weeks for which an individual could receive maternity, sickness and parental benefits. In Ms. McAllister-Windsor's case, the combination of her pregnancy and her disability resulted in the loss of her entitlement to parental benefits. She alleged that the cap had a discriminatory effect on her in the provision of a service customarily available to the public, by reason of her sex and disability.

[109] In determining whether the complainant established a *prima facie* case, the Tribunal stated:

> There is no dispute that the provision of EI benefits by HRDC is a 'service customarily available to the public', as contemplated by Section 5 of the Canadian Human Rights Act.

(*McAllister-Windsor* at para. 30)

[110] For its proposition that there was no dispute that the provision of employment insurance benefits constituted a "service", the Tribunal relied upon the Federal Court's decision in *Gonzalez* (see *McAllister-Windsor* at para. 30).

[111] The Tribunal found that, while subsection 11(5) of the *Unemployment Insurance Act* was, on its face, a neutral rule, it had not just a disproportionate effect, but an exclusive adverse effect on pregnant women such as Ms. McAllister-Windsor, who had claimed employment insurance sickness benefits (see *McAllister-Windsor* at para. 52). It also found that the respondent, Human Resources and Skills Development Canada, failed to establish that it could not accommodate persons with the characteristics of the complainant, without incurring undue hardship (see *McAllister-Windsor* at para. 71). The Tribunal ordered the respondent to cease applying the provisions of subsection 11(5) of the *Unemployment Insurance Act*, but suspended the order for 12 months to allow Parliament to remedy the problem. The Complainant was also awarded special compensation and interest.

[112] Like *Druken* and *Gonzalez*, and *Heerspink*, *Craton* and *Larocque*, the basis of the conflict between legislation in *McAllister-Windsor* was couched in a "discriminatory practice" under the *Act*, in the provision of a "service", namely unemployment insurance. Again, while *Murphy* puts in question the finding that unemployment insurance is a service, *McAllister-Windsor* is consistent with the *Murphy* reasoning in the sense that a "discriminatory practice", within the meaning of the *Act*, was present for the Tribunal to have jurisdiction over a matter.

***Uzoaba***

[113] In *Uzoaba*, an application for judicial review of a Tribunal decision, the Federal Court was asked to determine, among other things, whether the Tribunal erred in ordering the reinstatement of the complainant at a level two steps higher than that held by him at the time his rights were violated. Counsel for the Attorney General argued that the *Public Service*

*Employment Act* established a scheme whereby promotions are to be based on merit; and, that this cannot be overruled by the Tribunal. In rejecting this argument, the Federal Court stated:

> The law is clear and counsel for the Attorney General agrees that in the case of a direct conflict, the Act will apply. However, he argues the conflict here is not direct. It is not clear to me how this argument assists counsel. Indeed, counsel for Dr. Uzoaba submits there is no real conflict between the Act and the Public Service Employment Act. He says that the promotion on merit provisions of the Public Service Employment Act apply in the normal, day-to-day administration of the Public Service and that the Act does not purport to displace the Public Service Employment Act in that respect. In practical terms I agree with this submission.
>
> However, even if the power of a Human Rights Tribunal to order a promotion in the Public Service conflicts with the Public Service Employment Act, I am satisfied that the provisions of the Act must prevail.
>
> In Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 (the "Action Travail des Femmes" case), Chief Justice Dickson stated at pages 1135 and 1136:
>
> > The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, at p. 158, where Lamer J. emphasized that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". This principle of interpretation was further articulated by McIntyre J., for a unanimous Court, in Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150, at p. 156:
> >
> > > Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.
> >
> > The emphasis upon the "special nature" of human rights enactments was a strong indication of the Court's general attitude to the interpretation of such legislation.
>
> I think this principle of paramountcy must apply in this case to enable a Human Rights Tribunal to order a promotion which it has found has been denied for reasons of discrimination, contrary to the Act. In other words, the jurisdiction of the Public Service Commission and the process respecting promotions within the Public Service must give way in those rare exceptions where promotions have been denied based on discriminatory reasons and where a Tribunal, acting within its jurisdiction under the Act, orders a promotion in order to remedy the results of discriminatory action taken by the employer.

