Federal Court of Appeal | Cour d'appel fédérale

Date: 20160721

Docket: A-221-15

Citation: 2016 FCA 200

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on January 27, 2016.

Judgment delivered at Ottawa, Ontario, on July 21, 2016.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: PELLETIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] This appeal raises important issues about the degree of deference to be afforded to the Canadian Human Rights Tribunal [the Tribunal], when it interprets its constituent legislation, and about the breadth of its jurisdiction to hear challenges to federal legislation that is alleged to be discriminatory.

[2] These issues arise in the context of complaints filed under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [the *CHRA*] by several members of two First Nations. The complainants alleged that provisions in the *Indian Act*, R.S.C. 1985, c. I-5 that preclude the registration of their children as "Indians" under that *Act* violate their human rights because the impugned provisions constitute prohibited discrimination on the basis of race, national or ethnic origin, sex or family status.

[3] The *CHRA* prohibits a number of discriminatory practices. One of them is discrimination in the provision of services customarily available to the general public on one of the grounds enumerated in the *CHRA*. Section 5 of the *CHRA* defines this discriminatory practice in the following terms:

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

[4] In two very thoughtful and thorough decisions, reported as 2013 CHRT 13 [*Matson*] and 2013 CHRT 21 [*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 [the *Charter*] 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, 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.

[5] The Canadian Human Rights Commission [the Commission] participated in the hearings before the Tribunal and supported the complainants' position. Following release of the Tribunal's decisions, the Commission filed two judicial review applications with the Federal Court, seeking to set the Tribunal's decisions aside. In a decision dated March 30, 2015, the Federal Court (*per* Justice McVeigh) dismissed the Commission's applications: *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2015 FC 398, 252 A.C.W.S. (3d) 308. The Federal Court held that the reasonableness standard applies to the review of the Tribunal's decisions and concluded that the decisions were reasonable, principally because they followed *Murphy*.

[6] The Commission has appealed the Federal Court's decision to this Court and argues that it must be set aside for two reasons. First, it says that the Federal Court erred in applying the

reasonableness standard of review because the controlling authority from the Supreme Court of Canada indicates that the correctness standard is applicable to decisions like these, which interpret the scope of rights protected by human rights legislation. Second, the Commission says that the Tribunal's decisions are incorrect as section 5 of the *CHRA* must be interpreted as extending to complaints that directly challenge federal legislation. The Commission recognizes that *Murphy* holds otherwise, but says that we should conclude that *Murphy* was wrongly decided or has been overtaken by subsequent jurisprudence of the Supreme Court of Canada and is thus not good law.

[7] For the reasons that follow, I disagree with the Commission on both points and therefore would dismiss this appeal. However, I would not grant the respondent the costs it seeks as the Commission brought this appeal in the public interest to clarify the means to challenge federal legislation that is alleged to be discriminatory. I thus believe that it is appropriate to refrain from awarding costs against the Commission.

I. Background

[8] To place the issues in this appeal into context, it is useful to begin by a review of the impugned provisions in the *Indian Act* and of the facts which gave rise to the human rights complaints in the present case.

A. *The Relevant Provisions in the Indian Act*

[9] Since Confederation, the federal government has followed a policy of defining who is an "Indian" for the purpose of regulating its relationship with indigenous peoples. For some time, such status has been – and continues to be – governed by the *Indian Act*, which sets out the criteria for determining whether an individual is an "Indian" under the *Act*. (I refer to such a determination in the balance of these Reasons as a grant of "Indian status" and am sensitive to the fact that many indigenous people find this terminology offensive. It is, however, the terminology that is used in the legislation and thus is relevant to the issues in this appeal.)

[10] It is common ground between the parties that a grant of Indian status under the *Indian Act* confers a number of benefits, such as entitlement to non-insured and health benefits, certain tax exemptions and, in some instances, post-secondary education benefits. Status may also confer intangible benefits related to acceptance within indigenous communities.

[11] Prior to 1985, various provisions in the *Indian Act* allowed for "enfranchisement", a process whereby individuals who had been granted Indian status through registration under the *Indian Act* could be "enfranchised" from registration, either voluntarily or involuntarily. The effect of enfranchisement was to strip individuals and their descendants of the right to Indian status under the *Indian Act*. As noted by the Tribunal at paragraph 2 of *Andrews*:

> [g]enerally speaking, enfranchisement was a process by which the federal government stripped an Indian, all of his or her minor unmarried children and future descendants of Indian status and band membership in exchange for incentives and various entitlements under the *Indian Act* and otherwise, depending on the mechanisms in force at the time of enfranchisement. At different times, these incentives included such things as Canadian citizenship, the

> right to vote in Canadian elections, rights to hold life and/or fee simple estates in reserve lands, or per capita shares of funds held on behalf of the First Nation.

[12] The assumptions behind the enfranchisement policy were undoubtedly discriminatory: First Nations peoples were encouraged or required to renounce their heritage and identity in order to benefit from some of the advantages enjoyed by other members of Canadian society. Several courts have commented on the discriminatory nature of the enfranchisement policy: see, for example, *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 88, 239 N.R. 1 and *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 [*Larkman*]. In *Larkman*, this Court noted:

> "Enfranchisement" is a euphemism for one of the most oppressive policies adopted by the Canadian government in its history of dealings with Aboriginal peoples: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward*, vol. 1 (Ottawa: Canada Communication Group Publishing, 1996) at page 271.
>
> Beginning in 1857 and evolving into different forms until 1985, "enfranchisement" was aimed at assimilating Aboriginal peoples and eradicating their culture or, in the words of the 1857 Act, encouraging "the progress of [c]ivilization" among Aboriginal peoples: *An Act to Encourage the Gradual Civilization of Indian Tribes in the Province and the Amend the Laws Respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26 (initial law); *An Act to Amend the Indian Act*, S.C. 1985, c. 27 (the abolition).
>
> Under one form of "enfranchisement" … Aboriginal peoples received Canadian citizenship and the right to hold land in fee simple. In return, they had to renounce – on behalf of themselves and all their descendants, living and future – their legal recognition as an "Indian," their tax exemption, their membership in their Aboriginal community, their right to reside in that community, and their right to vote for their leaders in that community.
>
> [*Larkman* at paras. 10-12]

[13] Prior to 1985, the *Indian Act* also enshrined a patrilineal concept of descent that was foreign to many indigenous traditions: *Corbiere* at para. 86, quoting from the *Report of the Royal*

Commission on Aboriginal Peoples (1996), vol. 4, *Perspectives and Realities* at 26. Under the rules enshrined in the *Indian Act* prior to 1985, Indian status was based almost entirely on lineage stemming from a man who had such status. The children of men with Indian status, who married and had offspring with women without status, were granted Indian status under the pre-1985 legislation. Conversely, women who possessed Indian status but who had children with a man without status were unable to pass Indian status on to their children. In addition, their own status was dependent on that of the men they married.

