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Human Rights, the Charter, and Access to Justice

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Case Commented On: *Canadian Human Rights Commission v. Canada (Attorney General)*, 2016 FCA 200 (CanLII)

This summer, the Federal Court of Appeal upheld the ruling of the Canadian Human Rights Tribunal (CHRT) that if a claimant wishes to challenge discriminatory federal legislation, they must do so via a *Charter* claim rather than a human rights complaint. This post will analyze the Court's decision, compare it to the approach taken in Alberta in cases such as *Gwinner v. Alberta (Human Resources and Employment)*, 2002 ABQB 685 (CanLII); aff'd 2004 ABCA 210 (CanLII), and raise some concerns about the implications of the federal approach for access to justice. I will not analyze the Court's reasons on standard of review, but it is interesting to note that following a survey of Canadian courts of appeal, the Federal Court of Appeal refers to the "sorry state of the case law and its lack of guidance on when decisions of human rights tribunals interpreting provisions in human rights legislation will be afforded deference" (*Canadian Human Rights Commission v. Canada (Attorney General)*, 2016 FCA 200 (CanLII) at para 78). The Supreme Court has an opportunity to clarify the standard of review issue in *Stewart v Elk Valley Coal Corporation*, 2015 ABCA 225, leave granted 2016 CanLII 13730 (SCC), which we have blogged on here and here and which will be heard by the Court in December. In addition, this month the Canadian Human Rights Commission filed an application for leave to appeal the Federal Court of Canada decision that is the subject of this post.

Background

The CHRT's ruling was made in two cases that are summarized at paragraph 4 of the Federal Court of Appeal decision:

> In two very thoughtful and thorough decisions, reported as 2013 CHRT 13 (CanLII) [*Matson*] and 2013 CHRT 21 (CanLII) [*Andrews*], the Tribunal determined that the complaints in the present case were direct challenges to provisions in the *Indian Act* and that, as such, did not allege a discriminatory practice under section 5 of the *CHRA* because the adoption of legislation is not a service "customarily available to the general public" within the meaning of section 5 of the *CHRA*. While sensitive to the merits of the complainants' claims, the Tribunal ruled that the challenge to the impugned provisions in the *Indian Act* may only be brought under section 15 of the *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 … and therefore needs to be made to a court of law. In so deciding, the Tribunal relied on the decision in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7 (CanLII), 428 N.R. 240 [*Murphy*], where this Court held that the adoption of legislation is not a service customarily available to the general public within the meaning of section 5 of the *CHRA*. In result, the Tribunal dismissed the complaints.

The Canadian Human Rights Commission sought judicial review of these decisions at the Federal Court, supporting the *Matson* and *Andrews* complainants' position that the CHRT did have jurisdiction to hear their challenges to the registration provisions of the *Indian Act*, RSC 1985, c I-5 under the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*). The Federal Court dismissed the Commission's applications in *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2015 FC 398 (CanLII), holding that the CHRT's decisions should be reviewed on the standard of reasonableness and that its decisions were reasonable.

The underlying issue in both the *Matson* and *Andrews* complaints involved an allegation of ongoing discrimination in the *Indian Act* concerning entitlement to registration or "Indian status" (the Federal Court of Appeal notes (at para 9) that "many indigenous people find this terminology offensive", but uses it because of the language of the legislation, as will I).

Prior to 1985, the *Indian Act* determined status on a patrilineal basis, such that Indian men who married non-Indian women were able to pass their status on to their wives and children, whereas Indian women who married non-Indian men lost their status, as did their children. These provisions were unsuccessfully challenged under the *Canadian Bill of Rights* in *Attorney General of Canada v. Lavell*, [1974] SCR 1349, 1973 CanLII 175, but were revised in 1985 via Bill C-31 once the equality provisions in the *Charter* came into effect (see also *Lovelace v Canada*, Communication No R.6/24, UN Doc Supp No 40 (A/36/40) at 166 (1981), a decision of the UN Human Rights Committee finding that the provisions violated article 27 of the *International Covenant on Civil and Political Rights*, the right of ethnic minorities to enjoy their own culture in community with other members of their group).

