Court File No. 37208

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

B E T W E E N:

CANADIAN HUMAN RIGHTS COMMISSION

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. AND NATIVE WOMEN'S ASSOCIATION OF CANADA

Interveners

MEMORANDUM OF ARGUMENT OF THE INTERVENERS WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. AND NATIVE WOMEN'S ASSOCIATION OF CANADA

(Rule 42 of the *Rules of the Supreme Court of Canada*)

LAW OFFICE OF MARY EBERTS
95 Howland Avenue
Toronto, ON M5R 3B4

Mary Eberts
Tel.: (416) 923 5215
Fax: (416) 595-7191
Email: eberts@ebertslaw.ca

BORDEN LADNER GERVAIS LLP
Suite 1300, 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
Tel.: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.
260 Spadina Avenue, Suite 309
Toronto, ON M5T 2E4

Kim Stanton
Tel.: (416) 595-7170 x 223
Fax: (416) 595-7191
Email: k.stanton@leaf.ca

Ottawa Agent for the Interveners, Women's Legal Education and Action Fund Inc.and Native Women's Association of Canada

NATIVE WOMEN'S ASSOCIATION OF CANADA
1 Nicholas Street, 9th Floor
Ottawa, ON K1N 7B7

K. R. Virginia Lomax
Tel.: (613) 722 3033 ext. 246
Fax: (613) 722 7687
Email : vlomax@nwac.ca

Counsel for the Interveners, Women's Legal Education and Action Fund Inc. and Native Women's Association of Canada

Brian Smith / Fiona Keith
Canadian Human Rights Commission
Legal Services Division
344 Slater Street, 8th Floor
Ottawa, Ontario K1A 1E1

Telephone: (613) 943-9205
FAX: (613) 993-3089
E-mail: brian.smith@chrc-ccdp.gc.ca

Counsel for Appellant, Canadian Human Rights Commission

Valerie Phillips
Canadian Human Rights Commission
344 Slater Street, 9th Floor
Ottawa, Ontario
K1A 1E1

Telephone: (613) 943-9357
FAX: (613) 993-3089
E-mail: valerie.phillips@chrc-ccdp.gc.ca

Agent for Appellant, Canadian Human Rights Commission

Christine Mohr / Catherine Lawrence
Attorney General of Canada
3400 - 130 King Street West
The Exchange Tower, Box 36
Toronto, Ontario M5X 1K6

Telephone: (416) 973-4111
FAX: (416) 952-4518
E-mail: christine.mohr@justice.gc.ca

Counsel for Respondent, Attorney General of Canada

Christopher M. Rupar
Attorney General of Canada
50 O'Connor Street, Suite 500, Room 557
Ottawa, Ontario
K1A 0H8

Telephone: (613) 670-6290
FAX: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Agent for Respondent, Attorney General of Canada

Stephen J. Moreau
Cavalluzzo Shilton McIntyre Cornish LLP
300-474 Bathurst Street
Toronto, Ontario M5T 2S6

Telephone: (416) 964-1115
FAX: (416) 964-5895
E-mail: smoreau@cavalluzzo.com

Counsel for Intervener, Tania Zulkoskey

Moira Dillon
Supreme Law Group
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Telephone: (613) 691-1224
FAX: (613) 691-1338
E-mail: mdillon@supremelawgroup.ca

Agent for Intervener, Tania Zulkoskey

Marie Chen
Income Security Advocacy Centre
1500 - 55 University Avenue
Toronto, Ontario
M5J 2H7

Telephone: (416) 597-5820 Ext: 5152
FAX: (416) 597-5821
E-mail: chenmel@lao.on.ca

Counsel for Interveners, Income Security Advocacy Centre, Sudbury Community Legal Clinic, Chinese and Southeast Asian Legal Clinic, Community Legal Assistance Society and HIV & AIDS Legal Clinic Ontario

Marie-France Major
Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for Interveners, Income Security Advocacy Centre, Sudbury Community Legal Clinic, Chinese and Southeast Asian Legal Clinic, Community Legal Assistance Society and HIV & AIDS Legal Clinic Ontario

Kumail Karimjee / Nabila F. Qureshi
Karimjee Greene LLP
401 Bay Street
Suite 2008, P.O. Box 80
Toronto, Ontario M5G 2G8

Telephone: (416) 593-0007
FAX: (416) 593-9907
E-mail: kumail@karimjeegreene.com

Counsel for Intervener, Canadian Muslim Lawyers Association

D. Lynne Watt
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

Telephone: (613) 786-8695
FAX: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Counsel for Intervener, Canadian Muslim Lawyers Association

Kerri Joffe / Dianne Wintermute
ARCH Disability Law Centre
55 University Avenue
15th floor
Toronto, Ontario M5J 2H7

