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Barring Claims Against Discriminatory Legislation: *Canada v Canada*

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Case Commented On: *Canada (Canadian Human Rights Commission v Canada (Attorney General)*, 2018 SCC 31 (Can LII)

Two weeks ago, in *Canada (Canadian Human Rights Commission v Canada (Attorney General)* (*CHRC v AG*), the Supreme Court of Canada upheld the decision of the Canadian Human Rights Tribunal (CHRT) that direct challenges to legislation cannot be pursued under section 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *CHRA*). The claimants in this case argued that they were discriminated against under section 6 of the *Indian Act*, RSC 1985, c I-5 and filed a complaint under section 5 of the *CHRA* asking the CHRT to render inoperative the offending provisions in the *Indian Act*. The decision of the CHRT, with which the Court agreed, was that a complaint under the *CHRA* cannot be used to directly challenge legislation on the basis that it is discriminatory.

The two human rights complaints at issue alleged that refusing to register certain Indigenous peoples as "Indians" under the *Indian Act* was a discriminatory provision of a "service" under section 5 of the *CHRA*. The Court's decision upheld findings in the CHRT Federal Court and Federal Court of Appeal, each of which held that declaring portions of the *Indian Act* discriminatory did not fall within the CHRT's authority granted under section 5 of the *CHRA*.

This post will analyze the Court's decision, summarize the recent case law relating to Indian* status discrimination, and discuss the concerning implications of this ruling for access to justice. Prior commentary on ABlawg (namely, Jennifer Koshan's analysis of the Federal Court of Appeal ruling here and Elysa Darling's analysis of sex discrimination in the *Indian Act* here) will be drawn on and referred to in this post.

Status under the *Indian Act*

Indian status, an archaic concept created by the federal government in the mid 1800s as an effort to assimilate Indigenous peoples in Canada, dictates who is recognized as "Indian" and therefore entitled to receive benefits provided by the Canadian government under the *Indian Act*. Ignoring for a moment the shameful historical colonial context in which the concept of Indian status found its genesis, today individuals who possess Indian status may access government-funded programs and can participate fully in reserve or band life. Indigenous individuals who have been unable to obtain Indian status have indicated that they feel ostracised from their communities and that they have trouble finding access to support systems made available by either the federal government or Indigenous communities themselves (see for example, *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (CanLII), para 70).

As part of the assimilationist legislative scheme established under the *Indian Act*, the federal government implemented a system colloquially referred to as 'enfranchisement', which stripped Indian status from individuals. This included the government incentivizing individuals to renounce their status by offering such basic rights as citizenship, the right to vote, and the right to hold land in fee simple. While both men and women could be enfranchised under the historical versions of the *Indian Act*, women and their children were more acutely affected by the generational harms of enfranchisement. For instance, a status Indian woman who married a non-Indian man would lose her status and all associated rights. Conversely, if an Indian man married a non-status woman, he would not only maintain his status, but he would also confer status upon his wife.

As discussed in a prior post, amendments to the *Indian Act* in 1985 created two distinct subsets of status Indians: individuals who could register under subsection 6(1) of the *Indian Act*; and those who could register under subsection 6(2). Put simply, the main distinctions between these two categories are:

1. That both parents of a 6(1) Indian possessed status, while 6(2) Indians could only trace their status to one parent; and
2. 6(1) Indians can propagate with a non-status person and pass on their status to their child, whereas a 6(2) Indian could not pass their status on to their child.

In the case of a person born prior to 1985, the question of whether that person falls within the category of a 6(1) or 6(2) status Indian is often determined by the way in which their maternal ancestors were categorized under the *Indian Act*. With a few exceptions, a person who could trace their status to a paternal parent or line of ancestors will generally be registered under subsection 6(1). This form of blatant sex discrimination remains unresolved to this day.

After extensive litigation, the most overtly discriminatory provisions of the *Indian Act* were amended in 1985 and 2010 (*An Act to amend the Indian Act*, RSC 1985, c 32 (1st Supp) and the *Gender Equity in Indian Registration Act*, SC 2010, c 18. These amendments allowed women who had lost their status by marrying non-status men, along with their first-generation children, to regain status under subsection 6(1).

However, as Jennifer Koshan highlighted, these legislative changes exposed many residual problems that recent litigants have challenged in court. It is within this context that the *Matson* 2013 CHRT 13 (CanLII) and *Andrews* 2013 CHRT 21 (CanLII) complaints take place.

