Court File No.: 37208

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

CANADIAN HUMAN RIGHTS COMMISSION

APPELLANT
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

MEMORANDUM OF FACT AND LAW OF THE ATTORNEY GENERAL OF CANADA

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

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PART I – STATEMENT OF FACTS

A. Overview

1. Since the introduction of the *Charter of Rights and Freedoms*, the superior courts have acted as the arbiters of the validity of legislation as measured against the rights and freedoms it protects, including the right to equality. The federal human rights regime has a very different scope and mandate: to prohibit and remedy discriminatory practices in employment, commercial and residential accommodation and in the provision of goods, services and facilities. This mandate does not include the authority to review legislation directly to determine whether it contravenes the *Canadian Human Rights Act*. Rather, Parliament has specified in s. 5 to 14.1 of the *CHRA* the types of conduct and practices into which the Tribunal may inquire, and through s. 53 has provided broad remedial authority to ensure effective redress for such conduct.

2. The Canadian Human Rights Tribunal correctly recognized that as fundamental, quasi-constitutional law, the *CHRA* is to be given a broad and liberal interpretation to ensure that the rights protected are given their full recognition and effect. The Tribunal also recognized that its interpretation of the text had to be consistent with the words chosen and Parliament's intent. And while Parliament and provincial legislatures are competent to empower administrative bodies to review legislation for compliance with human rights legislation, the Tribunal's conclusion that Parliament has not chosen this course was both reasonable and correct.

3. Parliament has constructed a comprehensive and complementary scheme for the federal private and public sectors, comprised of constitutional and legislative instruments which are specifically tailored to address particular forms of discrimination. This comprehensive scheme ensures that complainants seeking to challenge legislation have access to meaningful and effective recourse. Parliament opted not to include a primacy clause which would assign the task of determining whether legislation discriminates to the Tribunal, and in so doing has indicated that the *Charter* and the *Bill of Rights* are the preferred tools for this function. The *Charter's* analytical and justificatory framework and the remedies available under s. 52(1) of the *Constitution Act, 1982* are more appropriate for the assessment of laws of general application, since they allow for the broader societal context to be taken into account.

4. The human rights complaints at issue take direct aim at the criteria for determining who is an "Indian" under the *Indian Act*. They do not impugn any wrongdoing by government officials engaged in the provision of goods, services and facilities. On either standard of review, the Tribunal and Courts below did not commit a reviewable error. The Tribunal's conclusion that s. 5 and 40(1) of the *CHRA* cannot reasonably be construed as encompassing direct challenges to an Act of Parliament like the *Indian Act* is consistent with a proper statutory interpretation analysis, the prevailing jurisprudence of the Federal Court of Appeal, and the overarching principles of interpretation applicable to human rights legislation, including the principle of primacy.

B. Summary of the facts

i. Background to the Complaints – Registration under the *Indian Act*

(a) Current Provisions

5. Entitlement to registration under the present *Indian Act* is prescribed by s. 6. An applicant is entitled to registration as an Indian[1] if he or she meets the conditions described in s. 6 of the present *Act*, and is not subject to the exceptions in s. 7.[2] Applicants entitled to registration fall into several broad categories:

(a) those with vested or acquired rights, have their rights preserved through para. 6(1)(a);
(b) those who are members of newly recognized bands declared by the Governor in Council since 1985 are entitled under para. 6(1)(b);
(c) those who were previously removed or omitted from the Indian Register or from a band list prior to September 4, 1951, because they were: women who had married non-Indians; men and women whose mothers and paternal grandmothers were non-Indians prior to marriage ('double mother rule'); "illegitimate"[3] children of Indian women who had lost status because of non-Indian paternity; and women who married non-Indians and were, as a result, commuted or enfranchised (and any children of the women included in the enfranchisement) are entitled under para. 6(1)(c);
(d) those whose entitlement was addressed by para. 6(1)(c.1) in response to the *McIvor* decision;
(e) those who were enfranchised upon application and whose entitlement was restored by para. 6(1)(d);
(f) those who were enfranchised by operation of law and whose status was restored by para. 6(1)(e);

[1] The Attorney General uses the term "Indian" in this factum as it is the term used in the *Indian Act*, RSC 1985, c I-5 and predecessor legislation.
[2] *Indian Act,* RSC 1985, c I-5, ss 6, 7.
[3] This is the term used in the predecessor legislation.

(g) those who have two parents entitled to registration under any category (6(1) or 6(2)) are entitled under para. 6(1)(f);
(h) those who have one parent entitled under s. 6(1) but whose other parent is non-Indian or unknown are entitled under s. 6(2).

6. Pursuant to s. 10(4) of the *1985 Act,* bands who have assumed control over their membership are not permitted to deprive individuals whose rights are restored from band membership. Pursuant to s. 11 of the *1985 Act,* for bands who have not assumed control of their membership, entitlement under the *Act* is synonymous with band membership.[4]

7. Under the present Act, on receipt of an application, the Office of the Indian Registrar will determine an applicant's entitlement to registration. Where entitlement is denied, there is a statutory appeal process.[5]

(b) History of* Charter *challenges and remedial amendments

8. Prior to the coming into force of the present *Indian Act* in 1985, the *Indian Act* treated women and men quite differently: entitlement to registration under the applicable *Indian Acts* was generally passed on through the male line.[6] Indian men could confer entitlement on non-Indian women (upon marriage), on their children from a marriage, and on their illegitimate male children. Indian women lost entitlement to registration upon marriage to a non-Indian man, and therefore could not confer entitlement on their children. For much of its history, the *Indian Act* also provided for various forms of "enfranchisement". Individuals who were entitled to register could be "enfranchised" (i.e. removed) from registration, on application, or by operation of law. Once enfranchised, the individual's descendants were no longer eligible for registration as an Indian.

9. Following the introduction of the *Charter*, and after extensive consultations with First Nations and other stakeholders, amendments to the *Indian Act* were introduced in 1985 through Bill C-31, *An Act to amend the Indian Act*.[7] The primary purpose of Bill C-31 was to

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[4] *Indian Act*, ss 10(4) and 11
[5] *Indian Act*, ss 14.2 and 14.3.
[6] See for example: The *Indian Act*, *1876*, SC 1876, c 18 (39 Vict), s 3, Authorities, Tab 1; *Indian Act*, RSC 1951, c 29, ss 11, 12, 14, Authorities, Tab 2; *Indian Act*, RSC 1970, c I-6 ("1970 Act"), ss 11, 12, Authorities, Tab 3.
[7] *McIvor v Canada (Registrar, Indian and Northern Affairs),* 2009 BCCA 153, para 10.

eliminate sex discrimination from the *Act.* The *Act* restored entitlement lost as a result of discrimination, while preserving existing rights, and creating a gender neutral regime going forward.[8] Bill C-31 also provided that all individuals who had been enfranchised were entitled to register under s. 6(1). The amendments did not extend status under s. 6(1) to women who had been enfranchised and whose only basis for registration was marriage to a person entitled to registration.

10. During the consultations leading to Bill C-31, concerns were expressed about the number of new registrants, and the impact that registration would have on communities and resources. To some extent, the desire to support greater autonomy and First Nations control over band membership was at odds with the desire to restore entitlement to large numbers of individuals, most of whom were women, who were denied status under the prior legislation.[9]

11. Against this backdrop, Parliament designed the legislative scheme in a manner that balanced several important objectives, which included:

(a) to end discrimination against women created by their loss of entitlement to registration through marriage to non-Indians;

(b) to restore entitlement to registration to those who had lost it due to this discrimination, including restoring membership in a band;

(c) to ensure that no one should gain or lose entitlement to registration due to marriage;

(d) to ensure that registered persons have a sufficient genealogical connection to the historical Indian population;

(e) to ensure that anyone who had acquired status under the registration scheme prior to the 1985 amendments would not lose it – for example, non-Indian women who married Indian men would not lose their entitlement to registration; and,

(f) to provide the First Nations that desired the ability to determine their own membership with a statutory mechanism to do so on a going forward basis (for individuals whose entitlement was restored, band membership would be statutorily mandated).[10]

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[8] See also: *Descheneaux c Canada (Procureur Général)*, 2015 QCCS 3555, para 34.

[9] *Indian Act*, ss 10(4) and 11; *McIvor*, *supra*, para 27; *House of Commons Debates*, (12 June, 1985) at 5686, Authorities, Tab 7; *Minutes of Proceedings and Evidence of the SCIAND,* 33rd Parl, 1st Sess, No 14 (March 13, 1985) at 14:5, Authorities, Tab 6.

[10] *McIvor*, *supra,* paras 123, 130; *House of Commons Debates*, 33rd Parl, 1st Sess, Vol 2 (1 March 1985) at 2644 -2646, Authorities, Tab 4; *House of Commons Debates*, 33rd Parl, 1st Sess, Vol 4 (10 June 1985), at 5564, 5576, Authorities, Tab 7; *Minutes of Evidence of the SCIAND*, 33rd Parl, 1st Sess, No 12 (7 March 1985) at 12:7-8, Authorities, Tab 5; *Minutes of Evidence of the SCIAND*, 33rd Parl, 1st Sess, No 14 (13 March 1985) at 14:24-25, Authorities, Tab 6.

12. The 1985 registration provisions remained unchanged until Bill C-3, the *Gender Equity in Indian Registration Act,* which came into force in 2011. Bill C-3 was remedial legislation, enacted to respond to the successful *Charter* challenge in *McIvor v Canada (Registrar of Indian and Northern Affairs).*[11] In *McIvor,* Sharon McIvor and her son Jacob Grismer challenged s. 6 of the *1985 Act,* on the basis that aspects of the old legislation that favoured male parentage over female parentage were carried into the new *Act,* which prevented Mr. Grismer from transmitting status. The British Columbia Court of Appeal found the discrimination would have been justified based on the objectives of preserving acquired entitlements and avoiding increased pressures on *Indian Act* bands, had the *1985 Act* not gone further and enhanced the rights of the group which Mr. Grismer compared himself to.[12]

13. The amendments did not eliminate all remaining gender discrimination in the *Act*. In *Descheneaux*,[13] the Superior Court of Quebec considered two similar disparities, this time involving the grandchildren of women who married a non-Indian and lost their status under the pre-1985 scheme and the sex-based distinction between children born out of wedlock to Indian men between 1951 and 1985. In both cases, the unequal treatment was found not to be justified on the same basis as in *McIvor*.[14] The Court's declaration of invalidity was suspended until February 2017, extended to July 3, 2017 and is now set to expire on August 9, 2017.[15]

14. Bill S-3, *An Act to amend the Indian Act (elimination of sex-based inequities in registration),* was introduced in October 2016, to remedy the infringements found in *Descheneaux*. Bill S-3 was passed by the Senate with amendments, and returned to the House where it was passed on June 21, 2017 also with amendments. As a result of the amendments, Bill S-3 returned to the Senate but it did not pass before the Senate rose for the summer recess on June 22, 2017.

15. If the legislation is passed in its current form, the complaint filed by the Matson siblings will be moot as their children would become eligible for status.

