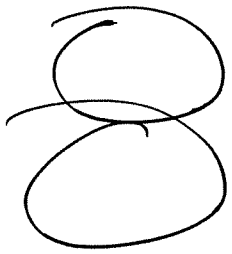

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SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-17-048861-093

DATE : August 3, 2015

PRESIDING: THE HONOURABLE CHANTAL MASSE, J.S.C.

STÉPHANE DESCHENEAUX
and
SUSAN YANTHA
and
TAMMY YANTHA
Plaintiffs
v.
ATTORNEY GENERAL OF CANADA
Defendant

and

CHEF RICK O'BOMSAWIN, NICOLE O'BOMSAWIN, CLÉMENT SADOQUES, ALAIN O'BOMSAWIN AND JACQUES THÉRIAULT WATSO, on their own behalf and in their capacity as elected council representing the ABENAKI OF ODANAK
and
CHEF RAYMOND BERNARD, CHRISTIAN TROTTIER, KEVEN BERNARD, LUCIEN MILLETTE AND NAYAN BERNARD, on their own behalf and in their capacity as elected council representing the ABENAKI OF WÔLINAK
Interveners

JUDGMENT

JM 2158

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INTRODUCTION

[1] Is the discrimination on the basis of sex suffered by Indian women and their descendants in the past with respect to their right to be entered in the Indian Register ("the Register") still present today? If so, has it been shown to be justified in a free and democratic society? Is the Court bound by the judgment of the Court of Appeal for British Columbia ("BCCA") in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*[1] ("*McIvor*") or are there grounds to set it aside in whole or in part? These are, in a few words, the basic issues that must be resolved here.

[2] Regarding the right to equality at issue in this case, Parliament has performed its task well in terms of the new regime established in the *Act to amend the Indian Act*[2] in 1985 and remedied from that point on the discrimination based on sex that had existed under the 1951 Act, which had created the Register and determined the conditions for being recognized as an Indian that may register.

[3] Nevertheless, the treatment of persons to whom both regimes were applicable did not perfectly meet the demands of this fundamental right. And indeed, the judgment of the BCCA in *McIvor*, which the Supreme Court of Canada refused to hear in appeal, gave rise to a legislative amendment in 2010. The purpose of the 2010 Act was to respond to that judgment by correcting sex discrimination arising from certain transitional provisions of the 1985 Act.

[4] In that case, the BCCA found that the discriminatory treatment was justified because it existed to preserve rights that were vested under the former legislation.

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1 2009 BCCA 153.

2 S.C. 1985, c. 27. For ease of comprehension, this judgment will refer to this statute as the "1985 Act". Similarly, the *Indian Act*, R.S.C. 1927, c. 98, will be referred to as the "1927 Act"; the *Indian* Act, S.C. 1951, c. 29, as the "1951 Act"; The *Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs)*, S.C. 2010, c. 18, as the "2010 Act"; *Indian Act*, R.S.C. (1985), c. I-5, which is the version of the statute currently in force, as the *Indian Act*.

[5] The unjustified discrimination identified by the BCCA in *McIvor* arose from an additional benefit conferred by the 1985 Act on a particular group, not from a vested right. Parliament could have chosen to identify the persons suffering from discrimination on the basis of a prohibited ground in comparison to this advantaged group and try to remedy this discrimination. Instead, however, it chose to restrict the remedy solely to the parties to the dispute and persons in situations strictly identical to theirs.

[6] Both the plaintiffs and the Attorney General of Canada ("the AGC") argue that the Court must depart from the judgment in *McIvor* in part, and both ask that the Court apply only the portions that benefit them. For the reasons explained below, it is not appropriate to rule in favour of one party or the other on this issue, at least with respect to the essential and determinative reasons for that judgment.

[7] Taking into account the precedent established in *McIvor*, the Court must decide in this case whether the plaintiffs have demonstrated that they are victims of the unjustified discrimination identified in the BCCA judgment that the 2010 Act failed to remedy, or whether they are victims of discrimination that was not identified in that case but which is also unjustified.

[8] All three of the plaintiffs have met their burdens and proved discriminatory infringement of their equality rights. The discriminatory treatment they have suffered is clear from a comparison with a sub-group that is part of the advantaged group identified by the BCCA in *McIvor*. As in that case, the AGC has failed to demonstrate that these infringements arising from sex discrimination can be justified in a free and democratic society.

[9] Thus, discrimination of the same nature as that which historically prevailed against Indian women and their descendants with respect to their being entered in the Register still exists today, despite Parliament's attempts to eradicate it in 1985 and 2010. In fact, by benefiting a group that was already advantaged under the former statute, the 1985 Act exacerbated the discriminatory treatment of certain persons, including the plaintiffs and other persons in their situation. The 2010 Act did not remedy the situation, at the very least, not fully.

[10] Sex discrimination, though more subtle than before, persists.

[11] This description represents, in a nutshell, the results of a deeper and sometimes quite technical analysis, which is outlined after the background provided directly below.

I- BACKGROUND

[12] The elements required to understand the background to this case and the stakes involved will be addressed under the following headings: the main legislative provisions at issue; the legislative history before the 1985 Act, the 1985 Act, the *McIvor* judgment and the 2010 Act, the plaintiffs and the discrimination they allege, and finally, the conclusions sought by the plaintiffs and the positions of the other parties to the dispute.

be inconsistent with the role of the courts and, in the second, not fall within the jurisdiction of the Court. The only possible remedy if the Court declares section 6 to be constitutionally invalid in whole or in part would be to suspend the effect of such remedy so that Parliament may consider the appropriate options.

II- ANALYSIS

[75] The Court will first determine to what measure it is bound by the judgment of the BCCA in *McIvor*. It will then decide the preliminary issues raised by the AGC in connection with the plaintiffs' standing and the retroactive application of the *Canadian Charter*, which it argues are involved in the present action. The next issue discussed will be the highly disputed question as to whether the provisions concerning registration that have been applicable since 1985 are a source of sex discrimination against each of the plaintiffs and, because such discrimination is in fact identified, whether the AGC has demonstrated that it can be justified in a free and democratic society. Finally, the appropriate remedy shall be discussed.

1. To what extent does the judgment in *McIvor* bind the Court?

[76] The BCCA judgment in *McIvor* concerns section 6 of the 1985 Act, a federal statute applicable all over the country, and its constitutional validity in light of section 15 of the *Canadian Charter*. The Court has before it the same issue, although it must take into account the amendments in the 2010 Act and factual situations that differ somewhat but contain several commonalities with the situation in *McIvor*.

[77] Under the doctrine of *stare decisis*, litigants whose situations in fact and in law are the same as one already decided in a judgment by a higher court will be treated by the courts in a manner consistent with the findings in the prior judgment.[18]

[78] The application of constitutional law across Canada must be consistent, starting at first instance. There is no reason for the final judgments of appellate courts in such matters not to be binding authority in their respective provinces, or at least before the trial courts. It should be noted that binding authority is distinct from the enforceability of a judgment, as the recognition of a foreign judgment in Quebec for the purpose of enforcement is governed by the provisions of the *Civil Code of Québec*.

[79] Save in the case of contradictory appellate judgments, which is not the case here, the Court considers itself in principle to be bound by the decision of an appellate court in a constitutional case, even if the judgment is from another province.

[80] In *Carter v. Canada (Attorney General)*,[19] the Supreme Court discussed the fundamental importance of the principle of *stare decisis*, stating that courts may

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[18] *Hall v. Hébert*, [1993] 2 S.C.R. 159 at 202.

[19] 2015 SCC 5 at para. 44.

disregard it only where a new legal issue is raised or where there is a change in circumstances or evidence that "fundamentally shifts the parameters of the debate":

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42

[81] In that case, the Supreme Court found that the trial judge was correct to reconsider the judgment in *Rodrigues v. British Columbia*[20] because the evidence adduced justified doing so and the applicable legal framework under section 7 of the *Canadian Charter* had evolved significantly since that judgment, which was rendered in 1993.

