Federal Court Cour fédérale

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Dockets: T-1088-13
T-1777-13

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Ottawa, Ontario, March 30, 2015

PRESENT: The Honourable Madam Justice McVeigh

Docket: T-1088-13

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

and

ATTORNEY GENERAL OF CANADA REPRESENTING INDIAN AND NORTHERN AFFAIRS CANADA (NOW ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA) AND JEREMY MATSON, MARDY MATSON AND MELODY SCHNEIDER

Respondents

Docket: T-1777-13

AND BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

and

**ATTORNEY GENERAL OF CANADA
REPRESENTING INDIAN AND NORTHERN
AFFAIRS CANADA
(NOW ABORIGINAL AFFAIRS AND
NORTHERN DEVELOPMENT CANADA)
AND
ROGER WILLIAM ANDREWS AND
MICHELLE DOMINIQUE ANDREWS**

Respondents

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Canadian Human Rights Tribunal (the "Tribunal") dismissing the human rights complaints of Jeremy Matson, Mardy Matson and Melody Schneider (the "Matson siblings", (T-1088-13)) and Roger Andrews ("Mr. Andrews", (T-1777-13)). The Canadian Human Rights Commission (the "Commission"), brings these Judicial Reviews.

[2] Both the Matson siblings and Mr. Andrews alleged before the Tribunal that the application of section 6 of the *Indian Act*, RSC 1985, c I-5 by Indian and Northern Affairs

Canada (now Aboriginal Affairs and Northern Development Canada ("AAND"), is discriminatory because it denies them the ability to pass Indian status to their children.

[3] The Tribunal found it did not have jurisdiction to hear a complaint under the *Canadian Human Rights Act*, RSC 1985, c H-6 ("CHRA") because the complaint was directed against legislation. The Tribunal held Section 6 of the *Indian Act* should be dealt with as a *Charter* challenge to the legislation and further found that section 6, as legislation, was not a "service" pursuant to section 5 of the CHRA. The Tribunal relied on the Federal Court of Appeal's decision in *Public Service Alliance of Canada v Canada (Revenue Agency)*, 2012 FCA 7 ("*Murphy*"), leave to appeal not granted ref'd [2012] SCCA No 102.

[4] On February 10, 2014, this Court ordered that the Application for judicial review in T-1088-13 be heard together with the Application for judicial review in T-1777-13. The two decisions are being heard together as the arguments are the same, though factually there are some distinctions. At the Tribunal hearings, the parties proceeded on an agreed statement of facts so there is no disagreement as to the facts considered by the Tribunal.

I. Facts and History of the Decisions

A. *T-1088-13*

[5] Jeremy Matson, Mardy Matson and Melody Schneider are siblings and each registered as "Indians" under subsection 6(2) of the *Indian Act*. Each of the siblings married an individual who is not registered or entitled to be registered under the *Indian Act*. Each couple has two children.

(1) Original Complaints

[6] In 1986 and 1994, the Matson siblings' mother submitted applications for registration on their behalf. These applications were refused. Between 2000 and 2008, the Matson siblings made applications for registration on their own behalf but all their applications were refused. In November and December 2008, the Matson siblings filed the present complaints with the Tribunal.

(2) 2011 Amendments to *Indian Act*; Matson siblings registered

[7] On April 6, 2009, the British Columbia Court of Appeal rendered its decision in *McIvor v Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153 ("*McIvor*") wherein it declared paragraphs 6(1)(a) and 6(1)(c) of the *Indian Act* to be of no force or effect pursuant to section 15 of the *Charter*.

[8] On January 31, 2011, the *Gender Equity in Indian Registration Act* ("GEIRA") came into force. It amended the registration provisions of the *Indian Act* such that the Matson siblings became eligible to be registered under subsection 6(2). In 2011, the Matson siblings were registered under section 6(2) of the *Indian Act*.

(3) Matson siblings' children cannot be registered

[9] Between 2010 and 2012, the Matson siblings applied for registration on behalf of their children. These applications were refused. The Matson siblings amended their Statements of

Particulars so that the complaints were directed at the denial of the opportunity to pass status to their children with one non-Indian parent.

(4) Matson siblings file Notice of Constitutional Question

[10] On January 19, 2012, the Matson siblings filed a Notice of Constitutional Question ("NCQ") with the Tribunal challenging the constitutional validity of section 6 of the *Indian Act*. On July 20, 2012, the AAND brought a motion for an order striking out the whole of the NCQ. On September 6, 2012, the Tribunal allowed the AAND's motion and ordered that the whole of the Matson siblings' NCQ be struck out. The Tribunal found that the constitutional question was not linked to determining whether a discriminatory practice has occurred within the meaning of the Act.

(5) Tribunal Decision

[11] On January 30 and 31, 2013, the Tribunal held a hearing to address whether the complaint was impugning a discriminatory practice in the provision of services customarily available to the general public. On May 24, 2013, the Tribunal dismissed the complaint.

[12] A draft order on consent was filed that set out the questions that the parties needed answered. The Tribunal decision is structured to reflect those questions and to answer them.

[13] The Tribunal considered three issues. First, it considered whether the complaint was a challenge to legislation. Secondly, whether the Tribunal was bound to follow the Federal Court

of Appeal decision in *Murphy*. The final of the three it considered was whether the complaint was impugning a discriminatory practice in the provision of services customarily available to the general public.

[14] The Tribunal found that the complaint was a challenge to section 6 of the *Indian Act*, and nothing else. They relied on the Federal Court of Appeal's decision in *Murphy* that held that section 6 of the *Indian Act* is legislation and is not a service pursuant to section 5 of the CHRA.

[15] The Tribunal rejected all of the Commission's arguments as to why the Tribunal was not bound to follow *Murphy*. The Tribunal found that *Murphy* was not inconsistent with the Supreme Court of Canada's human rights jurisprudence that the Commission had argued in their submissions. Further, the Commission raised several Federal and Provincial superior court cases that the Tribunal found did not support the proposition that legislation can be challenged under the CHRA. None of the sections of the CHRA that the Commission raised, including the former section 67 of the CHRA, explicitly provided that legislation could be challenged under the CHRA.

