

**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

-and-

**ATTORNEY GENERAL OF CANADA**

RESPONDENT

-and-

**ABORIGINAL LEGAL SERVICES, ATTORNEY GENERAL OF QUEBEC,  
TANIA ZULKOSKEY, INCOME SECURITY ADVOCACY CENTRE AND  
SUDBURY COMMUNITY LEGAL CLINIC AND CHINESE AND SOUTHEAST  
ASIAN LEGAL CLINIC AND COMMUNITY LEGAL ASSISTANCE SOCIETY  
AND HIV & AIDS LEGAL CLINIC ONTARIO, CANADIAN MUSLIM  
LAWYERS ASSOCIATION, COUNCIL OF CANADIANS WITH DISABILITIES,  
WOMEN'S LEGAL EDUCATION AND ACTION FUND AND THE NATIVE  
WOMEN'S ASSOCIATION OF CANADA, AMNESTY INTERNATIONAL, FIRST  
NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, JEREMY E.  
MATSON, AFRICAN CANADIAN LEGAL CLINIC, PUBLIC SERVICE  
ALLIANCE OF CANADA**

INTERVENERS

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**FACTUM OF THE INTERVENER  
ABORIGINAL LEGAL SERVICES**

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

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**ABORIGINAL LEGAL SERVICES**

211 Yonge Street, Suite 500  
Toronto, Ontario M5B 1M4  
Emily Hill, LSUC #46899Q  
Emilie Lahaie, LSUC #68795J  
Tel: (416) 408-4041 ext. 225  
Fax: (416) 408-1568  
E-mail: [e\\_hill@lao.on.ca](mailto:e_hill@lao.on.ca)

*Counsel for the Intervener*

**COMMUNITY LEGAL SERVICES  
OTTAWA CENTRE**

1 rue Nicholas Street, Suite 422  
Ottawa, Ontario K1N 7B7  
Michael Bossin  
Tel: (613) 241-7008  
Fax: (613) 241-8680  
E-mail: [turcottea@lao.on.ca](mailto:turcottea@lao.on.ca)

*Ottawa Agent for the Intervener*

**TO: The Registrar**  
Supreme Court of Canada  
301 Wellington Street  
Ottawa, ON K1A 0J1

**AND TO: Brian Smith**  
**Fiona Keith**  
Canadian Human Rights Commission  
Legal Services Division  
344 Slater Street, 8<sup>th</sup> Floor  
Ottawa, ON K1A 1E1  
Tel: (613) 943-9205 / (613) 943-9520  
Fax: (613) 993-3089  
E-mail: [brian.smith@chrc-ccdp.gc.ca](mailto:brian.smith@chrc-ccdp.gc.ca)  
[fiona.keith@chrc-ccdp.gc.ca](mailto:fiona.keith@chrc-ccdp.gc.ca)

*Counsel for the Appellant*

**AND TO: Valerie Phillips**  
Canadian Human Rights Commission  
344 Slater Street, 9<sup>th</sup> Floor  
Ottawa, ON K1A 1E1  
Tel: (613) 943-9357  
Fax: (613) 993-3089  
E-mail: [valerie.phillips@chrc-ccdp.gc.ca](mailto:valerie.phillips@chrc-ccdp.gc.ca)

*Agent for Counsel for the Appellant*

**AND TO: Christine Mohr**  
**Catherine Lawrence**  
Attorney General of Canada  
130 King Street West, Suite 3400  
The Exchange Tower, Box 36  
Toronto ON M5X 1K6  
Tel: (416) 973-4111 / (613) 670-6258  
Fax: (416) 952-4518  
E-mail: [christine.mohr@justice.gc.ca](mailto:christine.mohr@justice.gc.ca)  
[catherine.lawrence@justice.gc.ca](mailto:catherine.lawrence@justice.gc.ca)

*Counsel for the Respondent*

**AND TO: Christopher M. Rupar**  
Attorney General of Canada  
50 O'Connor Street, Suite 500, Room 557  
Ottawa, ON K1A 0H8  
Tel: (613) 670-6290  
Fax: (613) 954-1920  
E-mail: [christopher.rupar@justice.gc.ca](mailto:christopher.rupar@justice.gc.ca)

*Agent for Counsel for the Respondent*

**AND TO: Amelie Pelletier Desrosiers**  
Ministère de la Justice du Québec  
Service des enregistrements officiels  
1200, route de l'Eglise, 2<sup>e</sup> étage  
Québec, PQ G1V 4M1  
Tél: (418) 643-1477, poste 21006  
Télééc. : (418) 644-7030  
Courriel : [amelie.pelletier-desrosiers@justice.gouv.gc.ca](mailto:amelie.pelletier-desrosiers@justice.gouv.gc.ca)