[82] The Supreme Court, however, did not agree with the trial judge on the development of the law on the justification of an infringement of section 15 of the *Canadian Charter*, the provision invoked here, as sufficient to justify setting aside the judgment that had been rendered. This is what the Supreme Court said:

> [48] While we do not agree with the trial judge that the comments in *Hutterian Brethren* on the s. 1 proportionality doctrine suffice to justify reconsideration of the s. 15 equality claim, we conclude it was open to the trial judge to reconsider the s. 15 claim as well, given the fundamental change in the facts.[21]

[83] In this case, the parties agree that the test applied in *Withler v. Canada (Attorney General)*[22] should be applied here to determine whether there has been a violation of section 15 of the *Canadian Charter*. This two-stage test is nothing more than a reformulation of the three-stage test[23] set out in Law v. *Canada (Minister of Employment and Immigration)*,[24] on which the BCCA relied in *McIvor*.

[84] There has, however, been a certain evolution in the approach to determining the comparator group, which is now more clearly focused on substantive equality than on the comparison of groups that are identical in all respects. The Court must take this into account, particularly since it is relevant to the consideration of an issue that was not submitted before the BCCA but is before us in this case.

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20 [1993] 3 S.C.R. 519.

21 *Carter v. Canada (Attorney General)*, *supra* note 19 at para. 48.

22 [2011] 1 S.C.R. 396.

23 *R. v. Kapp*, [2008] 2 R.C.S. 483 at para. 17. See also the opinion of Abella J., for the majority concerning s. 15 in *Québec (A.G.) v. A.*, [2013] 1 S.C.R. 61 at paras. 323–330.

24 [1999] 1 S.C.R. 497.

[85] That said, the legal framework for section 1 of the *Canadian Charter* has not significantly evolved since *McIvor*. Indeed, the remarks of the Supreme Court in *Carter*, *supra*, mean that it would be difficult to conclude otherwise.

[86] In *McIvor*, the AGC challenged the plaintiffs' standing, which is also the case before us and for nearly identical reasons. The AGC also argued that the plaintiffs' submissions involved a retroactive application of the *Canadian Charter*. The AGC's argument was rejected by the BCCA. The AGC's oral arguments in this case asked the Court to reject the reasoning accepted by the BCCA on these issues in favour of the AGC's arguments, which were rejected by the BCCA. Its oral argument did not, however, point to any development in the law with respect to these issues.

[87] It can only be concluded that, aside from issues relating to the determination of the comparator group, there has been no evolution of the law justifying a reconsideration of *McIvor*. The 2010 Act, which is at issue before us, clearly is not the subject of the judgment of the BCCA, which was rendered before that statute was enacted. Insofar as that statute has not entirely resolved the discrimination arising from the 1985 Act that was identified in *McIvor*, however – and this is one of the plaintiffs' arguments – the Court remains in principle bound by that judgment on the questions of law it decided.

[88] The plaintiffs also submit that the facts in evidence before the Court are sufficiently distinct from those established in *McIvor* to justify a reconsideration, particularly with regard to the scope of the discrimination they suffer.

[89] In the plaintiff Stéphane Descheneaux's case, the nature of the discrimination he alleges is nearly identical to that identified by the BCCA in the case of the plaintiffs McIvor and Grismer, despite certain differences between Descheneaux and Grismer's situations. In Grismer's case, the discrimination he suffered was related to his mother's loss of status, and in Descheneaux's case, the discrimination he suffers today in terms of his registration is related to his grandmother's loss of status. In its decision, the BCCA also dealt with discrimination against McIvor's grandchildren, particularly in comparison to the more favourable treatment given under the 1985 Act to persons to whom the Double Mother Rule applied before the 1985 Act.

[90] On issues relating to discrimination with multigenerational aspects before and after the coming into force of the *Canadian Charter*, the Court is most certainly bound by *McIvor*. The fact situation in Descheneaux's case, however, sheds new light on the scope of the preferential treatment given certain persons to whom the Double Mother Rule applied, since his mother – unlike Grismer's – got married before 1985. On this issue, which was raised because of the different factual background in evidence in this case, on which *McIvor* did not rule, the Court is not bound by that earlier judgment.

[91] The discrimination alleged by the plaintiffs Susan and Tammy Yantha takes place in a slightly different context from that described in *McIvor*.

[92] Before 1985, Susan Yantha, the illegitimate daughter of an Indian man and a non-Indian woman, never had Indian status, whereas any illegitimate son of an Indian man and a non-Indian woman born during the same period did. After 1985 she obtained 6(2) status because she had only one Indian parent, while illegitimate male children born during the same time period as her obtained 6(1) status because they were already registered or were entitled to be on April 16, 1985. Although the fact situation is different, the nature of the discrimination is identical: it flows from the historically lower value placed by Parliament on a woman's Indian identity. The current discriminatory treatment of Susan and Tammy Yantha with regard to their registration, which occurs under the 1985 Act, also results – as it did in *McIvor* – from rights recognized in 6(1)(*a*) and benefits conferred on victims of the Double Mother Rule beyond the preservation of vested rights.

[93] The trial judgment in *McIvor* provides a thorough description of the considerable impact of recognition under 6(1)(*a*).[25] Nevertheless, the BCCA found that such discrimination was justified by the objective of preserving rights vested under the former statute, while also stating that the same was not true with respect to discrimination resulting from benefits conferred on victims of the Double Mother Rule that go beyond the preservation of such vested rights.

[94] The fact situation before the Tribunal cannot be characterized as "fundamentally shifting the parameters of the debate" and therefore does not allow it to reconsider the precedent established in *McIvor* on the issues of discrimination and its justification that were considered by the BCCA.

[95] Even if the Court were to ignore the weight of the precedent of *McIvor*, it would still be entirely in agreement with all of the conclusions set out in that judgment, except for one. Later on the Court will express its reservations as to the conclusion that the discriminatory treatment arising from the vested rights was justified. Despite the Court's reservations on this one issue, however, because of the importance of the rule of *stare decisis*, even in constitutional matters, the principles set out in *McIvor* on the issues before the BCCA will all be applied. The Court agrees with all the other conclusions and will add its own reasons to those of the BCCA on all of the other issues.

[96] Moreover, it is worth noting that if the Court had the latitude not to consider itself bound by *McIvor* on the issue of the justification of discrimination flowing from the preservation of vested rights and chose to depart from that ruling, the remedy granted the parties to this case would not have been any different or more extensive.

[97] Thus, the Court considers itself bound by the precedent established by the BCCA in *McIvor* to the following extent:

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[25] See, for example, paragraphs 199 to 220 of the judgment of the BCSC trial judgment in *McIvor v. The Registrar, Indian and Northern Affairs Canada, supra* note 8.

- *McIvor* binds the Court on all issues relating to the interest and standing to act, as well as the retroactive application of the *Canadian Charter*, since issues similar to those before the BCCA in this respect have been raised in this case;

the Court may not diverge from the conclusions of the BCCA that situations analogous to that in *McIvor* are discriminatory and, if it finds that Stéphane Descheneaux is the victim of such discrimination and the 2010 Act enacted after *McIvor* did not fully remedy the situation, it will also be bound by the conclusions of the BCCA whereby discriminatory effects resulting from the preservation of vested rights are justified and those resulting from additional benefits conferred by the 1985 Act on persons to whom the Double Mother Rule applied prior to that Act are unjustified;

- if the Court finds that the situation alleged by Susan and Tammy Yantha also constitutes discrimination, it will also not be possible to depart from the BCCA's opinion whereby the discrimination resulting from the preservation of vested right is justified, or from that whereby the discrimination arising from benefits beyond the preservation of vested rights conferred on victims of the Double Mother Rule is not justified;

provided that the facts relating to the justification are not radically different, which is not the case, as explained below.

[98] Moreover, and this must be reiterated, this Court is not bound by BCCA's judgment on the issue of the appropriateness of an even more advantaged comparator group because that issue was not submitted before the BCCA.

[99] Finally, it goes without saying that the Court is not bound by the *obiter* of the BCCA on how to remedy the discrimination that is found to exist. The BCCA issued its opinion in this respect incidentally, preferring to let Parliament determine the appropriate remedy. As a result, if Parliament was not bound by the suggestions of the BCCA in this respect, the Court is not either.

2. Do the plaintiffs have standing to act?

[100] At the hearing, the AGC argued that the plaintiffs do not have standing or sufficient interest.

[101] With respect to the plaintiff Stéphane Descheneaux, the reamended defence states on a few occasions that the [TRANSLATION] "true plaintiffs" are his children. Tammy Yantha, Susan's daughter, is one of the parties to the case and does not have status. It is therefore not surprising that there is no similar reference made concerning her mother Susan. In paragraph 173 of the AGC's notes and authorities, the AGC seems in fact to acknowledge Tammy Yantha's standing, at least with regard to the benefit of which she personally is deprived.

