Court File No.

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

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

APPLICANT
(Appellant)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

MEMORANDUM OF ARGUMENT
in support of the Application for Leave to Appeal of the Applicant,
the CANADIAN HUMAN RIGHTS COMMISSION
(Pursuant to Rule 25(1)(c) of the *Rules of the Supreme Court of Canada)*

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OVERVIEW

1. This case is about whether the *Canadian Human Rights Act* (the "*CHRA*") – a fundamental human rights law with quasi-constitutional status – can be used to challenge denials of government benefits that are based on discriminatory criteria written into federal legislation.

2. In the initial decisions at issue, the Canadian Human Rights Tribunal (the "Tribunal") dismissed complaints brought by or on behalf of five Indigenous persons. They had alleged that government officials discriminated in the provision of "services" by denying their requests for particular forms of registration under the *Indian Act*, based on legislated eligibility criteria. The Tribunal characterized the complaints as an attack on Parliament's enactment of the law, and found they did not relate to the provision of "services" within the meaning of s. 5 of the *CHRA*. The Federal Court of Appeal upheld the Tribunal decisions on a reasonableness standard.

3. The decision below (the "Appeal Decision") recognized that the Commission's appeal had raised "important issues," and was brought "…in the public interest to clarify the means to challenge federal legislation that is alleged to be discriminatory."[1] There is a continuing interest in having this Court review the Appeal Decision, to provide guidance on important questions of national public significance.

4. First, what is the appropriate standard of review where human rights tribunals interpret rights-granting provisions in their enabling statutes? Although the Federal Court of Appeal found that reasonableness applied, it said the question was "not straightforward", and that appellate jurisprudence was "divided" on the issue.[2] In the end, it based its conclusion on an assertion that the Tribunal has exclusive jurisdiction over the interpretation of s. 5 of the *CHRA* – neglecting to acknowledge that other federal tribunals with the power to decide general questions of law can also be called upon to apply the provision. Granting leave would permit the Court to examine this oversight, and clean up what the Federal Court of Appeal termed the "sorry state of the case law" on standards of review in human rights matters.[3]

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[1] *Canadian Human Rights Commission v. Attorney General of Canada*, 2016 FCA 200 at paras. 1 and 7 (AR, Tab 5, pp. 153-156) (the "Appeal Decision").
[2] Appeal Decision, at para. 60 (AR, Tab 5, p. 176).
[3] Appeal Decision, at para. 78 (AR, Tab 5, p. 183).

5. Second, how is the term "service" to be interpreted, as it is used in s. 5 of the *CHRA*, and in the analogous provision found in every provincial and territorial human rights law? Is it enough that a complainant seeks to access a benefit that the government makes available to others, or does the answer instead turn on the specific *means* by which the government makes the benefit available? Does the Appeal Decision's approach unduly limit the practical application of the principle of human rights law primacy? Would a human rights tribunal have the authority to order any effective remedies in a case relating to underinclusive benefits legislation? How is the Appeal Decision to be reconciled with appellate decisions from Ontario, Alberta, Saskatchewan and Newfoundland, and human rights decisions from British Columbia and Nova Scotia, finding that complaints about the denial of legislated benefits do relate to the provision of "services"?

6. The answers to these questions have important implications. The approach taken in the Appeal Decision restricts access to justice. It turns people in vulnerable circumstances away from the specialized administrative system designed to provide an accessible forum for vindicating rights. It will preclude statutory human rights challenges relating not only to the *Indian Act* (as here), but also to other federal laws, such as the *Employment Insurance Act*, *Income Tax Act*, or *Canadian Forces Members and Veterans Re-establishment and Compensation Act* ("*New Veterans Charter*"), implicated in past and current complaints about access to benefits. It will bind the Commission and Tribunal, and other federal decision-makers with authority to apply s. 5 of the *CHRA* in their work. The result is to undermine the *CHRA*'s status as a law of the people. Given the nature of the interests affected, it is of public importance to ensure that access to statutory human rights redress has not been unduly curtailed.

PART I ~ STATEMENT OF FACTS

A.) Background Context ~ Registration under the *Indian Act*

7. At all material times, provisions in the *Indian Act* have defined who is to be considered an "Indian" within the meaning of that statute.[4] These statutory definitions do not necessarily correspond to the customs of Indigenous communities for determining their own membership.[5]

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[4] *Indian Act*, s. 2(1), definition of "Indian." In this Memorandum, unless the context otherwise requires, the Commission uses the term "Indian" to refer to a person registered or eligible to be registered as an "Indian" under the *Indian Act*, the term "Indian status" to refer to the status of a person registered or eligible to be registered, and the term "non-Indian" to refer to a person who is not registered or eligible to be registered. The Commission

8. Since 1951, the *Indian Act* has effectively said that an "Indian" is a person who is registered or eligible to be registered in a central register of "Indians," to be maintained by INAC's Indian Registrar (the "Registrar"). Since 1985, the *Indian Act* has said that the Registrar is not required to add a person's name to the register unless the person first fills out an application and submits it to the Registrar. Upon receiving such an application, the Registrar will determine whether the applicant is or is not eligible to be registered, in accordance with the provisions of the *Indian Act*.[6]

9. People who are registered as Indians (i) receive tangible benefits, such as non-insured health benefits, certain tax exemptions, and eligibility to apply for certain post-secondary education benefits, and (ii) may also receive intangible benefits, such as increased acceptance within aboriginal communities, or the possibility of passing registration entitlements to their descendants.[7] Whether people can access this latter benefit depends on their category of registration, and the identity of the persons with whom they parent. In this regard, persons registered under 6(1) of the *Indian Act* are always able to pass registration entitlements to their children. Persons registered under 6(2) of the *Indian Act* are only able to pass registration entitlements if they parent with another person who is registered or eligible for registration.[8]

B.) The Matson Complaints

10. At all material times before 1985, the *Indian Act* made a woman's status dependent on that of any man she married, such that an Indian woman who married a non-Indian man lost her status. This same rule did not apply to Indian men who married non-Indian women; to the contrary, in such situations, the non-Indian wife gained status. Although Parliament took steps in 1985, and again in 2011, to address some of the discriminatory consequences of this approach, some differential treatment remains.[9]

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acknowledges that many Indigenous persons find the term "Indian" to be offensive, and uses it here only because it is the term used in the applicable legislation.

[5] *Andrews et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 21 at para. 1 (AR, Tab 3, p. 66) ("*Andrews Tribunal*").

[6] *Indian Act*, ss. 2(1) (definitions of "Indian," "Indian Register" and "Registrar"), 5(1), 5(3) and 5(5).

[7] Appeal Decision, at para. 10 (AR, Tab 5, p. 157). See also: *Andrews Tribunal*, at para. 55 ("There is undoubtedly great significance and there are numerous benefits attached to obtaining Indian status") (AR, Tab 3, p. 84).

[8] *Indian Act*, ss. 6(1) and 6(2); Appeal Decision, at para. 15 (AR, Tab 5, p. 159).

[9] Appeal Decision, at paras. 13-15 and 17-19 (AR, Tab 5, pp. 158-161).

11. Jeremy Matson, Mardy Matson and Melody Schneider (née Matson) are siblings who suffer such differential treatment. They have one Indian grandparent – a grandmother who lost her status by marrying a non-Indian man before 1985, but regained it following the 1985 amendments to the *Indian Act*. By virtue of 2011 amendments to the *Indian Act*, the Matson siblings became registered for the first time, under s. 6(2). As such, they are not able to pass registration entitlements to the children they have had with non-Indians. If their Indigenous grandparent had been male instead of female, they would be able to pass such entitlements.[10]

12. The Matson siblings filed human rights complaints alleging that INAC committed a discriminatory practice in the provision of services, contrary to s. 5 of the *CHRA*, when it denied a form of registration that would permit them to pass entitlements to their children, based on legislated eligibility criteria. Section 5 of the *CHRA* reads as follows:

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

C.) The Andrews Complaints

13. At all material times up to 1985, the *Indian Act* contained a variety of enfranchisement mechanisms – some involuntary, some triggered by application – by which the federal government could strip an Indian and his or her future descendants of status, in exchange for various incentives or entitlements.[11] Enfranchisement was aimed at assimilating Indigenous peoples into the rest of Canadian society, and has been recognized as "one of the most

[10] Appeal Decision, at paras. 26-29 (AR, Tab 5, p. 163); and *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13 at paras. 1-5 and 11-13 (AR Tab 2, pp. 6 and 8) ("*Matson Tribunal*"). It should be noted that the Quebec Superior Court has issued a suspended declaration of invalidity that may prompt legislative amendments to the *Indian Act* that could render the complaints of the Matson Siblings moot: *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555. However, as at the date of this Memorandum, Parliament has yet to make the required amendments, and the registration provisions still read as they did when the Matson Tribunal rendered its decision.