[14] In 1985, Parliament repealed the enfranchisement provisions in the *Indian Act* and changed the rules governing the acquisition of status, in an attempt to remove gender-based discrimination.

[15] On the latter point, the amendments introduced what is often called the "second generation cut-off rule" in subsection 6(1) and 6(2) of the *Indian Act*. Generally speaking, these 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 functions as follows:

- 6(1) has child with 6(1) = 6(1) child
- 6(1) has child with 6(2) = 6(1) child

- 6(2) child has child with 6(2) = 6(1) child
- 6(1) has child with a person without Indian status = 6(2) child
- 6(2) has child with a person without Indian status = child has no status

[16] In terms of the repeal of enfranchisement, the 1985 amendments provided an entitlement to registration under subsection 6(1) of the *Indian Act* to those who had been enfranchised and whose names appeared in an Order in Council issued under the former enfranchisement provisions. However, the amendments also provided in section 7 that women were not entitled to be registered if they had: (i) no claim to Indian status by virtue of their own ancestry; (ii) acquired such status only via a pre-1985 marriage to a man with status; and (iii) lost such status by virtue of enfranchisement.

[17] The interplay of the 1985 amendments to the *Indian Act* repealing enfranchisement with those creating the second generation cut-off rule resulted in differential treatment depending on whether one's enfranchised forbearer was a man or a woman. Where an individual's only forbearer with Indian status was a mother, who lost her status due to marriage with a non-Indian but regained it as a result of the 1985 amendments, offspring could be registered only under subsection 6(2) of the *Indian Act*. In result, they could not pass status on to children they had with a non-status person as such children fell within the third generation under the rules then enshrined in the *Indian Act*. However, the result was the opposite if the forbearer with status was an individual's father. In those circumstances, the individual was entitled to registration under subsection 6(1) of the *Indian Act*, was deemed to be within the first generation, and accordingly could pass status on to children the individual had with a non-status person.

[18] This situation was addressed by the British Columbia Court of Appeal in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, 177 A.C.W.S. (3d) 2 [*McIvor*], where the Court found that paragraphs 6(1)(*a*) and 6(1)(*c*) of the *Indian Act* infringed section 15 of the *Charter* in a manner that was not justified by section 1 of the *Charter*. More specifically, the Court determined that the impugned provisions of the *Indian Act* created a discriminatory distinction between individuals who inherited their indigenous heritage through their grandfather (who would also inherit Indian status) and those who inherited their heritage through their grandmother (who lost their status).

[19] In response to the decision in *McIvor*, Parliament enacted the *Gender Equity in Indian Registration Act*, S.C. 2010, c. 18 [the *GEIRA*] on January 31, 2011. Among other things, this legislation added a new paragraph 6(1)(c.1) to the *Indian Act*. This new paragraph provides an entitlement to registration under subsection 6(2) of the *Indian Act* for individuals whose grandmothers lost their status by marrying non-Indians before April 17, 1985.

[20] Having outlined the relevant legislative backdrop to the two complaints, I turn now to discuss the particular facts involved in each complaint.

B. *The Andrews Complaints*

[21] Roger William Andrews filed two human rights complaints that centred on the difference in the way he was treated, with respect to Indian status, as compared to his sister, who was several years older. He was registered under subsection 6(2) of the *Indian Act* but his sister

was registered under subsection 6(1). She could therefore pass Indian status on to the children she had with a non-status individual but Mr. Andrews could not.

[22] Their father was recorded at birth as a member of the Naotkamegwanning First Nation (also known as the Whitefish Bay Indian Band) and was registered as a status Indian. He married a woman who had no aboriginal ancestry, but who became a status Indian upon her marriage by virtue of the provisions of the *Indian Act* then in force. The complainant's father subsequently applied for and was granted enfranchisement in exchange for various incentives. In result, he, his wife and their unmarried child (the complainant's sister) lost their Indian status by virtue of the enfranchisement order.

[23] Some years later, following his enfranchisement, the complainant's father had another child – the complainant – with another woman who did not have Indian status and who had never been entitled to such a status. At birth, the complainant was not entitled to be registered as a status Indian because his father had been granted enfranchisement.

[24] As a result of the 1985 amendments, the complainant became eligible for registration under subsection 6(2) of the *Indian Act* as he was the child of a parent eligible under subsection 6(1) and a non-Indian parent. He was not eligible for registration under subsection 6(1) because his birth occurred after his father's enfranchisement and the complainant's name therefore did not appear in an enfranchisement order. Had the complainant been born before his father was enfranchised, the 1985 amendments to the *Indian Act* would have provided him entitlement to registration under paragraph 6(1)(d) of the *Indian Act*. The complainant's sister, who was born

before their father was enfranchised, was named in the enfranchisement order and therefore was entitled to registration under paragraph 6(1)(d) of the *Indian Act* even though her mother, like the complainant's, had no aboriginal ancestry. Both she and the complainant had children with individuals without Indian status. In result, the complainant's child could not be registered as a status Indian but his nieces and nephews could be registered.

[25] In the two complaints he filed, one on his own behalf and the other on behalf of his child, Mr. Andrews alleged that this differential treatment between himself and his half-sister and between their offspring under the provisions in the *Indian Act* constitutes prohibited discrimination on the grounds of race, national or ethnic origin and family status.

C. *The Matson Complaints*

[26] Jeremy Matson, Mardy Matson and Melody Schneider are siblings and have a grandmother who lost her Indian status when she married a non-Indian before 1985 and regained that status under paragraph 6(1)(*c*) of the *Indian Act* following the 1985 amendments. By virtue of those amendments, the complainants' father became eligible for registration under subsection 6(2) of the *Indian Act*. He married a woman without Indian status and the complainants, like one of the plaintiffs in *McIvor*, were ineligible for status at the time of their birth. As a result, the complainants' children, conceived with non-status individuals, were also ineligible for registration.

