Court File No. 37208

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

APPELLANT
(Appellant)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT, the CANADIAN HUMAN RIGHTS COMMISSION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW and STATEMENT OF FACTS

A.) Overview

1. The *Canadian Human Rights Act* (the "*CHRA*") was enacted to ensure that people in Canada can live the lives they wish to have, free from discrimination. This is a fundamental Canadian value. Among other things, it guarantees that people in vulnerable circumstances have substantively equal access to government benefits – regardless of whether eligibility for those benefits is determined by the exercise of discretion, policy, or legislation. In all such cases, the government officials who administer the benefits scheme should properly be recognized as providing services to the public. It is their delivery of that service to the public that crystallizes the adverse impact that will result, if claims are rejected for discriminatory reasons.

2. In the decisions at issue, the Canadian Human Rights Tribunal (the "Tribunal") incorrectly and unreasonably departed from this approach. It dismissed complaints brought by or on behalf of five persons with Indigenous ancestry. They had alleged that government officials infringed the *CHRA* by denying their requests for particular forms of registration under the *Indian Act*, based on legislative wording tainted by historic racism and/or sexism. The Tribunal agreed that the claimants would have received benefits, if registered as sought. Despite this, it refused to address the substance of their claims of discrimination. Instead, it re-characterized the complaints as direct attacks on Parliament's enactment of the law, found that such complaints do not relate to the provision of "services" within the meaning of the *CHRA*, and stated that relief could only lie under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

3. In framing the case this way, the Tribunal modified the traditional test for whether a complaint relates to the provision of services. It effectively added a new requirement that eligibility for benefits be determined by means other than legislation. This was a reversible error. While the source of the eligibility criteria may be relevant when considering available remedies, it should have no impact on determining whether a claimant has suffered discrimination in the provision of services. Instead, the focus should always remain on whether the denial of benefits has an adverse impact connected to a prohibited ground of discrimination.

4. The Tribunal's approach improperly restricts the scope of s. 5 of the *CHRA*. It narrows the test for "services" in a way that (i) is inconsistent with the broad, purposive interpretation to

be given to rights-granting provisions in human rights laws, (ii) improperly discounts current and former provisions in the *CHRA* that point to a broader approach, and (iii) contradicts the weight of authorities from other jurisdictions having analogous statutory protections, which treat complaints about legislated eligibility criteria as relating to the provision of services.

5. Ultimately, the Tribunal's decisions reduce the practical scope of the fundamental principle of human rights law primacy, based in part on mistaken or overstated concerns about the defences and remedies that would be available if the complaints were to proceed. The end result is to undermine the *CHRA*'s status as a "law of the people," and to restrict access to justice for persons identified by prohibited grounds of discrimination – persons who are both more likely to need access to government benefits, and less likely to have the resources needed to launch *Charter* challenges in the court system. This cannot be what Parliament intended.

B.) Statement of Facts

(i) Background context – registration under the *Indian Act*

6. At all material times, provisions in the *Indian Act* have defined who is to be considered an "Indian" within the meaning of that statute.[1] These statutory definitions do not necessarily correspond to the customs of Indigenous communities for determining their own membership.[2] Indeed, the Commission acknowledges that many find the term "Indian" to be offensive, and uses it throughout this Factum only because it is the term used in the applicable legislation.

7. Since 1951, the *Indian Act* has effectively said that an "Indian" is a person who is registered or eligible to be registered in a central register of "Indians," to be maintained by the Indian Registrar (the "Registrar"), an official of the Department now known as Indigenous and Northern Affairs Canada ("INAC"). Since 1985, the *Indian Act* has said that the Registrar is not required to add a person's name to the register unless the person first fills out an application and submits it to the Registrar. Upon receiving such an application, the Registrar will determine whether the applicant is or is not eligible to be registered, in accordance with the legislation.[3]

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[1] *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1), definition of "Indian."
[2] *Andrews et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 21 at para. 1 (Appeal Record ("AR"), Vol. 1, Tab 2, p. 63) ("Andrews Tribunal").
[3] *Indian Act*, s. 2(1) ("Indian," "Indian Register" and "Registrar"), 5(1), 5(3) and 5(5).

8. People who are registered as Indians (i) receive tangible benefits, such as non-insured health benefits, certain tax exemptions, and eligibility to apply for certain post-secondary education benefits, and (ii) may also receive intangible benefits, such as increased acceptance within Indigenous communities, or the possibility of passing registration entitlements to their descendants.[4] Whether people can access this latter benefit depends on their category of registration, and the identity of the persons with whom they have children. In this regard, persons registered under 6(1) of the *Indian Act* are always able to pass registration entitlements to their children. Persons registered under 6(2) of the *Indian Act* are only able to pass entitlements if they have children with people registered or eligible for registration.[5]

(ii) The Matson Complaints

9. At all material times before 1985, the *Indian Act* made a woman's status dependent on that of any man she married, such that a woman would lose her Indian status if she married a man without status. This same rule did not apply to men who married women without Indian status. To the contrary, in such situations, the men kept their Indian status, and the women gained status. Although Parliament took steps in 1985, and again in 2011, to address some of the discriminatory consequences of this approach, some differential treatment remains.[6]

10. Jeremy Matson, Mardy Matson and Melody Schneider (née Matson) are siblings who suffer such differential treatment (together, the "Matson Complainants"). They have one grandparent with Indian status – a grandmother who lost that status by marrying a man without status before 1985, but regained it under s. 6(1)(c) following the 1985 amendments to the *Indian Act*. By virtue of subsequent amendments to the *Indian Act* that came into force in 2011, the Matson Complainants became registered for the first time, under s. 6(2). As such, they are not able to pass registration entitlements to the children they have had with persons without Indian

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[4] *Canadian Human Rights Commission v. Attorney General of Canada*, 2016 FCA 200, at para. 10 (AR, Vol. 1, Tab 4, p. 154) ("Appeal Decision"). See also: Andrews Tribunal, at para. 55 (AR, Vol. 1, Tab 2, p. 82); *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 at paras. 70-71 ("*McIvor*").
[5] *Indian Act*, ss. 6(1) and 6(2); Appeal Decision, at para. 15 (AR, Vol. 1, Tab 4, p. 156).
[6] Appeal Decision, at paras. 13-15 and 17-19 (AR, Vol. 1, Tab 4, pp. 155-158).

status. If their grandparent with Indian status had been male instead of female, they would be able to pass such entitlements.[7]

11. The Matson Complainants filed human rights complaints alleging that INAC committed a discriminatory practice in the provision of services, contrary to s. 5 of the *CHRA*, when it denied a form of registration that would permit them to pass entitlements to their children.[8] Section 5 of the *CHRA* reads as follows:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	5. Constitute un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public: (a) d'en priver un individu; (b) de le défavoriser à l'occasion de leur fourniture.

12. It should be noted that claimants with a comparable family history have successfully argued that the differential treatment at issue in the Matson complaints unjustifiably infringes s. 15(1) of the *Charter*.[9] The Quebec Superior Court has declared aspects of the *Indian Act* to be unconstitutional, but suspended the effective date of that declaration until July 3, 2017.[10] Although proposed amendments are currently before Parliament, as at the date of this Factum, the registration provisions still read as they did at the time of the Matson Decision.[11]

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[7] Appeal Decision, at paras. 26-29 (AR, Vol. 1, Tab 4, pp. 160-61); and *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13 at paras. 1-5 and 11-12 (AR, Vol. 1, Tab 1, pp. 3-5) ("Matson Tribunal").

[8] Complaints of the Matson Complainants (AR, Vol. 2, Tabs 7-9, pp. 3-14); *Matson, Matson and Schneider (née Matson) v. Indian and Northern Affairs Canada*, 2011 CHRT 14 at paras. 17-20 (AR, Vol. 2, Tab 11, pp. 25-26); and Matson Tribunal, at para. 12 (AR, Vol. 1, Tab 1, p. 5).

[9] *Descheneaux c. Canada (Procureur général)*, 2015 QCCS 3555 at paras. 149-154 and 204-217 ("*Descheneaux*").

[10] *Descheneaux c. Canada (Procureure générale)*, 2017 QCCS 153 at paras. 34-35.

[11] Bill S-3, *An act to amend the Indian Act (elimination of sex-based inequities in registration)*, 1st Sess, 42nd Parl, 2017 (Third reading), as passed by the Senate, June 1, 2017).

(iii) The Andrews Complaints

13. At all material times up to 1985, the *Indian Act* contained a variety of enfranchisement mechanisms – some involuntary, some triggered by application – by which the federal government could strip an "Indian" and his or her future descendants of status, in exchange for various incentives or entitlements.[12] Enfranchisement was aimed at assimilating Indigenous peoples into the rest of Canadian society, and has been recognized as "one of the most oppressive policies adopted by the Canadian government in its history of dealings with Aboriginal peoples." The policy resulted in disadvantage, stereotyping, prejudice and discrimination, and was "completely contrary to human rights principles and values."[13]

14. In 1985, Parliament took steps to address the discriminatory effects enfranchisement had on the registration entitlements of persons who had been named in enfranchisement orders, generally allowing them to register under a new s. 6(1)(d) of the *Indian Act*.[14] However, it did not extend equal consideration to the children born to such persons after the date of enfranchisement. As a result, two siblings with identical genealogical connections to Indian ancestry can have different registration entitlements, depending on whether they were born before or after a parent's enfranchisement.

15. Roger Andrews is the son of a father who had Indian status, but who was enfranchised by application before 1985. The 1985 amendments to the *Indian Act* restored his father's status under s. 6(1)(d), and gave Mr. Andrews status under s. 6(2). However, Mr. Andrews remains unable to pass registration entitlements to the daughters he has had with a partner who does not have Indian status.[15] If his father had never been enfranchised, or if Mr. Andrews had been born before the date of the enfranchisement order, he would be able to pass such entitlements.

16. Mr. Andrews filed two human rights complaints, alleging discrimination in the provision of "services" under s. 5 of the *CHRA*. The first complaint, filed on behalf of his daughter, Michelle Andrews, alleged that INAC infringed s. 5 of the *CHRA* by denying an application that

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[12] Appeal Decision, at para. 11 (AR, Vol. 1, Tab 4, p. 154); Andrews Tribunal, at para. 2 (AR, Vol. 1, Tab 2, p. 63).
[13] Appeal Decision, at para. 12 (AR, Vol. 1, Tab 4, p. 155); Andrews Tribunal, at paras. 2-3 and 5 (AR, Vol. 1, Tab 2, pp. 63-66).
[14] Andrews Tribunal, at para. 19 (AR, Vol. 1, Tab 2, p. 69).
[15] Appeal Decision, at paras. 21-25 (AR, Vol. 1, Tab 4, pp. 158-160).

she be registered under the *Indian Act*.[16] The second complaint, filed on his own behalf, alleged that INAC infringed s. 5 of the *CHRA* by registering him in a fashion that left him unable to pass registration entitlements to his daughters.[17]

(iv) The Tribunal Decisions

17. The Matson and Andrews complaints proceeded separately before two different Tribunal members. The Matson Tribunal rendered its decision first, followed by the Andrews Tribunal, which adopted and expanded upon the Matson Decision. In both Decisions, the Tribunal dismissed the complaints on the grounds that they did not relate to the provision of "services."[18] In each case, the Tribunal considered itself bound by the Federal Court of Appeal's 2012 decision in *Public Service Alliance of Canada v. Canada Revenue Agency* ("*Murphy*").[19] In that brief oral ruling, the Court of Appeal held that a "direct attack" on the wording of federal legislation "...falls outside the scope of the *CHRA* since it is aimed at the legislation *per se*, and nothing else," and that "the *CHRA* does not provide for the filing of a complaint directed against an Act of Parliament."[20] This Court denied leave to appeal the *Murphy* decision.