[11] Appeal Decision, at para. 11 (AR, Tab 5, p. 157); *Andrews Tribunal*, at para. 2 (AR, Tab 3, p. 66).

oppressive policies adopted by the Canadian government in its history of dealings with Aboriginal peoples." The policy resulted in disadvantage, stereotyping, prejudice and discrimination, and was completely contrary to human rights principles and values.[12]

14. In 1985, Parliament took steps to address the discriminatory effects enfranchisement had on the registration entitlements of persons who had been named in enfranchisement orders.[13] However, it did not extend equal consideration to the children born to such persons after the date of enfranchisement.[14] As a result, two siblings with identical genealogical connections to Indian ancestry can have different registration entitlements, depending on whether they were born before or after a parent's enfranchisement.

15. Roger Andrews is the son of an Indian father who was enfranchised by application before 1985. Although the 1985 amendments to the *Indian Act* restored his father's status under s. 6(1)(d), and gave him status under s. 6(2), Mr. Andrews remains unable to pass registration entitlements to the children he has had with a non-Indian partner.[15] If his father had never been enfranchised, or if Mr. Andrews had been born before the date of the enfranchisement order, he would be able to pass such entitlements.

16. Mr. Andrews filed two complaints, alleging on behalf of himself and one of his daughters that INAC committed a discriminatory practice in the provision of services, contrary to s. 5 of the *CHRA*, when it denied a form of registration that would have allowed him to pass status entitlements to his children, based on legislated eligibility criteria.

D.) The Tribunal Decisions

17. The Tribunal released two decisions, dismissing all five complaints on the grounds that they did not relate to the provision of "services" within the meaning of the *CHRA*.[16] In each case, the Tribunal considered itself bound by the Federal Court of Appeal's 2012 decision in

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[12] Appeal Decision, at para. 12 (AR, Tab 5, p. 158); *Andrews Tribunal*, at paras. 2-3 and 5 (AR, Tab 3, p. 66).
[13] Since the 1985 amendments to the *Indian Act*, all such persons have been eligible to be registered under s. 6(1)(d) of the *Indian Act*: see *Andrews Tribunal*, at para. 19 (AR, Tab 3, p. 72).
[14] The 1985 amendments to the *Indian Act* did not contain any provisions that specifically dealt with such persons. As a result, since the 1985 amendments, such persons are entitled to register either under s. 6(1)(f) (if both their parents were registered or entitled), or s. 6(2) (if only one parent was registered or entitled).
[15] Appeal Decision, at paras. 21-25 (AR, Tab 5, pp. 161-163).
[16] *Matson Tribunal*, at paras. 150-151 (AR, Tab 2, p. 59); and *Andrews Tribunal*, at para. 111 (AR, Tab 3, p. 107).

Public Service Alliance of Canada v. Canada Revenue Agency ("*Murphy*").[17] In that brief oral ruling, the Court of Appeal held that a "direct attack" on the wording of federal legislation "...falls outside the scope of the *CHRA* since it is aimed at the legislation *per se*, and nothing else," and that "the *CHRA* does not provide for the filing of a complaint directed against an Act of Parliament."[18] This Court denied leave to appeal the *Murphy* decision.[19]

18. In *Murphy*, the Court of Appeal overturned a previous line of federal case law, originating in its 1989 decision in *Canada (Attorney General) v. Druken* ("*Druken*"), that had (i) accepted that complaints about denials of employment insurance benefits, flowing from legislated eligibility criteria, related to the provision of "services," and (ii) directed officials to cease and desist from applying discriminatory aspects of the legislation.[20]

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

- While INAC officials may provide "services" when they offer information or exercise discretion about the processing of applications for registration, the Matson and Andrews complainants did not make allegations relating to such activities. Instead, they effectively took issue with Parliament's *sui generis* lawmaking activity in enacting the unambiguous registration criteria in s. 6 of the *Indian Act*.[21]

- Parliament does not provide "services" within the meaning of s. 5 of the *CHRA* when it enacts legislation setting mandatory eligibility criteria for government benefits.[22]

- Supreme Court of Canada case law confirms that human rights laws, including the *CHRA*, have primacy, and can be used to render inconsistent legislation inoperable.[23]

- Although the *CHRA* has primacy over other laws, this does not mean that the act of applying discriminatory legislation is a "service" that can be challenged under s. 5 of

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[17] *Matson Tribunal*, at paras. 148-149 (AR, Tab 2, p. 58); and *Andrews Tribunal*, at paras. 54, 77-78, 80 and 85 (AR, Tab 2, pp. 82, 93-94, 97); both citing *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7 ("*Murphy*").
[18] *Murphy*, at paras. 5-6.
[19] *Public Service Alliance of Canada et al. v. Canada Revenue Agency et al.*, [2012] S.C.C.A. No. 102.
[20] *Murphy*, at para. 7. See *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24 at paras. 3 and 13-15 (C.A.), leave to appeal refused (1989), 55 D.L.R. (4th) vii (S.C.C.) ("*Druken*"). The *Druken* decision had been followed in: *Gonzalez v. Canada (Employment and Immigration Commission)*, [1997] 3 F.C. 646 at paras. 36-38 and 46 (T.D.) ("*Gonzalez*"); and *McAllister-Windsor v. Canada (Human Resources Development)*, [2001] C.H.R.D. No. 4 at paras. 30, 71 and 84 (Trib.) ("*McAllister-Windsor*").
[21] *Matson Tribunal*, at paras. 56-59 (AR, Tab 2, p. 22-24); *Andrews Tribunal*, at paras. 52 and 56-57 (AR, Tab 3, pp. 83, 85).
[22] *Matson Tribunal*, at para. 54 (AR, Tab 2, p. 22); *Andrews Tribunal*, at paras. 56-57 (AR, Tab 3, p. 85).
[23] *Matson Tribunal*, at para. 143 (AR, Tab 2, p. 57); *Andrews Tribunal*, at para. 77 (AR, Tab 3, p. 93).

the *CHRA*. Instead, the principle of human rights law primacy only has practical effect when a conflict between the *CHRA* and another law arises indirectly, as a side issue in a case that properly alleges some other kind of "discriminatory practice."[24]

- Where claimants argue they have been excluded from receiving government benefits because of discriminatory but legislated eligibility criteria, there is no statutory human rights recourse, and a *Charter* challenge must instead be brought before the courts.[25]

20. In each case, the Tribunal considered the former s. 67 of the *CHRA*, enacted in 1977 and repealed in 2008, which had stated that, "Nothing in this Act affects the provisions of the *Indian Act*, or any provisions made under or pursuant to that Act" (emphasis added).[26] The *Andrews* Tribunal discussed the provision in greater depth, agreeing there was persuasive evidence that Parliament had enacted this provision to shield the registration provisions of the *Indian Act* from scrutiny under the *CHRA*, and that in doing so, "... Parliament would have indeed implicitly imputed to [the *CHRA*] the ability to challenge legislation."[27] However, it found this was not sufficient to displace its earlier findings, stating ":... while this may reflect Parliament's intent to prevent challenges to the *Indian Act* by [the *CHRA*] in a pre-Charter era, this evidence is in and of itself insufficient to demonstrate that when Parliament enacted [the *CHRA*] in its entirety, it intended for this legislation to possess the ability to directly challenge other legislation."[28]

E.) The Judicial Review Decision

21. The Commission sought judicial review of both Tribunal decisions. The Federal Court heard the matters together, and issued a single decision dismissing both applications.[29] It reviewed the Tribunal Decisions for reasonableness, acknowledged Federal Court of Appeal case law saying that "sometimes the range of reasonableness may be very narrow," and found that the results reached were within the range of acceptable outcomes.[30]

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[24] *Matson Tribunal*, at paras. 92-94, 114 and 143-145 (AR, Tab 2, p. 36-37, 45, 57); *Andrews Tribunal*, at paras. 86-92 (AR, Tab 3, p. 97-99).
[25] *Matson Tribunal*, at paras. 150 and 152-154 (AR, Tab 2, pp. 59-62); *Andrews Tribunal*, at paras. 85 and 109-110 (AR, Tab 3, pp. 97, 106-107).
[26] *Matson Tribunal*, at paras. 146-147 (AR, Tab 2, p. 58); *Andrews Tribunal*, at paras. 102-103 (AR, Tab 3, p. 104).
[27] *Andrews Tribunal*, at para. 102 (AR, Tab 3, p. 104).
[28] *Andrews Tribunal*, at para. 103 (AR, Tab 3, p. 104).
[29] *Canadian Human Rights Commission v. Attorney General of Canada*, 2015 FC 398 at paras. 4 and 34 ("Judicial Review Decision") (AR, Tab 4, pp. 112, 120).
[30] Judicial Review Decision, at paras. 33-34 (AR, Tab 4, p. 120).

