Gaming the [Human Rights] System?: A Critical Look at Discrimination Complaints Involving Government Services

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In most Canadian jurisdictions, human rights statutes prohibit discrimination in the context of the provision of services available or offered to the public. While some statutes expressly exempt specific government activities from their scope of application, these statutes otherwise prohibit discriminatory practices in the context of service provision without distinction, regardless of whether these services are public or private in nature. Despite these prohibitions, respondents in government services cases have sought to advance various arguments that they should be treated differently from and in effect more leniently than other respondents who face human rights complaints, most notably in the past decade. This article shows that, by making service arguments, government respondents are gaming the system by attempting to limit avenues of recourse for discrimination claims, although important changes in the human rights legal landscape may alter government respondents' legal strategies in years to come.

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Dans certaines provinces canadiennes, les lois régissant les droits de la personne interdisent la discrimination dans la prestation de services offerts au public ou mis à sa disposition. Si elles excluent expressément certaines activités gouvernementales de leur champ d'application, elles interdisent par ailleurs les pratiques discriminatoires dans le contexte de la prestation de services, sans égard à la nature publique ou privée des services en question. Malgré ces interdictions, des défendeurs dans des causes portant sur des services gouvernementaux ont soutenu, notamment au cours de la dernière décennie, au moyen de divers arguments qu'ils devraient être traités différemment, voire avec plus de clémence, que d'autres visés par des plaintes pour violation des droits de la personne. L'auteur montre qu'en avançant des arguments fondés sur la notion de service, les défendeurs représentant l'administration gouvernementale chercent à déjouer le système en essayant de limiter les voies de recours dans les cas de plaintes pour discrimination, et ce, même si des changements importants dans le paysage juridique des droits de la personne pourront modifier, dans les années à venir, les stratégies juridiques de défense de l'administration gouvernementale.

I. Introduction

In most Canadian jurisdictions, human rights statutes specify that discrimination is prohibited in the context of the provision of services customarily available or offered to the public.[1] While some expressly exempt certain specific government activities from their scope of application,[2] these statutes otherwise prohibit discriminatory practices in the context of service provision without distinction, regardless of whether these services are public or private in nature. Despite this, respondents in government services cases have sought to advance various arguments suggesting that they should be treated differently from and in effect more leniently than other respondents who face human rights complaints, most notably in the past decade.[3] Indeed, in recent years, government respondents facing human rights complaints have claimed that government services, programs, policies and laws are not "services" under human rights legislation. When the subject matter of complaints relating to government programs, policies and activities are not considered services under human rights legislation, human rights tribunals do not have jurisdiction to deal with the alleged discrimination.[4] One can speculate that the service argument is part of a deliberate strategy of government respondents to game their way out of human rights systems. After all, when equality-seeking groups or individuals are prevented from alleging discrimination through human rights legal systems, which are generally more affordable and faster than courts, they are left with no other legal option than to bring constitutional challenges under section 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") which generally have lower chances of success.[5]

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1 See e.g. *Human Rights Code*, RSO 1990, c H19, s 1 [*HRC- ONT*]. See also *Canadian Human Rights Act*, RSC 1985, c H-6, s 5 [*CHRA*].

2 See e.g. *HRC- ONT*, *supra* note 1, ss 19(1), 20(2), 20(4), 24(1)(d)–24(1)(h); and *CHRA, supra* note 1, ss 15(1)(b), 15(1)(d). Most human rights statutes expressly provide that they are to apply to and bind the Crown and Crown agencies. See *HRC- ONT*, *supra* note 1, s 47(1) and *CHRA*, *supra* note 1, s 66(1). See also *CHRA*, *supra* note 1, s 67, which previously provided that "[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act". This section was repealed by *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30.

3 For the purposes of this article, the term "government respondents" will be used to describe respondents in human rights complaints such as those lodged against the Attorney General of Canada pursuant to section 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, as well as those listed in schedule I of the *Financial Administration Act*, RSC 1985, c F-11. This term will also be used to refer to discrimination claims brought against crown agencies, as well as entities such as municipalities, school boards, universities, colleges and other post-secondary institutions. In this article, I will generally use the term "complaint" when referring to the legal document in which allegations of discrimination are made under a given human rights statute to initiate a proceeding. All parties initiating proceedings will be referred to as "complainants", although some provincial jurisdictions use other terminology.

4 See Claire Mummé, "At a Crossroads in Discrimination Law: How the Human Rights Code Overtook the Charter in Canadian Government Services Cases" (2012) 9 JL & Equality 103.

5 For a more detailed discussion of the broader strategic implications of electing to lodge a human rights complaint instead of mounting a section 15 *Charter* challenge, see Bruce Ryder, "The Strange Double Life

This article examines the trend of government respondents using the service argument in order to prevent human rights tribunals from hearing discrimination complaints concerning their programs, policies and activities. Part II of this article summarizes the scope of the application of human rights legislation in Canada and examines discrimination cases decided in the 1980s and 1990s, which established that government programs and policies were interpreted as services under human rights legislation. *Hughes v Elections Canada,* a federal discrimination complaint brought against Elections Canada, is examined as an integral case study highlighting that human rights tribunals have generally cast the net of activities covered under services quite widely.[6]

Part III of this article examines recent cases in which government respondents have argued that government actions are not services under human rights statutes and assesses the degree of these government respondents' success. The claim that members of equality-seeking groups are gaming the system – or forum shopping – when they choose to lodge a human rights complaint regarding a government service instead of mounting a section 15 *Charter* challenge is also considered. Here, it is shown that, by making service arguments, government respondents are themselves gaming the system by attempting to limit avenues of recourse for discrimination claims. In conclusion, some important changes in the human rights legal landscape that may impact the strategies of government respondents are examined.

II. Traditional Approaches to Human Rights Complaints Involving Government Services

There is little doubt that most early Canadian anti-discrimination statutes and regulations were intended to apply only to narrow categories of activities that were commercial in nature, such as insurance, hall rentals and signage.[7]

of Canadian Equality Rights" (2013) 63 SCLR 261.

[6] *Hughes v Elections Canada*, 2010 CHRT 4 [*Hughes*].

[7] In 1932, an amendment was made to Ontario's insurance legislation to prohibit discrimination in risk assessment. See *Insurance Act,* SO 1932, c 24. *The Racial Discrimination Act*, SO 1944, c 51 is widely regarded as the precursor to human rights statutes in Canada. It prohibited discrimination in the publication and display of any notice, sign, symbol, emblem or any other representation indicating discrimination or intent to discriminate on the basis of race or creed. A regulation passed in 1944 in Ontario prohibited the denial of use of publicly funded halls for religious, fraternal or political reasons. See O Reg 67/44, s 6. Ontario later adopted statutes forbidding discrimination in employment and accommodation. See, *contra* the *Social Assistance Act*, SBC 1945, c 46, s 8 which prohibited discrimination on the basis of race, colour, creed or political affiliation in the administration of social assistance. *The Saskatchewan Bill of Rights Act,* SS 1947, c 35 prohibited discrimination in similar contexts as the *Human Rights Code* of Ontario. It also recognised the right to education without discrimination and purported to bind the Crown. See also Walter S Tarnopolsky J, "Discrimination in Canada: Our History and Our Legacy" (Paper delivered at the Canadian Institute for the Administration of Justice conference on Discrimination in the Law and the Administration of Justice, Kananaskis, Alberta, October 1989), online (pdf): *Canadian Institute for the Administration of Justice* <ciaj-icaj.ca/wp-content/uploads/documents/import/1989/TARNOPOL.