[16] Therefore, the Tribunal found that it was bound to follow *Murphy* and dismissed the complaint. The Tribunal noted that a constitutional challenge would be the most appropriate avenue to seek the result desired by the Matson siblings.

B. *T-1777-13*

[17] Roger Andrews is the father of Michelle Andrews. Ms. Andrews' mother is not entitled to registration as an Indian under the *Indian Act*.

(1) Complaints to the Human Rights Tribunal

[18] On July 29, 2004, Mr. Andrews submitted an application for registration under the *Indian Act*. On August, 21 2006, the Office of the Indian Registrar advised Mr. Andrews that he was registered under subsection 6(2) of the *Indian Act*.

[19] The formulation for eligibility (the "second generation cut-off rule") at the time of the Tribunal decision set out below refers to the *Indian Act* sections:

- 6(1) has a child with 6(1)= 6(1) child;
- 6(1) has a child with 6(2)= 6(1) child;
- 6(2) has a child with 6(2)= 6(1) child;
- 6(1) has a child with non-Indian= 6(2) child;
- 6(2) has a child with non-Indian= non-Indian child

[20] On October 19, 2006, Mr. Andrews filed an application for registration on behalf of his daughter, Michelle Andrews. The Registrar did not register Ms. Andrews since one of her parents was entitled to be registered under subsection 6(2) and no information was provided about her mother's Indian status.

(2) First complaint

[21] On October 20, 2008, Mr. Andrews filed a complaint to the Tribunal on behalf of his daughter. He claimed that AAND engaged in a discriminatory practice within the meaning of section 5 of the CHRA when it denied her application for Indian Status under the *Indian Act*.

(3) Second complaint

[22] On February 1, 2010, Mr. Andrews filed a second complaint with the Tribunal. He claimed that the AAND engaged in a discriminatory practice within the meaning of section 5 of the AAND when it granted his own application for Indian status under subsection 6(2) rather than subsection 6(1) of the *Indian Act*.

[23] The complaints were consolidated for the purpose of a single hearing, which was held in October and November of 2012 and on September 30, 2013, the Tribunal dismissed the complaints.

(4) Tribunal Decision

[24] The Tribunal considered two issues: first, whether the complaints involve the provision of services within the meaning of section 5 of the AAND; and second, if the complaints were solely a challenge to legislation, whether the AAND allows for such complaints.

[25] The Tribunal found that there was no dispute that the complaints were with regard to section 6 of the *Indian Act*. Therefore, if the Tribunal accepted that it must follow *Murphy* that would dispose of Mr. Andrews' complaints in their entirety.

[26] The Tribunal rejected all the Commission's arguments for why it should not rely on *Murphy*. The Tribunal reviewed the recent *Matson* Tribunal decision. The Tribunal shared the view that *Murphy* does not contradict the Supreme Court of Canada decisions. The Tribunal did not believe that the Provincial jurisprudence refuted the conclusion that a "service" must exist and the Tribunal dismissed the Commission's arguments regarding subsections 49(5), 62(1) and 67 of the CHRA.

[27] The Tribunal concluded that the complaints were solely a challenge to legislation, and that the CHRA does not allow for such complaints. It stated that the Complainants could still consider a challenge to the impugned section of the *Indian Act* pursuant to the *Charter*.

II. Issues

[28] The issues in this case are as follows:

A. Was the Tribunal's conclusion reasonable that registration under section 6 of the *Indian Act* is not a service?
B. Did the Tribunal err when it applied *Murphy* or should the Tribunal have "respectfully declined to follow" *Murphy*?
C. Did the Tribunal err by undermining the primacy of human rights law?
D. Did the Tribunal err by failing to properly interpret section 5 within the context of the former section 67 of the CHRA?

III. Standard of Review

[29] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62, wrote that I must first determine whether previous jurisprudence has already determined what the standard of review is for this particular category of judicial review. Only if it is not settled, should I conduct an analysis to find the appropriate standard of review

[30] The Federal Court of Appeal in *Murphy* determined the standard of review to be reasonableness when reviewing a Tribunal decision regarding whether the provision of services pursuant to legislation is a "service" under the CHRA (*Murphy*, at para 2).

[31] The Commission argued that *Air Canada Pilots Association v Kelly*, 2012 FCA 209 at para 40, said the standard should be correctness as the doctrine of stare decisis is engaged on these issues or in the alternative, that where there is statutory interpretation, the range of reasonable outcomes may be so narrow that a question may only have one reasonable outcome (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 27, 32, 34, 42, and 64 ("*Mowat"*)).

[32] In *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2013 FCA 75 at paras 13-15, Justice Stratas writing for the Federal Court of Appeal held that when interpreting statute, it is a reasonableness standard but sometimes the range of reasonableness may be very narrow as it is "…a matter constrained by the text, context and purpose of the statute".

[33] The Tribunal decisions before me were determined on an agreed statement of facts and were statutory interpretations of a highly specialized Tribunal's own home statute. This Tribunal has greater expertise in interpretation of section 5 of CHRA on this issue than the reviewing Court. Further, the Tribunal was deciding an issue analogous to what was at issue in *Murphy*. The standard of review has already been determined so I will do as the Federal Court of Appeal in *Murphy* and the Supreme Court in *Mowat* and review on a standard of reasonableness. The review will be detailed, but the Tribunal is entitled to deference.

IV. Analysis

[34] For the reasons below, I find the underlying decision of the Tribunal in T-1088-13 and T-1777-13, respectively, to be reasonable.

[35] This decision in no way deals with the merits of any *Charter* challenge concerning section 6 of the *Indian Act* as this is a judicial review of the Tribunal's decision regarding jurisdiction.