F.) The Appeal Decision

(i) Standard of Review

22. The Federal Court of Appeal said the application of the *Dunsmuir* standard of review principles was "not straightforward" in the present case, and that the governing case law provided a "lack of guidance."[31] It acknowledged the general presumption of reasonableness where tribunals interpret their enabling legislation, but noted that recent decisions of this Court had (i) left open the possibility that some issues coming before human rights tribunals might be reviewed for correctness[32], and (ii) applied correctness to a human rights tribunal's conclusions on the scope of the state's duty of religious neutrality.[33] It also noted conflicts in the law across jurisdictions, indicating that recent appellate decisions in Ontario and Quebec had reviewed human rights tribunal decisions for reasonableness post-*Dunsmuir*[34], while others in Alberta, PEI, Nova Scotia and Saskatchewan had applied correctness.[35]

23. The Court of Appeal held that the presumption of reasonableness review is not rebutted by the mere fact that human rights tribunals decide important issues with quasi-constitutional dimensions.[36] However, it appeared to accept that the presumption would be rebutted, and that correctness would apply, for the review of questions over which the Tribunal shares concurrent jurisdiction with other administrative decision-makers.[37] Regardless, it found that the Matson and Andrews Complaints did not raise such issues, based on its assertion that no other administrative tribunals could ever be called upon to interpret the term "services" as used in s. 5 of the *CHRA*.[38] As a result, the Court of Appeal found that the Matson and Andrews Decisions were to be reviewed on a standard of reasonableness.

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[31] Appeal Decision, at paras. 60 and 78 (citing *Dunsmuir v. New Brunswick*, 2008 SCC 9) (AR, Tab 5, pp. 176, 183).
[32] Appeal Decision, at para. 66 (referring to *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 23 ("*Mowat*")) (AR, Tab 5, p. 178).
[33] Appeal Decision, at para. 68 (referring to *Mouvement laïque québecois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 2 at para. 51 (AR, Tab 5, p. 179).
[34] Appeal Decision, at paras. 72 and 75 (AR, Tab 5, pp. 181, 182).
[35] Appeal Decision, at paras. 73, 74 and 76 (AR, Tab 5, pp. 181-183).
[36] Appeal Decision, at paras. 81-82 (AR, Tab 5, p. 184).
[37] Appeal Decision, at paras. 84-86 (AR, Tab 5, p. 185-186). In para. 86, the Court of Appeal stressed that labour adjudicators share jurisdiction to apply human rights legislation, and indicated that, "This overlap might provide a sound basis for selection of the correctness standard of review under general principles that flow from the Supreme Court's jurisprudence."
[38] Appeal Decision, at paras. 87-88 (AR, Tab 5, p. 186).

(ii) Merits of the Decisions

24. The Federal Court of Appeal upheld the Matson and Andrews Decisions, stating that the results reached, and the reasons given, were reasonable.[39] It accepted the Tribunal's characterization of the Complaints as challenges to the act of legislating[40], agreed that legislatures do not provide "services" when passing laws[41], and confirmed that the principle of human rights law primacy applies only where conflicts between the *CHRA* and other legislation arise indirectly, in cases otherwise addressing a legitimate discriminatory practice.[42]

25. The Court of Appeal considered the Tribunal's approach to have an unassailable policy rationale, stating it saw no reason for the Tribunal to hear such challenges when complainants could simply seek relief from the court under the *Charter*. It was not convinced that the Tribunal was a more accessible forum than the courts for resolving such matters.[43]

PART II ~ QUESTIONS IN ISSUE

26. This case raises the following questions of legal and public importance:

a. What standard of review is to be applied to a human rights tribunal's interpretation of the term "services" as used in its enabling legislation? Did the Federal Court of Appeal err in this case by placing mistaken emphasis on whether the Tribunal had exclusive jurisdiction to interpret s. 5 of the *CHRA*?

b. How is the term "services" to be interpreted, in the context of statutory human rights protections against discrimination in the provision of "services customarily available to the general public"? Do human rights statutes apply where a complainant seeks access to government benefits, but is denied because of legislated eligibility criteria? Did the Federal Court of Appeal err by taking an overly narrow approach that undermines human rights protections, and unduly restricts access to justice?

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[39] Appeal Decision, at para. 90 (AR, Tab 5, p. 187).
[40] Appeal Decision, at paras. 92-93 (AR, Tab 5, p. 187-188).
[41] Appeal Decision, at paras. 94-96 (AR, Tab 5, p. 188).
[42] Appeal Decision, at paras. 98-99 (AR, Tab 5, p. 189-190).
[43] Appeal Decision, at para. 103 (AR, Tab 5, p. 191).

27. Although a number of provincial appellate courts and human rights decision-makers have found that legislated government benefits are "services" capable of review, the Appeal Decision takes a different approach. This Court has yet to directly consider the merits of such a case. The Court's intervention is thus warranted to settle important outstanding questions, at the federal level and across the country, and thereby ensure the worthy aims of eliminating discrimination and enhancing access to justice are not improperly frustrated.

PART III – STATEMENT OF ARGUMENT

A.) Uncertainty Regarding Standard of Review

28. As explained above, the Appeal Decision noted conflicts in appellate jurisprudence on standards of review, and found that (i) correctness will generally apply to the decisions of human rights tribunals on issues over which they share concurrent jurisdiction, but (ii) the presumption of reasonableness applied to the Tribunal's interpretation of s. 5 of the *CHRA*, because no other administrative decision-makers will ever be called upon to interpret that term.

29. With respect, this rationale for applying reasonableness is based on a flawed premise, and further complicates an already difficult area of the law.

30. Contrary to what the Federal Court of Appeal asserts, there are federal administrative decision-makers other than the Tribunal that have the power to decide general questions of law, and could be asked to interpret the term "services" as it appears in s. 5 of the *CHRA*.[44] For example, the claimant in *Canada Employment Insurance Commission v. M.W.* (2014) cited the *CHRA* in arguing that certain provisions in the *Employment Insurance Regulations* should not be applied, because they had an adverse impact on persons with disabilities. The federal Social Security Tribunal rejected the argument on its merits, applying *Murphy*, and the Tribunal

[44] This Court has made clear that administrative decision-makers with the power to decide general questions of law are to apply human rights legislation in carrying out their mandates: see *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 at paras. 14 and 24-26 ("*Tranchemontagne (SCC)*"). In that case, a majority of the Court held that the Ontario Social Benefits Tribunal ("SBT") had the power and duty to apply the Ontario *Human Rights Code* prohibition against discrimination with respect to the provision of services. The SBT went on to find that legislated disability support benefits were "services" within the meaning of the *Code*, and that the *Code* rendered inoperable certain inconsistent provisions in the disability benefits legislation. This was upheld by the Ontario Court of Appeal: see *Ontario (Director, Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 at paras. 4, 13 and 38 ("*Tranchemontagne (ONCA)*"). Subsequent cases at the SBT have continued to hold that, "Government benefits are services within the meaning of s. 1 of the *Code*": *Piper v. Director, Ontario Disability Support Program*, 2013 ONSBT 6001 at para. 15.

decisions in *Matson* and *Andrews*, in concluding that the matter did not relate to the provision of "services" within the meaning of s. 5 of the *CHRA*.[45] While this matter happened to relate to employment insurance legislation, similar issues could presumably arise before the Social Security Tribunal in the context of other legislated benefits programs over which it has review authority, including Old Age Security, and the Canada Pension Plan.

31. The Appeal Decision had seized on the alleged lack of concurrent jurisdiction in an attempt to reconcile some of its recent decisions: *Johnstone* and *Seeley*, which held the Tribunal's interpretation of "family status" to a correctness standard in employment-based cases[46]; and *Canada (Attorney General) v. Canadian Human Rights Commission et al.*, which applied reasonableness to the Tribunal's interpretation of "services," but arguably applied the "margins of appreciation" approach recently disapproved of in two minority concurring opinions of this Court.[47] Once it is recognized that concurrency of jurisdiction is not properly a distinguishing factor, reviewing courts and parties will again be left to struggle with the conflicting appellate approaches that were canvassed in the Appeal Decision. This undermines the objective of predictability in the law, and makes it difficult for parties who are dissatisfied with Tribunal decisions to make informed choices about whether to seek judicial review.