When Ontario adopted Canada's first comprehensive human rights legislation in 1962, the province incorporated its existing legislation that prohibited discrimination in various contexts into it, including "accommodation, services or facilities available in any place to which the public is customarily admitted".[8] All other Canadian jurisdictions ultimately followed suit by enacting legislation that prohibited discrimination in similar social areas.[9] The adoption of "services" in the scope of the application of anti-discrimination statutes across the country marked a significant advancement in Canadian human rights legislation because the term came to be interpreted as a type of catchall category that also includes services provided by governments.

The first time the Federal Court of Canada ("FC"), called the Federal Court Trial Division at the time, weighed in on the definition of the term service under the *Canadian Human Rights Act* ("*CHRA*") was in *Canada (Attorney General) v Cumming* in 1979.[10] The case involved federal human rights complaints about *Income Tax Act* provisions that prevented some individuals from benefitting from deductions. One complaint challenged provisions that prevented common law spouses from benefitting from income tax deductions available to those who were married, and the other related to provisions setting additional requirements for men deducting childcare expenses from their income.[11]

The Attorney General of Canada ("AG") raised the service argument to try to prevent the Canadian Human Rights Tribunal ("CHRT") from inquiring into the complaints.[12] In an application for a writ before the Federal Court Trial Division, the AG argued that the Department of National Revenue, in assessing taxes, was not engaging in the provision of services within the meaning of the *CHRA*.[13] It also maintained that the CHRT did not have jurisdiction to hear the

pdf?id=1591&1586285185> [perma.cc/4Y2L-J4AX].

8 *Ontario Human Rights Code*, SO 1962, c 93, s 2. The provision forbidding discrimination in "accommodation, services or facilities" came from the *Fair Accommodation Practices Act*, SO 1954, c 28. For a detailed history of Canada's human rights laws, see Dominique Clément, "Renewing Human Rights Law in Canada" (2017) 54:4 Osgoode Hall LJ 1311.

9 Clément, *supra* note 8 at 1317.

10 *Canada (Attorney General) v Cumming et al*, [1980] 2 FC 122, 103 DLR (3d) 151 [*Cumming*]. For a history of the *CHRA*, see Dominique Clément, Will Silver & Daniel Trottier, *The Evolution of Human Rights in Canada* (Ottawa: Can Hum Rts Commission, 2012) at 25–28, online (pdf): <chrc-ccdp.gc.ca/eng/content/evolution-human-rights-canada> [perma.cc/L88N-SSDP]. However, *Re Lodge et al v Minister of Employment and Immigration*, [1979] 1 FC 775 at paras 1, 4, 22, 94 DLR (3d) 326, appears to be the first time the Federal Court of Appeal (at the time of this case, this court was called the Federal Court of Canada – Appeal Division) dealt with an appeal involving the *CHRA*. In particular, the Federal Court of Appeal was asked to grant an injunction to restrain the Minister of Employment and Immigration from deporting a landed immigrant, pending the determination of his human rights complaint alleging discrimination in "internal directives and secrets laws" in the department. The Federal Court of Appeal dismissed the appeal and declined to express an opinion as to whether a deportation order was a service within the meaning of the *CHRA*.

11 *Bailey v Canada (Department of National Revenue)*, 1980 CanLII 5 (CHRT), 1 CHRR D/1933 [*Bailey*].

12 *Cumming*, *supra* note 10 at para 19.

13 *Ibid.*

complaint because the impugned differentiation was prescribed by law which the Department was bound to follow.[14] The CHRT could not, it was argued, abrogate or alterate another law if it conflicted with the *CHRA*.

The FC dismissed the AG's application. In particular, it rejected the AG's service argument, stating it was "not prepared to accept the broad proposition that … assessing taxes" was not a service under section 5 of the *CHRA*.[15] In its reasons, the FC emphasized that "[t]he statute is cast in wide terms and both its subject-matter and its stated purpose suggest that it is not to be interpreted narrowly or restrictively" and that it was not "clear and beyond doubt that the Tribunal [was] without jurisdiction".[16] The FC declined to rule on the AG's second argument. Rather, it held that the question of whether the Department was engaging in unlawful discrimination by acting in accordance with legislative provisions in the *Income Tax Act* ought to be left to the CHRT to decide.

In accordance with the FC's decision, the complaints were sent back to the CHRT to inquire into the merits of the allegations of discrimination and to determine whether a differentiation prescribed by law could constitue a breach of the *CHRA*. Emboldened by the FC's dicta on the issue, the CHRT showed no hesitation when determining that the provisions of the *Income Tax Act* were services within the meaning of the *CHRA*. Pointing to Canada's international human rights law obligations and Parliamentary debates prior to the statute's adoption, the CHRT found that the *CHRA* could apply to other federal statutes.[17] The CHRT then discussed the various facets of government activities that could constitute services within the meaning of the *CHRA*, stating:

> The federal government provides services to the general population. Services are provided both through legislative enactment (for example, the family allowance) and in administering its responsibilities as established by the legislation enacted by Parliament (for example, providing the appropriate information and forms to citizens to be able to obtain family allowance, as well as sending out family allowance cheques, etc.).[18]

The CHRT's ruling in *Bailey* on services marked a clear departure from past thinking about services as being limited to commercial activities found in early anti-discrimination laws. The decision clarified that the *CHRA* also applied to activities that were non-commercial in nature, such as government services and activities.[19] It is worth noting, however, that the outcome was

[14] *Ibid* at para 11.
[15] *Ibid* at para 20.
[16] *Ibid* at paras 20, 23.
[17] *Bailey*, *supra* note 11 at 62, 66, 71.
[18] *Ibid* at 76.
[19] See Clément, Silver & Trottier, *supra* note 10 at 7, 11. See also *supra* note 11.

not favourable for the complainants. After finding the distinction based on common law spousal status had the effect of "denying equality of opportunity" to certain taxpayers based on their marital status,[20] the CHRT ruled that it did not have the required powers to remedy the discrimination.[21] The CHRT reasoned that it could not "amend the legislation to provide deductions to the Complaints"[22] because the *CHRA* did not expressly allow it "to make an order rendering a statutory provision inoperative."[23] Instead, the CHRT held that the most it could do was to "declare that a statutory provision *should* be rendered inoperative."[24] In practice, this left the complainants in *Bailey* without an effective remedy, even though their allegations of discrimination were within the CHRT's jurisdiction and substantiated. The CHRT appeared uneasy with this outcome, calling it an "anomaly".[25] However, neither party sought judicial review, leaving the peculiar decision unchallenged.