Bill C-31 made some attempt at removing the overt discrimination in the status provisions of the *Indian Act*, but maintained a "second generation cut-off rule" in section 6 of the *Indian Act*, described as follows by the Federal Court of Appeal (at para 15):

> [T]hese provisions contemplate that individuals born of only one parent with Indian status are considered to be second generation and are granted status under subsection 6(2). If they have children with a person without status, they cannot transmit Indian status to their children. Conversely, people born of two parents with Indian status are generally speaking considered to be first generation and are granted status under subsection 6(1) of the *Indian Act*. They can transmit Indian status to their children, irrespective of whether the other parent possesses Indian status.

The second generation cut-off rule was found to violate section 15 of the *Charter* in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (CanLII). The federal government responded with the *Gender Equity in Indian Registration Act*, SC 2010, c 18 [the *GEIRA*], which adds section 6(1)(c.1) to the *Indian Act*, providing an entitlement to registration under section 6(2) for those individuals whose grandmothers lost status by marrying non-Indians before April 17, 1985. However, the *McIvor* decision and the *GEIRA* that followed it did not completely eliminate the problem of differential entitlement to status under the *Indian Act*. Sharon McIvor unsuccessfully sought leave to appeal the BC Court of Appeal decision to the Supreme Court (see 2009 CanLII 61383 (SCC)), and she currently has a communication (complaint) pending with the UN Human Rights Committee (see here). In May 2016, Canada asked the UNHRC to suspend consideration of McIvor's communication to allow the government to implement a response to another constitutional challenge to the status provisions of the *Indian Act* in *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555 (CanLII). The government's request – which does not yet appear to have been ruled on by the UNHRC, but

to which McIvor objects – states that "Canada is now exploring various opportunities and approaches for engagement with First Nations and other Indigenous groups on necessary legislative changes in response to the *Descheneaux* decision."

Another case currently before the courts that challenges the *Indian Act*'s status policy is *Gehl v Attorney-General of Canada*, 2015 ONSC 3481 (CanLII). The Ontario Court of Appeal has granted leave to intervene to the Women's Legal Education and Action Fund (LEAF) to argue that the Proof of Paternity Policy – which assumes that if a father is not listed on a birth certificate, he is non-Indian – is discriminatory. LEAF argues that "there are many reasons why an Indigenous woman would not register her child's biological father", including lack of funds, denial of paternity by the father, or sexual violence such as incest and rape.

It is in this complicated context that the *Matson* and *Andrews* complaints were made under the *CHRA*. The *Matson* complaint concerns three siblings who became eligible for status under section 6(2) of the *Indian Act* following *McIvor* and the enactment of the *GEIRA*, but whose children are ineligible because the complainants married individuals who are not eligible for Indian status. The *Andrews* complaint involves a man entitled to status under section 6(2) who cannot pass status on to his children; he was born after his father was "enfranchised" (i.e. lost status under the *Indian Act*), whereas his sister, who was born before their father was enfranchised, is eligible for registration under section 6(1)(d) of the *Indian Act* and can pass status on to her children.

The issue for the Federal Court of Appeal was whether these complaints fell within the scope of section 5 of the *CHRA*, which provides that:

> **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.

The Federal Court of Appeal Decision

After lengthy consideration, the Court of Appeal determined that the appropriate standard of review was reasonableness. That is, were the CHRT's decisions reasonable in finding that the *Matson* and *Andrews* complaints involved direct challenges to the *Indian Act*, and that the adoption of legislation is not a "service customarily available to the public"?

On the first issue, the Court held that the CHRT reasonably characterized the *Matson* and *Andrews* complaints as involving direct challenges to the *Indian Act*. According to the Court, "The complaints seek to expand the statutory grounds for the grant of Indian status by arguing that the legislation is impermissibly under-inclusive because it makes discriminatory distinctions based on the prohibited grounds of race, national or ethnic origin, sex or family status." (at para 93). I do not take issue with this aspect of the Court's decision.