*Counsel for the Intervener  
Attorney General of Québec*

**AND TO: Pierre Landry**  
Noel et Associés  
111, rue Champlain  
Gatineau, QB J8X 3R1  
Téléphone: (819) 771-7393  
Télééc.: (819) 771-5397  
Courriel: [p.landry@noelassociés.com](mailto:p.landry@noelassociés.com)

*Agent for Counsel for the Intervener  
Attorney General of Québec*

**AND TO: Stephen J. Moreau**  
Cavalluzzo Shilton McIntyre Cornish LLP  
474 Bathurst Street, Suite 300  
Toronto, ON M5T 2S6  
Tel: (416) 964-1115  
Fax: (416) 964-5895  
E-mail: [smoreau@cavalluzzo.com](mailto:smoreau@cavalluzzo.com)

*Counsel for the Intervener  
Tania Zulkoskey*

**AND TO: Marie Chen**  
Income Security Advocacy Centre  
1500-55 University Avenue  
Toronto, Ontario M5J 2H7  
Tel: (416) 597-5820 ext. 5152  
Fax: (416) 597-5821  
E-mail: [chenmel@lao.on.ca](mailto:chenmel@lao.on.ca)

*Counsel for the Intervener  
Income Security Advocacy Centre, Sudbury Community Legal Clinic,  
Chinese and Southeast Asian Legal Clinic, Community Legal Assistance  
Society, and HIV & AIDS Legal Clinic Ontario*

**AND TO: Marie-France Major**  
Supreme Advocacy LLP  
340 Gilmour Street, Suite 100  
Ottawa, Ontario K2P 0R3  
Tel: (613) 695-8855 ext.102  
Fax: (613) 695-8580  
E-mail: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

*Agent for Counsel for the Intervener  
Income Security Advocacy Centre, Sudbury Community Legal Clinic,  
Chinese and Southeast Asian Legal Clinic, Community Legal Assistance  
Society, and HIV & AIDS Legal Clinic Ontario*

**AND TO: Kumail Karimjee  
Nabila F. Qureshi**  
Karimjee Greene LLP  
401 Bay Street, Suite 2008, PO Box 80  
Toronto, ON M5G 2G8  
Tel: (416) 593-0007  
Fax: (416) 593-9907  
E-mail: [kumail@karimjeegreene.com](mailto:kumail@karimjeegreene.com)  
[nabila@karimjeegreene.com](mailto:nabila@karimjeegreene.com)

*Counsel for the Intervener  
Canadian Muslim Lawyers Association*

**AND TO: D. Lynne Watt**  
Gowling WLG (Canada) LLP  
160 Elgin Street, Suite 2600  
Ottawa, ON K1P 1C3  
Tel: (613) 786-8695  
Fax: (613) 788-3509  
E-mail: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

*Agent for Counsel for the Intervener  
Canadian Muslim Lawyers Association*

**AND TO: Kerri Joffe**  
**Dianne Wintermute**  
ARCH Disability Law Centre  
55 University Avenue, 15<sup>th</sup> Floor  
Toronto, ON M5J 2H7  
Tel: (416) 482-8255  
Fax: (416) 482-2981  
E-mail: [joffek@lao.on.ca](mailto:joffek@lao.on.ca)  
[wintermd@lao.on.ca](mailto:wintermd@lao.on.ca)

*Counsel for the Intervener  
Council of Canadians with Disabilities*

**AND TO: Michael Bossin**  
Community Legal Services – Ottawa Carleton  
1 rue Nicholas Street, Suite 422  
Ottawa, Ontario K1N 7B7  
Tel: (613) 241-7008 ext. 224  
Fax: (613) 241-8680  
E-mail: [bossinm@lao.on.ca](mailto:bossinm@lao.on.ca)

*Agent for Counsel for the Intervener  
Council of Canadians with Disabilities*

**AND TO: Mary Eberts  
Kim Stanton  
K. R. Virginia Lomax**  
Law Office of Mary Eberts  
95 Howland Avenue  
Toronto, ON M5R 3B4  
Tel: (416) 923-5215  
Fax: (416) 595-7191  
E-mail: [eberts@ebertslaw.ca](mailto:eberts@ebertslaw.ca)

*Counsel for the Intervener  
Women's Legal Education and Action Fund Inc. and Native Women's  
Association of Canada*

**AND TO: Nadia Effendi**  
Borden Ladner Gervais LLP  
Suite 1100, 100 Queen Street  
Ottawa, ON K1P 1J9  
Tel: (613) 787-3562  
Fax: (613) 230-8842  
E-mail: [neffendi@blg.com](mailto:neffendi@blg.com)