32. Granting leave to appeal would allow this Court to advance the standard of review dialogue, to clarify the principles to be applied when reviewing decisions of human rights tribunals, and to thereby remedy the lack of guidance lamented in the Appeal Decision.

B.) Unduly Narrow Approach to the Term "Services"

(i) The Appeal Decision Fails to Properly Interpret the CHRA

33. Federal case law indicates that a "service" is something of benefit that is offered to the public.[48] Because government actions are generally taken for the benefit of the public, they

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[45] *Canada Employment Insurance Commission v. M.W.*, 2014 SSTAD 371 at para. 63.
[46] *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 at paras. 44-52; and *Canadian National Railway Company v. Seeley*, 2014 FCA 111 at para. 36.
[47] *Canada (Attorney General) v. Canadian Human Rights Commission et al.*, 2013 FCA 75 at paras. 11-14. The "margins of appreciation" approach, which applies "a potentially indeterminate number of varying degrees of deference" within the reasonableness standard, was disapproved of in two minority opinions in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29: see para. 18 (per Abella J.); and para. 73 (per Cromwell J.).
[48] Appeal Decision, at paras. 51-52 (AR, Tab 5, p. 172-173).

usually meet the requirement of being "customarily available to the general public."[49] This is true even if eligibility requirements mean that only a segment of the general public can access the service.[50] As this Court has held, while eligibility criteria are present for most services, they "should not come at the cost of excluding the protection of human rights legislation."[51]

34. In the context of this case, (i) the categories of *Indian Act* registration sought by the complainants would have conferred benefits, (ii) those benefits were held out and offered to the public in the *Indian Act*. In the circumstances, nothing in the wording of the *CHRA* prevented the Tribunal from finding that the general indicia of a service were present, and that everything relating to the process – including the consideration of the applications, and their substantive outcomes – related to the "provision of services" within the meaning of s. 5 of the *CHRA*.

35. Despite this, the decisions below took a more restrictive approach that focused on the *source* of the benefit – in this case, legislation – rather than on the adverse impact alleged by the complainants. The consequence is that services complaints may be possible where government benefits are made available as a matter of policy or discretion, or pursuant to ambiguous legislation that is open to a non-discriminatory intepretation.[52] However, no complaints will lie where eligibility for government benefits is determined by unambiguous legislation.

36. With respect, this outcome introduces unnecessary complexities into the human rights analysis, and will make it difficult for marginalized complainants in vulnerable circumstances to reliably determine where or how to challenge denials of government benefits. It is also inconsistent with this Court's repeated insistence that human rights legislation be interpreted in a broad, liberal and purposive manner that best advances its broad underlying policy

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[49] *Canada (Attorney General) v. Watkin*, 2008 FCA 170 at para. 31.

[50] *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 at paras. 8 and 11 (C.A.) (finding that a military parachuting course offered only to cadets was a "service customarily available to the general public"). See also: *Gonzalez v. Canada (Employment and Immigration Commission)*, *supra* at para. 38 (finding that eligibility criteria are a necessary part of most services, and that where such criteria exist, the *CHRA* requires they be non-discriminatory).

[51] *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 384.

[52] In this regard, the Tribunal recently upheld a complaint that – like the Matson and Andrews complaints – related to the denial of a particular form of registration under the *Indian Act*. In *Beattie et al. v. Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1, the Tribunal found the respondent department had committed a discriminatory practice in the provision of services by narrowly interpreting the term "child" to mean biological children, when it could have used a more expansive interpretation that would have included children adopted according to Indigenous custom (see paras. 2-3, 95-97, and 99-105). This decision demonstrates that the "services" question may depend on whether legislation can or cannot reasonably bear more than one interpretation.

considerations.[53] In this regard, s. 2 of the *CHRA* specifically proclaims its policy aim of eradicating discrimination in the purview of "all matters coming within the legislative authority of Parliament." This Court's guidance is needed to clarify whether the approach taken by the Appeal Decision is consistent with this fundamental purpose.

(ii) The Appeal Decision Undermines Human Rights Law Primacy

37. This Court has confirmed the *CHRA*'s status as a quasi-constitutional enactment.[54] It has also made clear that quasi-constitutional human rights laws render inconsistent legislation inoperable, unless the legislature has clearly stated otherwise in "express and unequivocal language".[55] As this Court made clear in *Tranchemontagne*, a finding of inoperability is something different from a finding of constitutional invalidity. Although both serve to eliminate the effects of discriminatory legislation, a human rights tribunal's finding of inoperability does not overturn legislative intent; instead, it upholds the legislature's intent in having enacted the human rights statute.[56]

38. Although the Appeal Decision recognizes that the *CHRA* is presumed to have primacy over inconsistent legislation, it carves out an exception that substantially reduces the practical application of this fundamental principle of human rights law. In essence, by precluding direct challenges to discriminatory impacts flowing from the application of legislation, it reduces primacy to an afterthought – something that applies only where a conflict with legislation arises indirectly, as a side issue in a case that otherwise deals with some other discriminatory practice.

39. In addition, the reasoning used in the Appeal Decision risks undermining even the limited scope of human rights law primacy that it claims to acknowledge. Here it must be remembered that the chief reason for dismissing the Complaints was that any adverse impact flowed from

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[53] For but a few examples, see: *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at pp. 1135-38 ("*Action Travail*"); and *Tranchemontagne (SCC)*, *supra* at paras. 33-34.

[54] *Action Travail*, *supra* at pp. 1135-1136; *Canada (House of Commons) v. Vaid***,** 2005 SCC 30, [2005] 1 S.C.R. 667 at paras. 26 and 81; *Mowat*, *supra* at para. 62.

[55] *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at pp. 157-158; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 at p. 156; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789 at paras. 25-27 ("*Larocque*"); *Mouvement laïque québecois v. Saguenay (City)*, *supra* at paras. 152-154.

[56] *Tranchemontagne (SCC)*, *supra* at paras. 31 and 35-36 (per Bastarache J. writing for the majority). Writing for the minority, Abella J. also accepted that the Ontario *Human Rights Code* could be used to find part of the impugned benefits legislation inoperable: see paras. 69, 79 and 97.

Parliament's conduct in passing the *Indian Act*, and not from INAC's conduct, which was limited to applying the rules established therein. If this rationale is carried over into future cases where legislative conflict arises indirectly, it would likely also lead to a dismissal. For example, consider a hypothetical situation where legislation imposes safety standards that prevent persons with particular disabilities from receiving a service. If an affected person were to file a human rights complaint, the service provider would presumably cite the Appeal Decision, and argue that (i) the only service it provides is that which is consistent with the safety legislation, (ii) it played no role in creating that legislation, and (iii) any discrimination flowing from the wording of the legislation is thus unrelated to any services it provides.

40. This Court's guidance is needed to establish whether the Appeal Decision properly respects the fundamental principle of primacy, consistent with the broad purposive interpretation that is to be given to human rights laws.

(iii) Available Defences and Remedies in Human Rights Cases

41. The Appeal Decision was motivated in part by concern that if *prima facie* discrimination had been found, the only statutory defence available to the government would have been that of *bona fide* justification under s. 15 of the *CHRA*. The Federal Court of Appeal, like the Tribunal before it, felt this would be contrary to past comments from this Court, refusing to incorporate undue hardship principles into the test for reasonable justification under s. 1 of the *Charter*.[57] However, those comments established that undue hardship defences are not appropriate when considering the constitutional validity of a law; they are silent on the separate question of whether statutory human rights defences are sufficient when considering whether a law should be rendered inoperable, due to conflict with a human rights statute. As this Court held in *Tranchemontagne*, a finding of invalidity is "clearly more offensive to the legislature" than a finding of inoperability.[58] Given this fundamental difference, there is no clear reason why the same justificatory test should have to apply in both scenarios.

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[57] Appeal Decision, at paras. 46-47 and 103 (AR, Tab 5, p. 170); *Matson Tribunal*, at paras. 153-154 (AR, Tab 2, pp. 61-62); and *Andrews Tribunal*, at paras. 81-85 (AR, Tab 3, p. 94-95); making reference to *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, a case about a *Charter* challenge to the constitutional validity of legislation. In the majority opinion in that case, McLachlin CJ. wrote at para. 71 that "...where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper s. 1 analysis based on the methodology of *Oakes*" (emphasis added).