On the second ground, the Court held the CHRT's decision that the adoption of legislation was not a "service customarily available to the general public" under section 5 of the *CHRA* was also reasonable. The Court noted that previous case law on the scope of the "services" section required proof of two elements: "first, something of benefit must be available and, second, the benefit must be held out or offered to the public or a segment of the public" (at para 95, citing *Gould v. Yukon Order of Pioneers*, [1996] 1 SCR 571, 1996 CanLII 231 (SCC) and *Watkin v. Canada (Attorney General)*, 2008 FCA 170 (CanLII); see also *University of British Columbia v. Berg*, [1993] 2 SCR 353, 1993 CanLII 89 (SCC)). The CHRT recognized that the *Indian Act* could be seen to confer benefits on those who have status, including benefits related to health and education, tax exemptions, and more "intangible benefits" related to acceptance by one's indigenous community (at paras 10, 54). LEAF points out in its factum in *Gehl* that the *Indian Act* also confers benefits related to band membership, including the ability to vote and run in band elections, and that "the ability to pass on Indian status to one's child is a significant benefit" (at paras 4-5). The first requirement of section 5 of the *CHRA* was therefore met.

However, the CHRT concluded that the second element –the benefit must be held out or offered to the public (or a segment thereof) – was not met, and the Court of Appeal found that there was a reasonable basis for this conclusion. It pointed to the unique and fundamental law-making function of Parliament, and asserted that "One simply cannot equate the act of legislating with a service" such as processing a citizenship application (at para 96, citing the CHRT decision in *Andrews* at para 57). The CHRT had followed the 2012 decision of the Federal Court of Appeal in *Murphy* that the adoption of legislation is not a service customarily available to the public, and while there is federal case law to the contrary, the CHRT properly found this case law less persuasive (at paras 36 and 97, referencing *Canada (Attorney General) v. Druken*, [1989] 2 FCR 24, 1988 CanLII 5712 (FCA), where the respondent had admitted that the adoption of the impugned legislation was a service customarily available to the public).

The Court of Appeal also found that the CHRT's decisions were "not at odds with the case law from the Supreme Court of Canada or other jurisdictions that recognizes that, in appropriate cases, a human rights tribunal may declare inoperative a piece of legislation that conflicts with the human rights legislation due to the primacy of the latter" (at para 98). It is here that I take issue with the Court's decision.

In *Gwinner v. Alberta (Human Resources and Employment)*, 2002 ABQB 685 (CanLII), Justice Sheila Greckol – who came to the bench with recognized expertise in human rights law – held that Alberta legislation, the *Widow's Pension Act*, SA 1983, c W-7.5, was subject to the "services customarily available to the public" clause in this province's human rights legislation (then section 3 of the *Human Rights, Citizenship and Multiculturalism Act*, RSA 1980, c H-11.7 (*HRCMA*)). The *Widow's Pension Act* conferred benefits on certain women but excluded others on the basis of their marital status. Justice Greckol focused on the quasi-constitutional nature of human rights legislation, and the "clear … expression of supremacy" in section 1(1) of the *HRCMA*, which provided that "Unless it is expressly declared by an Act of the Legislature that it operates notwithstanding this Act, *every law of Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act*." (at para 73; emphasis added). Her decision that the *Widow's Pension Act* was inoperative to the extent it discriminated on the basis of marital status was upheld by the Alberta Court of Appeal and leave to appeal was denied by the Supreme Court of Canada (see 2004 ABCA 210 (CanLII); [2004] SCCA No 342).

Similarly, in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 (CanLII), [2006] 1 SCR 513, a majority of the Supreme Court recognized the jurisdiction of

tribunals other than human rights bodies to apply human rights legislation. Part of the rationale for this decision was the primacy of human rights legislation, codified in Ontario in section 47(2) of the *Human Rights Code*, RSO 1990, c H.19: "Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, *this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act*" (emphasis added). In *Tranchemontagne*, the majority held that the Social Benefits Tribunal should not have declined to exercise its jurisdiction to apply the *Human Rights Code* to its own legislation, which excluded persons with addiction-related disabilities from receiving benefits.