> In this respect, I adopt the approach of Dickson J., as he then was, in Kelso v. Her Majesty the Queen, [1981] 1 S.C.R. 199 where he stated at page 207:
>
> > No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the Canadian Human Rights Act, S.C. 1976-77, c. 33, or a regulation such as the Exclusion Order.
>
> As counsel for Dr. Uzoaba pointed out, it would be easy, and correct, in this case, to paraphrase Dickson J. with the words: "No one is challenging the general right of the government to promote according to the merit principle. But this right is not unlimited. It must be exercised according to law. The government's right to promote according to merit cannot override a statute such as the Canadian Human Rights Act."
>
> Any other conclusion would, as put by Chief Justice Dickson in Action Travail des Femmes, minimize the rights contained in the Act and enfeeble their proper impact. See page 1134.
>
> Further, as counsel for the Human Rights Commission pointed out, if the Act was not paramount in a case such as this, the jurisdiction of a Tribunal to order reinstatement at a higher level would apply to non-government federal positions where the Act is applicable but not to government positions. Such an anomaly could not have been envisaged by Parliament.
>
> (*Uzoaba* at paras. 17-23)

[114] The *Uzoaba* decision reinforces the primacy of the *Act* when in conflict with other legislation, consistent with the principles enunciated in *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne*. However, given that the conflict between legislation arose in the context of remedies, the *Uzoaba* decision does not provide guidance on whether legislation can be challenged under the *Act* as a “service”. Rather, like *Heerspink*, *Craton*, and *Larocque*, the *Uzoaba* decision is instructive on the type of situation where other legislation may come in conflict with human rights laws.

***Dissenting reasons in Bhinder and Cooper***

[115] The dissenting reasons of Dickson C.J. and Lamer J. (as they then were) in *Bhinder*, like the decision in *Uzoaba*, reinforce the primacy of the *Act* when in conflict with other legislation:

> In the present appeal, the provisions of the *Canada Labour Code* and Regulations thereunder do not create an exception to the provisions of the *Canadian Human Rights Act*. The wearing of safety helmets by Sikhs, a requirement which has a *prima facie* discriminatory effect, is a matter governed by the *Canadian Human Rights Act*, not the *Canada Labour Code*, where the requirements of the two Acts conflict. Thus, even if the safety helmet policy is necessary under the *Canada Labour Code* and Regulations, it does not follow that the policy is *ipso facto* a *bona fide* occupational requirement for the purpose of the *Canadian Human Rights Act*. Accordingly, the Tribunal had jurisdiction to order the employer to grant Mr. Bhinder an exemption from the safety helmet policy on the ground the policy did not meet the requirements of s. 14(a) of the Act.
>
> (*Bhinder* at p. 575)

However, the dissenting reasons do not address whether legislation can be challenged under the *Act* as a "service".

[116] Similarly, the dissenting reasons of McLachlin J. and L'Heureux-Dubé J. (as they then were) in *Cooper* draw an analogy between the Tribunal's finding in *Druken* (that the offending enactment was implicitly repealed by the enactment of the *Act*) and the Commission's power to consider questions of law:

> In this case, it is a provision of the *Canadian Human Rights Act* -- the "normal age of retirement" defence which is argued to be implicitly repealed by the Charter. However, from the point of view of the jurisdiction of the Commission there is no distinction between this case and *Druken*. If the appellants are correct, s. 52 of the *Constitution Act, 1982* has implicitly repealed the "normal age of retirement" defence of the *Canadian Human Rights Act*. In order to decide whether a complaint has validity, the Commission is obliged to determine whether this submission has merit or not. Following the principle affirmed in Douglas College and applied in *Re Shewchuk* and *Druken*, the Commission has power to consider that question in discharging its duty of deciding whether to dismiss the complaint or refer it to a tribunal.
>
> (*Cooper* at para. 101)

Again, these dissenting reasons do not address whether legislation can be challenged under the *Act* as a "service".

***Conclusion on other federal case law prior to Murphy***

[117] The Commission's assertion that federal human rights cases have recognized the *Act* as having primacy over other inconsistent laws is correct. However, as mentioned above with regard to the Supreme Court of Canada cases, primacy does not mean that the *Act* allows for complaints that challenge the wording of other laws, absent a discriminatory practice within the meaning of the *Act*. Nor are there any comments in these cases that suggest otherwise.

[118] The basis of the conflict between legislation in cases like *Druken*, *Gonzalez*, and *McAllister-Windsor* began with a complaint regarding a "discriminatory practice" under the *Act*, in the provision of a "service". Again, I am of the view that those cases are actually consistent with the Federal Court of Appeal's decision in *Murphy*, in the sense that the Federal Court of Appeal required there to be a "service", within the meaning of section 5 of the *Act*, for there to be a valid complaint in that case.

**(iii) Provincial case law recognizing the primacy of human rights laws**

[119] According to the Commission, wherever possible, human rights statutes from across Canada should be given consistent interpretations, given their general similarities, quasi-constitutional status, and shared objectives of preventing discrimination. As a result, in considering whether the *Act* allows for complaints that effectively challenge the wording of federal laws, the Commission urges the Tribunal to examine case law from other jurisdictions across Canada. In this regard, the Commission submits that there is a wealth of decisions that follow the Supreme Court's guidance in cases like *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne*, and the *Druken* line of federal case law. According to the Commission, in these cases, decision-makers have accepted that (i) steps taken by government actors under mandatory terms of legislation can qualify as "services" for purposes of human rights review and/or (ii) quasi-constitutional human rights statutes can be used to render conflicting legislation inoperable.