[27] In November and December 2008, the complainants filed complaints under section 5 of the *CHRA*, alleging that they would have been entitled to registration under subsection 6(1) of

the *Indian Act* had their indigenous heritage been transmitted through their grandfather rather than through their grandmother. They further alleged that in this patrilineal scenario their children would have been eligible for registration under subsection 6(2) of the *Indian Act*. They claimed that the treatment afforded to them constituted discrimination in respect of the provision of service on the prohibited grounds of race, sex, national or ethnic origin and family status.

[28] Following the British Columbia Court of Appeal's decision in *McIvor* and the coming into force of the *GEIRA*, the complainants became eligible for registration under subsection 6(2) of the *Indian Act*, and applied for and were granted registration in May and June 2011. However, the Office of the Indian Registrar determined that their children are not eligible for registration under any of the provisions of section 6 of the *Indian Act* because the complainants are married to individuals who are not eligible for Indian status and are themselves registered under subsection 6(2) of the *Indian Act*.

[29] In a preliminary decision, dated September 27, 2011, the Tribunal held that the portions of the *Matson* complaints relating to the complainants' own eligibility for registration under the *Indian Act* were moot because the complainants had been successfully registered under subsection 6(2) of the *Act* following the adoption of the *GEIRA*. However, the Tribunal decided to proceed to a hearing on the remaining part of the complaints relating to the opportunity to pass status on to any children conceived with a non-Indian parent (*Matson, Matson, and Schneider (née Matson) v. Indian and Northern Affairs Canada*, 2011 CHRT 14).

II. The Tribunal's Decisions

[30] As noted, in both the *Matson* and *Andrews* decisions under review, the Tribunal decided that the complaints 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 and thus dismissed the complaints.

A. *Matson*

[31] The *Matson* case was decided first. In it, the Tribunal addressed three issues: first, whether the complaints involved a direct challenge to provisions of the *Indian Act*; second, whether the Tribunal was bound to follow the decision of this Court in *Murphy*; and, finally, whether the complaints impugned a discriminatory practice in the provision of services customarily available to the general public that could be the subject of a complaint under section 5 of the *CHRA*.

[32] In terms of the first issue, the Tribunal found that the complaints sought to directly challenge provisions of the *Indian Act* because the complainants were challenging their entitlements under the legislation as opposed to the manner in which the respondent processed their applications.

[33] On the second issue, the Tribunal determined that the decision in *Murphy* had not been overtaken by subsequent case law from the Supreme Court of Canada and was therefore still binding on the Tribunal. In reaching this conclusion, the Tribunal reviewed the Supreme Court

cases relied on by the Commission, which the Commission submitted support the application of the *CHRA* or similar provincial legislation by human rights tribunals to declare conflicting legislation inoperative: *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, 43 N.R. 168; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, 61 N.R. 241; *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, 27 Admin. L.R. 172; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 91 N.R. 255; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513.

[34] The Tribunal noted that none of these cases stands for the proposition that the adoption of legislation constitutes a service customarily available to the general public, and 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. The Tribunal reasoned that these cases did not undercut the holding in *Murphy* because they dealt with different situations.

[35] The Tribunal then went on to address and dismiss the various other arguments advanced by the Commission as to why *Murphy* should not be followed.

[36] First, it accepted that prior to the decision in *Murphy* there was a substantial body of jurisprudence under the *CHRA* that was to the opposite effect and which held that legislation could be challenged under section 5 of the *CHRA* as a service customarily available to the

general public. The Tribunal noted, though, that this jurisprudence was premised on the decision of this Court in *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24, 88 N.R. 150 (C.A.) [*Druken*] where the respondent admitted that the adoption of the impugned legislation – there provisions in the *Unemployment Insurance Act* – constituted a service customarily available to the general public within the meaning of section 5 of the *CHRA*. Because this point was admitted in *Druken*, the Tribunal found it to be less persuasive than *Murphy*. Also, as *Druken* was decided earlier, the Tribunal accepted that *Murphy* was the binding authority on the point.

[37] Next, the Tribunal discussed and dismissed as unhelpful several cases decided under provincial human rights legislation referred to by the Commission. In many of these cases, as in the cases from the Supreme Court relied on by the Commission, jurisdiction over the discriminatory practice in issue arose from another provision in the legislation, like the provisions prohibiting discrimination in employment. Thus, in several of these cases, where declarations of legislative invalidity were made, the underlying complaints did not stem from a direct challenge to legislation.

[38] The Tribunal also discussed section 2, subsection 49(5) and 62(1) as well as the former section 67 of the *CHRA* and found that none of these provisions required the result urged by the Commission.

[39] Section 2 of the *CHRA* provides:

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of	La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada,

Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

[40] Subsection 49(5) provides that "if a complaint involves a question about whether another Act or a regulation made under another Act is inconsistent" with the *CHRA*, the Tribunal member (where a single person panel is appointed to hear the case) or one of the members of the Tribunal (where there a three person panel is appointed to hear the case) must be legally trained.

[41] Subsection 62(1) provides that the portions of the *CHRA* that create, prohibit and provide a remedy for discriminatory practices "do not apply to or in respect of any superannuation or pension fund or plan established by an Act of Parliament enacted before March 1, 1978".

[42] Finally, the former section 67 of the *CHRA*, which was repealed in 2008 (with immediate effect in some cases and a three year delay in other cases), stated that nothing in the *CHRA* "affects any provision of the *Indian Act* or any provision made under or pursuant to that Act".

[43] The Commission argued that these provisions must lead to the conclusion that section 5 extends jurisdiction to the Tribunal to declare legislation invalid as an opposite conclusion would contradict the general purpose of the *CHRA* and would render subsections 49(5) and 62(1) as well as former section 67 of the *CHRA* virtually meaningless.