A. *Was the Tribunal's conclusion reasonable that registration under section 6 of the Indian Act is not a service?*

[36] The Commission submits that federal case law indicates that a "service" is something that is a benefit that is held out to the public, in the context of a public relationship (*Watkin v Canada (Attorney General*), 2008 FCA 170 at para 31 ("*Watkin*"). The argument is that the Matson siblings and Andrews family were seeking access to a "service" as they applied to AAND for a benefit. The Commission argues registration as an Indian confers tangible and intangible

benefits. As the Commission was seeking to have the names of the Matson siblings and Mr. Andrews entered into the Indian registry under a category of registration that would allow them to pass on entitlements to the Commission that this amount to a service. If the Tribunal had found registration under s. 6 of the *Indian Act* was a service, then pursuant to section 5 of the CHRA, the Commission would have jurisdiction.

[37] The Commission argues the Tribunal erred as they did not follow the Supreme Court of Canada decisions holding that rights-granting provisions must be given a broad, liberal and purposive interpretation to obtain their objective. The Commission's position is that unless there are express words that bar complaints that challenge legislation, the Tribunal has jurisdiction. The Commission said when Parliament conferred power on the Tribunal, it would not have been envisioned that the Tribunal would restrict people from human rights recourse. Further, the Commission submit that the SCC warns that decision makers should not read limitations into human rights legislation. Section 5 of the CHRA:

> 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.

[38] The Commission argues that *Murphy* was wrongly decided and the Tribunal should not have followed it.

[39] The Attorney General submits that the Tribunal was correct. The Attorney General relies on *Murphy* as the authority that confirmation of Indian status is not a service. The Attorney General argues that this is an attack on the legislation of the *Indian Act* and consequently outside the scope of the CHRA leaving the Commission without jurisdiction.

[40] The Attorney General maintains that the Tribunal's decision was reasonable because Indian registration is simply not a service within the meaning of section 5 of the CHRA. The Attorney General analogizes this matter to *Forward v Canada (Citizenship and Immigration)*, 2008 CHRT 5 ("*Forward*"), where the Tribunal determined that granting of Canadian citizenship is not a service under section 5 of the CHRA.

[41] To determine if the Tribunal was reasonable I look to the Federal Court of Appeal and Supreme Court of Canada jurisprudence on this issue.

(1) *Watkin*

[42] In *Watkin*, at para 31, the Federal Court of Appeal found that Health Canada's application of the *Food and Drugs Act* to classify a substance as a "Class II Health Hazard" and a "New Drug" was not a service because "enforcement actions are not "held out" or "offered" to the public in any sense and are not the result of a process which takes place "in the context of a public relationship"".

[43] The Court stated at paragraph 31:

> In this respect, "services" within the meaning of section 5 contemplate something of benefit being "held out" as services and "offered" to the public (Gould, supra, per La Forest J., para 55).

[44] At paragraph 28, the Court provided examples of services provided by public authorities:

> Public authorities can and do engage in the provision of services in fulfilling their statutory functions. For example, the Canada Revenue Agency provides a service when it issues advance income tax rulings; Environment Canada provides a service when it publicizes weather and road conditions; Health Canada provides a service when it encourages Canadians to take an active role in their health by increasing their level of physical activity and eating well; Immigration Canada provides a service when it advises immigrants about how to become a Canadian resident. That said, not all government actions are services. Before relief can be provided for discrimination in the provision of "services" the particular actions complained of must be shown to be "services"

[45] I note that in *Watkin* at paragraph 33, the Court of Appeal writes:

> Regard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are "services" (*Gould*, supra, per Iacobucci J., para. 16, per La Forest J., para. 60), and the fact that the actions are undertaken by a public body for the public good cannot transform what is ostensibly not a service into one. Unless they are "services", government actions do not come within the ambit of section 5.

(2) Murphy

[46] The Tribunal relied on *Murphy* as binding jurisprudence when they analysed whether section 6 of the *Indian Act* was a service, however the Commission submits that *Murphy* is wrong and should not have been relied on.

[47] *Murphy* was a judicial review of a Canada Revenue Agency ("CRA") decision applying sections of the *Income Tax Act* regarding Qualifying Retroactive Lump Sum Payment ("QRLSP"). When a taxpayer received a lump sum payment, the CRA would calculate the amount of tax owing according to two methods: first, by using the QRLSP mechanism which would calculate tax based on the year the income would have been received; second, by taxing the whole lump sum in the year in which it was actually received. The CRA would then compare the two results. It would apply the method that would most benefit the taxpayer

[48] In 2000, Ms. Murphy was awarded a lump sum payment from a successful pay equity complaint. The CRA compared the amount of tax she would owe using the QRLSP calculation to the amount of tax she would owe if the lump sum was taxed in the year it was received. CRA determined that the latter method was more beneficial. Therefore, CRA declined to apply the QRLSP.

[49] Ms. Murphy wanted the CRA to apply the QRLSP method to her, so that the lump sum would be spread out over previous tax years. The CRA included notional tax in her calculation, which was interest on the tax that would have been paid, but was delayed. She knew that if the interest component of the QRLSP were not included, it would be the method that would most benefit her. Ms. Murphy filed a human rights complaint before the Tribunal alleging that by including interest in the calculation of tax under the QRLSP, the CRA was perpetuating the pay gap that had been the very subject of her pay equity complaint that created the lump sum payment.

[50] The Tribunal dismissed her complaint, as did the Federal Court and the Federal Court of Appeal. The Supreme Court of Canada dismissed the application for leave to appeal without reasons ([2012] SCCA No. 102 (QL)).

[51] At paragraph 3 of the Federal Court of Appeal decision, Justice Noel (now Chief Justice of the Federal Court of Appeal) on behalf of the Court found that the QRLSP calculation was not a "service" as defined in section 5 of the CHRA. The Court stated that the CRA's application of the *Income Tax Act* based on undisputed facts was not a service. At paragraph 6, the Federal Court of Appeal stated:

> This is a direct attack on sections 110.2 and 120.31 of the ITA … [T]his type of attack falls outside the scope of the CHRA since it is aimed at the legislation per se, and nothing else. …[T]he CHRA does not provide for the filing of a complaint directed against an act of Parliament (see subsection 40(1) which authorizes the filing of complaints and sections 5 to 14.1 which sets out the "discriminatory practices" against which complaints may be directed).