CHRC v AG – The Claims

The Supreme Court provides the basis of the Matson and Andrews complaints at paragraphs 8 and 9 of the majority decision:

> The [Matson] complaints involve three siblings who allege that sex-based discrimination led to their ineligibility for s. 6(1) status, and their children's ineligibility for s. 6(2) status. Their grandmother lost her status under the *Indian Act* when she married a non-status man.

> Following the 1985 amendments, their grandmother was able to regain her status under s. 6(1)(c). The 2011 amendments then allowed their father to obtain status under s. 6(1)(c.1) and the siblings to obtain status under s. 6(2). Their children are, however, ineligible for status. If the siblings' status grandparent had been male, they would have been eligible for s. 6(1)(a) registration and their children would have been entitled to s. 6(2) registration.
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> The Andrews' complaints concern the impact of the enfranchisement provisions and the scope of subsequent remedial legislation. Mr. Andrews' father lost his status through an enfranchisement order. Consequently, his first wife and their daughter also lost their status. Mr. Andrews was born after the enfranchisement order was issued and his mother was a non-status woman unaffected by the order. Following the 1985 legislation, Mr. Andrews' father and his half-sister became eligible for s. 6(1)(d) status. However, as Mr. Andrews' mother was never eligible for status, Mr. Andrews is eligible only for s. 6(2) status and his daughter is ineligible for status. If Mr. Andrews had been born before the enfranchisement order, or if no order had been made, he would qualify for s. 6(1) status and his daughter would be eligible for s. 6(2) status. Mr. Andrews' complaints allege that this result constitutes prohibited discrimination on the grounds of race, national or ethnic origin and family status.

Matson and Andrews both filed complaints under the *CHRA,* alleging that Indian and Northern Affairs Canada (INAC) engaged in a discriminatory practice in the provision of services contrary to section 5 of the *CHRA* when it denied a form of registration that would permit the complainants to pass on status Indian registration to their children. Section 5 states:

> **5** it is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
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> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
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> (b) to differentiate adversely in relation to any individual,
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> on a prohibited ground of discrimination.

CHRC v AG – Procedural History

The Supreme Court summarized the prior decisions at paragraphs 11-30. The brief overview of the CHRT's finding provided in the Federal Court of Appeal decision summarizes the issue best:

> 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 Commission unsuccessfully sought judicial review of these decisions at both the Federal Court and Federal Court of Appeal. Although different factions of the Supreme Court differed on the administrative law aspects of the case, which will be addressed in a future ABlawg post, the Court unanimously ruled against Matson and Andrews.

CHRC v AG – The Supreme Court Decision

The Court upheld the Tribunal's decision that it could not rule on whether a statute itself was discriminatory. Writing for the majority, Justice Clement Gascon noted as follows with respect to the nature of the complaints:

> The adjudicators approached the characterization of the complaints by looking at the jurisprudence for determining what constitutes a service under s.5 of the *CHRA* and by considering the nature of the allegations, the wording of the complainants' submissions and the relationship between the Registrar and the s.6 entitlement provisions of the *Indian Act.* Both adjudicators placed weight on the complainants' submissions that framed their complaints as targeting the *Indian Act* entitlement provisions. The adjudicators found that the complaints did not impugn the means by which the Registrar had processed their applications, but substantively targeted the eligibility criteria that the Registrar was required to apply. On this basis, the adjudicators reasonably concluded that the complaints before them were properly characterized as direct attacks on legislation (*CHRC v AG*, para 58).

Since the complaints attacked the legislation, the Tribunal had to consider whether legislation fell within the statutory definition of service. Justice Gascon reviewed the adjudicators' analysis that considered leading case law where legislation that conflicted with human rights legislation was rendered inoperable. In these cases, human rights tribunals ordered administrators to stop applying conflicting provisions where a discriminatory practice was established without a *bona fide* justification (*CHRC v AG*, para 61). These cases differed from *Andrews* and *Matson* in that the Tribunals were responding to an established discriminatory *practice*, not instances in which the *legislation itself* was declared discriminatory because it fell within the meaning of 'services' (*CHRC v AG*, para 61). The adjudicators reviewed the definition of service, as described in *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571 and *Canada (Attorney General) v Watkin*, 2008 FCA 170, with the finding in *Murphy* that the *CHRA* did not permit complaints that directly targeted legislation (*CHRC v AG*, para 12). Justice Gascon stated, "the adjudicator in *Andrews* noted that the *sui generis* nature of Parliament's power to legislate is inconsistent with the characterization of law-making as a public service and that law-making does not have the transitive connotation necessary to identify a service customarily offered to the public" (*CHRC v AG*, para 62).

