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Late Breaking News...

BRITISH COLUMBIA COURT OF APPEAL DECISION REGARDING *INDIAN ACT* STATUS INDIAN RULES

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On April 6, 2009, the B.C. Court of Appeal released *Mclvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153. This decision represents the most recent judicial assessment of the federal *Indian Act* rules on Indian status, a controversial issue for many decades now. The Plaintiffs, Ms. Sharon Donna Mclvor and her son, Mr. Charles Jacob Grismer, alleged that the s. 6 *Indian Act* rules on Indian status are discriminatory on the basis of sex and marital status. They succeeded at trial.

On appeal, the Plaintiffs explained that the root of the discriminatory treatment is found in the pre-*Charter Indian Act* provisions regarding Indian status. Those provisions treated women and men very differently. Under the *Act*, Indian women lost their Indian status if they married non-Indian men, whereas Indian men who married non-Indian women retained their Indian status and their wives gained Indian status. Further, whether a child with only one Indian parent received status was dependent on whether that Indian parent was a man or woman – in particular, the child would not receive Indian status if the Indian parent was the mother, but would receive Indian status (subject to the “Double Mother Rule”) if the Indian parent was the father. The Double Mother Rule under the previous *Indian Act* provided that if a child’s mother and paternal grandmother did not have the right to Indian status other than by virtue of having married Indian men, the child had Indian status only up to the age of 21.

The current *Indian Act* rules on Indian status were deemed to come into force on April 17, 1985, the date on which s. 15 of the *Charter* took effect. On their face, these rules make no distinctions on the basis of sex. The operation of the new rules is largely prospective, in that they generally do not grant status to those individuals who lost Indian status under the former *Indian Act*. Certain groups that previously lost status, however, did regain status under the current rules.

In reviewing the case, the Court of Appeal stated that the current Indian status rules represent a genuine attempt by the federal government to eliminate the discriminatory provisions of the former *Indian Act*, and noted that it could not be claimed that these rules violate s. 15 had these rules always been in place. The issue was not, however, whether the current Indian status rules violate s. 15; rather, the issue was whether the current Indian status rules are discriminatory on the basis that they entrench and continue the discriminatory treatment of the former *Indian Act* rules on Indian status.

To begin, the Court rejected Canada’s contention that the Plaintiffs’ claim required the Court to engage in a retroactive or retrospective application of the *Charter*. It held that this was a case of ongoing discrimination, similar to the discrimination that was at issue in the Supreme Court of Canada

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decision *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358. Next, the Court rejected the Plaintiffs' arguments that s. 28 of the *Charter* and s. 35(4) of the *Constitution Act*, 1982 are implicated. The Court held that these provisions were of no assistance in addressing the case before it, and proceeded to analyze the arguments under the s. 15 *Charter* rights framework.

Following this framework, the Court held that the current *Indian Act* rules on Indian status violate s.15 of the *Charter*. Specifically, the Court found that:

- The ability to transmit Indian status to a child, and most likely to a grandchild, is a sufficient "benefit of the law" to come within s. 15 of the *Charter*;
- The trial judge was correct in comparing people (such as the Plaintiff Grismer) born before April 17, 1985 of an Indian woman married to a non-Indian man with people born before April 17, 1985 of an Indian man married to a non-Indian woman;
- The trial judge was correct in finding differential treatment. The Plaintiff Grismer's group was treated less well than the comparator group, in that persons in Grismer's group cannot transmit Indian status to children of marriages to non-Indians;
- This differential treatment occurred on the basis of the enumerated ground of sex. The Court expressed doubts that matrilineal or patrilineal descent, referred to several times by the trial judge, qualifies as an analogous ground under s.15 of the *Charter*, and
- The unequal treatment is discriminatory under s.15 of the *Charter*, and the justifications raised by Canada for this unequal treatment are most appropriately considered under s.1 of the *Charter*.

The Court then decided that Canada failed to establish that this violation of the *Charter* is justified under s.1 of the *Charter*. In particular, the current legislation is not minimally impairing in that it widened an existing inequality between the Plaintiff Grismer's group and members of the comparator group. Members of the comparator group were able, prior to 1985, to confer only limited Indian status on their children. These children (who would have fallen under the Double Mother Rule) were given status as Indians only up until the age of 21. Under the current legislation, introduced in 1985, members of the comparator group were granted Indian status (under *Indian Act* s.6(1)) and the ability to transmit status to their own children, who could in turn transmit status to their children as long as they married persons who had at least one Indian parent. In contrast, members of the Plaintiff Grismer's group, have a more limited Indian status under the current legislation.

The Court did note that the current Indian status rules pass the remaining portions of the s.1 analysis, in that they serve a pressing and substantial objective, there is a rational connection between this objective and the legislation, and the discriminatory effects of the current legislation are not out of proportion to the pressing and substantial governmental objective that it set out to serve.

As a remedy, the Court preferred an approach far narrower than what the trial judge considered appropriate. The Court held that the trial judge had erred in defining the extent of the *Charter* violation, such that she considered it necessary to redress all pre-1985 discrimination. The Court also held that the trial judge erred in the remedy granted, such that she considered it necessary to grant the Plaintiffs and those in similar situations an immediate remedy and saw it as appropriate to draft a complex order refashioning legislation.

For its part, the Court was reluctant to interfere with what it saw as a legislative function. It held that it is Parliament that should properly decide how the existing inequality under the Indian status rules should be remedied. To allow this to occur, the Court suspended for one year its declaration that ss.6(1)(a) and 6(1)(c) of the *Indian Act* are of no force and effect under s.52 of the *Constitution Act* to allow Parliament the time to make the necessary amendments.

Of particular interest to the intervenors that participated in this appeal, is that the Court ordered each of the intervenors to reimburse each of the parties for the disbursements that they incurred as a result of the intervention. The Court acknowledged that intervenors can play an important role in cases, but ultimately felt it would be unfair to expect the parties to bear the additional burden of disbursements consequent on the presence of the intervenors.

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