A CHRT decision upheld by the Federal Court of Appeal ("FCA") later changed the state of the law on human rights tribunals' remedial powers in cases involving legislative provisions.[26] In *Canada (Attorney General) v Druken*, Carla Druken challenged provisions and regulations of the former *Unemployment Insurance Act* ("*UIA*"), which prohibited her receipt of benefits because she had been employed by her spouse.[27] Druken alleged discrimination on the basis of her family and/or marital status, contrary to the *CHRA*.

The CHRT agreed and ordered the Canadian Employment and Immigration Commission to cease applying certain *UIA* provisions and regulations found to be discriminatory.[28] This remedy was coupled with an order requiring the respondent to compensate the complainants for the expenses they incurred as a result of the discrimination and for their pain and suffering.[29]

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[20] *Bailey*, *supra* note 11 at 102–103, 106, 108.

[21] *Ibid* at 111–16.

[22] *Ibid* at 112.

[23] *Ibid* at 111.

[24] *Ibid* [emphasis added].

[25] *Ibid*. In *Morrell v Canada (Employment and Immigration Commission)*, [1985] 6 CHRR D/3021, 8 CCEL 112 [*Morrell*] at para 21, tribunal member Robert Kerr used harsher language to describe the outcome in *Bailey*. He stated that "there would appear to be little purpose served in making such discrimination subject to the Act at all."

[26] It is noted following the release of *Bailey*, the CHRT held that the *CHRA* was not intended to override conflicting statutory provisions. See *Morrell*, *supra* note 25 at para 29.

[27] *Canada (Attorney General) v Druken*, [1989] 2 FC 24, 53 DLR (4th) 29 [*Druken*]; see also *McMillan v Canada (Employment and Immigration Commission)*, 1987 CanLII 99, 8 CHRR D/4379 [*McMillan*]. More specifically, the impugned legislation and regulations were the *Unemployment Insurance Act*, 1971, SC 1970-71-72, c 48 [*UIA*] and *Unemployment Insurance Regulations*, CRC 1978, c 1576, which excluded employment of a person by his or her spouse from the definition of insurable employment. This meant that individuals employed by their spouses could not qualify for benefits under the *UIA*. *Druken* was overturned in *Public Service Alliance of Canada v Canada (Revenue Agency)*, 2012 FCA 7 [*Murphy*], which will be discussed in Part III of this article.

[28] *McMillan*, *supra* note 27 at 11.

[29] *Druken, supra* note 27 at para 10.

It is noteworthy that the government respondent did not pursue the issue of whether the impugned provisions of the *UIA* constituted a "service customarily available to the general public" before the CHRT or the FCA.[30] The *UIA* and the benefit it conferred were assumed to be services and within the purview of the CHRT's jurisdiction. The FCA quoted their ruling in *Singh,* stating "the qualifying words of s. 5, 'provision of ... services ... customarily available to the general public', can only serve a limiting role in the context of services rendered by private persons or bodies; that, by definition, services rendered by public servants at public expense are services to the public and therefore fall within the ambit of s. 5."[31]

The central point of contention in the *Druken* appeal was whether the CHRT had jurisdiction to order the respondent to stop applying the discriminatory provisions of the *UIA*. The AG argued that the CHRT lacked authority to make general declarations of invalidity or order that legislation cease to be applied.[32] The FCA rejected this argument, finding it inconsistent with the CHRT's remedial powers.[33] Justice Mahoney noted that the *CHRA* conferred on the CHRT the power to make an order aiming to prevent similar discriminatory practices from occurring in the future.[34] Endorsing the CHRT's systemic remedy, the FCA said that the provision was "not intended only to prevent repetition of the discriminatory practice vis-à-vis the particular complainant; it is intended to prevent its repetition at all by the person found to have engaged in it."[35] Due to the provision's systemic nature, the order to cease applying the impugned provisions appeared "entirely apt."[36]

Druken, as well as *Bailey*, illustrate an important element of "first generation" human rights cases relating to government services. During the 1980s and 1990s, it was generally assumed that most government activities were services under the *CHRA*.[37] *Bailey* and *Druken* paved the way for a panoply of human

[30] *Ibid* at para 3. The argument was raised in the Attorney General's written submissions but not pursued during the hearing.

[31] See *Druken, supra* note 27 at para 3 citing *Singh (Re)*, [1989] 1 FC 430, 51 DLR (4th) 673. See also *Watkin v Canada (Attorney General)*, 2008 FCA 170 at para 33. The FCA in *Watkin* has taken a different position and held that "the fact that the actions are undertaken by a public body for the public good cannot transform what is ostensibly not a service into one."

[32] *Druken, supra* note 27 at para 13.

[33] *Ibid*.

[34] *Ibid* at para 9.

[35] *Ibid* at para 13.

[36] *Ibid*. However, the court also noted that there are "numerous grounds upon which a claimant for employment insurance benefit may be disentitled or disqualified which may not be properly ruled on by a human rights tribunal." Because it could not be inferred from the evidence in this case that the complainants would have qualified for the benefits but for the discriminatory criteria, it concluded that the proper order was to direct the respondent to process their claims for benefits once again in a manner consistent with the findings in the ruling. See *ibid* at para 15.

[37] Litigation during this time relating to the scope of the application of human rights in services cases focused instead on whether they were customarily available to the public. See Mummé, *supra* note 4 at 132.

rights complaints relating to government services, including challenges to deportation orders, police services, education funding for students with disabilities and statutory provisions adjudicated during that period.[38]

A. Hughes: A Case Study Relating to Government Services

Hughes, decided by the CHRT in 2010, exemplifies the traditional approach of human rights tribunals when dealing with discrimination complaints involving government services.[39] Although a "first generation" public service case, *Hughes* was released at the cusp of what would become a new era for such claims. This era is characterised by increased efforts of government respondents to game their way out of a legal system that, over prior decades, has shown itself to be responsive to the needs of equality claimants.

James Peter Hughes was a man with a physical impairment who encountered several barriers while attempting to vote in two separate 2008 federal elections. In the first election, the polling station where he voted did not have an accessible entrance, and the polling booths blocked his path when attempting to vote.[40] Mr. Hughes complained verbally on the day of the election and in writing following the incident. Despite these complaints, Elections Canada never followed up with Mr. Hughes. In the second election seven months later, he encountered the same barriers again.[41] In his human rights complaint, Mr. Hughes alleged that Elections Canada's inaccessible polling stations, failure to investigate and respond to his complaints discriminated against him on the basis of his disability.[42]

The CHRT rendered its decision on Mr. Hughes' case in February 2010 following a five-day inquiry.[43] All of Mr. Hughes' allegations of discrimination were upheld. Elections Canada admitted its liability for having differentiated adversely on the basis of Mr. Hughes' disability in the provision of a service contrary to section 5(b) of the *CHRA*, by failing to offer accessible voting stations.[44] The CHRT also found that Elections Canada had violated the *CHRA* by failing to ensure barrier-free access to voting and by its "sub-standard investigation" of the written and verbal complaints.[45] In particular, the CHRT

[38] See Mummé, *supra* note 4 at 114–19, where the author cites a host of successful human rights complaints relating to government services adjudicated in the 1980s.