Telephone: (416) 482-8255
FAX: (416) 482-2981
E-mail: joffek@lao.on.ca

Counsel for Intervener, Council of Canadians with Disabilities

Michael Bossin
Community Legal Services-Ottawa Carleton
1 Nicholas Street, Suite 422
Ottawa, Ontario K1N 7B7

Telephone: (613) 241-7008 Ext: 224
FAX: (613) 241-8680
E-mail: bossinm@lao.on.ca

Counsel for Intervener, Council of Canadians with Disabilities

Justin Safayeni / Stephen Alyward
Stockwoods LLP
TD North Tower, suite 4130
77 King Street West, P.O. Box 140
Toronto, Ontario
M5K 1H1

Telephone: (416) 593-7200
FAX: (416) 593-9345
E-mail: justins@stockwoods.ca

Counsel for Intervener Amnesty International

David Taylor
Power Law
130 Albert Street
Suite 1103
Ottawa, Ontario
K1P 5G4

Telephone: (613) 702-5563
FAX: (613) 702-5563
E-mail: dtaylor@powerlaw.ca

Counsel for Intervener Amnesty International

David P. Taylor
Conway Baxter Wilson LLP
400 - 411 Roosevelt Avenue
Ottawa, Ontario
K2A 3X9

Telephone: (613) 691-0368
FAX: (613) 613-6880
E-mail: dtaylor@conway.pro

Counsel for Intervener First Nations Child and Family Caring Society of Canada

Jeremy Matson
4516 Walker Road
Kelowna, British Columbia
V1W 2Z1
matinoia@hotmail.com

Self-Represented Intervener

Danardo Jones
Faisal Mirza
African Canadian Legal Clinic
402-250 Dundas Street West
Toronto, Ontario M5T 2Z5

Telephone: (416) 214-4747
FAX: (416) 214-4748
E-mail: jonesdn@lao.on.ca

Counsel for Intervener African Canadian Legal Clinic

Michael A. Crystal
Spiteri & Ursulak LLP
1010 - 141 Laurier Avenue West
Ottawa, Ontario
K1P 5J3

Telephone: (613) 563-1010
FAX: (613) 563-1011
E-mail: mac@sulaw.ca

Agent for Intervener African Canadian Legal Clinic

Emily Hill / Emilie Lahaie
Aboriginal Legal Services
211 Yonge Street, Suite 500
Toronto, Ontario
M5B 1M4

Telephone: (416) 408-4041 Ext: 224
FAX: (416) 408-1568
E-mail: e_hill@lao.on.ca

Counsel for Intervener Aboriginal Legal Services

Michael Bossin
Community Legal Services-Ottawa Carleton
1 Nicholas Street, Suite 422
Ottawa, Ontario K1N 7B7

Telephone: (613) 241-7008 Ext: 224
FAX: (613) 241-8680
E-mail: bossinm@lao.on.ca

Agent for Intervener Aboriginal Legal Services

Amélie Pelletier Desrosiers
Ministère de la Justice du Québec
1200, route de l'Église
2e étage
Québec, Quebec G1V 4M1

Telephone: (418) 643-1477 Ext: 21006
FAX: (418) 644-7030
E-mail:
amelie.pelletier-desrosiers@justice.gouv.qc.ca

Counsel for Intervener Attorney General of Quebec

Pierre Landry
Noël & Associés
111, rue Champlain
Gatineau, Quebec
J8X 3R1

Telephone: (819) 771-7393
FAX: (819) 771-5397
E-mail: p.landry@noelassocies.com

Agent for Intervener Attorney General of Quebec

Andrew Raven
Andrew Astritis
Morgan Rowe
Raven, Cameron, Ballantyne & Yazbeck LLP
1600 - 220 Laurier Ave West
Ottawa, Ontario
K1P 5Z9

Telephone: (613) 567-2901
FAX: (613) 567-2921
E-mail: araven@ravenlaw.com

Counsel for Intervener Public Service Alliance of Canada

TABLE OF CONTENTS

PART I – OVERVIEW 1

PART II – QUESTIONS AT ISSUE 1

PART III – STATEMENT OF ARGUMENT 2

A. Equality and access to justice are fundamental legal principles that must inform the Court's analysis 2

B. Parliament intended services under the *Indian Act*, including status registration, to fall under the CHRT's jurisdiction 6

C. Indigenous women and other marginalized groups should be able to bring a claim of discrimination in whichever forum they choose 8

PARTS IV & V – COSTS & ORDER REQUESTED 10

PART VI – TABLE OF AUTHORITIES 11

PART VII – STATUTORY PROVISIONS 14

PART I – OVERVIEW

1. The Women's Legal Education and Action Fund (LEAF) and the Native Women's Association of Canada (NWAC) adopt the arguments of the Canadian Human Rights Commission (CHRC) with respect to the jurisdiction of the Canadian Human Rights Tribunal (CHRT). LEAF and NWAC propose an analysis that provides additional reasons why the Court should accept the CHRC argument that the CHRT has jurisdiction to consider an assertion of discrimination embedded in legislation.