[44] The Tribunal disagreed and held that the foregoing provisions do not necessarily require a finding that the adoption of legislation is a service customarily available to the general public, within the meaning of section 5 of the *CHRA*, as legislation could be declared by the Tribunal to be inoperative in cases where the Tribunal possessed jurisdiction under a provision other than section 5 of the *CHRA*. It explained that such an issue could arise where the impugned legislation was raised as a defence by the respondent; cases in the employment context where the employer applied a legislative provision (like a provision in pension legislation) that conflicted with the *CHRA* provide an example of such a situation. The Tribunal reasoned that such cases are conceptually distinct from a direct challenge to a law because in such other cases the jurisdiction of the Tribunal is grounded in a provision governing the actions of the respondent and the challenge to the legislation arises only collaterally. Such cases, in other words, do not involve a direct challenge to the legislation. The Tribunal also noted that the now-repealed section 67 of the *CHRA* could have been explained by the former case law – overtaken by *Murphy*– that it was not obliged to follow. The Tribunal therefore found that its interpretation of section 5 of the *CHRA* was consistent with section 2, subsection 49(5) and former section 67 of the *CHRA*.

[45] Thus, after a thorough review of each of the arguments advanced by the Commission on behalf of the complainants, the Tribunal determined that it was bound to apply *Murphy* and that it was required to dismiss the complaint.

[46] This determination provided a negative answer to the third question of whether the complaints impugned a discriminatory practice in the provision of a service customarily available to the general public that could be the subject of a complaint under section 5 of the *CHRA*. In finding that the complaints did not raise such a question because the adoption of legislation is not a service customarily available to the general public, the Tribunal underscored the policy reasons why legislation should not be subject to direct challenge under the *CHRA* as opposed to the *Charter*. Citing from the decisions of the Supreme Court of Canada in *Andrews* and *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 S.C.R. 567, the Tribunal noted that a section 1 *Charter* justification would not be available under the *CHRA*, where the only defence would be a *bona fide* justification under subsection 15(2) of the *CHRA*.

[47] The Tribunal noted that in *Hutterian Brethren*, the Supreme Court of Canada held the two defences to be conceptually distinct, and relied on the following passage from the majority decision at paragraphs 68 to 70, where Chief Justice McLachlin wrote:

> Minimal impairment and reasonable accommodation are conceptually distinct. Reasonable accommodation is a concept drawn from human rights statutes and jurisprudence. It envisions a dynamic process whereby the parties — most commonly an employer and employee — adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party. In *Multani*, Deschamps and Abella JJ. explained:
>
> > The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue

> enables them to reconcile their positions and find common ground tailored to their own needs. [para. 131]

A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe *Charter* rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.

Similarly, "undue hardship", a pivotal concept in reasonable accommodation, is not easily applicable to a legislature enacting laws. In the human rights context, hardship is seen as undue if it would threaten the viability of the enterprise which is being asked to accommodate the right. The degree of hardship is often capable of expression in monetary terms. By contrast, it is difficult to apply the concept of undue hardship to the cost of achieving or not achieving a legislative objective, especially when the objective is (as here) preventative or precautionary. Though it is possible to interpret "undue hardship" broadly as encompassing the hardship that comes with failing to achieve a pressing government objective, this attenuates the concept. Rather than strain to adapt "undue hardship" to the context of s. 1 of the *Charter*, it is better to speak in terms of minimal impairment and proportionality of effects.

[48] Thus, in *Matson*, the Tribunal determined that both the binding authority in *Murphy* and sound policy reasons required it to find that the *Matson* complaints did not allege a discriminatory practice in the provision of services customarily available to the general public that could be the subject of a complaint under section 5 of the *CHRA*. It accordingly dismissed the complaints.

B. *Andrews*

[49] Many of the same points were again made by the Tribunal in the subsequent decision in *Andrews*. In addition, the Tribunal in that case undertook a more detailed analysis of what is required for something to constitute a service customarily available to the general public within the meaning of section 5 of the *CHRA*.

[50] The Tribunal began its analysis of the issue by referring to the decisions of the Supreme Court of Canada and of this Court in *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, 194 N.R. 81 [*Gould*] and *Watkin v. Canada (Attorney General)*, 2008 FCA 170, 378 N.R. 268 [*Watkin*]. Both cases were decided prior to the 2008 decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], which brought about a sea change in administrative law. Under pre-*Dunsmuir* principles, the standard of review applied in *Gould* and *Watkin* to decisions of the Tribunal defining discrimination and the scope of the rights protected under the *CHRA* was correctness. Thus, in *Gould* and *Watkin*, the Supreme Court and this Court expressed their views on the proper interpretation of what types of activities constitute services customarily available to the general public within the meaning of section 5 of the *CHRA*.

[51] In *Gould*, the Supreme Court established a two-step analysis for the determination: first, one must determine what constitutes the "service" based on the facts in the complaint; second, one must assess whether this service "creates a public relationship between the service provider and the service user" (at paragraph 68). The Tribunal noted that this notion of "service" was

further refined in *Watkin*, where this Court rejected the notion that all governmental actions come within the scope of section 5 of the *CHRA* and instead ruled that the section "contemplate[s] something of benefit being 'held out' as services and 'offered' to the public" (at paragraph 31).

[52] Thus, as noted by the Tribunal, a service customarily available to the public requires the presence of two separate components: first, something of benefit must be available and, second, this benefit must be held out or offered to the public. Accordingly, to use the words of the Tribunal, the language in section 5 of the *CHRA* requires "a transitive connotation" between the benefit and the process by which it is provided. The Tribunal referred to the reasons of LaForest, J. in *Gould* in support of this notion, where he noted at paragraph 55:

> [t]here is, therefore, a requisite public relationship between the service provider and the service receiver, to the extent that the public must be granted access to or admitted to or extended the service by the service provider. There is a transitive connotation from the language employed by the various provisions; it is not until the service, accommodation, facility, etc., passes from the service provider and has been held out to the public that it attracts the anti-discrimination prohibition.

[53] The Tribunal also referred to the decision of this Court in *Canada (Attorney General) v. McKenna*, [1999] 1 F.C. 401, 233 N.R. 52 [*McKenna*], where two members of the Court expressed doubt that a grant of citizenship under the *Citizenship Act*, R.S.C. 1985, c. C-29 constituted a service, and to the decision of the Tribunal in *Forward and Forward v. Citizenship and Immigration Canada*, 2008 CHRT 5, 63 C.H.R.R. 346 [*Forward*], finding that the grant of citizenship is not a service because nothing is held out or offered when legislation is applied. The Tribunal further mentioned the decisions of the Tribunal and the Federal Court in *Dreaver v. Pankiw*, 2009 CHRT 8 aff'd 2010 FC 555 [*Pankiw FC*] and noted that these decisions

"determined that a service must require something of benefit or assistance being held out, [and] that one may also inquire 'whether that benefit or assistance was the essential nature of the activity'" (*Andrews* at paragraph 49, citing from *Pankiw FC* at paragraph 42).