[58] *Tranchemontagne (SCC)*, *supra* at para. 31.

42. In addition, although it bars services-based complaints related to legislated benefits, the Appeal Decision accepts that the *CHRA* can be used to render legislation inoperable in other kinds of human rights cases.[59] It is not clear why the lack of a s. 1-style defence should preclude complaints like those filed by the Matson and Andrews complainants, but not the other kinds of complaints that could comparably lead to orders that render federal legislation inoperable.

43. The Federal Court of Appeal also found it significant that the Tribunal would have no authority to declare underinclusive benefits legislation invalid, or read in language that would extend benefits.[60] However, these statements do not tell the whole story. Federal cases predating *Murphy* had dealt with this by declaring inconsistent legislation inoperable, ordering that government officials cease and desist from applying the inconsistent legislation, and suspending those remedies to allow Parliament time to craft a legislative response.[61] This approach respects appropriate constitutional and institutional boundaries, while at the same time promoting the important objectives of the quasi-constitutional human rights law. The Appeal Decision does not explain why this would be inappropriate or inadequate.

44. Given these lingering uncertainties, it is important that the Court provide direction concerning the aspects of the Appeal Decision that relate to available defences and remedies in human rights proceedings.

(iv) The Appeal Decision Conflicts with the Prevailing Trend in Other Jurisdictions

45. Although there are minor variations in wording, provincial and territorial human rights laws all have provisions that protect against discrimination with respect to "services", and therefore correspond to s. 5 of the *CHRA*.[62] As this Court has indicated, wherever possible, analogous provisions in human rights laws should be given consistent interpretations across

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[59] The *Andrews Decision* lists a number of cases it considered to be proper examples of the application of human rights law primacy: see paras. 86-92 (AR, Tab 3, pp. 97-99).
[60] Appeal Decision, at para. 101 (AR, Tab 5, p. 190).
[61] See: *Gonzalez v. Canada (Employment and Immigration Commission), supra* at paras. 44-46; and *McAllister-Windsor v. Canada (Human Resources Development), supra* at para. 46.
[62] See: *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 8(1); *Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 4; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 12; *Human Rights Code*, C.C.S.M. c. H175, s. 13(1); *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1; *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 12; *Human Rights Act*, R.S.N.B. 2011, c. 171, s. 6(1); *Human Rights Act*, R.S.N.S., c. 214, s. 5(1)(a); *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1, s. 11; *Human Rights Act*, R.S.P.E.I. 1989, c. H-12, s. 2; *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 11; *Human Rights Act*, R.S.Y. 2002, c. 116, s. 9(a); and *Human Rights Act*, S.Nu. 2003, c. 12, s. 12.

jurisdictions, given their general similarities, and shared objectives of preventing discrimination.[63] As a result, any direction this Court may give concerning the impact of s. 5 of the *CHRA* on other laws will benefit not only litigants and decision-makers in the federal sphere, but also those in other jurisdictions.

46. It is of national public importance that this Court provide such direction, because there are currently conflicting and irreconcilable authorities across jurisdictions in Canada.

47. In this regard, a number of appellate and other decision-makers from across the country have taken approaches that are consistent with the *Druken* line of federal case law. In other words, these decision-makers have accepted that (i) benefits provided by the government pursuant to legislation are "services" for purposes of human rights review, (ii) complaints about the denial of such benefits relate to the provision of services, even where the denials are based in legislative wording, and (iii) in response to such complaints, human rights tribunals can order government officials to cease and desist from applying discriminatory statutory provisions. For example, the Courts of Appeal of Ontario[64], Alberta[65], Saskatchewan[66] and Newfoundland[67] have all made such findings concerning their respective human rights laws, as have tribunals in British

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[63] *University of British Columbia v. Berg*, *supra* at pp. 372-373; and *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604 at para. 68 (per McLachlin C.J., dissenting on other grounds).

[64] *Tranchemontagne (ONCA)*, *supra* at paras. 4, 7 and 12-13 (concerning underinclusive benefits provisions in the Ontario *Disability Support Program Act*). For more recent Human Rights Tribunal of Ontario decisions to similar effect, see: *XY v. Ontario (Minister of Government and Consumer Services)*, 2012 HRTO 726 at paras. 14-18, 85-87 and 288-294 (concerning the steps required under the *Vital Statistics Act* for changing the gender designation on birth certificates); and *Seberras v. Workplace Safety and Insurance Board*, 2012 HRTO 115 at paras. 5, 18 and 24 (accepting that the Tribunal has jurisdiction to hear services complaints alleging discrimination with respect to benefits prescribed by workers' compensation legislation).

[65] *Gwinner v. Alberta (Human Resources and Employment)*, 2002 ABQB 685 at paras. 76-77, 90, 165, 249-251 and 255-256 ("*Gwinner*"), aff'd 2004 ABCA 210, leave refused [2004] S.C.C.A. No. 342 (concerning distinctions in benefits under the Alberta *Widows Pension Act*).

[66] *Saskatchewan (Human Rights Commission) v. Saskatchewan (Department of Social Services)*, [1988] S.J. No. 464 at pp. 15-16 (C.A.) (concerning a discriminatory distinction in benefits under income assistance legislation); and *Saskatchewan (Workers' Compensation Board) v. Saskatchewan (Human Rights Commission)*, [1999] S.J. No. 457 at paras. 4 and 20-22 (C.A.) (finding that even if the remedy sought would need to affect legislation (which was not clear), the Tribunal would have jurisdiction to find a legislative provision inoperative if it contravened the human rights statute).

[67] *Newfoundland (Human Rights Commission) v. Newfoundland (Workplace Health, Safety and Compensation Commission)*, 2005 NLCA 61 at paras. 35 and 39 ("*Nfld HRC*") (finding the Board of Inquiry has jurisdiction to consider whether benefits provisions in workers' compensation legislation were discriminatory and therefore inoperative).

Columbia[68] and New Brunswick.[69] In making these determinations, a number of the decision-makers expressly relied on *Druken*[70] – which the Federal Court of Appeal overturned in *Murphy*, and which the decisions below have confirmed is no longer to be considered good law.

48. The Federal Court of Appeal did not engage with this jurisprudence in any depth, instead simply stating that it had not been referred to any cases finding that the act of passing legislation was a "service."[71] While it may be true that no cases have used those exact words, that is immaterial, as it is not what was alleged in the cases below. Instead, the argument is that services are things of benefit, Indian registration confers benefits, and complaints about the denial of such benefits therefore relate to the provision of services, regardless of whether they are based in legislation, policy, or the exercise of discretion. This is on all fours with the provincial cases described above. Indeed, the Tribunal appears to have recognized this in *Andrews*, as it did not distinguish all the provincial authorities, but rather refused to follow many of them, stating, "… I have come to a different conclusion which I have found to be supported by the Federal and Supreme Court of Canada jurisprudence. I note that while these cases could have had a persuasive effect, they are in no way authoritative or binding on the Tribunal."[72]

49. While the prevailing trend across Canada has been to adopt a broad approach to the term "services," some provincial decision-makers have reached outcomes similar to the Appeal Decision. For example, the Manitoba Court of Appeal held in 1997 that Manitoba's human rights law was never intended to address or provide a mechanism to deal with allegedly discriminatory provincial legislation.[73] The Nova Scotia Court of Appeal has also suggested that provincial human rights law is powerless to assist in cases aimed at legislative reform.[74] Similarly, the Quebec Court of Appeal dismissed a complaint from the same-sex partner of a

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[68] *Neubauer v. British Columbia (Ministry of Human Resources)*, 2005 BCHRT 239 at paras. 33-39 and 61 ("*Neubauer*") (accepting that the Tribunal has jurisdiction to hear a complaint concerning legislative provisions barring income assistance recipients from sitting on an income assistance appeal tribunal).

[69] *A.A. v. New Brunswick (Department of Family and Community Services)*, [2004] N.B.H.R.B.I.D. No. 4 at paras. 28, 49 and 58 ("*A.A.*") (concerning discriminatory exclusions of same-sex parents from statutory provisions concerning birth registration and spousal adoption).

[70] For examples of some provincial authorities that rely on *Druken*, see: *Gwinner* at paras 71 and 255, *Newfoundland (HRC)* at para. 22, *Neubauer* at paras. 24-28, and *A.A.* at paras. 46-48, all *supra*.

[71] Appeal Decision, at para. 98 (AR, Tab 5, pp. 189-190).

[72] *Andrews Tribunal*, at paras. 93-94 (AR, Tab 3, p. 100).