*Agent for Counsel for the Intervener  
Women's Legal Education and Action Fund Inc. and Native Women's  
Association of Canada*

**AND TO: Justin Safayeni  
Stephen Alyward**  
Stockwoods LLP  
TD North Tower Suite 4130  
77 King Street West, PO Box 140  
Toronto, ON M5K 1H1  
Tel: (416) 593-7200  
Fax: (416) 593-9345  
E-mail: [justins@stockwoods.ca](mailto:justins@stockwoods.ca)  
[stephena@stockwoods.ca](mailto:stephena@stockwoods.ca)

*Counsel for the Intervener  
Amnesty International*

**AND TO: David Taylor**  
Power Law  
130 Albert Street, Suite 1103  
Ottawa, ON K1P 5G4  
Tel: (613) 702-5563  
Fax: (613) 702-5563  
E-mail: [dtaylor@powerlaw.ca](mailto:dtaylor@powerlaw.ca)

*Agent for Counsel for the Intervener  
Amnesty International*

**AND TO: David P. Taylor**  
Conway Baxter Wilson LLP  
400 - 411 Roosevelt Avenue  
Ottawa, Ontario K2A 3X9  
Tel: (613) 691-0368  
Fax: (613) 613-6880  
E-mail: [dtaylor@conway.pro](mailto:dtaylor@conway.pro)

*Counsel for the Intervener  
First Nations Child and Family Caring Society of Canada*

**AND TO: Jeremy E. Matson**  
4516 Walker Rd.  
Kelowna, BC V1W 2Z1  
E-mail: [matinoia@hotmail.com](mailto:matinoia@hotmail.com)

*Intervener*

**AND TO: Danardo Jones  
Faisal Mirza**  
African Canadian Legal Clinic  
402-250 Dundas Street West  
Toronto, Ontario M5T 2Z5  
Tel: (416) 214-4747  
Fax: (416) 214-4748  
E-mail: [jonesdn@lao.on.ca](mailto:jonesdn@lao.on.ca)

*Counsel for the Intervener  
African Canadian Legal Clinic*

**AND TO: Michael A. Crystal**  
Spiteri & Ursulak LLP  
1010 - 141 Laurier Avenue West  
Ottawa, Ontario K1P 5J3  
Tel: (613) 563-1010  
Fax: (613) 563-1011  
E-mail: [mac@sulaw.ca](mailto:mac@sulaw.ca)

*Agent for Counsel for the Intervener  
African Canadian Legal Clinic*

**AND TO: Andrew Raven**  
**Andrew Astritis**  
**Morgan Rowe**  
Raven, Cameron, Ballantyne & Yazbeck LLP  
1600-220 Laurier Ave West  
Ottawa, ON M1P 5Z9  
Tel: (613) 567-2901  
Fax: (613) 567-2921  
E-mail: [araven@ravenlaw.com](mailto:araven@ravenlaw.com)

*Counsel for the Intervener  
Public Service Alliance of Canada*



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## **PART I – OVERVIEW AND STATEMENT OF FACTS**

1. The *Canadian Human Rights Act*<sup>1</sup> (the “CHRA”) aims to ensure there are legal remedies for individuals who experience discrimination in matters within the legislative authority of Parliament. First Nations<sup>2</sup> people have a unique relationship with the federal government as a result of s. 91(24) of the *Constitution Act*.<sup>3</sup> The *Indian Act*<sup>4</sup> (the “Act”) is the primary statutory expression of that unique relationship. The registration provisions of the *Act* are the mechanism whereby individuals’ entitlement to certain benefits are determined, thus rendering it a “service” pursuant to the CHRA. Given the explicitly racist and sexist history of the *Act*, and its ongoing discriminatory effects, it is essential that the registration provisions are subjected to the oversight of the CHRA.
2. Aboriginal Legal Services (ALS) adopts the position of the Appellant on the facts of the case.

## **PART II – OVERVIEW OF ALS’ POSITION**

3. ALS makes three arguments with respect to the case at bar:
  1. The benefits conferred by the registration provisions of the *Act* must be viewed through an historical lens. When first enacted, the provisions had the goal of eliminating First Nations people from the Canadian population. This goal was based on racist assumptions about the inferiority of First Nations people and communities.
  2. In their current form, the registration provisions of the *Act* are a mechanism through which the Federal government identifies and registers Indians to grant them unique benefits. For this reason, registration under the *Act* is a “service”, as defined by the CHRA.
  3. There have been repeated successful legal challenges to the discrimination in the registration provisions of the *Act*. The multiple rulings on the legality of the registration provisions and the piecemeal legislative responses have led to a complex,

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<sup>1</sup> *Canadian Human Rights Act*, RSC 1985, c. H-6 [CHRA].