[52] In *Murphy*, the Federal Court of Appeal found that when the CRA was applying a provision regarding the calculation of tax, it was not providing a service. The FCA found that this was a direct attack on legislation and as was found in *Forward* and *Wignall v Canada (Department of National Revenue (Taxation)*, 2003 FC 1280, Justice Noel concluded that:

> In our view, the opinion expressed in these cases is the correct one since the CHRA does not provide for the filing of a complaint directed against an act of Parliament (see subsection 40(1) which authorizes the filing of complaints and sections 5 to 41 which sets out the "discriminatory practices" against which complaints may be directed").

[53] In coming to this conclusion, the Federal Court of Appeal referenced its earlier decision in *Canada (Attorney General) v Druken*, [1989] 2 FC 24; [1988] FCJ No. 709 (QL) (FCA); leave to appeal to SCC denied, [1988] SCCA No. 433(QL) (*"Druken"*). In *Druken*, the Federal Court of Appeal found that application of mandatory eligibility provisions under the *Unemployment Insurance Act* was a service under the CHRA. The Court found that the refusal of unemployment insurance benefits in the circumstances in *Druken* were expressly mandated by provisions of the *Unemployment Insurance Act*.

[54] In *Druken*, the Attorney General raised arguments in its factum but did not argue that the provision of unemployment insurance benefits was not a service.

[55] In *Canada (Attorney General) v McKenna*, [1999] 1 FC 401 (FCA) (*"McKenna"*), Robertson JA commented on *Druken* in obiter. He questioned the correctness of the finding that the government's application of the eligibility provisions of a statute providing benefits was a service, commenting that the only reason the provision of employment insurance was found to be a "service" in *Druken* was because the Attorney General conceded the point.

[56] In *Murphy* Justice Noel at para 7 points out the caveat expressed by Robertson J.A. in *McKenna*, that the complaint was directed to the operability of the act and regulations and following the analysis the Court employed, would not come within the "practises that may form the object of the complaint under the CHRA."

(3) Analysis

[57] The concession regarding whether the government's application of a statute was a service by the Attorney General in *Druken* was discussed in *Watkin* in 2008 and in *Murphy* by the FCA. The Federal Court of Appeal tells us that the actual complaint must be examined as to whether it is a service and not simply the application of an eligibility provision by government.

[58] Parliament's jurisdiction given under section 91(24) of the *Constitution Act*, 1867 allows it to create and delineate the legal category between a subset of Aboriginal peoples and the state. The legislative criteria that were determined by Parliament to identify an individual as an Indian is not a "service" as envisioned under section 5 of CHRA; processing applications for registration may constitute a "service" under section 5 of the CHRA but not the criteria that needs met to be registered as an Indian under the *Indian Act*.

[59] A challenge to the way in which that formula is applied is a challenge to the law itself. In the present case, the Commission is alleging the eligibility provisions of the *Indian Act* are discriminatory. Therefore, applying the mandatory eligibility provisions of the *Indian Act* is an act of enforcing the law, even though the statute provides a benefit. It is the law which denies access to the benefit, not the government agency.

[60] In my opinion, the findings from *Forward* are equally applicable to the present case. At paragraph 54, referring to *Forward*, the Tribunal found that citizenship under the *Citizenship Act* was not a service, because the sole source of the alleged discrimination is the legislative

language of the *Citizenship Act*. *Forward* adopted the obiter from *McKenna* which said that *Druken* was wrongly decided (*Forward*, at paras 32-34).

[61] Moreover, the fact that *Matson* and *Andrews* are analogous to *Murphy* is supported by the fact that the Federal Court of Appeal in *Murphy* specifically addressed *Druken*. I think it is clear that the Federal Court of Appeal intended its conclusions to apply to cases of the government applying the mandatory provisions of a statute, particularly when reading the Court's comments in paragraph 7, as described above. The circumstances of T-1088-13 and T-1777-13 are arguably analogous to those in *Murphy*. In both instances, the legislature set out a mandatory scheme or formula which a government organization applies without discretion.

[62] I think the detailed analysis of the Tribunal is reasonable and I find that the Tribunal's reliance on *Murphy* was reasonable. *Murphy* was a decision by a higher court that legislation was not a "service" as defined in section 5 of the CHRA. The interpretation of section 5 from *Murphy* was consistent with the language of section 5 of the *Indian Act*. Further, *Murphy* also addressed the conflicting jurisprudence from *Druken*.

[63] The Tribunal decision at paragraph 52 of T-1777-13 clearly stated that the facts agreed between the parties are not in dispute and that the registration provisions pursuant to the *Indian Act* are at issue consequently it was reasonable for the Tribunal to rely on Court decisions directly on this point.

B. *Did the Tribunal err when it applied Murphy or should the Tribunal have "respectfully declined to follow" Murphy?*

[64] The Commission concedes that the Tribunal is consistent with the decision of the Federal Court of Appeal in *Murphy* and that on its face, *Murphy* is the answer to these complaints. But the Commission submits that the Federal Court of Appeal in *Murphy* is inconsistent with case law from the Supreme Court of Canada concerning the quasi-constitutional nature of human rights laws. The Commission argues that the Tribunal and I should decline to follow *Murphy* and lists *Canada v Craig*, 2012 SCC 43 at paras 18-23 ("*Craig*") as the authority.

[65] The Commission raised the following cases: Insurance Corp of British Columbia v Heerspink, [1982] 2 SCR 145 ("Heerspink"); Winnipeg School Division No. 1 v Craton, [1985] 2 SCR 150; CNR v Canada (Human Rights Commission), [1987] 1 SCR 1114; Quebec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal, 2004 SCC 30 ("Larocque") and Tranchemontagne v Ontario (Director, Disability Support Program), 2006 SCC 14 ("Tranchemontagne"). The record will support the extensive submissions on each of these authorities.

[66] The Commission submitted that if I conclude *Murphy* is binding then I may still be persuaded that the application be granted but asks that I "…outline any problematic aspects of the decision in its reasons for judgment". The purpose being that if a further appeal is filed and the Court of Appeal is invited to reconsider its approach in *Murphy*, it will have the benefit of this Court's reasoned opinion concerning the issues.