[102] The reamended defence also generally alleges, however, that the Act does not confer a right on parents to pass on their status to their children. It must therefore be understood that the interest or standing of Stéphane Descheneaux and Susan Yantha, who both have 6(2) status, is therefore still disputed. They both have Indian status themselves, but are unable to pass it on to their children because their spouses are not Indian. The same is true with regard to Tammy Yantha's standing because, according to the AGC, she has interest only in respect of herself, since her children must become plaintiffs themselves to be able to benefit from this decision.

[103] From the Court's perspective, this issue is among those settled in *McIvor*. The following excerpts from judgments rendered at first instance and in appeal in that case testify to this fact:

- **BCSC judgment:**

> 176] The plaintiffs submit that they seek a right to equal registration status and that each of registration status and the ability to transmit status to one's children is a benefit of the law to which s. 15 of the ***Charter*** applies. The plaintiffs submit that the challenged registration provisions governing registration constitute a benefit of the law, for both progenitors through whom the children derive status, and those upon whom the status is conferred.
>
> [177] The defendants submit that there is no denial of a benefit of law at issue in these proceedings. First, the benefits associated with registration are the same for all individuals, whether registered pursuant to s. 6(1)(a) as the plaintiffs seek, 6(1)(c) such as Sharon McIvor is, or 6(2) such as Jacob Grismer is. Thus, the difference in registration classification does not result in a denial of any benefit.
>
> [178] The defendants submit further that there is no right to transmit status. Rather, the entitlement to registration is conferred on a person by statute, and is contingent on the entitlement to registration of his or her parents. Registration or status as an Indian is not a right or entitlement which resides in the parent and which can be transmitted to a child. Accordingly, since regardless of registration status the plaintiffs have no ability to transmit status, they suffer from no denial of a benefit of the law. There is therefore, they submit, no violation of their equality rights.
>
> [179] It is correct that, with exception of the question of the status of one's children, entitlement to the tangible benefits associated with registration is the same for all persons registered whether under s. 6(1)(a), 6(1)(c), 6(2), or any of the other provisions in s. 6 of the ***1985 Act***. However, a person in Jacob Grismer's circumstances, married to a person who is not entitled to be registered, and therefore with children who are not entitled to be registered, will not have access to the tangible benefits available to children who are entitled to registration, such as extended health benefits, financial assistance with post secondary education and extracurricular programs. Since parents are responsible for the support of their children, such programs can, it seems to me, be benefits for both parent and child.

[180] The question of transmission of status as a benefit of the law in which both the parent and the child have an interest has arisen in a number of decisions. In ***Benner***, the plaintiff was the child. The respondent had argued that the child lacked standing because the discrimination was really imposed on his mother and not upon him. The court rejected this submission, concluding that the impugned provisions of the ***Citizenship Act*** are aimed at the applicant in that they determine the citizenship rights of the children, not of the parent. The ***Charter*** was engaged because the extent of the child's rights was dependent upon the gender of his Canadian parent. In ***Benner*** at para. 397 Iacobucci J. cited with approval an observation of Linden J.A., in dissent, suggesting that the mother was also discriminated against: "in this situation, the discrimination against the mother is unfairly visited upon the child."

[181] In ***Canada (Attorney General) v. McKenna***, 1998 CanLII 9098 (FCA), [1999] 1 F.C. 401 (F.C.A.), the issue was the provisions of the ***Citizenship Act*** pertaining to adopted children. Although the appeal was dismissed on other grounds, the court concluded that the ***Citizenship Act*** *prima facie* discriminates against children born abroad and adopted by Canadian citizens in comparison to children born abroad of Canadian citizens. The court also concluded that the adoptive mother could be considered to be a victim within the meaning of the ***Canadian Human Rights Act***, R.S.C. 1995, c. H-6.

[182] In ***Trociuk v. British Columbia (Attorney General)***, 2003 SCC 34 (CanLII), [2003] 1 S.C.R. 835, the provisions at issue were those of the ***Vital Statistics Act, R.S.B.C. 1996, c. 479*** that permitted the arbitrary exclusion of a father's particulars from his children's birth registration and of his participation from the choice of the child's surname. The court concluded that the arbitrary exclusion of the father from such participation negatively affects an interest that is significant to a father and did so in a way that the reasonable claimant would perceive as harmful to his dignity.

[183] The issue of the transmission of status from parent to child has been the subject of comment in international tribunals. Sources from international human rights law provide support for the view that the s. 15 right to equality encompasses the right to be free from discrimination in respect of the transmission of status. The plaintiffs relied on the following authorities:

1. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Algeria (January 27, 1999) at para. 83;

2. Concluding Observations of the Committee on the Rights of the Child: Kuwait (October 26, 1998) at para. 20;

3. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Iraq (June 14, 2000) at para. 187;

4. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Jordan (January 27, 2000) at para. 172; and

5. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Morocco (August 12, 1997) at para. 64.

[184] In ***U.S.A. v. Burns***, 2001 SCC 7 (CanLII), [2001] 1 S.C.R. 283, the court acknowledged sources of international human rights law as including declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, and customary norms. Such sources were acknowledged to constitute persuasive sources for the interpretation of the content of the rights guaranteed by the ***Charter*** in ***Slaight Communications Inc. v. Davidson***, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038..

[185] The question of transmission of status must be considered in light of the substance of the concept that is at issue. This touches upon the intangible implications of the concept of Indian discussed earlier in these reasons. The government created the concept of Indian, and in so doing, superimposed this concept upon the First Nations' own definitions of cultural identity. It is clear, as discussed earlier, that this concept of Indian has come to form an important aspect of cultural identity.

[186] It seems to me that it is one of our most basic expectations that we will acquire the cultural identity of our parents; and that as parents, we will transmit our cultural identity to our children. It is, therefore, not surprising to see this basic expectation reflected in the evidence, not only of Sharon *McIvor* and Jacob Grismer, but also of many of the witnesses who testified before the Standing Committee. It is also not surprising that one of the most frequent criticisms of the registration scheme is that it denies Indian women the ability to pass Indian status to their children. For example, "... we are unable to pass our Indian-ness and the Indian culture that is engendered by a woman in her children ..." Standing Committee, September 13, 1982, testimony of Mary Two-Axe Earley, President, Quebec Equal Rights for Indian Women at p. 4:46.

[187] Numerous publications that emanate from government ministries make use of the language of transmission of status in discussions of registration provisions under the ***1985 Act*** and its previous versions. For example, the publication of the Ministry of Indian and Northern Affairs entitled *Impacts of the 1985 Amendments to the Indian Act* (*Bill C-31*) (Ottawa: Indian and Northern Affairs Canada, Summary Report, 1990) reflects this understanding and uses the language of transmission of status. At p. ii the study notes that most ***Bill C-31*** registrants sought status for reasons of cultural belonging, personal identity and correction of injustice. At p. iv, in a discussion of concerns, the authors note:

Some gender discrimination remains because in certain family situations, women who lost status through marriage prior to 1985 cannot automatically pass on

status to their children as can their brothers who married prior to 1985 (emphasis added).

[188] Similar language was adopted by the Royal Commission on the Status of Women, cited earlier in these reasons, in the recommendation that the ***Indian Act*** be amended, *inter alia* to allow an Indian woman upon marriage to a non-Indian to "transmit her Indian status to her children". The Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1, *The Justice System and Aboriginal People; A Public Inquiry in to the Administration of Justice and Aboriginal People* (Manitoba, 1991), also incorporates the language of the transmission of status as follows at ch. 13, p. 479:

While Bill C-31 (1985) addressed many of these problems, it created new ones in terms of the differential treatment of male and female children of Aboriginal people. Under the new Act, anomalies can develop where the children of a status Indian woman can pass on status to their children only if they marry registered Indians, whereas the grandchildren of a status male will have full status, despite the fact that one of their parents does not have status.

[189] The *Royal Commission Report* quoted at para. 22 of these reasons in describing the discriminatory aspects of the registration system stated ... they lost Indian status, membership in their home community and the right to transmit Indian status to the children of that marriage at p. 28.