[39] *Hughes, supra* note 6.

[40] *Ibid* at paras 11–12.

[41] *Ibid* at paras 18–19.

[42] *Ibid* at para 1.

[43] Prior to the hearing, the Council of Canadians with Disabilities ("CCD") brought a motion to be added as an interested party. The motion was granted and the CCD was allowed to make written and oral arguments. See *ibid* at para 4. A week before the hearing on the merits, counsel for the Canadian Human Rights Commission indicated that it would not participate in the hearing. See *ibid* at para 3.

[44] *CHRA, supra* note 1, s 5(b). The facts upon which this liability was based are listed in *Hughes, supra* note 6 at para 56.

[45] *Hughes*, *supra* note 6 at para 59.

held that the denial of a barrier-free election constitutes a violation of section 5(a) of the *CHRA*. It also held that the failure to properly investigate Mr. Hughes' complaint amounted to a violation of sections 5(a) and 5(b) of the *CHRA*. Section 5(b) prohibits service providers from differentiating "adversely in relation to any individual" on a prohibited ground of discrimination.[46] To the CHRT, the facts giving rise to these violations "clearly indicate[d] a systemic problem."[47] The CHRT described the systemic nature of the discrimination and its source as follows:

> [T]he problem is not so much the standards or policies on accessibility, or EC's training in regard to them. They can be improved no doubt, updated, etc. To its credit, EC has indicated a willingness to engage in this process and with the involvement of the other parties. The problem is more in the nature of the policies and guidelines and training not being followed or applied by EC officials. There was also a stark problem in EC's internal mechanisms for handling complaints about access barriers to voting by persons with disabilities.[48]

The CHRT also found that there was a lack of communication between Elections Canada employees at headquarters in Ottawa and those employed in polling stations on election day.[49]

Based on these findings of systemic discrimination, the CHRT issued a series of orders to redress the discriminatory practices it identified. Firstly, the CHRT ordered Elections Canada to cease from situating polling stations in locations that "do not provide barrier-free access".[50] Secondly, the CHRT ordered Elections Canada to revise its standard lease for polling stations to include the requirement that the premises provide level access and are barrier free.[51] Thirdly, the CHRT ordered Elections Canada to work with the complainants and the Council of Canadians with Disabilities ("CCD") to review and update training materials dealing with accessibility issues.[52] Further, the CHRT ordered that Elections Canada create, publicize and report on complaint processes.[53] Lastly, the CHRT ordered the Canadian Human Rights Commission to monitor the implementation of its orders.[54]

Given that this process was to be in collaboration with the Commission, the complainant and the CCD, Elections Canada was ordered to pay for the

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[46] *Ibid*. See *CHRA*, *supra* note 1, s 5(a)–(b) which prohibits the denial of access to a service to an individual on a prohibited ground of discrimination.

[47] *Hughes, supra* note 6 at para 68. It is instructive to examine the exchange between the respondent's counsel and the tribunal member presiding over the hearing, reproduced at para 68, when seeking to understand what constitutes systemic discrimination and how it can be proven.

[48] *Ibid* at para 71.

[49] *Ibid* at para 72.

[50] *Ibid* at para 100.

[51] *Ibid*.

[52] *Ibid*.

[53] *Ibid*.

[54] *Ibid*.

reasonable expenses of the CCD and the complainant to participate in this process.[55] Elections Canada was also ordered to implement an election-day accessibility verification procedure, to review its policies and guidelines about accessibility and to provide sufficient and appropriate signage at elections, including the universal accessibility symbol.[56] Finally, the CHRT awarded Mr. Hughes $10,000 as compensation for the pain and suffering he experienced due to Elections Canada's discriminatory practices.[57]

Much like *Druken*, *Hughes* shows that human rights legislation applied to government services without much contention. In fact, the CHRT described the services at issue in the complaint broadly, specifying that "public information, barrier-free voting locations and polling stations, polite interaction of its officials with the voters, and the facilitation of accessible voting for all" were all covered by the *CHRA*.[58] This characterisation was consistent with previous human rights case law in which it was held that the scope of the application of the *CHRA*, and all human rights legislation, ought to be interpreted as broadly as possible.[59]

III. Gaming the System?

Victories like the one in *Hughes* are not uncommon in the human rights legal system. Indeed, in an illuminating study comparing the outcomes of section 15 *Charter* challenges to those of human rights complaints, Bruce Ryder found that human rights complaints were at least twice as likely to succeed as section 15 *Charter* challenges. According to Ryder, this comparative success rate, coupled with the absence of Court Challenges Program funding to bring section 15 constitutional challenges from 2006 to 2019, made human rights systems the recourse of choice for those alleging discrimination due to a government service or activity.[60]

Government respondents seem to have taken notice of this. Confronted with an increasing number of cases in a terrain that is hospitable to discrimination claims, government respondents have begun to advance arguments that they ought to be treated differently from and in effect more leniently than other respondents.

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[55] *Ibid*.

[56] *Ibid*.

[57] *Ibid* at para 62.

[58] *Ibid* at para 53. The CHRT notes that the complainant and the CCD disagreed with the respondent about whether the complaint related to the denial of a service under s 5(a) or an adverse differentiation under s 5(b) of the *CHRA*. Both relate to the discriminatory provision of a service. In other words, the respondent accepted that elections were a service under the *CHRA*.

[59] See e.g. *Canada (House of Commons) v Vaid*, 2005 SCC 30; *CN v Canada (Canada Human Rights Commission)*, [1987] 1 SCR 1114 at para 24, 40 DLR (4th) 193. See also *Dopelhamer v Workplace Safety and Insurance Board*, 2009 HRTO 2056 at para 9.

[60] See Ryder, *supra* note 5 at 270–272.

There are three main examples of these arguments. Firstly, governments facing discrimination complaints have argued that some of their activities are not services under human rights legislation and are therefore outside the purview of these statutes.[61] Secondly, when these arguments fail, they have used *Charter* principles to argue the CHRT should allow them to play by different rules than other respondents. Specifically, government respondents seek to import the stricter section 15 *Charter* analysis into human rights adjudication.[62] Thirdly, government respondents have also claimed that human rights tribunals should refrain from making remedial orders against them or that the orders ought to be more limited.[63] Simply put, when government respondents fail to force equality claimants to launch constitutional challenges rather than discrimination complaints by making the service argument, these government respondents have sought to dilute the human rights legal system with *Charter* principles. The first argument will be examined below.

A. Claims that Government Actions are Not Services Under Human Rights Legislation

Though uncontroversial in the past, the interpretation of the term services has become the new target of government respondents in their strategic offense against human rights complaints relating to government programs, policies and laws.[64] In some cases, the arguments advanced by

[61] See Mummé, *supra* note 4.