[120] Specifically, the Commission referred the Tribunal to the following provincial cases: *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 [*Tranchemontagne (ONCA)*]; *Ball v. Ontario (Minister of Community and Social Services)*, 2010 HRTO 360 [*Ball*]; *Hendershott v. Ontario (Community and Social Services)*, 2011 HRTO 482 [*Hendershott*]; *Ivancicevic v. Ontario (Consumer Services)*, 2011 HRTO 1714 [*Ivancicevic*]; *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 [*XY*]; *Gwinner v. Alberta (Human Resources and Employment)*, 2002 ABQB 685 [*Gwinner*]; *Saskatchewan (Human Rights Commission) v. Saskatchewan (Department of Social Services)*, 1988 CanLII 212 (SK CA) [*Chambers*]; *Saskatchewan (Workers' Compensation Board) v. Saskatchewan (Human Rights Commission)*, 1999 CanLII 12368 (SK CA) [*Wiebe*]; *Human Rights Commission v. Workplace Health, Safety and Compensation Commission*, 2005 NLCA 61 [*Nfld HRC*]; *Neubauer v. British Columbia (Ministry of Human Resources)*, 2005 BCHRT 239 [*Neubauer*]; and, *A.A. v. New Brunswick (Department of Family and Community Services)*, [2004] N.B.H.R.B.I.D. No. 4 (QL) [*AA*].

[121] While I agree, as analyzed above, that *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne*, and the *Druken* line of federal case law, provide that quasi-constitutional human rights statutes can be used to render conflicting legislation inoperable; however, as also noted above, in my view, these cases do not stand for the proposition that the *Act* allows for complaints that effectively challenge the wording of federal laws. Rather, for there to be a valid complaint under the *Act*, the complainant in each case must identify a discriminatory practice, within the meaning of the *Act*. The provincial authorities referred to by the Commission are also consistent with this reasoning:

- “The SBT held that the respondents were denied a service available to other disabled people” (*Tranchemontagne (ONCA)* at para. 50);

- “I note at the outset that there is no dispute between the parties that the provision of benefits under the special diet allowance program is a "service" within the meaning of the *Code*…” (*Ball* at para. 61);

- “There is no dispute that the provision of government benefits is a service” (*Hendershott* at para. 69);

- “In my view, the present Application is with respect to services within the meaning of the *Code*, and is within the jurisdiction of the Tribunal. I am satisfied that the legislation in question, concerning the regulation of licensed premises, is intended to benefit the public, and, in particular, staff and patrons of licensed premises in Ontario, including the applicant” (*Ivancicevic* at para. 150);

- “In these circumstances, it is clear that when the respondent provides birth certificates pursuant to the *VSA*, it provides something of benefit to a person or to the public, and therefore provides a “service” within the meaning of s.1 of the *Code*” (*XY* at para. 87);

- “In my opinion the financial assistance is a service offered to the public under s. 12(1) of the *Code*” (*Chambers* at p. 28);

- The finding that the payment of wage loss benefits was a service was not pursued on appeal (see *Wiebe* at paras. 3-4);

- “Clearly, the fact that Ms. Neubauer is ineligible for appointment to the EAA Tribunal is related to potential employment. Ms. Neubauer also argued that being eligible to be considered for appointment is a service customarily available to the public. The Ministry did not make any submissions on this issue. For the purposes of this decision, I will proceed on the basis that Ms. Neubauer's Complaint could, if found justified, constitute a contravention of s. 8 of the Code” (*Neubauer* at para. 61); and,

- “Consequently, the issues here - birth registration and adoption - must be said to fall within the meaning of "services" in section 5(1) of the New Brunswick Human Rights Act” (*AA* at para. 29).

[122] In *Gwinner*, while the Court identifies that the applicable section of the human rights legislation in that case requires that no person "deny anyone services customarily available to the public", the Court and the parties do not address whether there is a service in the circumstances of the case:

> Section 3(a) of the *HRCMA* requires that no person "deny anyone services customarily available to the public, on the basis of marital status". The question to be asked in considering whether there is a *prima facie* violation of s. 3(a) of the *HRCMA* is whether the *WPA* denies pension and benefits on the basis of marital status. Subsection 3(b) of the *HRCMA* requires that no person "discriminate" against anyone with respect to services customarily available to the public, on the basis of marital status. The question to be asked in considering whether there is a prima facie violation of s. 3(b) of the *HRCMA* is whether the *WPA* discriminates with respect to the provision of pension and benefits, on the basis of marital status.
>
> (*Gwinner* at para. 90)

[123] As there is no analysis of the services issue in *Gwinner*, I do not find this case particularly persuasive or useful in the circumstances of this case.