[190] Jill Wherrett, "Indian Status and Band Membership Issues", Political and Social Affairs Division, Research Branch, Feb. 1996, is another example of such an official publication referring to the transmission of status. In a section entitled "*Continuing Inequities in Legislation*", the author states at pp. 9-10:

> Despite efforts to eliminate inequities through the amendments, the effects of past discrimination remain and new forms of discrimination have been created. The amendments resulted in a complicated array of categories of Indians and restrictions on status, which have been significant sources of grievance. The most important target of criticism is the "second generation cut-off rule," which results in the loss of Indian status after two successive generations of parenting by non- Indians. People registered under section 6(2) have fewer rights than do those registered under section 6(1), as they cannot pass on status to their child unless the child's other parent is also a registered Indian. One criticism comes from women who, prior to 1985, lost status because of marriages to non-Indian men. These women are able to regain status under section 6(1); however, their children are entitled to registration only under section 6(2). In contrast, the children of Indian men who married non-Indian women, whose registration before 1985 was continued under section 6(1), are able to pass on status if they marry non-Indians.

[191] This use of language is consistent with the basic notion that one acquires one's cultural identity from one's parents and that a parent transmits such status to his or her child.

[192] In my view, status under the ***Indian Act*** is a concept that is closely akin to the concepts of nationality and citizenship. Status under the ***Indian Act***, like citizenship, is governed by statute. The eligibility of a child in both cases is related to the circumstances of his or her parents. In my view, the eligibility of the child to registration as an Indian based upon the circumstances of the parent, is a benefit of the law in which both the parent and the child have a legitimate interest.

[193] It is my view that the defendants' submission is a strained and unnatural construct that ignores the significance of the concept of Indian as an aspect of cultural identity. The defendants' approach would treat status as an Indian as if it were simply a statutory definition pertaining to eligibility for some program or benefit. However, having created and then imposed this identity upon First Nations peoples, with the result that it has become a central aspect of identity, the government cannot now treat it in that way, ignoring the true pith and substance or significance of the concept.[26]

- **BCCA judgment:**

[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 submission. 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.

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[26] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, *supra* note 8 at paras. 176–193.

[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.

...

[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.[27]

[104] The Court considers itself bound by the judgment of the BCCA and, moreover, agrees with the reasoning expressed by all of the British Columbia judges on this issue.

[105] What is more, in addition to the remarks of the government cited by Ross J. in first instance, Parliament agreed with this perspective by creating the condition of having a child to obtain status under 6(1)(*c*.1) under the 2010 Act.

[106] This condition implies that persons whose status is recognized under 6(2) are not victims of discrimination if they do not have at least one child, as it is only then that their status effectively limits their right to transmit it. Thus, by limiting the corrective brought by the 2010 Act to persons with at least one child, Parliament implicitly recognized the interest of those seeking to pass on their status.

[107] From all of the foregoing, it must be concluded that the three plaintiffs have sufficient interest in this action, within the meaning of section 55 C.C.P. Their interest is direct and personal, even when it concerns their ability to transmit Indian status to their children and grandchildren.

3. Does the action instituted require the retroactive application of the *Canadian Charter*?

[108] The AGC reiterated the argument made and rejected in *McIvor* whereby, in actual fact, the action undertaken seeks the retroactive application of the *Canadian Charter*. Not only is the Court bound by the judgment in *McIvor*, but it is in full agreement with the reasons set out on this issue, both in first instance and appeal. Essentially, the continuous nature of status means that the conditions whereby this status may or may not be obtained may be considered under the *Canadian Charter* as long as it involves the application of the Charter to the current conditions for obtaining or refusing status rather than an event that took place before it came into force:

- **BCSC judgment:**

> [144] The defendants submit that the plaintiffs' claim constitutes an impermissible attempt to apply the *Charter* in a retroactive or retrospective fashion. They submit that the real essence of the plaintiffs' claim is a challenge of the repealed provisions of the 1951 and 1970 versions of the Indian Act. The plaintiffs, however, submit that their challenge seeks neither a retroactive nor a retrospective application of the Charter. It is common ground that the Charter cannot be invoked to apply to repealed legislation or to attach future consequences to distinctions made in repealed legislation.

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[27] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 70–74 and 91–94.

[145] The leading case with respect to the issues of retroactivity and retrospectivity in the context of Charter litigation is Benner v. Canada (Secretary of State), 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358 [Benner]. The issue in Benner was the constitutionality of certain provisions of the Citizenship Act, S.C. 1974-75-76, c. 108 [Citizenship Act], which provided for different treatment of persons born before February 14, 1977, wishing to become Canadian citizens who had Canadian mothers when compared with those who had Canadian fathers. Prior to the enactment of the provisions at issue, children born abroad of Canadian fathers were entitled to claim Canadian citizenship on registration of their birth, but there were no such provisions for the children of Canadian mothers. Parliament then enacted new remedial legislation. The remedial legislation however continued to preserve different treatment for children born abroad of Canadian mothers prior to February 14, 1977. The legislation at issue created three classes of applicants for Canadian citizenship based on parental lineage:

> 1. Children born abroad after February 14, 1977. These children will be citizens at birth if either of their parents is Canadian: ss. 3(1)(b);
>
> 2. Children born abroad before February 15, 1977, of a Canadian father or out of wedlock of a Canadian mother. These children are automatically entitled to Canadian citizenship upon registration of their birth within two years of that birth or within an extended period authorized by the Minister: ss. 3(1)(e) (continuing ss. 5(1)(b) of the old Citizenship Act).
>
> 3. Children born abroad before February 15, 1977, in wedlock of a Canadian mother. These children must apply to become citizens and are required to swear an oath and pass a security check in order to qualify for citizenship: ss. 5(2)(b), 3(1)(c), 12(2), (3), 22(2) and (3).

[146] Mr. Benner was born in 1962 in the United States to a Canadian mother in wedlock. His father was not a Canadian. He applied for citizenship after he moved to Canada in 1986 under s. 5(2)(b) of the Citizenship Act. The Registrar refused his application because Mr. Benner did not pass the security check as a result of outstanding criminal charges against him.

[147] The court held that providing for differential treatment of persons wishing to become Canadian citizens who had Canadian mothers as opposed to those with Canadian fathers violated s. 15 of the Charter and could not be justified under s. 1. The offending provisions were, to the extent of the unconstitutionality, declared to be of no force and effect.

[148] One aspect of the decision was an analysis of the concepts of retroactivity and retrospectivity as they apply in the context of Charter litigation. Mr. Justice Iacobucci, speaking for the court, adopted the following definition of the concepts at para. 39:

> E.A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264 at pp. 268-69, has offered these concise definitions which I find helpful:
>
> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

[149] The following principles emerge from Benner with respect to the analysis of these concepts in the context of a claim under the Charter:

> (a) the Charter has neither retroactive nor retrospective application;
>
> (b) there is no rigid test for determining when an application is retrospective;
>
> (c) the court must consider the factual and legal context and the nature of the right at issue;
>
> (d) when considering the application of the Charter in relation to facts which took place before it came into force, the court must consider whether the facts constitute a discrete event or an ongoing status or characteristic;
>
> (e) the Charter cannot be evoked to attack a discrete event which took place before the Charter came into force such as a pre- Charter conviction;
>
> (f) the Charter can be invoked where the effect of a law is to impose an ongoing discriminatory status or disability on an individual; and
>
> (g) in applying the Charter to questions of status, the time to consider is not when the individual acquired the status but when the status was held against him or disentitled him to a benefit.
>
> (*Benner* at paras. 39-59).

[150] In *Benner*, the court concluded that the application of the Charter was not retrospective because:

> (a) the appellant's position was a status or on-going condition, being a child born outside Canada prior to February 15, 1977, to a Canadian mother and a non-Canadian father in wedlock; and
>
> (b) the discrimination took place when the state denied the appellant's application for citizenship on the basis of criteria which he alleged violated s. 15 of the Charter. This occurred after s. 15 of the Charter came into effect.

[151] In the instant case, the plaintiffs submit that the challenge is neither retroactive nor retrospective because the plaintiffs are not seeking to change the law in the past or to change the current legal consequences of a distinct event in the past, but rather to apply the Charter to current legislation. The case, they submit, concerns the application of the Charter to the legal effect of an ongoing state of affairs. They submit that the eligibility requirements for Indian status violate s. 15 of the Charter because the test for Indian ancestry continues to discriminate on grounds of sex, marital status, and legitimacy. The requirements of the current statute, the 1985 Act, continue to discriminate against descendents who trace their ancestry along the maternal line.