2. LEAF and NWAC submit that just as it is essential that this Court look at questions through an equality lens, so must access to justice inform judicial analysis. The lower court decisions failed to consider these animating principles in adopting a narrow conception of "service" and in rejecting case law that acknowledged equality and access to justice values.

3. LEAF and NWAC submit that where there are competing lines of authority regarding the appropriate role of human rights tribunals, the Court should endorse the authorities that promote access to justice. LEAF and NWAC submit that the Federal Court of Appeal erred when it departed from this interpretive principle in adopting the *Murphy*[1] line of authority.[2]

4. LEAF and NWAC dispute the Respondent's position that this matter amounts to a bare challenge to existing legislation. Rather we assert that registration is a "service" that properly falls under the CHRT's jurisdiction. LEAF and NWAC submit that the legislative intent and history of the repeal of s. 67 of the *Canadian Human Rights Act* (*CHRA*), as well as the broader purposes of the *CHRA*, provide incontrovertible support for the CHRC's argument that the registration provisions of the *Indian Act* are subject to CHRT review.

PART II – QUESTIONS AT ISSUE

5. LEAF and NWAC submit the CHRT has jurisdiction to consider the discriminatory impact of s. 6 of the *Indian Act*. In order to determine this issue, the Court must also determine the correct characterization of the services alleged to be discriminatory.

---

[1] *Public Service Alliance of Canada v Canadian Revenue Agency,* 2012 FCA 7.
[2] *Canadian Human Rights Commission v Canada (Attorney General),* 2016 FCA 200 [*CHRC FCA*].

6. LEAF and NWAC assert that the court below erred in characterizing the "services" at issue as not coming within the CHRT's jurisdiction because they were in the nature of legislation. LEAF and NWAC adopt the Appellant's submissions that the correct characterization of the services in question is registration under the legislation.

PART III – STATEMENT OF ARGUMENT

A. Equality and access to justice are fundamental legal principles that must inform the Court's analysis

7. The issues in this appeal cannot be divorced from the foundational principles of equality and access to justice. Substantive equality is a *Charter* value[3] that should not only inform *Charter* interpretation[4] but should inform the interpretation and application of all legislation. This Court has been clear about the importance of a broad and purposive interpretation of human rights statutes.[5] Further, the Court has stated: "The whole aim and purpose of human rights legislation is to prevent discrimination. If there can be discrimination without any consequences, then the very purpose of the legislation is defeated."[6]

8. Access to justice is a fundamental legal principle. In *Hryniak v Mauldin*[7] the Court identifies access to justice as among the goals in reforming the summary judgment rules, and settles on an interpretation that best advances access to justice. Similarly, the decision in *BC Trial Lawyers Association*[8] regarding court hearing fees affirms earlier jurisprudence that access to justice is fundamental to the rule of law. In *Sable Offshore*, dealing with the common law of

---

[3] *M (A) v Ryan*, [1997] 1 SCR 157 at para 30, per McLachlin J (as she then was).
[4] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46, at para 112, per L'Heureux-Dubé J, McLachlin J (as she then was), and Gonthier J; *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[5] *Action Travail des Femmes v Canadian National Railway Company*, [1987] 1 SCR 1114, at para 24, per Dickson CJ for the Court; *B v Ontario*, [2002] 3 SCR 403, at para 44, per Iacobucci and Bastarache JJ, for the majority.
[6] *Commission scolaire regionale de Chambly v Bergevin*, [1994] 2 SCR 525, at para 23, per Cory J; see also paras 19, 22-26; *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970, at paras 16-18, per Sopinka J for the Court.
[7] *Hryniak v Mauldin*, [2014] 1 SCR 87, 2014 SCC 7, at paras 1, 26, 34, 79, per Karakatsanis J for the Court.
[8] *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 39, per McLachlin CJ for the majority.

settlement privilege, Abella J states: "The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress."[9]

9. The disadvantaged position of Indigenous women in Canadian society is the result of complex social and legislative forces tied to colonization, racism and misogyny, including the *Indian Act* itself. Substantive equality and access to justice are key considerations in the context of this appeal, given the negative effects for Indigenous women when they are not able to access effective mechanisms to assert their human rights, and the long history surrounding discrimination in, and the importance of, registration for Indigenous women.