[124] In *Nfld HRC*, the complainants alleged that they were discriminated against on the basis of marital status because they were denied their respective widow's pension upon remarriage. A human rights board of inquiry found that the effect of the remedy sought by the complainants would render subsection 65.1(1) of the *Workplace Health and Safety and Compensation Act* invalid. Accordingly, it declined jurisdiction on the basis that the Newfoundland *Human Rights Code* did not create a mechanism to determine the validity of, or to strike down allegedly discriminatory provincial legislation. On appeal, the Newfoundland and Labrador Court of Appeal was not concerned with the merits of the complaint, but with whether the board of inquiry could order a remedy which is inconsistent with a directive contained in subsection 65.1(1) of the *Workplace Health and Safety and Compensation Act* (*Nfld HRC* at para. 9). A majority of the Court of Appeal found:

> The board of inquiry has no jurisdiction to issue a general declaration that s. 65.1(1) of the Workplace Health, Safety and Compensation Act is inoperative. The board of inquiry, however, could determine that by the operation of section 5 of the Human Rights Code a provision of another statute could not operate to justify what was otherwise conduct

> contrary to the Human Rights Code. Such a determination would apply only to the case in which the ruling was made. A board of inquiry could then fashion a remedy as contemplated by the Human Rights Code. This might include a directive to stop the offending behaviour and refrain from committing a contravention in the future or to take other action as permitted by s. 28 of the Human Rights Code, though this would not extend to specifying by what means the offending legislation should be made compliant. I conclude that the chief adjudicator and the Trial Division judge were in error in holding that the board of inquiry had no jurisdiction to grant a remedy in this case.
>
> (*Nfld HRC* at para. 39)

[125] As neither the board of inquiry nor the Court addressed the merits of the case, including the services issues, I also do not find this case particularly persuasive or useful in the circumstances of this case. If anything, it reinforces the primacy of human rights cases, which I accept as indicated above.

[126] To the extent that the above cases may stand for the proposition that 'steps taken by government actors under mandatory terms of legislation can qualify as "services" for purposes of human rights review', I would say that those findings are dependent on the circumstances of those cases. As the Federal Court of Appeal stated in *Watkin*: "Regard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are "services"…" (at para. 33). Therefore, while instructive and supportive of the primacy of human rights legislation, in my view, the provincial authorities relied on by the Commission do not support the proposition that, absent a discriminatory practice within the meaning of the *Act*, the wording of laws can be challenged under the *Act*; or, that the *Act* allows for complaints challenging government conduct that is mandatory under the wording of law. Consistent with the Supreme Court and federal case law examined above, a discriminatory practice within the meaning of the applicable provincial legislation was identified in each of the relevant provincial cases above.

**(iv) Section 2 and subsections 49(5) and 62(1) of the *Act***

[127] The Commission also points to the wording and legislative history of several current provisions of the *Act* as demonstrating Parliament's intent that the *Act* apply to the wording of other federal legislation: section 2 and subsections 49(5) and 62(1).

[128] According to the Commission, section 2 of the *Act* describes the aim and purposes of the legislation in broad terms and nothing in the statement suggest that conduct prescribed by law is immune from review for compliance with these purposes. However, on the other hand, I would note that neither does section 2 explicitly provide that conduct prescribed by law can be challenged under the *Act*. Furthermore, the Commission's argument ignores the rest of the wording and scheme of the *Act*. Subsection 40(1) of the *Act* provides that individuals may file a complaint if they have reasonable grounds for believing that a person has engaged in a discriminatory practice. Section 39 of the *Act* defines a "discriminatory practice" as any practice within the meaning of section 5 to 14.1 of the *Act*. There is no discriminatory practice in sections 5 to 14.1 that provides for the review of legislation for compliance with the *Act*.

[129] With regard to subsection 49(5), it requires that "[i]f a complaint involves a question about whether another Act or a regulation made under another Act is inconsistent with this Act or a regulation made under it", it be adjudicated by a Tribunal member who is a member of the bar of a province or the Chambre des notaires du Québec. According to the Commission, this demonstrates Parliament's understanding that complaints regarding inconsistencies between the *Act* and other federal laws may be filed and determined on their merits. However, again, the Commission's argument ignores the wording and scheme of the *Act* and, particularly, section 39 and subsection 40(1) of the *Act*. Subsection 49(5) does not alter, modify or add to the discriminatory practices set out in sections 5 to 14.1 of the *Act*.