18. In *Murphy*, the Court of Appeal had overturned a previous line of federal case law, originating in its 1989 decision in *Canada (Attorney General) v. Druken* ("*Druken*"), that had (i) accepted that complaints about denials of employment insurance benefits, flowing from legislated eligibility criteria, related to the provision of "services," and (ii) directed officials to cease and desist from applying discriminatory aspects of the legislation.[21]

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[16] Complaint of Roger Andrews on behalf of Michelle Andrews (AR, Vol. 2, Tab 6, pp. 1-2).
[17] Complaint of Roger Andrews (AR, Vol. 2, Tab 10, pp. 15-16).
[18] Matson Tribunal, at paras. 149-151 (AR, Vol. 1, Tab 1, pp. 55-56); and Andrews Tribunal, at para. 111 (AR, Vol. 1, Tab 4, p. 104).
[19] Matson Tribunal, at paras. 148-149 (AR, Vol. 1, Tab 1, pp. 55-56); and Andrews Tribunal, at paras. 54, 77-78, 80 and 85 (AR, Vol. 1, Tab 1, pp. 81, 90-91 and 94); both citing *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7 ("*Murphy*") (leave to appeal refused [2012] S.C.C.A. No. 102).
[20] *Murphy*, *supra* at paras. 5-6.
[21] *Murphy*, *supra* at para. 7. See *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24 (C.A.) at paras. 3 and 13-15 (C.A.) ("*Druken*") (leave to appeal refused (1989), 55 D.L.R. (4th) vii (S.C.C.)). The *Druken* decision had been followed in: *Gonzalez v. Canada (Employment and Immigration Commission)*, [1997] 3 F.C. 646 at paras. 36-38 and 46 (T.D.) ("*Gonzalez*") [Book

19. In both its Decisions, the Tribunal was satisfied that *Murphy* had properly overturned the *Druken* line of case law, essentially based on the following logic:

- While INAC officials may provide "services" when they offer information or exercise discretion about the processing of applications for registration, the Matson and Andrews complainants did not make allegations relating to such activities. Instead, they effectively took issue with Parliament's *sui generis* lawmaking activity in enacting the unambiguous registration criteria in s. 6 of the *Indian Act*.[22]

- Parliament does not provide "services" within the meaning of s. 5 of the *CHRA* when it enacts legislation setting mandatory eligibility criteria for government benefits.[23]

- Supreme Court of Canada case law confirms that human rights laws, including the *CHRA*, have primacy, and can be used to render inconsistent legislation inoperable.[24]

- Although the *CHRA* has primacy over other laws, this does not mean that the act of applying discriminatory legislation is a "service" that can be challenged under s. 5 of the *CHRA*. Instead, the principle of human rights law primacy only has practical effect when a conflict between the *CHRA* and another law arises indirectly, as a side issue in a case that properly alleges some other kind of "discriminatory practice."[25]

- Where claimants argue they have been excluded from receiving government benefits because of discriminatory but legislated eligibility criteria, there is no statutory human rights recourse, and a *Charter* challenge must instead be brought before the courts.[26] Among other things, this will enable the government to make use of the "reasonable justification" defence under s. 1 of the *Charter*.

(v) The Judicial Review Decision

20. The Commission filed applications for judicial review of both decisions. The Federal Court heard the two applications together, and issued a single decision dismissing both with costs. It reviewed the Tribunal Decisions for reasonableness, acknowledged Federal Court of

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of Authorities, Tab 5]; and *McAllister-Windsor v. Canada (Human Resources Development)*, [2001] C.H.R.D. No. 4 at paras. 30, 71 and 84 (Trib.) ("*McAllister-Windsor*").

[22] Matson Tribunal, at paras. 56-59 (AR, Vol. 1, Tab 1, pp. 19-21); Andrews Tribunal, at paras. 52 and 56-57 (AR, Vol. 1, Tab 2, pp. 80 and 82-83).

[23] Matson Tribunal, at para. 54 (AR, Vol. 1, Tab 1, p. 19); Andrews Tribunal, at paras. 56-57 (AR, Vol. 1, Tab 2, pp. 82-83).

[24] Matson Tribunal, at para. 143 (AR, Vol. 1, Tab 1, p. 54); Andrews Tribunal, at para. 77 (AR, Vol. 1, Tab 2, p. 90).

[25] Matson Tribunal, at paras. 92-94, 114 and 143-145 (AR, Vol. 1, Tab 1, pp. 33-34, 42 and 52); Andrews Tribunal, at paras. 86-92 (AR, Vol. 1, Tab 2, pp. 94-96).

[26] Matson Tribunal, at paras. 150 and 152-154 (AR, Vol. 1, Tab 1, pp. 56-59); Andrews Tribunal, at paras. 85 and 109-110 (AR, Vol. 1, Tab 2, pp. 91-93 and 103-104).

Appeal case law saying that "sometimes the range of reasonableness may be very narrow," and found that the results reached were within the range of acceptable outcomes. [27]

(vi) The Appeal Decision

21. The Commission filed an appeal. In its single ruling, the Federal Court of Appeal said the application of the *Dunsmuir* standard of review principles was "not straightforward," and that the governing case law provided a "lack of guidance."[28] It acknowledged the presumption of reasonableness where tribunals interpret their enabling legislation, and held that the presumption is not rebutted by the mere fact that human rights tribunals decide important issues with quasi-constitutional dimensions. However, it appeared to accept that the presumption would be rebutted, and that correctness would apply, for the review of questions over which the Tribunal shares concurrent jurisdiction with other administrative decision-makers (such as labour arbitrators).[29] Regardless, the Court of Appeal found that the Matson and Andrews complaints did not raise such issues, based on its assertion that no other administrative tribunals could ever be called upon to interpret the term "services" as used in s. 5 of the *CHRA*.[30] As a result, it held that the Decisions were to be reviewed on a standard of reasonableness.

22. The Court of Appeal went on to uphold the Decisions as reasonable. It accepted the Tribunal's characterization of the complaints as challenges to the act of legislating, agreed that legislatures do not provide "services" when passing laws, and confirmed that the principle of human rights law primacy applies only where conflicts between the *CHRA* and other legislation arise indirectly, in cases otherwise addressing a legitimate discriminatory practice.[31] The Court of Appeal further considered the Tribunal's approach to have an unassailable policy rationale. It saw no reason for the Tribunal to hear such challenges, when complainants could simply seek relief from the court under the *Charter*. It was not convinced that the Tribunal was a more accessible forum than the courts for resolving such matters.[32]

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[27] *Canadian Human Rights Commission v. Attorney General of Canada*, 2015 FC 398 at paras. 4 and 32-34 ("Judicial Review Decision") (AR, Vol. 1, Tab 3, pp. 109 and 116-117).
[28] Appeal Decision, at paras. 60 and 78 (AR, Vol. 1, Tab 4, pp. 173 and 180).
[29] Appeal Decision, at paras. 81-86 (AR, Vol. 1, Tab 4, pp. 181-183).
[30] Appeal Decision, at paras. 87-88 (AR, Vol. 1, Tab 4, pp. 183-184).
[31] Appeal Decision, at paras. 34, 90, 92-96 and 98-99 (AR, Vol. 1, Tab 4, pp. 163 and 184-187).
[32] Appeal Decision, at para. 103 (AR, Vol. 1, Tab 4, pp. 188-189).

PART II – QUESTIONS IN ISSUE

23. This case raises the following questions:

a. What standard of review is to be applied when a human rights tribunal (i) articulates the legal test to be used in deciding whether something is a "service" within the meaning of its enabling legislation, and (ii) applies that test to the facts before it?

b. How is the term "services" to be interpreted, in the context of statutory human rights protections against discrimination in the provision of "services customarily available to the general public"? Do human rights statutes apply where a complainant seeks to access benefits, but is denied because of legislated eligibility criteria?

PART III – STATEMENT OF ARGUMENT

A.) Standard of Review

(i) Existing jurisprudence is not clear on the standard of review

24. In its Decisions, the Tribunal (i) set out a legal test for analyzing whether a complaint relates to "the provision of services customarily available to the general public," within the meaning of s. 5 of the *CHRA*, then (ii) applied it to the Matson and Andrews complaints. The existing case law is not clear on what standard of review is to be applied in such circumstances.

25. Before *Dunsmuir*, two decisions in this Court applied the correctness standard to decisions from human rights tribunals about whether complaints related to "services" within the meaning of applicable human rights laws.[33] As recently as 2008, the Federal Court of Appeal followed this same approach, applying correctness review to a Tribunal decision that turned on that same question.[34] However, the case law with respect to the review of Tribunal decisions began to change in the wake of *Dunsmuir*. For example, although this Court held in 2010 that some decisions of human rights tribunals might be reviewed for correctness, it applied reasonableness to a Tribunal decision about the scope of its remedial powers.[35] Other federal

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[33] *University of British Columbia v. Berg*, [1993] 2 SCR 353 at pp. 368-69 ("*Berg*"); and *Gould v. Yukon Order of Pioneers*, [1996] 1 SCR 571 at paras. 3-4 and 48 ("*Gould*").
[34] *Watkin v. Canada (Attorney General)*, 2008 FCA 170 at para. 23 ("*Watkin*").
[35] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paras. 23 and 27 ("*Mowat*").

cases around this time also started to apply the reasonableness standard to Tribunal decisions regarding the interpretation and application of the "services" provision in s. 5 of the *CHRA*.[36]

26. In the decision below, the Federal Court of Appeal reviewed various authorities, including recent decisions where it had applied correctness to the Tribunal's interpretation of the test for *prima facie* discrimination in the employment context.[37] It indicated that (i) correctness will generally apply to the decisions of human rights tribunals on questions of law over which they share concurrent jurisdiction (for example, with labour arbitrators), but (ii) the presumption of reasonableness applied to the Tribunal's interpretation of s. 5 of the *CHRA*, because no other administrative decision-makers will ever be called upon to interpret that term.[38]

27. With respect, this rationale for applying reasonableness is based on a flawed premise. This Court has made clear that administrative decision-makers with the power to decide questions of law can apply human rights legislation in carrying out their mandates.[39] Contrary to what the Federal Court of Appeal asserts, there are federal decision-makers other than the Tribunal that could be asked to interpret the term "services" as it appears in s. 5 of the *CHRA*. For example, the claimant in *Canada Employment Insurance Commission v. M.W.* (2014) cited the *CHRA* in arguing that certain provisions in the *Employment Insurance Regulations* should not be applied, because they had an adverse impact on persons with disabilities. The federal Social Security Tribunal rejected the argument on its merits, applying *Murphy*, and the Tribunal decisions in *Matson* and *Andrews*, in concluding that the matter did not relate to the provision of "services" within the meaning of s. 5.[40] While this matter happened to relate to employment insurance legislation, similar issues could presumably arise before the Social Security Tribunal in the context of other legislated benefits programs over which it has review authority, including Old Age Security, and the Canada Pension Plan.