[67] For the reasons below, I find *Murphy* is binding and not inconsistent with Supreme Court of Canada jurisprudence.

[68] In this matter, as in the *Murphy* decision, the Commission argued the same position at the Tribunal level as they did at the Federal Court level.

[69] I fail to see how the Commission can still argue that *Murphy* is inconsistent with the Supreme Court of Canada jurisprudence when those arguments were made by the same counsel that appeared today for the Commission that represented the Commission at the *Murphy* leave application before the SCC where it was dismissed. The SCC did not grant leave to hear *Murphy* so unless it is distinguishable, then *Murphy* is the jurisprudence that both the Tribunal and I must follow.

[70] The Attorney General submits that the cases cited by the Commission as being in conflict with *Murphy* are in fact not in conflict. None of the Supreme Court of Canada jurisprudence considered whether the application of a mandatory legislative provision was a "service" under section 5 of the CHRA or a related statute. All of it related to the primacy of human rights legislation over other acts. The cases all show that if there is a conflict between human rights legislation and other legislation, the human rights acts will govern. The cases show that it is possible for a provision to be declared inoperable pursuant to the CHRA.

[71] I agree that the jurisprudence cited by the Commission does not show that the application of a law is a "service" under section 5 of the CHRA. The Tribunal in great detail explained that

Murphy is consistent with the Supreme Court's approach in those cases. Therefore, the Tribunal did not err by failing to rely on *Murphy*.

[72] Commission counsel's argument is that the *Murphy* decision is wrong. Counsel criticized the Federal Court of Appeal for not analysing all of the Supreme Court of Canada jurisprudence in their brief oral decision. The Commission submitted that the Tribunal said it was bound by *Murphy* and part of its role is to create a record so the Federal Court of Appeal and the Supreme Court of Canada can clarify the issue. Without a lengthy decision and review of jurisprudence from the Federal Court of Appeal, the Commission argues it is very difficult to show the Tribunal and this Court how the Federal Court of Appeal got it wrong and how that decision did not follow the Supreme Court.

[73] The Commission relied on *Craig* to say that the Tribunal and now I can respectfully decline to follow *Murphy*. Contrary to the Commission's contention, the Supreme Court of Canada's decision in *Craig* did not state that a lower court is entitled to overrule an applicable precedent to follow the Supreme Court of Canada. Rather, it held that a lower court must follow binding precedent.

[74] I do not believe that the Tribunal could have respectfully declined to follow *Murphy*. Justice Rothstein (as he then was) in *Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53 at para 54 speaks to *stare decisis:*

> The principle of *stare decisis* is, of course, well known to lawyers and judges. Lower courts must follow the law as interpreted by a higher co-ordinate court. They cannot refuse to follow it: *Canada Temperance Act (The), Re*, [1939] 4 DLR 14 at 33 (Ont CA), affd

> [1946] 2 DLR 1 (SCC); *Woods v. The King*, [1951] SCR 504, at page 515 (QL). This principle applies equally to tribunals having to follow the directions of a higher court as in this case. On redetermination, the duty of a tribunal is to follow the directions of the reviewing court.

[75] *Craig* dealt with a situation where the Federal Court of Appeal purported to overrule a Supreme Court of Canada precedent that it viewed as wrongly decided. Instead, the Federal Court of Appeal followed one of its own prior decisions. At paragraph 21, Justice Rothstein for the Supreme Court of Canada stated that the Federal Court of Appeal was bound to follow the Supreme Court of Canada precedent. Again, the Supreme Court in *Craig* held that a court may write reasons why the decision was problematic, but cannot overrule it. That was the preliminary issue and the main issue in *Craig* was whether the Supreme Court could overrule one of its own prior decisions. Rothstein J confirmed that lower courts and tribunals must follow the directions of a higher court. The Tribunal in *Craig* "did not just pay lip service to the directions of the Court, nor did it defy its direction" (paras 53-59).

[76] On these facts in the case at bar, *Craig* is applicable because it instructs that *stare decisis* applies. The Tribunal and I must follow the "vertical convention of precedent" as Justice Rothstein called it at paragraph 27. I do not think *Murphy* was decided wrongly and therefore I do not need to write in my reasons why I think *Murphy* was decided incorrectly.

[77] I find no fault with the Federal Court of Appeal for giving a concise, oral decision in *Murphy*. A concise decision, where the analysis has already been done may be a display of how justice is best served. The Tribunal decision in *Murphy* was very detailed and the FCA made note of that and then stated that they were adopting it.

[78] I too will decline the request to go into a detailed analysis of each of the cases presented by the Commission and will rely on the Tribunal decision. The jurisprudence presented by the Commission was not relevant to the issue of the definition of "service" under section 5 of the CHRA. The Commission sought leave in the *Murphy* case and the SCC did not grant leave. This Tribunal could not disregard binding jurisprudence on point from the Federal Court of Appeal and nor will I decline to follow the FCA in *Murphy*.

C. *Did the Tribunal err by undermining the primacy of human rights law?*

[79] The Commission submits the Tribunal improperly limited the application of primacy by finding that the CHRA can only render inconsistent legislation inoperable where the application of that legislation arises in a complaint filed about some other form of discriminatory practice.

[80] For support of this position, the Commission says the foundational Supreme Court of Canada cases did not place any such limits on the scope of the principle: *Heerspink*, *Craton*, *Tranchmontagne, Larcoque*. The Commission's position is that it is absurd to adopt an interpretation that would prevent claimants from challenging legislation under human rights law in the same way as they would in a constitutional challenge.

[81] The Commission submits that the Tribunal's reliance on obiter from *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 ("*Hutterian Brethren*") was misplaced because the Supreme Court's comments were intended to explain why undue hardship principles should not be incorporated into the analysis under section 1 of the *Charter*. Moreover, the Tribunal's finding that the complaints should not proceed because the government should not have to

defend the operation of legislation using the *bona fide* justification test conflicts with its earlier findings that the operation of legislation can be challenged in indirect ways under the CHRA.

