

## Overview of *McIvor v. Canada*

Bill C-31<sup>1</sup> amended the *Indian Act* in 1985 to provide equal treatment of all male and female Indians prospectively respecting entitlement to registration as a status Indian. Bill C-31 was directed at removing discrimination against women in the *Indian Act* registration provisions. All registered Indians are now subject to the "second generation cut-off rule" as a result of two successive generations of parenting with non-Indians of either sex. However, some discrimination remains and was not fully removed by Bill C-31.

Sharon McIvor obtained her Indian status after the 1985 amendments initially under section 6(3) and then, later, under section 6(1)(c). Her son, Jacob Grismer (born before 1985) he obtained his Indian status under section 6(2) after 1985. However, because Mr. Grismer's father was not a status Indian, and because Mr. Grismer's wife was not a status Indian, Mr. Grismer was unable to pass his status to his children. Ms. McIvor and Mr. Grismer accordingly challenged the 1985 amendments to the *Indian Act*, specifically section 6 on the basis that the status provisions nevertheless contained residual discrimination on the basis of sex.

### *At Trial*

In her Reasons for Judgment,<sup>2</sup> the trial judge held that section 6 of the *Indian Act*, R.S.C. 1985 c.I-5 ("*Indian Act*") violated the equality rights under section 15 of the *Charter of Rights and Freedoms* of Ms. McIvor and Mr. Grismer. The benefit of law at issue is the right to transmit Indian status and cultural identity to future generations.

The discrimination faced by McIvor, registered under s.6(1)(c) and Grismer, registered under s.6(2), involves the right to transmit cultural heritage. The 1985 amendments did not treat everyone born prior to 1985 and entitled to registration the same. The s.6(1) registration of pre-1985 Indians was continued by Bill C-31 as registration under s.6(1)(a) Indians. Thus, all children born prior to 1985 of s.6(1) fathers are entitled to s.6(1)(a) status, regardless of whether their mothers were registered Indians or not. That is contrasted by the experience of female members who regained their status via Bill C-31 under s.6(1)(c) and their pre-1985 children. If the pre-1985 child's father was also an Indian, then the child received status as a s.6(1)(a); but if the father was a non-Indian, then the child only received s.6(2) status under Bill C-31.

---

<sup>1</sup> *An Act to Amend the Indian Act*, S.C. 1985, c.27 ("*Bill C-31*").

<sup>2</sup> *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 827

Individuals like Ms. McIvor and Mr. Grismer face the “second generation cut-off” rule one generation sooner than male Indians who married and had children with non-Indians prior to 1985.

The trial judge fashioned a complex yet broad remedy to alleviate the sex discrimination she had found. She also refused Canada’s request to grant a stay of her judgment to allow Parliament time to figure out what to do to fix the problem.

### ***The Appeal***<sup>3</sup>

West Moberly First Nations was granted intervenor status in the appeal as an interested party. West Moberly believes that section 15 of the *Charter of Rights and Freedoms* does require Canada to remove all differences respecting entitlement under the *Indian Act* to be registered as Indians between Aboriginal people alive immediately prior to 1985, some of whom traces their patrimony along the paternal line and some of whom along the maternal line of their respective families.

The appeal was heard in Vancouver on October 14 to 17, 2008, and judgment was delivered on April 6, 2009.

### ***The Reasons for Judgment of the Court of Appeal***

The Court of Appeal upheld several of the key findings of the trial judge:

- The right to transmit Indian status is a tangible benefit of law (paragraph 71).
- The relevant personal characteristic, for the purposes of determining the comparator group for the discrimination analysis, is Indian ancestry i.e. the personal characteristic that is a requirement of the statute, and which is allegedly offensive to the *Charter* is that the Indian parent be the father (paragraph 78).
- The *Indian Act* treats Mr. Grismer’s group less well than the comparator group because unlike those in the comparator group, Mr. Grismer is unable to transmit Indian status to the children of his marriage to a non-Indian woman (paragraph 83).
- The discrimination is based on sex, and it is proper to consider the multi-generational effects of that discrimination (paragraphs 88 and 93).

---

<sup>3</sup> *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2008 BCCA 153

- Section 6 of the *Indian Act* is discriminatory as that concept is used in s. 15 of the *Charter* because the section is the echo of historic discrimination which perpetuates, at least in a small way, the discriminatory attitudes of the past based on stereotypical views of the role of a woman within a family (paragraph 111).

The Court of Appeal concluded:

The discrimination in this case is the result of under-inclusive legislation. The combination of s. 6(1)(a) and 6(2) of the *Indian Act* results in a situation in which people in Mr. Grismer's position are unable to transmit Indian status to their children only because their mothers, rather than their fathers, are entitled to status as Indians. This discrimination applies only to a group caught in the transition between the old regime and the new one (paragraph 122).

However, the BC Court of Appeal differed with the trial judge by taking a different approach with respect to the "comparator group" analysis. The Court of Appeal focussed on the old "Double Mother Rule." Before the amendments in Bill C-31, a person whose mother and whose grandmother were not Indians would lose his or her Indian status when they reached 21 years of age under the old section 12(1)(a)(iv), but after the 1985 amendments, such people received (or were reinstated to) full status (paragraph 85 and 137, 142 and 143). The Court of Appeal held that Bill C-31 effectively went beyond preserving rights by enhancing the right of transmitting status of the comparator group while at the same time denying to the same degree the same right to Mr. Grismer (paragraphs 140 and 143, 155). This was a much narrower ground on which to find that the discrimination was unjustifiable in a free and democratic society that what the trial judge had found (paragraphs 145, 150 and 151).

As a result, the Court of Appeal found that the trial judge erred in the remedy she fashioned and by not staying the declaration of the Charter violation to give Parliament time to prepare a legislative response. It is worth replicating the key paragraphs from the Reasons for Judgment in this regard, because the court spells out the narrow limits of the declaration it is prepared to grant:

[152] The trial judge erred, in my view, in defining the extent of the *Charter* violation. She considered it necessary to redress all discrimination that had occurred prior to 1985. Accordingly, she would have granted Indian status to all individuals who could show that somewhere in their ancestry there was a person who had lost Indian status by virtue of being a woman married to a non-Indian.

[153] In my view, the trial judge erred, as well, in the remedy she granted. In view of the length of time that had passed since the coming into force of the 1985 legislation, she considered it necessary to provide an immediate remedy to the plaintiffs and those in a similar situation. She granted a complex order refashioning the legislation, which she would have had take effect immediately. As I will indicate, I do not think that such an order was in keeping with the proper role of a court in making legislative choices.

[154] The *Charter* violation that I find to be made out is a much narrower one than was found by the trial judge. The 1985 legislation violates the *Charter* by according Indian status to children

- i) who have only one parent who is Indian (other than by reason of having married an Indian),
- ii) where that parent was born prior to April 17, 1985, and
- iii) where that parent in turn only had one parent who was Indian (other than by reason of having married an Indian),

if their Indian grandparent is a man, but not if their Indian grandparent is a woman.

As a result of this Charter violation, the Court declared that sections 6(1)(a) and 6(1)(c) of the *Indian Act* are of no force and effect, but suspended the effect of the judgment for 12 months to enable Parliament to respond to the declaration with a legislative remedy.

### ***Treaty-Related Issues***

When one considers the potential impact on rights found in the *Indian Act* and on Treaty rights, the *McIvor* case takes on added significance. Status as a Treaty Indian, i.e. an Aboriginal person who is a beneficiary of a Treaty with Canada, confers not only rights under the *Indian Act* to, among other things, education and health services, but also to Treaty entitlements such as annuity payments appropriated by Parliament under section 72 of the *Indian Act*. In addition, in order to exercise other rights generally conferred by Treaties (e.g. hunting, fishing and trapping), an Aboriginal person must have a sufficient connection to the Indian band that signed the Treaty. Proof of registration as a status Indian is a necessary pre-requisite for membership in the majority of Indian bands in Canada. Thus, status confers on a Treaty Indian a legal mechanism to access his or her entitlements under a particular Treaty.

For descendants of Treaty signatories who are similarly situated to Ms. McIvor and Mr. Grismer, the result at trial represented a profound re-connection to the legacy of their ancestors who signed Treaties and to their present human dignity as Treaty Indians, by entitling them to transmit their Treaty identity and legal entitlements to subsequent generations to the same degree as male Treaty Indians who married and had children with non-Indians prior to 1985.

The Court of Appeal declined to make any broad statements linking Indian status to Aboriginal or Treaty rights protected by section 35(1) of the *Constitution Act, 1982*. The court ruled that the case to date had not been presented by the parties in a manner that would allow it to consider section 35 arguments (paragraph 66). However, the court did acknowledge that “arguments might be made to the effect that elements of Indian status should be viewed as aboriginal or treaty rights” and “it seems likely that, at least for some purposes, that Parliament’s ability to determine who is and who is not an Indian” may be “circumscribed” by section 35 (paragraph 66).

### ***Next Steps***

As noted above, the Court of Appeal declared that sections 6(1)(a) and 6(1)(c) of the *Indian Act* are of no force and effect (paragraph 161, 166). Significantly, the Court of Appeal refused to “read in” provisions to overcome the discrimination as the trial judge had done in the decision below. By doing so, the Court of Appeal appears to have eliminated not only s. 6(1)(c), the subsection by which many Aboriginal women regained their status as Indians (specifically, those who had married non-Indians before 1985) but also s. 6(1)(a), the sub section by which many Aboriginal men, women and children had their pre-1985 Indian status recognised and continued post-1985. The only Indians who appear to keep their status are:

- (i) members of new Indian bands since 1985 (s.6(1)(b)),
- (ii) Indian men, their wives and children, who were enfranchised by Minister’s order before 1985 (s.6(1)(d)),
- (iii) the rare cases of those who lost status pre-1985 for becoming professionals or leaving the country (s.6(1)(e)) and
- (iv) the children of one or two such individuals (s.6(1)(f), s.6(2)).

However, the Court of Appeal suspended the judgment for 12 months, to give Parliament time to enact legislative change. This means that sections 6(1)(a) and 6(1)(c) continue in force for the next year only. After April 6<sup>th</sup>, 2010, those sections will no longer be in force and effect unless there is a successful appeal to the Supreme Court of Canada or Parliament enacts new status provisions.

Given the wide-scope of the declaration (paragraphs 161, 166), one of the parties may seek clarification from the Court of Appeal before the Order is entered. The extreme breadth of the declaration appears to contradict other portions of the judgment (e.g. paragraphs 152, 153, 154).

Canada might also take up the court's invitation to fashion a legislative "fix" to the discrimination (paragraphs 156-159). If that occurs, there will likely be consultation by the Department of Indian Affairs with First Nations and indigenous women's groups. Such a process might re-open the Pandora's Box of inter-related band governance and membership issues which plagued law makers in 1981-1985 when they were developing Bill C-31 (and its antecedent draft legislation Bill C-47).

However, there may be no appetite within the federal government to undertake a highly-charged political exercise within such a limited period of time. Given that neither party appears to have won the appeal, it is likely that one or both of the parties may chose to appeal the decision. One would assume the apparent global elimination of entitlement to registration as an Indian will be of concern to all parties.

The parties have until May 7, 2009 to seek leave to appeal to the Supreme Court of Canada. Given that the Court of Appeal's declaration is suspended for one year, a party seeking leave might also seek an extension of time from the usual 60 days from the date of judgment.