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[36] See, for example: *Murphy*, *supra* at para. 2; *Canada (Attorney General) v. Canadian Human Rights Commission et al.*, 2013 FCA 75 at paras. 10-15 ("*Caring Society/AFN*"); *Canada (Attorney General) v. Davis*, 2013 FC 40 at paras. 18-23; and *Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555 at para. 26.

[37] *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, at paras. 44-52 ("*Johnstone*"); and *Canadian National Railway Company v. Seeley*, 2014 FCA 111 at paras. 35-36 ("*Seeley*").

[38] Appeal Decision, at paras. 84-88 (AR, Vol. 1, Tab 4, pp. 182-184).

[39] *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 at paras. 14 and 24-26 ("*Tranchemontagne (SCC)*").

[40] *Canada Employment Insurance Commission v. M.W.*, 2014 SSTAD 371, at para. 63.

28. But for its emphasis on exclusivity of jurisdiction over s. 5 of the CHRA, it seems the Federal Court of Appeal would have reviewed the Tribunal Decisions for correctness. It is not immediately obvious how this is to be reconciled with the other post-*Dunsmuir* federal cases that took a different approach. In the circumstances, it cannot be said that the standard of review in this area is well-settled. Additional matters must therefore be considered.

(ii) Prevailing trends suggest a standard of correctness

29. This Court recently stated that it will generally approach decisions of tribunals under human rights statutes with considerable deference, as it is for the tribunals to evaluate evidence, find facts, draw reasonable inferences, and interpret human rights statutes in the cases before them, guided by applicable jurisprudence.[41] Because the Tribunal here was interpreting and applying the enabling *CHRA*, the presumption of reasonableness review applies. However, it remains to be asked whether a contextual analysis reveals that Parliament intended otherwise, having regard to the particular question that was before the Tribunal.[42]

30. On one hand, several factors point toward curial deference to the Tribunal's findings. The *CHRA* does not provide a statutory right of appeal, and it grants the Tribunal the power to decide all necessary questions of law[43], suggesting that Parliament intended such matters be left to the Tribunal for decision. In addition, the *CHRA* sets out minimum qualifications for Tribunal members, requiring they have "experience, expertise and interest in, and sensitivity to, human rights" – characteristics that will overlay the institutional expertise the Tribunal possesses by virtue of its habitual practice of adjudicating human rights disputes.[44]

31. On the other hand, some factors appear to point towards a standard of correctness. First, the *CHRA* does not contain a privative clause. Second, as described above, the Tribunal does not have exclusive primary jurisdiction over the interpretation of s. 5, but instead shares such jurisdiction with other federal tribunals empowered to decide questions of law in carrying out their mandates. Third, this Court has held that human rights statutes should generally be

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[41] *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 20 ("*Elk Valley Coal*").
[42] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 36, [2015] 2 S.C.R. 3 at para. 46 ("*Saguenay*").
[43] *CHRA*, s. 50(2).
[44] *CHRA*, s. 48.1(2).

interpreted consistently across jurisdictions, unless their wording expressly requires otherwise.[45] To achieve this goal, it would be necessary for this Court to be able to provide the necessary guidance through correctness review. Fourth, the Tribunal's decision forces claimants out of the administrative arena and into the courts, based in part on its analysis of constitutional law principles regarding the defences that should be available in cases challenging the operability of legislation.[46] This arguably implicates at least two categories of decisions identified in *Dunsmuir* as warranting correctness review – those dealing with constitutional law, and the drawing of jurisdictional boundaries between decision-makers.[47]

32. It is also appropriate to note a number of decisions that have suggested correctness for decisions that set out the foundational legal tests to be applied under human rights statutes, on the basis that they are extricable questions of law that (i) are of central importance to the legal system as a whole, outside the superior expertise of the tribunals, and (ii) must therefore be interpreted consistently and with uniformity. For example, when discussing the test for *prima facie* discrimination in *Bombardier*, this Court stated that, "We wish to be clear that the application of a given legal test must be based on the same elements and the same degree of proof in every case. This is necessary in order to maintain the uniformity, integrity and predictability of the law" (emphasis added).[48] Further, in a post-*Dunsmuir* case that turned on the elements of the test for a *bona fide* pension plan under a human rights statute, both the majority and minority opinions of this Court proceeded to undertake their own analyses, without mentioning deference or standard of review principles – effectively substituting their own views under an implicit correctness analysis.[49]

33. The Federal and Alberta Courts of Appeal have reached comparable conclusions, applying correctness to decisions they saw as having modified the legal tests for *prima facie* discrimination on the basis of family status (childcare obligations) and disability (substance use

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[45] This notion is discussed in more detail starting at para. 53 of this Factum.
[46] The Tribunal's analysis of s. 1 of the *Charter* is discussed starting at para. 94 of this Factum.
[47] *Mowat*, *supra* at para. 18.
[48] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789 at para. 69 ("*Bombardier*").
[49] *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604 at paras. 3, 6-11 and 41 (per Abella J., for the majority) and paras. 44-48 and 90 (per McLachlin C.J., for the minority) ("*NB HRC v. Potash Corp*.").

disorders), respectively.[50] Although this Court later substituted the standard of reasonableness in the Alberta case, it did so based on its view that the decision below had not turned on questions of law, but rather on the application of well-settled legal principles to the particular facts.[51] This was considered to be within the purview of the tribunal, and attracted deference.

34. Taking all this into account, the standard of correctness should be applied in this case. At issue was whether INAC provides "services" for purposes of s. 5 of the *CHRA* when registering people as "Indians" under the *Indian Act*. As will be discussed further below, the test for whether something relates to the "provision of services" has generally been well-settled, requiring that a complaint relate to (i) something of benefit, (ii) held out and offered to the public, (iii) in the context of a public relationship.[52] However, the Tribunal Decisions effectively went on to add a new element to the test – namely, a requirement that eligibility for the benefit be determined by means other than legislation. In essence, the Tribunal asked itself whether challenges like those raised in the Matson and Andrews complaints must proceed under the *Charter*, then found that they must – thereby carving out a new exception that does not appear on the face of the *CHRA*. It is appropriate to require that the Tribunal be correct if it is going to modify the elements of a foundational legal test in this way.[53]

35. While the Tribunal's application of the test to the facts would remain a question of mixed fact and law, presumptively reviewable for reasonableness, requiring the Tribunal to correctly identify the elements of the test will help achieve the goals of predictability and consistency. This would be of benefit within the federal sphere (as between the Tribunal and other tribunals with authority to consider the *CHRA*), and across jurisdictions (as between federal tribunals, and their provincial and territorial equivalents, applying analogous statutory provisions).

(iii) Standard of review will not be determinative

36. In any event, the standard of review will not be determinative in this case, as the appeal should be granted, even if the more deferential standard of reasonableness is to be applied. This

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[50] *Johnstone*, *supra* at paras. 44-52, and *Seeley*, *supra* at paras. 35-36; and *Stewart v. Elk Valley Coal Corporation*, 2015 ABCA 225 at paras. 47-50 and 57-58 (per Watson and Picard JJ.A.) and 94 (per O'Ferrall J.A., dissenting).
[51] *Elk Valley Coal*, *supra* at paras. 21-22.
[52] *Watkin*, *supra* at para. 31. This legal test is discussed in more detail in para. 62, below.
[53] *Saguenay*, *supra* at paras. 45-46 and 51.

Court has emphasized that reasonableness review does not equate to subservience or reverence.[54] Indeed, the Constitution gives an important role to the courts in overseeing the proper bounds of administrative action.[55] For this reason, deference ends where unreasonableness begins.[56]

37. What is reasonable in any given case will take its colour from the surrounding context, widening or narrowing depending on the nature of the question, and other circumstances.[57] For example, as this Court has held, "(w)here the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable."[58] This was the result reached in *Mowat*, where this Court found the only reasonable conclusion open to the Tribunal was that the *CHRA* did not allow successful complainants to seek reimbursement for legal expenses.[59] The Federal Court of Appeal reached a similar conclusion in the *Caring Society/AFN* case, stating that where a decision primarily involves statutory interpretation and equality law, the Tribunal will have a narrow margin, constrained by the text, context and purpose of the statute, and by judicial pronouncements.[60]

38. All these considerations apply in the present case. In reformulating the test for whether complaints relate to the provision of services, the range of reasonableness is necessarily circumscribed by the wording of the *CHRA*, the context and purpose of the quasi-constitutional statute, principles of statutory interpretation regarding human rights laws, and past judicial pronouncements. As explained in the balance of this Factum, a careful review of such matters properly leads to only one reasonable conclusion – namely, that the Matson and Andrews

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[54] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 48 ("*Dunsmuir*").
[55] *Dunsmuir*, *supra* at para. 31.
[56] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at para. 117 (reasons of McLachlin CJ. and Rothstein and Moldaver JJ., dissenting, but not on this point) ("*CEPU v. Irving Pulp & Paper*").
[57] *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at para. 18 ("*Catalyst Paper*"). See also: *CEPU v. Irving Pulp & Paper*, *supra* at para. 74 (per McLachlin CJ. and Rothstein and Moldaver JJ.); and *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para. 22 (per Abella J.).
[58] *McLean v. British Columbia (Securities Commisssion)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 38. See also: *Wilson*, *supra* at para. 35 (per Abella J.); and *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 SCR 80 at para. 57 (per Coté J. in dissent).
[59] *Mowat*, *supra* at paras. 27, 32, 34, 42 and 64.
[60] *Caring Society/AFN*, *supra* at paras. 10 and 14-18.

complaints related to the "provision of services" within the meaning of s. 5 of the *CHRA*, and should have continued on for further analysis on that basis.