[152] Finally, the plaintiffs submit that the current challenge is not retrospective because, as in Benner, Ms. *McIvor* did not apply for registration for herself and her children until after s. 15 of the Charter came into effect. The discrimination did not take place until the state actually responded to the applications. This was after s. 15 came into effect and accordingly the denial is open to scrutiny under the Charter.

[153] The defendants submitted that, in seeking to be registered under s. 6(1)(a), the plaintiffs are asking to apply the Charter retroactively since the only way to achieve this remedy would be to retroactively amend the 1951 Act and the 1970 Act so that they "were registered or entitled to be registered immediately before April 17, 1985". The plaintiffs, they submit, are seeking to redress the historical discrimination of those repealed provisions, all of which pre-date the coming into force of s. 15 of the Charter. In addition, the defendants submit that the distinction in treatment about which the plaintiffs complain arises from the discrete event of Ms. *McIvor*'s marriage in 1970 to a person who was not entitled to be registered. It was, the defendants contend, the single discrete event of that marriage which raised the distinction. Ms. *McIvor* was, to use the language of Benner, confronted with the law as of the date of her marriage. In Mr. Grismer's case, his entitlement to registration crystallized at birth and not upon application for registration. Finally, the defendants submit that the relief the plaintiffs seek would amount to a finding of discrimination by association and that the Supreme Court of Canada in Benner cautioned against such findings.

[154] In my view, the analysis of whether the claim is retrospective or retroactive must focus not on the particular remedies sought on the substance or essence of the complaint. In the case at bar, the substance or essence of the plaintiffs' complaint is that the eligibility criteria found in s. 6 of the 1985 Act discriminate contrary to s. 15 of the Charter. This is a claim that addresses the

present criteria for registration and not the criteria from previous versions of the Indian Act. I agree with the submission of the plaintiffs that the eligibility provisions of prior versions of Indian Acts are engaged only because and to the extent that these provisions have been continued in the 1985 Act. The fact that such criteria have been incorporated in the 1985 Act does not however make the application of those criteria to present eligibility for registration a retrospective exercise.

[155] In my view, the defendants' submission that the only way in which the plaintiffs can succeed is if the court were to amend repealed legislation is incorrect. I agree that such an exercise would be an inappropriate attempt to apply the Charter to repealed legislation. Further, it is the case that given the current legislation as drafted, the plaintiffs could only be entitled to registration under s. 6(1)(a) by amending repealed legislation. That is in fact, a reflection of the very distinction in treatment about which the plaintiffs complain in this litigation. However, the plaintiffs as part of their relief seek registration pursuant to s. 6(1)(a) as they propose it should be amended by this court. Thus, the relief sought in fact would not amend repealed legislation, but only the current legislation.

[156] Turning to the other factors identified in Benner, the plaintiffs' claim engages s. 15 of the Charter. The right to equality is, as Madam Justice Wilson noted in R. v. Gamble, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595 at para. 40, a right whose purpose is to protect against an on going condition or state of affairs. Such rights are susceptible of current application even where such application takes cognizance of pre-Charter events; See Benner para. 43-44.

[157] In my view, with respect to each plaintiff, it is an ongoing status that is at issue and not a discrete event. I agree with the plaintiffs' submission that Ms. *McIvor* did not become disentitled to registration because of the discrete act of marriage, but because she was a woman. Marriage was not, and is not, an event that results in the loss of status. Indian men and women could marry each other without effect on their status. Indian men could marry women without effect on their status. Marriage was a bar to status only when an Indian woman married a non-Indian man. The relevant factor, therefore, is not marriage, which typically did not result in a loss of entitlement to registration, but being a woman who married a non-Indian man. It was, therefore, Sharon *McIvor*'s sex and not the event of marriage, which was the primary cause of the loss of her entitlement to registration. Mr. Grismer's case, like that of Mr. Benner, involved the status of being the child of an Indian mother who married a non-Indian.

[158] The plaintiffs' challenge is directed to the present legislation and not to past repealed versions of the legislation. Finally, the state became engaged with each plaintiff when application was made for registration and the Registrar responded to the applications. That event occurred after s. 15 of the Charter

came into force. Accordingly, I conclude that this case does not involve either a retroactive or a retrospective application of the Charter.[28]

- **BCCA judgment:**

[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 CanLII 12 (SCC), [1986] 2 S.C.R. 713; R. v. Gamble, 1988 CanLII 15 (SCC), [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 CanLII 2 (SCC), [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 CanLII 376 (SCC), [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:

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[28] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, *supra* note 8 at paras. 144–158.

> [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.»[29]

[109] The reasoning of the BCSC and the BCCA on this issue is directly applicable to the action brought by the three plaintiffs in this case. Their action relies in particular on their status or lack thereof and the impossibility of passing it on to their children and grandchildren under the new regime that has been in place since 1985.

[110] Concerning the table in paragraph 59 of the BCCA judgment, it should be pointed out that if the marriage occurred before the 1985 Act, the treatment of persons to whom the Double Mother Rule applied under the 1985 Act is still more favourable than if the marriage occurred after 1985. Children who before lost their status at the age of 21 now obtain 6(1) status for life, not 6(2) status for life.

[111] The AGC cannot claim that this advantage results from the fact that the non-Indian wife benefits from a right vested under the former statute, because the former statute did not allow status acquired through marriage to be passed on to her children with an Indian man past the age of 21, at which point the Double Mother Rule applied.

[112] The idea here is not to rewrite the legislation applicable before 1985 on the basis of the *Canadian Charter*, but rather to make a decision regarding the constitutional validity of rights granted under the 1985 Act.

[113] The AGC's argument regarding the retroactive application of the *Canadian Charter* cannot be accepted.

4. Is there discrimination?

[114] First, we shall outline the general principles applicable in discrimination cases before determining the comparator group and whether there is discrimination against the plaintiffs.

4.1 *General principles*

[115] The right to equality without distinction based on a prohibited or analogous ground is set out in subsection 15(1) of the *Canadian Charter*:

> 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

[29] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 47–62.

particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[116] The Supreme Court has now established a two-part test for determining whether there is a violation of the right to equality: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[30]

[117] In a very recent decision rendered on May 28 of this year, the Supreme Court summarized the case law on the issue as follows:

> [16] The approach to s. 15 was most recently set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47. It clarifies that s. 15(1) of the *Charter* requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group": para. 331 (emphasis added).
>
> [17] This Court has repeatedly confirmed that s. 15 protects substantive equality: *Quebec v. A*, at para. 325; *Withler v. Canada (Attorney General)*, **[2011] 1 S.C.R. 396, at para. 2**; *R v. Kapp*, [2008] 2 S.C.R. 483, at para. 16; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. As McIntyre J. observed in Andrews, such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality: p. 164.
>
> [18] The focus of s. 15 is therefore on laws that draw discriminatory distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group: Andrews, at pp. 174-75; *Quebec v. A*, at para. 331. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec v. A*, at para. 331.
>
> [19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336. Claimants

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30 *Withler* v. *Canada (A.G.)*, *supra* note 22 at para.30.

> may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.
>
> [20] The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:
>
> > The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]
>
> [21] To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.[31]
>
> (Emphasis added.)

[118] In this case, the plaintiffs allege that the discriminatory treatment they suffer is based on the enumerated prohibited ground of sex.

[119] As the Supreme Court states, the focus must be substantive and not formal equality. Mere difference or lack of difference is not accepted as justification for differential treatment. It must be determined what the measure truly accomplishes and whether the characteristics on which the differential treatment is based are relevant in the circumstances:

> [39] Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going

[31] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras. 16–21.

> behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.
>
> [40] It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.[32]
>
> (Emphasis added.)

[120] Let us now consider how these principles apply to the present case.

4.2 *The comparator group selected and the relevant personal characteristics*

[121] The plaintiffs, in both their written proceedings and oral arguments, referred to the treatment of persons who are related to them. This element has no relevance in determining whether, in law, there has been a violation of the right to equality.[33] Moreover, it would likely cause confusion if exemptions to the Double Mother Rule obtained by the Bands to which the victims of discrimination belong were taken into account.

[122] The plaintiffs and the other victims of discrimination may compare themselves to the group that is most advantaged under the Act, as long as their personal characteristics relevant to the benefit sought are similar except for the prohibited ground of discrimination, whether the members of the group at issue are related to them or not.