In the *Matson* and *Andrews* cases, the CHRT found that "in those cases where legislation had been declared inoperative by reason of a conflict with human rights legislation, the Tribunal possessed jurisdiction on an alternate basis, often because the complaint stemmed from an employment relationship where the employer applied an impugned legislative provision" (at para 34; see also paras 98-99). The Federal Court of Appeal found that this was a reasonable basis for distinguishing cases such as *Tranchemontagne*. However, the sole basis of the complaints in *Gwinner* and *Tranchemontagne* was the legislation itself, so this basis for dismissing case law other than *Murphy* is not persuasive.

On the primacy argument more generally, the Federal Court of Appeal found that "there is no reason to read [section 5 of the *CHRA*] as providing jurisdiction to hear legislative challenges merely because in cases where the Tribunal otherwise possesses jurisdiction it may declare conflictual legislation inoperative" (at para 99). With respect, this guts the primacy of human rights legislation – tribunals should not be restricted to hearing challenges to legislation in the limited circumstances where they otherwise possesses jurisdiction.

More specific to the *Indian Act* context of the *Matson* and *Andrews* complaints, until 2008, section 67 of the *CHRA* provided that nothing in the Act "affects any provision of the *Indian Act* or any provision made under or pursuant to that Act". This section was repealed in *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30, s 1, an amendment which had been long in the making. In the *Matson* and *Andrews* cases, the Canadian Human Rights Commission argued that an interpretation of section 5 of the *CHRA* that did not include review of discriminatory legislation "would render … former section 67 of the *CHRA* virtually meaningless" (at para 43). The Tribunal rejected this argument, in part because section 67 covered collateral challenges to the *Indian Act*, such that its repeal was not conclusive about the CHRT's jurisdiction to consider direct legislative challenges (at paras 43-44). The Federal Court of Appeal found this to be a reasonable conclusion.

Also relevant was the remedial jurisdiction of human rights tribunals. The Federal Court of Appeal noted that the *Matson* and *Andrews* complaints "did not merely seek to have provisions in the *Indian Act* declared inoperative. Rather, their complaints of under-inclusiveness are ultimately aimed at having the provisions in section 6 of the *Indian Act* broadened to include the complainants' children and those who are similarly situated to them" (at para 101). The Court noted that the CHRT does not have remedial powers to declare legislation invalid or to read in excluded groups so as to cure underinclusive legislation; these are *Charter* remedies. In *Gwinner*, however, Justice Greckol also dealt with underinclusive legislation, and noted that a finding that the legislation was inoperative combined with an order to the respondent that it cease its discriminatory practices was within a tribunal's remedial powers (*Gwinner* at para 77).

Lastly, the Federal Court of Appeal dealt with the Commission's argument that allowing challenges to discriminatory legislation to proceed before human rights tribunals in appropriate cases would result in greater access to justice. It rejected this argument, noting "the lengthy delays that are all too often seen in human rights adjudications" (at para 103). While delays in the human rights system cannot be denied, there are other access to justice advantages that may apply in human rights challenges as compared to *Charter* challenges, including less stringent evidentiary rules and approaches to discrimination (although see here), the ability of agents to appear on behalf of claimants (see e.g. the work of Pro Bono Students Canada), and the supportive role of human rights commissions in tribunal hearings in many jurisdictions.

Although the context of the *Matson* and *Andrews* complaints are admittedly complex and arise in the midst of a number of *Charter* challenges to the same provisions, I believe a blanket rule that discriminatory legislation cannot be directly challenged in human rights proceedings is contrary to the wording of human rights legislation and previous case law, and has serious access to justice consequences for claimants. To close with the words of the Supreme Court in *Tranchemontagne,* human rights legislation "must be recognized as being the law of the people… Accordingly, it must not only be given expansive meaning, but also offered accessible application." (at para 33). Hopefully the Supreme Court will grant leave to appeal in *Canadian Human Rights Commission v. Canada (Attorney General)* and affirm that principle by recognizing the jurisdiction of human rights tribunals to hear challenges to discriminatory legislation.

This post may be cited as: Jennifer Koshan, "Human Rights, the Charter, and Access to Justice " (Sept 29, 2016), on-line: ABlawg, http://ablawg.ca/wp-content/uploads/2016/09/Blog_JK_Matson_Andrews_Sept2016.pdf