B.) Key Interpretive Principles that Provide Necessary Context

(i) The *CHRA* is to be interpreted in a broad and purposive manner

39. Human rights legislation has a fundamental and quasi-constitutional status, and as such should be interpreted in a broad, liberal and purposive manner that best advances its broad underlying policy considerations. Rules of strict grammatical construction are not necessarily applicable, since their application might result in ignoring the dominant purpose of the human rights protections. [61]

40. Section 2 of the *CHRA* clarifies that it is intended to "give effect, within the purview of matters coming within the legislative authority of Parliament" (emphasis added), to the principle that all individuals should have equal opportunities without being hindered by discriminatory practices. This Court has paraphrased the *CHRA*'s broad statement of purpose by stating that the aim of the statute is "…to identify and eliminate discrimination."[62] It has noted that the *CHRA* and other human rights laws are not aimed at "determining fault or punishing conduct", but rather at remedying the adverse impacts of discrimination, through the provision of effective remedies that are consistent with the quasi-constitutional nature of the rights protected.[63] Stated succinctly, "The purpose of the Act is not to punish wrongdoing but to prevent discrimination."[64]

41. This Court has emphasized that the "powerful language" used in the *CHRA*'s statement of purpose must be kept in mind, and that tribunals and courts should not search for ways to minimize the "rights of vital importance" protected therein, or to enfeeble their proper impact.[65] Instead, decision-makers are to "...breathe life, and generously so, into the particular statutory

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[61] *C.N. v. Canada (Human Rights Commission)*, [1987] 1 SCR 1114 at pp. 1134-38 ("*Action Travail*"); *Tranchemontagne (SCC)*, *supra* at paras. 33-34 (per Bastarache J., for the majority); *First Nation Child and Family Caring Society v. Canada (Attorney General)*, 2012 FC 445 at paras. 243-250 ("*Caring Society/AFN (Fed. Ct.)*").
[62] *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at para. 13 ("*Robichaud*").
[63] *Robichaud*, *supra* at para 15.
[64] *Action Travail*, *supra* at p. 1134.
[65] *Action Travail*, *supra* at p. 1134.

provisions...".[66] As a result, rights-granting provisions are to be interpreted broadly, while exceptions and defences are to be narrowly construed.[67] In addition, human rights laws have generally been described as "the law of the people", and hailed as "often the final refuge of the disadvantaged and the disenfranchised", and "the last protection of the most vulnerable members of society." Against this backdrop, this Court has cautioned that erecting barriers to access can render this refuge meaningless, and that the "laudatory goals of [a human rights statute] are not well served by reading in limitations to its application."[68]

(ii) Human rights laws have primacy and render inconsistent laws inoperable

(a) Primacy and inoperability

42. One consequence of the quasi-constitutional status of human rights laws is that they are presumed to have primacy over inconsistent legislation, unless the legislature says otherwise using express and unequivocal language. This principle finds its roots in the 1982 decision of Lamer J. (as he then was) in *Insurance Corporation of British Columbia v. Heerspink* ("*Heerspink*"), which stated, "...short of that legislature speaking to the contrary in express and unequivocal language in the Code [B.C. *Human Rights Code*] or some other enactment, it is intended that the Code supersede all other laws when conflict arises."[69] (emphasis added)

43. This Court subsequently endorsed this statement in its unanimous 1985 decision in *Winnipeg School Division v. Craton* ("*Craton*"), and also approved language from the Manitoba Court of Appeal stating that, "If there is a conflict between this fundamental law [the Manitoba *Human Rights Act*] and other specific legislation, unless an exception is created, the human rights legislation must govern."[70] It has since been clear that 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.

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[66] *Caring Society/AFN (Fed. Ct.)*, *supra* at para. 246 (citing para. 7 of *Gould*, *supra*).
[67] *Gwinner v. Alberta (Human Resources and Employment)*, 2002 ABQB 685 at paras. 78-79 ("*Gwinner*") (aff'd 2004 ABCA 210, leave to appeal declined [2004] S.C.C.A. No. 342).
[68] *Tranchemontagne (SCC)*, *supra* at paras. 14, 33 and 49.
[69] *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145 at pp. 157-58 (per Lamer J., as he then was) ("*Heerspink*").
[70] *Winnipeg School Division No. 1 v. Craton*, [1985] 2 SCR 150 at para. 8 ("*Craton*").

44. The practical consequence is that human rights laws render discriminatory legislation inoperable. The Court explained this in *Tranchemontagne v. Ontario (Director, Disability Support Program)* ("*Tranchemontagne (SCC)*"). In that case, two claimants applied to receive provincial disability support benefits. The officials responsible for administering the scheme denied the applications, based on legislated criteria that barred persons from receiving such benefits as a consequence of alcoholism. The claimants filed statutory appeals to the Ontario Social Benefits Tribunal (the "SBT"), arguing that in applying the legislation, the administering officials had infringed their rights to equal treatment with respect to "services", contrary to s. 1 of the Ontario *Human Rights Code*. The question before this Court was whether the claimant's allegations of discrimination should be heard by the SBT (as part of a statutory appeal from the denial of benefits), or by the Human Rights Tribunal of Ontario (the "HRTO") (by way of a separate human rights complaint alleging an infringement of s. 1 of the *Code*).

45. Nothing in this Court's decision questioned the underlying premise of the dispute, which was that the administering officials were providing "services" within the meaning of the *Code* when they applied the impugned legislation. Further, the majority and dissenting opinions both accepted that the Ontario *Code* could be used to render inconsistent legislation inoperable. However, they split on the question of whether the SBT had jurisdiction to consider the *Code*. At the core of the dispute was a provision in the SBT's governing statute that expressly barred the SBT from considering the constitutional validity of a statutory provision.

46. Writing for the majority, Bastarache J. found that the statutory bar did not prevent the SBT from hearing the claimants' arguments concerning the *Code*, or making an order that rendered discriminatory aspects of the legislation inoperable. He noted that the primacy of human rights legislation has both similarities and differences with the primacy of the *Constitution Act, 1982*. In terms of similarities, both function to eliminate the effects of inconsistent legislation, such that for purposes of the particular application, it is as if the legislation was never enacted. In terms of differences, while a provision declared invalid under s. 52 of the *Constitution Act, 1982* is deemed never to have existed in the first place, a finding of inapplicability under human rights legislation simply means that the legislature has passed another law that takes priority. As a result, the difference between the primacy of human rights

law, and that of the *Constitution Act, 1982*, was said to be the difference between following legislative intent, and overturning legislative intent.[71]

47. Because *Tranchemontagne* was an appeal from a preliminary ruling on jurisdiction, the Court did not pronounce on the merits, and instead sent the matter back to the SBT for determination. As will be discussed further below, this resulted in (i) an SBT decision finding that applying the legislation amounted to discrimination in the provision of "services", and that the impugned statutory provisions were therefore inoperable, and (ii) an Ontario Court of Appeal decision, upholding those conclusions.[72] Subsequent cases at the SBT have continued to hold that, "Government benefits are services within the meaning of s. 1 of the *Code*."[73]

48. *Tranchemontagne (SCC)* thus described the notion of inoperability, but did not itself apply the principle. However, the Supreme Court had applied the notion two years earlier, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal* ("*Larocque*"). At issue were the appropriate remedies where an employer had screened out a candidate for failing to meet hearing standards, set in a municipal by-law, that contravened the Quebec *Charter of Human Rights and Freedoms*. Writing for the Court, LeBel J. held that damages were not available, based on public law principles concerning the propriety of such awards in cases involving the enactment or application of a law.[74] However, stressing the need for a creative approach that would prospectively correct the discrimination, LeBel J. found it appropriate to declare the inconsistent law inoperable, such that the respondent employer would assess the complainant in future without regard for the offending hearing standards.[75]

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[71] *Tranchemontagne (SCC)*, *supra* at paras. 35-36 (per Bastarache J.).
[72] *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 at paras. 4-6 and 13 ("*Tranchemontagne (ONCA)*").
[73] *1112-11224 (Re)*, 2013 ONSBT 6001 at para. 15.
[74] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789 ("*Larocque*") at paras. 18-19 and 23.
[75] *Larocque*, *supra* at paras. 25-27.

(b) An express primacy clause is not required

49. The primacy of human rights laws is presumed from the nature of their subject matter, and does not depend on the existence of an express primacy clause.[76] This is evident from the fact that when this Court first declared the presumed primacy of human rights laws – in *Heerspink* and *Craton* – it did so in the context of human rights statutes that did not contain primacy provisions at the material times. It is also evident from the fact that the *CHRA* contains no express primacy provision, but has still been recognized by this Court as a quasi-constitutional enactment that prevails over other legislation, in the absence of a clear legislative statement to the contrary.[77]

50. Indeed, as will be discused later in more detail, the decisions below in this matter – the Tribunal, Federal Court and Federal Court of Appeal – have all accepted that the *CHRA* does have primacy, and can prevail over inconsistent legislation, where the underlying complaint properly relates to a discriminatory practice under the *CHRA*.[78] They have all done so, despite the absence of an express primacy clause.

51. Although a majority decision of this Court has yet to use the *CHRA* to render other legislation inoperable, some opinions have expressed views consistent with the approach outlined above. In dissenting reasons in 1985, Dickson C.J. and Lamer J. (as he then was) said the Tribunal had been correct in finding that federal legislation is inoperative to the extent it conflicts with the *CHRA*.[79] Further, in a 1996 dissent that now reflects the current state of the law, McLachlin J. (as she then was) and L'Heureux-Dubé J. found the Commission and the Tribunal have the power to consider the *Charter*. In reaching this conclusion, they approvingly drew an analogy to *Druken*, which had recognized the presumed primacy of the *CHRA*.[80]

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[76] *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2008 NSCA 21 at paras. 63-64 and 66-72, leave refused [2008] S.C.C.A. No. 245.
[77] *Action Travail*, *supra* at pp. 1135-1136 (citing *Heerspink*, *supra*, and *Craton*, *supra*); and *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at paras. 26 and 81.
[78] Matson Tribunal at para. 143 (AR, Vol. 1, Tab 1, p. 54); Andrews Tribunal at para. 77 (AR, Vol. 1, Tab 2, p. 90); Judicial Review Decision at para. 88 (AR, Vol. 1, Tab 3, p. 133); Appeal Decision at paras. 34 and 98-99 (AR, Vol. 1, Tab 4, pp. 163 and 186-187).
[79] *Bhinder v. Canadian National Railway Co.*, [1985] 2 SCR 561 at paras. 18-20.
[80] *Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854 at paras. 98-101.

52. The applicable jurisprudence thus recognizes that human rights legislation, including the *CHRA*, is presumed to have primacy, and to render inconsistent legislation inoperable, even in the absence of an express primacy clause. Indeed, in its 2000 report, the Canadian Human Rights Act Review Panel, chaired by the Honourable Gérard La Forest, summarized the applicable principles by saying that, "The effect of a finding of primacy is that it allows the tribunal to deal with an allegation of discrimination in a complaint about a statutory service...", and, "In our view the primacy provision does not have to be expressly added to the Act. It appears to be accepted without question by the courts and to be working well in practice."[81]

(iii) Human rights laws are to be interpreted consistently across jurisdictions

53. Unless the legislative wording expressly requires otherwise, human rights statutes from across Canada are to be given consistent interpretations, due to their general similarities, quasi-constitutional status, and shared objectives of preventing discrimination.[82] This requires that the Tribunal pay close attention to the case law in other jurisdictions concerning the proper interpretation and application of human rights protections, and follow suit, unless the wording of the *CHRA* compels a different result.