[73] *Gale Estate v. Hominick* (1997), 147 D.L.R. (4th) 53 at paras. 15 and 17-18 (per Scott C.J.M.), and para. 21 (per Huband J.A., concurring) (Man. C.A.).

[74] *Nova Scotia (Workers' Compensation Board) v. O'Quinn*, [1997] N.S.J. No. 44 ("*O'Quinn*") at paras. 42 and 52-55 (C.A., per Hallett J.A., with Roscoe J.A. concurring).

woman killed as a result of a criminal act, finding that the Quebec *Charter of Human Rights and Freedoms* could not be applied to review (i) the wording of the statutory benefit scheme, which provided compensation only to a victim's opposite sex consort, or (ii) the steps that public authorities were required to take under the statute.[75]

50. Stepping back, one is left with a number of decisions that appear to be working at cross-purposes. The Appeal Decision and a handful of provincial authorities exclude legislated denials of benefits from human rights review, while a majority of human rights jurisdictions take a different and broader approach. This Court's guidance is needed to bring consistency to this important area of the law.

(v) Important Access to Justice Issues are at Stake

51. The question of whether s. 5 of the *CHRA* can be used to challenge the denial of legislated benefits is not an academic or theoretical question. The answer has a direct impact on the ability of marginalized members of equality-seeking groups to access justice and challenge discrimination reinforced by law – a form of discrimination that this Court has described as "particularly repugnant," and as creating "the worst oppression."[76]

52. This Court has emphasized that tribunals and courts should not search for ways to minimize the "rights of vital importance" protected in the *CHRA*, or to enfeeble their impact.[77] In addition, human rights laws have been described as "the law of the people", and hailed as "often the final refuge of the disadvantaged and the disenfranchised", and "the last protection of the most vulnerable members of society."[78] Against this backdrop, this Court has cautioned that erecting barriers to access can render this refuge meaningless, and that the "laudatory goals of [a human rights statute] are not well served by reading in limitations to its application."[79]

53. If allowed to stand, the Appeal Decision will run contrary to these well-established principles. Instead of promoting access to the specialized administrative bodies created to

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[75] *Commission des droits de la personne et de la jeunesse c. Québec (Procureur général)*, 2006 QCCA 1506 at para. 38, leave to appeal refused [2007] C.S.C.R. no 30.
[76] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 172 (per McIntyre J., dissenting in part, but not on this point).
[77] *Action Travail*, *supra* at p. 1134.
[78] *Tranchemontagne (SCC)*, *supra* at para. 49 (citing *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at p. 339).
[79] *Tranchemontagne (SCC)*, *supra* at paras. 14 and 33.

eradicate discrimination in the federal domain, it endorses an exception that renders statutory human rights protections meaningless for marginalized persons who seek to challenge adverse impacts flowing from the application of federal legislation. In addition, it may have a disproportionate impact on Indigenous peoples, who by virtue of their constitutional status as the subject of a federal head of power, are uniquely impacted by federal legislation that touches wide aspects of their daily lives, and purports to define their relationships with the federal government.

54. Human rights challenges relating to the application of legislation are by no means rare. For example, reported decisions at the federal level show that complaints were litigated before *Murphy* with respect to conduct prescribed by provisions of the *Employment Insurance Act*, the *New Veterans Charter*, the *Income Tax Act*, the *Citizenship Act*, and the *Railway Vision and Hearing Examination Regulations*, with varying degrees of success.[80] Further, along with the Matson and Andrews claimants, other equality-seeking individuals have continued to come forward. In this regard, at least 19 "services" complaints are currently on hold before either the Commission or the Tribunal, waiting for a final resolution of the *Matson* and *Andrews* matters. Of these 19 complaints: 11 relate to the benefits that flow from registration under the *Indian Act*; five relate to the benefits made available to veterans or their surviving family members under the *New Veterans Charter*; and four relate to other federal laws having provisions that similarly confer benefits on some persons, but not others.[81]

55. The experience at the provincial and territorial level has been similar, with a broad range of human rights complaints filed with respect to "services" flowing from legislation governing, among other things, the provision of birth certificates that properly recognize gender identity and same-sex relationships, and the availability of income assistance, disability, workers compensation, pension and victims of crime benefits.[82] If the Appeal Decision stands, it may call into question the authority of provincial bodies to deal with these important matters.

56. The decisions below have stressed that their narrower approach to "services" does not leave complainants without recourse, as they can file *Charter* challenges in the court system.

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[80] See: *Druken*, *supra*; *Gonzalez*, *supra*; *McAllister-Windsor*, *supra*; *Donovan v. Canada*, 2008 FC 524 at para. 20; *Wignall v. Canada (Department of National Revenue (Taxation))*, 2003 FC 1280 at para. 30; *Canada (Attorney General) v. Bouvier*, [1998] F.C.J. No. 176 at paras. 2 and 4 (C.A.); *Dinning v. Veterans Affairs Canada*, 2011 CHRT 20 at paras. 2-3; and *Forward v. Canada (Citizenship and Immigration)*, 2008 CHRT 5 at para. 41.
[81] Affidavit of Ian Fine, sworn September 21, 2016, at paras. 8-10 (AR, Tab 7).
[82] See, generally, the cases identified in footnotes 64-75 of this Memorandum.

With respect, key differences between the human rights and court systems can make the former a more welcoming environment for persons in vulnerable circumstances. For example, this Court has previously taken notice of Commission publications mentioning the simplified process for the filing of complaints of discrimination.[83] Complainants whose cases raise systemic discrimination and/or new points of law may receive the assistance of the Commission, which can take an active role in presenting their complaints to the Tribunal.[84] In addition, the Tribunal does not have authority to award legal costs[85], making it possible for complainants to seek rulings about quasi-constitutional rights without exposing themselves to adverse costs awards. In these ways, the statutory human rights system promotes access to justice by allowing complainants to participate without having to hire lawyers, or incur excessive financial risk.

57. Given the nature and breadth of the interests affected, and the implications of the decisions below on access to justice, it is of national importance that this Court hear the proposed appeal, to ensure that fundamental human rights protections have not been unduly narrowed.

PART IV – SUBMISSIONS ON COSTS

58. The Commission does not seek costs, and submits that costs should not be ordered against it, since it seeks leave to appeal in its capacity as a representative of the public interest.

PART V – ORDER SOUGHT

59. The Commission asks that it be granted leave to appeal the decision of the Federal Court of Appeal.

ALL RESPECTFULLY SUBMITTED this 26th day of September, 2016.

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Counsel for the Applicant,
Canadian Human Rights Commission

[83] *Mowat*, *supra* at para. 55.
[84] *Mowat*, *supra* at para. 51-52 and 63.
[85] *Mowat*, *supra* at para. 64.

PART VI – TABLE OF AUTHORITIES

	Paragraphs referred	Footnote referred
Legislation		
Constitutional Documents		
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 1	**41**	
Federal Legislation		
Canadian Human Rights Act, RSC 1985, c. H-6, sections 2, 3, 5, 15, 51, 53 and repealed s. 67	**28, 30, 34, 36, 37, 38, 41, 42, 45, 51, 52**	
Indian Act, RSC 1985, c I-5, sections 2, 5, 6, 7	**34, 39, 54**	
Provincial Legislation		
Charter of human rights and freedoms, R.S.Q., c. C-12, s. 12	**49**	**62**
Human Rights Act, 2010, S.N.L. 2010, c. H-13.1, s. 11		**62**
Human Rights Act, R.S.A. 2000, c. A-25.5, s. 4		**62**
Human Rights Act, R.S.N.B. 2011, c. 171, ss. 6(1)		**62**
Human Rights Act, R.S.N.S 1989, c. 214, ss. 5(1)(a)		**62**
Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 2		**62**
Human Rights Act, R.S.Y. 2002, c. 116, ss. 9(a)		**62**
Human Rights Act, S.Nu. 2003, c. 12, s. 12		**62**
Human Rights Act, S.N.W.T. 2002, c. 18, s. 11		**62**
Human Rights Code, C.C.S.M. c. H175, ss. 13(1)		**62**
Human Rights Code, R.S.B.C. 1996, c. 210, ss. 8(1)		**62**
Human Rights Code, R.S.O. 1990, c. H.19, s. 1		**62**
Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 12		**62**

PART VII – STATUTES BEING RELIED ON

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11** 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	***Charte canadienne des droits et libertés*, Partie I de la Loi constitutionnelle de 1982, édictée comme l'annexe B de la *Loi de 1982 sur le Canada, 1982*, ch. 11 (R.U.)** 1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnable et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
***Canadian Human Rights Act*, R.S.C., 1985, c. H-6, as amended** 2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	***Loi canadienne sur les droits de la personne* L.R.C. (1985), ch. H-6, tel que modifié** 2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.
3(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. (2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.	3 (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience. (2) Une distinction fondée sur la grossesse ou l'accouchement est réputée être fondée sur le sexe.