[123] From the excerpt from *Withler* quoted above, it is clear that the characteristics of the comparator group selected need not be strictly identical to those of the persons complaining of discrimination. That judgment, it must be noted, was rendered after that of the BCCA in *McIvor*.

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[32] *Withler* v. *Canada (Attorney General)*, *supra* note 22 at paras. 39 and 40.

[33] This does not mean, however, that Parliament cannot consider the sometimes different effects of the Act on persons who are related (cousins, for example) for reasons of fairness even without there being any question of discrimination. The role of the Court, however, is limited to reviewing the constitutional validity of section 6, without regard to any issues of fairness that may arise.

[124] In *McIvor*, both the BCCA and the trial judge before it identified a comparator group identical in all aspects to Grismer's situation. It nevertheless referred to the characteristic it considered essential, that relating to Indian forebears, and made a very general finding of discrimination. This is apparent in the following paragraphs of its judgment:

> [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.
>
> ...

> [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 grand-parent is a man, but not if their Indian grandparent is a woman.
>
> ...
>
> [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.
>
> ...
>
> [165] ... 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.[34]
>
> (Emphasis added.)

[125] The selection of the comparator group in this case is conditioned by the fact that, in *McIvor*, the BCCA considered the favourable treatment of persons with vested rights to be justified. The Court has therefore selected as comparator a group of persons benefiting from improved treatment under the 1985 Act according to the BCCA.

[126] The BCCA provided the following description of the advantageous treatment enjoyed by the comparator group it identified as being in all ways identical to Grismer, which meant that Grismer's children would obtain 6(2) status:

> [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

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[34] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 76–79, 154, 161 and 165.

> their children. Such children (who would have fallen under the Double Mother Rule) were given status as Indians only up to 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.[35]
>
> (Emphasis added.)

[127] This is the result of the fact that Grismer got married after April 17, 1985, as well as the fact that the grandchildren of people to whom the Double Mother Rule applied and who married non-Indian women after 1985 also had 6(2) status.

[128] The fact situation in this case sheds a different light on the scope of the preferential treatment given under the 1985 Act to persons to whom the Double Mother Rule used to apply. It is appropriate, as requested by the plaintiffs, who have presented a table to this effect, to select as a comparator group the more advantaged sub-group of persons to whom the Double Mother Rule applied before 1985 when the parents of children who would have been excluded at the age of 21 got married before 1985.[36]

[129] All of the children who are members of the comparator group that had to be excluded under the Double Mother Rule – and this includes all children not yet born – lost their Indian status at the age of 21 under the provisions in force immediately before the 1985 Act.[37] In other words, before the enactment of the 1985 Act, an Indian father married to a mother who was non-Indian (before the marriage) and whose parents were an Indian man and a non-Indian woman could pass on his status to his children only during the first 21 years of their lives.

[130] Indian children under the age of 21 who were members of the comparator group at the time of the coming into force of the 1985 Act were granted 6(1)(*a*) status for life because they were either registered or entitled to be registered before the enactment of the statute. Persons over the age of 21 and born before 1985 who belonged to this group yet were still registered by error or otherwise were also recognized as having Indian status for life under the same provision, when this status might have been

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35 *Ibid.* at para. 137.

36 The plaintiffs Descheneaux and Tammy Yantha do not allege discrimination in their capacity to transmit their Indian status to their grandchildren. Accordingly, they have not asked the Court to consider as a comparator group persons who were excluded under the Double Mother Rule and who married a non-Indian woman before the age of 21 and before 1985. This judgment therefore does not deal with this issue. It should also be pointed out that most of the people who had to be excluded under the Double Mother Rule probably did not get married until after the age of 21, if they did at all. In such a case, they could not confer Indian status on their non-Indian wives, as they had already lost it before they got married. Persons who married after 1985 obviously could not either. One thing is certain: the possibility of passing on to another generation the advantages conferred by the 1985 Act on persons to whom the Double Mother Rule applied and who got married before 1985 becomes unrealistic at a certain point.

37 Subject to exemptions, as noted above.

questioned by the Registrar in the past. Persons who lost their status under the Double Mother Rule regained their Indian status under 6(1)(*c*), for life. Finally, persons born after April 17, 1985, of an Indian father who had married a non-Indian woman prior to this date and whose paternal grandparents were an Indian man and a non-Indian woman obtained Indian status under 6(1)(*f*), for life. The parents and grandparents of these persons therefore obtained the capacity to pass on their improved status.

[131] While there may be a relatively limited number of victims of the Double Mother Rule who actually lost their status and then regained it, the evidence does not reveal the number of other persons who benefited from this treatment that was more advantageous than under the former statute.

[132] As stated in *McIvor*, the plaintiffs may compare themselves to the more advantaged group. *Withler* reiterated that not all of the characteristics of the groups compared are relevant to the benefits sought, specifying further that it is appropriate to determine what the relevant characteristics are in the circumstances so as to better focus the analysis on substantive equality.

[133] Here, the relevant characteristic consists in the Indian forebears necessary to obtain or pass on status. Although the plaintiffs have tried to establish that all of their characteristics corresponded in every respect to those of the comparator group, it is sufficient for them to have their Indian ancestors as a commonality with this better-treated group and to demonstrate that they were not treated as advantageously on the basis of a prohibited ground of discrimination.

[134] Thus, if the 1985 Act granted 6(1) status for life to an already privileged group that was not entitled to such status under the former Act, while refusing groups that have historically been victims of discrimination when their genealogical characteristics, other than the sex of their Indian forebears, were the same, it must be concluded that it is discriminatory.

4.3 *Plaintiff Descheneaux*

[135] Descheneaux argues that he would be entitled to 6(1) status today and could therefore pass it on to his children if his Indian grandmother had been an Indian grandfather instead.

[136] He compares his situation to that of the grandchild of a hypothetical Indian man of the same generation as his grandmother Clémente, to whom the Double Mother Rule should have applied. When this hypothetical Indian man got married, he preserved his status and conferred it on his non-Indian wife. His son, born in the same era as Stéphane Descheneaux's mother, would therefore have had Indian status at birth. When the hypothetical son in turn married a non-Indian woman, she would obtain status. If they had children before April 17, 1985, the date the 1985 Act came into force, these children would, upon their birth, have status but in principle would lose it at the

age of 21 under the Double Mother Rule because their father had married a woman who was non-Indian (before her marriage) and because they were the grandchildren of an Indian man and a woman who was non-Indian (before her marriage).

[137] Before the 1985 Act, Stéphane Descheneaux, grandson of Clémente O'Bomsawin, did not have status, while the grandchildren of the hypothetical Indian man of the same generation as his grandmother would have had Indian status until the age of 21.

[138] When it came into force, the 1985 Act granted 6(1) status to the grandchildren who were members of the comparator group, whether or not they were registered at the time. Stéphane Descheneaux still did not have status. He acquired 6(2)status upon the enactment of the 2010 Act, while the grandchildren of the comparator group preserved their status under 6(1).

[139] The following tables illustrate the preceding:

Comparator group	Plaintiff Descheneaux
1927 Act	
The Indian grandfather preserves his status after his marriage and his non-Indian wife obtains it through the marriage.	The Indian grandmother, Clémente O'Bomsawin, loses her status upon marrying a non-Indian man in 1935.
The children of the non-Indian grandfather have status at birth.	Her daughter, Hélène Durand, future mother of the plaintiff Descheneaux, is not entitled to status at birth.
1951 Act	
The Indian grandfather and his wife preserve their status.	The Indian grandmother, Clémente O'Bomsawin, is still without status.
The Indian grandfather's son who marries after 1951 and before April 17, 1985, preserves his status and confers it on his non-Indian wife; they have the capacity to pass on their status to their children but only until those children reach the age of 21 (Double Mother Rule).	The daughter of the Indian grandmother, Hélène Durand, is still not entitled to status after her marriage to a non-Indian in 1968.
The grandchildren on the side of the Indian grandfather's son are entitled to status from birth until the age of 21 (Double Mother rule).	The grandson of the Indian grandmother, the plaintiff Descheneaux, born in 1968, is not entitled to status.
1985 Act	
The Indian grandfather and his wife preserve their status under 6(1)(*a*)	The Indian grandmother Clémente O'Bomsawin, regains status under 6(1)(*c*).