[82] The Commission raised two further arguments in the T-1777-13 pleadings:

a. A finding of constitutional invalidity under the *Charter* is "clearly more offensive to the legislature" than a finding of inoperability under a human rights statute: *Tranchemontagne* at para 31. Given this difference it is not surprising that different justificatory frameworks were adopted in each context;
b. In addition, the legislation would not be declared inoperative without first giving the respondent and/or the Attorney General of Canada an opportunity to argue that the legislation should continue to be applied: CHRA Review Panel Report.

[83] I will summarize the lengthy detailed technical arguments that were before the Tribunal and were before me. The Commission argues that the Supreme Court of Canada has found that human rights legislation has quasi - constitutional status. This status means that it should be interpreted in a "broad, liberal and purposive manner that best advances its broad underlying policy considerations". The CHRA's purpose and goals have been interpreted by the Supreme Court such that they are to be interpreted broadly however to narrowly construe the exceptions and defences. With that background, the Commission states that human rights laws have primacy and if there is a conflict between human rights law and other legislation, then human rights law will govern as a quasi- constitutional statement of public policy and render inconsistent laws inoperable. The Commission uses *Tranchemontagne* as authority of the notion of inoperability, though the legislation at issue was not held inoperable, but had been two years earlier where damages had been sought where an employer had screened out a candidate for failing to meet hearing standards in a municipal by-law (*Larocque*, above).

[84] The Commission admits that a majority decision of the Supreme Court of Canada has not used the CHRA to render other legislation inoperable. But they argued that the 1985 dissent in *Bhinder v Canadian National Railway Co*, [1985] 2 SCR 561, said that federal legislation is inoperative to the extent it conflicts with the CHRA. MacLachlin, CJ and L'Heureux-Dube, J in *Bell v Canada (Canadian Human Rights Commission)*; *Cooper v Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854, also in dissent found that the Tribunal and Commission have the power to consider the *Charter* when carrying out their mandates and drew the analogy to *Druken* above which confirmed the Tribunal's jurisdiction to find discriminatory enactments to have been implicitly repealed by the CHRA.

[85] With that background, the Commission says that CHRA has primacy and renders inconsistent legislation inoperable and for final support rely on a 2000 report of the CHRA Review Panel.

[86] In response, the Attorney General states that in *Hutterian Brethren*, the Supreme Court of Canada noted that the standard of reasonable accommodation is not appropriate for laws of general application and is only helpful where a government action or administrative action is impugned. Where a law is challenged, the government is entitled to justify it pursuant to the *Oakes* test. In the case of Indian registration, we are not dealing with a discretionary application of a general standard in individual circumstances. Therefore, the justificatory framework of reasonable accommodation is inapt. Accordingly, it is reasonable to conclude that Parliament, in limiting the CHRA's application to services, did not intend the reasonable accommodation test to apply to laws of general application, such as the *Indian Act*'s definition of Indian.

[87] The Attorney General submits that the Tribunal recognized the inappropriateness of the undue hardship analysis. The Commission's position, that Canada should be permitted to justify its delineation of the Indian status population based only on considerations of "health, safety and cost" is unreasonable.

(1) Analysis

[88] The Tribunal did not dispute that human rights legislation can render other legislation inoperable. The Tribunal did not dispute that it is within its power to grant a remedy of declaring legislation inoperable. Rather, it found that it did not have jurisdiction to consider legislation as a service in section 5 of the CHRA. For that reason I do not see that primacy is at issue in this case.

[89] The Tribunal's consideration of *Hutterian Brethren* was not unreasonable. In the passages cited, the Supreme Court of Canada was comparing two different situations: where the operation of a law of general application violates the *Charter*, and where government action or practice with respect to a particular individual violates the *Charter* (*Hutterian Brethren*, paragraphs 66-67).

[90] In the context of that analysis, the Supreme Court of Canada considered the defences that government can bring in response to each type of challenge. The Supreme Court of Canada noted that where the operation of law is being challenged, the government has the ability to defend its constitutionality with a consideration of its overall impact. This is distinct from circumstances where the law's impact on individual claimants is at stake, and the government must consider

whether it accommodated individuals to the point of undue hardship. The Court noted the difficulty in applying the undue hardship test to situations where the issue is the operation of law. It mentioned human rights legislation because the undue hardship analysis is drawn from human rights legislation (*Hutterian Brethren*, paragraphs 69-70).

[91] The Supreme Court's comments comparing the section 1 analysis to the reasonable accommodation test reinforced the Tribunal's conclusion that it was a complaint against the mandatory eligibility requirements. It was not unreasonable for the Tribunal to cite *Hutterian Brethren*.

[92] Secondly, the Tribunal's consideration of *Hutterian Brethren* at paragraph 153 was in *obiter*. The Tribunal made the decision to rely on *Murphy* for the proposition that the Complainants could not challenge the application of legislation. It went on to make additional observations about the applicability of the bona fide justification defence to the operation of legislation. It was in this context that it cited *Hutterian Brethren*. Therefore, even if it erred in its consideration of *Hutterian Brethren*, it would not change the outcome of the decision.

[93] I find the Tribunal did not err in its consideration of primacy.

D. *Did the Tribunal err by failing to properly interpret section 5 within the context of the former section 67 of the CHRA?*

(1) Relevant Provisions

[94] *Canadian Human Rights Act*, Former s. 67 (Repealed 2008-06-17):

> 67. Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.

[95] The Commission submits that the Tribunal did not take a contextual approach when interpreting the former section 67 (originally section 63(2)) of the CHRA). The Commission argues that Parliament intended to shield the registration provisions of the *Indian Act* from the CHRA by enacting section 67 of the CHRA. If the registration provisions of the *Indian Act* could not be challenged by the CHRA, the repeal of section 67 of the CHRA would be meaningless.

[96] This argument is not persuasive and I find that the Commission has not shown that the Tribunal's interpretation of the repeal of section 67 was unreasonable for the reasons below.

(2) Principle against tautology

[97] The Commission's argument that section 67 would be redundant if it was not meant to immunize challenges to the operability of the *Indian Act* must fail. This is because section 67 also immunized challenges made "pursuant to or under" the *Indian Act*. This would include a host of other decisions besides the registration provisions, such as decisions made by bands pursuant to the Act. For example, in *Laslo v Gordon Band (Council)*, [2000] FCJ No. 1175 at para 23 (FCA) (*Laslo*), section 67 of the CHRA barred a complaint against a Band housing

committee's decision to deny housing on a reserve to a woman who regained status and band membership following the 1985 amendments to the *Indian Act*.