The majority referenced section 67 of the *CHRA*, which was referred to by several intervenors, including the Women's Legal Education and Action Fund (LEAF) and the Native Women's Association of Canada (NWAC) see their joint factum here). The Court stated:

> The now repealed s.67 of the *CHRA*, which immunized the *Indian Act* from human rights complaints, was consistent with Parliament's intent to shield services rendered pursuant to the *Indian Act* from challenge. In any event, on its own, s. 67 was insufficient to infer that Parliament intended to allow direct challenges to all other legislation. (*CHRC v AG*, para 63)

Addressing the arguments raised by the Commission and various intervenors for considering direct challenges to the legislation through the *CHRA*, the majority simply stated, "it is not for a reviewing court to reweigh policy considerations" (*CHRC v AG*, para 64). It held that "the adjudicators clearly considered the practical difficulties and challenges to democratic legitimacy involved in evaluating challenges to legislation under the *bona fide* justification requirement. There is nothing unreasonable about this determination" (*CHRC v AG*, para 64).

In closing, Justice Gascon referred to recent litigation challenging the status provisions of the *Indian Act:*

> I would emphasize that the disposition of this appeal says nothing as to whether the *Indian Act* infringes the rights of the complainants under s.15 of the *Charter*. In this regard, I would simply note that in recent years, there have been two successful challenges to the *Indian Act* registration provisions, both of which have prompted legislative reform (*Descheneaux v Canada (Attorney General)*, 2015 QCCS 3555, *McIvor v Canada (Indian and Northern Affairs, Registrar)*, 2009 BCCA 153 (para 67).

While holding that a human rights complaint was unavailable, the Court appears to encourage a *Charter* challenge to the *Indian Act* through the civil court system. We take issue with this approach, particularly given the recent rulings in *Descheneaux c Canada (Procureur General)*, 2015 QCCCS 3555 (CanLII) (*Descheneaux*) and *Gehl v Canada (Attorney General)*, 2017 ONCA 319 (CanLII) (*Gehl*) and the recently passed *An Act to Amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c Canada (Procueruer général)*, Bill S-3, assented to 2017-12-12 (Bill S-3).

Access to Justice Barriers

Recent Litigation, Bill S-3 and Access to Justice

The most recent litigation, in addition to the 1985 and 2010 reforms (as summarized by Jennifer Koshan here), demonstrates that it is impossible to prevent discrimination with piecemeal amendments to the *Indian Act.* Though the most recent amendments introduced under Bill S-3 seem promising in preventing arbitrary cut-offs for those seeking status registration, the significant resources and time invested in these challenges by the complainants establish that *Charter* litigation is an unrealistic option for those seeking to challenge discrimination under the *Indian Act*, as the Supreme Court appears to propose.

In *Descheneaux* the Plaintiffs, Stephane Descheneaux and Susan and Tammy Yantha, claimed that section 6 of the *Indian Act* violated the equality guarantee in section 15(1) of the *Canadian Charter of Rights and Freedoms* by creating discriminatory and differential treatment in relation to who is or is not a status Indian. The Quebec Superior Court declared that sections 6(1)(a), (c), and (f) and subsection 6(2) of the *Indian Act* unjustifiably infringe section 15 of the *Charter* and are inoperative. The Court suspended the effect of the judgment for eighteen months, providing a deadline of February 3, 2017 for Parliament to remedy the provisions (*Descheneaux,* para 244). In *obiter*, the Court instructed Parliament to go beyond the facts in *Descheneaux* in their drafting of legislation to consider all sex discrimination arising out of the *Indian Act* (at para 143).

To comply with the *Descheneaux* ruling, the federal government introduced Bill S-3. After much testimony from representative Indigenous organizations (for example, see here and here) and advocacy work from numerous Senators on the Standing Senate Committee on Aboriginal Peoples, the government passed a more inclusive version of Bill S-3 that aims to extend status registration to all persons with First Nations ancestry. The Bill is not in full force yet, as it allows the government an extended consultation period to determine how to go about registering an estimated 670,000 Indigenous peoples.