The Indian grandfather's son and his wife preserve their status under 6(1)(*a*) and acquire the capacity to pass on status for life to their current and future children under 6(1)(*a*), 6(1)(*c*) or 6(1)(*f*).	The Indian grandmother's daughter, Hélène Durand, obtains status under 6(2); she cannot pass on status to her children because she married a non-Indian.
The grandchildren on the side of the Indian grandfather's son who were born before April 17, 1985, of a marriage that occurred before that date obtain status for life under 6(1)(*a*) or 6(1)(*c*) and, if they are born after that date of a marriage that occurred before that date, also obtain status for life under 6(1)(*f*); they have the capacity to pass on at least 6(2) status to their children.	The Indian grandmother's grandson, the plaintiff Descheneaux, still does not have status.

2010 Act

The Indian grandfather and his wife preserve their status under 6(10)(*a*).	The Indian grandmother, Clémente O'Bomsawin, preserves her status under 6(1)(*c*).
The Indian grandfather's son and his wife preserve their status under 6(1)(*a*) and their capacity to pass on status for life to their current and future children under 6(1)(*a*), 6(1)(*c*) or 6(1)(*f*).	The Indian grandmother's daughter, Hélène Durand, goes from 6(2) status to 6(1)(*c*.1) status; she acquires the possibility of passing on at least 6(2) status to her children.
The grandchildren on the side of the Indian grandfather's son born before April 17, 1985, of a marriage entered into before that date preserve status for life under 6(1)(*a*) or 6(1)(*c*) and, if they are born after that date of a marriage that occurred before that date, also preserve their status for life under 6(1)(*f*); they preserve the capacity to pass on at least 6(2) status to their children.	The Indian grandmother's grandson, the plaintiff Descheneaux, born before April 17, 1985, of a marriage that occurred before that date, obtains 6(2) status; he does not have the capacity to pass on any status whatsoever to his children because the mother of his children is non-Indian.
The great-grandchildren on the side of the Indian grandfather's son obtain at least 6(2) status.	The Indian grandmother's great-grandchildren are not entitled to status.

[140] It is obvious that Descheneaux does not receive the same treatment as those who preserve their status because of rights vested under the former Act pursuant to 6(1)(*a*), because of the sex of his Indian grandmother who lost her status after marrying a non-Indian. This group includes Indians to whom the Double Mother Rule would have applied if not for exemptions obtained by several Bands. These Indians were therefore registered or were entitled to be registered on April 16, 1985. In *McIvor*, however, discrimination related to such vested rights was deemed to be justified, and the Court considers itself bound by this conclusion, as stated above and for the reasons set out below on the issue of justification.

[141] He is also not treated equally, however, when he compares himself to the more limited group to whom the Double Mother Rule applied before the 1985 Act and on

whom the statute conferred an additional advantage beyond the rights vested under the former statute. The table above also refers to the treatment given persons to whom the rule applied when the parents of the children excluded under the rule were married before 1985, i.e., the comparator group selected in this case. It must be recalled that, as in *McIvor*, Descheneaux is entitled to compare himself to the group receiving the most advantageous treatment.

[142] In substance, the plaintiff Descheneaux's situation and that of the comparator group in respect of their forebears is identical: they have only one Indian parent (other than a non-Indian woman who acquired status through marriage), and this Indian parent had only one Indian parent (other than a non-Indian woman who acquired status through marriage). The member of the comparator group has status under 6(1)(*a*) because his or her Indian grandparent is male, as is his Indian parent, while Descheneaux has status under 6(2) because his Indian grandparent is female, regardless of the sex of his parent whose Indian mother lost status by marrying,

[143] The sex of the Descheneaux's Indian parent is in fact of no importance. Even if his father and not his mother had been the child of the Indian grandmother who lost her status, the 1985 Act and the 2010 Act would not have allowed his non-Indian spouse to be retroactively considered Indian so as to confer 6(1)(*a*) status on Descheneaux, because the 1951 Act never applied to her. In this scenario, Descheneaux, his father and his non-Indian mother would not have been registered or entitled to be registered on April 16, 1985.

[144] It should also be noted that, while this is the case for Descheneaux and his mother, it is not necessary for the victim of discrimination to have gotten married before 1985 as the members of the comparator group did. This characteristic is not relevant to the benefit sought.

[145] Moreover, the discrimination identified by the BCCA in *McIvor*, like that observed in this case, does not mean that the grandchildren belonging to the group suffering discrimination must be born of a marriage.[38] This is not a characteristic that is relevant to a finding of discrimination or to the recognition of substantive equality. The lack of relevance of such a distinction is also consistent with the 2010 Act and the neutral scheme it established.

[146] Similarly, as *McIvor* in fact illustrates (*McIvor*'s grandchildren were born after 1985), the group suffering from discrimination is not limited to persons born during the period during which the Double Mother Rule applied.

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[38] Grismer married a non-Indian woman in 1999, but their children were born in 1991 and 1993. See the trial judgment in *McIvor, McIvor v. The Registrar, Indian and Northern Affairs Canada*, *supra* note 8 at para. 97.

[147] The existence of discrimination at the time of the application for registration, however, depends on the exclusion of the grandmother because of her sex and her marriage to a non-Indian, which means that she was married before April 17, 1985.

[148] The advantageous treatment given under the 1985 Act to a group that was already advantaged under the former regime was considered discriminatory by the BCCA in *McIvor*:

> [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 duties 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.
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> ...
>
> [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.

...

[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.

...

[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.

...

[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.

...

[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 grand-parent 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.
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> ...
>
> [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.
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> ...
>
> [165] ... 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.[39]
>
> (Emphasis added.)

[149] It is clear that Descheneaux also suffers discriminatory treatment because of his Indian grandparent's sex, even when his situation is compared to the more limited group of persons to whom the Double Mother Rule applied before the enactment of the 1985 Act and to the even more advantaged group selected for comparison in this case.

[150] Despite what the AGC argued, this finding, given the historical and stereotypical nature of the discrimination at issue, i.e., the lesser value assigned to the Indian identity of women and their descendants, in no way depends on the way Descheneaux or his children actually coped with their diminished status or lack thereof. The benefit they were deprived of is related to their inability to pass on status the way those in the comparator group can.

[151] It should be noted that, for the purposes of the comparison and the finding of discrimination, we must disregard persons in the comparator group who obtained status through marriage, as the BCCA did in paragraph 154 of its judgment, quoted above. To do otherwise would not be consistent with an approach focused on substantive rather than formal equality. It would also constitute a failure to find that status acquired through marriage was not full status given the Double Mother Rule. The BCCA expressed itself on this subject as follows:

> [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

[39] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra*, note 1 at paras. 72–74, 83–86, 90–93, 111, 112 , 117, 154–156, 161 and 165.

> 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.[40]

[152] The Court is of the view that paragraphs 6(1)(*a*), (*c*), and (*f*) and subsection 6(2) of the Act infringe on the plaintiff Descheneaux's right to equality enshrined in the *Canadian Charter* by granting full 6(1) status or 6(1) status beyond the age of 21 to certain persons:

i) who have only one Indian parent (other than a non-Indian woman who acquired status through marriage), and

ii) this Indian parent had only one Indian parent (other than a non-Indian woman who acquired status through marriage),

if their Indian grandparent is a man, but not if the Indian grandparent is an Indian woman who lost her status through marriage.

[153] In other words, the Act discriminates against Descheneaux by not allowing him to be registered with a status equivalent to 6(1), thereby preventing him from passing on his status to his children unless he has them with an Indian woman, which is not the case here.

[154] Another way of expressing the discrimination identified by the Court is to say that one of the ways Parliament could have ensured treatment free of sex discrimination against the group Descheneaux belongs to would have been to give status equivalent to that in subsection 6(1) to all persons with a parent whose mother is an Indian woman who lost her status by marrying their non-Indian father and whose father is a non-Indian man.

[155] Now that the Court has established that Descheneaux belongs to a group suffering from sex discrimination, it must now determine whether the same is true for the plaintiffs Susan and Tammy Yantha before addressing the issue of justification.

4.4 *Plaintiffs Susan and Tammy Yantha*

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[40] *Ibid.* at paras. 141–142.

[156] Although technically speaking, it was argued that Susan and Tammy could compare themselves to persons benefiting from vested rights, their council placed more emphasis on the comparator group of persons to whom the Double Mother Rule applied before 1985.

[157] As stated above, the Court considers itself bound by the BCCA's finding that the discrimination arising from the treatment of persons with vested rights was justified. The analysis is therefore focused on discrimination arising from the special treatment given the comparator group, namely, persons to whom the Double Mother Rule applied before 1985 when the parents of children who would have been excluded at the age of 21 were married before 1985.