10. It is important not to take a narrow view of the significance of registration and the *Indian Act*-'s role in it. Exclusion from status registration can be catastrophic for Indigenous women.[10] Status rules that excluded Indigenous women who "married out" and their children from Indian status and the benefits of community life exposed them to poverty, dislocation, political disenfranchisement and social exclusion.[11] Registration is the only available avenue for access to material benefits, including tax exemptions, extended health coverage and financial assistance with post-secondary education,[12] as well as intangible benefits such as a sense of belonging, recognition and cultural connection.[13] In many First Nations, registration is also tied to band membership, and the ability to vote and run in band elections.[14] The ability to pass on Indian status to one's child is a significant benefit of the registration provisions. Conversely, restrictions on access to registration contribute to the marginalization and poverty that Indigenous women experience in this country,

---

[9] *Sable Offshore Inc v Ameron International*, 2013 SCC 37, at para 1: Again, the interpretation of the scope of settlement privilege is chosen based on its potential to advance access to justice. See also Andrea A. Cole & Michelle Flaherty, "Access to Justice Looking for a Constitutional Home: Implications for the Administrative Legal System" (2016) 94 *Can B Rev* 13, 44; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513, at paras 33, 49-50, per Bastarache J for the majority [*Tranchemontagne*].

[10] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 86, per L'Heureux-Dubé J, concurring; *Gehl v Canada (Attorney General*, 2017 ONCA 319 at para 41, per Sharpe JA [*Gehl*].

[11] *McIvor v The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 at para 27 [*McIvor*, BCSC].

[12] *McIvor v Canada (Registrar, Indian and Northern Affairs*), 2009 BCCA 153 at para 70 [*McIvor* BCCA].

[13] *McIvor* BCSC, *supra* note 11, at para 143; aff'd in *McIvor*, BCCA *supra* note 12 at para 70.

[14] *Indian Act*, RSC 1985, c I-5, s 10, 11; *Gehl, supra* note 10 at para 41, per Sharpe JA.

creating far from auspicious circumstances from which to launch a *Charter* challenge, particularly one that can last for decades.[15]

11. Indigenous women have been deprived of accessible remedies to combat the discrimination and disadvantage created by the *Indian Act*'s registration regime. The *Canadian Bill of Rights* has proved to be of no use against sex discrimination in the *Indian Act* and the *CHRA* was inaccessible until the repeal of s. 67.[16] If the decision below is upheld, this will have the effect hollowing out the promise the repeal of s. 67 has held for Indigenous women.

12. LEAF and NWAC note that individual Indigenous women are unlikely to be able to fund a *Charter* challenge, and it is by no means certain that they could get advance costs to bring a s. 15 case, given the very strict criteria and exceptional nature of the award.[17] Civil legal aid funding for *Charter* cases is extremely limited across Canada[18] and while the Court Challenges program is being reinstated after a long hiatus, its mandate has broadened and its budget is limited. By comparison, the Crown has shown itself willing to use its considerable resources to resist women's claims to equality under the *Indian Act*.[19] Court cases alleging discrimination under the *Indian Act*, and the unsuccessful applications for registration which precede them, can take upwards of thirty

---

[15] *McIvor* BCSC, *supra* note 11 at para 103-104; *McIvor* BCCA, *supra* note 12; Sharon McIvor, *Communication Submitted for Consideration under the First Optional Protocol to the International Covenant on Civil and Political Rights*: *Sharon McIvor and Jacob Grismer v Canada*, (Office of the High Commissioner for Human Rights, 2010) at 23-25 [*McIvor ICCPR Submission*]. Dr. Lynn Gehl applied for registration in 1994 and her case was not resolved until 2015: *Gehl*, *supra* note 10 at paras 21-23, per Sharpe JA.

[16] *Attorney General of Canada v Lavell*, [1974] SCR 1349, 38 DLR (3d) 481; *Canadian Human Rights Act*, RSC 1985, c H-6, s 67 [*CHRA*], repealed by *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30; see also Canadian Human Rights Commission, *A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act* (Canada: Minister of Public Works and Government Services, 2005) at 2-7.

[17] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 at paras 1, 40-41, per LeBel J for the majority; *Little Sisters Book and Art Emporium v Canada* (No 2), 2007 1 SCR 38 at paras 32-44, per Bastarache and Lebel JJ for the majority; *R v Caron*, 2011 SCC 5, [2011] 1 SCR 78 at paras 36-45, per Binnie J for the majority.

[18] Melina Buckley, *The Legal Aid Crisis: Time for Action* (Canadian Bar Association, 2000).