[54] Applying these principles to the facts of Mr. Andrews' complaints, as in *Matson*, the Tribunal held that the complaints were a direct challenge to provisions in the *Indian Act* because they alleged that these provisions were discriminatory. The Tribunal accepted that the impugned provisions do confer a benefit on those granted Indian status and thus meet the first component of a service customarily available to the public, within the meaning of section 5 of the *CHRA*.

[55] However, the Tribunal found the second component was missing because in the act of legislating, Parliament does not hold out or offer a service to the public; in short, the legislator is not a service-provider.

[56] The Tribunal further held that its conclusion was supported by the modern principle of statutory interpretation, which requires that the words of an Act be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament, citing Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67. Also citing the associated words rule applied in *Forward*, the Tribunal held that the term "services", as used in section 5 of the *CHRA*, is informed by its placement alongside the terms, "goods", "facilities" and "accommodations" and thus should be understood to be of a similar character. According to the Tribunal, such a reading confirms that the act of

legislating is not encompassed as a possible discriminatory practice within the meaning of section 5 of the *CHRA*.

[57] Thus, in addition to the reasons offered in *Matson*, the Tribunal in *Andrews* offered a more detailed analysis of the jurisprudence and the legislation in support of its conclusion that the complaints did not allege a discriminatory practice in the provision of services customarily available to the general public that could be the subject of a complaint under section 5 of the *CHRA.* And in result, it once again dismissed the complaints.

III. Analysis

[58] With this background in mind, it is now possible to move to review the two issues advanced by the Commission in this appeal, namely, what standard of review is applicable to the Tribunal's decisions and whether the decision in *Murphy* should be found to have been wrongly decided or to no longer be good law.

A. *Standard of Review*

[59] On the first issue, this Court is required to step into the shoes of the Federal Court and determine whether it selected the appropriate standard of review and whether it applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47 [*Agraira*].

[60] In the present case, discerning the appropriate standard of review is not straightforward. The post-*Dunsmuir* case law of this and other appellate courts as well as, arguably, that of the Supreme Court of Canada is divided on the issue of what standard of review applies to decisions of human rights tribunals when they are called upon to interpret the scope of protection afforded under human rights legislation.

[61] The starting point for the discussion is the recognition that, under *Dunsmuir* and the volley of administrative law cases subsequently decided by the Supreme Court, the reasonableness standard presumptively applies to decisions of all administrative tribunals interpreting their constituent statutes or statutes closely related to their functions: *Dunsmuir* at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160 at para. 28 [*Smith*]; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 16 [*Mowat*]; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 30 [*Alberta Teachers*]; *McLean v. British Columbia (Securities Commission)*, 2013 SCC, [2013] S.C.R. 895 at para. 21; *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25, [2014] 1 S.C.R. 546 at para. 11; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674 at para. 26; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 at para. 13 [*NGC*]; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 at para. 55 [*CN*]; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 at para. 35; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 at para. 46 [*Mouvement laïque*]; *Ontario (Energy Board) v. Ontario Power*

Generation Inc., 2015 SCC 44, [2015] 3 S.C.R. 147 at para. 73; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para. 32, 481 N.R. 25.

[62] However, this presumption is inapplicable if the issue under review involves a constitutional question (other than an issue of whether the exercise of discretion violates the *Charter* or does not respect *Charter* values), a question of general importance to the legal system that is outside the decision-maker's specialized expertise, the determination of the respective jurisdiction of two or more administrative decision-makers or a so-called "true" question of *vires*: *Dunsmuir* at paras. 58-61; *Smith* at para. 26; *Mowat* at para. 18; *Alberta Teachers* at para. 30; *NGC* at para. 13; *CN* at para. 55.

[63] In addition, the presumption may be rebutted by looking at contextual factors, including the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal. The presence or absence of a privative clause had been held to also be a key contextual factor in many cases that pre-dated *Dunsmuir*, but after the decision of the Supreme Court of Canada in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 209 N.R. 20 has been given far less weight, as in that case and many subsequent Supreme Court decisions, the reasonableness standard has been applied even in the absence of a privative clause (see e.g. *Dunsmuir* at para. 52; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paras. 25-26; *Mowat* at para. 17; and the non-labour decisions of the Supreme Court post-*Dunsmuir* applying the reasonableness standard of review, in many of which the relevant statutes lacked privative clauses).

[64] The other three contextual factors identified in the case law, involving the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal, are interrelated and are aimed at discerning whether the nature of the question being considered is such that the legislator intended it be answered by the administrative decision-maker as opposed to the Court. Indicia of such an intention include the role assigned to the administrative decision-maker under the legislation, and the relationship between the question decided and the institutional expertise of the decision-maker as opposed to the institutional expertise of a court. Where there is overlap between the two and the question at issue may be decided in the first instance either by a court or by the tribunal, the Supreme Court has indicated that correctness will apply: see, for example, *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; and *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615.

[65] Applying the foregoing general principles to decisions of human rights tribunals has resulted in conflicting decisions.

[66] In *Mowat*, the first case involving a human rights issue decided by the Supreme Court of Canada post-*Dunsmuir*, the Court held that the reasonableness standard applied to review of a decision of the federal human rights tribunal as to its authority to award costs to a successful complainant under the *CHRA*. The reasoning in *Mowat* focussed both on the presumptive application of the reasonableness standard to tribunals interpreting their constituent statutes and on the nature of the question, which was found to not be one of general importance to the legal system as a whole and outside the tribunal's expertise. However, Justices Lebel and Cromwell,

who wrote for the Court, left open the possibility that other sorts of issues that come before human rights tribunals might be subject to review on the correctness standard. They wrote as follows at paragraph 23:

> There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise.