[62] The implications of importing the s 15 analysis into human rights case law have been written about extensively. See e.g. Denise Réaume, "Defending Human Rights Codes from the Charter" (2012) 9 JL & Equality 67. See also Leslie A Reaume, "Postcards from O'Malley: Reinvigorating Statutory Human Rights Instruments in the Age of the Charter" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 373 and Andrea Wright, "Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 409. See also, Ryder, *supra* note 5 at 262–64, 267–68 where the author compares the 10-point test, consuming five pages in the Supreme Court Reports, of the *Law* analysis to the *prima facie* standard applied in the human rights context. While the author notes that the Court sought to "better align its jurisprudence with section 15's objective of promoting substantive equality", in more recent cases such as *R v Kapp,* 2008 SCC 41 and *Withler v Canada (Attorney General),* 2011 SCC 12, he maintains that the general approach to *Charter* equality claimants remains "fluctuating, verbose, demanding and anxious".

[63] See e.g. *First Nations Child & Family Caring Society of Canada v Canada (Minister of Indigenous and Northern Affairs),* 2018 CHRT 4 at paras 21–68 [*Caring Society (2018)*].

[64] See Mummé, *supra* note 4 at 103. For examples from the Human Rights Tribunal of Ontario, see *Baird v Workplace Safety and Insurance Appeals Tribunal*, 2009 HRTO 99; *Barker v Service Employees International Union*, 2009 HRTO 1253; *Lindberg v Caron-Adam*, 2009 HRTO 463; *Dann v Wallace*, 2009 HRTO 392; *Caldeira v Workplace Safety and Insurance Board*, 2009 HRTO 973; *Debowska v Francis*, 2009 HRTO 488; *Zaki v Ontario (Ministry of Community and Social Services)*, 2009 HRTO 1595; *McKinnon v Ontario (Community and Social Services)*, 2009 HRTO 1161; *Christianson v Ontario (Information and Privacy Commissioner)*, 2009 HRTO 203. For examples from federal courts, see *Canada (Attorney General) v Watkin,* 2008 FCA 170 and *Forward v Canada (Citizenship and Immigration),* 2008 CHRT 5.

government respondents, if accepted, would result in shielding a broad range of government activities from human rights scrutiny. The objective of government respondents here is clearly to leave complainants with no other option than to bring a challenge under section 15 of the *Charter*, a recourse known to be costlier, more likely to fail and to offer less exhaustive remedies compared to human rights claims.[65] Cases in which these arguments were put forward by government respondents will be discussed below.

i. *The* Caring Society *Cases*

Caring Society concerned a human rights complaint against the Minister of Indian Affairs and Northern Development related to services provided to First Nations children.[66] Funded by the Government of Canada, the services at issue were generally provided by child welfare agencies located on reserves across the country.[67] The AG argued that the CHRT did not have jurisdiction to hear the complaint by claiming that Canada was a funder and not a provider of the services at issue. The AG maintained mere funding was not a service under the *CHRA*. This argument was first advanced in a motion to strike filed by the AG before the CHRT.[68] The CHRT, the FC and the FCA declined to deal with the AG's service arguments after deciding the motion to strike on other grounds. After it was ultimately unsuccessful in its motion to strike and following a 72-day hearing, the AG again raised the service argument in its written submissions, arguing:

> The funding at issue is provided on a government to government or government to agency basis and follows a process of discussion and implementation. Individual First Nations children and their families are not invited or expected to participate in the creation of these funding arrangements. […] As a result, the funding itself is not being held out as a service to the public. Rather, the benefit that is being held out as

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[65] Ryder, *supra* note 5 at 270–272, 277, 292.

[66] *First Nations Child and Family Caring Society of Canada et al v Canada (Minister of Indian Affairs and Northern Development)*, 2016 CHRT 2 [*Caring Society (2016)*].

[67] The Government of Canada funds child and family services on reserves and in the Yukon pursuant to different funding formulas and agreements. At the time the complaint was lodged, there were 105 First Nations Child and Family Services Agencies (FNCFS) across Canada (104 at the time of the hearing). These agencies were funded pursuant to two funding formulas: Directive 20-1 and the Enhanced Prevention Focused Approach. In Ontario, funding was and still is provided through the *1965 Agreement*, which is a cost-sharing agreement. Canada also has cost-sharing agreements with Alberta and British Columbia for certain child welfare services. See *Caring Society (2016)*, *supra* note 66 at paras 46, 121.

[68] *First Nations Child and Family Caring Society of Canada v Canada (Minister of Indian Affairs and Northern Development)*, 2011 CHRT 4 at paras 26, 124–127, 141 [*Caring Society (2011)*]. This decision was overturned at the Federal Court in *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 [*Caring Society (2012)*]. The Federal Court's decision was upheld by the Federal Court of Appeal in *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2013 FCA 75 [*Caring Society (2013)*]. None of the parties sought judicial review of the Tribunal's decision on the services issue. That issue was thus not before the Federal Court or the Federal Court of Appeal. See *Caring Society (2011)*, *supra* note 68 at paras 8, 95–97, 141. The services issue was raised again by the Attorney General when the matter was returned before the Tribunal.

> a service and offered to the public are the provincially mandated child prevention and protection services that the agencies (and not the Respondent) directly provide to individual First Nations children and their families.[69]

The CHRT rejected the AG's characterisation of Canada's role in the delivery of child welfare services to First Nations children as that of a mere funder.[70] Finding that Canada was heavily involved in the design and delivery of child welfare services and their objectives, the CHRT concluded that the respondent was providing a service pursuant to the *CHRA*.[71] Most notably, the CHRT also found that even if Canada's role in child welfare services would have been limited to funding, which was not the case, it would still constitute a service under the *CHRA*.[72]

In finding that providing funding constitutes a service, the CHRT provided two important clarifications. Firstly, it emphasized that the government cannot evade its human rights obligations by delegating the delivery of a service to a third party.[73] This is significant as government programs and services such as education and special education,[74] health care services and government bursaries[75] are regularly funded by provincial or federal governments but delivered through other intermediaries. Such circumstances will certainly arise more frequently with the increased privatisation of government services.[76] In all of these situations, government respondents remain bound by applicable human rights legislation and liable in cases of discrimination.

Secondly, the CHRT also emphasized that the exertion of a significant influence over a benefit or assistance provided to the public constitutes a service under the *CHRA*.[77] In other words, the notion of service is intrinsically tied to the notion of control. The service provider is defined as the party that has the power to remedy a discriminatory practice and improve outcomes and is not necessarily the individual or entity responsible for the direct delivery of the service. This conclusion is of particular importance for First Nations in Canada who often receive services from federally funded local not-for-profit corporations and band councils. As Canada begins to implement measures that it claims will affirm the rights of First Nations over certain services

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[69] Attorney General of Canada, "Respondent's Closing Statement" (3 October 2014) at paras 134–35, online (pdf): *First Nations Child & Family Caring Society* <fncaringsociety.com/sites/default/files/Federal%20Government%20Closing%20Statements.pdf> [perma.cc/D22G-XP6X].