[130] If the *Act* does not apply to the wording of other laws then, according to the Commission, Parliament spoke in vain when it enacted subsection 49(5). The Commission argues that such an approach renders subsection 49(5) meaningless; and, there would be no purpose in defining the composition of the panel that will hear complaints challenging federal legislation, if such

complaints are always outside the Tribunal's jurisdiction. However, whereas the Commission interprets subsection 49(5) to indicate that legislation can be *challenged* under the *Act*, the opening words of subsection 49(5) only go so far as saying "[i]f the complaint *involves a question* about whether another Act…is *inconsistent*"; or, in French, "Dans le cas oû la plainte *met en cause la compatibilité* d'une disposition d'une autre loi…" (*emphasis added*). As cases such as *Heerspink*, *Craton*, *Larocque* and *Uzoaba* demonstrate, there are situations outside of actually *challenging* legislation under the *Act* where other legislation may be inconsistent with the *Act*. As mentioned above, this jurisprudence also does not indicate that the concept of the primacy of human rights legislation, which subsection 49(5) would appear to speak to, equates to the ability to challenge legislation under the *Act*.

[131] The Commission also relies upon passages from the proceedings in Parliament leading to the addition of subsection 49(5) in the *Act* as demonstrating the government's recognition and acceptance that the *Act* apply to the wording of other laws. My reading of these passages leads me to believe that the main reason for adding subsection 49(5) was to have lawyers adjudicate cases involving questions of inconsistency of legislation. The reasoning was that these types of cases may be legalistic and complex, and having a lawyer adjudicate them would assist in their expeditious resolution: "I am therefore of the view that having legal representation on the tribunal would be helpful and would assist in the expeditious adjudication of some of these complex legal and evidentiary and procedural issues" (Minutes of Proceedings of the Standing Committee on Justice and Human Rights, House of Commons, dated March 12, 1998, statement of Minister of Justice and Attorney General of Canada). This makes sense considering subsection 49(5)'s placement alongside subsection 49(2) of the *Act*, which provides for the Chairperson of the Tribunal to assign a three member panel where the complexity of a complaint requires it. While some officials also commented on the types of cases being brought before the Tribunal, including the Tribunal's power to render legislation inoperable, those comments do not indicate that the intention of 49(5) was anything other than having lawyers sit on those types of cases. Having examined the wording of subsection 49(5), along with its placement in the scheme of the *Act* and Parliament's intent in adding it, in my view, subsection 49(5) does not support the

Commission's argument that the *Act* allows for complaints that challenge the wording of other laws.

[132] The Commission also points to subsection 62(1) of the *Act* to support its case. This subsection provides a statutory exception from Parts I and II of the *Act* for any superannuation, pension fund or plan established by an Act of Parliament enacted before March 1, 1978. According to the Commission, without this exemption, the *Act* would have applied to and affected any discriminatory provisions in the federal pension or superannuation legislation. However, again, the Commission's argument ignores the wording and scheme of the *Act* and, particularly, section 39 and subsection 40(1) of the *Act*. Subsection 62(1) does not alter, modify or add to the discriminatory practices set out in sections 5 to 14.1 of the *Act*.

[133] Again, the Commission also argues that, if the *Act* does not apply to the wording of other laws, then Parliament spoke in vain when enacting subsection 62(1) and the provision is effectively rendered meaningless. However, that argument again confuses the concept of the primacy of human rights legislation with the ability to challenge legislation, as a discriminatory practice, under the *Act*. As analyzed above, there is no indication in the case law that the primacy of human rights legislation equates to the ability to challenge legislation under the *Act*.

[134] In the same vein, the March 10, 1977 statement of the then Minister of Justice regarding the inclusion of subsection 62(1) in the *Act*, relied upon by the Commission, does not indicate that the *Act* apply to the wording of other laws, absent a discriminatory practice within the meaning of the *Act*. The Minister's comments indicate to me that the inclusion of 62(1) was precautionary, to guard against the *possibility* that the *Act* could render aspects of government pension plans inoperable: "Modifications to some of these plans *may* be required to ensure consistency with Bill C-25" (Statement by Minister of Justice to Justice and Legal Affairs Committee, House of Commons, March 10, 1977, *emphasis added*). In this regard, I agree with the Commission's explanation of the implications of this passage:

> The implications of this passage is that without the statutory exemption, complaints under the CHRA *could have* led to hasty modifications to the terms of legislated pension plans.