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[11] *McIvor, supra*.
[12] *McIvor*, *supra*, paras 61, 85, 133, 137, 140, 151.
[13] *Descheneaux, supra*, paras 9, 14.
[14] *Ibid*, paras 14, 134, 139-141, 217.
[15] *Ibid,* paras 140, 157.

ii. Nature and history of the complaints

(a) Andrews complaints

16. Roger Williams Andrews is a registered Indian under the *Indian Act.* His daughters are not entitled to registration under the *Indian Act*. He filed two human rights complaints – one in 2008 and a second one in 2010.[16] Both were heard by the Tribunal at a hearing in the Fall of 2012.[17] The hearing proceeded with a detailed agreed statement of facts and book of documents.[18]

17. The facts relating to the Andrews family ancestry or entitlement to registration are not in dispute. Roger Andrews' father, Andrew Joseph, had Indian status and was a member of the Naotkamegwanning Band. On application, Andrew Joseph was enfranchised in 1957, along with his wife Isabella Joseph, who had no Indigenous ancestry, and their daughter Jessie Joseph.[19] Roger Andrews was born in 1958 to Andrew Joseph and Marie Holden. As neither parent had Indian status, Roger Andrews was not entitled to registration at birth.[20] In 1976, Roger Andrews married Georgina Maltzan, who is not entitled to Indian status. They have two daughters, Cheryl Andrews and Michelle Andrews, born in 1983 and 1986 respectively.[21]

18. Due to the 1985 amendments, Andrew Joseph and his daughter, Jessie Joseph regained status under para. 6(1)(d). Because Roger Andrews was not himself enfranchised, and his mother, Marie Holden, was not eligible for status, he gained status under s. 6(2). This meant that his daughters Cheryl and Michelle are not entitled under the current *Indian Act*, since they have one parent entitled under s. 6(2) and their other parent is not entitled.

19. On August 21, 2006, in response to an application by Roger Andrews, the Office of the Indian Registrar notified him that he was registered as an Indian under s. 6(2) of the *Indian Act*

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[16] Decision of the Canadian Human Rights Tribunal, *Roger William Andrews et al, and CHRC and INAC*, Member S. Marchildon, September 30, 2016, (*CHRT Reasons* (*Andrews*)), paras 9, 10, 22, Appellant's Record, Tab 2, pp 67, 70.
[17] *CHRT Reasons* (*Andrews*), para 12, Appellant's Record, Tab 2, p 67.
[18] Reasons of the Federal Court of Canada, the Honourable Madame Justice McVeigh, March 30, 2015, 2015 FC 398, (*Federal Court Reasons*), para 4, Appellant's Record, Tab 3, p 111.
[19] *CHRT Reasons (Andrews),* para 16, Appellant's Record, Tab 2, p 68.
[20] *Ibid,* para 17, Appellant's Record, Tab 2, p 68.
[21] *Ibid,* para 18, Appellant's Record, Tab 2, p 69.

and a member of the Naotkamegwanning Band in accordance with para. 11(2)(b).[22] On October 19, 2006, Mr. Andrews submitted an application on behalf of his younger daughter, Michelle Andrews. The Office of the Indian Registrar responded on March 20, 2007 that because Mr. Andrews was registered under s. 6(2), and since no information had been provided about Michelle's mother, Michelle was not eligible to be registered.[23] On March 30, 2009, Mr. Andrews filed a protest pursuant to s. 14.2 of the *Act*, relating to both decisions. On June 4, 2010, the Office of the Indian Registrar advised that the protests could not be upheld. Neither Mr. Andrews nor his daughter filed a statutory appeal to the Superior Court.[24]

20. The *Andrews* complaint proceeded about the same time as the CHRC was litigating *Murphy*.[25] The Federal Court of Appeal released its decision in *Murphy* roughly six months before the *Andrews* case was set to be heard. During this time, the Commission sought leave to appeal *Murphy* to this court. The application for leave was dismissed on November 8, 2012, while oral argument was proceeding before the Tribunal in the *Andrews* complaint.

(b) Matson complaints

21. The facts relating to the Matson family ancestry and registration entitlements are not in dispute. The Matson siblings' complaints began in 2008 and were similar in substance to the *McIvor* case in which the plaintiffs successfully challenged s. 6 of the *Indian Act* (as it existed) under s. 15 of the *Charter* in the British Columbia courts.

22. The Matsons' grandmother lost her status in 1927 when she married a non-Indian man. Her status was reinstated pursuant to para. 6(1)(c) of the *Indian Act* in 1985.[26] This gave the Matson siblings' father status under s. 6(2) of the *Indian Act* but, since their other parent was not entitled to register, they did not qualify for status under the *Indian Act*. The situation of the Matson

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[22] *Ibid,* para 23, Appellant's Record, Tab 2, p 70.
[23] *Ibid,* para 25, Appellant's Record, Tab 2, p 71.
[24] *Ibid,* para 27, Appellant's Record, Tab 2, p 71.
[25] *Public Service Alliance of Canada v Canada (Revenue Agency)* 2010 CHRT 9 [*Murphy CHRT*]; *Public Service Alliance of Canada v Canada (Revenue Agency)* [*Murphy FC*], 2011 FC 207; aff'd 2012 FCA 7 [*Murphy FCA*] leave to appeal to SCC denied, [2012] SCCA 102.
[26] Decision of the Canadian Human Rights Tribunal, Jeremy Eugene Matson *et al* and CHRC and INAC, Member E P Lustig, May 24, 2016, 2013 CHRT 13, (*CHRT Reasons (Matson)*), para 4, Appellant's Record, Tab 1, p 3.

siblings is similar to that implicated in *McIvor* except that the inequality (s. 6(1) as opposed to s. 6(2)) is not experienced by the child of the woman who was disentitled on marriage, but by a subsequent generation – the grandchildren or great-grandchildren. A distinction arises because that generation (grandchild) was either born prior to 1985 or was the product of a marriage entered into before 1985,[27] such that their "male-line" comparators acquired entitlement under the previous scheme and had their rights preserved under para. 6(1)(a).[28]

23. The siblings' entitlement changed in 2011 when Parliament amended the *Indian Act* in response to the decision in *McIvor*. Following the passage of Bill C-3, the *Gender Equity in Indian Registration Act,* the Matson siblings became entitled and were registered under s. 6(2).[29]

24. The Matson siblings amended their complaints to challenge s. 6*,* on the basis that Bill C-3 did not extend status to their children.[30] They also filed a notice of constitutional question asking the Tribunal to determine the validity of the *Indian Act* under both the *CHRA* and s. 15 of the *Charter*. The Tribunal struck out the Notice of Constitutional Question.[31]

25. The Tribunal heard the *Matson* complaints in January 2013. They proceeded differently than the Andrews complaints because of this Court's dismissal of the CHRC's leave application in *Murphy*. By consent motion, the parties asked the Tribunal to determine three questions: (a) is the complaint a challenge to legislation and nothing else; (b) is the Tribunal bound to follow *Murphy* and dismiss the complaint; and (c) do the complaints impugn a discriminatory practice in the provision of services customarily available to the general public that could be the subject of a finding of *prima facie* discrimination under s. 5 of the *CHRA*? [32]

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[27] Bill C-31 took effect on April 17, 1985.
[28] *Indian Act*, para 6(1)(f) and s 6(2).
[29] *CHRT Reasons (Matson)*, para 10, Appellant's Record, Tab 1, p 5; *Gender Equity in Indian Registration Act,* SC 2010, c 18.
[30] *Ibid,* para 12, Appellant's Record, Tab 1, p 5.
[31] *Ibid,* paras 13-15, Appellant's Record, Tab 1, pp 5-6. See also *Matson v Canada (Indian and Northern Affairs)*, 2012 CHRT 19.
[32] *CHRT Reasons (Matson),* para 17, Appellant's Record, Tab 1, pp 6-7.

iii. CHRT Decisions

26. The Tribunal dismissed the *Matson* complaints in May 2013. It answered the three questions raised as follows: (1) yes, these are challenges to legislation and nothing else;[33] (2) yes, the Tribunal is bound to follow *Murphy* and dismiss the complaints;[34] and (3) no, the complaints do not impugn a discriminatory practice in the provision of services pursuant to s. 5 of the *CHRA*.[35]

27. Member Lustig considered the various authorities cited by the Commission, including this Court's statements on the primacy of human rights legislation in *Heerspink, Craton, Larocque*, and *Tranchemontagne* but held that these cases did not conflict with *Murphy*. The Tribunal also considered this Court's comments in *Hutterian Brethren* on the difference between reasonable accommodation in the *CHRA* and the *Oakes* test under s. 1 of the *Charter*.[36]

28. The Tribunal dismissed the *Andrews* complaint in September 2013. The Tribunal considered the leading cases on "services" such as *Gould, Watkin* and *Forward* and concluded that in the act of creating legislation, as it did with the registration provisions of the *Indian* Act, Parliament is not a service provider, holding out a service to the public.[37] Then, having found as a fact that the complaints were solely challenging legislation, the Tribunal followed and applied *Murphy*, holding that the complaints were beyond the scope of the *CHRA*. Although the reasons of the Tribunal in *Matson* were available to her, Member Marchildon conducted an independent analysis in arriving at the same conclusion.

29. The Tribunal acknowledged the primacy of human rights legislation but noted that "this does not preclude the necessity for the existence of a discriminatory practice pursuant to the Act …"[38] The Tribunal pointed to a number of decisions of the CHRT in which the *CHRA* has appropriately taken primacy over inconsistent laws.[39] However, the Tribunal underscored a critical

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[33] *Ibid,* para 60, Appellant's Record, Tab 1, p 21. *Canadian Human Rights Act*, RSC 1985, c. H-6, as amended.
[34] *CHRT Reasons (Matson),* para 150, Appellant's Record, Tab 1, p 56.
[35] *Ibid,* para 151, Appellant's Record, Tab 1, p 56.
[36] *Ibid,* paras 65-94, 153-154, Appellant's Record, Tab 1, pp 22-34, 57-59.
[37] *CHRT Reasons (Andrews),* paras 56, 47-64, Appellant's Record, Tab 2, pp 82, 78-86.
[38] *Ibid,* para 77, Appellant's Record, Tab 2, p 90.
[39] *Ibid,* paras 86-92, Appellant's Record, Tab 2, pp 94-95.

distinction between such cases and the complaint before it: "in none of these examples was the Tribunal attempting to use the *Act* to invalidate the conflicting provision in the same way one would use the *Charter*…"[40] Finally, the Tribunal rejected arguments concerning ss. 49(5) and 62(1), and found that the repeal of s. 67 did not support the Commission's interpretation but rather, allows the Tribunal to hear complaints such as those relating to the denial of band housing.[41]

iv. Federal Court

30. The Federal Court heard the judicial review applications in *Andrews* and *Matson* together and dismissed them both. McVeigh J. found that the standard of review of the Tribunal's decisions was reasonableness, since they involved the statutory interpretation of a highly specialized tribunal's home statute.[42] Applying this standard, she held that the conclusion that the eligibility criteria for registration under s. 6 of the *Indian Act* are not a "service" was reasonable.[43]

31. The Court agreed that the complaints sought to challenge the law itself. They were about whether the legislated eligibility criteria for Indian status are discriminatory. McVeigh J. found that Parliament developed those criteria and they are mandatory.[44] Following the Federal Court of Appeal decision in *Murphy,* she also agreed that legislation is not a "service" under s. 5 of the *CHRA*. Accordingly, it was reasonable for the Tribunal to rely upon and follow an analogous decision of the Federal Court of Appeal. [45]

32. The Court also considered and rejected the Commission's argument that *Murphy* is inconsistent with this Court's jurisprudence on the primacy of human rights legislation or was otherwise wrongly decided, and found that the Tribunal was bound to follow *Murphy*.[46] In particular, the Court rejected the Commission's contention that the Tribunal's interpretation of s. 5 of the *CHRA* improperly limited the primacy of human rights legislation and the Tribunal's power

[40] *Ibid,* para 92, Appellant's Record, Tab 2, p 96.
[41] *Ibid,* paras 95-106, Appellant's Record, Tab 2, pp 98-102.
[42] *Federal Court Reasons,* paras 29-33, Appellant's Record, Tab 3, pp 116-117.
[43] *Ibid,* para 34, Appellant's Record, Tab 3, pp 107-147.
[44] *Ibid*, paras 58-59, Appellant's Record, Tab 3, p 124.
[45] *Ibid*, para 62, Appellant's Record, Tab 3, p 125.
[46] *Ibid*, paras 67-78, Appellant's Record, Tab 3, pp 127-130.

to render laws inoperative. Primacy was not at issue; instead, this case was about whether legislation is a "service" within the meaning of s. 5 of the *CHRA*.[47]

33. Finally, the Court concluded that the Tribunal's interpretation of "service" reasonably took into account the broader context of the *CHRA*, including former s. 67 of the *Act.* The legislative history of s. 67 did not demonstrate that Parliament considered the registration provisions of the *Indian Act* to be a "service" subject to scrutiny under the *CHRA*.[48]

v. Federal Court of Appeal

34. The Federal Court of Appeal also concluded that the Tribunal's decisions in both cases were reasonable.[49] The Court reviewed *Dunsmuir* and the prevailing jurisprudence. It noted the that it was difficult to draw a bright line as to which standard to apply to decisions of human rights tribunals interpreting the scope of the protections in their home statute.[50] In the present case however, it found that the matter could be decided on a narrower basis in application of the general principles in recent Supreme Court caselaw.[51] None of the recognized categories justifying the correctness standard applied, nor was this a case where the Courts and tribunals shared jurisdiction to remedy breaches of the *CHRA*.[52]

35. The Federal Court of Appeal found that the Tribunal's characterization of the complaints as direct challenges to legislation rather than to exercises of discretion was reasonable and, indeed, correct because the complainants sought to expand the statutory criteria for Indian status under the *Indian Act*.[53] In so finding, the Court accepted that it was reasonably open to the Tribunal to conclude that the adoption of legislation is not a "service … customarily available to the general public". The applicable jurisprudence suggests "service" in s. 5 contemplates "something of a benefit being held out or offered to the public or a segment thereof."[54] Lawmaking

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[47] *Ibid,* paras 88-93, Appellant's Record, Tab 3, pp 133-134.
[48] *Ibid*, paras 94-123, Appellant's Record, Tab 3, pp 135-143.
[49] Judgment and Reasons for Judgment of the Federal Court of Appeal (Pelletier, de Montigny and Gleason JJ.A.) July 21, 2016, (*FCA Reasons*), Appellant's Record, Tab 4, pp. 148-190.
[50] *FCA Reasons*, paras 69, 78, Appellant's Record, Tab 4, pp 177, 180.
[51] *Ibid*, paras 78, Appellant's Record, Tab 4, p 180.
[52] *Ibid*, paras 79-88, Appellant's Record, Tab 4, pp 180-184.
[53] *Ibid*, para 93, Appellant's Record, Tab 4, p 185.
[54] *Ibid,* para 95, Appellant's Record, Tab 4, p 185.

does not come within this definition. As the Tribunal reasoned in *Andrews*, Parliament is not a service provider in fulfilling its *sui generis* constitutional role in lawmaking. [55] The Federal Court of Appeal decision in *Murphy* overtook previous decisions in which legislation was the subject of a discrimination complaint under s. 5 of the *CHRA*.[56]

36. The Court of Appeal rejected the argument that *Murphy* is at odds with the jurisprudence of this Court recognizing the primacy of human rights legislation over other laws and the ability of a human rights tribunal to declare legislation inoperative where there is a conflict. Those cases did not hold that the act of passing legislation constitutes a service customarily available to the general public. Further, a tribunal's jurisdiction should not be conflated with or determined by the extent of its remedial authority when it is validly seized of a complaint.[57]

37. The Court further held that the Tribunal's limited remedial capacity militates in favour of its conclusion. The panel agreed that a finding that the impugned provisions of the *Indian Act* are inoperative would not assist the complainants as they were seeking to broaden the terms of legislation. This can only be done by Parliament or through a declaration under s. 52(1) of the C*onstitution Act 1982*.[58] The Court also held that the Tribunal's rejection of the arguments based on ss. 2, 49(5), 62(1) and the former s. 67 of the *CHRA* was reasonable. The Court found persuasive the Tribunal's comment that s. 2 was in no way violated by a finding that the Tribunal could not hear direct challenges to federal legislation.[59]

38. Finally, the Tribunal advanced "unassailable" policy reasons for its decision. The Court of Appeal saw "no reason … that the Tribunal should be an alternate forum to the courts for adjudicating … the alleged discriminatory nature of legislation when a challenge may be made to a court under s. 15 of the *Charter*".[60] The "ultimate" support for the Tribunal's conclusion that

[55] *Ibid*, paras 96, 100, Appellant's Record, Tab 4, pp 185-187.
[56] *Ibid*, para 97, Appellant's Record, Tab 4, p 186.
[57] *Ibid*, paras 98-100, Appellant's Record, Tab 4, pp 186-187
[58] *Ibid,* para 101, Appellant's Record, Tab 4, pp 187-188.
[59] *Ibid,* para 102, Appellant's Record, Tab 4, p 188.
[60] *Ibid,* para 103, Appellant's Record, Tab 4, pp 188-189.

challenges of this nature should proceed before the courts is that s. 1 of the *Charter* would not be available to the respondent as a defence under the *CHRA*.[61]

PART II – POINTS IN ISSUE

39. This appeal raises the following issues:

(a) What standard of review applies to the Tribunal's determination of its jurisdiction under its enabling legislation?

(b) Did the Tribunal reasonably conclude it lacked jurisdiction to hear the complaints because they did not engage section 5 of the *Canadian Human Rights Act*?

PART III – ARGUMENT

A. The applicable standard of review is reasonableness

i. The presumption of reasonableness review applies to the questions in issue

40. The Attorney General of Canada agrees with the Commission that the standard of review is not a determining factor in this case. On either standard, the Tribunal's conclusion that the complaints did not involve the provision of a service customarily available to the general public within the meaning of s. 5 of the *CHRA* should be upheld. To the extent it is necessary to determine the issue, the appropriate standard of review is reasonableness. This standard accords with the Court's recent pronouncements on this issue, and is consistent with an application of the principles from *Dunsmuir*.[62] The issue determined by the Tribunal does not fall within the four recognized categories and the context shows no indication that Parliament intended the standard to be correctness.

41. This Court has recently emphasized that "the choice of the applicable standard depends primarily on the nature of the questions that have been raised, which is why it is important

[61] *Ibid*.
[62] *Quebec (Attorney General) v Guérin*, 2017 SCC 42; *Dunsmuir v New Brunswick*, 2008 SCC 9.

to identify those questions correctly".[63] The Tribunal identified the question as "whether the complaints involve the provision of services customarily available to the general public within the meaning of section 5 of the *Act or* whether they were solely a challenge to legislation"[64] and applied binding appellate jurisprudence holding that the adoption of legislation does not fall within the meaning of s. 5 of the *CHRA*.[65]

42. The Commission is wrong to suggest that the prevailing trends support a standard of correctness, or that the Tribunal altered a foundational test. The jurisprudence establishes that the reasonableness standard is presumed to apply where a tribunal, in discharging its statutory duty, has interpreted its home statute.[66] This proposition has been consistently applied in the human rights context.[67] In this case, the Tribunal did not purport to set or change the existing legal test; it applied a binding precedent which is consistent with a proper statutory interpretation analysis.

ii. The presumption of reasonableness is not rebutted

43. The presumption of reasonableness review is grounded in the "legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing."[68] The presumption can be rebutted in two ways, neither of which apply in these circumstances. First, by establishing that the matter falls within one of the four recognized categories of questions that attract correctness review: (1) constitutional questions; (2) true questions of jurisdiction or *vires*; (3) general questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise; and (4) questions regarding the jurisdictional lines between two or more competing tribunals.[69] Second, by a

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[63] *Mouvement läique québécois v Saguenay (City),* 2015 SCC 16 (*Saguenay*), para 45.
[64] *CHRT Reasons (Andrews),* paras 41, 111, Appellant's Record, Tab 2, pp 76, 104; *CHRT Reasons (Matson)*, para 17, Appellant's Record, Tab 1, pp 6-7.
[65] *Ibid*, paras 63-64, Appellant's Record, Tab 2, p 86.
[66] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, para 30; *Guérin, supra,* para 31.
[67] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53, [*Mowat*], paras 23, 24; *Saskatchewan (Human Rights Commission) v Whatcott,* 2013 SCC 11, paras 167-168.
[68] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 [*Capilano*], para 33.
[69] *Dunsmuir, supra,* paras 58-61.

contextual analysis that reveals that the legislature did not intend to insulate the tribunal's decisions from judicial review.[70]

44. The four categories identified in *Dunsmuir* have been narrowly applied.[71] In particular, this Court has cautioned that the category of a "true question of jurisdiction" may not exist and that the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be subject to deference on judicial review."[72] Most recently, this Court in *Guérin* affirmed that the reasonableness standard applies to an arbitrator's interpretation of its enabling legislation determining whether a dispute is arbitrable. The Court held that such a determination is not a true question of jurisdiction, and that the adoption of reasonableness standard undermines neither the rule of law nor the other constitutional bases of review.[73]

45. As in *Guérin*, this is a matter involving the Tribunal's interpretation of its enabling statute. It is not a true question of jurisdiction. Although the question identified by the Tribunal[74] involves a determination of the jurisdiction or statutory mandate of the Tribunal, it is unequivocally "a question of statutory interpretation involving the issue of whether the [statutory] complaint mechanism is available to certain parties."[75]

46. Similarly, an interpretation of "services" that does not include Parliament's action in enacting legislation is not a question of central legal importance to the legal system as a whole. In any event, because the question falls squarely within the specialized expertise of the Tribunal, it does not meet the second requirement.[76]

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[70] *Capilano*, *supra,* paras 24, 32.
[71] *Mclean v British Columbia (Securities Commission),* 2013 SCC 67, paras 22; *Capilano*, *supra,* paras 24, 32.
[72] *Alberta Teachers*, *supra*, para 34; *Canadian Broadcasting Corp v SODRAC 2003 Inc,* 2015 SCC 57, para 38; *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission),* 2015 SCC 45, para 27.
[73] *Guérin*, *supra*, para 34. See also: *Canadian National Railway Co v Canada (Attorney General),* 2014 SCC 40, para 61.
[74] *CHRT Reasons (Matson),* para 17, Appellant's Record, Tab 2, p 6; *CHRT Reasons (Andrews),* paras 41, 111, Appellant's Record, Tab 2, pp 76, 104.
[75] *Canadian National Railway Co*, *supra,* para 61.
[76] *Mowat*, *supra*, para 23-25; *Alberta Teachers*, *supra,* paras 45-46.

47. Moreover, the contextual factors identified by the Commission do not support correctness review. The contextual review must focus on identifying clear legislative signals that the presumption is rebutted. Recent jurisprudence indicates this could arise where the legislator uses express legislative language providing for the standard on a statutory right of appeal,[77] or where primary jurisdiction to determine the issue is shared with ordinary courts.[78]

48. Parliament has not specified the applicable standard of review nor used the kind of clear legislative language recognized as indicating such an intent.[79] Similarly, this is not a situation where shared primary jurisdiction has been conferred on courts or other tribunals. The Tribunal has exclusive primary jurisdiction to hear complaints under s. 5 of the *CHRA*. It is not analogous to the situation in *Saguenay* where the Quebec tribunal shared primary jurisdiction for the interpretation of the rights protected in the Quebec *Charter* with the Superior Court of Quebec.

49. Similarly, it does not assist the Commission to point to a decision of the Social Security Tribunal which held that it was beyond its authority to hear a direct challenge to legislation under the *CHRA*.[80] Although tribunals other than human rights bodies may consider human rights legislation, in order to increase the protection of, and respect for, human rights, this should not be conflated with a desire for increased supervisions by courts. Similarly, the nature of the question does not tip the balance towards correctness. Human rights tribunals often deal with questions of broad import; their core function is to determine the scope of protection of human rights. However, "not all questions of general law…rise to the level of issues of central importance…or fall outside the adjudicator's specialized area of expertise. Proper distinctions ought to be drawn…"[81] As in *Mowat*, failing to draw the distinction here would not only depart from the jurisprudence but would ultimately not respect Parliament's intention to entrust this task to the Tribunal.

50. The final factor identified by the Commission is the need for consistency. However, this factor on its own cannot mandate the application of the correctness standard. The balance

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[77] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, paras 37-39.
[78] *Saguenay, supra,* paras 49-51; *SODRAC 2003, supra*, para 35; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, para 15
[79] *Tervita, supra*, para 38.
[80] CHRC's Factum, para 27.
[81] *Mowat, supra*, para 23.

between concern for the rule of law and consistent decision-making on one hand, and legislative supremacy and administrative efficiency on the other, does not require courts to review all tribunal decisions that address questions relating to the scope of a tribunal's statutory mandate on a correctness standard. Some tolerance of inconsistent decisions by a single tribunal or between tribunals allows for the flexible development of the law, and where there is a persistent conflict on a matter of statutory interpretation that is not resolved, the conflict can itself be unreasonable.[82]

51. With respect to conflict across jurisdictions, each provincial or territorial legislature and the federal Parliament that has decided to pass human rights legislation has established their own administrative structures and bodies to receive, screen and adjudicate complaints. The various codes are far from identical.[83] Inconsistency is an inherent feature of a federal system and merely reflects different legislative choices and priorities.[84]

52. In the present case, the Tribunal's decision should be upheld on either standard. As this Court has explained, legislative provisions may sometimes be susceptible to multiple reasonable interpretations.[85] However, it may also be the case that when the principles of statutory interpretation are properly applied, there can be only one reasonable interpretation.[86] That is the situation here.

B. The Complaints fall outside the jurisdiction of the Tribunal

53. In holding that the complaints were a direct challenge to the *Indian Act,* that the *CHRA* does not allow for such complaints and that Parliament's enactment of the criteria for registration could not be construed as the provision of services within the meaning of s. 5 of the *CHRA,* the Tribunal's decision was both reasonable and correct. These conclusions are consistent with the evidentiary record and recent jurisprudence concerning the Tribunal's mandate, as well as the proper application of the principles of statutory interpretation in the human rights context.

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[82] *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, para 17.
[83] See note 161 below.
[84] *McLean, supra*, para 29.
[85] *Wilson, supra*, para 34; *McLean, supra,* para 32.
[86] *Wilson, supra,* para 35, citing *Mowat.* See also: *First Nations Child and Family Caring Society of Canada v Canada (Attorney General),* 2013 FCA 75, para 15.

i. The complaints are solely about an Act of Parliament

54. The Tribunal's characterization of the complaints as direct challenges to s. 6 of the *Indian Act* was consistent with the evidence and arguments presented. Its decision is eminently reasonable and, as the Court of Appeal concluded, correct.[87]

55. As the complainants themselves confirmed during the Tribunal hearings, they seek to challenge the registration provisions in s. 6 of the *Indian Act,* which determine eligibility for Indian status. Their complaints do not challenge the actions of a government service provider nor the manner in which any benefits are provided to the public.[88] The complaints are not about the application or administration of the legislation. Rather, they are about Parliament's decision to set certain parameters around the definition of "Indian" in the legislation. The complaints are direct challenges to legislation and nothing more.

56. Although the Commission attempts to characterize the complaints as being about the review and processing of applications for registration leading to the conferral of benefits on applicants,[89] the Tribunal and Courts below correctly rejected that characterization. The complaints did not take issue with the manner in which their applications for registration under s. 6 were processed.[90] As the Matson Tribunal found, the "evidence and argument were not directed at any wrongdoing by the Respondent but focussed on the alleged discriminatory impact of the entitlement provisions of s. 6 of the *Indian Act*."[91]

57. The Registrar generally has no discretion in the application of s. 6 of the *Act*.[92] As in *Forward*, "any issue taken with the application review process is really an issue taken with the

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[87] *FCA Reasons*, para 93, Appellant's Record, Tab 4, p 185.
[88] *CHRT Reasons (Matson),* paras 50-54, 59, Appellant's Record, Tab 1, pp 16-19; *CHRT Reasons (Andrews),* paras 11, 31, 52, Appellant's Record, Tab 2, pp 67, 72, 80.
[89] CHRC Factum, paras 62-65.
[90] *CHRT Reasons (Matson),* paras 48-60, Appellant's Record, Tab 1, pp 16-21; *CHRT Reasons, (Andrews),* paras 52-57, Appellant's Record, Tab 2, pp 80-83; *Federal Court Reasons*, paras 57-60, Appellant's Record, Tab 3, pp 124-125; *FCA Reasons*, para 93, Appellant's Record, Tab 4, p 185.
[91] *CHRT Reasons (Matson),* para 55, Appellant's Record, Tab 1, p 19.
[92] *Forward v Canada (Citizenship and Immigration),* 2008 CHRT 5, para 38; *Etches v. Canada Department of Indian Affairs and Northern Development (Registrar),* 2009 ONCA 182, para 26;

Act."[93] The government officials involved did nothing more than apply categorical statutory criteria to undisputed facts. The complainants' applications were not processed any differently than other applications. There was no exercise of discretion or action by government officials in the present cases that could constitute a discriminatory practice.

ii. The Tribunal properly applied and followed sound Federal Court of Appeal jurisprudence

58. The Tribunal and courts below applied and followed the Federal Court of Appeal decision in *Murphy,*[94] in which Noël C.J. held that a direct attack on legislation falls outside the scope of the *CHRA*. In doing so, the Court expressly overruled its 1989 decision in *Druken*,[95] noting that the issue of whether the complaint was directed at a discriminatory practice in the provision of a service under s. 5 had been conceded by the Attorney General without argument.[96]

59. The *Murphy* decision signaled an evolution in the Tribunal and courts' treatment of service complaints under s. 5 of the *CHRA*. The complaint in *Murphy* asserted that the Canada Revenue Agency's tax treatment of payments received pursuant to the settlement of a pay equity complaint was discriminatory. The Tribunal found that the alleged discrimination resulted not from any actions of government officials but from the application of non-discretionary provisions in the *Income Tax Act* and that this did not constitute a "service" within the meaning of s. 5 of the *CHRA*.[97]

60. The Federal Court and Federal Court of Appeal upheld the Tribunal's finding as both reasonable and correct. The Court of Appeal concluded "this is a direct attack on sections 110.2 and 120.31 of the *ITA*, based on considerations that are wholly extrinsic to the *ITA*. […] [t]his type of attack falls outside the scope of the *CHRA* since it is aimed at the legislation *per se*,

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Gehl v Canada (Attorney General), 2017 ONCA 319, paras 84-87; *Gehl v Canada (Attorney General),* [2001] 4 CNLR 108 (SCJ), para 14.
[93] *Forward, supra*, para 38.
[94] *Murphy FCA, supra,* para 6.
[95] *Canada (Attorney General) v Druken*, [1989] 2 FC 24 (CA).
[96] *Murphy FCA*, *supra*, para 7. See also: *Canada (Attorney General) v McKenna*, [1999] 1 FC 401, paras 78-80.
[97] *Murphy CHRT*, *supra*, paras 50-58.

and nothing else".[98] It also stated, unequivocally, that "the *CHRA* does not provide for the filing of a complaint directed against an act of Parliament"[99] and endorsed the Federal Court's statement in *Wignall*[100] that only a constitutional challenge could counter the discriminatory application of a provision of the *Income Tax Act*.

61. As the following statutory interpretation analysis demonstrates, the Court of Appeal's decision in *Murphy* is sound and should be upheld.

iii. The Tribunal's finding that the *CHRA* does not authorize the Tribunal to determine the validity of legislation is reasonable

62. To properly determine the scope of the Tribunal's authority or jurisdiction, and more particularly, the meaning of "discriminatory practices" and "services," the Court must not only examine the object and purpose of the *Act* and the words at issue, but also the broader context in order to give effect to the will of Parliament.[101]

63. The Tribunal and Courts below applied the proper interpretive approach to the *CHRA*. The *Act* has quasi-constitutional status and must be construed generously in order to give effect to its important and broad remedial purpose of preventing and redressing discriminatory acts.[102] At the same time, the words of the statute must not be given a meaning they are incapable of bearing.[103] Even in pursuit of the laudable policy goal of preventing discrimination, any interpretation of the words in the statute must be reasonable.

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[98] *Murphy FCA*, *supra*, para 6.
[99] *Ibid.*
[100] *Wignall v Canada (Department of National Revenue (Taxation)*, 2003 FC 1280.
[101] *Mowat, supra*, para 33.
[102] *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571, paras 13, 50; *Mowat, supra,* para 62.
[103] *Ibid; Canada (Attorney General) v Mowat*, 2009 FCA 309, para 99; *Gould, supra,* para 50; *Canada (House of Commons) v Vaid,* 2005 SCC 30, para 80; *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan,* 2008 SCC 45, para 19; *University of British Columbia v Berg,* [1993] 2 SCR 353, at 371; *Watkin v. Canada (Attorney General),* 2008 FCA 170, para 34.

(a) The CHRA's object and purpose is to prohibit discriminatory practices

64. Consistent with Parliament's legislative authority under s. 91 of the *Constitution Act, 1867,* the object and purpose of the *CHRA* is to prohibit discriminatory practices in certain defined spheres of federal private and public activity. The purpose and scope of the *CHRA* is carefully calibrated to complement the purpose and scope of the *Charter* and the *Bill of Rights*. Both the *Charter* and *Bill of Rights* constrain Parliament's ability to enact discriminatory laws.

65. The *CHRA's* particular purpose, as enunciated through s. 2, is to enable individuals to live without the hindrance of discriminatory practices. Section 2 makes clear that the purpose of the *Act* is "to give effect to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives they are able and wish to have …without being hindered or prevented from doing so by *discriminatory practices*" based on the prohibited grounds listed. By contrast, s. 15 of the *Charter* guarantees "the right to equality before and under the law" and "the right to equal protection and equal benefit of the law without discrimination".[104] Parliament is presumed to choose its words carefully and to intend that there be coherence between various sources of law within a jurisdiction.[105] Had Parliament intended the Tribunal to examine whether legislation is itself discriminatory, it could have included an express primacy clause in the *CHRA*.

66. The difference in language reflects the intended purpose and scope of each instrument.[106] This conclusion is reinforced when one reviews the legislative history. This Court has often noted that speeches in Parliament are "helpful, particularly insofar as they corroborate and do not contradict the meaning and purpose to be derived upon a reading of the words of the provision in the context of the legislative scheme as a whole".[107] Conversely, "information gleaned from parliamentary history should not be afforded much weight where it contradicts the meaning

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[104] *Constitution Act, 1982*, s 15. See also: *Canadian Bill of Rights*, SC 1960, c 44, ss 2, 5(2).
[105] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed, pp 372, 419-421, Authorities, Tab 31.
[106] *Ibid,* at 416-419, 423.
[107] *R v Gladue*, [1999] 1 SCR 688, para 45; *Ontario Teachers Federation v Ontario (Attorney General),* (2000), 49 OR (3d) 257 (CA), para 32.

of the text derived from a contextual reading in accordance with recognised principles of statutory interpretation."[108]

67. A review of the legislative record surrounding the enactment of the *CHRA,* and subsequent amendments, confirms that the overarching aim of the legislation was to confer the right on individuals to challenge and obtain redress for certain discriminatory conduct or practices within the federal sphere.[109] It was not intended as a vehicle for challenging discriminatory laws.

68. When asked about the difference between the *CHRA* and the *Bill of Rights,* and specifically in what way the former would "strengthen the law to give human rights to the average Canadian", the Minister of Justice explained that the *CHRA* would give an individual the ability to specifically challenge and obtain redress for certain discriminatory practices. This is something the *Bill of Rights* did not do: the *Bill of Rights* "acts as a guide for the drawing and interpretation of federal legislation and regulations, [b]ut does not provide any mechanism to deal with individual cases of discrimination".[110] He considered that the two pieces of legislation achieved very different objectives: the *Bill of Rights* targeted discrimination "by operation of law" while the *CHRA* targeted discrimination arising by "operation of the bigotry of the people running the hotel, or the particular waiter or room clerk."[111]

69. While the Minister did not refer to government service providers, the nature of the interactions referenced in his description suggests that Parliament contemplated analogous interactions between Crown officials and individuals, such as where someone submits an application at a government office or attends a government office, museum or other place.[112]

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[108] Pierre André Coté, *The Interpretation of Legislation in Canada*, (4th Ed 2011), p 467, Authorities, Tab 29. See also: *Teal Cedar Products Ltd v British Columbia,* 2017 SCC 32, para 97; *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42, paras 11-12.
[109] *House of Commons Debates*, 30th Parl, 2nd Sess, Vol 3, (11 February 1977) at 2975-2977, Authorities, Tab 8; *Debates of the Senate*, 30th Parl, 2nd Sess, Vol 2, (8 June 1977) at 841, Authorities, Tab 14; *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs*, 30th Parl, 2nd Sess, No 11 (17 May 1977) at 11:29, 11:31-36, 11:48, Authorities, Tab 12.
[110] *Ibid,* at 11:32, Authorities, Tab 12.
[111] *Ibid,* at 11:32-33, Authorities, Tab 12.
[112] See also: *Gould, supra*, para 59.

(b) The text and ordinary and grammatical meaning of "discriminatory practices" and "service" does not include lawmaking

70. As a statutory body, the Tribunal has no inherent jurisdiction which would permit it to entertain complaints that do not meet the terms of the statute. It has only the authority that Parliament has conferred upon it through legislation. To come within the scope of the *CHRA*, a complainant must first identify a "discriminatory practice" that a "person is engaging" in within the meaning of ss. 39 and 40(1).

71. Parliament has provided that the Tribunal's mandate encompasses complaints relating to "discriminatory practices", which is defined as those listed in ss. 5 to 14(1).[113]

72. The scope the *CHRA* extends only to certain areas of activity, including those set out in ss. 5, 6 and 7. Section 5 prohibits the denial of goods services, facilities or accommodation and adverse differentiation in relation to any individual on a prohibited ground. Sections 6 and 7 extend protection in relation to the provision of commercial premises and residential accommodation, and employment, respectively.[114]

73. In this case, the complainants sought access to the *CHRA* scheme through s. 5, which required them to demonstrate that the particular impugned actions are or concern services.[115] The text of s. 5 makes clear that the type of "practices" or « actes » which may be the subject of a complaint relate to individual actions or interactions which take place in the context of providing or delivering goods, services or facilities. Section 5 provides as follows:

Discriminatory Practices	**Actes discriminatoires**
Denial of good, service, facility or accommodation	Refus de biens, de services, d'installations ou d'hébergement
5. It is a discriminatory practice in the provision of goods, services, facilities or	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction

[113] *CHRA*, *supra*, s 39.
[114] *CHRA*, *supra*, ss 9, 10.
[115] *CHRT Reasons (Matson),* paras 46-60, Appellant's Record, Tab 1, pp 15-21; Appellant's Record, Tab 78-83, *CHRT Reasons (Andrews),* paras 47-57; *Federal Court Reasons,* paras 57-59, Appellant's Record, Tab 3, pp 124; *FCA Reasons*, paras 95-96, Appellant's Record, Tab 4, pp 155-156; *Gould, supra,* paras 15-17, 58, 60; *Watkin, supra*, para 31.

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.	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.

74. The Tribunal and Courts' conclusions that Parliament did not intend s. 5 to encompass direct challenges to legislation are consistent with the ordinary and understood meaning of "discriminatory practices" and "service".

75. When used as a noun, "practices" means "an action, deed, undertaking or proceeding".[116] Similarly, "service" is defined in the Oxford English Dictionary as "to be of service to; to serve; to provide with a service"; to "supply (a person) *with* something" or "to process".[117] These definitions demonstrate that the ordinary meaning of "service" involves some interaction or individual action.

76. The meaning of "service" must also be determined in the context of the provision as a whole. The terms in s. 5 are all similar in the sense that they refer to things that may be requested by, offered and provided to the public either by a private person or the government. Legislating is fundamentally different in character than the words immediately surrounding "service" in s. 5 (i.e. "goods", "facilities" and "accommodation").[118] Accordingly, the Tribunal and Courts' conclusion is consistent with the associated words rule of statutory interpretation, which requires the reader to look for a common feature among linked terms.[119]

77. The Commission argues that the French version of s. 5, which uses « fournisseur … de services» instead of "in the provision of … services" means the focus of the s. 5 is on the

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[116] OED: practice; Larousse dictionnaires de français: acte.
[117] OED: service (emphasis added). See also: Larousse dictionnaires de français: service.
[118] *Forward, supra,* para 42; *Murphy FCA*, *supra,* para 6; *Mowat, supra,* para 37. See also: *CHRT Reasons (Andrews),* paras 57-58, Appellant's Record, Tab 2, pp 82-83.
[119] *Sullivan*, *supra*, at 230; *Opitz v Wrzesnewskyj*, 2012 SCC 55, paras 40-43.

service provider, who is the government official charged with administering the legislation.[120] There is no significant discrepancy between the plain meaning of the French and English versions of the provision that may be relevant in determining legislative intent. Both are aimed at preventing the provision of services in a discriminatory manner. Rather than weakening the Tribunal's interpretation, the text's focus on the service provider is a signal that it is the individual action or manner of delivering the services that is targeted. Any reasonable interpretation of « fournisseur … de services » (service provider) would exclude the Parliament of Canada.

78. The Commission's contention that the Tribunal ought to have looked only to the impact of the eligibility criteria and not its source, ignores the text and structure of the *Act*. The focus must be on determining if the actions said to be a discriminatory practice are, in this case, a "service". This is because, in the federal context, only certain types of government actions can constitute "practices" or the provision of "services." Judicial interpretations have found that "service" within the meaning of s. 5 contemplates something in the nature of a benefit being held out or offered to the public by a service provider.[121] Parliament's lawmaking function does not resemble anything ordinarily viewed as a "practice" or a "service" that is held out to the public.

79. Some forms of government action taken pursuant to statute can constitute a "service". Services in a government context can include discretionary government actions such as: the Canada Revenue Agency issuing advance income tax rulings; Environment Canada publicizing weather and road conditions; Health Canada encouraging Canadians to increase their level of physical activity; or Immigration Canada advising immigrants about how to become a Canadian resident.[122] Government services may also be transactional and involve direct interface between government officials and members of the public, perhaps in the context of an application for a passport at a Passport Canada office or for benefits at a Service Canada office.

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[120] CHRC Factum, paras 59-61.
[121] *Gould, supra*, paras 57-58; *Watkin, supra,* para 31.
[122] *Watkin, supra*, paras 28, 34.

80. Courts have rejected the proposition that all government action is a "service". The Federal Court of Appeal in *Watkin* expressly disavowed the notion that the performance of a statutory duty by the public service is "by definition" a service to the public.[123]

> [r]egard must be had to the particular actions which are said to give rise to the alleged discrimination … and the fact that the actions are undertaken by a public body for public good cannot transform what is ostensibly not a service into one. Unless they are "services", government actions do not come within the ambit of section 5. [124]

81. As noted above, the complaints at issue do not impugn the conduct of public servants in processing applications under s. 6 of the *Indian Act*. Rather, they take issue with Parliament's delineation of the "status Indian" population, a legislative act which cannot reasonably be grouped in the category of "government services" amenable to challenge under section 5. As the Tribunal properly noted, the act of lawmaking is one of Parliament's most fundamental and significant functions and is *sui generis* in its nature: the powers, privileges and immunities that Parliament and Legislatures possess are rooted in the constitution and are essential to their functioning.[125] When Parliament legislates "it is fulfilling its constitutionally mandated role, at the very core of our democracy" and characterizing it as a "service" would ignore these fundamental constitutional precepts.

(c) The broader context of the CHRA confirms the Tribunal's interpretation

82. The broader context and overall design of the *CHRA* further support the conclusion that a "service" does not include lawmaking. The justificatory mechanisms, the scope of the remedial authority and various other provisions support this conclusion. The Tribunal's determination that ss. 49(5) and 67 did not support a contrary interpretation was also reasonable.

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[123] *Ibid*, para 32, disavowing proposition in *Bailey et al v Minister of National Revenue* (1980), 1CHRR/D 193, at 212-214, and *Anvari v Canada (Canadian Employment and Immigration Commission)* (1989), 10 CHRR D/5816.
[124] *Watkin*, *supra*, para 33.
[125] *CHRT Reasons (Andrews),* para 57, Appellant's Record, Tab 2, pp 82-83, *citing Telezone Inv v Canada (Attorney General)* (2004), 69 OR (3d) 161 (CA), paras 13-17; *Harvey v New Brunswick (Attorney General),* [1996] 2 SCR 876; *Canada (House of Commons) v Vaid,* 2005 SCC 30, para 33. And see: *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly),* [1993] 1 SCR 319 at 389.

83. First, the justificatory mechanism available to respondents under s. 15(2) of the *CHRA* is inadequate and inappropriate for assessing laws of general application.[126] The *CHRA* has no equivalent to s. 1 of the *Charter*. Instead, *bona fide* justification is a respondent's primary defence for a *prima facie* discriminatory practice.[127]

84. Subsection 15(2) of the *CHRA* provides that for any practice relating to the denial of a service the service provider must establish that accommodating the complainant would impose undue hardship, limited to considerations of "health, safety and cost."[128] Parliament's decision to limit the *CHRA's* justificatory criteria to these factors is a strong signal that the legislation does not contemplate challenges to laws of general application, which often implicate complex public policy considerations which extend far beyond these factors and require careful balancing of competing societal interests.

85. The concept of reasonable accommodation applies to relationships amenable to being adjusted to conform with human rights legislation "up to the point at which accommodation would mean undue hardship for the accommodating party."[129] However, the concept of "undue hardship" is not easily applicable to a legislature enacting laws. Reasonable accommodation can only apply where the government actor has discretion to tailor the general rule to individual circumstances. As this Court explained in *Hutterian Brethren*, applying it to legislation attenuates the concept because a "very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants."[130]

86. In contrast to the s. 15 *CHRA* justificatory mechanism, s. 1 of the *Charter* affords a full consideration of the often complex and polycentric considerations that animate laws, a function that has proven critical in the *Charter* challenges to s. 6 of the *Indian Act*.[131] The *Charter*

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[126] *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37, para 68; *Multani v. Commission scolaire Marguerite-Bourgeoys,* 2006 SCC 6, para 131 (dissent of Abella J).
[127] *CHRA*, para 15(1)(g).
[128] *CHRA*, s 15(2).
[129] *Hutterian Brethren, supra,* para 68.
[130] *Ibid*, paras 69-70.
[131] *McIvor,* paras 10, 123-129; *Descheneaux, supra,* paras 178-196; *Gehl (OCA), supra*, para 10.

jurisprudence has given rise to concepts of deference, dialogue and the development of the *Oakes* test. The test provides safeguards to balance individual rights and freedoms with broader social objectives. It incorporates the concepts of minimal impairment and the proportionality of effects, which are more amenable to the broadly contextual analysis necessary to assess Parliamentary line-drawing. Accordingly, when a law is challenged, the government is entitled to justify the law not by showing reasonable accommodation, but through the s. 1 *Oakes* analysis.[132]

87. The legislation at issue in these cases amply illustrates that it would be untenable for the Tribunal to hear direct challenges to legislation given its present statutory mandate and analytical framework. The *CHRA's* reasonable accommodation justificatory mechanism is ill-suited for the task of assessing the justification for Parliament's Indian status criteria in s. 6, which was the product of years of consultation with Indigenous groups and which is informed by a host of complex and competing social, demographic and cultural considerations.[133] Health and safety concerns do not arise and 'cost' is inadequate to address these considerations.

88. Second, the language of s. 53 cannot actually remedy the alleged discrimination that arises from legislation. As the Court of Appeal noted, the Tribunal cannot make legislative provisions more inclusive: "the Tribunal is not empowered to issue a declaration of invalidity or to read in additional language into the *Indian Act* to broaden those entitled to Indian status as this type of remedy is only available to a court under s. 24(1) of the *Charter* and 52(1) of the *Constitution Act, 1982*. The inability of the Tribunal to grant the remedy sought by the complainants militates in favour of the conclusion reached by the Tribunal."[134]

89. Had Parliament intended the Tribunal to review legislation for *CHRA* compliance, it would have included express language in s. 53 empowering the Tribunal to meaningfully address deficient legislation. The Tribunal's ability to order a respondent to cease applying discriminatory legislative provisions will never be sufficient where the complainant alleges non-discretionary legislated criteria are under-inclusive. Only Parliament or a declaration pursuant to s. 52(1) of the *Constitution Act, 1982* can change the law.

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[132] *Hutterian Brethren, supra*, paras 65-71.
[133] *McIvor, supra,* paras 10, 129-132.
[134] *FCA Reasons*, para 101, Appellant's Record, Tab 4, pp 187-188.

90. Third, the language of various other provisions also supports the interpretation. For example, s. 40 makes it clear that the *CHRA* is focussed on preventing discriminatory actions by "persons" engaged in specific activities or undertakings.[135] The Tribunal's remedial powers presume the service provider found to have discriminated will be a "person" against whom an order can be made.[136] When the alleged discrimination flows directly from decisions made by Parliament in the process of legislating, no "person" can be said to have caused the discrimination.[137]

91. The Tribunal properly rejected the Commission's argument that Parliament intended the *CHRA* to apply to legislation based on the wording and legislative history of two provisions of the *CHRA*: s. 49(5) and the former s. 67. The Tribunal and Courts considered and addressed those provisions in their decisions.[138] These are not jurisdiction conferring provisions and they are of limited assistance in interpreting s. 5 of the *CHRA*. Neither of them expressly states that "services" in s. 5 was intended to cover Parliament's lawmaking function and that intent cannot reasonably be inferred from their words or from the legislative history surrounding their adoption.

92. The Tribunal and Courts' interpretation of s. 5 of the *CHRA* does not render those provisions meaningless. Rather, these provisions suggest that Parliament recognized that the Tribunal may be called upon to consider and interpret other legislative provisions arising incidentally in cases that are properly before it. The Tribunal provided a number of examples of cases that may implicate, but not directly challenge legislation.[139] Although the Tribunal's statutory mandate does not encompass the review of legislative provisions alleged to contravene the *CHRA*, it can certainly consider legislation and where a law impedes the Tribunal's mandate, the *CHRA* will prevail. On their own, these provisions do not alter the scope of s. 5 of the *CHRA* to allow direct challenges to a legislative provision in complaints relating to a "service."

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[135] *CHRA, supra,* ss 40(1), 40(3), 40(4).
[136] *CHRA, supra*, s 53(2).
[137] *House of Commons v Canada (Labour Relations Board)*, [1986] 2 FC 372, per Hugessen JA, concurring, paras 24-37
[138] *CHRT Reasons (Matson)*, paras 34-36, 137-142, Appellant's Record, Tab 1, pp 11-12, 52-54; *CHRT Reasons (Andrews),* paras 97-109, Appellant's Record, Tab 2, pp 99-104; *Federal Court Reasons,* paras 26-27, 94-123 Appellant's Record, Tab 3, pp 115, 135-144; *FCA Reasons*, para 102, Appellant's Record, Tab 4, p 188.
[139] *CHRT Reasons, (Andrews),* paras 86-92, Appellant's Record, Tab 2, pp 94-96.

93. In support of a broader interpretation of "services", the Commission points to statements made by some witnesses appearing before Parliamentary committees in 1997 and 1998, prior to the adoption of s. 49(5), who apparently believed the *CHRA* allowed direct challenges to legislation.[140] The passages show that this provision was adopted to adjudicate cases involving questions of inconsistency of legislation, rather than direct challenges, given the complex legal and evidentiary issues the Tribunal was called upon to address.[141]

94. As the Tribunal and Courts below found, the evidence relied upon by the Commission concerning the legislative history of the enactment and repeal of s. 67 is also of limited assistance in defining what constitutes a "service" in s. 5 of the *CHRA*.[142] Although the record is mixed, there is an indication in debates and committee hearings when the *CHRA* was first introduced that s. 67 was intended to shield band councils from complaints.[143] At the time, the government was consulting with bands and other groups with a view to amending the *Indian Act*. While many of those who appeared before the Committees when the *Act* was first introduced objected to the failure to repeal s. 12(1)(b) of the *Indian Act* at the same time, and urged that Indigenous women be protected,[144] the Minister clarified that issues tied to band membership such as who is entitled to reside on reserve would have to be dealt with comprehensively in consultations with bands.[145] This could include action taken in relation to elections, by-laws made pursuant to the *Indian Act*, Indian monies and land management.

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[140] CHRC's Factum, para 74 (see quoted excerpts). Those views were likely based on *Druken* in which the *CHRA* was assumed to apply to discriminatory legislation.
[141] *CHRT Reasons (Matson),* para 131, Appellant's Record, Tab 1, p 50.
[142] CHRC's Factum, paras 78-80.
[143] *Proceedings of the Standing Senate Committee of Legal and Constitutional Affairs,* 30th Parl, 2nd Sess, No 5, (21 June 1977), at 5:43-45, 5:48-49, Authorities, Tab 15*; Minutes of the House of Commons Standing Committee on Justice and Legal Affairs*, 30th Parl, 2nd Sess, No 9, (26 April 1977) at 9:25-26, Authorities, Tab 11.
[144] *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs,* 30th Parl, 2nd Sess, No 8 (31 March 1977) at 8:6-7, Authorities, Tab 10; *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs,* 30th Parl, 2nd Sess, No 9 (26 April 1977) at 9:24-25, Authorities, Tab 11.
[145] *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs,* 30th Parl, 2nd Sess, No. 15 (25 May 1977) at 15:43-47, Authorities, Tab 13; *Proceedings of the Standing Senate Committee of Legal and Constitutional Affairs,* 30th Parl, 2nd Sess, No. 5 (21 June 1977) at 5:42-43, Authorities, Tab 15. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs,* 30th Parl, 2nd Sess, (5 July 1977) at 7:21-25, Authorities, Tab 16.

95. Similarly, the record indicates that the purpose of repealing s. 67 was to extend the Tribunal's ability to review decisions and actions taken by federal officials and Band Councils under the authority of the *Indian Act.*[146] It was also intended to cure the irony that "legislation designed to promote equality effectively sanctions discrimination."[147] When asked if the repeal meant that the Tribunal would be obliged to tear apart the *Indian Act,* counsel for the Department of Justice explained that repeal will allow challenges to decisions made pursuant to the *Act*, and noted that the *Charter* was the means by which challenges to legislative provisions are brought.[148]

96. The repeal of s. 67 is not rendered meaningless by a finding that complaints about the wording of s. 6 of the *Indian Act* do not engage the *CHRA*. There are an array of discretionary decisions made pursuant to legislative powers under the *Indian Act* that might constitute a "service" and therefore attract *CHRA* scrutiny. Indeed, since the repeal of s. 67, decisions authorized by the *Indian Act* have been the subject of *CHRA* complaints.[149]

97. The Tribunal was entitled to give limited weight to the Hansard evidence in the record regarding these provisions. Not only was the evidence inconclusive on the key issue before it (whether a direct challenge to legislation can be brought under s. 5 of the *CHRA*) but it appropriately recognized that the "words of the statute carry paramount importance in its interpretation".[150]

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[146] *House of Commons Debates*, 39th Parl, 1st Sess, Vol 141, No 105 (7 February 2007) at 6521-6524, Authorities, Tab 25; *House of Commons Standing Committee on Aboriginal Affairs and Northern Development,* 39th Parl, 1st Sess, No 42 (22 March 2007), at 1-3, 5-7, Authorities, Tab 26.

[147] *House of Commons Debates*, 39th Parl, 1st Sess, Vol 141, No 105 (7 February 2007) at 6522, Authorities, Tab 25.

[148] *House of Commons Standing Committee on Aboriginal Affairs and Northern Development*, 39th Parl, 2nd Sess, No 5 (4 December 2007) at 13-14, Authorities, Tab 28. See also the proposals for a non-derogation clause: *House of Commons Standing Committee on Aboriginal Affairs and Northern Development*, 39th Parl, 1st Sess, No 46 (24 April 2007) at 1-2, Authorities, Tab 27.

[149] See for eg: *Beattie and Louie v Indian and Northern Affairs Canada,* 2011 CHRT 2; *Beattie and Louie v Indian and Northern Affairs Canada,* 2014 CHRT 7; *Tanner v Gambler First Nation,* 2015 CHRT 19.

[150] *Teal Cedar Products, supra*, para 97. See also: *AYSA Amateur Youth Soccer*, *supra*, paras 11-12; *Sullivan, supra,* at 682-683, Authorities, Tab 31.

iv. The role of primacy in the federal scheme

98. As a quasi-constitutional statute,[151] the *CHRA* prevails over other laws that impede the fulfilment of its statutory mandate. However, a careful reading of *Heerspink*, *Craton* and *Tranchemontagne* demonstrates that the principle of primacy recognized in those cases does not alter the Tribunal's statutory mandate in the absence of an express primacy clause.[152] Properly understood, the primacy principle has no application until a valid complaint is before the Tribunal except to the extent that it supports a broad and liberal interpretation. There can be no "conflict" necessitating the application of the primacy principle if the human rights legislation is not even engaged. As the Federal Court of Appeal reasoned, "one must not conflate the scope of the Tribunal's jurisdiction with the extent of its remedial authority once it is validly seized of a complaint."[153] The first question must always be whether the *CHRA* is engaged insofar as the allegations properly relate to a discriminatory practice, which in this cases requires that the facts underlying the complaint relate to the provision of "services".

(a) Primacy ensures that the Tribunal can fulfil its mandate

99. While the *CHRA's* mandate focuses on addressing discriminatory practices, which on a proper interpretation does not include legislation, it will take primacy wherever another law interferes with the fulfilment of its object and purpose. For example, where a complaint is properly before the Tribunal, and a provision of a federal law conflicts with the Tribunal's remedial powers, the provision may be treated as inoperative in order to allow the Tribunal to fulfill its mandate to prevent discrimination.[154] The Tribunal has applied the primacy principle in this manner on numerous occasions, where it has found the existence of a discriminatory practice.[155] This reading is consistent with the principles stated in *Heerspink, Craton* and *Tranchemontagne*.

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[151] For a discussion of the meaning of this term, see: Vanessa MacDonnell, "Non-Constitutional Influences on Constitutional Law and Constitutional Design, A Theory of Quasi-Constitutional Legislation", (2016) Osgoode Hall L J 508.
[152] *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14; *Winnipeg School Division No 1 v Craton,* [1985] 2 SCR 150; *Insurance Corp of British Columbia v Heerspink,* [1982] 2 SCR 145.
[153] *FCA Reasons*, para 99, Appellant's Record, Tab 4, p 187.
[154] *Franke v Canada (Canadian Armed Forces),* [1998] CHRD No 3, paras 763-770.
[155] *CHRT Reasons (Andrews),* paras 86-91, Appellant's Record, Tab 2, pp 94-96; *Eyerley v Seaspan International Ltd*, [2000] CHRD No 14, paras 29-30; *Morten v Air Canada*, 2009 CHRT

100. In assessing the impact of these decisions on this case, *Heerspink* and *Craton* must be situated in their historical context, which includes the introduction of *Bill of Rights* and human rights codes from the 1960s to the 1980s, the development of jurisprudence thereunder and the entrenchment of the *Charter*. In *Heerspink*, Lamer J. held that the subject matter of human rights laws indicates the legislature's intent that "the Code supersede all other laws when conflict arises."[156] In *Craton*, the Court adopted this proposition, while noting that such legislation is "of a special nature and declares public policy regarding matters of general concern."[157] The Court noted however that it could be altered, amended or repealed and exceptions created to its provisions.[158] Some twenty years later, the Court in *Tranchemontagne* took these principles into account in noting that as fundamental quasi-constitutional law, the *Code* was to be interpreted in a broad and liberal manner, before carefully reviewing the *Code's* provisions to determine the extent to which the Code could prevail.[159]

101. Neither *Heerspink n*or *Craton* involved direct challenges to legislation; the complaints were in respect of discretionary action taken pursuant to statute. Statutory condition 5(1) in s. 208 of the *Insurance Act*, which was at issue in *Heerspink*, left the decision of whether to terminate a contract of insurance entirely to the discretion of the insurer. In *Craton*, s. 50 of the *Public Schools Act* provided the school board with discretion to decide whether to fix a compulsory retirement age. The fact that these discretionary decisions were authorized by legislation did not oust the jurisdiction of the human rights legislation. The Tribunal's decision in this case leaves open the possibility that similar discretionary decisions authorized by statute and, in particular by the *Indian Act*, could be found to engage the *CHRA*.[160]

3, rev'd on other grounds *Canada (Canadian Transportation Agency v Morten)*, 2010 FC 1008, para 198, rev'd *Canada (Canadian Human Rights Commission) v Canada (Canadian Transportation Agency)*, 2011 FCA 332; *Douglas v SLH Transport Inc.*, 2010 CHRT 1, para 70; *Canada (Attorney General) v Uzoaba,* [1995] 2 FC 569, paras 17-20.

[156] *Heerspink, supra,* at 157-158, per Lamer J. (Estey and McIntyre JJ.A.). The Chief Justice, Ritchie and Dickson wrote concurring reasons, and Martland, Beetz and Chouinard JJ. dissented.

[157] *Craton, supra*, para 8.

[158] *Ibid.*

[159] *Tranchemontagne, supra*, paras 33-34.

[160] See also: *Louie, supra; Laslo v Gordon Band (Council),* [2001] 1 FCR 124 (CA).

102. *Tranchemontagne* concerned whether Ontario's Social Benefits Tribunal (SBT) could apply the *Ontario Human Rights Code* to a legislative provision. The Court held that the SBT could apply the *Code* to review legislation and that the *Code* should prevail in the event of a conflict with other legislation. This conclusion is consistent with the clear primacy clause enacted by Ontario in 1981, which specifically contemplates, as part of its mandate, the review of other laws for alleged discrimination. Subsection 47(2) of the *Ontario Human Rights Code* provides: "47(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding this Act."[161]

103. As discussed below, Parliament deliberately chose not to include a primacy clause in the *CHRA*. Accordingly, *Tranchemontagne* can only be understood as affirming primacy in the context of the very different statutory mandate that Ontario has assigned to the Human Rights Tribunal of Ontario.[162] The Court's conclusion that legislation conflicting with the Code's anti-discrimination protections may be rendered inoperable is entirely in line with legislative intent.[163]

104. In *Larocque*, the discriminatory practice was the municipality's adoption, through its regulatory powers, of a legislated hearing acuity standard. The Court upheld the Quebec Court of Appeal's remedy declaring the regulatory standard inoperable in relation to the complainant, and added a direction that the complainant be able to benefit from a legislated exemption. It also confirmed the Court of Appeal's refusal to grant damages, citing the public law principle against awarding damages for laws declared unconstitutional, absent bad faith, conduct that is clearly

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[161] *Ontario Human Rights Code*, RSO 1990, c. H 19, s 47(2) emphasis added. Like Ontario, the Quebec, Alberta and Saskatchewan Codes have clear form and manner requirements allowing the legislature to oust the paramountcy of those instruments: *Quebec Charter of Human Rights and Freedoms*, CQLR c C-12, s 52; *Alberta Human Rights Act*, RSA, 2000, c A-25.5, s 1; *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 44. Other provinces and territories have more general paramountcy clauses: *Newfoundland and Labrador Human Rights Act*, SNL 2010, c H-13.1, s 5; *Prince Edward Island Human Rights Act*; RSPEI 1988, c H-12, s 1(2); *Manitoba Human Rights Code*, CCSM c H175, s 58; *British Columbia Human Rights Code*, RSBC 1996, c 210, RSA 2000, c A-25.5, s 4; *Yukon Human Rights Act*, RSY 2002, c 116, s 39; *Nunavut Human Rights Act*, SNu 2003, c 12, s 5(1). New Brunswick, Nova Scotia and the Northwest Territories have no similar clause.

[162] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, para 40.

[163] *Tranchemontagne*, *supra*, paras 31-32.

wrong, or an abuse of power. To the extent the case constituted a direct challenge to legislation, it must be read in the context of the primacy clause in the Quebec *Charter*.[164]

105. As the Commission notes, other provincial tribunals and courts have adjudicated direct challenges to legislative provisions under their respective human rights codes.[165] With one exception,[166] all of the decisions cited by the Commission involving direct challenges to laws and a finding that the provision(s) were inoperable were in jurisdictions whose legislation includes an express primacy clause; that is, a clause that states that the Code will prevail over legislation that contravenes its terms.[167] Although parallel legislation and the other jurisdictions' jurisprudence may sometimes be helpful in interpreting the *CHRA*, the wording of the specific statutory scheme at issue must take precedence.[168]

v. The absence of an express primacy clause reflects legislative intent

106. The Commission's argument requires the Court to ignore the clear differences between the *Charter* and other federal legislation relating to discrimination such as the *Bill of Rights*. The *CHRA* is neither entrenched, nor does it have a primacy clause.[169]

107. The Commission selectively relies on *Hansard* without acknowledging that the *CHRA's* legislative history reveals that on more than one occasion Parliament had the option to include a primacy clause in the *CHRA* and deliberately opted not to do so. This was not because of any implied primacy, but rather because Parliament did not intend that the *CHRA* would be used to invalidate legislation. When the Assistant Deputy Minister of Justice was asked why the legislation "could not have been enacted as amendments to the *Bill of Rights*", he explained that that the *Bill of Rights* was the tool to be used to direct officials on the interpretation of statutes, whereas the *CHRA* directs individuals as to how to relate to other individuals

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[164] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal,* 2004 SCC 30 [*Larocque*], paras 14-15, 23-28; *Quebec Charter of Human Rights and Freedoms,* CQLR c C-12, s 52.
[165] CHRC's Factum, paras 55-56.
[166] *AA v New Brunswick,* [2004] NBHRBID No 4, Appellant's Authorities, Tab 2.
[167] Peter Hogg, *Constitutional Law of Canada,* looseleaf (Carswell: Markham, 2016+), at 12-17-18, Authorities, Tab 30.
[168] See *Mowat,* SCC, *supra*, paras 57-59.
[169] *Constitution Act, 1982*, ss 33, 52(1); *Canadian Bill of Rights*, s 2.

> It was felt that the Bill of Rights is really of a different nature from the Human Rights Act, because the Canadian Bill of Rights is in effect a directive to courts and to officials as to how to interpret the laws of Parliament. The Human Rights Act is really a directive to individuals as to how to relate to other individuals, and provides for a system of controls and sanctions to regulate these matters as between individuals. So the *Human Rights Act* is not really of the same constitutional order as the Canadian Bill of Rights which is more fundamental and pervasive and is a directive as to the interpretation of statutes.[170] [emphasis added]

108. The Committees specifically considered whether the *CHRA* should have a paramountcy clause. In the House Committee, the Minister of Justice and the Assistant Deputy Minister both took the position that a paramountcy clause was unnecessary, and explained that one was not included because of fears it would create "a whole range of new problems if one keeps proliferating that kind of provision in various pieces of legislation, because one does not know what takes precedence over what".[171]

109. Because the *Bill of Rights* already had a paramountcy clause which was being invoked by courts to render inoperable legislation that was inconsistent with its terms, there was no need to make similar provision in the *CHRA*. Rather than targeting discrimination on the face of legislation, the *CHRA* was targeting a different mischief: "... the way that the acts are administered."[172] In discussing the provision allowing the Commission to review regulations and by-laws and make recommendations (now s. 27(1)(g)), Mr. Strayer explained that "some reservations were expressed about making the commission specifically a watchdog over Parliament …[T]here was some reservation about setting the commission up as the critic of Parliament itself".[173]

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[170] *Proceedings of the Standing Senate Committee of Legal and Constitutional Affairs,* 30th Parl, 2nd Sess, No. 5 (21 June 1977) at 5:25, per B L Strayer, Authorities, Tab 15.
[171] *Ibid*, at 5:34-5:35. See also: *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs,* 32nd Parl, 1st Sess, No 114 (20 December 1982) at 114:41-42, Authorities, Tab 19.
[172] *Ibid* at 5:35, 5:32-34, Authorities, Tab 15. See also: *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs*, 30th Parl, 2nd Sess, No 11 (17 May 1977) at 11:31-35, Authorities, Tab 12; *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs,* 32nd Parl, 1st Sess, No 31 (14 May 1981) at 31:23-26, Authorities, Tab 18; *Proceedings of the Standing Senate Committee of Legal and Constitutional Affairs*, 32nd Parl, 1st Sess, No 51 (30 March 1983), at 51:20-23, Authorities, Tab 21.
[173] *Proceedings of the Standing Senate Committee of Legal and Constitutional Affairs,* 30th Parl, 2nd Sess, No 5 (21 June 1977) at 5:36, Authorities, Tab 15.

110. In 1982, Counsel for the Department of Justice, respond to concerns that the *CHRA* amendments under consideration at that time would not overrule *Bliss* which was a challenge to the *Unemployment Act* under the *Bill of Rights*.[174] Mr. Low explained that *Bliss* would be looked at in the context of the *Charter*.[175] Mr. MacGuigan, then Minister of Justice added that "[t]he question there was whether this act took priority over other pieces of federal legislation, and we said that, no, it did not; only the *Charter* does that":[176]

> … we take the view that this act [the *CHRA*] does not have any primacy over other acts of Parliament, nor should it have. That primacy is in the *Charter*, and to some extent in the Canadian Bill of Rights, and we are satisfied to leave those as the governing statutes and to make other statutes equal. In the case of collision, the courts have to follow the normal rules of statutory interpretation and they have to try to decide, on the basis of the indications that they are used to looking at, which statutes should prevail.[177]

111. Similar views as to the scope of the *CHRA* were expressed when the ground of "sexual orientation" was added in 1996.[178] At the same time, the Commission has pointed to other excerpts from *Hansard* which suggest that on different occasions, some thought that the *CHRA's* scope extended to the review of legislation. Each excerpt must be considered in the relevant context and in view of the development of the jurisprudence. Overall, *Hansard* demonstrates that the government saw the purpose of the *CHRA* as distinct and did not see a need to duplicate the functions of the *Charter* and *Bill of Rights* which already provided mechanisms for the review of federal legislation alleged to discriminate.

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[174] *Bliss v Attorney General of Canada,* [1979] 1 SCR 183.
[175] *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs,* 32nd Parl, 1st Sess, No 115 (21 December 1982) at 115:75, Authorities, Tab 20.
[176] *Ibid*.
[177] *Ibid*, at 115:75-76. See also: *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs,* 32nd Parl, 1st Sess, No 114 (20 December 1982) at 114:41-42, Authorities, Tab 19; *Proceedings of the Standing Senate Committee of Legal and Constitutional Affairs*, 32nd Parl, 1st Sess, No 51 (30 March 1983) at 51:21-22, Authorities, Tab 21; House of Commons, Special Committee on the Disabled and the Handicapped, *"Obstacles. Report of the Special Committee on the Disabled and the Handicapped",* 32nd Parl, 1st Sess (February 1981) (Chair: David Smith), Authorities, Tab 17.
[178] *House of Commons Debates*, 35th Parl, 2nd Sess, Vol 134, No 36 (30 April 1996) at 2104-05, Authorities, Tab 22; *House of Commons Proceedings of the Standing Committee on Human Rights and the Status of Persons with Disabilities*, 35th Parl, 2nd Sess, No 7 (1 May 1996) at 1849-1850, 1855-1856, Authorities, Tab 23; *House of Commons Debates*, 35th Parl, 2nd Sess, Vol 134, No 43 (9 May 1996) at 2526-2530, Authorities, Tab 24.

112. The absence of a primacy clause does not detract from the fundamental nature or importance of the legislation, nor does it impede its purpose which is to prevent and remedy discriminatory practices. While the *CHRA* cannot take primacy over other legislation in the way that the *Bill of Rights* or some provincial human rights codes do, it can still be used to review discretionary decisions taken pursuant to statute and to read down other legislation where it interferes with the Tribunal's mandate under the *CHRA*. These are the types of situations that Parliament contemplated in "extending the laws of Canada" and in choosing not to include a primacy clause. And as the Andrews Tribunal rightly held, this is consistent with the "true essence of the meaning of the primacy of human rights laws."[179]

vi. The interpretation adopted by the Tribunal does not impede access to justice

113. The Commission argues that the Tribunal's decision undermines Parliament's intent to have discrimination complaints adjudicated by a specialized administrative tribunal, which it asserts may provide a more expedient, less costly and less complicated avenue for obtaining justice than the court system. Although one of the laudable goals of assigning responsibility for the *CHRA* to the Commission and the Tribunal was undoubtedly to make justice more accessible to victims of discrimination, that broad policy objective is not, in itself sufficient to override the wording of the *CHRA* or to expand the mandate that Parliament assigned to the Commission and the Tribunal. As this Court noted in *Mowat,* a beneficial policy outcome identified by the Commission or the Tribunal cannot trump the necessary "interpretative process taking account of the text, context and purpose of the provisions in issue".[180]

114. Access to justice can be provided in many ways. The Tribunal's conclusion does not insulate the wording of s. 6 of *Indian Act* from review. It can and has been challenged under the *Charter*, and determinations have been made in favour of claimants. Those challenges illustrate the complexity inherent in assessing potentially discriminatory effects of legislative provisions and

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[179] *CHRT Reasons (Andrews),* para 92, Appellant's Record, Tab 2, p 34.
[180] *Mowat, supra*, para 64.

the inability of the *bona fide* justification test to adequately address Parliamentary objectives. As noted by this Court, the lines drawn by Parliament in laws of general application are more effectively assessed through the concepts of minimal impairment and proportionality of effects.[181]

115. Nor is it necessarily the case that expanding the jurisdiction of the Tribunal to permit direct challenges would increase access to justice.[182] While there may be instances where shared jurisdiction increases access to justice, there may equally be a cost to the system where litigants who are unsuccessful in seeking relief under either the *CHRA* or the *Charter* in one forum, turn around and seek relief in another. Ease of access, duplicative proceedings, inconsistent decisions, delay, and resource concerns are just a few of the many factors that Parliament considers in its design of the administrative justice system. Parliament is best placed to weigh the relative costs of different models to the overall system and to the administration of justice.

116. What is important is that there is access to a procedure that can provide meaningful redress. This Court's equality jurisprudence has developed over more than 30 years. Although the test differs in some respects, this Court has held that both human rights legislation and the *Charter* are capable of remedying discrimination.[183] The courts' constitutional authority to apply s. 15 is ensures that meaningful redress is available in respect of legislation that draws distinctions or has adverse impacts that are found to be discriminatory.

C. Indian Status is not a "service" even if direct challenges to legislation can be brought under section 5

117. Even if the *CHRA*'s mandate is found to permit direct challenges to legislation, it does not necessarily follow that Parliament's definition of "Indian" in the *Indian Act* (or the delineation of the "Indian status" population) is a "service." Like the criteria governing qualification for citizenship, refugee status, or permanent residence, the criteria for Indian status

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[181] *Hutterian Brethren, supra,* paras 66-71.
[182] *FCA Reasons,* para 103, Appellant's Record, Tab 4, pp 188-189.
[183] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, para 48; *Tranchemontagne supra*, paras 83-84; *B v Ontario (Human Rights Commission,* 2002 SCC 66, para 46. See also: *Quebec (Attorney General) v A*, 2013 SCC 5, paras 319-347; *Kahkewistahaw First Nation v Taypotat,* 2015 SCC 30, paras 16-21.

do not have the characteristics of a service.[184] The legislation is aimed at ascribing a legal status to certain individuals. The government has enacted legislative criteria in a range of different areas for the purpose of identifying or designating persons who have a particular legal status or relationship with the state. Delineating who will fall within a particular group or class of persons, is not equivalent to the provision of a service.

PART IV – COSTS

118. The Attorney General does not seek her costs on this appeal.

PART V – NATURE OF ORDER SOUGHT

119. The appeal should be dismissed without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 15th day of August, 2017.

Christine Mohr / Catherine Lawrence

Of Counsel for the Respondents

[184] *Forward*, *supra*, paras 36-43.

PART VI – TABLE OF AUTHORITIES

LEGISLATIVE AUTHORITIES	Cited at Paragraph
Constitution Act, 1982, section 15/*Lois constitutionnelles de 1982* article 15	65
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Saskatchewan Human Rights Code, SS 1979, c S-24.1, s 44	102
Newfoundland and Labrador Human Rights Act, SNL 2010, c H-13.1, s 5;	102

AUTHORITIES

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