[70] *Caring Society (2016)*, *supra* note 66 at paras 45, 427, 457, 482.

[71] *Ibid* at para 53.

[72] *Ibid* at paras 40–45.

[73] *Ibid* at para 84.

[74] *Moore v British Columbia (Education)*, 2012 SCC 61.

[75] *Arnold v Canada (Human Rights Commission)*, [1997] 1 FC 582, 119 FTR 241.

[76] Gwen Brodsky, "Governments as Interpreters and Shapers of Human Rights" in Shelagh Day, Lucie Lamarche & Ken Norman, eds, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014) 37.

[77] *Caring Society (2016),* supra note 66 at para 85.

without guaranteeing their equitable funding, the CHRT may likely be called to reiterate this principle in the future.[78]

ii. *The* Matson *Case*

The question of excluding government funding from the scope of the application of human rights legislation has been laid to rest for now. However, the battle regarding the application of anti-discrimination statutes to government services will likely intensify on another front as a result of the Supreme Court of Canada's ("SCC") 2018 decision in *Canada (Human Rights Commission) v Canada (Attorney General)*, referred to as *Matson*.[79] *Matson* concerned a CHRT decision on two human rights complaints which alleged that provisions of the *Indian Act* were discriminatory.[80]

The complainants alleged that because of their matrilineal First Nations heritage they were treated differently under the *Indian Act* than others with paternal First Nations heritage. They argued that the registration provisions applicable to them within the *Indian Act* were discriminatory on the basis of sex, family status, race, national origin and/or ethnic origin contrary to section 5 of the *CHRA*.[81]

The AG brought a motion to strike before the CHRT, arguing that legislation is not a service under the *CHRA*.[82] It argued that complainants should be required to bring a *Charter* challenge instead of a human rights complaint because Canada was "entitled to justify the law not by showing reasonable accommodation, but by a section 1 analysis under the *Charter*."[83]

The CHRT accepted the AG's claim that it did not have the jurisdiction to examine two complaints aimed exclusively at attacking provisions of the *Indian Act* or, as the CHRT panel put it, "a challenge to legislation and nothing else".[84] The CHRT acknowledged that *Druken* established the precedent that human rights tribunals have the power to examine compliance of other

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[78] For an example of such a measure, see Naiomi Walqwan Metallic et al, *"Bill C-92: An Act Respecting First Nations, Inuit and Métis children, Youth and Families"* (July 2019), online: *Yellowhead Institute* <yellowheadinstitute.org/bill-c-92-analysis/> [perma.cc/BRC3-TLK5].

[79] *Canada (Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 [*Matson*].

[80] *Ibid* at para 1.

[81] *Ibid* at paras 5, 8, 10, 59, 93.

[82] Attorney General of Canada, "Memorandum of Fact and Law of the Attorney General of Canada" (15 August 2017) at paras 40–41, 53, 55, 70–82, 117, online (pdf): *Supreme Court of Canada* <scc-csc.ca/WebDocuments-DocumentsWeb/37208/FM020_Respondent_Attorney-General-of-Canada.pdf> [perma.cc/T9BA-5VEL]. The CHRT heard two similar complaints around the same period. See *Matson v Canada (Indian and Northern Affairs)*, 2013 CHRT 13 at paras 1–2 [*Matson 2013 (CHRT)*]. This complaint was filed by Jeremy and Mardy Matson, and Melody Schneider. The second complaint was filed by Roger William Andrews, on behalf of his daughter Michelle. The decision relating to this complaint is *Andrews v Canada (Indian and Northern Affairs)*, 2013 CHRT 21. The Human Rights Commission sought the joint judicial review of these two decisions.

[83] *Matson 2013 (CHRT)*, *supra* note 82 at para 44.

[84] *Ibid* at paras 45–54.

statutes with anti-discrimination legislation and order them to cease applying when non-compliant.[85] However, it opted to apply *Public Service Alliance of Canada v Canada Revenue Agency*, referred to as *Murphy*, instead.[86]

In *Murphy*, the FCA held that provisions relating to the characterization of lump sum payments received through settlements for income tax purposes were not services under the *CHRA* and therefore outside the jurisdiction of the CHRT.[87] The FCA in *Murphy* had declined to follow *Druken*, because the respondent in *Druken* had conceded that the operation of a statute was a service under the *CHRA*. Therefore, the operation of a statute constituting a service was not argued.[88] The CHRT sought to reconcile *Druken* with *Murphy* by holding that the *Druken* complaint was "couched in" a discriminatory practice and therefore aimed to challenge more than just a legislative provision.[89] The FC and the FCA agreed with the CHRT's decision.[90]

In *Matson*, the AG argued at every level of court that the *mere act of lawmaking* was not a service under human rights legislation.[91] According to this position, a human rights complaint relating to a statutory government action could survive, provided that the complainant could show the government action related to a "benefit being held out or offered to the public".[92] During oral arguments before the SCC, the AG departed from this more moderate position advanced before the CHRT, the FC, the FCA and in its written argument.[93] Instead, the AG argued broadly that *all* government services which are legislatively mandated should be excluded from the scope of the application of human rights legislation.[94] Much like the position taken by the government respondent in the *Caring Society* cases, this argument, if accepted, would result in the exclusion of a broad range of government

[85] *Ibid* at para 102.
[86] *Murphy, supra* note 27.
[87] *Ibid* at para 2.
[88] *Ibid* at para 7.
[89] *Matson 2013 (CHRT), supra* note 82 at para 107.
[90] *Ibid* at paras 143–150; *Canada (Human Rights Commission) v Canada (Indian and Northern Affairs)*, 2015 FC 398 at paras 36–123 [*Matson 2015*]; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2016 FCA 200 at paras 89–104 [*Registration*].
[91] This was the ratio in *Freitag v Penetanguishene (Municipality)*, 2009 HRTO 1712 at paras 12, 20, in which the HRTO dismissed an application against the Legislative Assembly of Ontario. In quoting the Supreme Court of Canada in *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at para 61, 83 DLR (4th) 297, the Vice-Chair of the HRTO, Judith Keene, held that "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle".
[92] Attorney General of Canada, *supra* note 82 at para 78.
[93] *Matson 2015*, *supra* note 90 at para 39*; Registration*, *supra* note 90. See also Attorney General of Canada, *supra* note 82 at para 98.
[94] During *Matson*, Rowe J specifically asked whether government services of an "operational" nature ought to be immune from review under the *CHRA* simply because they were provided in accordance with legislation. The Attorney General confirmed that this was its position. "Webcast of the Hearing on 2017-11-28" (28 November 2017) at 02h:13m:00s, online (video): *Supreme Court of Canada* <scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=37208&id=2017/2017-11-28—37208&date=2017-11-28&audio=n> [perma.cc/EGS7-83QZ].

activities from the scope of human rights legislation, including government operated housing, ferries and stores in remote communities.[95]