(3) Jurisprudence

[98] The Commission submits that Federal Court jurisprudence indicates that section 67 functioned to shield the provisions of the *Indian Act* from the CHRA: *Laslo* at para 23; *Desjarlais v Piapot Band No. 75* [1989] FCJ No. 412 at para 3 (CA)(QL) (*Desjarlais*); *Shubenacadie Indian Band v Canada (Human Rights Commission)* [1998] 2 FC 198 (TD)(QL) at para 31 (*Shubenacadie*). The Commission submits that *Laslo* is particularly relevant because it links section 67 of the CHRA with the registration provisions of the *Indian Act*.

[99] The Commission's above cited jurisprudence does not show that the Tribunal's interpretation of section 67 was unreasonable. In each of the three cases, *Laslo, Desjarlais and Schubenacadie* the issue was whether a band council's decision was made "under or pursuant" to the *Indian Act*. None of the three cases address a situation where there was a complaint made against the operability of the eligibility provisions of the *Indian Act*.

(4) Legislative History

[100] Legislative history is an appropriate tool to determine the intention of the legislature (*Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27, at para 31). Some of the legislative history that the Commission provided suggests that Parliament intended that, but for section 67, the

registration provisions of the *Indian Act* would be subject to scrutiny under the CHRA. However, the linkage is not strong enough to conclude that the Tribunal's decision was unreasonable.

[101] I will briefly analyze each of the sources of legislative history that the Commission cites.

(a) *2006 Aboriginal Affairs and Northern Development Canada (AANDC) Backgrounder*

[102] The Commission cites an AANDC Backgrounder from 2006 on the repeal of section 67. That Backgrounder states:

> Section 67 was part of the *Canadian Human Rights Act* when the Act was introduced in 1977. At the time, discussions were underway with Aboriginal groups about possible reforms to the *Indian Act*. Section 67 was originally adopted as a temporary measure because it was recognized that the application of the *Canadian Human Rights Act* to all matters falling under the *Indian Act* could have resulted in certain provisions of the *Indian Act* being found discriminatory before the discussions with Aboriginal groups about reforming the *Indian Act* had concluded.

[103] There is nothing in the Backgrounder stating that section 67 was intended to shield the registration provisions of the *Indian Act* specifically.

(b) *Laslo*

[104] In *Laslo*, the Federal Court of Appeal linked the legislative history of section 67 with the provisions in registration for band membership. In *Laslo*, at paras 23-24, the Federal Court of Appeal commented briefly on the purpose of section 67 of the *Indian Act*:

> [23] Section 67 was part of the *Canadian Human Rights Act* when it was enacted by SC 1976-77, c 33. At that time, the *Indian Act*

> still contained provisions such as section 14 that were recognized as discriminating against women. The original objective of section 67 was to immunize the *Indian Act* and its regime from scrutiny under the *Canadian Human Rights Act*.
>
> [24] In 1985, the discriminatory effect of section 14 of the *Indian Act* was abolished by Bill C-31. However, section 67 of the *Canadian Human Rights Act* was not amended or repealed. There is no basis for concluding, as the Commission contends, that the objective or intended scope of section 67 changed in 1985 when Bill C-31 was enacted.

[105] Section 14 was the section that related to eligibility for band membership.

[106] However, this comment is not sufficient to show that Parliament's intent was to exclude the registration provisions of the *Indian Act* from scrutiny under the CHRA. Indeed, it suggests that the "*Indian Act* and its regime" was to be immunized from scrutiny. This suggests that the intended impact of section 67 was broader than the registration provisions.

(c) *Speaking Notes, 1979*

[107] The Commission also cites speaking notes from 1979 on proposals to revise the *Indian Act*. At page 5, the speaking notes considered the revision of section 12(1)(b), which related to registration. After noting that section 12(1)(b) must be revised, the speaking notes state:

> The *Indian Act* was excluded from the operation of the federal *Human Rights Act*. The exclusion section was included in the *Human Rights Act* on the specific request and recommendation of the then Minister of Indian Affairs and Northern Development for the specific purpose of preserving the government's commitment to the Indian people about consulting them about changes in the *Indian Act*. At the time, discussions were just getting under way on the *Indian Act* revision.

> Consideration of the membership issue began with a cabinet commitment in 1977 to end discrimination on the grounds of sex in the *Indian Act* with particular reference to section 12(1)(b)…

[108] This passage does not say that the exclusion section was included specifically regarding the membership issue, but rather because of the government's desire to consult about changes to the *Indian Act* generally. The exclusion provision was intended to exempt other sections of the *Indian Act* from review as well.

(d) *Statement by Minister of Justice to Justice and Legal Affairs Committee, March 10, 1977*

[109] The Commission also refers to a statement made by the Minister of Justice on March 10, 1977, to the Justice and Legal Affairs Committee. This statement was made regarding Bill C-25, which was the CHRA. In the comments regarding section 63(2) the Minister's comments were general and did not link the Act with the registration provisions:

> Subclause (2) has been criticized because it ensures that the *Indian Act* will not, in effect, be modified by this Act. Indian representatives have asked that there be no revision of any aspects of the *Indian Act* except after full consultation with them. Those consultations are still continuing. It should be noted, however, that like all other Canadians, Indians will have the general protection of the *Canadian Human Rights Act* in all except the special situations where their rights and status are governed by the *Indian Act*.

[110] There is no direct linkage between the registration provisions and section 67. Indeed, the passage suggests that section 67 was intended to have a broad effect to insulate the *Indian Act* from the purview of the CHRA.