<sup>2</sup> Indigenous peoples of Canada are commonly understood to consist of three overarching groups: the First Nations, Métis and Inuit. Within the term First Nations, those recognized as “status Indians” are registered under the *Indian Act*, and people without “status” are not registered. In this factum, the term Indian is used to be consistent with the use of the term in the *Indian Act*.

<sup>3</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91(24).

<sup>4</sup> *Indian Act*, RSC 1985, c I-5.

fact-specific system of determining who is and who is not an Indian. This piecemeal approach has not been able to root out all discrimination in the registration provisions of the *Act*. The Canadian Human Rights Tribunal (the “CHRT”) is the best forum to address this discrimination. The CHRT has the capacity to consider the individual circumstances of applicants and provide the remedy they seek: registration under the *Act*.

### **PART III – LEGAL ARGUMENT**

#### **1. Historical Context**

4. To understand the current discriminatory impacts of the *Act*, it is important to understand the roots of the statute. Like its precursor colonial legislation, the *Gradual Civilization Act*<sup>5</sup> of 1857, the goal of the 1876 *Act* was the assimilation of First Nations people. This is made clear in the following statement by John A. Macdonald in 1887:

The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change.<sup>6</sup>

5. This assimilationist goal was based on the discriminatory view that First Nations people were inferior. The Royal Commission on Aboriginal Peoples<sup>7</sup> (‘RCAP’) concluded that the adoption of the *Act* was a demonstration that “Indian policy was now firmly fixed on a national foundation based unashamedly on the notion that Indian cultures and societies were clearly inferior to settler society.”<sup>8</sup>
6. A key aspect of the *Act* was the determination of who was and was not an Indian and the definitions had a profound effect on First Nations women. Because the *Act* reflected European Victorian ideas of patriarchy, women’s identities were tied to those of their husbands. This had the result of diminishing First Nations women’s role in their communities.<sup>9</sup> In 1951, registration provisions “with a strong emphasis on the male line

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<sup>5</sup> Report of the Royal Commission on Aboriginal Peoples: *Looking Forward, Looking Back*, Vol 1 (Ottawa, Supply and Services Canada, 1996) at p 252 [RCAP 1].

<sup>6</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling the Future* (Report) (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at p 126.

<sup>7</sup> RCAP 1, supra note 5.

<sup>8</sup> *Ibid* at p 255.

<sup>9</sup> *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, Vol 4 (Ottawa, Supply and Services Canada, 1996) at p 22 [RCAP 4].

of descent”<sup>10</sup> replaced definitions based on Indian bloodlines.

7. It is respectfully submitted that this Honourable Court’s consideration of the appropriate remedy to the persistent discrimination in the registration provisions of the *Act* must be informed by the conclusion of RCAP that:

The issue of identity under the Indian Act has been and continues to be a source of personal pain and frustration for Indian women. Through its restrictive and sexist definition of 'Indian' and the selective application of the involuntary enfranchisement provisions, the Indian Act has created a legal fiction as to cultural identity. This has profoundly affected the rights of women of Indian ancestry, denying these rights entirely in the case of the thousands of women and their descendants who were subject, against their will, to loss of status and enfranchisement and to subsequent removal from their home communities because they married men without Indian status. Categories of aboriginality have been created through Canadian law as though Aboriginal identity and the rights that go with that identity could be chopped and channelled into ever more specific compartments or, in some cases, excised completely.<sup>11</sup>

## 2. **The Effect of Registration**

### a) *Indian Registration as a Benefit*

8. Registration as an Indian brings with it access to certain benefits. This was recently recognized by the Ontario Court of Appeal in *Gehl v. Canada*, a case about registration under the *Act*. Justice Sharpe wrote:

There is no dispute that denial of Indian status constitutes denial of the benefit of the law. Indian status carries with it an important bundle of legal rights. Registration entails access to significant material benefits, including some tax exemptions, extended health coverage and financial assistance with post-secondary education.<sup>12</sup>

9. The provision of benefits in the *Act* relates to the relationship between the federal government and individual First Nations people. Some of the benefits which flow to individuals as registered Indians are a result of treaties that are at the root of that relationship. As noted in RCAP:

In the absence of effective laws to implement treaties, the federal Indian administration fell back on the *Indian Act*. As time went on, basic treaty provisions such as annuities were provided for in the *Indian Act* to enable the federal government to deliver them. Although it does not recognize, affirm or

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<sup>10</sup> *Ibid* at p 28.

<sup>11</sup> *Ibid* at p 22.

<sup>12</sup> *Gehl v Canada (Attorney General)*, 2017 ONCA 319 at para 41 [*Gehl*].

otherwise acknowledge treaties, the *Indian Act* continues to be the only federal statute administering to Indians generally, including those with historical treaty agreements.<sup>13</sup>

10. Similarly, access to funding for education originates in treaty and constitutional obligations, but is operationalized through the *Indian Act*. As Dr. Carr-Stewart writes:
- The right of all non-Aboriginal children to education was surely applicable to First Nations children as a part of their treaty and constitutional rights and Canada was required to act in the children’s best interest. ... However, Canada did not create any specific educational legislation; rather, the government administered all matters relating to education under the umbrella of the *Indian Act*.<sup>14</sup>

Because of the unique history of colonization in Canada, the *Act* must be viewed as the framework through which a number of particular benefits are provided by the federal government to registered First Nations people.

***b) Registration under the Indian Act is a “Service”***

11. Central to this appeal is the determination of whether registration is a “service” as set out in the CHRA. Section 5 states:
- 5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
- (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
- (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.<sup>15</sup>
12. This section has been interpreted to “contemplate something of benefit being ‘held out’ as services and ‘offered’ to the public” and “which takes place ‘in the context of a public relationship.’”<sup>16</sup> It is submitted that because of the benefits that relate to Indian status, the registration of Indians is a service offered to certain members of the public and takes place in the public relationship between First Nations individuals and the federal government.
13. This is not the first time the federal government has argued that its role in facilitating access to federal benefits that flow from the unique relationship between the federal government and First Nations people is not a service under the *CHRA*. In *First Nations*

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<sup>13</sup> *RCAP I*, *supra* note 5 at p 164.

<sup>14</sup> Carr-Stewart, Sheila, “A Treaty Right to Education” (2001) Canadian Journal of Education Vol 26 No 2

<sup>15</sup> *CHRA*, *supra* note 1 at s 5.

<sup>16</sup> *Watkin v Canada (Attorney General)*, 2008 FCA 170 [2008] FCJ No 710 at para 31.

*Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*,<sup>17</sup> Indigenous and Northern Affairs Canada (INAC) argued that its role in the provision of child and family services to First Nations was limited to funding and thus did not constitute a "service". The CHRT disagreed. It wrote:

The Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves across Canada and in the Yukon. Specifically, AANDC offers the benefit or assistance of funding to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations on reserves and in the Yukon. With specific regard to the FNCFS Program, the objective is to ensure the delivery of culturally appropriate child and family services, in the best interest of the child, in accordance with the legislation and standards of the reference province/territory, and provided in a reasonably comparable manner to those provided to other provincial/territorial residents in similar circumstances and within FNCFS Program authorities. This benefit or assistance is held out as a service by AANDC and provided to First Nations in the context of a public relationship.<sup>18</sup>

14. The reasoning behind the federal government's efforts to characterize the registration of Indians as something other than a service and thus falling outside the mandate of the *CHRA* was not accepted in *First Nations Child and Family Caring Society*. Similarly in this case, the public nature of the activity, the practical realities of the process of registration and the tangible effects of registration lead to the conclusion that registration is a service as described in s. 5 of the *CHRA*.
15. The Respondent argues that the determination of whether or not a First Nations person is entitled to Indian status is merely an application of legislation "delineating who will fall within a particular group or class of persons."<sup>19</sup> However, rather than merely applying a legislative standard, the determination of whether an applicant qualifies for registration is complex and involves the use of policy and discretion – both hallmarks of service provision.
16. In order to register as an Indian, an application is submitted to the Indian registrar at INAC. This department will then determine if the application will be added, deleted or

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<sup>17</sup> *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.

<sup>18</sup> *Ibid* at paras 34-35.

<sup>19</sup> Respondent's Factum at para 117.

omitted from the Register.<sup>20</sup> For example, in *Gehl*, the Ontario Court of Appeal determined that because the identity of the appellant’s paternal grandfather was unknown, the registrar should consider evidence that supported an inference that this unknown figure had Indian status.<sup>21</sup> Such inferences are made by assessing a variety of types of evidence (such as affidavits of relatives) and the absence of evidence to the contrary.

17. The registration provisions of the *Act* determine who can receive individual benefits.

This determination relies on distinctions drawn in legislation, policy, and the exercise of discretion, all of which are part of providing a “service” as set out in s. 5 of the CHRA.

### **3. Addressing the Discrimination that Continues in the Indian Act**

#### ***a) Legacy of Racial and Gender Discrimination***

18. The *Act*’s “dual policy of paternalism and assimilation led to a mishmash of nonsensical, ethnocentric, and sexist rules.”<sup>22</sup> The Registration provisions have been subject to many court challenges. Parliament’s legislative response to these successful challenges has been to enact narrow and piece-meal amendments. The consequence is that the legislation is now complex, but still discriminatory.