The SCC dismissed the appeal.[96] Justice Gascon, writing for the SCC majority, agreed with the CHRT's determination that legislation in itself is not necessarily a service within the meaning of the *CHRA*. Specifically, the majority held that the CHRT's decision was reasonable considering the guidance of the FCA in *Murphy* and its characterisation of the complaint as one that solely targeted legislation.[97] The majority held that complaints targeting legislation could be considered services under the *CHRA* if justified in the particular circumstances of a case.[98]

In other words, the *Matson* complaint failed because the CHRT found that it was a challenge to legislation and nothing else.[99] It appears the impugned legislative provisions could have been challenged indirectly by a human rights complaint focused on the denial of a benefit caused by a lack of Indian status. This proposition is in fact supported by the majority's dicta in the case. It emphasized that "where a discriminatory practice without *bona fide* justification is established, the Tribunal has the power to order administrators to stop applying conflicting provisions."[100]

Still, *Matson* represented a devastating blow to the two complainants who were amongst the growing chorus of voices that had been calling for a definite end to sex discrimination against First Nations women and their descendants due to the *Indian Act*.[101] Less than a year after the release of *Matson*, the United Nations Human Rights Committee ("UN Human Rights Committee") found Canada to be in violation of the *International Covenant on Civil and Political Rights* and urged the country to provide an effective remedy.[102] The UN

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[95] *Ibid.* Rowe J specifically asked the Attorney General if it claimed that these services ought to be excluded from human rights scrutiny.

[96] Côté and Rowe JJ issued joint concurring reasons agreeing with the service issue, as did Brown J in his concurring reasons. However, Côté and Rowe JJ were of the view that a complaint must focus on the discriminatory discretion exercised pursuant to statue for it to be a service under human rights law. See *Matson*, *supra* note 79 at para 97.

[97] *Ibid* at paras 56–58, 60, 66.

[98] *Ibid* at para 57.

[99] *Ibid* at paras 45-60.

[100] *Ibid* at para 61.

[101] For an accessible but comprehensive primer on the longstanding and ongoing discrimination in the *Indian Act*, see "Equal Status for Women in the Indian Act: the *Indian Act* and Bill S-3" (2017), online (pdf): *Feminist Alliance for International Action* < fafia-afai.org/wp-content/uploads/2017/10/Equal-Status-for-Women-in-the-Indian-Act-2.pdf> [perma.cc/F8YU-7XYK]. Senator Lillian Dyck, Senator Sandra Lovelace-Nicholas, Jeanette Corbiere Lavell, Yvonne Bedard, Sharon McIvor and Dr Lynn Gehl, who are commonly referred to as the ''Famous Six'', have spearheaded various public campaigns, law reform initiatives and constitutional challenges aiming to put an end to the sex discrimination existing in the *Indian Act* since 1876. The Feminist Alliance for International Action has also been instrumental in this advocacy.

[102] In particular, the Government of Canada was found to be in violation of articles 3 and 26, read in conjunction with article 27 of the UN General Assembly. *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), online (pdf): *Refworld* <refworld.org/

Human Rights Committee decision was the wind in the sails of the decades-long campaign of First Nations and human rights advocates calling for Canada to end sex-based inequalities in the *Indian Act*.[103]

On August 5th, 2019, Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général),* came into force.[104] While Bill S-3 represents an important victory for many, it does not address some of the allegations of discrimination raised in *Matson*. Jeremy Matson has thus taken his concern to the United Nations Committee on the Elimination of Discrimination against Women ("CEDAW").[105] At the time of writing, the CEDAW had not yet ruled on Mr. Matson's petition. A favourable decision by CEDAW may compel Canada to finally make the amendments to the *Indian Act* required to remedy all aspects of the alleged discrimination faced by Mr. Matson.

Moreover, a successful decision on the merits of the complaint before the CHRT would have addressed all aspects of the discrimination much more expeditiously. The CHRT could have also provided much needed oversight in the implementation of the changes required to truly achieve substantive equality for individuals such as Mr. Matson within a government department that has been found to be trapped in its "old mindset",[106] repeating historical patterns of discrimination,[107] and showing little regard for its harmful impact on First Nations Peoples.[108]

On the brighter side, the outcome in *Matson* could have been worse for members of equality seeking groups. The SCC could have accepted the AG's

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docid/3ae6b3aa0.html> [perma.cc/V35Y-RPS8]. For the decision of the UN Human Rights Committee regarding the *McIvor* cases, see Human Rights Committee, "Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2020/2010" (*McIvor & Grismer v Canada*), (11 January 2019), online (pdf): *Feminist Alliance for International Action* <fafia-afai.org/wp-content/uploads/2019/03/CCPR_C_124_D_2020_2010_28073_E.pdf> [perma.cc/6KXD-J7L6]. See also *McIvor v Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 26; *McIvor v Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153.

[103] See the Letter from Jeannette Corbiere Lavell et al to Prime Minister Trudeau, Minister Bennett, Minister Lametti and Minister Monsef (27 March 2019), online (pdf): *Feminist Alliance for International Action* <fafia-afai.org/wp-content/uploads/2019/03/Letter-to-Trudeau-re-Indian-Act-March-27-2019FINAL.pdf> [perma.cc/6HE9-WP5C].

[104] *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général),* SC 2017, c 25. For legislative history see Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, 1st Sess, 42nd Parl, 2017. The bill came into force following an Order in Council. *Order Fixing August 15, 2019 as the Day on which Certain Provisions of that Act Come into Force*, PC 2019-1163, (2019) C Gaz II, 153. For an analysis of Bill S-3, see "Sex Discrimination in the Indian Act is Gone; What Comes Next?" (29 August 2019), online: *Canadian Human Rights Reporter* <www.cdn-hr-reporter.ca/content/sex-discrimination-indian-act-gone-what-comes-next> [perma.cc/58LS-BMV4].

[105] Jeremy Matson, "Communication 68/2014: Request to Decide Admissibility-Merits" (30 September 2019) [unpublished].

[106] See *Caring Society (2018)*, *supra* note 63 at para 154.

[107] *Ibid* at para 275.

[108] See *Caring Society (2016) supra* note 66 at para 461.

arguments during the oral submissions that the CHRT did not have jurisdiction to inquire into discrimination complaints relating to all government services that can be traced back to legislation.[109] Instead, the majority endorsed human rights tribunals' well-established practice of declaring statutes to be inoperative in order to put an end to a discriminatory practice.[110] Despite this strong dictum, government respondents will likely seize upon the narrow exception of lawmaking to the definition of services endorsed by the SCC to attempt to shelter additional government actions from the scope of Canadian human rights legislation.

B. Who is Really Gaming the System?

In both focal cases discussed above, either the decision maker suggested or the government respondent argued that the complainant should bring a constitutional *Charter* challenge instead of a human rights complaint.[111] For example, during the oral arguments in *Matson*, Justice Rowe asked counsel for the Human Rights Commission whether there were two doors available to discrimination complainants, suggesting this was unfair.[112] These remarks seem to imply that it is unjust to allow victims of discrimination to choose between two legal recourses and that those who lodge human rights complaints, instead of *Charter* challenges, concerning government programs, policies and legislation are somehow gaming the system.[113]

What such arguments fail to consider is that an activity can be regulated by different legislative schemes, meaning that individuals can have different legislative recourses against the same person or entity. Service providers, employers and indeed governments often have overlapping and concurrent legal obligations arising from separate statutes.[114] Employers, for example, have duties to accommodate injured workers under both human rights and employment compensation schemes.[115] These regimes create similar but distinct obligations for employers who employ people with disabilities.[116]

[109] See *Matson*, *supra* note 79.