[67] Next, in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, the Supreme Court held that the reasonableness standard applied to review of a decision made by the Saskatchewan Human Rights Tribunal, interpreting and applying the hate speech provisions in the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1. In so deciding, Justice Rothstein, who penned the unanimous ruling, stated at paragraph 168 that:

> the decision was well within the expertise of the Tribunal, interpreting its home statute and applying it to the facts before it. The decision followed [the applicable leading authority] and otherwise did not involve questions of law that are of central importance to the legal system outside its expertise.

[68] Two years later, in *Mouvement laïque*, the majority of the Supreme Court held that both the reasonableness and the correctness standards applied to different aspects of the Quebec Human Rights Tribunal's interpretation of the scope of protection afforded under the Quebec *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12 [*Quebec Charter*] to freedom of religion. More specifically, the Court ruled that the correctness standard applied to discerning the scope of the state's duty of religious neutrality. However, it held that the reasonableness standard applied to the rest of the Tribunal's decision, including the issues of whether the impugned

prayer before a council meeting was of a religious nature, whether it interfered with the complainant's freedom of religion and whether the prayer was discriminatory. The Court held that these latter questions fell "squarely within the Tribunal's area of expertise" and were therefore entitled to deference (at paragraph 50). On the religious neutrality question, the majority of the Court found that "the importance of this question to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner" militated in favour of the correctness standard (at paragraph 51).

[69] From the foregoing, it is difficult to draw a bright line as to when the reasonableness or the correctness standard will apply to decisions of human rights tribunals interpreting the scope of the protections afforded in their constituent legislation.

[70] Turning to the case law of this Court, in *Murphy*, Chief Justice Noël, writing for the panel, applied the reasonableness standard to review of the Tribunal's decision interpreting the meaning to be given to services "customarily available to the general public" in section 5 of the *CHRA*. Similarly, in *Canada (Attorney General) v. Canadian Human Rights Commission et al.*, 2013 FCA 75, 444 N.R. 120, Justice Stratas, writing for the panel, applied the reasonableness standard to review the Tribunal's decision interpreting the meaning to be given to "discrimination" in the context of a claim alleging that schools and child welfare on Indian reserves were under-funded.

[71] On the other hand, in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, 459 N.R. 82, Justice Mainville, who wrote for the panel, found that the correctness standard applied to

review of the Tribunal's interpretation of family status discrimination. He based this conclusion on: i) the fact that pre-*Dunsmuir* case law had applied this standard; ii) human rights statutes are quasi-constitutional and therefore their interpretation raises questions of fundamental importance; and iii) a multiplicity of courts and tribunals are called upon to interpret human rights statutes, which favours full curial review to avoid inconsistency in the interpretation of fundamental rights. The approach in *Johnstone* was followed by this Court in *Canadian National Railway Company v. Seeley*, 2014 FCA 111, 458 N.R. 349.

[72] In Ontario, both the Court of Appeal and the Divisional Court have applied the reasonableness standard of review in the post-*Dunsmuir* case law to decisions of the provincial human rights tribunal interpreting provisions in the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 that define the scope of anti-discrimination protection: see, for example, *Taylor-Baptiste v. OPSEU*, 2015 ONCA 495, 126 O.R. (3d) 481; *Shaw v. Phipps*, 2012 ONCA 155, 289 O.A.C. 163; *Grogan v. Ontario (Human Rights Tribunal)*, 2012 ONSC 319, 214 A.C.W.S. (3d) 531; *Visc v. HRTO and Elia Associates Professional Corporation*, 2015 ONSC 7163, 343 O.A.C. 318.

[73] In Alberta, the Court of Appeal has taken the opposite approach and applied the correctness standard to review the human rights tribunal's interpretation of the provisions in human rights legislation that define discrimination and the scope of protection afforded under the legislation: *Stewart v. Elk Valley Coal Corp.*, 2015 ABCA 225, 602 A.R. 210. A similar approach has been taken by the Prince Edward Island Court of Appeal: *Eastern School Board v. Prince Edward Island (Human Rights Commission)*, 2008 PESCAD 10, 168 A.C.W.S. (3d) 148.

[74] In Nova Scotia, post-2008, the Court of Appeal initially applied the reasonableness standard to review of Human Rights Board of Inquiry decisions interpreting the scope of protections provided under the legislation: *Tri-County Regional School Board v. Nova Scotia (Human Rights Board of Inquiry)*, 2015 NSCA 2, 248 A.C.W.S. (3d) 695; *Foster v. Nova Scotia (Human Rights Board of Inquiry)*, 2015 NSCA 66, 256 A.C.W.S. (3d) 895. However, following the decision of the Supreme Court of Canada in *Mouvement laïque*, the Nova Scotia Court of Appeal modified its approach and applied the correctness standard to the Board of Inquiry's interpretation of "discrimination" in *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6, 262 A.C.W.S. (3d) 456.

[75] In Quebec, as noted in *Mouvement laïque*, the Quebec Court of Appeal had often applied the appellate standards of review to decisions of the Quebec Human Rights Tribunal under the *Quebec Charter* and, accordingly, reviewed legal determinations of the Tribunal on the correctness standard. In *Mouvement laïque* the Supreme Court overturned this approach in favour of administrative law review on the principles outlined above. Subsequently, the Quebec Court of Appeal has reviewed decisions of the Quebec Human Rights Tribunal in *Université de Sherbrooke c. Commission des droits de la personne et des droits de la jeunesse*, 2015 QCCA 1397, 260 A.C.W.S. (3d) 594 and *Commission des droits de la personne et des droits de la jeunesse c. Côté*, 2015 QCCA 1544, 260 A.C.W.S. (3d) 328. In those cases it applied the reasonableness standard to review of the Tribunal's finding that the clause of a collective agreement was discriminatory on the basis of age (*Université de Sherbrooke* at paragraphs 31-33), and of the Tribunal's interpretation of the expression "the use of any means to palliate a handicap" provided in section 10 of the *Quebec Charter* (*Côté* at paragraphs 19-21).

[76] In Saskatchewan, the Court of Appeal applied the correctness standard in *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26, 346 Sask. R. 210 to review of the Tribunal's ruling on whether the offensive flyers constituted prohibited hate speech as defined in the human rights legislation, but was overturned on this point by the Supreme Court of Canada, as noted above.

[77] The issue does not arise in British Columbia as legislation in that province determines the applicable standard of review: *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58-59. Finally, appellate courts in Manitoba, Newfoundland and Labrador and New Brunswick do not appear to have considered the issue.