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public : a) d'en priver un individu; b) de le défavoriser à l'occasion de leur fourniture.
15 (1) It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement; (b) employment of an individual is refused or terminated because that individual has not reached the minimum age, or has reached the maximum age, that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph; (c) [Repealed, 2011, c. 24, s. 166] (d) the terms and conditions of any pension fund or plan established by an employer, employee organization or employer organization provide for the compulsory vesting or locking-in of pension contributions at a fixed or determinable age in accordance with sections 17 and 18 of the *Pension Benefits Standards Act, 1985*; (d.1) the terms of any pooled registered pension plan provide for variable payments or the transfer of funds only at a fixed age under sections 48 or 55, respectively, of the *Pooled Registered Pension Plans Act*; (e) an individual is discriminated against on a prohibited ground of discrimination in a manner that is prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be reasonable; (f) an employer, employee organization or employer organization grants a female employee special leave or benefits in	15 (1) Ne constituent pas des actes discriminatoires : a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées; b) le fait de refuser ou de cesser d'employer un individu qui n'a pas atteint l'âge minimal ou qui a atteint l'âge maximal prévu, dans l'un ou l'autre cas, pour l'emploi en question par la loi ou les règlements que peut prendre le gouverneur en conseil pour l'application du présent alinéa; c) [Abrogé, 2011, ch. 24, art. 166] d) le fait que les conditions et modalités d'une caisse ou d'un régime de retraite constitués par l'employeur, l'organisation patronale ou l'organisation syndicale prévoient la dévolution ou le blocage obligatoires des cotisations à des âges déterminés ou déterminables conformément aux articles 17 et 18 de la Loi de 1985 sur les normes de prestation de pension; d.1) le fait que les modalités d'un régime de pension agréé collectif prévoient le versement de paiements variables ou le transfert de fonds à des âges déterminés conformément aux articles 48 et 55 respectivement de la Loi sur les régimes de pension agréés collectifs; e) le fait qu'un individu soit l'objet d'une distinction fondée sur un motif illicite, si celle-ci est reconnue comme raisonnable par une ordonnance de la Commission canadienne des droits de la personne rendue en vertu du

connection with pregnancy or child-birth or grants employees special leave or benefits to assist them in the care of their children; or (g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is *bona fide* justification for that denial or differentiation. (2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.	paragraphe 27(2); f) le fait pour un employeur, une organisation patronale ou une organisation syndicale d'accorder à une employée un congé ou des avantages spéciaux liés à sa grossesse ou à son accouchement, ou d'accorder à ses employés un congé ou des avantages spéciaux leur permettant de prendre soin de leurs enfants; g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire. (2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.
51. In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.	51 En comparaissant devant le membre instructeur et en présentant ses éléments de preuve et ses observations, la Commission adopte l'attitude la plus proche, à son avis, de l'intérêt public, compte tenu de la nature de la plainte.
53 (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms	53 (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée. (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire : a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de

that the member or panel considers appropriate: (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or (ii) making an application for approval and implementing a plan under section 17; (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice; (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expensesincurred by the victim as a result of the discriminatory practice; and (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice. (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly. (4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a	redressement ou des measures destinées à prévenir des actes semblables, notamment : (i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1), (ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17; b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée; c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte; d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte; e) d'indemniser jusqu'à concurrence de 20000$ la victime qui a souffert un préjudice moral. (3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré. (4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

rate and for a period that the member or panel considers appropriate.	
67. Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act. [Repealed, 2008, c. 30, s. 1]	67. La présente loi est sans effet sur la *Loi sur les Indiens* et sur les dispositions prises en vertu de cette loi. [Abrogé, 2008, ch. 30, art. 1]

***Indian Act*, R.S.C. 1985, c I-5**	*Loi* ***concernant les Indiens*, S.R., ch. I-6**
2.(1) In this Act, "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian; "Indian Register" means the register of persons that is maintained under section 5; "Registrar" means the officer in the Department who is in charge of the Indian Register and the Band Lists maintained in the Department;	2.(1) Les définitions qui suivent s'appliquent à la présente loi. « Indien » Personne qui, conformément à la présente loi, est inscrite à titre d'Indien ou a droit de l'être. « registre des Indiens » Le registre de personnes tenu en vertu de l'article 5. « registraire » Le fonctionnaire du ministère responsable du registre des Indiens et des listes de bande tenus au ministère.
5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act. (2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985. (3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register. (4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom. (5) The name of a person who is entitled to be registered is not required to be recorded in	**5.** (1) Est tenu au ministère un registre des Indiens où est consigné le nom de chaque personne ayant le droit d'être inscrite comme Indien en vertu de la présente loi. (2) Les noms figurant au registre des Indiens le 16 avril 1985 constituent le registre des Indiens au 17 avril 1985. (3) Le registraire peut ajouter au registre des Indiens, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans ce registre. (4) Le registre des Indiens indique la date où chaque nom y a été ajouté ou en a été retranché. (5) Il n'est pas requis que le nom d'une personne qui a le droit d'être inscrite soit consigné dans le registre es Indiens, à moins qu'une demande à cet effet soit présentée au

the Indian Register unless an application for registration is made to the Registrar.	registraire.
6. (1) Subject to section 7, a person is entitled to be registered if (*a*) that person was registered or entitled to be registered immediately prior to April 17, 1985; (*b*) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act; (*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1) (*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions; (*c.1*) that person (i) is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(*b*) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject- matter as any of those provisions, (ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951, (iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was	**6.** (1) Sous réserve de l'article 7, toute personne a le droit d'être inscrite dans les cas suivants: *a*) elle était inscrite ou avait le droit de l'être le 16 avril 1985; *b*) elle est membre d'un groupe de personnes déclaré par le gouverneur en conseil après le 16 avril 1985 être une bande pour l'application de la présente loi; *c*) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sousalinéa 12(1)*a*)(iv), de l'alinéa 12(1)*b*) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)*a*)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions; *c.1*) elle remplit les conditions suivantes : (i) le nom de sa mère a été, en raison du mariage de celle-ci, omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu de l'alinéa 12(1)*b*) ou en vertu du sousalinéa 12(1)*a*)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions, (ii) son autre parent n'a pas le droit d'être inscrit ou, s'il est décédé, soit n'avait pas ce droit à la date de son décès, soit n'était pas un Indien à cette date dans le cas d'un décès survenu avant le 4 septembre 1951, (iii) elle est née à la date du mariage visé au sous-alinéa (i) ou après cette date et, à moins que ses parents se soient mariés avant le 17

born prior to that date, and (iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;	avril 1985, est née avant cette dernière date, (iv) elle a eu ou a adopté, le 4 septembre 1951 ou après cette date, un enfant avec une personne qui, lors de la naissance ou de l'adoption, n'avait pas le droit d'être inscrite;
(*d*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;	*d*) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sousalinéa 12(1)*a*)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(1), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;
(*e*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, (i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or (ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or	*e*) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande : (i) soit en vertu de l'article 13, dans sa version antérieure au 4 septembre 1951, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article, (ii) soit en vertu de l'article 111, dans sa version antérieure au 1er juillet 1920, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article;
(*f*) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.	*f*) ses parents ont tous deux le droit d'être inscrits en vertu du présent article ou, s'ils sont décédés, avaient ce droit à la date de leur décès.
(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).	(2) Sous réserve de l'article 7, une personne a le droit d'être inscrite si l'un de ses parents a le droit d'être inscrit en vertu du paragraphe (1) ou, s'il est décédé, avait ce droit à la date de son décès.
(3) For the purposes of paragraph (1)(*f*) and subsection (2), (*a*) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(*a*);	(3) Pour l'application de l'alinéa (1)*f*) et du paragraphe (2) : *a*) la personne qui est décédée avant le 17 avril 1985 mais qui avait le droit d'être inscrite à la date de son décès est réputée avoir le droit