54. Although there are slight variations in wording, every human rights statute across Canada has a provision that prohibits discrimination with respect to the provision of "services".[83] Given the existence of these analogous provisions, it is not surprising that decision-makers from across Canada have previously considered whether government officials who apply the wording of a statute can be said to provide "services" for human rights law purposes.

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[81] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Dept. of Justice, 2000) ("*CHRA Review Panel*"), at p. 23 (AR, Vol. 3, Tab 28, p. 112).

[82] *Berg*, *supra* at p. 373; *NB HRC v. Potash Corp.*, *supra* at para. 68 (per McLachlin CJ., departing from the majority but not on these grounds); and *Bombardier*, *supra* at para. 31.

[83] *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 8(1); *Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 4; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 12; *Human Rights Code*, C.C.S.M. c. H175, s. 13(1); *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1; *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 12; *Human Rights Act*, R.S.N.B. 2011, c. 171, s. 6(1); *Human Rights Act*, R.S.N.S., c. 214, s. 5(1)(a); *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1, s. 11; *Human Rights Act*, R.S.P.E.I. 1989, c. H-12, s. 2; *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 11 ; *Human Rights Act*, R.S.Y. 2002, c. 116, s. 9(a); and *Human Rights Act*, S.Nu. 2003, c. 12, s. 12.

55. In this regard, numerous appellate and other decisions have followed this Court's guidance in cases like *Heerspink*, *Craton*, *Larocque* and *Tranchemontagne*, and found 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, and to thereby remedy its discriminatory impact. For example, the Courts of Appeal of Ontario[84], Alberta[85], Saskatchewan[86] and Newfoundland[87] have all made such findings under their respective human rights laws, as have tribunals in British Columbia[88] and New Brunswick.[89]

56. Indeed, human rights decision-makers across the country have accepted that protections against discrimination with respect to "services" applied in cases involving:

- legislated rules governing receipt of income assistance benefits;[90]
- legislated rules governing receipt of disability support benefits;[91]
- legislated rules governing receipt of survivor pension benefits;[92]
- legislated rules governing receipt of workers compensation benefits;[93]
- mandatory legislated priorities in the wind-up of a pension plan;[94]

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[84] *Tranchemontagne (ONCA)*, *supra* at paras. 4, 7 and 12-13.
[85] *Gwinner*, *supra* at paras.76-77, 90, 165, 249-251 and 255-256.
[86] *Saskatchewan (Human Rights Commission) v. Saskatchewan (Department of Social Services)* (1988) 52 DLR (4th) 253 at pp. 22-25 and 27-30 (Sask. C.A.) ("*Saskatchewan (Social Services)*"); and *Saskatchewan (Workers' Compensation Board) v. Saskatchewan (Human Rights Commission)* (1999) 174 DLR (4th) 391 at paras. 3-4 and 20-22 (Sask. C.A.) ("*Saskatchewan (Workers Compensation)*").
[87] *Newfoundland (Human Rights Commission) v. Newfoundland (Workplace Health, Safety and Compensation Commission)*, 2005 NLCA 61 at paras. 35 and 39 (per Cameron and Mercer JJ.A) (but see Rowe J.A. (as he then was) dissenting, at paras. 53-59) ("*Nfld HRC*").
[88] *Neubauer v. British Columbia (Ministry of Human Resources)*, 2005 BCHRT 239 at paras. 33-39 and 61 ("*Neubauer*").
[89] *A.A. v. New Brunswick (Department of Family and Community Services)*, [2004] N.B.H.R.B.I.D. No. 4 at paras. 28, 49 and 58 ("*A.A.*") [Book of Authorities, Tab 2].
[90] *Hendershott v. Ontario (Minister of Community and Social Services)*, 2011 HRTO 482 at paras. 10, 21, 69, 128 and Order; *Saskatchewan (Social Services)*, *supra*.
[91] *Tranchemontagne (ONCA)*, *supra*; and *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 at paras. 61, 68, 109 and 172.
[92] *Gwinner*, *supra*.
[93] *Seberras v. Workplace Safety and Insurance Board*, 2012 HRTO 115 at paras. 5 and 15-18; *Nfld (HRC)*, *supra*; *Saskatchewan (Workers Compensation)*, *supra*.

- legislated criteria for the holding of coroner's inquests;[95]
- legislated criteria governing birth registration and spousal adoption, in the context of a complaint from same-sex parents;[96]
- legislated rules governing the modification of sex designations on birth certificates, in the context of a complaint based on gender identity;[97]
- a municipal by-law requiring that city council meetings be opened with a particular prayer;[98] and
- legislation prescribing eligibility criteria for serving on an income assistance appeal tribunal.[99]

57. In making these determinations, decision-makers properly focused on the impact of the alleged discrimination, rather than its source. It is acknowledged that a number of the provincial authorities expressly relied on *Druken*[100] – which the Federal Court of Appeal decision in *Murphy* has now disapproved of, as previously mentioned. Some provincial decision-makers have also found or suggested that human rights laws are powerless to assist in cases aimed at legislative reform.[101] However, as a general observation, these latter decisions either predate, or fail to address, key authorities such as *Tranchemontagne (SCC)* or *Larocque*. On other occasions, they note that human rights laws do not render inconsistent legislation invalid, and cannot be used to "read in" legislative language, but prematurely end their analysis at that point, without going on to address the human rights primacy and the related notion of inoperability.

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[94] *Blair v. New Brunswick (Department of Justice and Consumer Affairs, Superintendent of Pensions)*, [2008] N.B.H.R.B.I.D. No. 5 at paras. 15 and 21-22 [Book of Authorities, Tab 3].
[95] *Ontario (Attorney General) v. Ontario (Human Rights Commission)* (2007), 88 OR (3d) 455 at paras. 20-22 and 40-42 (Div. Ct.); and *R. v. Peart*, 2017 ONSC 782 at paras. 5-6, 17 (Div. Ct.).
[96] *A.A.*, *supra* [Book of Authorities, Tab 2].
[97] *XY v. Ontario (Minister of Government and Consumer Services)*, 2012 HRTO 726 at paras. 1-2, 14-18, 85-87, 181 and 289-299 ("*XY*").
[98] *Freitag v. Penetanguishene (Town)*, 2013 HRTO 893 at paras. 2-3, 5, 11-13 and 55.
[99] *Neubauer*, *supra*.
[100] See, for example: *Gwinner*, *supra* at paras. 71-72 and 255; *Nfld (HRC)*, *supra* at paras. 22-23; *Neubauer*, *supra* at paras. 24-28; and *A.A.*, *supra* at paras. 46-48 [Book of Authorities, Tab 2].
[101] For two examples, see: *Gale v. Hominick* (1997) 147 D.L.R. (4th) 53 at pp. 7-8 (Man. C.A.) (leave to appeal refused [1997] S.C.C.A. No. 275); and *Commission des droits de la personne et de la jeunesse c. Québec (Procureur général)*, 2006 QCCA 1506 at para. 38 (leave to appeal refused [2007] C.S.C.R. no. 30).

58. Viewed as a whole, the prevailing trend under Canadian human rights laws is to recognize complaints about the denial of government benefits as properly relating to the provision of "services," even if eligibility criteria are written into legislation.

(iv) Shared meaning of English and French versions to be adopted

59. The English and French versions of section 5 of the *CHRA* describe the discriminatory practice differently (see paragraph 11, above). The English version does not refer to the service provider but is focused on the "provision of a service". The French version is more clearly worded and defines the discriminatory practice as whether or not the service provider has discriminated in the provision of services.

60. When the English and French versions of legislation do not say the same thing, a meaning that is shared and that reflects the legislative intent should be adopted.[102]

61. Both linguistic versions of s. 5 are intended to direct that services be provided in a non-discriminatory fashion. However, the French language version brings a focus to identifying the service provider. In cases alleging discrimination arising from legislation, this makes it clearer that the government officials charged with administering the legislation, not Parliament, are the service provider, and that the service is the benefits under the legislation, not the legislation itself. This line of inquiry more closely reflects the shared meaning of both linguistic versions.

C.) Interpreting "Services" in Section 5 of the *CHRA*

(i) The general indicia of a "service" are present

62. Case law in the federal sphere indicates that a "service customarily available to the general public," within the meaning of s. 5 of the *CHRA*, is something of benefit that is held out to the public, in the context of a public relationship.[103] Because government actions are generally taken for the benefit of the public, they usually meet the requirement of being "customarily available to the general public."[104] This is true even if access and eligibility

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[102] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis Canada Inc., 2014) at pp. 118-19 [Book of Authorities, Tab 6].
[103] *Watkin*, *supra* at para. 31.
[104] *Watkin*, *supra* at para. 31.

requirements mean that only a segment of the general public, and not every member, can access the service.[105] As this Court has held, while eligibility criteria are present for most services, they "should not come at the cost of excluding the protection of human rights legislation."[106]

63. All these hallmarks of a "service" are present in this case. As the Tribunal properly held, registration under the *Indian Act* leads to the conferral of tangible and intangible benefits.[107] This point cannot seriously be disputed. The Ontario Court of Appeal recently confirmed the notion, with a concurring opinion stating that registration entails access to significant tangible and intangible benefits (including the right to pass on Indian status to one's children), and a majority opinion describing such benefits as constitutionally guaranteed by s. 35 of the *Constitution Act, 1982*.[108]

64. The only way a person can obtain these important benefits is to submit an application for registration to INAC, and for the Registrar to process the application by applying the wording of the *Indian Act*, and informing the person of the substantive outcome of that process. This process confirms the public nature of the relationship between applicants for registration and INAC. In addition, the benefits associated with registration are held out and offered to the public in the *Indian Act*, and in various government publications.[109]

65. Bearing all this in mind, the Matson and Andrews Complainants applied to INAC, in the context of a public relationship, to receive benefits that were held out and offered to an eligible public. INAC considered the applications and advised that they were not eligible, and could not be registered. In the circumstances, it was open to the Tribunal to find that (i) INAC was a "fournisseur de services", within the meaning of the French language wording of s. 5 of the

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[105] *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 at paras. 8 and 11 (C.A.) [Book of Authorities, Tab 4]; and *Gonzalez*, *supra* at para. 38 [Book of Authorities, Tab 5].
[106] *Berg*, *supra* at p. 384.
[107] Andrews Decision, *supra* at para. 55 (AR, Vol. 1, Tab 2, pp. 81-82).
[108] *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 at para. 70 (per Lauwers and Miller JJ.A.), and para. 41 (per Sharpe J.A.).
[109] For examples, see: INAC, "You Wanted to Know: Federal Programs and Services for Registered Indians" (Ottawa, 1999) (AR, Vol. 3, Tab 27, p. 60); Health Canada, "Your Health Benefits: A Guide for First Nations to Access Non-Insured Health Benefits" (2011) (AR, Vol. 3, Tab 31, p. 160); and INAC, "Post-Secondary Student Support Program (PSSSP) and University and College Entrance Preparation (UCEP) Program, National Program Guidelines" (Feb. 2011) (AR, Vol. 3, Tab 32, p. 204).