> In the circumstances, Parliament took specific steps to ensure that it would retain the ability to make the desired modifications at its own pace.
>
> (*Written Submissions of the Canadian Human Rights Commission for use at Stage 1 of the Tribunal Hearing (to be held January 30 to Feb. 1, 2013)*, January 11, 2013, at para. 74, *emphasis added*)

[135] Therefore, pursuant to the analysis above, in my view, section 2 and subsections 49(5) and 62(1) of the *Act* do not demonstrate Parliament's intent that the *Act* apply to the wording of other federal legislation, absent a discriminatory practice within the meaning of the *Act*.

### (v) The former section 67 of the *Act*

[136] According to the Complainants, the intent and purpose behind the repeal of section 67 was to open up the whole of the *Indian Act* to full scrutiny under the *Act*. Similarly, the Commission claims that the former section 67 functioned as a statutory exception to the general principle that human rights laws have primacy. The existence of section 67 implied that, without the exemption, the *Act* would have applied to and affected any discriminatory provisions in the *Indian Act*. In fact, the Commission submits that Parliament enacted the former section 67 for the purpose of shielding the registration provisions of the *Indian Act* from review under the *Act*. Therefore, in repealing section 67 in 2008, Parliament intended to open the door to human rights complaints challenging discriminatory aspects of those same provisions.

[137] The former section 67 of the *Act* provided:

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

[138] Similar to the exemption at subsection 62(1), I agree that the former section 67 of the *Act* functioned as a statutory exception to the *possibility* of the *Act* having primacy over the *Indian Act* and, therefore, rendering some of its provisions inoperable. As the Commission aptly explained in its submissions:

> In this regard, the record shows that at the time in 1977 that Parliament was considering the legislation that would eventually become the CHRA, a commitment had been made not to amend the Indian Act without consulting with Indian peoples. As a result, the Minister of Indian Affairs requested that an exemption be written into the CHRA that would exempt the Indian Act from human rights review. The government agreed and included clause 63(2) (the section that would eventually become s. 67), with the stated intent of ensuring that "…the Indian Act will not, in effect, be modified by this Act" while consultations with Indian representatives are continuing.
>
> *(Written Submissions of the Canadian Human Rights Commission for use at Stage 1 of the Tribunal Hearing (to be held January 30 to Feb. 1, 2013)*, January 11, 2013, at para. 80)

[139] However, as analyzed above, the primacy of human rights legislation does not mean that the wording of other laws can be challenged under the *Act*, absent a discriminatory practice within the meaning of the *Act*. In this regard, the Complainants and Commission's argument again ignores the wording and scheme of the *Act* and, particularly, section 39 and subsection 40(1) of the *Act*. The inclusion of the former section 67 in the *Act*, did not alter, modify or add to the discriminatory practices set out in sections 5 to 14.1 of the *Act*.

[140] The Commission goes further and claims that section 67 was specifically included because the government felt that the registration provisions in the *Indian Act* violated the *Act*. According to the Commission, once it is accepted that Parliament enacted section 67 for the purpose of shielding the registration provisions of the *Indian Act* from review under the *Act*, it must also be accepted that in repealing section 67, Parliament intended to open the door to human rights complaints challenging discriminatory aspects of those same provisions.

[141] Similar to the inclusion of section 67 in the former *Act*, the repeal of the section also did not alter, modify or add to the discriminatory practices set out in sections 5 to 14.1 of the *Act*. While the repeal of the section no longer exempts the provisions of the *Indian Act*, or any provision made under or pursuant to the *Indian Act*, from potential conflict with the *Act*; however, as analyzed above, that conflict must arise pursuant to a discriminatory practice, within the meaning of the *Act*. I would add that, aside from the Commission's focus on the registration provisions of the *Indian Act*, the repeal of section 67 more broadly allows for complaints

challenging actions and decisions made pursuant to the provisions of the *Indian Act*, whether by the government or First Nations organizations.

[142] Therefore, in my view, the repeal of section 67 of the *Act* also does not demonstrate Parliament's intent that the *Act* apply to the wording of other federal legislation, absent a discriminatory practice within the meaning of the *Act*.

**(vi) Conclusion: the complaint is dismissed**

[143] *Heerspink, Craton, Larocque* and T*ranchemontage* support the Complainants and Commission's claim that human rights legislation has primacy over other inconsistent laws and, consequently, can render legislation that is in conflict with it inoperable. This is also consistent with federal human rights cases such as *Druken, Gonzalez, McAllister-Windsor* and *Uzoaba*, and other provincial human rights cases, that have used human rights legislation to render inconsistent legislation inoperable. However, while these cases support the primacy of human rights legislation and its ability to render legislation inoperable, there is no indication in these cases that the *Act* allows for complaints that challenge the wording of other laws.