[19] *McIvor ICCPR Submission*, *supra* note 15; Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare" (2016) 62 McGill LJ 283 [*Blackstock*].

years to process.[20] Any court challenge to systemic discrimination in the *Indian Act* will be a very long, difficult journey for those least able to mount such a challenge.[21]

13. Moreover, in *Cunningham*,[22] the federal government has successfully shielded exclusionary provisions of the *Indian Act* from *Charter* review by arguing that the purpose of the exclusionary provisions is ameliorative (i.e. designed to assist the First Nations groups subject to them), and therefore protected from s. 15 scrutiny under s. 15(2). If the decisions in *Matson* and *Andrews* are affirmed, it is likely that both the human rights and the *Charter* routes of challenging the impugned provisions will be effectively barred for Indigenous women.[23]

14. Historically, the Canadian government has resisted changing the *Indian Act* to remove discrimination against women and their descendants until there has been adjudication that a provision is discriminatory. The *Lovelace* case at the UN Human Rights Committee (which reached the Committee on the shoulders of the *Bedard* and *Lavell* cases in the SCC) precipitated the enactment of Bill C-31;[24] the *McIvor* case precipitated the enactment of Bill C-3;[25] and Bill S-3 was introduced in 2016 following the decision in *Descheneaux*.[26] Justice Masse eloquently states in her judgment that Parliament has failed in its legislative duty by typically adopting a minimalist remedial response each time a s. 15 case has succeeded. This response has necessarily forced the courts to decide yet another challenge, brought at great cost, to remedy the remaining discrimination.[27] While the *Charter* remains open to use, LEAF and NWAC posit that the cost and

---

[20] *Gehl*, *supra* note 10 at paras 21-23, per Sharpe JA.
[21] Ian Peach, "Section 15 of the *Canadian Charter of Rights and Freedoms* and the Future of Federal Regulation of Indian Status" (2012) 45 *UBC Law Review* 1 at 106-107 [*Peach*].
[22] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011] 2 SCR 670, 2011 SCC 37.
[23] Naiomi Metallic, "The Door has a Tendency to Swing Shut: The Saga of Aboriginal Peoples' Equality Claims" in *Aboriginal Law Bench Book*, 2nd ed (Ottawa: National Judicial Institute, 2017) at para 100.
[24] *Peach*, *supra* note 21 at 106-107.
[25] Canada, Legal and Social Affairs Division, *Legislative Summary of Bill C-3: Gender Equity in Indian Registration Act*, by Mary C Hurley and Tonina Simeone, Publication No 40-3-C3E (Library of Parliament Research Publications, 15 November 2010).
[26] Canada, Legal and Social Affairs Division, *Legislative Summary of Bill S-3: An Act to amend the Indian Act (elimination of sex based inequities in registration)* by Norah Kielland and Marlisa Tiedemann, Publication No 42-1-S3-E (Library of Parliament Research Publications, 22 February 2017); *Lovelace v Ontario*, [2000] 1 SCR 950, 48 OR (3d) 735.
[27] *Déscheneaux c Canada (Procureur Général)*, 2015 QCCS 3555 at paras 238-241.

time involved in mounting a *Charter* claim make it vital that more than one forum be available for Indigenous women to access justice.

B. Parliament intended services under the *Indian Act*, including status registration, to fall under the CHRT's jurisdiction

15. Finding that the challenge currently under appeal did not fall within the CHRT's jurisdiction is in direct conflict with the purpose of the *CHRA* and the intent of the repeal of s. 67. Section 67 read: "[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."[28] Section 67 was intended as a "temporary measure" because Parliament recognized that the *Indian Act* needed to be redrafted, and required time to do so before a flood of human rights claims surged forward.[29] However, such redrafting as occurred in 1985 did not remove all the discrimination on the basis of sex and family relationship and s. 67 remained in place for many years. Section 67 barred Indigenous women from challenging restricted status registration before the CHRT as service discrimination.

16. Human rights legislation that excluded the most disadvantaged members of society, particularly those put in that position by legislation that was both inherently and explicitly racist and sexist, could not properly be considered a tool for human rights protection. Section 67 of the *CHRA* acted to not just perpetuate but to also reinforce racist policies originally aimed at eliminating Indigenous people as distinct cultures and nations.[30]

17. The repeal of s. 67 through Bill C-21[31] was to be an important step forward in reconciliation between First Nations and the Canadian government. It was also meant to open the door for Indigenous people, particularly Indigenous women, to address the severe discrimination and disadvantage they faced through the various sexist and racist policies under the *Indian Act*. Indeed,

---

[28] *CHRA*, *supra* note 16 at s 67 (repealed).
[29] *House of Commons Debates*, 39th Parl, 1st Sess, Number 105 (7 February 2007) (Hon Rod Bruinooge), [*Bruinooge*]; *House of Commons Debates*, 39th Parl, 2nd Sess, Number 100 (28 May 2008) (Hon Jean Crowder) [*Crowder*].
[30] Truth and Reconciliation Commission of Canada, *Honoring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 53-55.
[31] Bill C-21, *An Act to amend the Canadian Human Rights Act*, 2nd Sess, 39th Parl, 2008, originally Bill C-44, *An Act to amend the Canadian Human Rights Act*, 1st Sess, 39th Parl, 2007.

it was the intent of Parliament in repealing s. 67 of the *CHRA* to remedy the failure to meaningfully amend and address the discrimination in the *Indian Act* and provide an avenue through which Indigenous people, particularly women, could finally seek an effective human rights remedy.