In 2017, Lynn Gehl won her 32-year battle for Indian status registration. Despite tracing her Indigenous heritage back almost five generations, the Indian Registrar denied Gehl registration because of a government policy adopted in 1985 that deems a father to be a non-Indian if his paternity is unstated or listed as unknown on a child's birth certificate (*Gehl,* paras 2-3). In its ruling the Ontario Court of Appeal recognized that a woman might have good reasons to keep her child's father secret or may not be able to identify the father as a status Indian with certainty. The Court stated at paras 44-45:

> Proof of identity of a parent is, as a matter of biology and common experience, more difficult for a mother to establish than a father. There can hardly ever be any doubt about maternity, but there may be considerable doubt about paternity. Moreover, a woman may have good reason for her reluctance or inability to disclose the identity of her child's father. The child may be the product of a relationship the mother is reluctant or unable to disclose. The pregnancy may be the result of a relationship with a man the mother is fearful of identifying, for example, a relative, or the spouse or partner of a friend or family member. The pregnancy may be the product of abuse, rape or incest. The mother may have had multiple sexual partners.
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> The Policy imposes a relatively strict burden of proof essentially based upon documentary evidence. The Policy provides that where confidentiality or personal safety is a concern and documentary proof of paternity is not available, the Registrar may consider conducting a hearing and considering other evidence. However, the Policy falls well short of what is required to address the circumstances that I have just described making proof of paternity problematic for many women. This failure perpetuates the long history of disadvantage suffered by Indigenous women. As Parliament itself recognized in 1985, the historic practice of stripping and denying Indigenous women of status represented a significant disadvantage that was inconsistent with the *Charter's* promise of equality.

Bill S-3 will likely resolve the form of discrimination that Gehl faced, in that individuals will no longer be required to demonstrate specific patrilineal ties to Indigenous heritage in cases where the father's heritage is unknown. Nevertheless, the lengthy and costly process that the litigants had to engage in for the purpose of effecting incremental changes to the *Indian Act* in both *Gehl* and *Descheneaux* shows how burdensome and ineffective *Charter* challenges can be. To date, discriminatory provisions are still deeply entrenched within the *Indian Act*.

The Court's point in *CHRC v AG* that arguments regarding discrimination in the *Indian Act* can be brought via *Charter* claims is a hollow solution for the disenfranchised. As Karen Segal, counsel to LEAF, states:

> The SCC's decision will continue to confine First Nations women to lengthy, expensive, and piecemeal complaints in the court system. We are disappointed that the SCC has cut off First Nations women's access to a key venue to confront this discrimination, which will perpetuate sexism in the *Indian Act* and could ultimately have the effect of insulating discriminatory government legislation from human rights review.

While the adjudication of CHRT complaints are not guaranteed to produce a timely and cost-effective result, delays and legal fees associated with CHRT complaints are eclipsed by the potential costs and timelines associated with the civil court system engaged in *Charter* challenges. As noted by Jennifer Koshan, there are other advantages to bringing claims under human rights legislation, including less stringent evidentiary rules and the supportive role of human rights commissions in many jurisdictions. In the joint factum of LEAF and NWAC, the intervenors highlighted a number of other access to justice concerns when proceeding through the civil court system, including limited legal aid funding for *Charter* cases and the Crown's track record in expending significant resources to fight such challenges (at para 12).

Toothless Amendment: Section 67 and the *CHRA*

Section 67 of the *CHRA* stated, "[n]othing in this Act affects any provisions of the *Indian Act* or any provision made under or pursuant to that Act". Originally, this exemption shielded the *Indian Act* and any decisions or actions taken by band councils or the federal government pursuant to the *Indian Act* from claims brought pursuant to the *CHRA.* In June 2008, section 67 of the *CHRA* was repealed with Bill C-21, *An Act to amend the Canadian Human Rights Act,* SC 2008, c 30. The amendment applied to the federal government effective immediately; however, First Nation governments were given a three-year window to comply with the *CHRA*. After the three-year period lapsed, individuals who are registered Indians and members of bands, or individuals residing or working on reserves, can make complaints of discrimination to the CHRC relating to decisions or actions arising under the *Indian Act.* LEAF and NWAC noted the legislative history of Bill C-21 to reinforce their argument that the repeal of section 67 was meant to address discrimination deriving from the *Indian Act.* Paragraphs 18 and 21 of their factum stated:

> The express purpose of s.67 of the *CHRA* was to protect the *Indian Act* from CHRT review. New Democratic Party MP Jean Chowder argued: "What we had in place was a

> system that disenfranchised thousands and thousands of women and their families." It is evident that the intention of Parliament was to open access to the CHRC regarding services contained in the *Indian Act*, including status registration. Further, the Honourable Rod Bruinooge, Parliamentary Secretary to the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians said, "These decisions often touch on crucial aspects of day to day life, such as education, housing, registration and the use and occupation of reserve lands. We must take immediate action to remove this fundamental inequality."
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> LEAF and NWAC submit that the legislative history of the repeal of s. 67 of the *CHRA* clearly supports an interpretation of the *CHRA* that guarantees, rather than denies, Indigenous women recourse to accessible and effective remedies under federal human rights legislation. Such a reading of the *CHRA* is also consistent with Canada's international human rights obligations under *UNDRIP* and *CEDAW* to ensure Indigenous women enjoy the equal protection and benefit of the domestic human rights accountability mechanism provide under the *CHRA.*

The argument put forward by LEAF and NWAC draws a clear connection between the discrimination imposed by the provisions in the *Indian Act* and the role that Parliament envisioned for the CHRC in combatting that discrimination. One could argue that one of the principal reasons behind the repeal of section 67 was to allow Indigenous claimants to avail themselves of the protections in the *CHRA* against discriminatory legislation to which they are subject. In this regard, the Supreme Court failed to provide a compelling response (see *CHRC v AG*, para 63). We argue that the Supreme Court's interpretation of the amendment to the *CHRA* repealing section 67 maintains a de facto bar against the very claims that the repeal of this section was meant to facilitate. We echo the sentiments of LEAF, NWAC, and the Canadian Human Rights Commission in their calls for a broad interpretation of human rights legislation in Canada, thereby allowing greater access to justice.

Lastly, this decision is considerably informative for the future of the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*. As a signatory to *UNDRIP*, Canada is required to comply with the commitments set out in the Declaration. Similar to the *CHRA*, UNDRIP is intended to express the minimum standard for the recognition and protection of Indigenous rights, and member states such as Canada "shall promote respect for and full application of the provisions of [*UNDRIP*] and follow up the effectiveness of [*UNDRIP*]" (Article 42, *UNDRIP*). Based on the decision in *CHRC v AG*, it appears that the courts are not prepared to create an accessible and effective forum for challenging discriminatory legislation absent the establishment of a tribunal that possesses clear and unequivocal authority to do so. Given that one of the goals of Indigenous peoples is to utilize *UNDRIP* as a basis for challenging legislation which violates Indigenous rights, it is imperative that any initiative to incorporate *UNDRIP* into Canadian law expressly gives primacy to the provisions of *UNDRIP*. Otherwise, Indigenous peoples could be consigned to a position where their only recourse for challenging legislation that infringes Indigenous rights is a time consuming and costly claim alleging a breach of an aboriginal or treaty right under section 35 of the *Constitution Act*.

Accordingly, the private member's bill, Bill C-262 *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples* – put forward by NDP MP Romeo Saganash, passed in the House of Commons and now before the Senate – must be closely examined. The Bill aims to ensure Canada's laws are in harmony with *UNDRIP*. In this regard, Bill C-262 appears to mandate that Canada take concrete steps to redraft bills and amend legislation that do not accord with *UNDRIP*. Under Bill C-262, Canada must "take all measures necessary to ensure that the laws of Canada are consistent with the [*UNDRIP*]" (section 4, Bill C-262). With perhaps blind optimism we hope that Bill 262, if adopted, will create a sufficient foundation for Indigenous peoples to introduce the rights enunciated in *UNDRIP* into all Canadian laws, by a cooperative exercise of revisiting and amending such laws. Failing this approach to implementation of Bill C-262, the decision-making body charged with hearing complaints about breaches of Indigenous rights under UNDRIP must be empowered to render non-compliant legislation inoperable.

** A note that we consider the term 'Indian' derogatory and use it in this post only because of its meaning under the* Indian Act *and thus its significance in the case law as a defined term.*

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