[110] *Ibid* at para 94.

[111] *Ibid* at paras 17, 67. See also *Caring Society (2011)*, *supra* note 68 at para 138.

[112] See *supra* note 94 at 00h:08m:33s. Rowe J later asked whether the same rules applied in both fora, *ibid* at 00h:10m:21s.

[113] See *Hines v Nova Scotia (Registrar of Motor Vehicles),* 1990 CanLII 4131, [1990] NSJ No 222, where the Nova Scotia Human Rights Commission ("NSHRC") sought to have a *Charter* claim struck on the basis that it ought to be brought as a human rights complaint instead. The NSHRC expressly raised the issue of forum shopping, but their request was refused.

[114] Note that s 45.1 of the *HRC-ONT*, *supra* note 1 allows the HRTO to dismiss an application that has been appropriately dealt with in another forum. Otherwise, applicants may choose their forum of preference to raise issues of discrimination.

[115] See *HRC-ONT*, *supra* note 1, s 11(2); *Workers' Compensation Act,* RSO 1990, c W11, s 54(4).

[116] See *McKee v Imperial Irrigation Co,* 2010 HRTO 1598 at paras 27–28, where the HRTO explains the competing obligations of employers relating to the duty to accommodate when similar workplace situations arise. These obligations flow from the *HRC-ONT*, *supra* note 1 at ss 5(1), 17(2) and the *Workplace Safety and*

As found by the Human Rights Tribunal of Ontario ("HRTO"') on numerous occasions, meeting one's obligations under the Ontario *Workers' Compensation Act* does not necessarily mean that one is in compliance with the Ontario *Human Rights Code*.[117] In fact, the HRTO regularly hears applications in which employers have satisfied their obligations under the *Workers' Compensation Act* but have failed to meet their substantive or procedural duty to accommodate under the *Human Rights Code*.[118]

The Government of Canada also has concurrent obligations, for example, regarding language rights. The federal government must comply with sections 16 through 20 of the *Charter* and the *Official Languages Act* ("*OLA*"), a quasi-constitutional statute that provides more comprehensive language rights than the *Charter* and is aimed at the preservation and vitality of official language minorities.[119] Members of official language minorities may launch *Charter* challenges if they believe their right to communicate with and to receive services from the Government of Canada in English or French has been infringed. They may also file complaints to the Official Language Commissioner when the Government of Canada has failed to meet its obligations under the *OLA*.[120]

Similarly, the existence of two separate legal recourses for allegations of discriminatory government actions or services is the product of deliberate policy choices made by Parliament. Far from gaming the system or forum shopping, members of equality-seeking groups who choose to file discrimination complaints relating to government services are availing themselves to an administrative recourse provided by Parliament. In many Canadian jurisdictions, human rights legislation includes specific provisions either allowing or disallowing complaints to proceed if another administrative recourse is available.[121] Conversely, no legislation in Canada bars victims from lodging human rights complaints against a government respondent if it could be litigated as a *Charter* challenge. In light of this, accusations of

Insurance Act, SO 1997, c 16, Schedule A more generally.

[117] See e.g. *Galves v Balzac's Coffee Roastery Ltd*, 2010 HRTO 1539 at paras 11–12, where the HRTO refused to dismiss an application on a preliminary basis, on the grounds that the question of whether the employer met its duty to accommodate the employee under the *HRC-ONT* was not addressed in substance by the Workplace Safety and Insurance Board.

[118] *Ibid.* However, collateral attack decisions by the Workers' Compensation Board before the HRTO are not permitted. See *British Columbia (Workers' Compensation Board) v Figliola,* 2011 SCC 52 at para 50.

[119] *Official Languages Act*, RSC 1985, c 31 (4th Supp) [*OLA*]. s 41(2) provides that "every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1)." In *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*, 2018 FC 530, the scope of the interpretation of s 41(2) and the obligation to take "positive measures" were narrowed significantly. This decision is currently under appeal before the Federal Court of Canada. At the time of writing, the appeal has been heard and the decision is under reserve.

[120] *OLA*, *supra* note 119, s 77(1) stipulates that any person who has made a complaint to the Commissioner in respect of a language right or duty under the *OLA* may appeal to the Federal Court of Canada.

[121] See e.g. *CHRA*, *supra* note 1.

forum shopping or gaming the system would be more aptly redirected at government respondents who are using their publicly funded legal teams to make the service argument in an effort to circumvent the will of Parliament and legislatures across the country.

IV. Conclusion

Human rights legislation does not draw distinctions regarding the nature or level of obligations conferred on service providers based on whether they are public or private in nature. Thus, it is not surprising that in early cases involving government services, it was generally assumed that human rights legislation applied in public and private contexts and that human rights tribunals exercised their broad remedial powers upon finding instances of discrimination. These principles are illustrated in the examination of *Hughes*.

Despite these principles, government respondents have recently argued they should be treated differently from and in effect more leniently than other respondents who face human rights complaints. Through service arguments, government respondents aim to create blanket exclusions to categories of government activities from the scope of the application of human rights legislation. However, the claim that victims of discrimination are forum shopping when they file human rights complaints instead of mounting *Charter* challenges relating to government services or activities is misleading.

Upon closer inspection, it becomes clear that government respondents are making these service arguments in order to prevent victims of discrimination from accessing human rights regimes. Instead, complainants would be forced to mount section 15 *Charter* challenges, which are generally slower, more expensive and less welcoming to discrimination claims. However, a few important changes in the landscapes of human rights and *Charter* law have recently occurred that may impact the types of arguments government respondents will advance in the future.

For instance, the re-establishment of the Court Challenges Program in 2018 has helped to lessen the financial burden faced by members of equality seeking groups when pursuing a *Charter* challenge. Additionally, in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, referred to as *Mowat*, the SCC held that the CHRT does not have jurisdiction to award legal costs to successful complainants.[122] This dealt a major blow to the accessibility of human rights systems across Canada. Finally, in Ontario, the human rights legal system is deliberating delays because of the Government of Ontario's failure to both renew the tenure of existing members and appoint

[122] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 63–64 [*Mowat*].

new members to the HRTO.[123]

These recent developments in both *Charter* and human rights legal regimes may eliminate the need for government respondents to attempt to limit access to human rights systems. It will be important for human rights advocates and academics to closely monitor how these changes will impact future strategies of government respondents.

[123] "Is the Ontario Human Rights Tribunal in Trouble?" (15 January 2019), online: *Canadian Human Rights Reporter* <https://www.cdn-hr-reporter.ca/content/ontario-human-rights-tribunal-trouble> [perma.cc/DV3L-SG97].