18. The express purpose of s. 67 of the *CHRA* was to protect the *Indian Act* from CHRT review. New Democratic Party MP Jean Crowder argued: "What we had in place was a system that disenfranchised thousands and thousands of women and their families."[32] It is evident that the intention of Parliament was to open access to the CHRC regarding services contained in the *Indian Act*, including status registration. Further, the Honourable Rod Bruinooge, Parliamentary Secretary to the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, said: "**These decisions often touch on crucial aspects of day to day life, such as education, housing, registration and the use and occupation of reserve lands.** We must take immediate action to remove this fundamental inequality." [33]

19. Parliament recognized both the historic discrimination against Indigenous women and their distinct and unique lack of an appropriate and accessible venue to challenge that discrimination, with particular regard to status registration which was the only avenue for Indigenous women to access rights and services. To this point, the Honourable Senator Mobina Jaffer noted the 31 years that it took to pass legislation to repeal s. 67 and queried how the lives of Indigenous women would have been different if they had been granted access to the *CHRA*.[34]

20. Canada's international law obligations favour an interpretation and application of Canadian human rights laws that address and reverse these historic wrongs.[35] Article 8 of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) provides in s. 1 that Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. Section 2(d) of *UNDRIP* provides that States shall provide effective mechanisms for

---

[32] *Crowder, supra* note 31 at 1555. See also footnote 32, above.
[33] *Bruinooge, supra* note 31 at 1524 [emphasis added].
[34] *Debates of the Senate*, 39th Parl, 2nd Sess, Volume 144, Issue 69 (12 June 2008) at 1710 (Hon Mobina Jaffer).
[35] *Attorney General of Canada v Canadian Human Rights Commission*, 2013 FCA 75, 444 NR 120 at paras 16-17, per Stratas JA for the Court.

prevention of, and redress for any form of forced assimilation or integration.[36] In addition, Canada is a signatory to the UN *Convention on the Elimination of all Forms of Discrimination Against Women* (*CEDAW*), which condemns discrimination on the basis of sex.[37] The CEDAW Committee has recognized that: "the right of access to justice for women is essential to the realization of all rights protected under the CEDAW", including "Six interrelated and essential components — justiciability, availability, accessibility, good-quality, accountability of justice systems, and the provision of remedies for victims" as being "necessary to ensure access to justice."[38]

21. LEAF and NWAC submit that the legislative history of the repeal of s. 67 of the *CHRA* clearly supports an interpretation of the *CHRA* that guarantees, rather than denies, Indigenous women recourse to accessible and effective remedies under federal human rights legislation. Such a reading of the *CHRA* is also consistent with Canada's international human rights obligations under *UNDRIP* and *CEDAW* to ensure Indigenous women enjoy the equal protection and benefit of the domestic human rights accountability mechanism provided under the *CHRA*.

C. Indigenous women and other marginalized groups should be able to bring a claim of discrimination in whichever forum they choose

22. Limiting the types of venue in which historically disadvantaged people can bring claims for redress simply perpetuates their disadvantage. Possible concerns about differing outcomes if the same claim is pursued in more than one forum, or that offering a choice of venue might produce two decisions on the same point, are highly speculative and outweighed by access to justice considerations.

23. Human rights tribunals not only have institutional competence to address issues of legislative discrimination, they are obliged to do so.[39] The decision of the CHRT in this case,

---

[36] *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295 (Annex), UN GAOR, 61st Sess., Supp No 49, UN Doc A/61/49 (2008), see also Articles 2, 22(2), 40; See also *International Convention on the Elimination of All Forms of Racial Discrimination*, 4 January 1969, 660 UNTS 195, s 6.

[37] *The Convention to Eliminate All Forms of Discrimination Against Women*, 17 July 1980, 1249 UNTS 13.

[38] United Nations Committee on the Elimination of Discrimination against Women, *General recommendation on women's access to justice*, Recommendation No 33, CEDAW/C/GC/33 (2015) at para 14.