(*b*) a person described in paragraph (1)(*c*), (*d*), (*e*) or (*f*) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision; and (*c*) a person described in paragraph (1)(*c.1*) and who was no longer living on the day on which that paragraph comes into force is deemed to be entitled to be registered under that paragraph.	d'être inscrite en vertu de l'alinéa (1)*a*); *b*) la personne visée aux alinéas (1)*c*), *d*), *e*) ou *f*) ou au paragraphe (2) et qui est décédée avant le 17 avril 1985 est réputée avoir le droit d'être inscrite en vertu de ces dispositions; *c*) la personne visée à l'alinéa (1)*c.1*) et qui est décédée avant l'entrée en vigueur de cet alinéa est réputée avoir le droit d'être inscrite en vertu de celui-ci.
7. (1) The following persons are not entitled to be registered: (a) a person who was registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or (b) a person who is the child of a person who was registered or entitled to be registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and is also the child of a person who is not entitled to be registered. (2) Paragraph (1)(a) does not apply in respect of a female person who was, at any time prior to being registered under paragraph 11(1) (f), entitled to be registered under any other provision of this Act. (3) Paragraph (1)(b) does not apply in respect of the child of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.	7. (1) Les personnes suivantes n'ont pas le droit d'être inscrites : a) celles qui étaient inscrites en vertu de l'alinéa 11(1)f), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et dont le nom a ultérieurement été omis ou retranché du registre des Indiens en vertu de la présente loi; b) celles qui sont les enfants d'une personne qui était inscrite ou avait le droit de l'être en vertu de l'alinéa 11(1)f), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et qui sont également les enfants d'une personne qui n'a pas le droit d'être inscrite. (2) L'alinéa (1)a) ne s'applique pas à une personne de sexe féminin qui, avant qu'elle ne soit inscrite en vertu de l'alinéa 11(1)f), avait le droit d'être inscrite en vertu de toute autre disposition de la présente loi. (3) L'alinéa (1)b) ne s'applique pas à l'enfant d'une personne de sexe féminin qui, avant qu'elle ne soit inscrite en vertu de l'alinéa 11(1)f), avait le droit d'être inscrite en vertu de toute autre disposition de la présente loi.

Provincial Legislation

***Charter of human rights and freedoms,* R.S.Q., c. C-12**	***Charte des droits et libertés de la* personne, C.Q.L.R., c. C-12**
12. No one may, through discrimination, refuse to make a juridical act concerning goods or services ordinarily offered to the public.	12. Nul ne peut, par discrimination, refuser de conclure un acte juridique ayant pour objet des biens ou des services ordinairement offerts au public.

***Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1**

11.(1) A person shall not, on the basis of a prohibited ground of discrimination,
(a) deny to a person or class of persons goods, services, accommodation or facilities that are customarily offered to the public; or (b) discriminate against a person or class of persons with respect to goods, services, accommodation or facilities that are customarily offered to the public.

(2) Notwithstanding subsection (1) , a limitation, specification, exclusion, denial or preference because of a disability shall be permitted where that limitation, specification, exclusion, denial or preference is based upon a good faith qualification.

(3) Subsection (1) does not apply
(a) to accommodation in a private residence, except a private residence that offers bed and breakfast accommodation for compensation;
(b) to the exclusion of a person because of that person's sex from accommodation, services or facilities upon the ground of public decency;
(c) to accommodation where sex is a reasonable criterion for admission to the accommodation;
(d) to a restriction on membership on the basis of a prohibited ground of discrimination, in a religious, philanthropic, educational, fraternal, sororal or social organization that is primarily engaged in serving the interests of a group of persons identified by that prohibited ground of discrimination; or
(e) to other situations where a good faith reason exists for the denial of or discrimination with respect to accommodation, services, facilities or goods.

(4) Subsection (1) does not prohibit the denial or refusal of accommodation, services, facilities or goods to a person who is less than 19 years of age where the denial or refusal is required or authorized by another Act.

(5) For the purpose of this section, "accommodation, services, facilities or goods to which members of the public customarily have access or which are customarily offered to the public" include accommodation, services, facilities or goods that are restricted to a certain segment of the public.

***Human Rights Act,* R.S.A. 2000, c. A-25.5**

4. No person shall
(a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or
(b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public, because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.

***Human Rights Act,* R.S.N.B. 2011, c. 171**

6(1) No person, directly or indirectly, alone or with another, by himself, herself or itself or by the interposition of another, shall, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity,
(a) deny to any person or class of persons any accommodation, services or facilities available to the public, or
(b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public.

***Human Rights Act,* R.S.N.S 1989, c. 214**

5 (1) No person shall in respect of
(a) the provision of or access to services or facilities;
(b) accommodation;
(c) the purchase or sale of property;
(d) employment;
(e) volunteer public service;
(f) a publication, broadcast or advertisement;
(g) membership in a professional association, business or trade association, employers organization or employees organization,

discriminate against an individual or class of individuals on account of
(h) age;
(i) race;
(j) colour;
(k) religion;
(l) creed;
(m) sex;
(n) sexual orientation;
(na) gender identity;
(nb) gender expression;
(o) physical disability or mental disability;

(p) an irrational fear of contracting an illness or disease;
(q) ethnic, national or aboriginal origin;
(r) family status;
(s) marital status;
(t) source of income;
(u) political belief, affiliation or activity;
(v) that individuals association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).

***Human Rights Act,* R.S.P.E.I. 1988, c. H-12**

2. (1) No person shall discriminate
(a) against any individual or class of individuals with respect to enjoyment of accommodation, services and facilities to which members of the public have access; or
(b) with respect to the manner in which accommodations, services and facilities, to which members of the public have access, are provided to any individual or class of individuals.
(2) Subsection (1) does not prevent the denial or refusal of accommodation, services or facilities to a person on the basis of age if the accommodation, services or facilities are not available to that person by virtue of any enactment in force in the province.

***Human Rights Act,* R.S.Y. 2002, c. 116**

9. No person shall discriminate
(a) when offering or providing services, goods, or facilities to the public;
(b) in connection with any aspect of employment or application for employment;
(c) in connection with any aspect of membership in or representation by any trade union, trade association, occupational association, or professional association;
(d) in connection with any aspect of the occupancy, possession, lease, or sale of property offered to the public;
(e) in the negotiation or performance of any contract that is offered to or for which offers are invited from the public.

***Human Rights Act,* S.Nu. 2003, c. 12**

12. (1) No person shall, on the basis of a prohibited ground of discrimination, unless done in good faith and with reasonable justification,
(a) deny to any individual or class of individuals any goods, services or facilities that are customarily available to the public;
(b) deny to any individual or class of individuals the ability to enter into any contract that is offered or held out to the public generally;
(c) discriminate against any individual or class of individuals with respect to any goods, services or facilities that are customarily available to the public;
(d) discriminate against any individual or class of individuals with respect to the ability to enter into any contract that is offered or held out to the public generally; or
(e) discriminate against any individual or class of individuals with respect to any term or condition of any contract that is offered or held out to the public generally.

***Human Rights Act,* S.N.W.T. 2002, c. 18**

11. (1) No person shall, on the basis of a prohibited ground of discrimination and without a bona fide and reasonable justification,
(a) deny to any individual or class of individuals any goods, services, accommodation or facilities that are customarily available to the public; or
(b) discriminate against any individual or class of individuals with respect to any goods, services, accommodation or facilities that are customarily available to the public.

(2) In order for the justification referred to in subsection (1) to be considered bona fide and reasonable, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on a person who would have to accommodate those needs.

(3) It is not a contravention of subsection (1) for an owner of a business to give preference in goods, services, accommodation or facilities, on the basis of family affiliation, to a member of his or her family.

***Human Rights Code,* C.C.S.M. c. H175**

13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

***Human Rights Code,* R.S.B.C. 1996, c. 210**

8 (1) A person must not, without a bona fide and reasonable justification,
(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons.

***Human Rights Code,* R.S.O. 1990, c. H.19**

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

***Saskatchewan Human Rights Code,* S.S. 1979, c. S-24.1**

12 (1) No person, directly or indirectly, alone or with another, or by the interposition of another shall, on the basis of a prohibited ground:
(a) deny to any person or class of persons the accommodation, services or facilities to which the public is customarily admitted or that are offered to the public; or
(b) discriminate against any person or class of persons with respect to the accommodation, services or facilities to which the public is customarily admitted or that are offered to the public.
(2) Subsection (1) does not apply to prevent the barring of any person because of the sex of that person from any accommodation, services or facilities upon the ground of public decency.
(3) Repealed. 2007, c.39, s.5, effective November 17, 2007 (Act, s. 10).
(4) Subsection (1) does not apply to prevent the giving of preference because of age, marital status or family status with respect to membership dues, fees or other charges for services or facilities.