# SUPREME COURT OF CANADA

## Case in Brief: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*

**2018 SCC 31 | Judgment of June 14, 2018 | On appeal from the Federal Court of Appeal**

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***The Canadian Human Rights Tribunal did not have the power to decide if parts of the Indian Act were discriminatory, because legislation is not a "service" provided to the public, the Supreme Court has confirmed. Individuals could still make a Charter claim in court, however.***

Indigenous persons can be registered as status "Indians" under the *Indian Act*, the law that determines who qualifies as "Indian." ("Indian" is an outdated term to refer to an Indigenous person that still exists in some Canadian laws.) This gives them access to different programs and services from the government. Status is not based on ethnicity, heritage, or racial background; whether it is granted depends on if a person's parents have (or could get) status. There are two types of status under the Act. The first, known as "section 6(1) status" allows a person to pass status on to his or her children, even if the other parent doesn't have status. The second, "section 6(2) status," does not allow status to be passed on unless the other parent has status.

Some people who consider themselves Indigenous may not qualify for status. One reason for this situation was the existence of past discriminatory government policies that caused people to lose it. People lost their status by becoming "enfranchised," which meant losing their rights under the *Indian Act*. One policy encouraged people to give up status to get basic rights other Canadians enjoyed (like full citizenship and the right to own land). Another policy automatically "enfranchised" any status woman who married a non-status man. The goal of these policies was to destroy Indigenous culture and assimilate Indigenous peoples, so they had serious negative effects on Canada's Indigenous community. Both policies were ended by 1985, and the government has passed laws to give status back to people who lost it, as well as to their children and grandchildren.

This case involved two groups of people who had status they could not pass on to their children or who were not eligible for status at all. The situation was due to the discriminatory policies. The groups said that the government had not done enough to undo the damage done by the previous policies.

The first group was the Matson siblings, whose grandmother lost her status when she married a non-status man. While legislation later gave them section 6(2) status, they are not able to pass status on to children they have with a non-status person. Had their grandmother never lost her status, they would have had section 6(1) status and could pass status on to their children no matter what.

The second group was the Andrews family. Mr. Andrews' father was voluntarily enfranchised before Mr. Andrews was born. Later legislation was meant to fix the problem, but didn't quite. It left Mr. Andrews with section 6(2) status, and his daughter without any status at all. Had Mr. Andrews' father never lost status, Mr. Andrews would have been eligible for section 6(1) status and his daughter for section 6(2) status.

The Canadian Human Rights Commission brought challenges to the Canadian Human Rights Tribunal on the Matsons' and the Andrewses' behalf. The Commission argued the law on who qualifies for status was discriminatory. The Tribunal said it did not have the power to decide that. The Commission asked the courts to review the Tribunal's decisions. Both the Federal Court and Federal Court of Appeal upheld the decisions.

Justice Clément Gascon, writing for the Supreme Court majority, said the Tribunal's decisions to dismiss the challenges were reasonable. Courts normally give wide latitude to a decision-maker's understanding of its own powers under the law that governs it (its "home statute"), unless a decision falls outside the range of reasonable outcomes. The *Canadian Human Rights Act* was the Tribunal's home statute. The statute said the Tribunal only had the power to decide if a "service" was being delivered in an unequal way, not whether the law itself was discriminatory. The Matsons and the Andrewses were arguing the *Indian Act* itself was discriminatory. Justice Gascon said it was reasonable for the Tribunal to consider whether a law could be considered a service, and dismiss the claims when it decided that it was not. But he made it clear that the Matsons and the Andrewses

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could still challenge the *Indian Act* under the *Canadian Charter of Rights and Freedoms*, as the Tribunal had said.

Justice Russell Brown agreed that the Tribunal's decisions should stand. However, he took issue with part of the majority's approach to reviewing administrative decisions in general.

Justices Suzanne Côté and Malcolm Rowe also agreed that the Tribunal's decisions should stand, but for different reasons. They said that courts should look at many factors before deciding whether to give the Tribunal so much latitude. After considering these factors, they said the Tribunal's answer to the question about whether legislation was a "service" didn't just have to fall within a *reasonable range* of answers—it had to be the *correct* one. That meant courts could overturn a decision if, for example, the Tribunal had incorrectly said that a complaint challenged a "service" when it did not. In this case, they found that the Tribunal was correct when it decided that the act of making laws was not a service, and they would have upheld the decisions.

The Supreme Court did not rule on whether parts of the *Indian Act* were actually discriminatory, but only confirmed that the Canadian Human Rights Tribunal did not have the power to decide that. While all the judges agreed on this point, there was some disagreement about how courts should look at decisions by administrative bodies.

**For more information (case # 37208):**

- Reasons for Judgment
- Case information
- Hearing webcast

**Breakdown of the decision:**

- Majority: Gascon J. (McLachlin C.J. and Abella, Moldaver, Karakatsanis and Wagner JJ. in agreement)
- Concurring (separate reasons): Brown J. and Côté and Rowe JJ. (the latter two writing together)

**Lower court rulings:**

- Federal Court of Appeal (appeal judgment)
- Federal Court of Canada (judgment)
- Canadian Human Rights Tribunal (Matson decision, Andrews decision)

*Ce document est disponible en français.*