(e) *Parliamentary Memorandum*

[111] The Commission cites a Parliamentary memorandum from July 1, 1978. This source provides support to the contention that the purpose of section 67 was to insulate the registration provisions of the *Indian Act*. It is not clear who wrote this memorandum, but the object was to seek Cabinet guidance to proceed with amendments to the *Indian Act* in certain areas. I note that it does not say that the section's only purpose was with regards to section 12(1)(b). The memorandum states:

> At the time the *Human Rights Act* was passed by Parliament, discrimination against sex in the *Indian Act* (particularly section 12(1)(b)) was exempted from its jurisdiction pending revision of the *Indian Act*. The major issue concerns the existing situation wherein Indian women who marry non-Indian men lose their Indian status; whereas Indian men who marry non-Indian women retain their status. Cabinet has committed itself to removing the discriminatory provisions of the Act…

(f) *Department of Indian Affairs and Northern Development Report (DIAND)*

[112] The 1979 Report of the Policy, Research and Evaluation Group of the DIAND supports the Commission's position. This report included a section on "Membership/*Indian Act* Revision." Appendix A to this section was an explanation of the *Human Rights Act*.

[113] At page 5 of the report, it states:

> Section 12(1)(b) of the *Indian Act* discriminates against Indian women on the basis of sex (an Indian woman who marries a non-Indian man loses her Indian status). In 1977, however, the federal Cabinet committed itself to removing discrimination on the basis of sex from the *Indian Act*.

> When the CHRA was passed, revisions to the *Indian Act*, which would remove such discrimination, were being planned. Therefore, in order to avoid conflict with the *Indian Act*, section 63(2) was included in the CHRA …
>
> Thus, the CHRA cannot override the *Indian Act* if there is any conflict. It is anticipated that once the proposed amendments to the *Indian Act* have been made, section 63(2) of the CHRA could be deleted, as it would then be superfluous. All other provisions of the CHRA shall apply to Indians, just as they apply to all Canadian citizens.

(g) *The Report of the Canadian Human Rights Review Panel*

[114] The Report of the Canadian Human Rights Review Panel is supportive of the Commission's position. The Report, which considered section 67, explicitly states that section 67 would apply to the registration provisions of the *Indian Act*. At page 128 of the Report, the Panel found:

> Section 67 also prevents non-Indians (including non-status Aboriginal people, Inuit and Metis) from challenging the benefits provided under the *Indian Act* to status Indians.

(h) *Library of Parliament Publication*

[115] The Library of Parliament publication on Bill C-21, an *Act to Amend the Human Rights Act*, mentions the registration provisions, but more in the sense of the fact that section 67 generated criticism that it was discriminatory towards women who were deprived of status.

[116] This is not evidence of the reason why Parliament introduced the Bill; it is more evidence of the criticism that Parliament received for introducing the Bill. I am hesitant to use this source to ascribe intent to Parliament.

(i) *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, May 25 1977*

[117] The Commission cites debates from the Standing Committee on Justice and Legal Affairs, which was considering Bill C-25, an *Act to Amend the CHRA* (II.289). One of the members moved to delete section 63(2), on the grounds that it "continues the unequal status which exists for Indian people in this country, and most particularly Indian women". As the Commission points out, one of the other members noted that "undoubtedly the amendment would provide that Indian women would not be treated differently from Indian men".

[118] These comments do not specifically reference the registration provisions, although it might be inferred that sections 12(1)(b) and 14 are implicated. However, like the Library of Parliament publication, these comments speak more to the kinds of criticism that section 67 was generating rather than the intention of Parliament in implementing section 67.

(j) *Section 67 in relation to Andrews*

[119] The Commission submits that the Tribunal erred by acknowledging, then dismissing, the former section 67 of the *Indian Act*. It reiterates the evidence and sources it drew from in *Matson*.

[120] The Tribunal accepted that Parliament may have feared scrutiny of the *Indian Act* under the CHRA. The Tribunal noted that in light of case law like *Druken*, there was indeed a risk that the *Indian Act* would have been considered by the Tribunal. Nonetheless, the Tribunal ultimately

concluded that this evidence was insufficient to demonstrate that when Parliament enacted the *Indian Act* in its entirety, it intended for this legislation to possess the ability to directly challenge other legislation. This did not render section 67 meaningless because other decisions would be made under the *Indian Act*.

(k) *Conclusions*

[121] Based on the evidence that the Commission has provided, it is possible to conclude that the reason for implementing section 67 was to give Parliament the opportunity to consult with Canada's First Nations regarding changes to the *Indian Act*. Some of the provisions that were intended to be subject to the consultation process were the registration provisions, particularly section 12(1) (b) and section 14.

[122] However, I do not think that this evidence is sufficient to show that registration was intended to be a service pursuant to section 5 of the CHRA. While section 5 may have been the only section under which those provisions could conceivably have been challenged, I would note that section 67 of the CHRA was implemented prior to the *Charter*. Prior to the *Charter*, the new CHRA would have been the only means of challenging the *Indian Act* provisions as discriminatory. Since the *Charter*, the jurisprudence has evolved to the extent that would make it clear that the *Charter* would be the appropriate means by which to bring a challenge.

[123] I find that the Tribunal's consideration was reasonable. It is not clear that the repeal of section 67 would be meaningless if the Tribunal followed *Murphy*. As I addressed above it is not

clear that the only reason why section 67 was enacted was to immunize the registration provisions of the Indian Act.

V. Costs

[124] The Commission did not seek costs against the Attorney General as they argue this was a public interest case and it is a legitimate application if *Murphy* is inconsistent with Supreme Court of Canada jurisprudence.

[125] The Attorney General seeks costs against the Commission for this application. The main argument is that the Federal Court of Appeal was wrong in *Murphy* and the Tribunal should not have followed *Murphy*. As this argument is beyond the normal realm of public interest the Attorney General says it is appropriate that they seek costs.

[126] Neither party sought cost against the individuals.

[127] I will award costs to the Attorney General payable by the Applicant forthwith in the lump sum amount of $5,000.00.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;

2. Costs are awarded to the Attorney General payable by the Applicant forthwith in the lump sum amount of $5,000.00.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1088-13
STYLE OF CAUSE:	CANADIAN HUMAN RIGHTS COMMISSION v ATTORNEY GENERAL OF CANADA ET AL
AND DOCKET:	T-1777-13
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