[78] The foregoing survey highlights 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. Fortunately, it is not necessary to decide between the conflicting lines of authority in this case, as this matter can be decided on a narrower basis in application of the following general principles that emerge from the Supreme Court's case law.

[79] First, one cannot turn to the pre-*Dunsmuir* case law as satisfactorily settling the standard of review applicable to Tribunal decisions interpreting the *CHRA*. In *Agraira*, the Supreme Court indicated that one cannot necessarily rely on pre-*Dunsmuir* precedents "if [they] appear to be inconsistent with recent developments in the common law principles of judicial review" (at paragraph 48), which include the presumptive application of the reasonableness standard to review of a tribunal's interpretation of its constituent statute. This conclusion was applied by this

Court in *Canada (Citizenship and Immigration) v. Kandola*, 2014 FCA 85 at paragraph 35, 456 N.R. 115. Thus, one of the reasons offered in *Johnstone* for selection of the correctness standard no longer holds in light of *Agraira*.

[80] Second, the interpretation of human rights legislation does not involve a constitutional question, within the meaning of the Supreme Court's administrative law jurisprudence, which leaves the courts as final arbiter of constitutional issues due to the role assigned to them under the constitution to enforce the *Charter* and the *Constitution Act, 1867*. The rights afforded under human rights legislation – while important and fundamental – are statutory and therefore fundamentally different from constitutional rights.

[81] Third, the presumptive application of the reasonableness standard is not rebutted by the mere fact that human rights tribunals are called upon to decide important issues of broad import that possess quasi-constitutional dimensions. In the Supreme Court's case law, the exception to the reasonableness standard due to the importance of the issue under review to the legal system is double-pronged: to merit correctness review, the issue must *both* be one of importance to the legal system as a whole *and* must be outside the expertise of the tribunal.

[82] Interpretation of human rights legislation is the core competency of human rights adjudicators and thus falls squarely within their expertise. Indeed, the decisions in the present case eloquently attest to this. Thus, the fact that discrimination protection is of broad general importance to the legal system is not enough to merit correctness review.

[83] An analogy may be drawn in this regard to some of the issues that come before labour boards, which in terms of review do not differ in any meaningful way from the sorts of issues considered by human rights tribunals. Labour boards are called upon to interpret labour legislation and the breadth of legislative provisions governing the grant of bargaining rights, which the Supreme Court has confirmed possess a constitutional aspect: *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245. The reasonableness standard of review undoubtedly applies to labour board decisions of this nature; the importance of the issues decided by a labour board or such issues' quasi-constitutional dimension does not give rise to correctness review. Similarly, the nature of the issues decided by human rights tribunals when they interpret the scope of protection afforded under their constituent statutes cannot, in and of itself, merit application of the correctness standard.

[84] It thus follows that, if the correctness standard applies, justification must be found on some other basis. An alternate justification may arise through application of the contextual factors, discussed above, and, more specifically, through the fact that in many instances issues decided by certain human rights tribunals may also arise before the courts or labour arbitrators.

[85] In Quebec, both the courts and the Human Rights Tribunal possess jurisdiction to remedy breaches of the *Quebec Charter* and both are thus called upon to interpret it: *Mouvement laïque* at paragraph 51. In my view, the decision in *Mouvement laïque* must be understood in this context – it is this overlapping jurisdiction combined with the overarching importance of defining the bounds of the state's role in assuring freedom of religion that explains the selection of the correctness standard in that case.

[86] Likewise, in the employment context, labour adjudicators now have jurisdiction to apply human rights legislation: see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157 and for example, paragraph 226(2)(*a*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 and paragraph 60(1)(a.1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2. Thus, several tribunals may be called upon to interpret concepts like what constitutes discrimination and the bounds of the *bona fide* justification defence. This overlap might provide a sound basis for selection of the correctness standard of review under general principles that flow from the Supreme Court's jurisprudence.

[87] Even if this is so, there is no such overlap in the present case. The issue of what constitutes a service customarily available to the general public within the meaning of section 5 of the *CHRA* can only ever be decided by the Tribunal. It will not ever come before a labour adjudicator or arbitrator as employers do not provide such services to their employees. Similarly, the issue cannot come before a court as there is no cause of action arising from a breach of the *CHRA*: *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181 at 194-195, 37 N.R. 455; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362 at paras. 63-65; *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 36, 369 N.R. 207.

[88] In the absence of any possible overlapping jurisdiction in the present case, the presumptive application of the reasonableness standard of review is not rebutted. Thus, the interpretation given by the Tribunal to section 5 of the *CHRA* and, more specifically, to its determination that the adoption of legislation is not a service customarily available to the general public is reviewable on the reasonableness standard. Likewise, its application of that

interpretation to the facts of the *Matson* and *Andrews* complaints is reviewable on the reasonableness standard as a matter of mixed fact and law.

B. *Are the Tribunal's Decisions Reasonable?*

[89] In determining whether the Tribunals' decisions in *Matson* and *Andrews* should be set aside, this Court must assess both the reasons given by the Tribunal and the result reached. The requisite inquiry involves asking whether the decisions are transparent, justified and intelligible and whether the result reached falls within the range of possible, acceptable outcomes that are defensible in light of the facts and applicable law: *Dunsmuir* at para. 47.

[90] Here, both the reasons given and the result reached are reasonable.

[91] The Tribunal's reasons in both *Matson* and *Andrews* are entirely adequate as they fully set out why the Tribunal reached its conclusions and thoroughly canvass the evidence, the parties' arguments and the applicable case law. The decisions are therefore transparent and intelligible.

[92] Similarly, the result reached by the Tribunal is justifiable and defensible because its characterization of the *Matson* and *Andrews* complaints as being direct challenges to the impugned provisions in the *Indian Act* is reasonable, and the Tribunal's interpretation of section 5 of the *CHRA* is one that the section can reasonably bear.

[93] More specifically, it is reasonable to conclude that both complaints were aimed at challenging the provisions in the *Indian Act* under which the complainants' children were ineligible for a grant of Indian status. 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. Thus, what was impugned in the complaints are the provisions of the *Indian Act* themselves. The Tribunal therefore reasonably (and, indeed, correctly) characterized the nature of the complaints.

[94] As for the interpretation of section 5 of the *CHRA* to the effect that the adoption of legislation does not give rise to a service customarily available to the general public, this interpretation was likewise reasonably open to the Tribunal for several reasons.