CHRA, and (ii) everything relating to the application process – including INAC's consideration of the applications, and their substantive outcomes – related to "the provision of services" within the meaning of the English wording of s. 5 of the *CHRA*.

(ii) The Decisions below erred by narrowly interpreting section 5

66. Although nothing in the wording of s. 5 expressly foreclosed the approach described above, the Tribunal nevertheless held that the substantive outcome of the application process was beyond the scope of s. 5 of the *CHRA*, as eligibility for the benefits was dictated by the *Indian Act*. Its Decisions in this regard were both incorrect and unreasonable, for several reasons.

(a) Failure to take a broad purposive approach

67. The Tribunal's approach fails to follow this Court's direction that the *CHRA*, and particularly rights-granting provisions like s. 5, be given a broad interpretation that best ensures the attainment of the underlying legislative objective – namely, the elimination of discrimination within the sphere of Parliament's legislative authority. Although no express wording compelled the result, the Tribunal chose an interpretation that will leave people in vulnerable circumstances without statutory human rights recourse, in the face of laws that rely on prohibited grounds of discrimination to restrict access to government benefits. This cannot be what Parliament intended when enacting the quasi-constitutional *CHRA*, or what this Court had in mind when warning decision-makers not to weaken human rights laws by reading in limitations.

68. Indeed, this Court has said that "…discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law."[110] It is incorrect and unreasonable to choose a restrictive interpretation that renders the *CHRA* powerless to address the operability of such measures.

(b) Focusing on the source of the eligibility criteria creates needless uncertainty

69. The Tribunal Decisions took a restrictive approach that focused on the source of the eligibility criteria for the benefit – here, legislation – rather than on the adverse impact alleged by the Complainants. The consequence is that services complaints may now be possible where

[110] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at p. 172 (per McIntyre J., dissenting in part but not on this point).

government benefits are made available as a matter of policy or discretion, or pursuant to ambiguous legislation that is open to a non-discriminatory intepretation.[111] However, no complaints will lie where eligibility is instead determined by unambiguous legislation.

70. With respect, this outcome introduces unnecessary complexities into the human rights analysis, and will make it difficult for marginalized complainants in vulnerable circumstances to reliably determine where or how to challenge denials of government benefits. This is fundamentally contrary to the repeated direction that human rights protections be given a broad and accessible interpretation that focuses on the adverse impacts experienced by claimants.

(c) Failure to interpret section 5 in the context of the CHRA as a whole

71. It is a basic principle of statutory interpretation that the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act.[112] Despite this, the Tribunal Decisions fail to appropriately consider the impact of current and former provisions in the *CHRA* – the current s. 49(5), and the former s. 67 – that show Parliament's intent to allow for complaints that directly challenge the impact of discriminatory benefits legislation.

72. First, the Tribunal erred in failing to properly consider the significance of s. 49(5) of the *CHRA*, which requires that the panel or its chair be a member of the bar in any case where the 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 …" (emphasis added).

73. Parliament added s. 49(5) to the *CHRA* in 1998 – roughly ten years after the Federal Court of Appeal had accepted in *Druken* that human rights complaints could directly challenge the government's application of discriminatory legislation.[113] Parliament thus did not respond to *Druken* by passing legislative amendments to overrule its approach. To the contrary, Parliament appears to have implicitly accepted the *Druken* line of authority, and simply sought to ensure that

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[111] *Beattie et al. v. Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1 at paras. 2-3, 95-97, and 99-105 ("*Beattie*").
[112] *Mowat*, *supra* at para. 33.
[113] See *Bill S-5* (May 12, 1998) at s. 27 (adding s. 49(5)) (AR, Vol. 3, Tab 26, p. 47).

cases directly challenging the application of legislation would be decided by Tribunal members with appropriate legal expertise.

74. This was confirmed by witnesses who appeared before Parliamentary committees in the time leading up to the enactment of s. 49(5) of the *CHRA*. For example, in describing the rationale for the amendment, the responsible Minister stated that, among other things, "Moreover, the tribunal can be called upon to determine the validity of other federal legislation against the standard set out in the *Canadian Human Rights Act*"[114] (emphasis added). Similarly, a senior counsel from the Human Rights Law section of the Department of Justice stated, "Another aspect is that you will also see challenges to other federal legislation under the Human Rights Act, the same sorts of challenges you would see under the Charter in the courts"[115], and "We do have a provision for where there is a challenge to federal legislation. Much as you might have a challenge under the Charter to federal legislation that would be heard in the courts, we've made a provision for lawyers to sit on those"[116] (all emphasis added).

75. Despite this backdrop, the Tribunal found that s. 49(5) did not purport to comment on whether something is or is not a service, and instead spoke only to a restricted form of human rights law primacy – namely, that which applies where legislative inconsistency arises indirectly, as a side issue in a case about some other matter. In making this finding, the Tribunal did not meaningfully address the legislative history, took an unduly narrow approach, and incorrectly and unreasonably failed to interpret s. 5 of the *CHRA* in its proper broader context.

76. Second, the Tribunal erred when it acknowledged, but then dismissed, the import of the former s. 67 of the *CHRA*, which had stated the following until its repeal in 2008:

67. Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.	67. La présente loi est sans effet sur la *Loi sur les Indiens* et sur les dispositions prises en vertu de cette loi.

[114] Minutes of Proceedings of the Standing Committee on Justice and Human Rights, dated March 12, 1998, at p. 4 (AR, Vol. 2, Tab 24, p. 207).
[115] Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, October 30, 1997, at p. 16 (AR, Vol. 2, Tab 23, p. 192).
[116] Minutes of Proceedings of the Standing Committee on Justice and Human Rights, April 1, 1998, at p. 21 (AR, Vol. 3, Tab 25, p. 26).

77. To properly appreciate the significance of this wording, and the important context it provides for interpreting s. 5 of the *CHRA*, it is useful to review in some detail the legislative history that was before the Tribunal with respect to the provision.

78. In this regard, the record showed 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 First Nations peoples. As a result, the Minister of Indian Affairs requested that an exemption be written into the *CHRA* that would protect the *Indian Act* against human rights review.[117] The government agreed and included the clause 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.[118] INAC has itself confirmed this understanding, stating in a 2006 Backgrounder that, "Section 67 was originally adopted as a temporary measure because it was recognized that the application of the *Canadian Human Rights Act* to all matters falling under the *Indian Act* could have resulted in certain provisions of the *Indian Act* being found discriminatory."[119]

79. The government included this exemption because it felt that the registration provisions in the *Indian Act* in force at the time, and specifically s. 12(1)(b) (which stripped a woman of her Indian status upon marriage to a man without status), violated the *CHRA*. This was confirmed at the Andrews Tribunal hearing by INAC's own expert witness on legislative history and government policy.[120]

80. The necessary corollary is that the government expected in 1977 that discriminatory registration provisions in the *Indian Act* would be vulnerable to human rights complaints, if a

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[117] Speaking Notes, 1979, at p. 5 (AR, Vol. 2, Tab 21, p. 166).
[118] Statement by Minister of Justice to Justice and Legal Affairs Committee, House of Commons, March 10, 1977, at p. 23 (AR, Vol. 2, Tab 19, p. 110).
[119] INAC, "Backgrounder, Repeal of Section 67 of the *CHRA*", p. 1 (AR, Vol. 3, Tab 29, p. 133).
[120] Testimony of Gerard Hartley, October 17, 2013 (p. 12, ll. 3-13) (AR, Vol. 2, Tab 17, p. 74). and October 18, 2013 (p. 2, ll. 7-20) (AR, Vol. 2, Tab 18, p. 79). See also: Report dated July 5, 1979, at p. 5 (AR, Vol. 2, Tab 22, p. 176) (Mr. Hartley agreed this document was consistent with his understanding of the circumstances regarding the former s. 67: Testimony of Gerard Hartley, Oct. 18, 2013 (p. 9, ll. 14-20) (AR, Vol. 2, Tab 18, p. 86); *CHRA Review Panel*, *supra* at p. 127 (AR, Vol. 3, Tab 28, p. 123); and Mary C. Hurley, "Bill C-21: An Act to Amend the Canadian Human Rights Act" (Library of Parliament, Parliamentary Information and Research Service: revised June 30, 2008), at p. 3 (AR, Vol. 3, Tab 30, p. 140).

specific exemption was not created. This was acknowledged in Parliamentary committee, when an opposition member moved to delete the exemption clause from the Bill, on the grounds that it "...continues the unequal status which exists for Indian people in this country, and most particularly Indian women", and that removing the clause "...would say that this act [i.e., the *CHRA*] supersedes the Indian Act and it is the most positive statement this Committee could make."[121] In responding to the motion, the Hon. S.R. Basford (then the Minister of Justice and Attorney General of Canada) admitted that "...undoubtedly the amendment would provide that Indian women would not be treated differently from Indian men."[122] In other words, the Minister accepted that without the express statutory exemption, the *CHRA* would have required that discriminatory aspects of the registration provisions be amended.

81. With this background in mind, the former s. 67 clearly functioned as an unequivocal statutory exception to the presumption that human rights laws have primacy, and that human rights complaints can be filed alleging that other legislation has a discriminatory impact. The very existence of the opening words of s. 67 of the *CHRA* – "Nothing in this Act affects any provision of the *Indian Act*…" – necessarily implied that without the exemption, the *CHRA* would have applied to and affected any discriminatory provisions in the *Indian Act*. Any other conclusion would mean that Parliament spoke in vain when enacting those opening words in s. 67, and that the words had no real effect during their lifespan. This would violate the presumption against tautology, and cannot be what Parliament intended.[123]

82. In addition, during its 30-year lifespan, the former s. 67 of the *CHRA* was considered by the Federal Courts. The resulting decisions acknowledge that the former s. 67 (i) prevented the *CHRA* from "having an effect on" the "legislative" provisions of the *Indian Act*,[124] and (ii) recognized that "certain provisions of the *Indian Act* and *Regulations* may conflict with the

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[121] Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, May 25, 1977, at p. 42 (AR, Vol. 2, Tab 20, p. 153).
[122] Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, May 25, 1977, at p. 46 (AR, Vol. 2, Tab 20, p. 157).
[123] *Sullivan on the Construction of Statutes*, *supra* at p. 211 [Book of Authorities, Tab 6].
[124] *Desjarlais (Re)*, [1989] 3 FCR 605 at paras. 10-11 (C.A.).

Canadian Human Rights Act," and that the *Indian Act* would prevail in such cases.[125] As the Federal Court of Appeal stated: (emphasis added)

> Section 67 was part of the *Canadian Human Rights Act* when it was enacted by S.C. 1976-77, c. 33. At that time, the Indian Act still contained provisions such as section 14 [re the effects of marriage] that were recognized as discriminating against women. The original objective of section 67 was to immunize the *Indian Act* and its regime from scrutiny under the *Canadian Human Rights Act*.[126]

83. Once it is accepted that the former s. 67 was passed to shield the discriminatory effects of the *Indian Act* registration provisions from review, the only remaining question is to ask how, or through what mechanism, the *CHRA* would otherwise have affected the operation of those provisions. In this regard, the only available answer is that Parliament believed that without the former s. 67, the Tribunal could accept and uphold complaints alleging that the application of those provisions was a "discriminatory practice in the provision of services", within the meaning of s. 5 of the *CHRA*. There is no other section that could reasonably be interpreted to support the kinds of complaints that Parliament clearly envisioned when enacting the former s. 67.

84. At first instance, only the Andrews Tribunal attempted to deal with the former s. 67 in any depth. It agreed there was persuasive evidence that Parliament had enacted it to shield the registration provisions of the *Indian Act* from scrutiny under the *CHRA*, and that in doing so, "... Parliament would have indeed implicitly imputed to [the *CHRA*] the ability to challenge legislation."[127] However, it found this was not sufficient to displace its earlier findings, stating ":... while this may reflect Parliament's intent to prevent challenges to the *Indian Act* by [the *CHRA*] in a pre-Charter era, this evidence is in and of itself insufficient to demonstrate that when Parliament enacted [the *CHRA*] in its entirety, it intended for this legislation to possess the ability to directly challenge other legislation."[128] With respect, this analysis is thin and unconvincing. Without more, the Tribunal's treatment of the former s. 67, and its role in aiding the proper interpretation of s. 5, is both incorrect and unreasonable.

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[125] *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 FCR 198 at para. 31 (T.D.) (aff'd (2000), 187 D.L.R. (4th) 741 (C.A.)).
[126] *Canada (Human Rights Commission) v. Gordon Band Council*, [2001] 1 FCR 124, at para. 23 (C.A.).
[127] Andrews Tribunal, at para. 102 (AR, Vol. 1, Tab 2, p. 101).
[128] Andrews Tribunal, at para. 103 (AR, Vol. 1, Tab 2, p. 101).

(d) Out of step with the majority of other jurisdictions

85. As explained earlier, this Court has directed that analogous provisions in human rights statutes be interpreted consistently across jurisdictions, unless the wording of the statutes requires otherwise. Here, there are no material differences in the wording of the various "services" provisions in human rights statutes across the country. Despite this, the decisions settled on an interpretation of s. 5 of the *CHRA* that departs from that taken in the majority of jurisdictions, which accept complaints about legislated benefits as relating to the provision of "services."

86. For their narrower approach to be correct or at least reasonable, the decision-makers below would have had to provide a compelling reason for the departure, rooted in the wording of the applicable human rights laws. With respect, no such reasons were provided. Indeed, the Federal Court of Appeal did not engage with this jurisprudence in any depth, instead simply stating that it had not been referred to any cases finding that the act of passing legislation was a "service."[129] Even if that were true, it is immaterial, as it is not what was alleged. Instead, the argument is that services are things of benefit, Indian registration confers benefits, and complaints about the denial of such benefits therefore relate to the provision of services, regardless of whether they are based in legislation, policy, or the exercise of discretion. This is on all fours with the majority of the provincial authorities.

(iii) The Appeal Decision undermines human rights law primacy

87. The decisions below rightly accept that the *CHRA* is a fundamental human rights law that has primacy and renders inconsistent legislation inoperable. However, they also create and impose a barrier that will bar any complaint that directly challenges the impact of legislation restricting access to benefits. As a result, the decision-makers had to explain the circumstances in which the principle of primacy might still come to be applied. In this regard, they effectively held that the *CHRA* will only render inconsistent legislation inoperable where the application of that legislation arises as a secondary issue, in a complaint filed about some other form of

[129] Appeal Decision, at para. 98 (AR, Vol. 1, Tab 4, pp. 186-187).

"discriminatory practice." The Tribunal erred by limiting the application of human rights law primacy to such situations, for several reasons.

88. First, the foundational cases from this Court that established and developed the primacy of quasi-constitutional human rights laws did not place any such limits on the scope of the principle. To the contrary, they described primacy in broad terms that aimed to advance the laudable goal of identifying and remedying discrimination. Although the facts of early cases like *Heerspink* and *Craton* may be along the lines of what the Tribunal has described, their statements of the applicable legal principles are not limited to such circumstances.

89. Second, the powerful purpose of the *CHRA* is to eliminate discrimination in all "matters coming within the legislative authority of Parliament." Once one accepts the *CHRA* is capable of resolving legislative inconsistencies that arise in indirect or secondary ways out of a human rights complaint, it seems unusual, and even absurd, to prevent claimants from reaching the same results by challenging the conduct of government officials applying discriminatory legislation. In both scenarios, the human rights law is being used to render inoperable legislation that would create or condone discriminatory impacts. The decisions below do not identify any principled reasons why Parliament would have intended for the former complaints to proceed, but the latter complaints to be outside the scope of the *CHRA*.

90. Third, although the Tribunal states that its analysis leaves room for practical applications of the principle of primacy, its logic in rejecting the complaints calls this into question. Here it must be remembered that a chief reason for dismissing the complaints was that any adverse impact flowed from Parliament's conduct in passing the *Indian Act*, not from INAC's conduct, which was limited to applying the rules established therein. Although intention and moral culpability are not relevant considerations when examining discriminatory impacts[130], the Tribunal appears to have been influenced by a misplaced concern that it would be unfair to "blame" INAC for the creation of the legislation. If this rationale is carried over into the kinds of cases described above, it would likely also lead to a dismissal.

91. For example, consider a hypothetical situation where legislation imposes safety standards that, when applied, have the inevitable effect of preventing persons with a particular disability

[130] *Action Travail*, *supra* at pp. 1134-37; *Bombardier*, *supra* at para. 40.

from receiving a service. If an affected person were to file a human rights complaint against the service provider, claiming discrimination in the provision of services, the service provider would now presumably cite the Decisions, and argue that (i) the only "service" it provides is that which is consistent with the safety legislation, (ii) it played no role in creating that legislation, which was instead the product of Parliament's *sui generis* lawmaking function, and (iii) any adverse discriminatory impacts on the person are thus unrelated to the services it provides.

92. Based on the Tribunal's logic, this situation would seem indistinguishable from that in the Matson and Andrews cases, and the hypothetical complaint would likely have to be dismissed. As a result, it appears that the long-term effect of the Decisions might be not only to bar complaints that directly challenge the impact of discriminatory legislation, but to further restrict or even negate the scope of human rights law primacy.

(iv) Available defences and remedies in human rights cases

(a) The defence of* bona fide *justification

93. Where a complainant makes out a *prima facie* case of discrimination in the provision of a service, the burden shifts to the respondent to introduce evidence capable of proving, on a balance of probabilities, that its approach has a *bona fide* justification. Based on the wording of ss. 15(1)(g) and 15(2) of the *CHRA*, and the applicable case law, this generally requires that a respondent prove three things: (i) that the impugned measure was adopted for a purpose or goal that is rationally connected to the purpose for which the service is provided; (ii) that it adopted the impugned measure in good faith, in the belief it was necessary for the fulfillment of the purpose or goal; and (iii) that the impugned measure is reasonably necessary, in the sense that it cannot be relaxed to accommodate persons with the characteristics of the complainant, without causing undue hardship, having regard to health, safety and cost.[131]

94. The decision-makers below felt it would be inappropriate to require the government to justify the application of legislation using this framework. They based their concerns on *obiter* comments from this Court's majority decision in *Alberta v. Hutterian Brethren of Wilson*

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[131] *CHRA*, ss. 15(1)(g) and 15(2); applied, for example, in *McAllister-Windsor*, *supra* at paras. 53-70.

Colony, which had refused to incorporate undue hardship principles into the test for reasonable justification under s. 1 of the *Charter*.[132] These concerns are misplaced, for several reasons.

95. First, this Court's comments were made in the context of a *Charter* challenge, not a statutory human rights claim. They stand for the proposition that it would not be appropriate to incorporate undue hardship principles into the well-settled tests for determining the constitutional validity of legislation.[133] Nothing in the comments expresses any views about whether statutory human rights defences are sufficient when considering whether a law should be rendered inoperable, due to conflict with a human rights law. As this Court held in *Tranchemontagne*, a finding of invalidity is "clearly more offensive to the legislature" than a finding of inoperability.[134] Given this fundamental difference, there is no clear reason why identical justificatory tests should have to apply in both scenarios.

96. Second, the Tribunal's emphasis on this passage was at odds with its earlier conclusions that the *CHRA* can and will render legislation inoperable in appropriate cases. Presumably, the legislation in those cases would not be declared inoperable without first giving the respondent and/or the Attorney General of Canada an opportunity to argue that the legislation should continue to be applied, notwithstanding any *prima facie* discrimination. Indeed, it was for this reason that the Canadian Human Rights Act Review Panel recommended that the Attorney General of Canada be required to appear in all Tribunal proceedings where the operation of legislation was at issue.[135] In such cases, the analysis would presumably proceed on the basis of s. 15 of the *CHRA*, and the notion of undue hardship incorporated therein. As the Tribunal is apparently willing to accept the use of the *bona fide* justification test in cases where legislative conflicts arise indirectly, so too should it accept its use in cases like the present ones, where the conflicts arise directly out of the complaints.

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[132] Appeal Decision, at paras. 46-47 and 103 (AR, Vol. 1, Tab 4, pp. 167-168 ad 188-189); Matson Tribunal, at paras. 153-154 (AR, Vol. 1, Tab 1, pp. 57-59); Andrews Tribunal, at paras. 81-85 (AR, Vol. 1, Tab 2, pp. 91-94); all making reference to *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 ("*Hutterian Brethren*").
[133] *Hutterian Brethren*, *supra* at para. 71 (per McLachlin CJ. for the majority).
[134] *Tranchemontagne (SCC)*, *supra* at para. 31.
[135] *CHRA Review Panel*, *supra* at pp. 23-24 (AR, Vol. 3, Tab 28, pp. 112-113).

97. Third, as described earlier, the *Druken* line of federal case law had previously allowed for "services" complaints challenging the impact of discriminatory legislation, and other jurisdictions continue to regularly process such complaints. In such cases, decision-makers have applied the statutory defences available under the applicable human rights laws, which generally track the *bona fide* justification test that the Decisions below reject as unworkable. Despite this, there are no indications in the case law that the defences are inherently deficient, or that governments have been prevented from raising arguments or considerations they wished to rely on in attempting to justify the operation of otherwise discriminatory legislation.