[144] The basis of the conflict between legislation in *Heerspink*, *Craton* and *Larocque*, and the federal and provincial cases relied upon by the Complainants and Commission, were couched in "discrimination" complaints under the applicable human rights legislation in those cases. The complaints themselves were not challenges to the wording of other laws. A "discriminatory practice", within the meaning of the applicable legislation, was present.

[145] In this regard, subsection 40(1) of the *Act* provides that individuals may file a complaint if they have reasonable grounds for believing that a person has engaged in a discriminatory practice. Section 39 of the *Act* defines a "discriminatory practice" as any practice within the meaning of section 5 to 14.1 of the *Act*. There is no discriminatory practice in sections 5 to 14.1 that provides for the review of legislation for compliance with the *Act*.

[146] While the Commission pointed to section 2 and subsections 49(5) and 62(1) of the *Act* as demonstrating Parliament's intent that the *Act* apply to the wording of other federal legislation, those sections do not alter, modify or add to the discriminatory practices set out in sections 5 to 14.1 of the *Act*. While subsections 49(5) and 62(1) may speak to the primacy of the *Act* when in conflict with other federal legislation, again, the primacy of human rights legislation does not mean that there is an ability to challenge legislation under the *Act*, absent a discriminatory practice.

[147] Similarly, the inclusion and repeal of the former section 67 of the *Act* did not alter, modify or add to the discriminatory practices set out in sections 5 to 14.1 of the *Act*. In the same vein as subsection 62(1), the former section 67 of the *Act* functioned as a statutory exception to the *possibility* of the Act having primacy over the *Indian Act* and, therefore, rendering some of its provisions inoperable. However, again, the primacy of human rights legislation does not mean that the wording of other laws can be challenged under the *Act*, absent a discriminatory practice within the meaning of the *Act*.

[148] On the basis of the above reasoning, I do not find that *Murphy* is superseded by binding case law from the Supreme Court of Canada. Nor do I find authority to support the proposition that the *Act* allows for complaints challenging the discriminatory impact of other federal laws, absent a discriminatory practice within the meaning of the *Act*. In my view, *Heerspink*, *Craton* and *Larocque*, and the federal and provincial cases relied upon by the Complainants and Commission, are actually consistent with the Federal Court of Appeal's decision in *Murphy*. Similar to the analysis in those cases, the Federal Court of Appeal required there to be a "service", within the meaning of section 5 of the *Act*, for the Tribunal to have jurisdiction. Also, the Federal Court of Appeal's comments in *Murphy* do not put in question the primacy of the *Act* when in conflict with other legislation.

[149] However, *Murphy* does clarify that a challenge to legislation, and nothing else, is not a service and, therefore, is not a discriminatory practice within the meaning or jurisdiction of the *Act*. Leading to *Murphy*, through cases like *Forward* and *Watkin*, the judicial understanding of

the term "services", within the meaning of section 5 of the *Act*, has been clarified, consistent with the proper interpretive attitude toward human rights legislation espoused in *Heerspink*, *Craton*, *Action Travail des Femmes* and *Tranchemontagne* (see *Watkin* at para. 34). As mentioned above, neither the Complainants nor the Commission took issue with the general criteria currently used to determine whether conduct is with respect to a "service" within the meaning of section 5 of the *Act*.

[150] Having found the current complaint to be a challenge to legislation, and nothing else; that *Murphy* is not superseded by binding case law from the Supreme Court of Canada; and, that the *Act* does not allow for complaints challenging the discriminatory impact of other federal laws, absent a discriminatory practice within the meaning of the *Act*; therefore, as the Complainant's have not identified a discriminatory practice within the meaning of section 5 of the *Act*, this complaint is dismissed.

## C. Does the complaint impugn a discriminatory practice in the provision of services customarily available to the general public that could be the subject of a finding of *prima facie* discrimination under section 5 of the *Act*?

[151] Pursuant to the conclusion above, this last question is answered in the negative.

[152] Given that the Complainants are attempting to counter the application of legislation, a constitutional challenge would be the most appropriate avenue to seek the result desired by the Complainants, especially given the Complainants' claim that there is a significant public interest in their cause. As described in *Andrews* above, the difference between a challenge under the *Charter* and a complaint under the *Act* are distinct:

> The Court in the case at bar must address the issue of discrimination as the term is used in s. 15(1) of the *Charter*. In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1). Certain differences arising from the difference between the *Charter* and the Human Rights Acts must, however, be considered. To begin with, discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities.