[39] See *Tranchemontagne*, *supra* note 9 at para 52, per Bastarache J for the majority.

upheld by the court below, emphasizes a narrow and technical reading of the *CHRA*. The language of s. 5 is seen as a net with a very tight mesh, depriving the CHRT of jurisdiction if the function complained of is not a "service" "of a nature similar to providing goods, facilities or accommodation."[40] By identifying the impugned service as legislation rather than registration, and holding that legislation is not a service under the *CHRA*, the CHRT in effect declines to exercise its jurisdiction over the *Matson* and *Andrews* complaints. It characterizes these complaints as a direct attack on legislation, while acknowledging that it will assert the primacy of the *CHRA* vis-à-vis legislation as long as the complaint presents only a collateral attack on that statute. The distinction between direct and collateral attacks on legislation would not have been necessary in this case, if the CHRT had accepted that registration is the service at issue, and the legislative criteria affecting registration fall to be considered as part of that complaint. Approaching the case that way makes it no different from the kind of case where a piece of legislation is tendered as a defence to certain employer conduct alleged to be discriminatory, and the CHRT examines the legislation as part of its inquiry, and will assert the primacy of the *CHRA* over it if necessary.[41]

24. While the CHRT process is not immune from access to justice issues, as noted by the court below,[42] the process has other elements not present in litigation that are invaluable to disadvantaged complainants. For example, the CHRC may take a complaint forward through the CHRT process.[43]

25. LEAF and NWAC concur with the CHRC argument that the Court's reasoning in *Tranchemontagne* is applicable in the present case.[44] Requiring seriously disadvantaged Indigenous women and their families to undertake *Charter* litigation to challenge discrimination under the *Indian Act* is contrary to the direction given by this Court in *Tranchemontagne* against erecting barriers to the human rights process.[45]

---

[40] *CHRC FCA, supra* note 1 at para 100, per Gleason JA.
[41] *Ibid* at para 34, 37, 99.
[42] *Ibid* at para 103.
[43] *Blackstock, supra* note 19 at 301.
[44] *Tranchemontagne, supra* note 9 at para 49-50, per Bastarache J for the majority, citing with approval Sopinka J in *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321, at p 339.
[45] *Ibid* at para 49.

26. In conclusion, LEAF and NWAC submit that the CRHT's decision is incompatible with domestic, constitutional and international human rights principles as well as with Parliament's intent in repealing s. 67 of the *CHRA*. Seen through the interpretive lenses of substantive equality and access to justice favoured by this Court in *Tranchemontagne* and *Cooper*,[46] a decision to deprive Indigenous women of recourse to the *CHRA* undermines *Charter* values. LEAF and NWAC urge the Court not to follow the CHRT's narrow decision.

PARTS IV & V – COSTS & ORDER REQUESTED

27. LEAF and NWAC do not seek costs, and ask that no costs be ordered against them.

28. LEAF and NWAC respectfully request that the appeal be determined in accordance with the above submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Ottawa, Ontario, this 5th day of October, 2017.

Mary Eberts	**Kim Stanton**	**K.R. Virginia Lomax**

Counsel for the interveners, LEAF and NWAC

[46] *Cooper v Canada (Human Rights Commission*), [1996] 3 SCR 854.

PART VI – TABLE OF AUTHORITIES

JURISPRUDENCE	Cited at para.
Action Travail des Femmes v Canadian National Railway Company, [1987] 1 SCR 1114	7
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, [2011] 2 SCR 670, 2011 SCC 37	13
Attorney General of Canada v Canadian Human Rights Commission, 2013 FCA 75, 444 NR 120	20, 23, 24
Attorney General of Canada v Lavell, [1974] SCR 1349, 38 DLR (3d) 481	11
B v Ontario (Human Rights Commission), [2002] 3 SCR 403, 2002 SCC 66	7
British Columbia (Minister of Forests) v Okanagan Indian Band, [2003] 3 SCR 371, 2003 SCC 71	12
Canada (Human Rights Commission) v Canada (Attorney General), 2016 FCA 200, 402 DLR (4th) 160	3
Central Okanagan School District No 23 v Renaud, [1992] 2 SCR 970, 95 CLR (4th) 577	7
Commission scolaire regionale de Chambly v Bergevin, [1994] 2 SCR 525, 115 DLR (4th) 609	7
Cooper v Canada (Human Rights Commission), [1996] 3 SCR 854, 140 DLR (4th) 193	26
Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, 173 DLR (4th) 1	10
Descheneaux c Canada (Procureur Général), 2015 QCCS 3555, [2016] 2 CNLR 175	14
Gehl v Canada (Attorney General), 2017 ONCA 319	10, 12
Hryniak v Mauldin, [2014] 1 SCR 87, 2014 SCC 7	8
Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue), [2007] 1 SCR 38, 2007 SCC 2	12
Lovelace v Ontario, [2000] 1 SCR 950, 48 OR (3d) 735	14
M (A) v Ryan, [1997] 1 SCR 157, 143 DLR (4th) 1	7
McIvor v Canada (Registrar of Indian and Northern Affairs), 2009 BCCA 153, 306 DLR (4th) 193	10