98. Fourth, and in any event, where legislation provides tribunals with a specific test for justifying discrimination, the tribunals should apply that test.[136] With this in mind, it was not for the Tribunal to raise concerns that the *bona fide* justification test would be inadequate for government respondents seeking to defend legislation, then work backwards by narrowly interpreting the "services" provision to limit the frequency of such situations. Instead, the Tribunal's task was to follow the directions given to it by Parliament, by (i) ensuring the members assigned to hear the complaints were members of the bar, as required by s. 49(5) of the *CHRA*, (ii) interpreting s. 5 of the *CHRA* in a broad and purposive manner, befitting its status as a rights-granting provision in a quasi-constitutional law, and (iii) if *prima facie* discrimination is found, applying the statutory defence that Parliament chose to make available, with such flexibility as can be afforded to the words actually used.

99. Finally, it must also be remembered that Parliament has another choice, if it does not want to have to defend one of its laws under the *bona fide* justification test. As discussed earlier, the *CHRA*'s primacy over conflicting legislation is the product of a presumption. This presumption can be displaced at any time by unequivocal statutory wording indicating that a discriminatory law will continue to operate, despite its inconsistency with the *CHRA*. As a result, if Parliament wants a law to operate, even in the absence of a *bona fide* justification, it can simply amend either the law or the *CHRA* to say as much. The law would then be insulated from review under the *CHRA*, and could only be challenged under the *Charter*, which would allow the government to mount a defence of reasonable justification under s. 1.

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[136] *NB HRC v. Potash Corp.*, *supra* at para. 19 (per majority reasons of Abella J.).

100. As a practical matter, this possibility negates any concerns the Tribunal and Federal Court of Appeal have expressed with respect to the adequacy of the *bona fide* justification test. Indeed, Parliament clearly knows that it can take such steps, if it wants to. It did exactly that when it passed the former s. 67 of the *CHRA*, which specifically exempted the provisions of the *Indian Act* from human rights review. By repealing that provision in 2008, Parliament must be deemed to have accepted that (i) human rights complaints about the provisions of the *Indian Act* could now be filed, and (ii) any findings of *prima facie* discrimination relating to the provisions would have to be defended using the justification defence set out in the *CHRA*.

(b) Remedies available where legislation is found to have a discriminatory impact

101. Section 53(2)(a) of the *CHRA* gives the Tribunal a broad discretion to order that a respondent cease a discriminatory practice, and take measures to redress the practice or to prevent the same or a similar practice from occurring in the future. In *Druken*, the Federal Court of Appeal found that this wording allowed the Tribunal to order that officials cease and desist from applying discriminatory legislation, not only to the particular complainants before it, but to all other future claimants as well.[137] Although it overturned *Druken* on the "services" question, the *Murphy* panel did not comment on this aspect, and similar conclusions have been reached by decision-makers in other jurisdictions, based on analogous remedial provisions in their respective human rights laws.[138] As a result, even though no declaration of invalidity is possible, the *CHRA* does allow the Tribunal to impose effective remedies in cases involving discriminatory legislation, aimed at the prevention of further discriminatory impacts.

102. It must be acknowledged that ordering officials to cease and desist from applying underinclusive benefits legislation will not itself result in complainants receiving the benefits they seek. Legislation would have to be amended in order for that to happen. Federal cases predating *Murphy* had dealt with this by declaring discriminatory legislation inoperable, ordering that government officials cease and desist from applying the inconsistent legislation, and

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[137] *Druken*, *supra* at para. 13, leave to appeal to this Court refused.
[138] For two examples: *Gwinner*, *supra* at paras. 70-72, 255 and 261-262; and *XY*, *supra* at paras. 288-298.

suspending those remedies to allow Parliament time to settle on its response[139] – which might be to (i) appeal the Tribunal's decision, (ii) amend the legislative scheme to expand the class of beneficiaries, or (iii) declare that the scheme will continue to operate, notwithstanding the *CHRA*. This approach properly respects constitutional and institutional boundaries, while at the same time promoting the important objectives of the human rights law.

103. The decisions below do not acknowledge or grapple with these principles, and instead appear to improperly assume that the Tribunal is without the power to craft effective remedies. In the absence of a persuasive explanation for rejecting the approach described above, the Decisions are both incorrect and unreasonable.

D.) The Decisions Reduce Access to Justice for Persons in Vulnerable Circumstances

104. As described earlier, human rights laws like the *CHRA* are to be given purposive and accessible interpretations, befitting their status as "laws of the people", and "the last protection of the most vulnerable members of society." Despite these cautions, the decisions below have carved out an exception that reduces access to justice, barring use of the *CHRA* to challenge legislated exclusions from receipt of government benefits. This is of grave concern, as many groups protected by human rights laws – such as Indigenous persons, racialized persons, persons with disabilities, and transgender persons – have experienced significant disadvantage. As a result, members of such groups are more likely to be low-income, and to thereby have greater need to access the kinds of legislated benefits at issue in the cases discussed throughout this Factum – things like income assistance, employment insurance, workers compensation, veterans and disability-related benefits. Preventing human rights complaints about discriminatory provisions in such laws runs the risk of further excluding and marginalizing these groups.

105. The impact may be especially significant for Indigenous peoples, who – by virtue of their constitutional status as the subject of a federal head of power – are uniquely impacted by federal legislation that touches their daily lives. The registration provisions of the *Indian Act* alone have generated a host of legal proceedings from claimants alleging the federal government has

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[139] See: *Gonzalez*, *supra* at paras. 44-46 [Book of Authorities, Tab 5]; and *McAllister-Windsor*, *supra* at paras. 73, 76 and 84.

unjustly failed to recognize connections to Indigenous ancestry.[140] In addition, as this Court has noted, the history of colonialism, displacement, and residential schools "…continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal offenders."[141] By virtue of this "indisputable disadvantage,"[142] Indigenous peoples may have heightened needs for benefits, and face additional challenges accessing justice.

106. The Federal Court of Appeal felt the Tribunal had identified unassailable policy reasons for its restrictive approach, stating that (i) there was no reason for the Tribunal to hear challenges that could instead be made to a court under s. 15 of the *Charter*, and (ii) it was "far from convinced" that human rights tribunal afford greater access to justice, "especially given the lengthy delays that are all too often seen in human rights adjudications…"[143]

107. With respect, there was no systemic information before the Court of Appeal to support its assertion regarding delays in human rights as opposed to *Charter* proceedings. Regardless, access to justice means more than timeliness. A faster process will not be of much help to a low-income self-represented claimant from a marginalized community, if it is so complex that it cannot be navigated without the costly assistance of counsel. In this regard, a number of reports and commentators have remarked on challenges that litigants face in the civil justice system[144], and this Court has stated the following:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves

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[140] For a few examples outside the current litigation, see: *McIvor*, *supra*; *Gehl*, *supra*; *Descheneaux*, *supra*; *Beattie*, *supra*; and *Larkman v. Canada (Attorney General)*, 2014 FCA 299.

[141] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 at para. 60.

[142] *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 59 (making reference to *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, and *Lovelace v. Ontario*, [2000] 1 SCR 950).

[143] Appeal Decision, at para. 103 (AR, Vol. 1, Tab 4, pp. 188-189).

[144] See, for example: Action Committee on Access to Justice in Civil and Family Matters, "Executive Summary," *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: October 2013) at p. iii; and Remarks of the Right Honourable Beverley McLachlin, P.S., Chief Justice of Canada, to the Council of the Canadian Bar Association at the Canadian Legal Conference (Ottawa, Ontario: August 11, 2016).

> when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened . . .[145]

108. With this context in mind, it was incorrect and unreasonable for the Tribunal to create a barrier that forces claimants to launch *Charter* challenges in the civil court system, and forego the specialized administrative system designed to provide an inexpensive and accessible forum for vindicating quasi-constitutional rights.

109. Proceedings under the *CHRA* have numerous features that can make them more welcoming for persons in vulnerable circumstances. For example, this Court has taken notice of Commission publications mentioning the simplified process for filing complaints of discrimination under the *CHRA*.[146] Where complaints proceed to investigation, Commission investigators will gather information and documents, and prepare a summary report that analyzes the issues under the *CHRA* framework – meaning that complainants do not need to shoulder such responsibilities entirely on their own.[147] Once at the Tribunal, there are flexible rules about representation.[148] The rules of evidence are expressly relaxed, pursuant to a *CHRA* provision that signals the legislature's intent to establish a more accessible and less formalistic forum, in which claimants are often not represented by counsel.[149] Importantly, complainants whose cases raise systemic discrimination and/or new points of law may receive the assistance of the Commission, which can – as it has in the Matson and Andrews cases – take an active role in presenting evidence and arguments to the Tribunal, further to its statutory mandate to represent the public interest in human rights proceedings.[150] Finally, the Tribunal does not have authority to award legal costs[151], making it possible for complainants to seek rulings about quasi-constitutional rights without exposing themselves to adverse costs awards.

110. In these ways, the statutory human rights system promotes access to justice by facilitating the participation of complainants who do not have legal representation, and cannot afford to

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[145] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 1.
[146] *Mowat*, *supra* at para. 55.
[147] *CHRA*, ss. 43-44.
[148] Canadian Human Rights Tribunal, *Practice Note No. 2 – Re: Representation of Parties by Non-Lawyers* (12 June 2009) .
[149] *CHRA*, ss. 50(3)(c), 50(4) and 50(5); and *Bombardier*, *supra* at para. 68.
[150] *Mowat*, *supra* at para. 51-52 and 63; *CHRA*, s. 51.
[151] *Mowat*, *supra* at para. 64.

incur excessive financial risk. With these considerations properly borne in mind, it was of critical importance that s. 5 of the *CHRA* be given a purposive interpretation that would further or maintain such access. To the extent they take the exact opposite approach, the Tribunal Decisions are incorrect and unreasonable.

PART IV – SUBMISSIONS ON COSTS

111. The Commission does not seek costs, and submits that costs should not be ordered against it, since – as the Federal Court of Appeal recognized, below – it has brought this appeal in the public interest, to clarify an important legal issue.[152]

PART V – ORDER SOUGHT

112. The Commission asks for an Order allowing the appeal, setting aside the decisions of the Federal Court of Appeal and Federal Court, quashing the Tribunal Decisions, and remitting the Matson and Andrews Complaints back to the Tribunal for redetermination, in accordance with this Court's directions.

ALL RESPECTFULLY SUBMITTED this 21st day of June, 2017.

Brian Smith / Fiona Keith
Counsel for the Appellant,
Canadian Human Rights Commission

[152] Appeal Decision, at paras. 1 and 7 (AR, Vol. 1, Tab 4, pp. 150 and 153).

PART VI – TABLE OF AUTHORITIES

Cited at Para. No.

LEGISLATIVE AUTHORITIES

Constitutional Documents

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 / *Charte canadienne des droits et libertés*, Partie I de la *Loi constitutionnelle de 1982*, édictée comme l'annexe B de la *Loi de 1982 sur le Canada, 1982*, ch. 11 (R.U.)

2. *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 / *Loi constitutionnelle de 1982*, édictée comme l'annexe B de la *Loi de 1982 sur le Canada, 1982*, ch. 11 (R.U.)

Federal Legislation

3. *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 / *Loi canadienne sur les droits de la personne*, L.R.C. (1985), ch. H-6

Provincial Legislation

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