> […]
>
> Where discrimination is forbidden in the Human Rights Acts it is done in absolute terms, and where a defence or exception is allowed it, too, speaks in absolute terms and the discrimination is excused. There is, in this sense, no middle ground. In the *Charter*, however, while s. 15(1), subject always to subs. (2), expresses its prohibition of discrimination in absolute terms, s. 1 makes allowance for a reasonable limit upon the operation of s. 15(1). A different approach under s. 15(1) is therefore required. While discrimination under s. 15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts, a further step will be required in order to decide whether discriminatory laws can be justified under s. 1. The onus will be on the state to establish this. This is a distinct step called for under the *Charter* which is not found in most Human Rights Acts, because in those Acts justification for or defence to discrimination is generally found in specific exceptions to the substantive rights.
>
> (*Andrews* at pp. 175, 176)

[153] If the Complainants had established a *prima facie* case under section 5 of the *Act*, then paragraph 15(1)(g) of the *Act* would have provided the Respondent with the opportunity to demonstrate a *bona fide* justification for its actions. To be considered a *bona fide* justification, subsection 15(2) of the *Act* provides that the Respondent must establish that accommodating the needs of individuals like the Complainants would impose undue hardship considering health, safety and cost. However, as a majority of the Supreme Court of Canada explained in *Hutterian Brethren*, the duty to accommodate analysis is not appropriate where the validity of a law is at stake:

> In my view, a distinction must be maintained between the reasonable accommodation analysis undertaken when applying human rights laws, and the s. 1 justification analysis that applies to a claim that a law infringes the *Charter*. Where the validity of a law is at stake, the appropriate approach is a s. 1 *Oakes* analysis. Under this analysis, the issue at the stage of minimum impairment is whether the goal of the measure could be accomplished in a less infringing manner. The balancing of effects takes place at the third and final stage of the proportionality test. If the government establishes justification under the *Oakes* test, the law is constitutional. If not, the law is null and void under s. 52 insofar as it is inconsistent with the *Charter*.
>
> A different analysis applies where a government *action* or administrative *practice* is alleged to violate the claimant's *Charter* rights. If a *Charter* violation is found, the court's remedial jurisdiction lies not under s. 52 of the *Constitution Act, 1982* but under s. 24(1) of the *Charter*: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 61. In such cases, the jurisprudence on the duty to accommodate, which applies to governments

and private parties alike, may be helpful "to explain the burden resulting from the minimal impairment test with respect to a particular individual" (emphasis added): *Multani*, at para. 53, *per* Charron J.

Minimal impairment and reasonable accommodation are conceptually distinct. Reasonable accommodation is a concept drawn from human rights statutes and jurisprudence. It envisions a dynamic process whereby the parties — most commonly an employer and employee — adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party. In *Multani*, Deschamps and Abella JJ. explained:

> The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs. [para. 131]

A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe *Charter* rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.

Similarly, "undue hardship", a pivotal concept in reasonable accommodation, is not easily applicable to a legislature enacting laws. In the human rights context, hardship is seen as undue if it would threaten the viability of the enterprise which is being asked to accommodate the right. The degree of hardship is often capable of expression in monetary terms. By contrast, it is difficult to apply the concept of undue hardship to the cost of achieving or not achieving a legislative objective, especially when the objective is (as here) preventative or precautionary. Though it is possible to interpret "undue hardship" broadly as encompassing the hardship that comes with failing to achieve a pressing government objective, this attenuates the concept. Rather than strain to adapt "undue hardship" to the context of s. 1 of the *Charter*, it is better to speak in terms of minimal impairment and proportionality of effects.

> In summary, where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper s. 1 analysis based on the methodology of *Oakes*. Where the government has passed a measure into law, the provisions of s. 1 apply. The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects.
>
> (*Hutterian Brethren* at paras. 66-71)

[154] Therefore, aside from the determination that legislation is not a service within the meaning of section 5 of the *Act*, the comments of the majority of the Supreme Court of Canada would also suggest that the scheme and analytical framework of the *Act* is not an appropriate method by which to analyze the alleged discriminatory aspects of section 6 of the *Indian Act*. The government is entitled to justify section 6 of the *Indian Act*, not by showing a *bona fide* justification pursuant to subsection 15(2) of the *Act*, but by establishing that any infringement on the rights of the Complainants is justifiable in a free and democratic society pursuant to section 1 of the *Charter*.

[155] For all these reasons, the complaint is dismissed.

*Signed by*

Edward P. Lustig
Tribunal Member

OTTAWA, Ontario
May 24, 2013

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File:** T1444/7009

**Style of Cause:** Matson et al. v. Indian and Northern Affairs Canada

**Ruling/Decision of the Tribunal Dated:** May 24, 2013

**Place of Hearing:** Kelowna, British Columbia

**Appearances:**

Jeremy Eugene Matson, for the Complainants

Brian Smith, for the Canadian Human Rights Commission

Sean Stynes and Michelle Casavant, for the Respondent