[95] First, the Tribunal followed the authority from this Court and the Supreme Court of Canada on what sorts of activities constitute services customarily available to the general public, within the meaning of section 5 of the *CHRA*. As noted, flowing principally from the decisions in *Gould* and *Watkin*, such a service requires the presence of two separate components: 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.

[96] Second, there is certainly a reasonable basis for concluding that in passing legislation, a legislator is not "holding out" or "offering" something of benefit to the public or to those who

might benefit from the legislation. One simply cannot equate the act of legislating with a service. As the Tribunal aptly noted at paragraph 57 of *Andrews*:

> Law-making is one of Parliament's most fundamental and significant functions and *sui generis* in its nature. This is confirmed by the powers, privileges and immunities that Parliament and the Legislatures possess to ensure their proper functioning, which are rooted in the Constitution, by virtue of the preamble and section 18 of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3, [*Constitution Act*] and in statute law, in sections 4 and 5 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1: *Telezone Inc. v. Canada (Attorney General)*, (2004), 2004 CanLII 36102 (ON CA), 235 D.L.R. (4th) 719 at paras. 13-17. Indeed, the dignity, integrity and efficient functioning of the Legislature is preserved through parliamentary privilege which, once established, is afforded constitutional status and is immune from review: *Harvey v. New Brunswick (Attorney General)*, (1996), 1996 CanLII 163 (SCC), 137 D.L.R. (4th) 142, [1996] 2 S.C.R. 876; *Canada (House of Commons) v. Vaid*, 2005 SCC 30 (CanLII) at para. 33 [*Vaid*]. To consider the act of legislating along the same lines as that of delivering Householders as in *Pankiw* or to processing a citizenship application as in *Forward* is fundamentally problematic and emblematic of an approach which ignores the special role law-making possesses in our society. In legislating, Parliament is not a service provider and there is no "transitive connotation" to this function. Rather, it is fulfilling a constitutionally mandated role, at the very core of our democracy. As such, while law-making is an activity that could be said to take place "in the context of a public relationship" (*Gould* at para. 16) or "creates a public relationship" (*Gould* at para. 68, cited above) as per the second part of the *Gould* test, to characterize it as a service would ignore this *sui generis* quality.

[97] Third, in ruling as it did, the Tribunal applied the decision of this Court in *Murphy* and provided a rational basis for distinguishing *Druken* and the earlier case law of the Tribunal. It therefore reasonably concluded that the binding precedent supported the result it reached, as *Murphy* decides that one may not challenge legislation as being discriminatory under section 5 of the *CHRA* because the adoption of legislation is not a service customarily available to the general public.

[98] Fourth, contrary to what the Commission asserts, the Tribunal's interpretation is 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. As the Tribunal correctly noted, none of the cases relied on by the Commission held that the act of passing legislation constitutes a service customarily available to the general public, within the meaning of section 5 of the *CHRA* or other similar provisions in provincial human rights legislation.

[99] Moreover, the principle of the primacy of human rights legislation is not at odds with the Tribunal's interpretation of section 5 of the *CHRA* because one must not conflate the scope of the Tribunal's jurisdiction with the extent of its remedial authority once it is validly seized of a complaint. Section 5 defines the type of matters over which the Tribunal has jurisdiction; there is no reason to read the provision as providing jurisdiction to hear legislative challenges merely because in cases where the Tribunal otherwise possesses jurisdiction it may declare conflictual legislation inoperative.

[100] Rather, as the Tribunal noted, under the modern approach to statutory interpretation and the associated words rule, the term "services" should be read in context to mean an action of a nature similar to providing goods, facilities or accommodation. The passing of legislation bears no similarity to these sorts of activities.

[101] In addition, in these complaints, the complainants 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. However, the Tribunal is

not empowered to issue a declaration of invalidity or to read in additional language into the *Indian Act* to broaden those entitled to Indian status as this type of remedy is only available to a court under sections 24(1) of the *Charter* and 52 of the *Constitution Act, 1982*. The inability of the Tribunal to grant the remedy sought by the complainants militates in favour of the conclusion reached by the Tribunal.

[102] Fifth, there is no reason to consider that section 2, subsections 49(5) and 62(1) or the former section 67 of the *CHRA* necessitate reading section 5 of the *CHRA* in the way the Commission advocates. As the Tribunal convincingly noted, section 2 of the *CHRA* – the statutory purpose clause – is in no way violated if the Tribunal were to decline to accept that it is entitled to rule on direct challenges to federal legislation. Similarly, subsection 49(5) and 62(1) are consistent with the Tribunal's interpretation for the reasons given by the Tribunal. The Tribunal's reasoning regarding former section 67 of the *CHRA* is likewise persuasive.

[103] Finally, I believe that the policy reasons advanced by the Tribunal are unassailable. Simply put, there is no reason to find that the Tribunal should be an alternate forum to the courts for adjudicating issues regarding the alleged discriminatory nature of legislation when a challenge may be made to a court under section 15 of the *Charter*. Contrary to what the Commission asserts, I am far from convinced that proceeding before a human rights tribunal would afford complainants greater access to justice, especially given the lengthy delays that are all too often seen in human rights adjudications and that were apparent to a certain extent in these cases. Moreover, the availability of the section 1 defence before the courts but not before the Tribunal provides the ultimate support for the Tribunal's conclusion as section 1 of the

Charter is meant to provide a possible defence when legislation is impugned as being discriminatory. It therefore follows that challenges of this nature should proceed before the courts, where a section 1 defence is available.

[104] I therefore conclude that the Tribunal's decisions in *Matson* and *Andrews* are reasonable and that there is no basis upon which to declare that *Murphy* is no longer good law.

IV. Proposed Disposition

[105] For the foregoing reasons, I would dismiss this appeal, without costs.

"Mary J.L. Gleason"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-221-15
STYLE OF CAUSE:	CANADIAN HUMAN RIGHTS COMMISSION v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 27, 2016
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	PELLETIER J.A. DE MONTIGNY J.A.
DATED:	JULY 21 2016

APPEARANCES:

Brian Smith Fiona Keith	FOR THE APPELLANT
Sean Stynes Josef Rosenthal	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Litigation Services Division Canadian Human Rights Commission	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT