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COURT OF APPEAL OF ALBERTA

Form AP-5
[Rule 14.87]

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FILED
MAR 12 2018
Court of Appeal of Alberta

COURT OF APPEAL FILE NO.:	1703-0239AC
TRIAL COURT FILE NO.:	1103 14112
REGISTRY OFFICE:	Edmonton
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, C T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND, INTER VIVOS SETTLEMENT, CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANT:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
RESPONDENTS (ORIGINAL APPLICANTS):	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST (the "Sawridge Trustees")
STATUS ON APPEAL:	Respondents
RESPONDENTS:	PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL:	Not a Party to the Appeal
INTERVENOR:	SAWRIDGE FIRST NATION
STATUS ON APPEAL:	Respondent
INTERESTED PARTY	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers And Sisters
STATUS ON APPEAL:	Appellant
DOCUMENT:	**SUPPLEMENTAL EXTRACTS OF KEY EVIDENCE**

Appeal from the Decision of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 31st day of August, 2017
Filed the 12th day of March, 2018

SUPPLEMENTAL EXTRACTS OF KEY EVIDENCE
OF THE APPELLANT PRISCILLA KENNEDY

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TAB 5

Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

August 24, 2016 — Morning Session

The Honourable Mr. Justice Thomas	Court of Queen's Bench of Alberta
C.K.A. Platten, Q.C.	For Catherine Twinn
C. Osuladini	For Catherine Twinn
L. Maj	For the Minister of Aboriginal Affairs and Northern Development
J.L. Hutchison	For the Public Trustee of Alberta
D.C. Bonora	For Sawridge Trustees
A. Loparco	For Sawridge Trustees
N.L. Golding, Q.C.	For Patrick Twinn, et al
E.H. Molstad, Q.C.	For Sawridge First Nation
G. Joshee-Arnal	For Sawridge First Nation
S.A. Wanke	For Morris Stoney, et al
C. Wilde	Court Clerk

Discussions

THE COURT: Good morning.

Are you going to do the introductions?

MR. MOLSTAD: I have been assigned that task, Sir.

THE COURT: All right.

MR. MOLSTAD: We have, representing the Sawridge Trustees, Ms. Bonora and Ms. Loparco.

We have representing the Public Trustee, Ms. Hutchison. Mr. Meehan is not with us today.

We have representing Catherine Twinn, Ms. Platten, and Ms. Osualdini.

We have myself, Sir, and Mr. Joshee-Arnal representing the Sawridge First Nation.

We have representing Mr. Morris Stoney, et al, Ms. Wanke.

And we have representing Patrick Twinn, et al, Ms. Golding.

We also have in attendance from the Minister of Aboriginal Affairs and Northern Development, Ms. Maj from the Department of Justice.

We -- as you can see from the agenda that was sent to you yesterday, the first item on the agenda is the Rule 5.13 application --

THE COURT: Yes.

MR. MOLSTAD: -- on membership and costs. And I'd like to guess that the matters after that are not going to take too long, but that is a guess in terms of the other matters (INDISCERNIBLE).

THE COURT: Yeah, I saw that revised agenda this morning. Thanks for sending it in. But I think what I'm going to do is I'm going to reorder it, because it looks to me from the revised agenda, the only matter that may take some time is actually your application.

MR. MOLSTAD: That may be the case.

THE COURT: So let's see if we can move some of the counsel along here.

MR. MOLSTAD: Well, I'm -- we're all in your hands, Sir, so. . .

THE COURT: All right.

MR. MOLSTAD: What order are you proposing in.

THE COURT: Oh, I'm proposing just normal chambers process; that is the consent order first, get it resolved and dealt with. That would be --

MR. MOLSTAD: Number 4?

THE COURT: Number 4, the consent order. And then we'll deal with these adjournment requests and --

MR. MOLSTAD: All right. Before I sit down, before we start the

Rule 5.13 application, I've had some discussion with my friend and I have a few preliminary comments before we start that.

THE COURT: All right.

MR. MOLSTAD: Okay? Thank you, Sir.

THE COURT: Certainly. And I think I will -- that's useful, because I think I've reviewed that material and I can narrow it down fairly quickly.

MR. MOLSTAD: Thank you.

THE COURT CLERK: Sorry, Sir, what was your name?

THE COURT: Mr. Molstad, Q.C.

MR. MOLSTAD: Sorry.

Submissions by Ms. Bonora

MS. BONORA: Sir, you'll recall that in this application, there were basically two issues. One was the beneficiary designation and the second was to confirm that the transfer of assets from the 1982 Trust to the 1985 Trust were -- was appropriate, and that we've put that issue behind us. And through the work of counsel, we've been able to reach agreement on the issue of the transfer of assets.

I believe, Sir, you received a brief from us and a copy of the consent order.

THE COURT: I did. And thank you very much for the brief, because it makes it pretty clear --

MS. BONORA: Yeah. So --

THE COURT: -- well, what the basis for it is, and I'm certainly satisfied that the consent order is appropriate and properly based in law.

MS. BONORA: Sir, I will not take any more time then. If you've read the brief, I really have nothing else to add to the submissions that we've made. And so, therefore, I think my friends would like to make a few comments, and I'll just respond to those if there's anything else, unless you have any questions for me.

THE COURT: All right. I wonder if, counsel, if you wouldn't mind just mentioning your name before you speak just so the clerk can keep track of who's speaking?

MS. BONORA: Doris Bonora of Dentons just spoke. Thank you, Sir.

THE COURT: Thanks, Ms. Bonora.

Submissions by Ms. Hutchison

MS. HUTCHISON: Good morning, My Lord. Janet Hutchison for the Public Trustee of Alberta.

Very brief comments, My Lord, simply to give the Court some idea of why the OPTT, and I believe Ms. Platten will speak to trustee Twinn, why we weren't able to arrive at a joint brief, as well as a consent order. And it was simply a matter, My Lord, of some of the wording around the facts and the evidence and what evidence was actually available, as well as the final paragraph of the brief. Counsel just really weren't able to quite agree how to characterize some of the issues around accounting.

The -- the Public Trustee would just like it noted on record that its position on the consent order is that when it -- there is this reference to accounting in the preamble in paragraph 2, that includes an individual accounting, as well as a passing of accounts. And, of course, My Lord, for future reference, the passing of accounts for the five trusts would occur logically within this proceeding, after beneficiary identification is dealt with.

But that's all we have to say, My Lord.

THE COURT: All right. Thank you. Ms. Platten?

Submissions by Ms. Platten

MS. PLATTEN: Sir, I think those are also our submissions, and so we don't really anything further to say.

THE COURT CLERK: Sorry, your name, for the record?

MS. PLATTEN: Sorry, Karen Platten for Catherine Twinn.

Submissions by Ms. Golding

MS. GOLDING: Sir, Nancy Golding from Borden Ladner Gervais in Calgary, and I am new to these -- this matter, acting on behalf of several of the individual beneficiaries.

I just wanted to comment that my client wasn't involved in this order, and so we don't intend to make any comment on it. However, we do want it noted that our understanding is the order is without prejudice to the rights of our client to request an accounting as it relates to the 1982 and 1985 Trusts, and for any relief that might come from that.

Thank you, Sir.

THE COURT: Thank you. Ms. Bonora, any --

MS. BONORA: Just one --

THE COURT: Look, I --

MS. BONORA: -- comment, Sir.

MS. MAJ: Sorry, sorry.

MS. BONORA: Oh, my -- my apologies.

THE COURT: You -- you can say something, but if --

MS. MAJ: That's all right. It's hard -- it's hard to see me in the back.

THE COURT: Quite frankly, you are not a party at --

Submissions by Ms. Maj

MS. MAJ: I was simply going to actually echo Ms. Platten's comments, My Lord.

THE COURT: Yeah. Well, okay. Well, just echo it and let's get on with it.

Ms. Bonora?

Submissions by Ms. Bonora

MS. BONORA: Just one comment. Ms. Hutchison said that the consent order was based on the accounting naturally occurring in this proceeding, and that was not discussed until yesterday morning. So I don't think it is the basis for the consent order, and that is a very live issue in terms of how the accounting will proceed. So I -- we just need to -- I'm not sure that you will be hearing that accounting. That is an issue that you'll hear about later in terms of how that's going to happen, so . . .

THE COURT: All right. Mr. Molstad, you don't have anything to say?

MR. MOLSTAD: I don't have anything to say. My name is Mr. Molstad.

Order (Consent Order)

THE COURT: All right. The consent order being sent to me with the brief, as I -- just so it's clear on the record, I did review that brief and it was very helpful to me in terms of providing a legal basis for the consent order. Plus, the Summary of Facts helped put me in the picture again.

So the consent order is granted, and there it is.

MS. BONORA: Thank you, Sir.

THE COURT: Madam Clerk, if you wouldn't mind handing that to Ms. Bonora.

Submissions by Ms. Bonora (Distribution Proposal Adjournment)

MS. BONORA: Sir, perhaps I'll speak to the adjournment in respect of the distribution proposal next.

THE COURT: All right. Sure.

MS. BONORA: Sir, the -- you'll recall in your December 17th, 2015, decision, you asked the Trustees to present a distribution proposal and to have it approved by the Court, and so we, in fact, submitted the distribution proposal to the Court. We then filed a brief in respect of approving that distribution proposal, and briefs have been filed by the Office of the Public Guardian and Trustee, and by Catherine

Twinn.

Subsequent to the filing of those briefs, we received applications by Morris Stoney and his brothers and sisters, and from Patrick Twinn, and his family Shelby Twinn and Debra Sarafinchin.

In respect of the standing of those parties and whether they are beneficiaries, we believe that until those applications are heard, that, as beneficiaries, they probably have a right to speak. If they, in fact, are beneficiaries and are going to be treated as parties, that they have a right to speak to distribution, and so we think it appropriate to postpone that issue. It's ready to go once we've determined the standing of the various other parties and -- and it would be our submission that especially with respect to the clients Ms. Golding represents.

So those are my submissions in respect of the adjournment, and I think all counsel are on board with that adjournment request.

THE COURT: So both the distribution plan, I'll call it, plus the issue of -- the outstanding issue of who the beneficiaries are?

MS. BONORA: Yes. So the beneficiary definition is also postponed. Counsel have advised that they believe it would be perhaps a two-day application to deal with that particular issue, and so we still have to determine exactly how we're going to come to bring that issue before the Court. We're still in discussions among counsel on that issue.

THE COURT: Well, thank you for that, but I'll give you my thinking on that issue. I'm inclined to send that issue to trial, and it won't be me hearing it. It will be some other judge. I'm finding that the estimates of counsel in this matter aren't too accurate, and given the nature of this litigation, I'm thinking -- my thinking is, I'm not making an order, but I'm thinking this is not going to be determined on the basis of affidavit evidence. It's going to go to a trial and get this thing resolved once and for all. So --

MS. BONORA: Thank you, Sir.

THE COURT: -- just so you know my thinking on it.

MS. BONORA: And it --

THE COURT: And that you might want to start preparing a

contingency plan around that approach.

MS. BONORA: M-hm. That's very helpful to all counsel, because there was some discussion about whether you would, in fact, hear that application, and there was a discussion about whether we needed to make an application about whether you would hear that application. So if, in fact, you are saying perhaps you won't and that it should move to a trial, that gives us some direction in our next discussions about scheduling and moving towards that.

THE COURT: Okay.

MS. BONORA: So thank you for those comments.

THE COURT: Yeah. No, I -- the reason I'm saying it is I really came on to this before we had all sorts of rules around case management in -- generally, and specifically in commercial matters. I mean, case managers are meant to deal with process issues, and not substantive disputes. I mean, we deal with a lot of disputes over the appropriate process, but this one is going off in the direction of a more general dispute. So that's why I'm thinking about it, and I -- and clearly if it went to a trial, I would not be the case manager in this case.

MS. BONORA: Yes, Sir.

THE COURT: All right?

MS. BONORA: So perhaps if you could leave the issue of the actual process and whether it would be a trial or whether counsel may be able to agree that it could proceed by affidavit evidence, and whether we could maybe discuss that before you made a decision about that and we could make some -- even if we just did it by way of written submissions to you, that would be helpful to all of us, I think, to have us consider that and consult with our clients.

THE COURT: That would be satisfactory to me.

MS. BONORA: Thank you. Mr. Molstad just asked me if you were talking about trials of other issues on the agenda, but I think you're just talking about --

THE COURT: No, I'm --

MS. BONORA: -- the definition of beneficiary, which was the

original issue in our action.

Order (Distribution Proposal Adjournment)

THE COURT: That's -- well, I think it -- my goal here has been to try and get this litigation focussed, or refocussed in some cases, and it does seem that the issues are narrowing, which is sort of the function of a case manager. We're down to the -- well, the distribution plan, I'll call it, appears to be generally acceptable, subject to some latecomers having a look at it. Whether they'll have anything to say is yet to be decided, but my thinking is that the distribution plan looks like it's -- I mean, I've read it. It seems quite reasonable. It looks like that issue is going to get swept off the table. The -- so the one outstanding issue is the -- the scope of the beneficiary group.

MS. BONORA: Thank you, Sir.

THE COURT: So your request for an adjournment on the distribution proposal application and -- is adjourned *sine die*.

Submissions by Ms. Bonora (Standing)

MS. BONORA: Thank you, Sir.

Perhaps, Sir, we could deal with number 3 on the list, because I don't believe Ms. Wanke has any other matters that she would be attending to. I don't know that for sure, but the -- so the application with respect to Mr. Stoney is an application for standing, an application to be determined as a beneficiary. We're asking that matter to be adjourned. We just got served with it. Obviously, there needs to be some discussion around exactly what's going to happen with that, and questioning. And I don't think there's any opposition to that request to adjourn, but I will leave it for Ms. Wanke to speak, and Mr. Molstad would like to address it, as well.

THE COURT: All right. Well, Ms. Wanke, you're the applicant -- representing the applicant, so if you'd like to speak first?

Submissions by Ms. Wanke (Standing)

MS. WANKE: I am, My Lord. We have no issue with Ms. Bonora's request to adjourn the matter. She had proposed that counsel have a conference and come to you with a proposal in terms of timelines and how the matter will be heard, and we think that's reasonable. And we think counsel can certainly do that by consent.

We have some concerns that matters will be decided in this proceeding before the issue of our application is determined if our application doesn't move forward in a timely manner, and we're wondering if it would be appropriate to suggest that our application would be determined first, before any more matters of -- that effect Mr. Stoney and his brothers and sisters are heard and determined, or, in the alternative, at the very least if we could be added to the service list while their application is pending so we receive notice of what's going on in this proceeding.

Sir, I'd --

THE COURT: Okay.

MS. WANKE: I'd also like to speak briefly to Mr. Molstad speaking. I understand that Mr. Molstad wants to speak today. I appreciate that there's likely hardly anything of substance that's going to be said or determined on the adjournment application, since nothing of -- no merit decision is being made, but as a matter of precedent we think it's important to note that the Sawridge First Nation was, in your decision in 2015, expressly noted not to be a party to these proceedings, and rights and benefit flow and obligations flow from being a party. Since they're not a party or a respondent to our application, our position is they would first need to seek standing to make any submissions. And, again, nothing of merit or substance is being determined today, but for precedent, I think it's important that prior to Sawridge First Nation having a say on anything to do with our application, they first satisfy the Court they have standing to speak.

THE COURT: Mr. Molstad, as an active participant?

Submissions by Mr. Molstad (Standing)

MR. MOLSTAD: Well, we haven't been named as a respondent. However, my friend's application sets out as one of the grounds that Mr. Stoney and his siblings are members of the Sawridge First Nation. So it is a matter that directly affects the Sawridge First Nation.

We can tell you that we will be making an application to intervene in this matter and participate because of this allegation. And also you may or may not be aware that this issue has been litigated before a number of courts previously, including the Federal of Court of Appeal, the Federal Court and the Canadian Human Rights Commission.

THE COURT: Thank you.

MS. WANKE: But the issue that's been litigated is a different issue.

THE COURT: Well --

MS. WANKE: The issue of being a beneficiary of the Trust --

THE COURT: Okay. Well, look --

MS. WANKE: -- versus being a present day member.

THE COURT: -- I'm not going to get into it.

MS. WANKE: And it -- it simply -- you're right. It simply isn't a matter for --

THE COURT: Well, let me --

MS. WANKE: -- to be determined.

Order (Standing)

THE COURT: Let me -- I'll give you some direction right now.

You can make your application in writing, with a written brief, serve it on all of the participants who are here today. They can respond, or not, and you can include in that the Sawridge First Nation application for intervenor status. This matter will be dealt with in writing. It will not be the subject of court appearance. You can stand in line for a decision, because it may take some time to get dealt with, but that's the way it will proceed. Okay?

MR. MOLSTAD: In terms of timing, Sir. We would just ask for a reasonable period of time to prepare and file.

THE COURT: Well, certainly. Well, let's just pick dates. So pick end dates.

MR. MOLSTAD: Pardon me?

THE COURT: The -- the applicant Stoney will have a -- well, they've got an application, or -- all I've got is a Notice of Motion or --

MR. MOLSTAD: Right.

THE COURT: So, but the -- no affidavit ever made it to me, my desk. So all materials, including a written brief in respect of this application to be joined as a party by Maurice Stoney shall be completed, filed and served by September 30th, 2016, and the respondents, including a proposed intervenor, the Sawridge First Nation, by October 31st.

MR. MOLSTAD: But we'll be making an application to intervene. Should -- is that October 31st for us?

THE COURT: Well, you can put it in right -- yeah, just be -- you're a without-prejudice respondent, all right? Sawridge First Nation, you're to be served with this application.

MR. MOLSTAD: Okay.

THE COURT: So double up on the response to the application, and put in your intervenor response.

MR. MOLSTAD: So --

THE COURT: Or position.

MR. MOLSTAD: -- I just want to make sure I understand, Sir, When do we file our application to intervene? September 30th --

THE COURT: You can do it --

MR. MOLSTAD: -- or October --

THE COURT: Well, do it by September 30th.

MR. MOLSTAD: All right. Thank you.

THE COURT: Okay?

MR. MOLSTAD: Yeah.

THE COURT: And then we'll give you until mid-November, November 15th, for the Maurice Stoney applicant to respond in turn in writing to those, and in particular the intervention application.

MS. WANKE: My Lord, my only concern with the proposed schedule is that Ms. Bonora had requested to question on the affidavit last week, and we provided her – admittedly, it was right before this application – we provided her with three dates before today, and those weren't acceptable. So if questioning is to take place, I wonder if we could have a commitment? I know that Mr. Stoney will make himself available. Can we have a commitment from Ms. Bonora that any questioning that will take place will take place before September 10th?

THE COURT: Well, why don't you work that out with counsel?

MS. WANKE: Well, my fear is that it will happen after.

THE COURT: Well, I'm not going to get into it. Work it out with counsel. We're not going to stand this litigation still while, you know, the latecomers get their act together. You can deal with her.

MS. WANKE: Thank you, My Lord.

THE COURT: I'm not going to intervene in it.

Now, we've got another matter, another similar latecomer.

Submissions by Ms. Golding (Scheduling)

MS. GOLDING: That is correct, Sir. And, Sir, I had actually prepared an order that I had provided to counsel and have comments on, and it is (INDISCERNIBLE) in accordance with those comments.

Sir, my application and my order in terms of the scheduling just indicated that our application would be adjourned to allow counsel to schedule a hearing of the matter. And, in fact, Ms. Bonora and I may be able to come to an agreement in terms of the standing part of that, although perhaps not the costs part. And then we had put into this order that until the hearing date, and without prejudice to the actual decision that gets made, that we would be considered to be parties and would have standing to make submission, and that any documents that are to be served on our clients could be served

on our office, Sir. And as I've indicated, counsel have all approved the order.

THE COURT CLERK: Sorry, can you state your name for the record?

MS. GOLDING: Sorry, I apologize. Nancy Golding.

THE COURT: I take it when you say all counsel, it includes the Sawridge First Nation and Mr. Molstad?

MS. GOLDING: I did talk with Mr. Molstad about it --

MR. MOLSTAD: We're not --

MS. GOLDING: But he'd indicated --

MR. MOLSTAD: -- a party to this.

MS. GOLDING: -- he's not a party to this.

THE COURT: Yeah, I know you're not party, but have you seen this?

MR. MOLSTAD: Well, I haven't seen it, no. Sorry.

MS. GOLDING: I -- I tried to show it to him, but he didn't want to look at it.

MR. MOLSTAD: It appears that this is simply an adjournment and deems them to be parties until it's decided, and that seems reasonable, Sir.

THE COURT: I'm just wondering about -- again, I keep clogging this litigation up with additional parties who really don't -- I mean, on the face of it I'm not seeing what Mr. Patrick Twinn and -- who is already a beneficiary. . .

MS. GOLDING: That's correct, Sir.

Order (Standing)

THE COURT: I'm just concerned about clogging this litigation up with unnecessary parties. I'm not saying Mr. Twinn and his relations are unnecessary parties, but the more lawyers and the more people that get added into this litigation

simply make it more difficult to bring to a conclusion, and I'm not sure at this stage that there aren't enough people involved in this to raise all the issues that should be raised.

I'm not prepared to grant this order. I'm prepared to – you – I'm not prepared to grant it, and I'm just going to – Patrick Twinn and company, I'm going to – you can proceed in the same way as Mr. Stoney.

MS. GOLDING: Thank you, Sir.

THE COURT: In terms of we'll deal with their application in writing. All right? Same timelines?

MS. GOLDING: That – that's fine, Sir. Thank you, Sir.

THE COURT: In include Sawridge First Nation in terms of the receipt of the materials, and you can decide whether or not you want the band – pardon me, the Sawridge First Nation can decide whether they want to take a position on intervention.

MS. GOLDING: Thank you, Sir.

THE COURT: All right? So otherwise that is – you're adjourned *sine die*. Your matter's adjourned *sine die* as of –

MS. GOLDING: Thank you, Sir.

THE COURT: Madam Clerk, I'm just going to pass that proposed consent order back.

Okay. Madam Clerk, I've moved along fairly quickly. Would you like to – are you okay with – everything's adjourned? You've got notes?

All right. We're – you're the only application outstanding.

Submissions by Mr. Molstad (Application)

MR. MOLSTAD: Just I have a couple of preliminary comments before my friend makes her submissions in relation to this matter, and we're really in your hands in terms of the procedure, but the comments are very brief.

When we referred in our brief to the decision of *Francis Kutee (phonetic)* as a decision of

the Supreme Court of British Columbia, we did not indicate that it was reversed by -- on the merits by the BC Court of Appeal, and this was an unintentional oversight on our part. We do say, Sir, that the comment of the trial judge is consistent with the law in Alberta, and will make submissions in that regard when we make our submissions.

We also spoke to our friend and there was an unintentional error in their brief, which is the written submissions of the Public Trustee of Alberta in response to Sawridge First Nation's costs submissions at page 6.

THE COURT: Sorry, which one of the briefs?

MR. MOLSTAD: It's the written submissions of the Public Trustee of Alberta in response to the Sawridge First Nations costs submissions.

THE COURT: Okay. The August 19th -- filed August 19th?

MR. MOLSTAD: August 19th, that's correct.

THE COURT: Okay.

MR. MOLSTAD: And in paragraph 20, my friend has written that at the September 2nd and 3rd hearing, Thomas, J ordered the SFN would prepare and serve an Affidavit of Records. That's a typographical error.

THE COURT: Sorry, I'm still getting the paragraph.

MR. MOLSTAD: Sorry.

THE COURT: Twenty?

MR. MOLSTAD: Paragraph 20.

THE COURT: On page 6?

MR. MOLSTAD: Page 6. It says that the Sawridge First Nation, SFN, would prepare and serve an Affidavit of Records according to the rules. That was the Sawridge Trustee, not the Sawridge First Nation.

THE COURT: Okay.

MR. MOLSTAD: And that was also an unintentional error on the

TAB 6

Clerk's stamp:

1103 14112

COURT FILE NUMBER

COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE

EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANTS

ROLAND TWINN,
CATHERINE TWINN,
WALTER FELIX TWIN,
BERTHA L'HIRONDELLE, and
CLARA MIDBO, as Trustees for the 1985 Sawridge Trust

DOCUMENT

Affidavit of Paul Bujold for Procedural Order

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Attention: Doris C.E. Bonora

Reynolds, Mirth, Richards & Farmer LLP

3200 Manulife Place

10180 - 101 Street

Edmonton, AB T5J 3W8
Telephone: (780) 425-9510
Fax: (780) 429-3044
File No: 108511-001-DCEB

AFFIDAVIT OF PAUL BUJOLD

Sworn on August 30, 2011

I, Paul Bujold, of Edmonton, Alberta swear and say that:

1. I am the Chief Executive Officer of the Sawridge Trusts, which trusts consist of the Sawridge Band Intervivos Settlement created in 1985 (hereinafter referred to as the "1985 Trust") and the Sawridge Band Trust created in 1986 (hereinafter referred to as the "1986 Trust"), and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I make this affidavit in support of an application for setting the procedure for seeking the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust.

3. On April 15, 1982, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "A" to this my affidavit ("1982 Trust").

4. On April 15, 1985, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "B" to this my affidavit ("1985 Trust").

5. On August 15, 1986, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "C" to this my affidavit ("1986 Trust").

6. The Trustees of the 1985 Trust have been managing substantial assets, some of which were transferred from the 1982 Trust, and wish to make some distributions to the Beneficiaries of the 1985 Trust. However, concerns have been raised by the Trustees of the 1985 Trust with respect to the following:

   a. Determining the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary varying the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".

   b. Seeking direction with respect to the transfer of assets to the 1985 Sawridge Trust.

7. In order to determine the beneficiaries of the 1985 Trust, the Trustees of the 1985 Trust directed me to place a series of advertisements in newspapers in Alberta, Saskatchewan, Manitoba and British Columbia to collect the names of those individuals who may be beneficiaries of the 1985 Trust.

8. As a result of these advertisements I have received notification from a number of individuals who may be beneficiaries of the 1985 Trust.

9. I have corresponded with the potential beneficiaries of the 1985 Trust and such correspondence is attached hereto as Exhibit "D".

10. I have compiled a list of the following persons who I believe may have an interest in the application for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust:

    a. Sawridge First Nation;

b. All of the registered members of the Sawridge First Nation;

c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the 1986 Sawridge Trust, but who would now qualify to apply to be members of the Sawridge First Nation;

d. All persons known to have been beneficiaries of the Sawridge Band Trust dated April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;

e. All of the individuals who have applied for membership in the Sawridge First Nation;

f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;

g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries;

(those persons mentioned in Paragraph 10 (a) – (h) are hereinafter collectively referred to as the "Beneficiaries and Potential Beneficiaries"); and

i. Those persons who regained their status as Indians pursuant to the provisions of *Bill C-31* (An Act to amend the *Indian Act*, assented to June 28, 1985) and who have been deemed to be affiliated with the Sawridge First Nation by the Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister").

11. The list of Beneficiaries and Potential Beneficiaries consists of 194 persons. I have been able to determine the mailing address of 190 of those persons. Of the four individuals for whom I have been unable to determine a mailing address, one is a person who applied for membership in the Sawridge First Nation but neglected to provide a mailing address when submitting her application. The other three individuals are persons for whom I have reason to believe are potential beneficiaries of the 1985 Trust and whose mother is a current member of the Sawridge First Nation.

12. With respect to those individuals who regained their status as Indians pursuant to the provisions of *Bill C-31* and who have been deemed to be affiliated with the Sawridge First Nation by the Minister, the Minister will not provide us with the current list of these individuals nor their addresses, citing privacy concerns. These individuals are not members of the Sawridge First Nation but may be potential beneficiaries of the 1985 Trust due to their possible affiliation with the Sawridge First Nation.

13. A website has been created and is located at www.sawridgetrust.ca (hereinafter referred to as the "Website"). The Beneficiaries and Potential Beneficiaries and the Minister have

access to the Website and it can be used to provide notice to the Beneficiaries and Potential Beneficiaries and the Minister and to make information available to them.

14. The Trustees seek this Court's direction in setting the procedure for seeking the opinion, advice and direction of the Court in regard to:

    a. Determining the Beneficiaries of the 1985 Trust.

    b. Reviewing and providing direction with respect to the transfer of the assets to the 1985 trust.

    c. Making any necessary variations to the 1985 Trust or any other Order it deems just in the circumstances.

SWORN OR AFFIRMED BY THE DEPONENT BEFORE A COMMISSIONER FOR OATHS AT EDMONTON, ALBERTA ON AUGUST 30, 2011.

PAUL BUJOLD

Commissioner's Name:
Appointment Expiry Date:
MARCO S. PORETTI
Barrister / Solicitor

810070; August 29, 2011
810070;August 30, 2011

This is Exhibit " A " referred to in the Affidavit of Paul Bujold
Sworn before me this 30 day of August A.D., 20 11
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
MARCO S. PORETTI

DECLARATION OF TRUST

SAWRIDGE BAND TRUST

This Declaration of Trust made the 15th day of April, A.D. 1982.

BETWEEN:

CHIEF WALTER PATRICK TWINN
of the Sawridge Indian Band
No. 19, Slave Lake, Alberta

(hereinafter called the "Settlor")

of the First Part

AND:

CHIEF WALTER PATRICK TWINN,
WALTER FELIX TWINN and GEORGE TWINN
Chief and Councillors of the
Sawridge Indian Band No. 150 A S H respectively

(hereinafter collectively called the "Trustees")

of the Second Part

AND WITNESSES THAT:

Whereas the Settlor is Chief of the Sawridge Indian Band No. 19, and in that capacity has taken title to certain properties on trust for the present and future members of the Sawridge Indian Band No. 19 (herein called the "Band"); and,

Whereas it is desirable to provide greater detail for both the terms of the trust and the administration thereof; and,

Whereas it is likely that further assets will be acquired on trust for the present and future members of the Band, and it is desirable that the same trust apply to all such assets;

NOW, therefore, in consideration of the premises and mutual promises contained herein, the Settlor and each of the Trustees do hereby covenant and agree as follows:

1. The Settlor and Trustees hereby establish a Trust Fund, which the Trustees shall administer in accordance with the terms of this Agreement.

2. Wherever the term "Trust Fund" is used in this Agreement, it shall mean: a) the property or sums of money paid, transferred or conveyed to the Trustees or otherwise acquired by the Trustees including properties substituted therefor and b) all income received and capital gains made thereon, less c) all expenses incurred and capital losses sustained thereon and less d) distributions porperly made therefrom by the Trustees.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Agreement. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein.

4. The name of the Trust Fund shall be "The Sawridge Band Trust", and the meetings of the Trustees shall take place at the Sawridge Band Administration office located on the Sawridge Band Reserve.

5. The Trustees of the Trust Fund shall be the Chief and Councillors of the Band, for the time being, as duly elected pursuant to Sections 74

through 80 inclusive of the Indian Act, R.S.C. 1970, c. I-6, as amended from time to time. Upon ceasing to be an elected Chief or Councillor as aforesaid, a Trustee shall ipso facto cease to be a Trustee hereunder; and shall automatically be replaced by the member of the Band who is elected in his stead and place. In the event that an elected Chief or Councillor refuses to accept the terms of this trust and to act as a Trustee hereunder, the remaining Trustees shall appoint a person registered under the Indian Act as a replacement for the said recusant Chief or Councillor, which replacement shall serve for the remainder of the term of the recusant Chief or Councillors. In the event that the number of elected Councillors is increased, the number of Trustees shall also be increased, it being the intention that the Chief and all Councillors should be Trustees. In the event that there are no Trustees able to act, any person interested in the Trust may apply to a Judge of the Court of Queen's Bench of Alberta who is heraby empowered to appoint one or more Trustees, who shall be a member of the Band.

6. The Trustees shall hold the Trust Fund for the benefit of all members, present and future, of the Band; provided, however, that at the end of twenty one (21) years after the death of the last decendant now living of the original signators of Treaty Number 8 who at the date hereof are registered Indians, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among all members of the Band then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and

their status may not have been protested under Section 12(2) thereunder; and provided further that the Trustees shall exclude any member of the Band who transfers to another Indian Band, or has become enfranchised (within the meaning of these terms in the Indian Act).

The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for the beneficiaries set out above; and the Trustees may make such payments at such time, and from time to time, and in such manner as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investment authorized for Trustees' investments by The Trustees' Act, being Chapter 373 of the Revised Statutes of Alberta 1970, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or desirable to give effect to the trust purposes set out above,

and to discharge their obligations thereunder other than acts done or omitted to be done by them in bad faith or in gross negligence, including, without limiting the generality of the foregoing, the power

a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefore; and

c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund, including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by Federal, Provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them

by this Agreement provided such act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take with notice of and subject to this clause.

12. A majority of the Trustees shall be required for any action taken on behalf of the Trust. In the event that there is a tie vote of the Trustees voting, the Chief shall have a second and casting vote.

Each of the Trustees, by joining in the execution of this Trust Agreement, signifies his acceptance of the Trust herein. Any Chief or Councillor or any other person who becomes a Trustee under paragraph 5 above shall signify his acceptance of the Trust herein by executing this Trust Agreement or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Trust Agreement.

IN WITNESS WHEREOF the parties hereto have executed this Trust Agreement.

SIGNED, SEALED AND DELIVERED
In the Presence of:

Heather Lyle
NAME
1100 One Thornton Court
ADDRESS

A. Settlor: Walter P. J.

Heather Lyle
NAME
1100 One Thornton Court
ADDRESS

B. Trustees: 1. Walter P. J.

NAME Heather Ifork

ADDRESS 1100 One Thornton Court

NAME Heather Ifork

ADDRESS 1100 One Thornton Court

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

2. [redacted]

3. Walter F [redacted]

4.

5.

6.

7.

8.

This is Exhibit " B " referred to in the Affidavit of Paul Bujold
Sworn before me this 30 day of August A.D., 20 11
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
MARCO S. PORETTI

SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

THIS DEED OF SETTLEMENT is made in duplicate the 15th day of April, 1985

B E T W E E N :

CHIEF WALTER PATRICK TWINN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter called the "Settlor"),

OF THE FIRST PART,

- and -

CHIEF WALTER PATRICK TWINN,
GEORGE V. TWIN and SAMUEL G. TWIN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter collectively called
the "Trustees"),

OF THE SECOND PART.

WHEREAS the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution of this Deed are members of the Sawridge Indian Band No. 19 within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, as such provisions existed on the 15th day of April, 1982, and the future members of such band within the meaning of the said provisions as such provisions existed on the 15th day

of April, 1952 and for that purpose has transferred to the Trustees the property described in the Schedule hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Settlement, the following terms shall be interpreted in accordance with the following rules:

(a) "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time

would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band

No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement; and

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule hereto and any accumulated income thereon;

(B) any further, substituted or additional property and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Settlement; and

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement.

4. The name of the Trust Fund shall be "The Sawridge Band Inter Vivos Settlement", and the meetings of the Trustees shall take place at the Sawridge Band Administration Office located on the Sawridge Band Reserve.

5. Any Trustee may at any time resign from the office of Trustee of this Settlement on giving not less than thirty (30) days notice addressed to the other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee shall be vested in the continuing Trustees or Trustee of this Settlement and such

power shall be exercised so that at all times (except for the period pending any such appointment, including the period pending the appointment of two (2) additional Trustees after the execution of this Deed) there shall be at least five (5) Trustees of this Settlement and so that no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there is more than one (1) Trustee who is not then a Beneficiary.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the end of twenty-one (21) years after the death of the last survivor of all persons who were alive on the 15th day of April, 1982 and who, being at that time registered Indians, were descendants of the original signators of Treaty Number 8, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under section 12(2) thereunder.

The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for Trustees' investments by the Trustees' Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Settlement for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner to any extent detracting from the generality of the foregoing, the power

(a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

(b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor; and

(c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund,

including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under subparagraph 2(a) of this Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such

act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and subject to this clause.

13. Subject to paragraph 11 of this Deed, a majority of fifty percent (50%) of the Trustees shall be required for any decision or action taken on behalf of the Trust.

Each of the Trustees, by joining in the execution of this Deed, signifies his acceptance of the Trusts herein. Any other person who becomes a Trustee under paragraph 5 of this Settlement shall signify his acceptance of the Trust herein by executing this Deed or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Deed.

14. This Settlement shall be governed by, and shall be construed in accordance with the laws of the Province of

Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

Bruce G Thom
NAME

Box 326 Slave Lake Alta
ADDRESS

A. Settlor

B. Trustees:

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

1.

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

2.

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

3.

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

This is Exhibit " C " referred to in the Affidavit of Paul Bujold
Sworn before me this 30 day of August A.D., 20 11
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
MARCO S. PORETTI

THE SAWRIDGE TRUST

DECLARATION OF TRUST

THIS TRUST DEED made in duplicate as of the 15th day of August, A.D. 1986.

BETWEEN:

CHIEF WALTER P. TWINN,
of the Sawridge Indian Band, No. 19, Slave Lake, Alberta
(hereinafter called the "Settlor")

OF THE FIRST PART,

- and -

CHIEF WALTER P. TWINN, CATHERINE TWINN and GEORGE TWIN,
(hereinafter collectively called the "Trustees")

OF THE SECOND PART,

WHEREAS the Settlor desires to create an inter vivos trust for the benefit of the members of the Sawridge Indian Band, a band within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, and for that purpose has transferred to the Trustees the property described in the Schedule attached hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Deed, the following terms shall be interpreted in accordance with the following rules:

(a) "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada;

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule attached hereto and any accumulated income thereon;

(B) any further, substituted or additional property, including any property, beneficial interests or rights referred to in paragraph 3 of this Deed and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Deed;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Deed;

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted; and

(E) "Trust" means the trust relationship established between the Trustees and the Beneficiaries pursuant to the provisions of this Deed.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell, lease or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Deed.

4. The name of the Trust Fund shall be "The Sawridge Trust" and the meetings of the Trustees shall take place at the Sawridge Band Administration Office located on the Sawridge Band Reserve.

5. The Trustees who are the original signatories hereto, shall in their discretion and at such time as they determine, appoint additional Trustees to act hereunder. Any Trustee may at any time resign from the office of Trustee of this Trust on giving not less than thirty (30) days notice addressed to the

other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee and the power of appointing additional Trustees to increase the number of Trustees to any number allowed by law shall be vested in the continuing Trustees or Trustee of this Trust and such power shall be exercised so that at all times (except for the period pending any such appointment) there shall be a minimum of Three (3) Trustees of this Trust and a maximum of Seven (7) Trustees of this Trust and no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there are more than Two (2) Trustees who are not then Beneficiaries.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the expiration of twenty-one (21) years after the death of the last survivor of the beneficiaries alive at the date of the execution of this Deed, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then alive.

During the existence of this Trust, the Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for trustees' investments by the Trustee's Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Saving Bank Act applies.

8. The Trustees are authorized and empowered to do all acts that are not prohibited under any applicable laws of Canada or of any other jurisdiction and that are necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Trust for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner or to any extent detracted from the generality of the foregoing, the power

(a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

(b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor; and

(c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with this Trust shall be paid from the Trust Fund, including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of this Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The provision of this Deed may be amended from time to time by a resolution of the Trustees that received the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years and, for greater certainty, any such amendment may provide for a commingling of the assets, and a consolidation of the administration, of this Trust with the assets and administration of any other trust established for the benefit of all or any of the Beneficiaries.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and shall be subject to this clause.

13. Any decision of the Trustees may be made by a majority of the Trustees holding office as such at the time of such decision and no dissenting or abstaining Trustee who acts in good faith shall be personally liable for any loss or claim whatsoever arising out of any acts or omissions which result from the exercise of any such discretion or power, regardless whether such Trustee assists in the implementation of the decision.

14. All documents and papers of every kind whatsoever, including without restricting the generality of the foregoing, cheques, notes, drafts, bills of exchange, assignments, stock transfer powers and other transfers, notices, declarations, directions, receipts, contracts, agreements, deeds, legal papers, forms and authorities required for the purpose of opening or operating any account with any bank, or other financial institution, stock broker or investment dealer and other instruments made or purported to be made by or on behalf of this Trust shall be signed and executed by any two (2) Trustees or by any person (including any of the Trustees) or persons designated for such purpose by a decision of the Trustees.

15. Each of the Trustees, by joining in the execution of this Deed, signifies his acceptance of the Trusts herein. Any other person who becomes a Trustee under paragraph 5 of this Trust shall signify his acceptance of the Trust herein by executing this Deed or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Deed.

16. This Deed and the Trust created hereunder shall be governed by, and shall be construed in accordance with, the laws of the Province of Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

A. Settlor

CHIEF WALTER P. TWINN

B. Trustees:

1.

CHIEF WALTER P. TWINN

2.

CATHERINE TWINN

3.

GEORGE TWIN

860647-1/6

SCHEDULE

One Hundred Dollars ($100.00) in Canadian Currency.

This is Exhibit "D" referred to in the Affidavit of Paul Boyd
Sworn before me this 30 day of August A.D., 20 11
A Notary Public, A Commissioner for Oaths In and for the Province of Alberta
MARCO S. PORETTI

SAWRIDGE TRUSTS

24 November 2009

Dear Sawridge Trusts Potential Beneficiary,

During the consultations carried out by Four World Centre for Development Learning (Four Worlds), some of those consulted raised some questions regarding either the Sawridge Band Inter-Vivos Settlement (1985 Trust) or the Sawridge Trust (1986 Trust) or both (Trusts). The Trustees of the Trusts are pleased to try to answer your questions to the best of our ability based on information available at this time. The questions asked were:

- *Who are the trustees and how are they appointed?*
- *Are the children of individuals who became eligible under Bill C-31 also eligible as beneficiaries?*
- *What about the children of those individuals who are now deceased?*
- *What is the process whereby decisions are made about who is or is not a beneficiary?*
- *How do we get to the place where we can operate the Trusts without being forced into boxes originated with the Indian Act and that continue to cause disunity?*
- *If I am a beneficiary under a Trust and I receive benefits, am I taking something from someone else's table?*
- *Do "new" beneficiaries get the same benefits as those who have been eligible for their whole lives?*
- *Can benefits to seniors be structured to avoid tax consequences and not impact old age benefits?*
- *How can we ensure equity for all beneficiaries when the Band only serves those individuals who live on the Reserve?*
- *What happens to the Trust programs if the trustees change and new trustees have a different set of ideas?*

Attached to this letter is a copy of each of the deeds setting out the terms of each of the Trusts. These are the basic governing documents which, along with generally applicable principles and the rules of trust law, determine how the Trusts are operated.

Currently, the trustees of the two Trusts are the same, namely, Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland (Guy) Twinn and Walter Felix Twin. The trustees can be reached through the Trusts' office located in Edmonton, Alberta. The address, telephone number, fax number and email address for the Trusts is listed below on the letterhead. According to the trust deeds, the existing trustees select new trustees as trustees leave. The number of possible trustees for each trust is slightly different but the trustees have chosen to appoint five trustees for both trusts and have appointed the same trustees to each trust so that the two trusts can operate together.

801, 4445 Calgary Trail NW, Edmonton, Alberta T6H 2R7 Canada | P: (780) 988-7723 | F: (780) 988-7724 | general @sawridgetrusts.ca

Letter to Beneficiaries, 24 November, 2009

Paragraph 6 of the deeds applying to each of the Trusts provides that the trustees have power to distribute income or capital of the Trusts "as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the trustees may make such payment at such time and from time to time, in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate."

Although this provision refers to the Trustees' discretion as "unfettered", it is in fact controlled by the requirements of trust law. These requirements, which have been laid down in case law and are expressed in fairly general terms, can be summarized as follows:

- Trustees must give their active consideration to the exercise of their discretionary powers.
- Trustees must act in good faith, in the sense that they must take account of relevant factors and must not take account of irrelevant factors.

Whatever is relevant for these purposes depends on the circumstances of each particular case. However, the basic idea is that trustees should take account of factors relevant to the purposes of the Trusts.

The trustees have recently hired a Trust Administrator and Program Manager, Paul Bujold, to administer the benefits, develop the programs and run the office of the Trusts. Paul can be reached at the address and telephone/fax numbers below, by email at paul@sawridgetrusts.ca or on his cell at (780) 270-4209.

Sawridge Trusts are developing a web site that will be accessible to all beneficiaries. Certain parts of the site will contain documents that are of interest to all beneficiaries while other parts will only be accessible to the particular beneficiary as it will contain private information about that person. The Web site will also list the programs currently available through the Trusts and how to access them and will provide useful links to other sites that can provide information or support programs to the beneficiaries.

Each of the Trusts owns all the shares in a separate holding company. In the case of the 1985 Trust, that company is Sawridge Holdings Ltd. and in the case of the 1986 Trust it is 352736 Alberta Ltd. Through these companies, the Trusts have invested in a number of businesses. The assets of Sawridge Holdings Ltd. and 352736 Alberta Ltd. are listed on the attached flow chart. The Directors of the holding companies and their subsidiaries, called the Sawridge Group of Companies, are independent individuals who have been chosen for their skills and experience in overseeing business enterprises such as those owned by the companies.

The Trusts were established to provide on-going benefits to the beneficiaries from the revenue generated by the Trusts' investments. This revenue fluctuates with the economic climate. The success of the businesses vary, accordingly. The resources of each Trust are limited and any system of programs has to be based on views about equitable and appropriate use of the resources available.

It is for the trustees to consider the weight to be given to particular factors. They may consider the length of time a person has been a beneficiary as one relevant factor if this is appropriate to the nature of the particular program or benefit being provided.

Another factor the trustees may consider is the impact of taxation, both generally and in the circumstances of particular beneficiaries. The trustees may be able to attempt to structure distributions in a way that will be as tax-efficient as reasonably possible. It is possible, however, that a particular distribution from the Trusts may have an impact on a person's entitlement to other programs such as Old Age Security. In considering the appropriate programs, the trustees may consider it relevant that certain programs and other benefits are only available to beneficiaries who live on the Reserve and other programs may only be available to beneficiaries living off the Reserve.

As trustees of discretionary trusts, the trustees have a broad discretion to develop those benefits through the Trusts that they feel would, from time to time, assist the individual beneficiaries and the Sawridge Band community grow and develop to better meet their own needs, the costs of which are consistent with the revenues available to the Trusts. Following the Four Worlds report, the trustees adopted a list of potential benefits suggested by the beneficiaries and Four Worlds. These benefits will be put in place gradually as more work is done on planning the financial impact of the programs on the Trusts and as the programs are matched with other programs already existing through the Regional Council, the Alberta Government, the Canadian Government or other agencies.

The trustees are responsible for exercising their discretion in respect of the programs while they are trustees. They will be responsible for evaluating the success of the programs on an on-going basis and therefore would be expected to make changes when they determine that changes are required. They also have the power to make changes based on their having, as phrased in the question asked by a beneficiary, "a different set of ideas". However, in order to make any such change they would need to consider whether replacing an already existing program would be reasonable in all the circumstances. The trustees may also, from time to time, have to take into consideration the cost of a program in relation to the amount of revenue available to the Trusts.

The rules for eligibility as a beneficiary are presently being worked out for each of the trusts. According to the trust deeds, the persons who qualify as beneficiaries are to some extent different for the 1985 Trust and for the 1986 Trust. In the 1985 Trust (paragraph 2(a) of the Deed), 'beneficiaries' are defined as persons who are also qualified to be Band members in accordance with the criteria provided in the Indian Act as at 15 April 1982. In the 1986 Trust (paragraph 2(a) of the Deed), 'beneficiaries' are defined as "all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada.".

The trustees are presently in the process of having some research carried out by experts in Canadian law and First Nations and Cree traditional law to develop a clear list of criteria. This

will help in the process of determining who is an eligible beneficiary, especially under the 1985 Trust where the rules are more complex.

As part of this process, the trustees will post a notice in newspapers in British Columbia, Alberta and Saskatchewan asking anyone who thinks that they may be a beneficiary under either trust to provide the Trusts with information about why they feel they are eligible. Based on the facts determined and the legal advice received, the Trusts will then develop a list of qualified beneficiaries. Where it is still not clear after this process whether someone is or is not a beneficiary, the Trusts will apply to the Alberta Court for its advice on the matter.

We hope that this information answers most people's questions. As more information becomes available we will keep the beneficiaries informed, either by newsletter or through the web site. If you have any questions, please do not hesitate to contact our office and the Trusts Administrator will try to assist you.

Cordially

Paul Bujold,

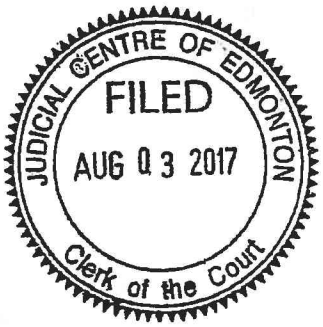
Interim Chair

Sawridge Trusts Board of Trustees

Attachments

TAB 7

Clerk's Stamp



COURT FILE NO.:	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as am.

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19 ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST
RESPONDENT:	MAURICE STONEY
INTERVENER:	SAWRIDGE FIRST NATION
DOCUMENT:	**WRITTEN RESPONSE ARGUMENT OF MAURICE STONEY ON VEXATIOUS LITIGANT ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

DLA Piper (Canada) LPP
1201 Scotia 2 Tower
10060 Jasper Avenue NW
Edmonton, AB, T5J 4E5
Attn: Priscilla Kennedy
Tel: 780.429.6830
Fax: 780.702.4383
Email: priscilla.kennedy@dlapiper.com
File: 84021-00001

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Authorities

1. Consent Order of Associate Chief Justice Rooke July 19, 2017.
2. *Huzar v. Canada*, 2000 CanLII 15589 (FCA).
3. *Powder v. H.M.T.Q.* August 16, 2016.
4. *Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation*, 2013 FC 509.
5. *Benner v. Canada*, [1997] 1 SCR 358 (headnote only).
6. *Re Manitoba Language Rights*, [1985] 1 SCR 721 (headnote only).
7. *McIvor v. Canada*, 2009 BCCA 153.
8. *Descheneaux v. Canada (A.G.)*, 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act*, set to be heard on August 9, 2017].
9. *The Government of Canada's Response to the Descheneaux Decision.*
10. *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99.
11. *Sawridge Band v. H.M.T.Q.* 2009 FCA 123.
12. And see *Twinn v. Sawridge Band*, 2017 ABQB 366.
13. *Poitras v. Twinn*, 2013 FC 910.
14. *Federal Court Rules*, Rule 114.

I. QUESTION SET BY THE COURT

1. Case Management Decision (Sawridge #6) orders in paragraph 63 that Maurice Stoney make written submissions prior to the close of the Law Courts on August 4, 2017 on the following two matters:

    1. his access to Alberta courts should be restricted, and
    2. if so, what the scope of that restriction should be.

2. This Order further stipulates:

    I declare that Maurice Stoney is prohibited from filing any material on any Alberta court file, or to institute or further any court proceedings, without the permission of the Chief Justice, Associate Chief Justice, or Chief Judge of the court in which the proceedings is conducted, or his or her designate. ...

3. An exception to the Interim Court Filing Restriction Order was granted by Associate Chief Justice Rooke on July 19, 2017 filed on July 20, 2017 which permits completion of the direction of Master Schulz in Alberta QB Action 1603 03761 *Gabriel Nussbaum v. Maurice Felix Stoney and Eliza Marie Stoney.* The Associate Chief Justice did not require any notice to any other person nor any conditions or security for costs.

    Consent Order of Associate Chief Justice Rooke July 19, 2017. [Tab 1]

4. <u>This Consent Order was agreed to by Counsel for the Trustees and by Counsel for the Sawridge First Nation who both signed the Consent Order.</u>

II. FACTS

5. The 1985 Sawridge Trustees have adopted the arguments of the Sawridge First Nation. Paragraph 2 of the submissions of the 1985 Sawridge Trustees states:

    The trustees have reviewed the brief filed by the Sawridge First Nation and confirm that they agree with the contents. In the interests of saving costs to the 1985 Sawridge Trustee and in the interest of avoiding duplicative arguments, the Trustees wish to adopt the arguments of the Sawridge First Nation as filed in this action.

(A) Misstated Facts of Sawridge First Nation

6. The Federal Court of Appeal struck the Statement of Claim issued in Federal Court in 1995 on the ground that there was "no reasonable cause of action" and that the matter was properly a judicial review under section 18(3) of the *Federal Court Act*. On such a proceeding where the argument is that there is no reasonable cause of action, no evidence is admissible: *Canada (A.G.) v. Inuit Tapirisit of Canada,* [1980] SCJ No. 99 quoted at paragraph 24 in *Powder v. H.M.T.Q.* [Tab 3]. Accordingly, the striking of the Statement of Claim does not rely on any Affidavit evidence of Sawridge First Nation nor make any finding on it. It is improper to rely upon that evidence in this matter.

Huzar v. Canada, 2000 CanLII 15589 (FCA). [Tab 2]
Powder v. H.M.T.Q. August 16, 2016. [Tab 3]

7. The judicial review in 2013 did not include a "thorough analysis" of Maurice Stoney's arguments regarding his entitlement to membership since it was determined that no constitutional arguments could be made, see paragraph 22 as a result of not completing the Constitutional Question Notice required by section 57 of the *Federal Courts Act,* which provides in subsection 1 that it applies whenever "the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the ...Federal Court" must be served on each Attorney General in Canada.

Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation, 2013 FC 509, para. 22. [Tab 4]

8. Paragraphs 10 to 14 are in reference to the claims by Aline Huzar and June Kolosky to Sawridge First Nation membership as stated by Mr. Justice Barnes at paragraphs 10 to 14 and concluded by his statement "the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership". Only paragraph 15 refers to Maurice Stoney.

Stoney, supra, paras. 10-14, 15. [Tab 4]

9. As noted at paragraph 4, Mr. Justice Barnes did state that the Sawridge First Nation membership rules only applied from the point when the Minister of Indian and Northern Affairs gave notice under section 10(7) of the *Indian Act*, which occurred in September, 1985. This is contrary to the assertions throughout the facts stated by Sawridge First Nation. The date of issue in this matter of the beneficiaries of the 1985 Sawridge Trust is the date of the Trust which is dated April 15, 1985.

Stoney, supra., para. 4. [Tab 4]

(B) Other Facts

10. Following the cross-examination of Maurice Stoney on September 23, 2016, counsel for the Trustees did not make any applications to require further examination nor request any further cross-examination.

11. At no time did the Sawridge First Nation apply for clarification of whether or not they were a party entitled to attend cross-examination prior to the examination although they were well aware of the timing of the examination and the refusal of their participation much earlier in September, 2016 and had time to apply for such an Order.

12. Maurice Stoney has not attempted to re-litigate the membership issue but rather to set out the legal arguments to address the direct issue of the definition of a beneficiary under the 1985 Sawridge Trust made on April 15, 1985 at a time when the Sawridge First Nation was not legally able to limit its membership as noted by Mr. Justice Barnes in his decision at paragraph 4. The Supreme Court of Canada has held that citizenship is always an issue to be reviewed on constitutional rights see: *Benner v. Canada*, [1997] 1 SCR 358 (headnote only). Limitation periods, long periods where legislation have been treated as being constitutional, and prior decisions, even of the Supreme Court of Canada do not limit the ability to bring forward a question before the Courts: *Re Manitoba Language Rights*, [1985] 1 SCR 721. In this context, there have been a number of recent decisions on these constitutional issues that have and are in the

process of completely altering the law related to these issues of the membership/citizenship of Indians, in order to have them comply with the *Constitution*.

Benner v. Canada, [1997] 1 SCR 358 (headnote only). [Tab 5]

Re Manitoba Language Rights, [1985] 1 SCR 721 (headnote only). [Tab 6]

McIvor v. Canada, 2009 BCCA 153. [Tab 7]

Descheneaux v. Canada (A.G.), 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act*, set to be heard on August 9, 2017]. [Tab 8]

The Government of Canada's Response to the Descheneaux Decision. [Tab 9]

Daniels v. Canada (Indian Affairs and Northern Development), [2016] 1 SCR 99. [Tab 10]

13. The Federal Court of Appeal determined on April 21, 2009, that the Sawridge Band's action seeking an order declaring that certain amendments to the *Indian Act* regarding membership, were unconstitutional. Sawridge Band had brought action against all of the amendments which "compelled the appellants [Sawridge Band], against their wishes, to add certain individuals to the list of band members. The appellants had argued that the legislation is an invalid attempt to deprive them of their right to determine the membership of their own bands." The first trial had commenced in 1993 and the history of the trial and re-trial is set out at paragraph 4. It is to be noted that the length of time this matter was before the Federal Court is indicative of the unsettled nature of the issues raised. The issue of membership/citizenship remains an unsettled matter as shown by the decisions of various courts including the Supreme Court of Canada, cited in paragraph 12 above.

Sawridge Band v. H.M.T.Q. 2009 FCA 123. [Tab 11]

And see *Twinn v. Sawridge Band*, 2017 ABQB 366. [Tab 12]; *Poitras v. Twinn*, 2013 FC 910. [Tab 13]

14. It is acknowledged that this court has dismissed these arguments and they are not referred to here, other than as the facts to set the context for the matters to

be dealt as directed on the issue of whether or not the application of Maurice Stoney was vexatious litigation.

III. RESTRICTED ACCESS TO ALBERTA COURTS

(A) The *Judicature Act*, section 23(2)

15. Section 23(2) requires that the following matters be considered as a list of vexatious litigation:

> (2) For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:
>
> (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
>
> (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
>
> (c) persistently bringing proceedings for improper purposes;
>
> (d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;
>
> (e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
>
> (f) persistently taking unsuccessful appeals from judicial decisions;
>
> (g) persistently engaging in inappropriate courtroom behavior.

16. As shown by the litigation in the Sawridge Band cases above, the on-going case in *Descheneaux* and decision of the Supreme Court of Canada in *Daniels,* and by the review of the Federal Court of Appeal decision in *Huzar* and the judicial review in *Stoney,* it is submitted that this is not a proceeding where the issue has already been determined by a court of competent jurisdiction. Nor is this a matter where proceedings have been brought that cannot succeed or have no reasonable expectation of providing relief.

17. It is submitted that litigation seeking to determine whether or not you qualify as a beneficiary under a trust established on April 15, 1985 in a matter where the issue of membership/citizenship has not been settled by the courts, and this

application was not brought for an improper purpose. Nor have the matters raised in (d), (f) and (g) occurred.

18. Costs to the Sawridge First Nation have not been paid however the intention is to pay them as soon as it is possible for Maurice Stoney. Costs to the 1985 Sawridge Trust have been paid.

B. Inherent Jurisdiction

19. The elements of vexatious litigation are set out in *Chutskoff v. Bonora*, at paragraph 92 quoted at pages 13-16 of the Written Submissions of the Sawridge First Nation.

20. It is submitted that this application by Maurice Stoney was not a collateral attack. The issue before the Court here is the definition of beneficiary in the 1985 Sawridge Trust when beneficiary is to be determined as of April 15, 1985. As Mr. Justice Barnes stated at paragraph 4 of the judicial review of the Sawridge First Nation membership application, that the Sawridge First Nation membership application does not apply to anything before the date that the Minister agreed to the Sawridge First Nation membership by-law in September, 1985, leaving a period from April 17, 1985 until September, 1985 which is not covered by the Sawridge First Nation membership process. The issue that was argued in the written submission during the fall of 2016, was the status of Maurice Stoney under the Sawridge Band on or about April, 1985 which was not *res judicata* from the previous matters in Federal Court. The issue of the status in the period from April 15, 1985 to September, 1985 was a completely new issue. Mr. Justice Barnes determined that the decision of the Appeal Committee of the Sawridge First Nation was reasonable on the question of membership in the Sawridge First Nation, based on the application made by Maurice Stoney to the Sawridge First Nation.

Stoney, supra. [Tab 4]

21. It is acknowledged that the costs owed from the Federal Court proceeding are owed by Maurice Stoney and because the judicial review was heard with the judicial review by Aline Huzar and June Kolosky, owed by all three of them and have not been paid along with the costs of the application before the Court of Appeal in Feb. 2016, although the costs of the 1985 Sawridge Trustees have been paid by Maurice Stoney in November, 2016. Maurice Stoney is 77 years of age and Aline Huzar and June Kolosky are all senior citizens of limited means.

22. There has been no 'escalating' of proceedings in this matter. The law related to status of Indians in Canada has changed over the years and Canada is still involved in proceedings to determine and satisfy these membership and status issues currently outstanding as a result of the *Descheneaux v. Canada (A.G.)* decision [Tabs 8 and 9] and the decision in the *Daniels* case [Tab 10]. These matters all include the issue of who, in law, is a member of a band and that will affect the issue of the Sawridge Band during the time period from April 17, 1985 until September, 1985.

23. No disrespect for the court process or intention to bring proceedings for an improper purpose, was intended to be raised by these arguments respecting this time period and the definition of beneficiary in this trust.

24. Contrary to the argument of Sawridge First Nation these matters have not been determined in the past Federal Court proceedings. Issues of citizenship and the constitutionality of these provisions remains a legal question today as shown by the on-going litigation throughout Canada. Plainly this Court has determined that these arguments are dismissed in this matter and that is acknowledged.

25. Throughout all of these proceedings and proceedings in the Federal Court, Maurice Stoney has honoured his Court obligations. The failure to pay the costs of Sawridge First Nation is the intervening result of foreclosure proceedings against Maurice Stoney and his wife in Q.B. Action No. 1603 03761 (originally started in Peace River in 2011 and transferred to Edmonton in 2016) in which the Associate Chief Justice Rooke has issued a Consent Order on July 19, 2017

directing that this Action is an exception to the Interim Order granted on July 12, 2017. This Order of the Associate Chief Justice has been consented to by the 1985 Sawridge Trustees and by the Sawridge First Nation [see Tab 1].

26. Affidavit evidence has been filed and provided to the Court on July 28, 2017, by Bill Stoney, brother to Maurice, by Gail Stoney, sister to Maurice and by Shelley Stoney, daughter of Bill Stoney, respecting the approval of the other brothers and sisters, to show that they commenced this application and directed that Maurice Stoney proceed on their behalf. The *Federal Court Rules,* provide for Representative proceedings where the representative asserts common issues of law and fact, the representative is authorized to act on behalf of the represented persons, the representative can fairly and adequately represent the interests of the represented persons and the use of a representative proceeding is the just, most efficient and least costly manner of proceeding. This method of proceeding is frequently used for aboriginals and particularly for families who are aboriginal. It is submitted that this was the most efficient and least costly manner of proceeding in the circumstances where the claim of all of the living children possess the same precise issues respecting their citizenship.

Federal Court Rules, Rule 114. [Tab 14]

27. No collateral attack was intended nor was this brought as a "busy body" proceeding in presenting the arguments of Maurice Stoney and his brothers and sisters respecting the fact that they were born as members (citizens) of the Sawridge Band, they were removed by the provisions of the *Indian Act* during the 1940's and effective April 17, 1985 their removal from the *Indian Act,* was repealed.

28. It is also submitted that this application was not a hopeless proceeding without any reasonable expectation to provide relief. This is an area of the law that is changing rapidly as shown by *McIvor* [Tab 7], *Descheneaux* [Tab 8], *The Government of Canada's Response to the Descheneaux Decision* [Tab 9] and *Daniels* [Tab 10]. No conclusion was made in the 1995 Federal Court

proceedings which were struck as showing no reasonable cause of action and the judicial review was concerned with the issue of the Sawridge First Nation Appeal Committee decision based on membership rules post September, 1985.

IV. SCOPE OF THE RESTRICTION

29. In *Hok v. Alberta*, para. 36 [Tab 2 of the Sawridge First Nation Authorities], three questions are set out to be answered on the question of how to structure the court order restricting access to the court for the litigant. These questions are:

1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?
2. What litigation subject or subjects are likely involved in that abuse of court processes?
3. In what forums will that abuse occur?

30. The Sawridge First Nation submits at paragraph 57 of their Written Submissions, that the claims of Maurice Stoney to membership in the Sawridge First Nation show the indicia of vexatious litigation. In paragraph 80, their submission is that Maurice Stoney's access to the Alberta Courts should be restricted for any litigation against:

(a) Sawridge First Nation

(b) any past, present, or future members of the Chief and Council of the Sawridge First Nation;

(c) the 1985 Sawridge Trust;

(d) the 1986 Sawridge Trust; and

(e) the Trustees of the 1985 and 1986 Sawridge Trusts.

31. It is submitted that the Interim Court Filing Restriction Order should not be made permanent on the grounds that the necessary conditions for such an Order are not met as set out in argument above.

32. In the alternative, it is submitted that such an Order should only restrict actions by Maurice Stoney against the Sawridge First Nation and the 1985 Sawridge Trust.

33. In paragraph 82 of the Sawridge First Nation Written Argument it appears that the Sawridge First Nation is also asking that all access to the Courts be restricted for Maurice Stoney although they have submitted in the previous paragraph that the restriction should only be with respect to the bodies set out in paragraph 30 above. It is submitted that there is no basis for restriction of Mr. Stoney's rights to access the Alberta Courts for matters unrelated to the Sawridge First Nation and the 1985 Sawridge Trust.

V. ORDER SOUGHT

34. It is respectfully submitted that Maurice Stoney should not be declared to be a vexatious litigant and that the Interim Order should not be made permanent.

35. In the alternative, it is submitted that, if Maurice Stoney is declared to be a vexatious litigant, it should be narrowed to restrict actions against the Sawridge First Nation and the 1985 Sawridge Trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd day of August, 2017.

DLA PIPER (CANADA) LLP.

Per: _____

Priscilla Kennedy
Associate Counsel
Counsel for Maurice Stoney

LIST OF AUTHORITIES

1. Consent Order of Associate Chief Justice Rooke July 19, 2017.
2. *Huzar v. Canada*, 2000 CanLII 15589 (FCA).
3. *Powder v. H.M.T.Q.* August 16, 2016.
4. *Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation*, 2013 FC 509.
5. *Benner v. Canada*, [1997] 1 SCR 358 (headnote only).
6. *Re Manitoba Language Rights*, [1985] 1 SCR 721 (headnote only).
7. *McIvor v. Canada*, 2009 BCCA 153.
8. *Descheneaux v. Canada (A.G.)*, 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act*, set to be heard on August 9, 2017].
9. *The Government of Canada's Response to the Descheneaux Decision.*
10. *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99.
11. *Sawridge Band v. H.M.T.Q.* 2009 FCA 123.
12. And see *Twinn v. Sawridge Band*, 2017 ABQB 366.
13. *Poitras v. Twinn*, 2013 FC 910.
14. *Federal Court Rules*, Rule 114.

Tab #3

Federal Court | Cour fédérale

Date: 20160816

Docket: T-436-15

Ottawa, Ontario, August 16, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MARYANN POWDER, JEAN POWDER, ELMER CREE, FLORA POWDER, ALLAN AND FLOYD POWDER AND THEIR CHILDREN AND THE CHILDREN OF LILA POWDER LAFONTAINE, ALL OF THE LIVING MEMBERS OF THE PAUL CREE BAND (ALSO CALLED THE CLEARWATER RIVER BAND #175)

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT AND FORT MCMURRAY FIRST NATION

Defendants

ORDER

UPON Her Majesty the Queen in right of Canada (the "Applicant" in this motion) ["Canada"], bringing a motion seeking an order to strike the Paul Cree Band's Statement of

Claim, as provided for by Rule 221(1) of the *Federal Courts Rules*, SOR/98-106 [the Rules], thereby disposing of the cause of action;

AND UPON hearing this motion in person in Edmonton, Alberta, on May 24, 2016;

AND UPON further written submissions filed after the hearing regarding costs;

[1] Canada, the Defendant in the action and Applicant on the motion, takes the position that Maryann Powder et al ["Paul Cree Band"], the Plaintiffs in the action and Respondents on the motion, are estopped from bringing Federal Court Action No. T-436-15. Canada alleges that the Statement of Claim filed by the Paul Cree Band discloses the same causes of action that were previously pleaded and dismissed by way of a Consent Dismissal Order in Federal Court Action No. T-986-99 [First Action].

[2] Canada submits that the pleading be struck out on the ground that it: (a) discloses no reasonable cause of action; (b) is scandalous, frivolous or vexatious; or (c) is otherwise an abuse of the process of this Court.

[3] I believe that the motion should be dismissed for the reasons that follow.

I. Background

[4] In 2003, counsel for the Paul Cree Band in the First Action advised counsel for Canada before examinations for discovery were held that he had received instructions to discontinue the

action and requested Canada's consent. The Paul Cree Band's legal counsel told Canada that the instructions from the Plaintiffs were to discontinue the action because the Plaintiffs were without funds to continue the litigation.

[5] Counsel for Canada advised that consent was not required to file a notice of discontinuance. Further and more important to this matter, Canada's counsel said they were seeking instructions to claim costs against the Paul Cree Band if the First Action was discontinued.

[6] Counsel for the Paul Cree Band clarified that he was requesting "consent to a discontinuance with each side bearing their own costs."

[7] Counsel for Canada would not consent to a discontinuance with the parties bearing their own costs. Counsel for Canada indicated that a simple discontinuance without costs "would not prevent some, or all of [the plaintiffs], from launching an action at a future time with respect to the issues raised in [the] statement of claim." She then proposed a consent order dismissing the action with each party bearing its own costs, noting that "[i]n doing so, those issues would then be res judicata." With a consent motion before him, Prothonotary Hargrave of the Federal Court on February 12, 2004, ordered that the "action be dismissed with each side bearing its own costs" [Consent Dismissal Order].

[8] Some sixteen (16) years later, Federal Court Action No. T-436-15 was filed on March 28, 2015 [the Second Action]. The named Plaintiffs are: Maryann Powder, Jean Powder, Elmer

Cree, Flora Powder, Allan and Floyd Powder, and their children and the children of Lila Powder Lafontaine, all the living members of the Paul Cree Band (also called the Clearwater River Band #175). At the hearing, counsel for the Plaintiffs conceded the Plaintiffs in this action meet the criterion of "b) the parties to the subsequent litigation must have been parties to or privy with the parties to the prior action;" set out in *Beattie v Canada*, 2001 FCA 309 at paragraph 19, for cause of action estoppel.

II. Issues

[9] In accordance with Rule 221, Canada submits that the issues to be decided in this motion are whether the Second Action should be struck on the grounds that the doctrine of *res judicata* specifically action estoppel applies as it is a collateral attack on an order of this court and is an abuse of process as "...it offends the integrity of the administration of justice." Canada asks that the action be struck on the grounds that it:

- Discloses no reasonable cause of action - Rule 221(1)(a);
- Is scandalous, frivolous or vexatious - Rule 221(1)(c); or
- Is otherwise an abuse of process - Rule 221(1)(f)

[10] Fort McMurray First Nation [FMFN] has been named as a co-Defendant in the Second Action and supports the motion of Canada to strike the pleadings of the Paul Cree Band in the matter.

III. Abuse of Process

[11] Canada submits that it is an abuse of process for the Paul Cree Band to twice sue Canada for the same cause (*Black v Creditors of the Estate Nsc Diesel Power Inc*, 183 FTR 301 at para

11). Canada notes that the doctrine of abuse of process is unencumbered by the specific requirements of *res judicata* and submits that re-litigation alone is sufficient to give rise to abuse of process and "it cannot be said that any additional element of misconduct is required" (*Sanofi-Aventis Canada Inc v Novopharm* Ltd, 2007 FCA 163 at para 43 [*Sanofi*]).

[12] The doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process, and may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency (*Toronto (City) v CUPE, Local* 79, 2003 SCC 63 at para 35 [*CUPE*]).

[13] However, not all instances of re-litigation will impeach the integrity of the judicial system. There are many circumstances in which the bar against re-litigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness; therefore, it can be understood that the discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result (*CUPE*, above, at para 52).

[14] The correspondence exchanged prior to the issuance of the Consent Dismissal Order indicates that counsel for the Paul Cree Band originally sought to discontinue the action with each party bearing its own costs. The reason for they sought the discontinuous at this early stage of the proceedings was due to the Paul Cree Band's lack of funds. However, as noted in the correspondence, counsel for Canada recognized that a simple discontinuance would not prevent

representatives of the Paul Cree Band from launching a future action with respect to these issues. As a result, counsel for Canada ostensibly agreed to bear its own costs on the condition that a consent judgment for dismissal is requested in lieu of a discontinuance; the effect of which would render the issues arising in the First Action *res judicata*. While counsel for the Paul Cree Band seemingly indicated a reluctance to agree to the consent judgment for dismissal, he did eventually file a motion to this effect.

[15] Canada presented me with strong detailed arguments of why I should strike the Second Action. I agree that the Consent Dismissal Order is a final decision of this Court and further agree that if counsel for the Paul Cree Band in the First Action did not have the proper instructions from the Plaintiffs because they now allege it was a representative action, the Plaintiffs should have sought to have the judgment lawfully quashed.

[16] However, in light of the foregoing facts, I believe that this is a situation where the abuse of process doctrine should not be invoked to strike the Statement of Claim. The merits of this action need to be determined. I agree with the Paul Cree Band that it appears that Canada took advantage of the poverty of the Plaintiffs in the First Action to try to ensure that a long resolved aboriginal claim was quickly disposed of by the dismissal at an early stage in the litigation. The substances of the claims advanced by the Paul Cree Band have never been properly heard. I am of the view that the application of either the *res judicata* or abuse of process doctrines would create an injustice in this instance (*Danyluk v Ainsworth Technologies*, 2011 SCC 44 at para 80 [*Danyluk*]).

[17] I will not strike this action as an abuse of process as in the administration of justice it would be unfair to do so as the Plaintiffs wished to discontinue the action only because they had no funds to continue. The Plaintiffs requested the discontinuance at an early stage in the proceeding, before the examination for discovery process began and only consented to the dismissal to avoid the Motion for costs that the Plaintiffs said they would seek against them. The Plaintiffs already had no money to continue the litigation and were left with little options but to consent to a dismissal. To date the merits of this action have not been examined by the parties at examinations for discovery or by the Courts.

[18] In exercising my discretion, I believe that this is an exceptional instance where applying the abuse of process doctrine in order to strike the Paul Cree Band's Statement of Claim would create unfairness.

[19] Even though I believe this is the determinative issue, I will comment briefly on other issues raised by Canada.

IV. No Reasonable Cause of action

[20] Relying on the doctrine of *res judicata*, Canada argues that the Paul Cree Band is estopped from bringing the same cause of action that was previously brought and dismissed by way of the Consent Dismissal Order from the First Action.

[21] Canada acknowledges that there has been no adjudication on the merits of the issues raised in the First Action, but argues that the doctrine of *res judicata* also operates to prevent re-litigation where the cause of action is the same (*Irmes v Bui*, 2010 BCCA 322 at para 19).

[22] The Plaintiffs argued that the claims of the Paul Cree Band have never been properly heard and the application of *res judicata* or issue estoppel creates an injustice (*Danyluk*, above, at para 80).

[23] The test to strike out pleadings is whether it is "plain and obvious" that the claim discloses no reasonable cause of action (*Hunt v Carey Can Inc*, [1990] 2 SCR 959). The onus of proof on the party seeking to strike pleadings is a heavy one (*Apotex Inc v Syntex Pharmaceuticals International Ltd*, 2005 FC 1310, aff'd 2006 FCA 60).

[24] Where a party requests that a pleading be struck for failing to disclose a reasonable cause of action, no evidence is admissible; the Court will simply look at the pleading on its face (*Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] SCJ No 99).

[25] I do not agree with Canada's submissions on this issue. Furthermore, in relying on the argument that the issues which underpin the Statement of Claim are *res judicata*, Canada introduces, by way of affidavit, evidence relating to the First Action. I believe that this is contrary to the rule in *Inuit Tapirisat*, above, which prohibits the introduction of evidence when considering whether a pleading should be struck for failing to disclose a reasonable cause of action. This was recently confirmed by the Federal Court in *NOV Downhole Eurasia Ltd v TLL*

Oil Field Consulting, 2014 FC 889 at paragraph 21, where it was held that when considering a motion under Rule 221(1)(a), the Court is limited to the language in the pleadings and it cannot consider any evidence in support of a motion to strike.

[26] From reading the pleading on its face, I find that the Paul Cree Band's Statement of Claim in the Second Action does disclose a reasonable cause of action: the Statement of Claim alleges material facts against Canada (*Chavali v Canada*, 2002 FCA 209) and sets out effective relief which it seeks to recoup (*Weiten v Canada*, [1993] 1 CTC 2, aff'd [1995] 1 CTC 25 (FCA)). A chart of the material facts as they relate to the cause of action listed in the Statement of Claim are found in the annex to Canada's written representations. The relief sought by the Paul Cree Band is clearly set out on pages 7-8 of the Statement of Claim.

V. Scandalous and frivolous - Collateral Attack

[27] Canada argues that ".....,the Paul Cree Band is attempting to re-litigate matters already settled by court order and discount the authority of this Court's previous judgment in this matter." I do not find that this is a collateral attack on the court order as I find this issue factually linked to the determinative issue of abuse of process.

VI. Costs

[28] Counsel for the parties provided written arguments and draft bills of costs post hearing. In the normal course, costs would be granted to the successful party.

[29] Costs can be awarded against the successful party but only on exceptional circumstances:

> [1] Costs may be awarded to an unsuccessful litigant in rare and exceptional cases. The question here is whether this is one of those rare and exceptional cases. After much consideration, I find that it is....
>
> [13] Awarding costs to an unsuccessful applicant even in cases where there are important public interest dimensions is "highly unusual" and only permitted in "very rare cases."[8] Examples are few and far between. Indeed, both sides agree that costs have been awarded to an unsuccessful constitutional litigant in only a handful of cases.
>
> *Thompson v Ontario (Attorney General)*, 2013 ONSC 6357

[30] I will not award costs on this motion against the unsuccessful litigant (Canada) because this matter was of public interest to be brought before the court by Canada.

[31] After lengthy consideration, I will not order costs against the successful litigant as even though it was an unusual case, I do not believe it rose to the level of a very rare and exceptional matter.

[32] I will order that the parties provide the court with a consent timetable regarding the next steps of the litigation on or before September 29, 2016.

THIS COURT ORDERS that:

1. The motion be dismissed;

2. No costs are ordered and the parties will bear their own costs;

3. The parties are to provide the court with a consent draft timetable for the next steps in the litigation on or before September 29, 2016.

"Glennys L. McVeigh"
Judge

Mark Donald Benner *Appellant*

v.

The Secretary of State of Canada and the Registrar of Citizenship *Respondents*

and

The Federal Superannuates National Association *Intervener*

INDEXED AS: BENNER v. CANADA (SECRETARY OF STATE)

File No.: 23811.

1996: October 1; 1997: February 27.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Equality rights — Citizenship — Children born abroad before February 15, 1977 of Canadian fathers granted citizenship on application but those of Canadian mothers required to undergo security check and to take citizenship oath — U.S.-born son of a Canadian mother denied citizenship because of criminal charges — Whether applying s. 15(1) of Charter involves illegitimate retroactive or retrospective application — If not, whether the treatment accorded to children born abroad to Canadian mothers before February 15, 1977 by the Citizenship Act offending s. 15(1) — If so, whether saved by s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Citizenship Act, R.S.C., 1985, c. C-29, ss. 3(1), 4(3), 5(1)(b), (2)(b), 12(2), (3), 22(1)(b), (d), (2)(b) — Citizenship Regulations, C.R.C., c. 400, s. 20(1).

The appellant, who was born in 1962 in the United States of a Canadian mother and an American father, applied for Canadian citizenship and perfected his application on October 27, 1988. The *Citizenship Act* provided that persons born abroad before February 15, 1977, would be granted citizenship on application if born of a Canadian father but would be required to undergo a security check and to swear an oath if born of

Mark Donald Benner *Appelant*

c.

Le secrétaire d'État du Canada et le greffier de la citoyenneté *Intimés*

et

L'Association nationale des retraités fédéraux *Intervenante*

RÉPERTORIÉ: BENNER c. CANADA (SECRÉTAIRE D'ÉTAT)

N° du greffe: 23811.

1996: 1er octobre; 1997: 27 février.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Droits à l'égalité — Citoyenneté — Citoyenneté attribuée sur demande aux enfants nés à l'étranger avant le 15 février 1977 d'un père canadien, alors que ceux nés d'une mère canadienne sont tenus de se soumettre à une enquête de sécurité et de prêter le serment de citoyenneté — Refus, en raison de l'existence d'accusations criminelles, d'accorder la citoyenneté à un enfant né aux États-Unis d'une mère canadienne — Le fait d'appliquer le par. 15(1) de la Charte entraîne-t-il l'application rétroactive ou rétrospective illégitime de ce texte — Si la réponse est non, le traitement appliqué par la Loi sur la citoyenneté aux enfants nés à l'étranger d'une mère canadienne avant le 15 février 1977 viole-t-il le par. 15(1)? — Dans l'affirmative, peut-il être sauvegardé par l'article premier? — Charte canadienne des droits et libertés, art. 1, 15(1) — Loi sur la citoyenneté, L.R.C. (1985), ch. C-29, art. 3(1), 4(3), 5(1)b), (2)b), 12(2), (3), 22(1)b), d), (2)b) — Règlement sur la citoyenneté, C.R.C., ch. 400, art. 20(1).

L'appelant, qui est né aux États-Unis en 1962 d'une mère canadienne et d'un père américain, a présenté une demande de citoyenneté canadienne, demande qu'il a complétée le 27 octobre 1988. La *Loi sur la citoyenneté* prévoyait que les personnes nées à l'étranger d'un père canadien avant le 15 février 1977 acquéraient la citoyenneté sur demande, mais que si c'était leur mère qui était canadienne les demandeurs devaient se soumettre à une

a Canadian mother. The appellant therefore underwent a security check, during which the Registrar of Citizenship discovered that he had been charged with several criminal offences. The Registrar advised that he was prohibited from acquiring citizenship and his application was rejected.

The appellant applied for an order in the nature of *certiorari* quashing the Registrar's decision and for an order in the nature of mandamus requiring the Registrar to grant him citizenship without swearing an oath or being subject to a security check. The application was dismissed by the Federal Court, Trial Division and an appeal from that decision to the Federal Court of Appeal was also dismissed. The appellant was deported. The appeal raised three issues: (1) whether applying s. 15(1) — the equality provision — of the *Canadian Charter of Rights and Freedoms* involved an illegitimate retroactive or retrospective application of the *Charter*; (2) if not, whether the treatment accorded to children born abroad to Canadian mothers before February 15, 1977 by the *Citizenship Act* offends s. 15(1) of the *Charter*; and (3) if so, whether the impugned legislation was saved by s. 1. The constitutional questions as stated were found wanting.

Held: The appeal should be allowed.

The *Charter* does not apply retroactively. The Court has not adopted a rigid test for determining when a particular application of the *Charter* would be retrospective. Rather, each case is to be weighed in its own factual and legal context, with attention to the nature of the particular *Charter* right at issue. Not every situation involving events which took place before the *Charter* came into force will necessarily involve a retrospective application of the *Charter*. Where the fact situation is a status or characteristic, the enactment is not given retrospective effect when it is applied to persons or things that acquired that status or characteristic before the enactment, if they have it when the enactment comes into force; but where the fact situation is an event, then the enactment would be given retrospective effect if it is applied so as to attach a new duty, penalty or disability to an event that took place before the enactment. The question is one of characterization: is the situation really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated, or is it simply one of assessing the contem-

enquête de sécurité et prêter serment. L'appelant a en conséquence fait l'objet d'une enquête de sécurité au cours de laquelle le greffier de la citoyenneté a découvert qu'il avait été accusé de plusieurs infractions criminelles. Le greffier l'a informé qu'il était inadmissible à la citoyenneté canadienne et a rejeté sa demande.

L'appelant a demandé une ordonnance de la nature d'un *certiorari* portant annulation de la décision du greffier ainsi qu'une ordonnance de la nature d'un *mandamus* enjoignant à ce dernier de lui attribuer la citoyenneté sans l'obliger à prêter serment et à se soumettre à une enquête de sécurité. La Section de première instance de la Cour fédérale a rejeté cette demande et la Cour d'appel fédérale a rejeté l'appel formé contre cette décision. L'appelant a été expulsé. Le pourvoi soulève les trois questions suivantes: (1) Le fait d'appliquer le par. 15(1) — la garantie du droit à l'égalité — de la *Charte canadienne des droits et libertés* entraîne-t-il l'application rétroactive ou rétrospective illégitime de la *Charte*? (2) Si la réponse est non, le traitement appliqué par la *Loi sur la citoyenneté* aux enfants nés à l'étranger d'une mère canadienne avant le 15 février 1977 viole-t-il le par. 15(1) de la *Charte*? (3) Si oui, la validité des mesures législatives contestées est-elle sauvegardée par l'article premier? Le libellé des questions constitutionnelles a été jugé inadéquat.

Arrêt: Le pourvoi est accueilli.

La *Charte* ne s'applique pas rétroactivement. La Cour n'a pas adopté un critère rigide de détermination des situations particulières dans lesquelles l'application de la *Charte* serait rétrospective. Chaque cas doit plutôt être apprécié selon le contexte factuel et législatif qui lui est propre, en portant attention à la nature du droit garanti par la *Charte* qui est en cause. Une situation comportant des événements antérieurs à l'entrée en vigueur de la *Charte* n'entraînera pas toujours l'application rétrospective de la *Charte*. Dans le cas où la situation factuelle en cause est un statut ou une caractéristique, on n'attribue aucun effet rétrospectif à un texte de loi lorsqu'il est appliqué à des personnes ou à des choses qui ont acquis ce statut ou cette caractéristique avant l'édiction du texte en question, pourvu qu'elles possèdent toujours le statut ou la caractéristique au moment de l'entrée en vigueur du texte. Par contre, dans le cas où la situation factuelle est un événement, on attribuerait un effet rétrospectif au texte de loi s'il était appliqué pour imposer une nouvelle obligation, peine ou incapacité par suite d'un événement survenu avant son édiction. La question à trancher consiste donc à caractériser la situation: s'agit-il réellement de revenir en arrière pour corriger un événement passé survenu avant que la

porary application of a law which happened to be passed before the *Charter* came into effect?

This case does not involve either a retroactive or a retrospective application of the *Charter*. The notion that rights or entitlements crystallize at birth, particularly in the context of s. 15 of the *Charter*, suggests that whenever a person born before s. 15 came into effect (April 17, 1985) suffers the discriminatory effects of a piece of legislation these effects may be immunized from *Charter* review. This is not so.

The appellant's situation should instead be seen in terms of status or ongoing condition. His status from birth — as a person born abroad prior to February 15, 1977 of a Canadian mother and a non-Canadian father — is no less a "status" than being of a particular skin colour or ethnic or religious background: it is an ongoing state of affairs. People in the appellant's condition continue to be denied the automatic right to citizenship granted to children of Canadian fathers. The presence of a date in a piece of legislation, while it may suggest an "event-related" focus rather than a "status-related" one, cannot alone be determinative. Consideration must still be given to the nature of the characteristic at issue. A difference exists between characteristics ascribed at birth (e.g., race) and those based on some action taken later in life (e.g., being a divorced person). Immutable characteristics arising at birth are generally more likely to be correctly classified as a "status" than are characteristics resulting from a choice to take some action.

In applying s. 15 to questions of status, the critical time is not when the individual acquires the status in question but when that status is held against the person or disentitles the person to a benefit. Here, that moment was when the Registrar considered and rejected the appellant's application. Since this occurred well after s. 15 came into effect, subjecting the appellant's treatment by the respondent to *Charter* scrutiny involves neither retroactive nor retrospective application of the *Charter*. Had the appellant applied for citizenship before s. 15 came into effect and been refused, he could not now come before the Court and ask that s. 15 be applied to that refusal. The appellant, however, had not engaged the legislation governing his entitlement to citizenship until his application in 1988. Until he actually

Charte crée le droit revendiqué, ou s'agit-il simplement d'apprécier l'application contemporaine d'un texte de loi qui a été édicté avant l'entrée en vigueur de la *Charte*?

La présente affaire n'entraîne pas l'application rétroactive ou rétrospective de la *Charte*. Le concept de la cristallisation des droits au moment de la naissance, plus particulièrement dans le contexte de l'art. 15 de la *Charte*, suggère que, chaque fois qu'une personne née avant l'entrée en vigueur de l'art. 15 (le 17 avril 1985) subit les effets discriminatoires d'une mesure législative, ces effets seraient à l'abri des contestations fondées sur la *Charte*. Ce n'est pas le cas.

La situation de l'appelant doit plutôt être considérée comme un statut ou une condition en cours. Son statut à la naissance — le fait d'être une personne née à l'étranger, avant le 15 février 1977, d'une mère canadienne et d'un père non canadien — est tout autant un «statut» que le fait d'avoir la peau d'une certaine couleur ou celui d'appartenir à une origine ethnique ou religieuse donnée: c'est un état de fait en cours. Les personnes dans la situation de l'appelant continuent aujourd'hui d'être privées du droit à la citoyenneté qui est conféré d'office aux enfants nés d'un père canadien. Bien que la mention d'une date dans une mesure législative puisse tendre à indiquer que celle-ci s'attache d'avantage à un «événement» qu'à un «statut», ce fait à lui seul ne saurait être déterminant. Il faut également tenir compte de la nature de la caractéristique en cause. Il y a une différence entre les caractéristiques acquises à la naissance (par exemple la race) et celles qui découlent d'un acte quelconque, accompli plus tard dans la vie (par exemple l'état de personne divorcée). Les caractéristiques immuables acquises à la naissance sont, en général, plus susceptibles d'être qualifiées à juste titre de «statut» que celles résultant de la décision d'accomplir un acte.

Lorsque l'art. 15 est appliqué à des questions de statut, l'élément important n'est pas le moment où la personne acquiert le statut en cause, mais celui auquel ce statut lui est reproché ou la prive du droit d'obtenir un avantage. En l'espèce, ce moment est celui où le greffier a examiné et rejeté la demande de l'appelant. Étant donné que cela s'est produit bien après l'entrée en vigueur de l'art. 15, l'examen en regard de la *Charte* du traitement réservé à l'appelant par l'intimé ne met pas en jeu l'application rétroactive ou rétrospective de ce texte. Si l'appelant avait demandé la citoyenneté avant l'entrée en vigueur de l'art. 15 et qu'on la lui avait refusée, il ne pourrait maintenant se présenter devant la Cour et demander l'application de cet article à ce refus. Toutefois, ce n'est que lorsque l'appelant a présenté sa

made an application for citizenship, the law set out only what his rights to citizenship would be if and when he applied, not what they were.

Several approaches to s. 15 have been advanced in the recent jurisprudence of this Court. It is not necessary for the purposes of this appeal to say determinatively which of these approaches is the most appropriate since the result is the same no matter which test is used in the application of s. 15.

The fact that children born abroad of a Canadian mother are required to undergo a security check and to swear the oath, when those born abroad of a Canadian father are not required to do so, constitutes a denial of equal benefit of the law guaranteed by s. 15 of the *Charter*. Access to the valuable privilege of Canadian citizenship is restricted in different degrees depending on the gender of an applicant's Canadian parent; sex is one of the enumerated grounds in s. 15.

The fact that Parliament attempted to remedy the inequity found in the 1947 legislation by amending it does not insulate the amended legislation from further review under the *Charter*. The true source of the differential treatment for children born abroad of Canadian mothers cannot be said to be the 1947 Act, as opposed to the current Act, because the earlier Act does not exist anymore. It is only the operation of the current Act and the treatment it accords the appellant because his Canadian parent was his mother which is in issue. The current Act, to the extent that it carries on the discrimination of its predecessor legislation, may itself be reviewed under s. 15.

The appellant is not attempting to raise the infringement of someone else's rights for his own benefit. He is the primary target of the sex-based discrimination mandated by the legislation and possesses the necessary standing to raise it. The appellant's mother is implicated only because the extent of his rights are made dependent on the gender of his Canadian parent. Where access to a benefit such as citizenship is restricted on the basis of something so intimately connected to and so completely beyond the control of an applicant as the gender of his or her Canadian parent, that applicant may invoke the protection of s. 15. Permitting s. 15 scrutiny of the treatment of the appellant's citizenship application simply allows the protection against discrimination guaranteed

demande, en 1988, que la loi régissant son droit à la citoyenneté s'est appliquée à lui. Jusqu'à ce qu'il présente effectivement une demande de citoyenneté, la loi établissait simplement quels seraient ses droits en matière de citoyenneté lorsqu'il ferait une demande en ce sens, et non quels étaient ces droits.

Plusieurs façons d'aborder l'application de l'art. 15 de la *Charte* ont été avancées dans la jurisprudence récente de notre Cour. Pour trancher le présent pourvoi, il n'est pas nécessaire de déterminer de façon décisive laquelle est la plus appropriée, car le résultat serait identique, peu importe le critère retenu pour l'application de l'art. 15.

Le fait que les enfants nés à l'étranger d'une mère canadienne sont tenus de se soumettre à une enquête de sécurité et de prêter serment, alors que ceux nés à l'étranger d'un père canadien ne le sont pas, constitue une négation du droit à l'égalité de bénéfice de la loi garanti par l'art. 15 de la *Charte*. L'accès au précieux privilège qu'est la citoyenneté canadienne est limité, à des degrés divers, selon que c'est la mère ou le père du demandeur qui est canadien; le sexe est l'un des motifs énumérés à l'art. 15.

Le fait que le Parlement ait tenté de corriger l'iniquité créée par la Loi de 1947 en y apportant des modifications n'a pas pour effet de soustraire la loi modifiée à tout examen ultérieur fondé sur la *Charte*. Il est impossible d'affirmer que la source véritable du traitement différent appliqué aux enfants nés à l'étranger d'une mère canadienne est la Loi de 1947, et non la loi actuelle, car l'ancienne loi n'existe plus. Ce qui est en litige, ce n'est que le fonctionnement de la Loi actuelle et le traitement qu'elle applique à l'appelant du fait que seule sa mère était canadienne. Dans la mesure où la Loi actuelle perpétue la discrimination créée par la loi qui l'a précédée, elle peut elle-même être examinée en regard de l'art. 15.

L'appelant ne tente pas d'invoquer, à son propre profit, la violation des droits d'une autre personne. Il est la cible principale de la discrimination fondée sur le sexe établie par la législation et il a la qualité requise pour la contester. Sa mère n'est concernée que parce que l'étendue des droits de l'appelant est tributaire du sexe de celui de ses parents qui est canadien. Lorsque l'accès à des avantages tels que la citoyenneté est restreint pour un motif aussi intimement lié à un demandeur et aussi indépendant de sa volonté que le sexe de celui de ses parents qui est canadien, le demandeur peut invoquer la protection de l'art. 15. Le fait d'autoriser l'examen, en regard de l'art. 15, du traitement appliqué à la demande de citoyenneté de l'appelant ne fait qu'étendre la protec-

to him by s. 15 to extend to the full range of the discrimination. This is precisely the "purposive" interpretation of *Charter* rights mandated by earlier decisions of this Court.

These reasons do not create a general doctrine of "discrimination by association". The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. Whether this analysis should extend to situations where the association is voluntary rather than involuntary or where the characteristic of the parent upon which the differential treatment is based is not an enumerated or analogous ground are questions for another day.

That the differential treatment of children born abroad with Canadian mothers as opposed to those with Canadian fathers may be a product of historical legislative circumstance, not of discriminatory stereotypical thinking, is not relevant to deciding whether or not the impugned provisions are discriminatory. The motivation behind Parliament's decision to maintain a discriminatory denial of equal treatment cannot make the continued denial any less discriminatory. This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen.

The impugned legislation was not saved under s. 1 of the *Charter*. Ensuring that potential citizens are committed to Canada and do not pose a risk to the country are pressing and substantial objectives which are not reasonably advanced by the two-tiered application system created by the impugned provisions. The impugned legislation was not rationally connected to its objectives. The question to be asked in this regard is not whether it is reasonable to demand that prospective citizens swear an oath and undergo a security check before being granted citizenship but whether it is reasonable to make these demands only of children born abroad of Canadian mothers, as opposed to those born abroad of Canadian fathers. Clearly no inherent connection exists between this distinction and the desired legislative objectives.

Although retroactively imposing automatic Canadian citizenship in 1977 on children already born abroad of

tion contre la discrimination qui lui est garantie par l'art. 15 à la pratique discriminatoire dans son ensemble. Il s'agit précisément de l'interprétation «fondée sur l'objet» des droits garantis par la *Charte* qu'a prescrite notre Cour dans des arrêts antérieurs.

Les présents motifs ne créent pas un principe général de «discrimination par association». Le lien entre un enfant et son père ou sa mère a un caractère particulièrement unique et intime. L'enfant ne choisit pas ses parents. La question de savoir si cette analyse devrait s'étendre aux situations dans lesquelles l'association d'une personne à un groupe est volontaire plutôt qu'involontaire, ou dans lesquelles la caractéristique appartenant au père ou à la mère et sur laquelle est fondé le traitement différent n'est pas un motif énuméré ou analogue sera examinée à une autre occasion.

Le fait que le traitement différent appliqué aux enfants nés à l'étranger d'une mère canadienne par rapport à ceux nés d'un père canadien puisse être le produit d'événements législatifs historiques, et non d'une attitude discriminatoire stéréotypée, n'est pas pertinent pour décider si les dispositions contestées sont discriminatoires. Les motifs à l'origine de la décision du Parlement de maintenir une négation discriminatoire du droit à l'égalité de traitement ne peuvent atténuer le caractère discriminatoire de cette négation. Ces mesures législatives continuent de suggérer que, à tout le moins dans certains cas, les hommes et les femmes n'ont pas une capacité égale de transmettre à leurs enfants ce qu'il faut pour être un bon citoyen canadien.

La validité des mesures législatives contestées n'est pas sauvegardée par l'article premier de la *Charte*. Le fait de s'assurer de l'engagement envers le Canada des citoyens potentiels et celui de s'assurer qu'ils ne constituent pas un risque pour le pays sont des objectifs urgents et réels, mais dont le régime de demande à deux niveaux créé par les dispositions contestées ne peut raisonnablement favoriser la réalisation. Il n'existe pas de lien rationnel entre les dispositions législatives contestées et les objectifs qu'elles visent. À cet égard, la question n'est pas de savoir s'il est raisonnable de demander aux éventuels citoyens de prêter serment et de se soumettre à une enquête de sécurité avant de leur attribuer la citoyenneté, mais plutôt s'il est raisonnable de l'exiger uniquement des enfants nés d'une mère canadienne, et non de ceux nés d'un père canadien. Il n'y a manifestement aucun lien inhérent entre cette distinction et les objectifs législatifs poursuivis.

Même si en accordant rétroactivement d'office, en 1977, la citoyenneté canadienne aux enfants nés à

Canadian mothers could have caused difficulties for those children by interfering with rights or duties of citizenship already held in other countries, the Act clearly demonstrates that citizenship based on lineage was never imposed automatically, even on children born abroad of Canadian fathers. Treating children born abroad of Canadian mothers similarly to those born of Canadian fathers would therefore not have caused any undesirable retroactive effects. Anyone not wanting Canadian citizenship through an extension of those rights enjoyed by children of Canadian fathers to those born abroad of Canadian mothers would have had the option of simply not registering his or her birth. Only those children born abroad of Canadian mothers willing to take on Canadian citizenship would have it. It should also be noted that the current Act does not require these procedures for any children born abroad of a Canadian parent after February 15, 1977, no matter how old. If such children do not pose a potential threat to national security such that an oath and security check are required, it is difficult to see why someone in the appellant's class does.

It was probable that the impugned legislation would likely fail the proportionality test as well.

The offending legislation was declared to be of no force or effect.

Cases Cited

Considered: *R. v. Gamble*, [1988] 2 S.C.R. 595; *Andrews v. Law Society of British Columbia*, [1989]1 S.C.R. 143; *R. v. Sarson*, [1996] 2 S.C.R. 223; *Murray v. Canada (Minister of Health and Welfare)*, [1994] 1 F.C. 603; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314; *Elias v. U.S. Department of State*, 721 F.Supp. 243 (1989); **distinguished:** *R. v. Edwards*, [1996] 1 S.C.R. 128; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; **referred to:** *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922; *R. v. Stevens*, [1988] 1 S.C.R. 1153; *R. v. Stewart*, [1991] 3 S.C.R. 324; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Crease v. Canada*, [1994] 3 F.C. 480; *R. v. Turpin*,

l'étranger d'une mère canadienne, on aurait pu leur causer des problèmes d'incompatibilité avec les droits et les devoirs qu'ils avaient déjà en tant que citoyens d'autres pays, la Loi démontre clairement que la citoyenneté fondée sur la filiation n'a jamais été imposée d'office, même aux enfants nés à l'étranger d'un père canadien. Le fait de traiter de la même manière les enfants nés à l'étranger d'une mère canadienne et ceux nés d'un père canadien n'aurait donc entraîné aucun effet rétroactif indésirable. Quiconque n'aurait pas voulu profiter de la citoyenneté canadienne par l'extension des droits reconnus aux enfants nés d'un père canadien à ceux nés à l'étranger d'une mère canadienne aurait eu la faculté de tout simplement s'abstenir d'enregistrer sa naissance. Seuls les enfants nés à l'étranger d'une mère canadienne et désirant acquérir la citoyenneté canadienne se la verraient reconnaître. Il convient également de souligner que la Loi actuelle n'impose pas ces formalités aux enfants nés à l'étranger, après le 15 février 1977, d'une mère ou d'un père canadiens, et ce quel que soit l'âge des enfants. Si ces enfants ne constituent pas, du point de vue de la sécurité nationale, une menace potentielle telle qu'il est nécessaire de leur faire prêter serment et de les soumettre à une enquête de sécurité, il est difficile d'imaginer en quoi les personnes dans la situation de l'appelant constitueraient une telle menace.

Il est vraisemblable que les mesures législatives contestées ne satisferaient pas non plus au critère de la proportionnalité.

Les mesures législatives attentatoires sont déclarées inopérantes.

Jurisprudence

Arrêts examinés: *R. c. Gamble*, [1988] 2 R.C.S. 595; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *R. c. Sarson*, [1996] 2 R.C.S. 223; *Murray c. Canada (Ministre de la Santé et du Bien-être social)*, [1994] 1 C.F. 603 ; *Miron c. Trudel*, [1995] 2 R.C.S. 418; *Egan c. Canada*, [1995] 2 R.C.S. 513; *Thibaudeau c. Canada*, [1995] 2 R.C.S. 627; *Cheung c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] 2 C.F. 314; *Elias c. U.S. Department of State*, 721 F.Supp. 243 (1989); **distinction d'avec les arrêts:** *R. c. Edwards*, [1996] 1 R.C.S. 128; *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; **arrêts mentionnés:** *Reference re Workers' Compensation Act, 1983 (T.-N.)*, [1989] 1 R.C.S. 922; *R. c. Stevens*, [1988] 1 R.C.S. 1153; *R. c. Stewart*, [1991] 3 R.C.S. 324; *Dubois c. La Reine*, [1985] 2 R.C.S. 350; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Crease c. Canada*,

[1989] 1 S.C.R. 1296; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *R. v. Big M Drug Mart, Ltd.*, [1985] 1 S.C.R. 295; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C., 1985, App. III, s. 1(*b*).
Canadian Charter of Rights and Freedoms, ss. 1, 15.
Canadian Citizenship Act, R.S.C. 1970, c. C-19 [formerly R.S.C. 1952, c. 33], s. 5(1).
Citizenship Act, R.S.C., 1985, c. C-29 [formerly S.C. 1974-75-76, c. 108], ss. 3(1), 4(3), 5(1)(*b*), (2)(*b*), 12(2), (3), 22(1)(*b*), (*d*), (2)(*b*).
Citizenship Regulations, C.R.C., c. 400, s. 20(1).

Authors Cited

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Driedger, Elmer A. "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. B. Rev.* 264.

APPEAL from a judgment of the Federal Court of Appeal, [1994] 1 F.C. 250, (1993), 105 D.L.R. (4th) 121, 155 N.R. 321, 16 C.R.R. (2d) 15, [1993] F.C.J. 658, dismissing an appeal from a judgment of Jerome A.C.J., [1992] 1 F.C. 771, (1991), 43 F.T.R. 180, 14 Imm. L.R. (2d) 266, dismissing an application for *certiorari* and mandamus with respect to the dismissal of an application for citizenship by the Registrar of Citizenship. Appeal allowed.

Mark M. Yang, for the appellant.

Roslyn J. Levine, Q.C., and *Debra M. McAllister*, for the respondents.

Neil R. Wilson, for the intervener.

The judgment of the Court was delivered by

IACOBUCCI J. — This appeal raises the constitutionality of certain provisions of the *Citizenship Act*, S.C. 1974-75-76, c. 108, and proclaimed in force February 15, 1977 by SI/77-43, (hereinafter

[1994] 3 C.F. 480; *R. c. Turpin*, [1989] 1 R.C.S. 1296; *Weatherall c. Canada (Procureur général)*, [1993] 2 R.C.S. 872; *R. c. Big M Drug Mart, Ltd.*, [1985] 1 R.C.S. 295; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Schachter c. Canada*, [1992] 2 R.C.S. 679.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 15.
Déclaration canadienne des droits, L.R.C. (1985), app. III, art. 1*b*).
Loi sur la citoyenneté, L.R.C. (1985), ch. C-29 [auparavant S.C. 1974-75-76, ch. 108], art. 3(1), 4(3), 5(1)*b*), (2)*b*), 12(2), (3), 22(1)*b*), *d*), (2)*b*).
Loi sur la citoyenneté canadienne, S.R.C. 1970, ch. C-19 [auparavant S.R.C. 1952, ch. 33], art. 5(1).
Règlement sur la citoyenneté, C.R.C., ch. 400, art. 20(1).

Doctrine citée

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Driedger, Elmer A. "Statutes: Retroactive Retrospective Reflections" (1978), 56 *R. du B. can.* 264.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1994] 1 C.F. 250, (1993), 105 D.L.R. (4th) 121, 155 N.R. 321, 16 C.R.R. (2d) 15, [1993] F.C.J. 658, qui a rejeté l'appel du jugement du juge en chef adjoint Jerome, [1992] 1 C.F. 771, (1991), 43 F.T.R. 180, 14 Imm. L.R. (2d) 266, ayant refusé la demande de *certiorari* et de *mandamus* présentée relativement au rejet, par le greffier de la citoyenneté, d'une demande de citoyenneté. Pourvoi accueilli.

Mark M. Yang, pour l'appelant.

Roslyn J. Levine, c.r., et *Debra M. McAllister*, pour les intimés.

Neil R. Wilson, pour l'intervenante.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Le présent pourvoi soulève la constitutionnalité de certaines dispositions de la *Loi sur la citoyenneté*, S.C. 1974-75-76, ch. 108, proclamées en vigueur le 15 février 1977

Tab #7.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***McIvor v. Canada (Registrar of Indian and Northern Affairs),*** 2009 BCCA 153

Date: 20090406
Docket: CA035223

Between:

Sharon Donna McIvor and Charles Jacob Grismer

Respondents
(Plaintiffs)

And

The Registrar, Indian and Northern Affairs Canada
The Attorney General of Canada

Appellants
(Defendants)

And

Native Women's Association of Canada, Congress of Aboriginal Peoples, First Nations Leadership Council, West Moberly First Nations, T'Sou-ke Nation, Grand Council of the Waban-Aki Nation, the Band Council of the Abenakis of Odanak and the Band Council of the Abenakis of Wôlinak, Aboriginal Legal Services of Toronto

Intervenors

Corrected Judgment: The text of the judgment was corrected at paragraphs 41 and 90 on June 3, 2009, and at paragraph 81 on July 13, 2009.

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

Mitchell R. Taylor, Q.C.
Glynis Hart
Brett C. Marleau
Sean Stynes — Counsel for the Appellants

Robert Grant
Gwen Brodsky
Susan Horne — Counsel for the Respondents

Mary Eberts — Counsel for Native Women's Association of Canada

Joseph E. Magnet Janet L. Hutchison	Counsel for Congress of Aboriginal Peoples
Anja P. Brown	Counsel for First Nations Leadership Council
Christopher G. Devlin	Counsel for West Moberly First Nations
Robert Janes	Counsel for T'Sou-ke Nation
Peter R. Grant David Schulze	Counsel for Grand Council of Waban-Aki Nation, Band Council of the Abenakis of Odanak and Band Counsel of the Abenakis of Wôlinak
Kasari Govender	Counsel for Aboriginal Legal Services of Toronto
Place and Date of Hearing:	Vancouver, British Columbia October 14 - 17, 2008
Additional Written Submissions	October 31, November 14 & 20, 2008
Place and Date of Judgment:	Vancouver, British Columbia April 6, 2009

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This appeal concerns the constitutionality of s. 6 of the *Indian Act*, R.S.C. 1985, c. I-5, which establishes the entitlement of a person to be registered as an Indian. The plaintiffs argue that the provisions of that section violate the *Canadian Charter of Rights and Freedoms* because they discriminate on the basis of sex and marital status. While the remedy they seek is complex, the plaintiffs' major claim is that Mr. Grismer should be entitled to transmit Indian status to his children, despite the fact that his father was non-Indian and his wife is non-Indian.

[2] The plaintiffs were successful at trial, though the order of the trial judge has been stayed pending appeal. The reasons of the trial judge, Ross J., are indexed as 2007 BCSC 827. She delivered supplementary reasons on remedy, which are indexed as 2007 BCSC 1732.

[3] In these reasons for judgment, unless the context indicates a different usage, I will use the term "Indian" to mean a person entitled to registration as an Indian under the *Indian Act*, which I will refer to as "Indian status". I will use the term "non-Indian" to mean a person not entitled to such status.

Overview

[4] Prior to the coming into force of the current legislation in 1985, the *Indian Act* treated women and men quite differently. An Indian woman who married a non-Indian man ceased to be an Indian. An Indian man who married a non-Indian

woman, on the other hand, remained an Indian; his wife also became entitled to Indian status.

[5] Children who were the product of a union of an Indian and a non-Indian were non-Indian if their father was non-Indian. On the other hand, the legitimate children of an Indian father were Indian, subject only to the "Double Mother Rule", which provided that if a child's mother and paternal grandmother did not have a 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.

[6] The old provisions had been heavily criticized prior to 1985, and there was a strong movement to amend them. Unfortunately, there was considerable controversy over what ought to replace them. With the coming into force of s. 15 of the *Charter* on April 17, 1985, the need to amend the law took on new urgency, as it was clear that the then-existing regime discriminated on the basis of sex.

[7] The current system of entitlement to Indian status was enacted by *An Act to amend the Indian Act*, S.C. 1985, c. 27, s. 4. The amending *Act* received Royal Assent on June 28, 1985, but was deemed (by virtue of s. 23 of the *Act*) to have come into force on April 17, 1985, the date on which s. 15 of the *Charter* took effect.

[8] On its face, the current system makes no distinction on the basis of sex. From April 17, 1985 on, no person gains or loses Indian status by reason of marriage. A child of two Indians is an Indian. A child who has one Indian parent and one non-Indian parent is entitled to status unless the Indian parent also had a non-Indian parent. In sum, the current legislation does away with distinctions between

men and women in terms of their rights to status upon marriage, and in terms of their rights to transmit status to their children and grandchildren.

[9] There is little doubt that the provisions of the *Indian Act* that existed prior to the 1985 amendments would have violated s. 15 of the *Charter* had they remained in effect after April 17, 1985. Equally, it is clear that if the current provisions had always been in existence, there could be no claim that the regime discriminates on the basis of sex. The difficulty lies in the transition between a regime that discriminated on the basis of sex and one that does not.

[10] The 1985 legislation was enacted only after extensive consultation. It represents a *bona fide* attempt to eliminate discrimination on the basis of sex. For the most part, the legislation was prospective in orientation; it did not go so far as to grant Indian status to everyone who had an ancestor who had lost status under earlier discriminatory provisions. It did, however, reinstate Indian status to women who had lost their status by marrying non-Indians. It also reinstated status to certain other persons, including those who lost it by virtue of the Double Mother Rule.

[11] Subject to these, and a few other statutory exceptions, a person's entitlement to Indian status (or lack thereof) prior to April 17, 1985 subsisted after the coming into force of the new legislation. The plaintiffs argue that in using the former regime as the starting point for determining the status, the government effectively continued a discriminatory regime. They say that that continuation violates s. 15 of the *Charter*.

[12] The defendants argue that the *Charter* cannot be applied retrospectively, and that it was therefore sufficient for Parliament to enact a regime that was non-discriminatory going forward. They claim that the government was not required to enact legislation that sought to undo all of the effects of legislation that had been in place for over one hundred years. Indeed, they say, the new legislation is generous in reinstating the right to Indian status to certain groups of people; it goes further than necessary in trying to redress past wrongs.

[13] The analysis of the issue is made more difficult by the fact that the provisions governing Indian status are complex. The system was not a static one before 1985, and the manner in which illegitimate children and those of partial Indian heritage have been treated varied over time. There are, as well, provisions of the *Indian Act* that allow the government to exempt particular bands from particular provisions of the *Act*, and those provisions were frequently used after 1980. I will, as necessary, refer to particular changes and exemptions to the *Indian Act* that have a bearing on the issues at bar.

Legislative History Prior to the 1985 Amendments

[14] Historically, members of First Nations in Canada were subject to special disqualifications as well as special entitlements. Not surprisingly, it became necessary, even prior to Confederation, to enact legislation setting out who was and who was not considered to be an Indian. In 1868, the first post-confederation statute establishing entitlement to Indian status was enacted. Section 15 of *An Act providing for the organisation of the Department of the Secretary of State of Canada,*

and for the management of Indian and Ordnance Lands, S.C. 1868, c. 42 (31 Vict.) provided as follows:

> 15. For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any such lands or immoveable property:
>
> *Firstly*. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;
>
> *Secondly*. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And
>
> *Thirdly*. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

[15] This early legislation, then, treated Indian men and women differently, in that an Indian man could confer status on his non-Indian wife through marriage, while an Indian woman could not confer status on her non-Indian husband. It appears that one rationale for this distinction was a fear that non-Indian men might marry Indian women with a view to insinuating themselves into Indian bands and acquiring property reserved for Indians.

[16] In 1869, the first legislation that deprived Indian women of their status upon marriage to non-Indians was passed. Section 6 of *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend*

the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6 (32-33 Vict.) amended s. 15 of the 1868 statute by adding the following proviso:

> Provided always that any Indian woman marrying any other than an Indian shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act; Provided also, that any Indian woman marrying an Indian of any other tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only.

[17] The traditions of First Nations in Canada varied greatly, and this new legislation did not reflect the aboriginal traditions of all First Nations. To some extent, it may be the product of the Victorian mores of Europe as transplanted to Canada. The legislation largely parallels contemporary views of the legal status of women in both English common law and French civil law. The status of a woman depended on the status of her husband; upon marriage, she ceased, in many respects for legal purposes, to be a separate person in her own right.

[18] The general structure of 1869 legislation was preserved in the first enactment of the *Indian Act*, as S.C. 1876, c. 18 (39 Vict.). This statute added further bases for the loss of Indian status, including provisions whereby an illegitimate child of an Indian could be excluded by the Superintendent General of Indian Affairs.

[19] Substantial changes in the regime were introduced in the *Indian Act*, S.C. 1951, c. 29 (15 Geo. VI). The statute created an "Indian Register". Sections 10-12 of the *Act* defined entitlement to registration as an Indian:

10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be.

11. Subject to section twelve, a person is entitled to be registered if that person

(a) on the twenty-sixth day of May, eighteen hundred and seventy-four, was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, chapter forty-two of the statutes of 1868, as amended by section six of chapter six of the statutes of 1869, and section eight of chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada,

(b) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy-four have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act,

(c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b),

(d) is the legitimate child of

(i) a male person described in paragraph (a) or (b), or

(ii) a person described in paragraph (c),

(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d), unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered, or

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).

12. (1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been allotted half-breed lands or money scrip,

(ii) is a descendant of a person described in subparagraph (i),

(iii) is enfranchised, or

> (iv) is a person born of a marriage entered into after the coming into force of this Act and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (a), (b), (d), or entitled to be registered by virtue of paragraph (e) of section eleven, unless, being a woman, that person is the wife or widow of a person described in section eleven, and
>
> (b) a woman who is married to a person who is not an Indian.

[20] Apart from one amendment in 1956, this legislation survived intact until the 1985 legislation. The 1956 amendment made a change in the manner in which the registration of an illegitimate child could be nullified. It allowed the council of the band to which a child was registered, or any ten electors of the band, to file a written protest against the registration of the child on the ground that the child's father was not an Indian. The Registrar was then required to investigate the situation, and to exclude the child if the child's father was determined to be a non-Indian.

[21] For the purposes of this litigation, then, there were three significant features of the legislation that immediately pre-dated the coming into force of s. 15 of the *Charter*. First, a woman lost her status as an Indian if she married a non-Indian. On the other hand, an Indian man retained his status if he married a non-Indian, and his wife also became entitled to status.

[22] Second, a child born of a marriage between an Indian and a non-Indian was an Indian only if his or her father was an Indian. The rules for illegitimate children were more complex – if both parents were Indians, the child was an Indian. If only the father was an Indian, the child was non-Indian, and if only the mother was an Indian, the child was an Indian, but subject to being excluded if a protest was made.

[23] Finally, from 1951 onward, where an Indian man married a non-Indian woman, any child that they had was an Indian. If, however, the Indian man's mother was also non-Indian prior to marriage, the child would cease to have Indian status upon attaining the age of 21 under the Double Mother Rule.

Growing Discontent with the Status Regime

[24] The statutory provisions for determining Indian status were, from the beginning, at odds with the aboriginal traditions of some First Nations. By the last half of the twentieth century, they were also at odds with broader societal norms. The idea that women did not have separate personal identities from their husbands was increasingly recognized as offensive. Further, the personal hardship many Indian women faced upon losing their Indian status and band membership was severe. Some First Nations also objected to the Double Mother Rule, considering that those with Indian blood brought up in an Indian culture should remain Indians even if they had only one grandparent of Indian descent.

[25] There was widespread dissatisfaction with the rules governing Indian status. As outlined by the learned trial judge, numerous studies and reports criticized the contemporary legislation. There were also legal challenges to it. The Supreme Court of Canada narrowly upheld the legislation in *A.G. Canada v. Lavell*, [1974] S.C.R. 1349, holding that the provisions of the *Canadian Bill of Rights* did not allow it to declare such a law inoperative.

[26] In 1981, in *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166, the United Nations Human Rights Committee considered

arguments that the *Indian Act* violated provisions of the International Covenant on Civil and Political Rights. Ms. Lovelace had lost her Indian status in 1970 on marrying a non-Indian. The marriage eventually broke down, and Ms. Lovelace wished to return to live on reserve, but was denied the right to do so because she no longer had Indian status. The Committee found the denial to be unreasonable in the particular situation of the case, and to violate the applicant's rights to take part in a minority culture.

[27] By the early 1980s, it was clear that the legislative scheme for determining Indian status needed to be changed. There was, however, considerable difficulty in finding a new scheme to replace the old one. There was simply no consensus among First Nations groups as to who should be reinstated to Indian status, and as to what the future rules governing status should be. Some groups were fearful that a sudden reinstatement to status of a large number of persons might overwhelm the resources available to Indian bands, or dilute traditional First Nations culture. In addition, there was a strong movement among First Nations groups to seek a level of control over band membership. Pressures aimed at a higher degree of self-government made it difficult for the government of the day to impose a new regime by legislation.

[28] It is unnecessary to detail all of the various positions taken by different aboriginal and governmental groups. The trial judge has discussed many of the various movements, government studies, and reports, and has reproduced some of their arguments and rhetoric in her judgment, particularly at paragraphs 38 to 77.

[29] While the debate continued, the then-Minister of Indian Affairs and Northern Development offered, in July of 1980, to have proclamations issued under s. 4 of the *Indian Act* to exempt bands, at their request, from particular provisions of the *Act*. While the record does not contain complete evidence of the take-up rate on the Minister's offer, it does appear to have been significant, particularly with respect to s. 12(1)(a)(iv) (the Double Mother Rule) and, to a lesser extent, with respect to s. 12(1)(b) (the provision under which a woman who married a non-Indian lost her status – I will refer to this as the "Marrying Out Rule").

[30] In its First Report to the Parliamentary Standing Committee on Indian Affairs and Northern Development (quoted in the Standing Committee's Sixth Report to Parliament, September 1, 1982), the Sub-committee on Indian Women and the Indian Act reported that by July of 1982, some 285 Indian bands had requested exemptions from the Double Mother Rule and 63 had requested exemptions from the Marrying Out Rule. A draft report from the Department of Indian Affairs and Northern Development entitled "The Potential Impacts of Bill C-47 on Indian Communities" (November 2, 1984) stated that by July 1984, out of a total of about 580 bands in Canada, 311 (54%) had sought exemption from the Double Mother Rule, and 107 (18%) had sought exemption from the Marrying Out Rule.

[31] In an attempt to bring the *Indian Act* into compliance with s. 15 of the *Charter* without causing turmoil for First Nations, the government eventually brought forward compromise legislation. In introducing the legislation for second reading in the House of Commons, the then-Minister of Indian Affairs and Northern Development

outlined five principles on which the legislation was based (Hansard, March 1, 1985, at p. 2645):

> The legislation is based on certain principles, which are the cornerstones that John Diefenbaker identified. The first principle is that discrimination based on sex should be removed from the Indian Act.
>
> The second principle is that status under the Indian Act and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the Indian Act.
>
> The third principle is that no one should gain or lose their status as a result of marriage.
>
> The fourth principle is that persons who have acquired rights should not lose those rights.
>
> The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership.

[32] Section 6 of the *Indian Act*, R.S.C. 1985, c. I-5 remains as it was amended in 1985. It reads as follows:

> 6(1) Subject to section 7, a person is entitled to be registered if
>
> (a) that person was registered or entitled to be registered immediately prior to April 17, 1985;
>
> (b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
>
> (c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
>
> (d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April

> 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
>
> (e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,
>
> (i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or
>
> (ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or
>
> (f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.
>
> (2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).
>
> (3) For the purposes of paragraph (1)(f) and subsection (2),
>
> (*a*) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a); and
>
> (*b*) a person described in paragraph (1)(c), (d), (e) or (f) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision.

[33] Section 6(1)(a) is a key provision. It preserves the status of all persons who were entitled to status immediately prior to the 1985 amendments. The plaintiffs say that the section violates s. 15 of the *Charter* by incorporating, by reference, the discriminatory regime that existed before 1985.

[34] Other key provisions are ss. 6(1)(c) and 6(2). Section 6(1)(c) restores the status of (among others) people who were disqualified from status under the Marrying Out Rule and the Double Mother Rule. Section 6(2) applies what is known as the "Second Generation Cut-off". It extends Indian status to a person with one

Indian parent, but, significantly, does not allow such a person to pass on Indian status to his or her own children unless those children are the product of a union with another person who has Indian status.

The Plaintiffs

[35] The plaintiffs are a mother and son. Prior to 1985, neither had Indian status. Today, Ms. McIvor has status under s. 6(1)(c) of the *Indian Act*, and Mr. Grismer has status under s. 6(2). Their claim is that Mr. Grismer should be given status equivalent to those who come under s. 6(1) of the statute, so that he is able to pass on Indian status to his children despite the fact that his wife is non-Indian.

[36] The plaintiffs' family tree is somewhat complex – I will describe it first, and then provide a brief table, which may assist in understanding its details.

[37] Ms. McIvor's grandfathers were both non-Indians. One grandmother was an Indian, and the other was entitled to Indian status. Neither set of grandparents were married.

[38] Ms. McIvor's parents were also unmarried. Neither parent ever applied for Indian status, apparently because they did not understand themselves to be entitled to it under the extant legislation. While it appears that they could have applied for status under that legislation on the basis that each was the illegitimate child of a woman entitled to status, it is also likely that they would ultimately have been denied registration upon the Superintendent General or Registrar determining that they had non-Indian fathers.

[39] Ms. McIvor was not registered as an Indian prior to 1985. She did not believe that she was entitled to status under earlier legislation, because she understood that neither of her parents were entitled to status, both being children of non-Indian fathers. Ms. McIvor would, in any event, have lost her right to status under the former s. 12(1)(b) when she married a non-Indian.

[40] In September 1985, Ms. McIvor applied under the amended legislation for Indian status on behalf of herself and her children. The application took years to resolve. The Registrar gave his initial decision in February 1987, holding that Ms. McIvor was entitled to status under s. 6(2) of the *Indian Act*, and that her children were not entitled to status. In May 1987, Ms. McIvor protested the decision, seeking status under s. 6(1) for herself and 6(2) for her children. After reconsideration, in February 1989, the Registrar confirmed his initial decision. The plaintiffs launched an appeal of the decision in July 1989, but the appeal was not heard expeditiously. After a considerable delay and some procedural wrangling (including the discontinuance and reinstatement of the appeal), the Registrar conceded that his decision could not stand. The B.C. Supreme Court, in a decision indexed as 2007 BCSC 26, found Ms. McIvor to be entitled to status under s. 6(1)(c). She was held to be the daughter of two persons each entitled to Indian status, and was found to have been deprived of status only by virtue of her marriage to a non-Indian man.

[41] Mr. Grismer is the son of Ms. McIvor and Charles Terry Grismer. As he has only one parent who has status under s. 6(1) of the *Indian Act*, he was found to have status under s. 6(2) of that *Act*. Mr. Grismer himself married a non-Indian woman.

Accordingly, their children do not have status, having no parent entitled to status under s. 6(1) of the *Act*. The Second Generation Cut-off of s. 6(2) applies. In contrast, Ms. McIvor's daughter has married an Indian man, and their children are entitled to Indian status under s. 6(1)(f) of the *Act*.

[42] As the family tree is somewhat difficult to describe, I reproduce a slightly modified version of the helpful diagram included in the trial judge's judgment at para. 97:

<table>
<tr><th colspan="2">Paternal Side</th><th colspan="2">Maternal Side</th></tr>
<tr><td>Alex McIvor
(non-Indian)</td><td>Cecelia McIvor
(entitled to status)</td><td>Jacob Blankenship
(non-Indian)</td><td>Mary Tom
(Indian)</td></tr>
<tr><td colspan="2">Ernest McIvor
(born out of wedlock)
(never registered as an Indian)
Entitled to status under pre-1985 legislation as an illegitimate child of an Indian woman</td><td colspan="2">Susan Blankenship
(born out of wedlock)
(never registered as an Indian)
Entitled to status under pre-1985 legislation as an illegitimate child of an Indian woman</td></tr>
<tr><td colspan="4">Sharon McIvor (born out of wedlock, married to Charles Terry Grismer, a non-Indian)
Entitlement to status lost upon marriage under former s. 12(1)(b)
Entitlement to status restored under current s. 6(1)(c)</td></tr>
<tr><td colspan="4">Charles Jacob Grismer (married to a non-Indian)
No status under pre-1985 legislation
Entitlement to status under current s. 6(2)</td></tr>
<tr><td colspan="4">Children of Charles Jacob Grismer
No status under s. 6(2) – "Second Generation Cut-off"</td></tr>
</table>

[43] The plaintiffs do not challenge the Second Generation Cut-off, *per se*. They say, however, that it is discriminatory to assign s. 6(2) status to persons born prior to April 17, 1985. They illustrate the discrimination by postulating a situation in which

Ms. McIvor had a brother, who also married a non-Indian prior to 1985, and had children.

[44] Under the pre-1985 *Indian Act*, Ms. McIvor's hypothetical brother would have been entitled to status at birth in the same way that she was. Upon marriage to a non-Indian, he would have maintained his status, and his wife would have gained entitlement to Indian status. Their children would also have been entitled to status, and would, under the current legislation, be entitled to status under s. 6(1). If those children, in turn, married non-Indians and had children, their children would have status under s. 6(2). Again, a diagram may help to illustrate the situation:

Ms. McIvor Status under s. 11(e) of pre-1985 Act Marries non-Indian Loses status upon marriage (s. 12(1)(b))	**Hypothetical Brother** Status under s. 11(e) of pre-1985 Act Marries non-Indian Maintains status
Charles Jacob Grismer no status under pre-1985 Act	Child born – entitled to status
——— **1985 Act** comes into force ———	
Charles Jacob Grismer gains status under s. 6(2)	Child maintains status under s. 6(1)(a)
——— Assume marriage to non-Indian ———	
Grandchild of Ms. McIvor not entitled to status as a result of 2nd Generation Cut-off	Grandchild of hypothetical brother entitled to status under s. 6(2)

[45] While the legislative schemes are complex, the complaint in this case is, essentially, that Mr. Grismer's children would have Indian status if his Indian status had been transmitted to him through his father rather than through his mother. The

plaintiffs claim that that is ongoing discrimination on the basis of sex, which contravenes s. 15 of the *Charter*. Section 15(1) states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[46] The defendants, on the other hand, say that the differential treatment is solely a result of events that occurred prior to the coming into force of s. 15 of the *Charter*. Because the *Charter* cannot be applied retroactively, they contend that the plaintiffs do not have a viable claim under s. 15.

Retrospectivity and the *Charter*

[47] It is evident from the history of the *Charter* that it was not intended to apply retroactively. This is particularly clear in respect of s. 15 of the *Charter*, which, pursuant to s. 32(2) of the *Charter* did not take effect until 3 years after the rest of the *Charter* came into force. The delay in bringing s. 15 into effect was a recognition of the fact that considerable legislative amendment might be necessary in order to bring the laws of Canada into compliance with its dictates. It is now well-settled that the *Charter* applies only prospectively from the date it was brought into effect. Section 15, therefore, cannot be used to question the validity of governmental action that pre-dated its coming into force.

[48] On the other hand, continuing governmental action may violate the *Charter* even if it began prior to the coming into force of the *Charter*. Violations of s. 15 cannot be countenanced simply because discrimination began before April 17, 1985:

> Section 15 cannot be used to attack a discrete act which took place before the *Charter* came into effect. It cannot, for example, be invoked to challenge a pre-*Charter* conviction: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *R. v. Gamble*, [1988] 2 S.C.R. 595. Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, however, then it will not be insulated from *Charter* review simply because it happened to be passed before April 17, 1985. If it continues to impose its effects on new applicants today, then it is susceptible to *Charter* scrutiny today: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
>
> The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the Charter came into effect?
>
> *Benner v. Canada (Secretary of State),* [1997] 1 S.C.R. 358 at paras. 44-45

[49] Unfortunately, differentiating between ongoing discrimination and mere effects of concluded pre-*Charter* discrimination is not always a simple matter. In *Benner*, at para. 46, the Supreme Court of Canada adopted a flexible and nuanced approach to the issue:

> [M]any situations may be reasonably seen to involve both past discrete events and on-going conditions. A status or on-going condition will often, for example, stem from some past discrete event. A criminal conviction is a single discrete event, but it gives rise to the on-going condition of being detained, the status of "detainee". Similar observations could be made about a marriage or divorce. Successfully determining whether a particular case involves applying the *Charter* to a past event or simply to a current condition or status will involve determining whether, in all the circumstances, the most significant or relevant feature of the case is the past event or the current condition resulting from it. This is, as I already stated, a question of characterization, and will vary with the circumstances. Making this determination will depend on the facts of the case, on the law in question, and on the *Charter* right which the applicant seeks to apply.

[50] The *Benner* case is instructive. In 1962, Mr. Benner was born abroad to a mother who was a Canadian citizen and a father who was not. At the time of his birth, the *Canadian Citizenship Act*, R.S.C. 1952, c. 33, provided that a child born abroad was entitled to Canadian citizenship if the child's father was a citizen. A legitimate child born abroad whose only Canadian parent was his or her mother was not entitled to citizenship. Mr. Benner, therefore, had no right to Canadian citizenship at the time of his birth.

[51] A new *Citizenship Act* (S.C. 1974-75-76, c. 108) came into force in 1977. For the first time, it allowed persons in Mr. Benner's position to apply for Canadian citizenship. Still, it differentiated between people born abroad whose fathers were Canadian and those whose mothers (but not fathers) were Canadian. If only the mother was a citizen, the child was required to meet requirements with respect to criminal records and national security; people whose fathers were Canadian did not have to satisfy those requirements. The difference was of significance to Mr. Benner, because he was, when his application was before the Registrar in 1989, facing serious criminal charges that prevented him from gaining citizenship.

[52] Canada argued that Mr. Benner's right to citizenship had crystallized in 1962, when he was born, or in 1977, when the new statute came into force. Any discrimination faced by Mr. Benner, it claimed, pre-dated the coming into force of the *Charter*. Therefore, it said, Mr. Benner was not entitled to rely on s. 15 to found his claim.

[53] The Supreme Court of Canada, at para. 52, rejected that view, holding that Mr. Benner's situation should be characterized not as an "event", but as an ongoing status:

> From the time of his birth, he has been a child, born outside Canada prior to February 15, 1977, of a Canadian mother and a non-Canadian father. This is no less a "status" than being of a particular skin colour or ethnic or religious background: it is an ongoing state of affairs. People in the appellant's condition continue to this day to be denied the automatic right to citizenship granted to children of Canadian fathers.

[54] It followed that any discrimination occurred when Mr. Benner applied for and was denied citizenship, not at an earlier date. The Court concluded, at para. 56:

> In applying s. 15 to questions of status, or what Driedger, [*Construction of Statutes* (2nd ed. 1983), at p. 192], calls "being something", the important point is not the moment at which the individual acquires the status in question, it is the moment at which that status is held against him or disentitles him to a benefit. Here, that moment was when the respondent Registrar considered and rejected the appellant's application. Since this occurred well after s. 15 came into effect, subjecting the appellant's treatment by the respondent to *Charter* scrutiny involves neither retroactive nor retrospective application of the *Charter*.

[55] The case at bar is, in many ways, similar to *Benner*. Mr. Grismer says that he suffers discrimination because his Indian status derives from his mother rather than his father. He says that the discrimination is ongoing; his children (who were not even born prior to the coming into force of the *Charter*) are denied Indian status based on differences between men and women in the pre-1985 law that were preserved in the transition to the current regime.

[56] The defendants argue that the source of discrimination, if any, is Ms. McIvor's loss of Indian status when she married a non-Indian. They say that any discrimination was not on the basis of sex, but on the basis of marriage. Further, they contend that the marriage was an event, not a status; therefore, they argue, any discrimination pre-dated the *Charter*.

[57] I am unable to accept the defendants' characterization of the matter for several reasons. First, to describe any discrimination as being based on "marriage" rather than "sex" is arbitrary. It might equally have been said that Mr. Benner suffered discrimination not because of the sex of his Canadian parent, but by virtue of the event of being born abroad. Ms. McIvor's loss of status was not based solely on marriage or on sex, but rather on a combination of the two. The claim in the case at bar is based primarily not on differences in treatment between married and single people (just as the claim in *Benner* was not based on the difference between people born in Canada and those born abroad), but rather on the differences in treatment between men and women. In that sense, the claim is based on an ongoing status (that of Ms. McIvor being a woman) rather than on a discrete event (marriage).

[58] Second, the defendants' argument focuses exclusively on Ms. McIvor's loss of status prior to the coming into force of the *Charter*. That loss is not, *per se*, the foundation for the claim of discrimination. Rather, it is the fact that Ms. McIvor's grandchildren lack status that constitutes the tangible basis for a claim of discrimination. Had they a male Indian grandparent rather than a female one, the current legislation would grant them status.

[59] Finally, and importantly, the defendants ignore the detailed effects of the 1985 statute in suggesting that the alleged discrimination against Ms. McIvor and Mr. Grismer arose from pre-*Charter* statutory provisions. This becomes clear when one compares the situation of Ms. McIvor's male analogue (or "hypothetical brother") under the old legislation and under the current regime. The situation is summarized in the following table:

Situation under Old Legislation	**Situation under 1985 Statute**
Hypothetical Brother Status Indian (s. 11(e) of pre-1985 Act) Marries non-Indian Maintains status	**Hypothetical Brother** Status Indian (s. 11(e) of pre-1985 Act) Marries non-Indian Maintains status
Child born – Child entitled to status	Child born – Child entitled to status
	1985 Act comes into force
——— Assume child marries a non-Indian and has children ———	
Grandchild of hypothetical brother loses Indian status at age 21 (s. 12(1)(a)(iv)of pre-1985 Act) (Double Mother Rule)	Grandchild of hypothetical brother entitled to Indian status (s. 6(2))

[60] The old legislation treated the hypothetical brother's grandchildren somewhat better than those of Ms. McIvor; the hypothetical brother's grandchildren would have enjoyed status up until the age of 21. It is, however, the overlay of the 1985 amendments on the previous legislation that accounts for the bulk of the differential treatment that the plaintiffs complain about. Under the 1985 legislation, the hypothetical brother's grandchildren have Indian status. They are also able to transmit status to any children that they have with persons who have status under

ss. 6(1) or 6(2). Ms. McIvor's grandchildren, on the other hand, have no claim to Indian status.

[61] Thus, the most important difference in treatment between Ms. McIvor's grandchildren and those of her male analogue was a creation of the 1985 legislation itself, and not of the pre-*Charter* regime.

[62] For all of these reasons, I would reject the defendants' contention that the plaintiffs' claim would require the Court to engage in a prohibited retroactive or retrospective application of the *Charter*. Just as in the *Benner* case, the plaintiffs' claim in this case is one alleging ongoing discrimination.

Section 28 of the *Charter* and Section 35 of the *Constitution Act, 1982*

[63] Before addressing the primary claim in this case, which is brought under the equality rights section of the *Charter*, I will address the plaintiffs' contention that s. 28 of the *Charter* and s. 35(4) of the *Constitution Act, 1982* are implicated in this case. Section 28 of the *Charter* is as follows:

> 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[64] The plaintiffs assert that this section "buttresses" s. 15 of the *Charter* and also that the *Indian Act* contravenes this section. I am unable accept either argument. Section 28 is a provision dealing with the interpretation of the *Charter*. It does not, by itself, purport to confer any rights, and therefore cannot be "contravened". Further, the equality rights set out in s. 15 explicitly encompass discrimination on the

basis of sex; they are incapable of being interpreted in any manner which would be contrary to s. 28. In my opinion, s. 28 of the *Charter* is of no particular importance to this case.

[65] Section 35 of the *Constitution Act, 1982* provides:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> ...
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[66] I do not doubt that arguments might be made to the effect that elements of Indian status should be viewed as aboriginal or treaty rights. The interplay between statutory rights of Indians and constitutionally protected aboriginal rights is a complex matter that has not, to date, been thoroughly canvassed in the case law. It seems likely that, at least for some purposes, Parliament's ability to determine who is and who is not an Indian is circumscribed. Arguments of this sort, however, have not been addressed in this case. We have neither an evidentiary foundation nor reasoned argument as to the extent to which Indian status should be seen as an aboriginal right rather than a matter for statutory enactment. This case, in short, has not been presented in such a manner as to properly raise issues under s. 35 of the *Constitution Act, 1982*.

[67] The plaintiffs have presented their case on the basis that their equality rights under the *Charter* are violated by s. 6 of the *Indian Act*. Their references to s. 28 of the *Charter* and s. 35 of the *Constitution Act, 1982* add nothing to their arguments in

relation to those rights. In the result, I do not find it necessary to make further reference to either s. 28 of the *Charter* or s. 35 of the *Constitution Act, 1982*.

Analysis Under s. 15 of the *Charter*

[68] The Supreme Court of Canada's decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established a three-stage approach to determining whether or not an alleged infringement of s. 15 of the *Charter* has been made out. At para. 88, the Court discussed the approach:

> (1) It is inappropriate to attempt to confine analysis under s. 15(1) of the *Charter* to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.
>
> (2) The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:
>
> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
>
> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
>
> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.
>
> The first issue is concerned with the question of whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).
>
> (3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already

> disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[69] The first step of the analysis, then, is to determine whether the plaintiffs have established differential treatment cognizable as a breach of s. 15. To make this determination, the Court must consider three issues. First, it must identify the "benefit of the law" that is at issue in this case. Second, it must find an appropriate comparator group against which to gauge the treatment that the plaintiffs receive under the law. Finally, it must determine whether that comparator group is treated more favourably than the plaintiffs.

The "Benefit of the Law" at Issue in this Case

[70] This case is concerned with entitlement to Indian status. The plaintiffs have adduced significant evidence demonstrating that Indian status is a benefit. Under the terms of the *Indian Act* and other legislation, persons who have Indian status are entitled to tangible benefits beyond those that accrue to other Canadians. These include extended health benefits, financial assistance with post-secondary education

and extracurricular programs, and exemption from certain taxes. The trial judge also accepted that certain intangible benefits arise from Indian status, in that it results in acceptance within the aboriginal community. While some of the evidence of such acceptance may be overstated, in that it fails to distinguish between Indian status and membership in a band, I am of the view that the trial judge was correct in accepting that intangible benefits do flow from the right to Indian status.

[71] The plaintiffs assert that the right to transmit Indian status to one's child should also be recognized as a benefit. I agree with that proposition. Parents are responsible for their children's upbringing, and financial benefits that an Indian child receives will, accordingly, alleviate burdens that would otherwise fall on the parent. Quite apart from such benefits, though, it seems to me that the ability to transmit Indian status to one's offspring can be of significant spiritual and cultural value. I accept that the ability to pass on Indian status to a child can be a matter of comfort and pride for a parent, even leaving aside the financial benefits that accrue to the family.

[72] It is evident to me, therefore, that there is merit in Mr. Grismer's claim that the ability to transmit status to his children is a benefit of the law to which s. 15 applies. Ms. McIvor's claim is a more remote one. She does not, as a grandparent, have the same legal obligations to support and nurture her grandchildren that a parent has to his or her children.

[73] Given that Mr. Grismer is a plaintiff in this matter, and given that any practical remedy that might be granted could be based on the claim by Mr. Grismer rather

than that of Ms. McIvor, it is, strictly speaking, unnecessary to determine whether the ability to confer Indian status on a grandchild is a "benefit of the law" to which s. 15 of the *Charter* applies. In view of the cultural importance of being recognized as an Indian and the requirement to give s. 15 a broad, purposive interpretation, however, I would be inclined to the view that the ability to transmit Indian status to a grandchild is a sufficient "benefit of the law" to come within s. 15 of the *Charter*.

[74] In the analysis that follows, I will concentrate on Mr. Grismer's claim, since it is, in some ways, more straightforward and simpler to describe than that of Ms. McIvor. Except as I will indicate, however, the analysis of Ms. McIvor's claim would be similar. In my view, the claims stand or fall together.

The Appropriate Comparator Group

[75] The next aspect of the first step in the s. 15 analysis is the selection of an appropriate comparator group with which to compare the treatment that is accorded to the plaintiffs. The parties to this litigation do not agree on which comparator group is appropriate.

[76] It is clear that the claimant under s. 15 is entitled, in the first instance, to choose the group with which he or she wishes to be compared (*Law* at para. 58). This is partly a function of the nature of the equality inquiry. The right to equality is not a right to be treated as well as one particular comparator group. Rather, it is, *prima facie*, a right to be treated as well as the members of all appropriate comparator groups. It is, therefore, no defence to a s. 15 claim that some particular comparator group is treated no better than the group to which the claimant belongs.

On the other hand, all that the claimant need show, in order to pass the first stage of analysis of a s. 15 claim, is that there is at least one appropriate comparator group which is afforded better treatment than the one to which he or she belongs.

[77] In this case, Mr. Grismer wishes to compare his group (people born prior to April 17, 1985 of Indian women who were married to non-Indian men) with people born prior to April 17, 1985 of Indian men who were married to non-Indian women. That comparator group was accepted by the trial judge.

[78] On the face of it, the comparator group proposed by Mr. Grismer is the most logical one. It is a group that is in all ways identical to the group to which Mr. Grismer belongs, except for the sex of the parent who has Indian status. By selecting this comparator group, Mr. Grismer isolates the alleged ground of discrimination as the sole variable resulting in differential treatment. That is, generally, an indicator of an appropriate comparator group:

> The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*. *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65 at para. 23

[79] Here, Mr. Grismer says that the benefit or advantage sought is the ability to transmit Indian status to one's children. The relevant characteristic is Indian ancestry. 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. While it is true that that personal characteristic is not expressly referred to in the current

legislation, the plaintiffs argue that in preserving Indian status for those who had it prior to the 1985 amendments, that personal characteristic has effectively been imported into the current legislation.

[80] The defendants object to this comparator group. They say that the appropriate comparator group must consist of persons who were not entitled to be registered as Indians prior to April 17, 1985. They say that by comparing Mr. Grismer to persons who had status prior to April 17, 1985, the trial judge erred by failing to take into account the full historical context of the 1985 legislation.

[81] In my view, the defendants' objection cannot prevail, at least at this stage of the analysis. Where legislation is enacted to remedy discrimination, a court is fully entitled to look at how different groups are treated under the revised legislation. The fact that one group was advantaged prior to the enactment of the remedial legislation will not reduce the need to subject it to *Charter* scrutiny. As Justices LeBel and Rothstein (speaking for the majority) noted in *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, 2007 SCC 10 at para. 39:

> When the government enacts remedial legislation, that legislation may still violate s. 15(1) requirements. The fact that it is remedial legislation does not immunize it from *Charter* review.

[82] I do not doubt that the legislative history and the purposes of the 1985 amendments are factors to be considered in the *Charter* analysis in this case. It might (as I will discuss) be argued that they are valid considerations in determining whether differential treatment is properly described as "discriminatory"; they are certainly important considerations in determining whether a law that infringes s. 15 of

the *Charter* is nonetheless a reasonable limit under s. 1. I do not, however, think that the legislative history in this case can be used to prevent the claimant from asking to be compared to an otherwise appropriate comparator group. Accordingly, the trial judge was, in my view, correct in accepting the comparator group proposed by the plaintiffs.

Is there Differential Treatment?

[83] It is apparent that the *Indian Act* treats Mr. Grismer's group less well than the comparator group. 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.

[84] Interestingly, even if one accepted the defendants' assertion that only people who were benefited by the 1985 amendments can constitute a comparator group, the result would be the same. The defendants argue, in their factum, that no appropriate comparator group obtained, as a result of the 1985 amendment, any benefit superior to that afforded Mr. Grismer:

> 68. ... [L]ike all children of registrants entitled under s. 6(2), Mr. Grismer's children will not be entitled to registration if he parents with a non-Indian. This is the real benefit that the Respondents seek – registration and the ability to transmit entitlement to registration after two successive generations of parenting with a non-Indian.
>
> 69. However, no one obtains this benefit under the impugned legislation. The 1985 *Act* incorporates a second generation cut-off rule, and no one was reinstated or registered with the ability to circumvent it. The entitlement of Mr. Grismer's hypothetical cousin was only maintained or confirmed ... and not obtained ... under s. 6(1)(a). [Emphasis added]

[85] In my view, this assertion mischaracterizes the effects of the 1985 amendments. As I have already noted, prior to 1985, Mr. Grismer's hypothetical cousin was not entitled to transmit normal Indian status to his children if he married a non-Indian. Any children of the marriage would cease to have Indian status when they attained the age of 21 under s. 12(1)(a)(iv) of the pre-1985 legislation. It is only with the coming into force of the 1985 legislation that such children received (or were reinstated to) full status.

[86] Even, therefore, if I were convinced by the defendants' argument that only those who were afforded enhanced status by the 1985 amendments can constitute a comparator group for the purposes of s. 15 of the *Charter*, it seems to me that Mr. Grismer would be able to demonstrate differential treatment.

Is the Differential Treatment Based on an Enumerated or Analogous Ground?

[87] The plaintiffs say that the differential treatment in this case is based on sex (an enumerated ground) and on marital status (an analogous ground). I think that the case is properly analyzed as one of discrimination on the basis of sex. That is the basis on which it was argued in this Court. While the pre-1985 legislation did contain provisions that distinguished situations based on the marital status of a child's mother, the background of such distinctions is historically complicated. I am not at all convinced that the evidentiary basis for an analysis of such distinctions has been fully presented in this case, nor that sufficient argument has been directed toward that ground.

[88] The sex discrimination claim in this case, on the other hand, is relatively straightforward. Mr. Grismer says that if his Indian parent were his father, his children would be entitled to Indian status. As it is his mother that is Indian, they are not.

[89] This case is, on its face, similar to *Benner*. Mr. Benner's inability to obtain citizenship was not a result of his own sex, but rather that of his Canadian parent. While recognizing that, as a general rule, a person cannot found a claim on the breach of another person's *Charter* rights (*R. v. Edwards*, [1996] 1 S.C.R. 128), the Supreme Court of Canada in *Benner* allowed Mr. Benner to rely on discrimination on the basis of his mother's gender to found a s. 15 claim. The Court reasoned as follows:

> 78. If the appellant were truly attempting to raise his mother's s. 15 rights, he would not have the requisite standing. I am not convinced, however, that he is attempting to do so. The impugned provisions of the *Citizenship Act* are not aimed at the parents of applicants but at applicants themselves. That is, they do not determine the rights of the appellant's mother to citizenship, only those of the appellant himself. His mother is implicated only because the extent of his rights is made dependent on the gender of his Canadian parent.
>
> ...
>
> 80. In this case ... there is a connection between the appellant's rights and the differentiation made by the legislation between men and women. The impugned provisions clearly make Mr. Benner's citizenship rights dependent upon whether his Canadian parent was male or female. In these circumstances, I do not believe permitting s. 15 scrutiny of the respondent's treatment of his citizenship application amounts to allowing him to raise the violation of another's *Charter* rights. Rather, it is simply allowing the protection against discrimination guaranteed to him by s. 15 to extend to the full range of the discrimination. This is precisely the "purposive" interpretation of *Charter* rights mandated by this Court in many earlier decisions: see, e.g., *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344;

> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 169.
>
> ...
>
> 82. I hasten to add that I do not intend by these reasons to create a general doctrine of "discrimination by association". I expressly leave this question to another day, since it is not necessary to address it in order to deal with this appeal. The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. Their nationality, skin colour, or race is as personal and immutable to a child as his or her own.
>
> ...
>
> 85. Where access to benefits such as citizenship is restricted on the basis of something so intimately connected to and so completely beyond the control of an applicant as the gender of his or her Canadian parent, that applicant may, in my opinion, invoke the protection of s. 15. As Linden J.A. noted in dissent in the Federal Court of Appeal, [1994] 1 F.C. 250 at p. 277, "[i]n this situation, the discrimination against the mother is unfairly visited upon the child. This is surely as unjust as if the discrimination were aimed at the child directly".

[90] The defendants acknowledge that, based on *Benner*, if Mr. Grismer suffers discrimination as a result of his mother's gender, he has standing to raise a s. 15 claim. They say, however, that the situation that is alleged to prevail in this case is not discrimination against Mr. Grismer based on his mother's gender, but rather discrimination against Mr. Grismer's children based on his mother's gender.

[91] I am unable to accept this argument. As I have already indicated, I am of the view that the ability to transmit Indian status to his children is a benefit to Mr. Grismer himself, and not solely a benefit to his children. He is, therefore, in a situation analogous to that of Mr. Benner.

[92] Similarly, I am of the view that the ability to transmit Indian status to her grandchildren through Mr. Grismer is a benefit to Ms. McIvor. I am, therefore, of the view that she can also demonstrate that the legislation accords her disadvantageous treatment on the basis of sex.

[93] In any event, it seems to me that the inherently multi-generational nature of legislation of the sort involved in this case and in *Benner* requires a court to take a broad, "purposive approach" to determining issues of discrimination and of standing. The determination of Indian status under the *Indian Act* requires an examination of three generations (here, Ms. McIvor, Mr. Grismer, and his children); it would not be in keeping with the purpose of s. 15 of the *Charter* to hold that sex discrimination directed at one of those three generations was inconsequential so long as the disadvantageous treatment accrued only to another of them.

[94] This is not to say that the Court should adopt a broad "discrimination by association" doctrine. The extent to which a person can raise a *Charter* claim based on discrimination directed primarily against a person's ancestors or descendants must depend on the context of the legislation in question and its effects on the claimant.

Discrimination on the Basis of Matrilineal of Patrilineal Descent

[95] Before leaving the issue of whether differential treatment here was based on an enumerated ground or analogous ground, I think it is necessary to comment on one aspect of the judgment in the court below. On several occasions, the trial judge described the case at bar as being one based on discrimination against those of

matrilineal as opposed to patrilineal descent. This characterization led her to grant a very expansive remedy, giving Indian status to all persons who have at least one female Indian ancestor who lost status through marriage, no matter how many generations have intervened between that ancestor and a person claiming status.

[96] I do not doubt that in one sense, discrimination on the basis of matrilineal or patrilineal descent is a species of sex discrimination. If one sex is preferred over the other in terms of its ability to transmit legal status to the next generation, it is evident that that equality rights are violated.

[97] On the other hand, issues of retroactivity and standing make it important, in a *Charter* claim, to identify the claimant him or herself as the person suffering discrimination. It is not apparent to me that a person who is, for example, the fifth generation descendant of a woman who lost status in the 1870s can make a claim under s. 15 of the *Charter*. First, the discrimination giving rise to the claim long pre-dates the *Charter*. Second, such a remote descendant of a person who suffered discrimination would not appear to have standing to raise a claim.

[98] It might, of course, be argued that the descendant raising the claim is not complaining of discrimination against a forebear, but rather of discrimination against him or herself, on the basis of his or her lineage. If the claim is so characterized, it seems to me that it ceases to be a claim based on sex discrimination, *per se*. In order to succeed in making such a claim, the claimant would have to demonstrate that discrimination on the basis of matrilineal as opposed to patrilineal descent should be characterized as an analogous ground under s. 15 of the *Charter*.

[99] The trial judge did not undertake any analysis to determine whether this broadly interpreted ground of "matrilineal or patrilineal descent" qualifies as an analogous ground under s. 15 of the *Charter*. I regard the proposition that s. 15 extends to all discrimination based on pre-*Charter* matrilineal or patrilineal descent to be a dubious one. All persons are persons of both matrilineal and patrilineal descent, in that we all have an equal number of male and female forebears. The usual indicators of an analogous ground of discrimination – historic disadvantage of a particular group, stereotyping, insularity, etc. – cannot be sensibly applied when everyone partakes of the characteristic allegedly forming the basis of discrimination.

[100] In any event, this case does not require the Court to go nearly so far as the trial judge did in accepting historical distinctions to be the foundation of discrimination claims.

[101] For the purposes of this case, it is sufficient to consider whether or not distinctions based on Ms. McIvor's sex violate s. 15 of the *Charter*. In the discussion that follows, I intend to focus on the allegedly discriminatory treatment of the plaintiffs on the basis of Ms. McIvor's sex, and not on the much broader argument apparently accepted by the trial judge based on historical lineage.

Is the Distinction Discriminatory?

[102] The third step in analyzing a claim under s. 15 of the *Charter* is to consider whether the distinction based on an enumerated or analogous ground is "discriminatory" as that concept is used in the *Charter*.

[103] In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 172-176, McIntyre J. attempted to give definition to the concept of discrimination in s. 15 of the *Charter*. Drawing on human rights jurisprudence, he cited, at 174, *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1138-39, which in turn had cited the following comments from page 2 of the Abella Report on equality in employment:

> Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or group's right to the opportunities generally available because of attributed rather than actual characteristics.

[104] McIntyre J. continued, at 174, with his own oft-cited description of discrimination:

> [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[105] In defining the scope of equality rights under s. 15 in *Andrews*, both McIntyre J. and La Forest J. noted that in speaking of discrimination, the *Charter* was aimed at distinctions based on "irrelevant personal differences".

[106] Unfortunately, it has proven rather difficult to fully define and apply an appropriate standard of "discrimination" under s. 15. In cases leading up to *Law v.*

Canada, the Supreme Court of Canada gradually developed jurisprudence concentrating on affronts to human dignity in trying to define "discrimination". In *Law*, at subparagraphs 8 and 9 of paragraph 88, the Supreme Court of Canada suggested factors that should be considered in determining whether legislative distinctions demean a claimant's dignity:

> 88. ...
>
> (8) There is a variety of factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation demeans his or her dignity. The list of factors is not closed. Guidance as to these factors may be found in the jurisprudence of this Court, and by analogy to recognized factors.
>
> (9) Some important contextual factors influencing the determination of whether s. 15(1) has been infringed are, among others:
>
> (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities" should always be a central consideration. Although the claimant's association with a historically more advantaged or disadvantaged group or groups is not *per se* determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.
>
> (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. Although the mere fact that the impugned legislation takes into account the claimant's traits or circumstances will not necessarily be sufficient to defeat a s. 15(1) claim, it will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society, and less difficult to do so where the law fails to take into account the claimant's actual situation.
>
> (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. An

> ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member of society.
>
> and
>
> (D) The nature and scope of the interest affected by the impugned law. The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1).

[107] In analyzing s. 15 claims, Canadian courts enthusiastically embraced the four contextual factors set out in *Law.* In adopting a sort of "checklist" approach to the concept of discrimination, however, they ran the risk of transforming the s. 15 analysis into an inquiry more concerned with formal than with substantive equality. In *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41 at paras. 19-24, the Supreme Court of Canada revisited the issue of discrimination, and cautioned courts about an overly technical application of the *Law* criteria:

> 19. [I]n *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).
>
> 20. The achievement of *Law* was its success in unifying what had become, since *Andrews*, a division in this Court's approach to s. 15. *Law* accomplished this by reiterating and confirming *Andrews*' interpretation of s. 15 as a guarantee of substantive, and not just

formal, equality. Moreover, *Law* made an important contribution to our understanding of the conceptual underpinnings of substantive equality.

21. At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. As Dickson C.J. said in *R. v. Oakes*, [1986] 1 S.C.R. 103:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. [p. 136]

22. But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.

23. The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

24. Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of

> focussing on the central concern of s. 15 identified in *Andrews* – combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.
>
> [Footnotes omitted]

[108] This is not to say that an analysis of the four factors set out in *Law* is no longer important. The factors do serve as indicators of discriminatory treatment, and can be very useful in determining whether differential treatment is discriminatory – see, for example, the recent judgment of this Court in *Withler v. Canada (Attorney General)*, 2008 BCCA 539, particularly at paras. 172-180. The factors in *Law*, however, must not be applied in a mechanical fashion.

[109] Part of the difficulty that courts have had in applying the *Law* criteria to the concept of discrimination has been the scope of the third *Law* factor. The question of whether the impugned law or program has an ameliorative purpose or effect can easily be expanded into an analysis of whether the law, while discriminatory, is nonetheless justifiable. This latter inquiry is not an appropriate one under s. 15 of the *Charter*. It is an inquiry properly undertaken under s. 1.

[110] *Kapp* serves as a reminder that the third factor in *Law* is not directed at broad societal goals, but at the question of whether distinctions in impugned legislation are, themselves, designed to alleviate discrimination or are, rather, distinctions that tend to perpetuate disadvantage.

[111] The impugned legislation in this case is, in my opinion, discriminatory as that concept is used in s. 15 of the *Charter*. The historical reliance on patrilineal descent to determine Indian status was based on stereotypical views of the role of a woman

within a family. It had (in the words of *Law*) "the effect of perpetuating or promoting the view that [women were] ... less ... worthy of recognition or value as a human being[s] or as a member[s] of Canadian society, equally deserving of concern, respect, and consideration". The impugned legislation in this case is the echo of historic discrimination. As such, it serves to perpetuate, at least in a small way, the discriminatory attitudes of the past.

[112] The limited disadvantages that women face under the legislation are not preserved in order to, in some way, ameliorate their position, or to assist more disadvantaged groups. None of the distinctions is designed to take into account actual differences in culture, ability, or merit.

[113] The defendants point out that, on a going-forward basis, the legislation treats all persons the same – that is, persons with only a single Indian grandparent will not be entitled to Indian status under the current legislation. They say that the decision to preserve the status of those who benefitted from pre-*Charter* legislation should not be seen as an affront to dignity, and that the law should, therefore, not be seen as discriminatory.

[114] While I agree that the factors put forward by the defendants in justifying the current regime must be accorded considerable weight, it does not seem to me that they are particularly forceful at this stage of the *Charter* analysis. To the extent that the defendants wish to justify discriminatory treatment by reference to the need to respect vested rights and to effect a smooth transition from a discriminatory pre-*Charter* regime to a non-discriminatory post-*Charter* one, it seems to me that the

justification should be considered under s. 1 of the *Charter*. It should not be for the claimants to prove that *prima facie* discriminatory legislation cannot be justified – rather, it should be for the government to show that its own pressing and substantial objectives justify the discrimination.

[115] In saying this, I appreciate that the word "discrimination" is pejorative. At least as the word is used in common parlance, it is difficult to conceive of discrimination being justifiable. For this reason, there is a temptation to examine all justifications for legislation before labelling it "discriminatory". It is tempting, in other words, to view s. 15 as having its own internal limitations such that resort to s. 1 of the *Charter* to evaluate justifications is unnecessary. There are, of course, *Charter* provisions that do have internal limitations, such that s. 1 justifications for infringements are no more than theoretical possibilities – it is difficult, for example, to conceive of a s. 1 justification for an *unreasonable* search and seizure which violates s. 8 of the *Charter*. Section 15, however, is not such a provision.

[116] In *Andrews*, the members of the Supreme Court of Canada emphasized the importance of s. 1 in analyzing alleged *Charter* violations arising under s. 15. While there was, particularly after the *Law* decision, a tendency to treat all justifications as issues to be considered in determining whether differential treatment is "discriminatory", *Kapp*, in my view, serves as a reminder that the discrimination analysis is more narrow, and that policy justifications for unequal treatment under the law will normally be matters that must be treated outside of s. 15 itself.

[117] It follows that the unequal treatment of which the plaintiffs complain is discriminatory, and that the justifications for the discrimination proposed by the defendants are most appropriately considered under s. 1 of the *Charter*. The impugned legislation constitutes a *prima facie* infringement of s. 15 of the *Charter*. Section 6 of the *Indian Act* must be justified, if at all, under s. 1.

Arguments Under Section 1 of the Charter

[118] Section 1 of the *Charter* provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[119] In determining whether a *prima facie* infringement of a *Charter* right is saved by s. 1, courts apply the test established in *R. v. Oakes*, [1986] 1 S.C.R. 103. In *Hislop* at para. 44, the Supreme Court of Canada suggested that the *Oakes* test might be simplified somewhat by expressing it as a four-part test:

> (1) Is the objective of the legislation pressing and substantial?
>
> (2) Is there a rational connection between the government's legislation and its objective?
>
> (3) Does the government's legislation minimally impair the *Charter* right or freedom at stake?
>
> (4) Is the deleterious effect of the *Charter* breach outweighed by the salutary effect of the legislation?

[120] In applying this test, it is necessary, at the outset, to identify with some precision both the legislative provisions that are in issue, and the objectives that are put forward as justifications for them.

[121] In its argument before this Court, the defendants concentrated, for the purposes of s. 1, on showing that a continuing connection between Indian status and membership in Indian bands justifies the current legislation. It is understandable that this was the focus of argument, given the trial judge's statements with respect to that issue, and also given that other possible s. 1 justifications were dealt with on the footing that they were properly addressed under s. 15 (I note that the principle factums of both the plaintiffs and the defendants were filed before the Supreme Court of Canada's decision in *Kapp*). In my view, however, the main argument put forward by the defendants – that the 1985 legislation was a compromise with several goals, including preserving existing rights – should properly be considered under s. 1.

[122] 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.

Pressing and Substantial Governmental Objective

[123] I have already quoted from the speech of the Minister of Indian Affairs and Northern Development in the House of Commons on moving second reading of the legislation. He set out five objectives, or principles, for the legislation:

> (1) Removal of sex discrimination from the *Indian Act*.
>
> (2) Restoration of Indian status and band membership to those who lost such status as a result of discrimination in the former legislation.
>
> (3) Removal of any provisions conferring or removing Indian status as a result of marriage.
>
> (4) Preservation of all rights acquired by persons under the former legislation.
>
> (5) Conferral on Indian bands of the right to determine their own membership.

[124] The extensive legislative history presented in this case clearly establishes that these were, indeed, the objectives of the 1985 legislation. It cannot be seriously suggested that the government acted other than in good faith in enacting legislation in pursuit of these objectives.

[125] It is the fourth of the listed objectives, *i.e.*, preservation of existing rights, which is the most important for the purposes of the s. 1 analysis in this case.

[126] I am of the view that the objective of preserving the rights of people who acquired Indian status and band membership under pre-1985 legislation is properly considered to be pressing and substantial. The law generally places significant value on protecting vested rights. This is particularly important in situations where

people have made life choices and planned their futures in reliance on their legal status.

[127] In enacting new legislation in 1985, the government cannot, in my view, be criticised for embracing the principle that those who had Indian status under the previous legislative regime ought to be able to retain the benefits of such status going forward. Indeed, such a principle was necessary in order to avoid the disruption and hardship to individuals that would have resulted from depriving them of Indian status.

[128] Because the legislation in this case is criticized as being under-inclusive, however, it is necessary to consider whether the government had a proper objective in refusing to grant Indian status under s. 6(1) to persons in the position of Mr. Grismer. In other words, was there a pressing and substantial objective that was satisfied by preserving the status of the comparator group, while not extending that status to the group to which Mr. Grismer belongs?

[129] In my view, there was such an objective, though the objective is apparent only when one examines the broader provisions and goals of the regime put in place in 1985. The 1985 legislation was passed only after years of consultation and discussion. The legislation resulted in a significant increase in the number of people entitled to Indian status in Canada. There were widespread concerns that the influx might overwhelm the resources available to bands, and that it might serve to dilute the cultural integrity of existing First Nations groups. The goal of the legislation, therefore, was not to expand the right to Indian status *per se*, but rather to create a

new, non-discriminatory regime which recognized the importance of Indian ancestry to Indian status.

[130] In fashioning the legislation, the government decided that having a single Indian grandparent should not be sufficient to accord Indian status to an individual. This was in keeping with the views expressed by a number of aboriginal groups. It was also in keeping with the existing legislative regime, which included the Double Mother Rule.

[131] It is in this context that we must examine the transitional provisions of the 1985 legislation. It would have been quite anomalous for the legislation to extend Indian status to Mr. Grismer's children. They did not qualify for status under the old regime, nor would people in their situation (*i.e.*, having only a single Indian grandparent) have status in the future under the new regime.

[132] It is true that one group of persons who have only a single Indian grandparent are entitled to status under the 1985 legislation. That group is comprised of persons who had status prior to April 17, 1985. That anomaly is (subject to what I will say later about the Double Mother Rule) justified by the governmental objective of preserving vested rights. To extend that anomaly to Mr. Grismer would give him equality with the existing anomalous group, but only at the expense of creating yet more anomalies in the legislation.

[133] Given that there is a clear pressing and substantial objective in preserving the status of those who had Indian status prior to 1985, and given that it would be anomalous and not in keeping with the post-1985 regime to extend status to people

in Mr. Grismer's situation, I am of the view that the first part of the s. 1 test is satisfied in this case. The legislative regime is premised on a pressing and substantial governmental objective.

Rational Connection

[134] It is also clear that there is a connection between the legislation and its objectives. It is because the legislation sought to protect vested rights that it allowed one group – those who had status prior to April 17, 1985 – to continue to have status.

Minimal Impairment

[135] In order to be saved under s. 1 of the *Charter*, legislation must satisfy the pressing and substantial governmental objective while impairing the claimants' *Charter* rights as little as possible. This requires a careful tailoring of the legislation to the objective at which it is aimed.

[136] I acknowledge that where legislation serves to compromise various competing concerns (*i.e.*, it is "polycentric") some deference is to be given to choices made by government in weighing the various factors and in coming up with a solution (see *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at 304-305). Even according the government deference, however, I find it impossible to say, on the record that is before the Court, that the 1985 legislation satisfies the minimal impairment test.

[137] I say this because the 1985 legislation did not merely preserve the rights of the comparator group. As I have previously indicated, members of the comparator group were able, prior to 1985, to confer only limited Indian status on their children. Such children (who would have fallen under the Double Mother Rule) were given status as Indians only up until the age of 21. Under the 1985 legislation, persons who fell into the comparator group were given Indian status under s. 6(1). Their children had status under s. 6(2) for life, and the ability to transmit status to their own children as long as they married persons who had at least one Indian parent.

[138] In saying this, I do not ignore the fact that more than half of Canada's Indian bands appear to have been exempted from the Double Mother Rule by Order in Council during the 1970s and early 1980s. This fact may limit the number of people whose status was enhanced by the 1985 legislation, but it does not mean that such people do not exist. Further, as the parties have pointed out in their submissions, by 1985, significant doubt had been expressed as to the validity of the exemptions.

[139] The defendants argue that discrimination resulting from the enhanced status of those who lost, or would lose their status under the Double Mother Rule is not properly a part of this case. They say that it is not properly within the bounds of the statement of claim. There is no basis for this contention. The statement of claim makes several broad allegations of discrimination on the basis of sex in respect of s. 6 of the *Indian Act*. The claims do encompass the inequality that results from the enhanced status given to those to whom the Double Mother Rule previously applied. The issue of the status of those who would have been caught by the Double Mother

Rule prior to 1985 arises, in any event, as part of the evaluation of the defendants' s. 1 defence to the claim.

[140] The 1985 legislation put Mr. Grismer and his group at a further disadvantage *vis-à-vis* the comparator group than they were at prior to its enactment. Had the 1985 legislation merely preserved the right of children of persons in the comparator group to Indian status until the age of 21, the government could rely on preservation of vested rights as being neatly tailored to the pressing and substantial objective under s. 1. Such legislation would have minimally impaired Mr. Grismer's right to equality. Instead, the 1985 legislation appears to have given a further advantage to an already advantaged group. I am unable to accept that this result is in keeping with the minimal impairment requirement of the *Oakes* test.

[141] The defendants have not presented evidence or argument attempting to justify the 1985 legislation on any basis other than that it preserved existing rights. When pressed, they acknowledge that the situation of persons in what I have found to be the appropriate comparator group was ameliorated by the 1985 legislation. They say, however, that there is an important difference between the comparator group and Mr. Grismer's group. They note that members of the comparator group have two Indian parents – a father who is of Indian heritage, and a mother who became Indian by virtue of marriage. In contrast, Mr. Grismer has only one parent of Indian heritage – his mother.

[142] I find this distinction unconvincing. It is based on the very sort of discrimination that Mr. Grismer complains of. Further, notwithstanding the Indian

status of the comparator group's mothers, the pre-1985 legislation specifically limited the member's ability to transmit status to their children, through the Double Mother Rule.

[143] I find that the 1985 legislation does not minimally impair the equality rights of Mr. Grismer, because it served to widen the existing inequality between his group and members of the comparator group.

Proportionality

[144] While the 1985 legislation fails the minimal impairment test, it does, in my view, pass the proportionality test. While the legislation does not give Mr. Grismer's group all of the advantages that are given to the comparator group, it does treat Mr. Grismer in a manner that is consistent with the legislative regime going forward. In this respect, the legislation is unlike the legislation that was in issue in *Benner*. In that case, Mr. Benner's group was treated disadvantageously not only in comparison with those who had previously been entitled to citizenship, but also in comparison with those who were born after the coming into force of the legislation.

[145] The denial of Indian status to Mr. Grismer's children, in other words, is not an extraordinary prejudice, but rather the ordinary situation under the current legislation. With the extraordinary exception of the comparator group, all children with only a single Indian grandparent are denied Indian status.

[146] This is not, I would emphasize, a case in which a facially neutral statutory requirement disguises ongoing prejudice against an identifiable group. While the

plaintiffs rely strongly on the case of *Guinn v. United States*, 238 U.S. 347 (1915), I do not believe the case to be analogous to the case at bar.

[147] In *Guinn*, the state of Oklahoma imposed a literacy requirement on voters, but exempted from the requirement all persons who were entitled to vote prior to 1866, as well as all lineal descendants of such persons.

[148] The legislation, while facially neutral, in fact subjected black voters to a requirement that most white voters did not face. This was because black persons did not, historically, have the right to vote in Oklahoma. Had the impugned legislation been allowed to stand, it would have entrenched racial discrimination in voting for generations.

[149] In contrast, the legislation at issue in this case does not have such effects. All people have both male and female ancestors – there is no identifiable group of people that are the descendants of women as opposed to being the descendants of men. While the 1985 legislation, for reasons of preserving existing rights, postpones the second generation cut-off by one generation for those who had Indian status at the date of its enactment, it does not have permanently discriminatory effects against an identifiable group in the way that the legislation in *Guinn* did.

[150] I do not agree with the plaintiffs' position that the discriminatory effects of the 1985 legislation are out of proportion to the pressing and substantial governmental objective that it set out to serve.

Conclusion on Section 1

[151] I find that the infringement of the plaintiffs' s. 15 rights is not saved by s. 1 of the *Charter*. In according members of the comparator group additional rights beyond those that they possessed prior to April 17, 1985, the 1985 legislation did not minimally impair the equality rights of the plaintiffs. However, the legislation does pass all other aspects of the s. 1 test.

Remedy

[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.

[155] The legislation would have been constitutional if it had preserved only the status that such children had before 1985. By according them enhanced status, it created new inequalities, and violated the *Charter*.

[156] There are two obvious ways in which the violation of s. 15 might have been avoided. The 1985 legislation could have given status under an equivalent of s. 6(1) to people in Mr. Grismer's situation. Equally, it could have preserved only the existing rights of those in the comparator group. While these are the obvious ways of avoiding a violation of s. 15, other, more complicated, solutions might also have been found.

[157] The legislation at issue has now been in force for 24 years. People have made decisions and planned their lives on the basis that the law as it was enacted in 1985 governs the question of whether or not they have Indian status. The length of time that the law has remained in force may, unfortunately, make the consequences

of amendment more serious than they would have been in the few years after the legislation took effect.

[158] Contextual factors, including the reliance that people have placed on the existing state of the law, may affect the options currently available to the Federal government in remedying the *Charter* violation. It may be that some of the options that were available in 1985 are no longer practical. On the other hand, options that would not have been appropriate in 1985 may be justifiable today, under s. 1 of the *Charter*, in order to avoid draconian effects.

[159] I cannot say which legislative choice would have been made in 1985 had the violation of s. 15 been recognized. I am even less certain of the options that the government might choose today to make the legislation constitutional. For that reason, I am reluctant to read new entitlements into s. 6 of the *Indian Act*. I am even more reluctant to read down the entitlement of the comparator group, especially given that it is not represented before this Court. In *Schachter v. Canada*, [1992] 2 S.C.R. 679, the Supreme Court of Canada discussed situations in which the appropriate remedy is a declaration of invalidity that is temporarily suspended. At 715-716, the Court said:

> A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach ... may ... be appropriate in cases of underinclusiveness as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant. At the same time, if there is no

> obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.

[160] It seems to me that this reasoning is apt in the case at bar. It would not be appropriate for the Court to augment Mr. Grismer's Indian status, or grant such status to his children; there is no obligation on government to grant such status. On the other hand, it would be entirely unfair for this Court to instantaneously deprive persons who have had status since 1985 of that status as a result of a dispute between the government and the plaintiffs. In the end, the decision as to how the inequality should be remedied is one for Parliament.

[161] Sections 6(1)(a) and 6(1)(c) of the *Indian Act* violate the *Charter* to the extent that they grant individuals to whom the Double Mother Rule applied greater rights than they would have had under s. 12(1)(a)(iv) of the former legislation. Accordingly, I would declare ss. 6(1)(a) and 6(1)(c) to be of no force and effect, pursuant to s. 52 of the *Constitution Act, 1982*. I would suspend the declaration for a period of 1 year, to allow Parliament time to amend the legislation to make it constitutional.

Disbursements Occasioned to the Parties as a Result of Interventions

[162] The various intervenors in this matter were granted leave to intervene and file factums pursuant to the order of Hall J.A. pronounced March 19, 2008. That order included the following provisions:

> 5. Whether Intervenors are liable for any disbursements occasioned to the Parties by [their] intervention[s] is deferred to the panel hearing the appeal.
>
> 6. Intervenors are not entitled to costs and not liable to pay costs in the appeal.

[163] While I acknowledge that intervenors can play an important role in cases before this Court, it seems to me unfair to expect the parties to bear the additional burden of disbursements consequent on their presence.

[164] I am satisfied that it is appropriate to require each of the intervenors in this case to reimburse each of the parties for the disbursements that they have incurred as a result of its intervention.

Conclusion

[165] While I am in agreement with the trial judge that s. 6 of the *Indian Act* infringes the plaintiffs' right to equality under s. 15 of the *Charter* and that the infringement is not justified by s. 1, I reach this conclusion on much narrower grounds than did the trial judge. In particular, I find that the infringement of s. 15 would be saved by s. 1 but for the advantageous treatment that the 1985 legislation accorded those to whom the Double Mother Rule under previous legislation applied.

[166] I would allow the appeal, and substitute for the order of the trial judge an

order declaring ss. 6(1)(a) and 6(1)(c) of the *Indian Act* to be of no force and effect. I would suspend the declaration for a period of 1 year.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Tysoe"

Canada

Tab #9.

The Government of Canada's Response to the Descheneaux Decision

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Introduction

On August 3, 2015, the Superior Court of Quebec rendered its decision in the Descheneaux case. The court found that several paragraphs and one subsection relating to Indian registration (status) under section 6 of the *Indian Act* unjustifiably violate equality provisions under section 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*) because they perpetuate a difference in treatment in eligibility to Indian registration between Indian women as compared to Indian men and their respective descendants. The court struck down these provisions, but suspended the implementation of its decision for a period of 18 months, until February 3, 2017, to allow parliament to make the necessary legislative amendments.

In its decision, the court also advised (in obiter) that legislative amendments to address inequities in Indian registration not be limited to the specific facts in the Descheneaux case.

More broadly, the Descheneaux decision highlights the continued residual sex-based inequities in Indian registration that were carried forward following the 1985 comprehensive changes to Indian registration and band membership under the *Indian Act* through Bill C-31 to comply with the *Charter*. Some of these inequities were not fully addressed in 2011 as part of the *Gender Equity in Indian Registration Act* (Bill C-3).

The decision also brings to the forefront the long-standing and unaddressed broader issues relating to Indian registration, band membership and citizenship that were raised by First Nations as part of the 2011-2012 *Exploratory Process on Indian Registration, Band Membership and Citizenship*, such as, the historic and continued federal legal authority to define Indian and band member under the *Indian Act*.

On July 28, 2016, the Government of Canada announced a two-staged approach, in response to the Descheneaux decision, to eliminate known sex-based inequities in Indian registration and to launch a collaborative process with First Nations and other Indigenous groups on the broader issues relating to Indian registration, band membership and citizenship with a view to future reform.

The Descheneaux Case

In 2011, three members of the Abénakis of Odanak First Nation in Quebec, Stéphane Descheneaux, Susan Yantha and Tammy Yantha, filed litigation in the Superior Court of Quebec challenging the Indian registration provisions under section 6 of the *Indian Act* as being unconstitutional and in contravention of the *Charter*.

The plaintiffs argued that the current registration provisions perpetuate different treatment in entitlement to Indian registration between Indian women as compared to Indian men and their respective descendants. They also argued that amendments to the *Indian Act* under the 2011 *Gender Equity in Indian Registration Act* (Bill C-3) in response to the 2009 decision of the British Columbia Court of Appeal in the McIvor case did not go far enough in addressing sex-based inequities in Indian registration.

The Descheneaux case deals with two specific situations of residual sex-based inequities in Indian registration affecting cousins and siblings.

The "cousins" issue relates to the differential treatment in how Indian status is acquired and transmitted among first cousins of the same family depending on the sex of their Indian grandparent, in situations where their grandmother was married to a non-Indian prior to 1985. This results in different abilities to acquire and pass on status between the maternal and paternal lines.

Although the 2011 *Gender Equity in Indian Registration Act* (Bill C-3) removed the inequality directly affecting the grandchildren of Indian women who had married non-Indians in certain circumstances, it did not address a further inequality that directly affected the great-grandchildren of such women. Therefore, it did not bring matrilineal entitlement to Indian registration into line with that of patrilineal entitlement in similar circumstances.

The "siblings" issue concerns the differential treatment in the ability to transmit Indian status between male and female children born out of wedlock to an Indian father between the 1951 and 1985 amendments to the *Indian Act*. Indian women in this situation cannot pass on status to their descendants, unless their child's father is a status Indian. Unlike Indian men in similar circumstances who can pass on status to their children regardless of whether they parent with a non-Indian.

The Descheneaux Decision

On August 3, 2015, the Superior Court of Quebec ruled in favour of the plaintiffs, finding that paragraphs 6(1)(a), (c) and (f) and subsection 6(2) of the *Indian Act* unjustifiably infringe section 15 of the *Charter*. The court declared these provisions to be of no force and effect but suspended its decision for a period of 18 months (until February 3, 2017, later extended to July 3, 2017) to allow parliament time to make the necessary legislative amendments. [1]

In its decision, the court also warned that legislative amendments to address inequities in Indian registration not be limited to the specific facts in the Descheneaux case.

On September 2, 2015, an appeal in the decision was filed pending direction from the new government following the federal election of October 19, 2015. As part of the government's review of court cases, Canada withdrew its appeal of the decision on February 22, 2016, and began work on the required legislative amendments to respond to the decision.

The Government of Canada's Response: A Two-Staged Approach

The Government of Canada is aware that sex-based inequities in Indian status is one of a number of issues relating to Indian registration and band membership under the *Indian Act* that are of concern to First Nations and other Indigenous groups.

Some of these issues involve distinctions in Indian registration that are based on family status and ancestry or date of birth, and involve such matters as: adoption; the 1951 and second-generation cut-offs; unstated/unknown paternity; and voluntary deregistration. Other matters relate to broader policy questions, such as Canada's continued role in determining Indian status and band membership. These subject matters are complex, and some are subjective in nature as they focus on issues relating to culture and ethnicity and finding the appropriate balance between individual and collective rights. Impacted individuals and communities bring a wide range of views on how to address these matters.

In keeping with Canada's commitment to reconciliation and a renewed nation-to-nation relationship with Indigenous peoples, the government will not act unilaterally to bring about legislative change in respect of the broader-related and complex issues. These issues should be the subject of meaningful consultations with First Nations, Indigenous groups and affected individuals.

For these reasons, the Government of Canada has launched a two-staged approach in response to the Descheneauxdecision. Stage I is focused on the elimination of known sex-based inequities in Indian registration, including the issues that were raised in Descheneaux, through legislative amendments. Stage II will provide for comprehensive consultations with First Nations, Indigenous groups and affected individuals through a collaborative process that will examine the broader issues relating to Indian registration, band membership and citizenship with a view to future reform.

Stage I (roman numeral 1): Engagement and A Legislative Process to Address Known Sex-Based Inequities in Indian Registration (2016-2017)

In July 2016, the Government of Canada began engagement with First Nations and other Indigenous groups on the proposed legislative amendments to address the sex-based inequities found in the Descheneaux decision, as well as other sex-based inequities in Indian registration.

As part of the engagement, the federal government invited, and provided funding to, interested First Nation and Indigenous organizations to work with the government to bring together individuals and groups to discuss the proposed legislative changes.

Engagement sessions took place across Canada over summer and fall 2016. Participation in these sessions was inclusive of:

- First Nations, Métis, and non-status Indians
- First Nation chiefs, councillors, administrators and community members
- representatives of Treaty and Nation organizations, and regional and national Indigenous organizations, including women's organizations.

A draft of the legislative proposal was also shared with First Nations and other Indigenous groups and posted on the INAC (Indigenous and Northern Affairs Canada) website for information purposes prior to the introduction of the legislation in parliament.

Bill S-3, An Act to amend the Indian Act (elimination of sex-based inequities in registration), was introduced in the Senate of Canada on October 25, 2016.

The proposed amendments under Bill S-3 address the inequities identified in the Descheneaux decision and other known sex-based inequities in Indian registration:

- **Cousins Issue:** Address the differential treatment of first cousins whose grandmother lost status due to marriage with a non-Indian, when that marriage occurred before April 17, 1985 (see Annex A).
- **Siblings Issue:** Address the differential treatment of women who were born out of wedlock of Indian fathers between September 4, 1951 and April 17, 1985 (see Annex B).
- **Issue of Omitted Minors:** Address the differential treatment of minor children, who were born of Indian parents or of an Indian mother, but lost entitlement to Indian Status because their mother married a non-Indian after their birth, and between September 4, 1951 and April 17, 1985 (see Annex C).

The Standing Senate Committee on Aboriginal Peoples began its study of Bill S-3 on November 22, 2016. The Standing Committee on Indigenous and

Northern Affairs also undertook a pre-study of the bill beginning November 21, 2016.

During the Standing Senate Committee deliberations, witnesses and senators expressed concerns regarding the level of engagement with First Nations, Indigenous groups and affected individuals prior to the introduction of the bill. Concerns were also raised on whether the bill addresses all known sex-based inequities in Indian registration.

On December 6, 2016, the Standing Senate Committee suspended consideration of Bill S-3, and on December 13, 2016, the committee recommended that the government seek an extension of the February 3, 2017 court order, to continue the engagement process.

On December 22, 2016, in response to the recommendation of the Standing Senate Committee, the government sought an extension of the decision from the Superior Court of Quebec to continue engagement on the proposed amendments to address sex-based inequities in Indian registration as part of Stage I. On January 20, 2017, the court granted a five-month extension of the decision, to July 3, 2017.

The court extension allowed the Government of Canada to:

- Further engage with First Nations, Indigenous groups and affected individuals on Bill S-3.
- Hold technical meetings with legal experts.
- Confirm that the proposed amendments outlined in the bill provide the appropriate remedies for the situations found in the Descheneaux decision.
- Ensure that the bill addresses other known situations of sex-based inequities.
- Further analyse a proposed amendment to Bill S-3 put forward during testimony to the Standing Senate Committee (see Annex D).

Parliament has until July 3, 2017, to enact legislative amendments under Bill S-3 in order to eliminate the sex-based inequities in Indian registration.

Stage II (roman numeral 2): A Collaborative Process on the Broader Issues Relating to Indian Registration, Band Membership and Citizenship (2017-2018)

In keeping with the government's commitment to reconciliation with Indigenous peoples through a renewed nation-to-nation relationship, a collaborative process on the broader issues relating to Indian registration, band membership and citizenship will be launched following the passage of Bill S-3.

The collaborative process will be jointly designed with First Nations and other Indigenous groups. Preliminary discussions will be held to determine the nature and scope of work and discussions to take place, the subject matters that would be examined under this process and the types of activities that would be undertaken by participants.

Participation in the collaborative process will be inclusive and involve First Nations governments, Treaty and Nation organizations, and regional and national Indigenous organizations that represent the interests of First Nations, including First Nations women, Métis and non-status Indians.

Stage II will build on the wealth of information submitted by First Nations and other Indigenous groups as part of the 2011-2012 *Exploratory Process on Indian Registration, Band Membership and Citizenship*. [2]

Without prescribing the subject matters for discussion, based on the findings of the 2011-2012 *Exploratory Process*, it is anticipated that the issues of interest for First Nations and other Indigenous groups will likely include, but not be limited to, the following:

- Other distinctions in Indian registration
- Issues relating to adoption
- The 1951 cut-off date for eligibility to registration specific to Bill C-3
- The second-generation cut-off
- Unstated/unknown paternity
- Cross-border issues
- Voluntary de-registration
- The continued federal role in determining Indian and band member under the *Indian Act*
- First Nations authorities to determine membership under the *Indian Act*.

Canada will also seek to include for discussion issues surrounding children of same-sex parents and non-cisgender identities as they relate to eligibility for Indian registration and band membership.

At the end of Stage II (roman numeral 2), the Minister will present the results of the collaborative process to Cabinet. Should recommendations be made for further legislative changes, the Minister could embark on subsequent phases of engagement with First Nations and other Indigenous groups on future legislative or other reform pertaining to Indian registration and band membership.

The collaborative process under Stage II will be conducted within a 12 to 18 month time frame and will be launched following the passage of legislative amendments to the *Indian Act* under Bill S-3.

Conclusion

Canada has an obligation to amend the *Indian Act* to respond to the Descheneaux decision by the court-extended deadline of July 3, 2017.

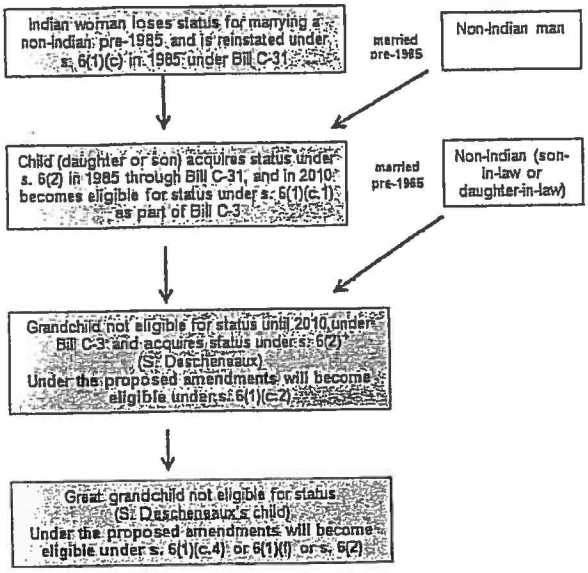
Consistent with the government's commitment to reconciliation and a nation-to-nation relationship with Indigenous peoples, the collaborative process will be launched following the passage of Bill S-3. This will open the door to comprehensive consultation and collaborative work with First Nations, Indigenous organizations and affected individuals on the broader issues relating to Indian registration, band membership and citizenship.

Annex E of this document provides comprehensive information on Frequently Asked Questions relating to this initiative.

Annex A: The Cousins Issue

Addressing the differential treatment of first cousins whose grandmother lost status due to marriage with a non-Indian before April 17, 1985

Figure 1a: Maternal line (situation of Stéphane Descheneaux)

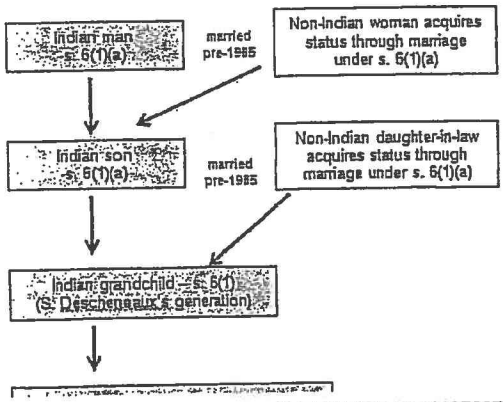


▼ Text description of Figure 1a: maternal line (situation of Stéphane Descheneaux)

Figure 1a describes the treatment of children, grandchildren and great grandchildren of the maternal line (the mother's side), which is the situation of Stéphane Descheneaux. If an Indian woman married a non-Indian prior to April 17, 1985 she lost her status for marrying a non-Indian and their children were also not eligible for status. In 1985 the mother is reinstated under paragraph 6(1)(c) pursuant to Bill C-31 and her children gain status under subsection 6(2). In 2011, under Bill C-3, the children become eligible for status under paragraph 6(1)(c.1) and the grandchildren acquire status under subsection 6(2). This is the status category of Stéphane Descheneaux. As part of the proposed amendments the grandchild will become eligible for status under subsection 6(1).

Currently, the great grandchild of the maternal line is not eligible for status. This is the situation of Stéphane Descheneaux's child. Under the proposed amendments the great grandchild will become eligible under subsection 6(1) or 6(2).

Figure 1b: paternal line (Comparator group)



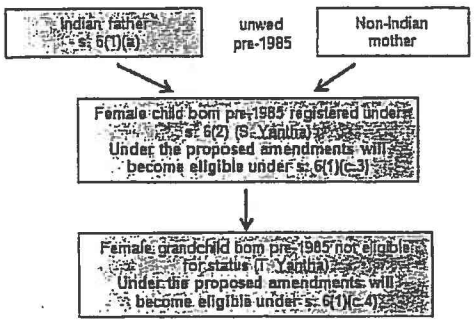
▼ Text description of Figure 1b: paternal line (Comparator group)

Figure 1b describes the treatment of children of the paternal line (the father's side) as the comparator group. If an Indian man registered under paragraph 6(1)(a) married a non-Indian woman prior to April 17, 1985, then the non-Indian woman acquired status through marriage and is entitled to status under paragraph 6(1)(a). Their children are also eligible for status under paragraph 6(1)(a). If the male child (the son) married a non-Indian woman (the daughter-in-law) prior to 1985, she also gained entitlement to status through marriage under paragraph 6(1)(a) as did their child (the grandchild). The grandchild in this situation is eligible for status under subsection 6(1) and is of Stéphane Descheneaux's generation. The great grandchild in this situation is registered under subsection 6(1) or subsection 6(2). The great grandchild is of the same generation as the child of Stéphane Descheneaux.

Annex B: The Siblings Issue (Women Born Out of Wedlock to an Indian Father and non-Indian Mother)

Addressing the differential treatment of women who were born out of wedlock to Indian fathers between September 4, 1951 and April 17, 1985

Figure 2a: Female born out of wedlock to an Indian father between 1951 and 1985 (situation of Susan and Tammy Yantha)

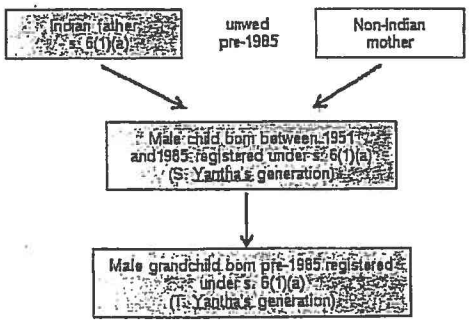


▼ Text description of Figure 2a: Female born out of wedlock to an Indian father between 1951 and 1985 (situation of Susan and Tammy Yantha)

Figure 2a describes the treatment of a female grandchild who was born prior to April 17, 1985, to a woman who was in turn born out of wedlock between September 4, 1951 and April 17, 1985, to an Indian father registered under paragraph 6(1)(a) of the *Indian Act* and a non-Indian mother. Prior to 1985, if an Indian man registered under paragraph 6(1)(a) had a daughter between 1951 and 1985 with a non-Indian woman out of wedlock, the daughter in this situation is registered under subsection 6(2) of the *Indian Act* and consequently is not able to pass on Indian status to her children if she parents with a non-Indian man.

The proposed amendments to the *Indian Act* will rectify this issue and allow the female children in this situation to become eligible for registration under subsection 6(1) of the *Indian Act* instead of under subsection 6(2). These amendments will in turn allow the female grandchildren, born prior to April 17, 1985, to these women to become eligible for Indian status under subsection 6(1).

Figure 2b: Paternal line (Comparator group)



▼ Text description of Figure 2b: paternal line (Comparator group)

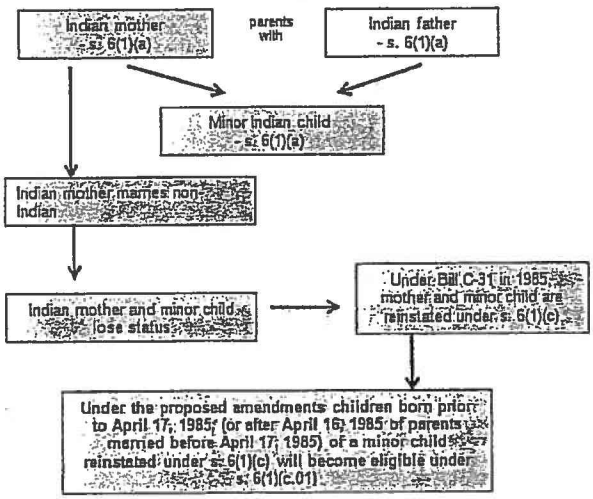
Figure 2b describes the treatment of a male grandchild born before April 17, 1985, to an Indian man who was born out of wedlock, between September 4, 1951 and April 17, 1985, of an Indian father registered under paragraph 6(1)(a) of the *Indian Act* and a non-Indian mother. Prior to 1985, if a status Indian man registered under paragraph 6(1)(a) had a son with a non-Indian woman out of wedlock, the son born in this situation is

registered under paragraph 6(1)(a) of the *Indian Act* and consequently is able to pass on Indian status to his child, even if he parents with a non-Indian woman.

Annex C: The Issue of Omitted Minor Children

Addressing the differential treatment of minor children who were born of Indian parents or of an Indian mother, but could lose entitlement to Indian status, between September 4, 1951 and April 17, 1985, if they were still unmarried minors at the time of their mother's marriage.

Figure 3a: Minor child born of Indian parents; mother marries a non-Indian man, between 1951 and 1985, after the birth of the minor child; minor child loses status

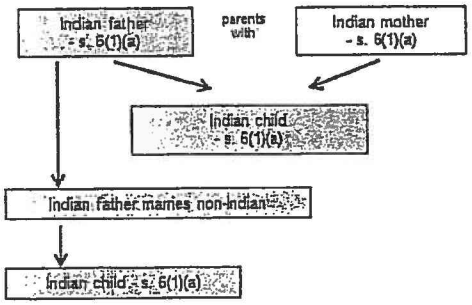


▼ Text description of Figure 3a: Minor child born of Indian parents; mother marries a non-Indian man, between 1951 and 1985, after the birth of the minor child; minor child loses status

Figure 3a describes the situation where an Indian woman has a child with an Indian man, and both mother and child are registered under paragraph 6(1)(a) of the *Indian Act*. The Indian woman marries a non-Indian man, between September 4, 1951 and April 17, 1985, after the minor child's birth, who remains a minor at the time of the marriage. As a result of the marriage to a non-Indian, the woman and the minor child lose status. On April 17, 1985, Bill C-31 restored Indian status to women and their children in this situation under paragraph 6(1)(c), and the children of reinstated minor child became eligible for Indian status under subsection 6(2). By comparison, if an Indian man had children who are registered, and he subsequently married a non-Indian woman prior to April 17, 1985, there is no impact on the entitlement to registration of his children, or in turn, their ability to transmit Indian status to their children.

The proposed amendments will extend eligibility for Indian status under subsection 6(1) to the children of the reinstated minor child.

Figure 3b: Child born of Indian parents; father subsequently marries a non-Indian woman prior to April 17, 1985, after the birth of his child; child retains their Indian status (Comparator group



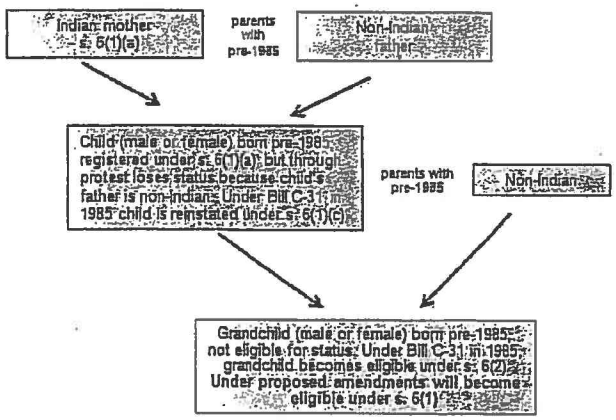
▼ Text description of Figure 3b: Child born of Indian parents; father marries a non-Indian woman prior to 1985, after the birth of the child; child retains Indian status

Figure 3b describes the situation where an Indian man has a child with an Indian woman, and mother and child are registered under paragraph 6(1)(a) of the *Indian Act*. The father marries a non-Indian woman, prior to April 17, 1985, after the birth of the child. The Indian child does not lose status as a result of this marriage, and is therefore able to transmit status to subsequent generations.

Annex D: The Issue of Children Born Out Of Wedlock to an Indian Mother and non-Indian Father

The proposed amendment under Bill S-3 to address the siblings issue (see Annex B) will grant eligibility for Indian status to the children of women who were born out of wedlock to an Indian father and non-Indian mother, between 1951 and 1985. The proposed remedy for the siblings issue creates a new inequity in respect of the grandchildren of children born out of wedlock, prior to 1985, to an Indian woman and a non-Indian man. Accordingly, an additional amendment has been proposed by the Indigenous Bar Association for inclusion in Bill S-3 to address the differential treatment of children born out of wedlock, prior to 1985, to an Indian mother and non-Indian father.

Figure 4a: Children born out of wedlock, prior to 1985, to an Indian mother and non-Indian father, but through protest lost Indian status



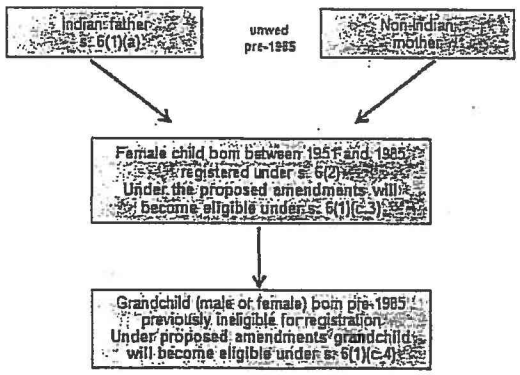
▼ Text description 4a: Children born out of wedlock, prior to 1985, to an Indian mother and non-Indian father, but through protest could lost Indian status)

Figure 4a describes the situation of children born out of wedlock, prior to 1985, to an Indian woman and a non-Indian man were registered but, through protest, could lose status if their father was a non-Indian. Under Bill C-31 in 1985, these children were reinstated under paragraph 6(1)(c), and if they had parented with a non-Indian prior to 1985, their children became eligible for Indian status under subsection 6(2).

Under Bill S-3, female children born out of wedlock prior to 1985 to an Indian man and non-Indian woman and were ineligible for registration prior to 1985, will become eligible for Indian status under subsection 6(1) rather than subsection 6(2) and their children (regardless of sex) born prior to 1985 (or after their parents married each other before 1985) will also become eligible for registration under subsection 6(1).

The proposed remedy would address the situation of the grandchildren born prior to 1985 (or after and their parents married each other before 1985), of an Indian grandmother who parented out of wedlock with a non-Indian by granting them eligibility for status under subsection 6(1). This would eliminate the differential treatment in respect of the grandchildren of Indian men who parented out of wedlock with a non-Indian prior to 1985.

Figure 4b: Proposed remedy to address the siblings issue under Bill S-3 in respect of females born out of wedlock to an Indian father and non-Indian mother between 1951 and 1985 (Comparator group)



▼ Text description of Figure 4b: Proposed remedy for siblings issue under Bill S-3 (Comparator group)

Figure 4b describes the treatment of a female grandchild who was born prior to April 17, 1985, to a woman who was in turn born out of wedlock