McIvor v The Registrar, Indian and Northern Affairs Canada, 2007 BCSC 827, [2007] 3 CNLR 72	10
New Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46, 177 DLR (4th) 124	7
Public Service Alliance of Canada v Canada Revenue Agency, 2012 FCA 7, 428 NR 240	3
R v Caron, [2011] 1 SCR 78, 2011 SCC 5	12
Sable Offshore Energy Inc v Ameron International Corp, [2013] 2 SCR 623, 2013 SCC 37	8
Tranchemontagne v Ontario (Director, Disability Support Program), [2006] 1 SCR 513, 2006 SCC 14	8, 23, 25
Trial Lawyers Association of British Columbia v British Columbia (Attorney General), [2014] 3 SCR 31, 2014 SCC 59	8
Zurich Insurance Co v Ontario (Human Rights Commission), [1992] 2 SCR 321, 9 OR (3d) 224	25
SECONDARY SOURCES	
Andrea A Cole & Michelle Flaherty, "Access to Justice Looking for a Constitutional Home: Implications for the Administrative Legal System", (2016) 94 Can B Rev 13, 44	8
Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare" (2016) 62 McGill LJ 285	12, 24
Ian Peach, "Section 15 of the Canadian Charter of Rights and Freedoms and the Future of Federal Regulation of Indian Status" (2012) 45 UBC L Rev 1	12, 14
Naiomi Metallic, "The Door has a Tendency to Swing Shut: The Saga of Aboriginal Peoples' Equality Claims" in *Aboriginal Law Bench Book*, 2nd ed (Ottawa: National Judicial Institute, 2017)	13
Melina Buckley, *The Legal Aid Crisis: Time for Action* (Canadian Bar Association, 2000)	12
Sharon McIvor, *Communication Submitted for Consideration under the First Optional Protocol to the International Covenant on Civil and Political Rights: Sharon McIvor and Jacob Grismer v Canada*, (Office of the High Commissioner for Human Rights, 2010)	10, 12
Canadian Government Documents	
Canada, Legal and Social Affairs Division, *Legislative Summary of Bill C-3: Gender Equity in Indian Registration Act, by Mary C Hurley and Tonina*	14

Simeone (Publication No 40-3-C3E) (Ottawa: Library of Parliament Research Publications, 15 November 2010)	
Canada, Legal and Social Affairs Division, *Legislative Summary of Bill S-3: An Act to amend the Indian Act (elimination of sex based inequities in registration), by Norah Kielland and Marlisa Tiedemann* (Publication No 42-1-S3-E) (Ottawa: Library of Parliament Research Publications, 22 February 2017)	14
Canadian Human Rights Commission, *A Matter of Rights* (A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the *Canadian Human Rights Act*) (Ottawa: Minister of Public Works and Government Services, 2005)	11
Debates of the Senate, 39th Parl, 2nd Sess, Volume 144, Issue 69 (12 June 2008) at 1710 (Hon Mobina Jaffer)	19
House of Commons Debates, 39th Parl, 1st Sess, Number 105 (7 February 2007) (Hon Rod Bruinooge)	15, 18
House of *Commons Debates*, 39th Parl, 2nd Sess, Number 100 (28 May 2008) (Hon Jean Crowder)	15, 18
Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (Summary of the Final Report of the Truth and Reconciliation Commission of Canada) (Ottawa: Truth and Reconciliation Commission of Canada, 2015)	16
International Documents	
General Recommendation on Women's Access to Justice, UNCEDAWOR 2015, UN Doc CEDAW/C/GC/33	20
International Convention on the Elimination of All Forms of Racial Discrimination, GA Res 2106 (XX), UNGAOR (4 January 1969)	20
The Convention to Eliminate All Forms of Discrimination Against Women, 17 July 1980, 1249 UNTS 13	20
United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61 (295), UNGAOR, 61 Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008)	20

PART VII – STATUTORY PROVISIONS

LEGISLATIVE AUTHORITIES	Cited at para.
Constitutional Documents	
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11:	7
s. 15	13, 14
Federal Legislation	
Canadian Human Rights Act, RSC 1985, c H-6	
s. 67 (repealed)	11, 15, 17, 18, 19, 21
Bill C-21, *An Act to amend the Canadian Human Rights Act*, 2nd Sess, 39th Parl, 2008, originally Bill C-44, *An Act to amend the Canadian Human Rights Act*, 1st Sess, 39th Parl, 2007.	17
Indian Act, RSC 1985, c I-5	
s. 6	5
s. 10	10
s. 11	10