19. From 1970 to today, the discriminatory impacts of the *Act* have been challenged by First Nations women. The challenges have primarily been brought by women who have been denied status because they, or their mothers or grandmothers, married a person who was not a Status Indian. In 1971 Jeannette Corbiere Lavell challenged the “marrying out” rules using the 1960 *Canadian Bill of Rights*. A short time later, Yvonne Bedard brought a case against her First Nation because the “marrying out” rules meant she could not inherit her mother’s house on her Indian reserve. The Supreme Court heard the cases together. The majority decision determined that the general language of the *Canadian Bill of Rights* did not render inoperative the registration provisions of the *Act*, which had been passed by Parliament “to specify how and by whom Crown lands reserved for Indians are to be used.”<sup>23</sup>

20. In 1979, Sandra Lovelace challenged the ‘marrying out’ provisions of the *Act* under

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<sup>20</sup> Indigenous and Northern Affairs Canada, “The Indian Registrar” (January 2011), online: Indigenous and Northern Affairs Canada <<https://www.aadnc-aandc.gc.ca/eng/1100100032475/1100100032476>>.

<sup>21</sup> *Gehl*, *supra* note 12 at para 50.

<sup>22</sup> Olthuis, Kleer, Townshend LLP, *Aboriginal Law Handbook*, 4<sup>th</sup> ed (Toronto: Carswell, 2012) at p 240.

<sup>23</sup> *Attorney General of Canada v Lavell*, [1974] SCR 1349, 38 DLR (3d) 481 at 1372.

Article 27 of the International Convention on Civil and Political Rights, which protects the right to freely participate in the cultural life of one's community. In the resulting case, *Sandra Lovelace v. Canada*,<sup>24</sup> the United Nations Human Rights Committee ruled in 1981 that Canada was in contravention of these rights.

21. In 1985, as the result of *Lovelace, Lavell* and the soon to be in force sections of the Canadian *Charter of Rights and Freedoms (Charter)*,<sup>25</sup> Parliament amended the *Act*. The provisions stipulating that Indian women lost status upon marriage to a non-status male were removed and Indian status was retroactively returned to women who had lost their status after marrying non-Indian men.<sup>26</sup>
22. However, gender discrimination continued in the registration provisions. In 2007, Sharon McIvor, whose grandchildren were unable to claim Indian status as both she and her son had married a non-status Indians, launched a successful challenge to the 1985 *Act*. Ms. McIvor demonstrated that the attempts to remove discrimination from the *Act* had not been successful. The court held "the impugned legislation in this case is the echo of historic discrimination. As such, it serves to perpetuate, at least in a small way, the discriminatory attitudes of the past."<sup>27</sup> As a result of the decision in *McIvor*, further amendments were made to the *Act* in 2010.<sup>28</sup>
23. Subsequent challenges have resulted in further determinations that inequities continue to flow from the registration provisions in the *Act*. Recently, in *Descheneaux c Canada*,<sup>29</sup> the Quebec Superior Court considered the case of three applicants challenging sex-based inequities in Indian registration, specifically those that treat cousins and siblings differently depending on the gender of the status grandparent. The court concluded:

Thus, discrimination of the same nature as that which historically prevailed against Indian women and their descendants with respect to their being entered in the Register still exists today, despite Parliament's attempts to eradicate it in 1985 and 2010. ...Sex discrimination, though more subtle than before, persists.<sup>30</sup>

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<sup>24</sup> *Sandra Lovelace v Canada*, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 83 (1984).

<sup>25</sup> *Charter of Human Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), c 11, s 15.

<sup>26</sup> *Descheneaux c Canada (Procureur Général)*, 2015 QCCS 3555, [2016] 2 CNLR 175 at paras 2-3 [*Descheneaux*].

<sup>27</sup> *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, 91 BCLR (4<sup>th</sup>) 1 at para.111.

<sup>28</sup> *Descheneaux*, *supra* note 26 at paras 2-3.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid* at para 9-10.



24. The facts of the applicants in the case at bar raise two further combinations of gender, date of birth, marriage and enfranchisement that present registration outcomes that vary depending on the gender of the applicants' relevant ancestor. This is yet another example of the enduring discrimination of the *Act*. In its 1996 report, RCAP discussed the registration provisions:

Although the current *Indian Act* contains no enfranchisement provisions, the status rules, as modified in 1985 by Bill C-31, are still highly problematic. Not only are they extremely complex, but like their historical predecessors, they appear to continue the policy of assimilation in disguised but strengthened form.<sup>31</sup>

Clearly RCAP's concerns regarding ongoing discrimination are still relevant today.

***b) The Discriminatory Consequences of a Piece-meal Approach***

25. Each time the government was faced with a successful challenge to the registration provisions, it responded with narrow amendments rather than comprehensive reform. This approach further complicated an already byzantine statutory scheme. The complexity of interpreting and applying the registration provisions was noted by the B.C. Court of Appeal in *McIvor*:

The analysis of the issue is made more difficult by the fact that the provisions governing Indian status are complex. The system was not a static one before 1985, and the manner in which illegitimate children and those of partial Indian heritage have been treated varied over time. There are, as well, provisions of the *Indian Act* that allow the government to exempt particular bands from particular provisions of the *Act*, and those provisions were frequently used after 1980.<sup>32</sup>

26. In *Descheneaux*, the court acknowledged that the 2010 amendments did not fully address this ongoing discrimination.<sup>33</sup> In that case, the court suggested that Parliament should take a broader approach to remedying the discrimination that continues to flow from the *Act*. Justice Masse wrote:

Parliament should not interpret this judgment as strictly as it did the BCCA's judgment in *McIvor*. If it wishes to fully play its role instead of giving free reign to legal disputes, it must act differently this time, while also quickly making

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<sup>31</sup> RCAP 1, *supra* note 5 at p 280.

<sup>32</sup> *McIvor*, *supra* note 27 at para 13.

<sup>33</sup> *Descheneaux*, *supra* note 26 at para 238.

sufficiently significant corrections to remedy the discrimination identified in this case.<sup>34</sup>

27. However, rather than enact a comprehensive amendment to the registration provisions of the *Act*, the government proposed legislation which narrowly responds to the discrimination identified in the *Descheneaux* and *Gehl* decisions.<sup>35</sup> Senator Patterson observed in a May 17, 2017 meeting of the Senate Standing Committee for Aboriginal Peoples that “...the government has probably — it's not unfair to say — done kind of the minimum in moving beyond *Descheneaux* in this bill... This is a piecemeal approach and perpetuates the hierarchy between 6(1)(a), 6(1)(c) and 6(2) Indians.”<sup>36</sup> The individuals affected by the discriminatory effects of the registration provisions of the *Act* and successive government’s piecemeal approaches require a venue to address the inevitable discrimination.

***c) Individual Ancestral History is Best Considered by the CHRT***

28. The facts of Matson’s and Andrews’ applications for Indian registration demonstrate that the impact of the registration provisions of the *Act* will be experienced differently by families and even among family members depending on the age, gender, marital status and band affiliation of their grandparents and great-grandparents. As discussed in *Gehl*, the quality of the evidence required may vary and may be affected by policies unknown to even the parties themselves.<sup>37</sup>

29. This type of case-by-case analysis is more suited to an application under the *CHRA* than to a *Charter* challenge. The *CHRA* outlines<sup>38</sup> that the Canadian Human Rights Commission can investigate a claim, gather and evaluate documents and prepare a report about how the registration provisions apply to a particular individual. As an administrative tribunal, the CHRT is designed to apply the tests set out in the *CHRA* to particular facts in a less formal setting where parties may not be represented by counsel. This is in contrast to a challenge brought pursuant to the *Charter* which is necessarily legalistic, involving an analysis not only of the applicant’s particular situation, but a

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<sup>34</sup> *Ibid* at para 243.

<sup>35</sup> Canada, Senate of Canada, Standing Senate Committee on Aboriginal Peoples in *Transcript* No 42-1-22 (17 May 2017) at 160-S, Centre Block (Chair: Lillian Eva Dyck).

<sup>36</sup> *Ibid*.

<sup>37</sup> *Gehl*, *supra* note 12 at para 37.

<sup>38</sup> *CHRA*, *supra* note 1 at ss 43-44.

consideration of the *Act* as a whole.

***d) CHRT Provides the Appropriate Remedy***

30. Sharon McIvor applied for Indian Status for her family in 1985.<sup>39</sup> Ms. McIvor's claim was completed in 2010 when the *Act* was amended to comply with the B.C. Court of Appeal order in her case. The applicants in the *Descheneaux* case were unable to apply for status until the *McIvor* amendments passed in 2010 and are still waiting for the government to pass legislation in response to their court victory two years ago. These protracted court battles highlight the barriers faced by others who are also caught by the ongoing discrimination of the *Act*. Piece-meal legislative changes cannot keep up with new fact scenarios which continue to engage the *Act* in ways not addressed before.
31. Not only is the process of mounting a *Charter* challenge lengthy and expensive, even if it is successful, the government's response to the case will need to address more than the individual's registration. Because the legislature's response to a successful *Charter* case has public and political implications, individual remedies are delayed. Individuals whose only barrier to registration are the discriminatory provisions are left unable to access benefits and in a state of uncertainty about the status of their children and grandchildren.
32. Such individuals are entitled to a remedy which, rather than striking down the registration provisions of the *Act* because they violate s. 15 of the *Charter*, instead allows an individualized assessment of their claim to be registered as an Indian. That remedy is found in a hearing by the CHRT.

**PART IV – POSITION ON COSTS**

33. ALS seeks no costs and respectfully requests that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of October, 2017.

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**Emily Hill**  
**ABORIGINAL LEGAL SERVICES**  
 Counsel for the Intervenor

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**Emilie Lahaie**  
**ABORIGINAL LEGAL SERVICES**  
 Counsel for the Intervenor

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<sup>39</sup> *McIvor*, *supra* note 27 at para 40.

## PART VI – TABLE OF AUTHORITIES

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Legislation		
1.	<p><i>Canadian Charter of Rights and Freedoms</i>, Part 1 of the <i>Constitution Act, 1982</i>, being Schedule B to the <i>Canada Act 1982 (UK)</i>, c 11  <a href="#">15</a></p> <p><i>Charte Canadienne des droits et libertes</i> <i>Loi de 1982 sur le Canada</i>, 1982, ch. 11 (RU)  <a href="#">15</a></p>	21
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3.	<p><i>Constitution Act, 1867 (UK)</i>, <a href="#">30 &amp; 31 Vict, c 3</a>, reprinted in <a href="#">RSC 1985, App II, No 5</a>  <a href="#">91(24)</a></p> <p><i>Loi constitutionnelle de 1867</i>, <a href="#">30 &amp; 31 Victoria, ch. 3 (RU)</a>  <a href="#">91(24)</a></p>	1
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Cases		
5.	<i>Attorney General of Canada v Lavell</i> , <a href="#">[1974] SCR 1349</a> , 38 DLR (3d) 481	19
6.	<i>Descheneaux c. Canada (Procureur Général)</i> , 2015 QCCS 3555, [2016] 2 CNLR 175 <a href="#">[french]</a> <a href="#">[english]</a>	21, 22, 23, 26
7.	<i>First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)</i> , <a href="#">2016 CHRT 2</a>	13
8.	<i>Gehl v Canada (Attorney General)</i> , <a href="#">2017 ONCA 319</a>	8, 16, 28
9.	<i>McIvor v. Canada (Registrar of Indian and Northern Affairs)</i> , <a href="#">2009 BCCA 153</a> , 91 BCLR (4th) 1	22, 24, 25, 30
10.	<i>Sandra Lovelace v Canada</i> , Communication No. 24/1977, <a href="#">U.N. Doc. CCPR/C/OP/1 at 83 (1984)</a>	20
11.	<i>Watkin v Canada (Attorney General)</i> , <a href="#">2008 FCA 170</a> , [2008] FCJ No 710	12
Secondary Sources		
12.	Canada, Senate of Canada, <a href="#">Standing Senate Committee on Aboriginal Peoples</a> in <i>Transcript</i> No 42-1-22 (17 May 2017) at 160-S, Centre Block (Chair: Lillian Eva Dyck)	27
13.	Carr-Stewart, Sheila, “ <a href="#">A Treaty Right to Education</a> ” (2001) <i>Canadian Journal of Education</i> Vol 26 No 2	10

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14.	Indigenous and Northern Affairs Canada, “The Indian Registrar” (January 2011), online: Indigenous and Northern Affairs Canada < <a href="https://www.aadnc-aandc.gc.ca/eng/1100100032475/1100100032476">https://www.aadnc-aandc.gc.ca/eng/1100100032475/1100100032476</a> >	16
15.	Olthuis, Kler, Townshend LLP, <i>Aboriginal Law Handbook</i> , 4 <sup>th</sup> ed (Toronto: Carswell, 2012)	18
16.	<i>Report of the Royal Commission on Aboriginal Peoples: <a href="#">Looking Forward, Looking Back, Vol 1</a></i> (Ottawa, Supply and Services Canada, 1996)	5, 24
17.	<i>Report of the Royal Commission on Aboriginal Peoples: <a href="#">Perspectives and Realities, Vol 4</a></i> (Ottawa, Supply and Services Canada, 1996)	6, 11, 9
18.	Truth and Reconciliation Commission of Canada, <i><a href="#">Honouring the Truth, Reconciling the Future</a></i> (Report) (Ottawa: Truth and Reconciliation Commission of Canada, 2015)	4