[158] Susan Yantha compares her situation to that of the hypothetical illegitimate son of an Indian man born in the same period as her, while Tammy's situation is compared to that of children of a marriage of such an Indian man with a non-Indian mother.

[159] The hypothetical illegitimate son was born of an Indian father and a non-Indian mother, like Susan, but has Indian status from birth under paragraph 11(*c*) of the 1951 Act – which became 11(1)(*c*) with the 1956 amendments – as interpreted by the Supreme Court in *Martin v. Chapman*.[41]

[160] He preserved his status upon marrying a non-Indian before 1985 and his wife obtained status under the provisions applicable at the time. Their children, however, while they had Indian status at birth, stood to lose it at the age of 21 because of the Double Mother Rule, as described above.

[161] The 1985 Act granted children of the comparator group status under 6(1), but because Susan had only 6(2) status after the coming into force of this statute since she had only one Indian parent and did not marry an Indian, she could not pass that status on to Tammy Yantha, who remains without status.

[162] The 2010 Act had no impact on the two Yantha plaintiffs. The plaintiff Tammy Yantha, whose mother Susan did not have status and therefore did not lose it though marriage, does not meet this condition for the application of the new paragraph 6(1)(*c*.1). As for the plaintiff Susan Yantha, her father is the Indian parent, which means that she also does not fall within the scope of application of this provision.

[163] The tables that follow illustrate the effect of the different Acts on the status of the plaintiffs Susan and Tammy Yantha and on the comparator group.

Comparator group	Plaintiffs Yantha
1951 Act	

[41] *Supra* note 5.

The Indian grandfather has a son out of wedlock with a non-Indian woman.	Clément O'Bomsawin, an Indian man, has a daughter out of wedlock with a non-Indian woman; the daughter is the plaintiff Susan Yantha, born in 1954.
The son born out of wedlock is entitled to Indian status upon birth under paragraph 11(*c*) (which became 11(1)(*c*) in 1956).	The plaintiff Susan Yantha is not entitled to status.
The son born out of wedlock preserves his status after marrying a non-Indian woman, and she obtains status through the marriage. Their capacity to pass on their status to their children, however, ceases when the children reach the age of 21 (Double Mother Rule).	The plaintiff Susan Yantha remains without status upon her first marriage to a non-Indian man and her second marriage to a non-Indian man, whether or not these marriages are valid.
The children of the son born out of wedlock is entitled to status from birth until the age of 21 (Double Mother Rule).	The children of the daughter born out of wedlock, Tammy Yantha, born in 1972, and Dennis, born on April 23, 1983, are without status at birth.

1985 Act

The son born out of wedlock and his wife preserve their status under 6(1)(*a*) and acquire the capacity to pass on the status for life to their current and future children under 6(1)(*a*), 6(1)(*c*) or 6(1)(*f*).	The daughter born out of wedlock, the plaintiff Susan Yantha, obtains status under 6(2) and cannot pass on status to her daughter Tammy Yantha because Tammy's father is non-Indian.
The children of the son born out of wedlock before April 17, 1985, of a marriage that occurred before that date obtain status for life under 6(1)(*a*) or 6(1)(*c*) and, if they are born after that date of a marriage that occurred before that date, also obtain status for life under 6(1)(*f*); they have the capacity to pass on at least 6(2) status to their children.	The child of the daughter born out of wedlock, the plaintiff Tammy Yantha, born before April 17, 1985, of a marriage that occurred before that date, remains without status and cannot pass on status of any kind to her children, and the same is true for Dennis, whether or not the marriages are valid.
The grandchildren of the son born out of wedlock obtain at least 6(2) status at birth.	The granddaughter of the daughter born out of wedlock, Julia Yantha, has no status at birth (2006).

2010 Act

No change.	No change.

[164] It is clear that, because of Susan's sex, Susan and Tammy Yantha receive differential treatment with regard to their status and registration and the possibility of passing on their status following the 1985 Act, when compared to the group to which the Double Mother Rule applied under the former regime. Ultimately, the 1985 Act further emphasized the lesser value assigned under the former Act to the Indian identity of

women and their descendants compared to that of Indian men and their descendants. This is clearly discrimination that has existed historically and is based on stereotype, which means that it is discrimination under section 15.

[165] Susan Yantha was born in 1954 and was therefore without status at birth because she was an illegitimate female child. The result is that neither Susan nor Tammy could pass on status to their children with non-Indian men. Susan obtained only 6(2) status under the 1985 Act and Tammy has none. In contrast, as stated and shown in the table above, the comparator group benefited upon the coming into force of the 1985 Act from an improved status that is no longer limited to passing on status to children until they reach the age of 21. Thus, children comparable to Tammy in terms of their Indian forebears obtain 6(1) status for life, while she has none.

[166] The question of the validity of the marriage of Tammy's parents, Susan Yantha and Robert Marier, was raised during arguments regarding the Double Mother Rule to dispute the validity of the group to which she compares herself as a comparator group.

[167] In the case of both Susan and Tammy, whether or not Tammy was born in or out of wedlock is not a personal characteristic relevant to the benefit sought, which is the right to be entered in the Register with status that allows her to pass it on to her children.

[168] It is the Indian forebears needed to obtain status that can be passed on to children – with the exclusion of persons who obtained status through marriage – that allow Susan and Tammy to compare themselves to the group to which the Double Mother Rule applies. Susan Yantha's Indian father is sufficient for this purpose. As seen above, not excluding from consideration persons who obtained status through marriage would be tantamount to denying that this case requires a ruling on substantive as opposed to formal equality. Moreover, this is the approach that was applied by the BCCA in *McIvor*.[42]

[169] The finding of discrimination in respect of the current conditions for registration and the right to pass on status can only exist in cases where, as in the case of Susan Yantha, the illegitimate daughter of an Indian man and a non-Indian woman was born between September 4, 1951, and April 16, 1985, inclusively. Before September 4, 1951, the illegitimate daughters of an Indian father had status at birth, as has been the case again, since April 17, 1985.

[170] As the table above shows, the 2010 Act in no way remedied the discriminatory situation identified.

[171] The Court is of the view that paragraphs 6(1)(*a*), (*c*), and (*f*) and subsection 6(2) of the Act infringe on the right to equality enshrined in the *Canadian Charter*:

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[42] See note 40 of this judgment and the explanations therein.

1. of Susan Yantha, by making it possible for

(i) some male illegitimate children of an Indian man and a non-Indian woman to pass on 6(1) status to their children with a non-Indian woman (who acquired status through marriage),

(ii) beyond the children's age of 21 or, in other words, for life,

when she is not permitted to do so because she is a illegitimate female child born between September 4, 1951, and April 16, 1985, inclusively;

2. of Tammy Yantha, by granting status equivalent to that in subsection 6(1) to some persons:

i) who have only one Indian parent (other than a non-Indian woman who acquired status through marriage), and

ii) this Indian parent was born out of wedlock of an Indian father and a non-Indian mother between September 4, 1951, and April 16, 1985, inclusively,

if their Indian parent born out of wedlock is a man but not if this Indian parent born out of wedlock is a woman born between September 4, 1951, and April 16, 1985, inclusively.

[172] Another way of expressing the discrimination identified by the Court is to say that one of the ways Parliament could have ensured equal treatment for all illegitimate daughters of Indian fathers compared to the comparator group would have been to confer status equivalent to that in subsection 6(1) on all persons whose mother was born out of wedlock to an Indian man and non-Indian woman between the dates referred to above, and whose father is non-Indian. Granting 6(1) status only to the illegitimate daughter is in fact insufficient because it does not ensure status equivalent to 6(1) for persons in Tammy's situation, which is what would be required for equality to be achieved.

[173] Taking for granted that the only tangible benefit of having 6(1) status as opposed to 6(2) status is the greater possibility of passing that status on to children, giving 6(1) status to Tammy directly would be sufficient to eliminate the discriminatory effect against her mother Susan. Despite her 6(2) status, this illegitimate child of an Indian father and a non-Indian mother would, through a corrective provision to this effect, *de facto* pass on 6(1) status to her children with a non-Indian man and therefore at least 6(2) status to her grandchildren.

5. Is the discrimination justified?

[174] Section 1 of the *Canadian Charter* establishes the limits within which Parliament may restrict *Charter* rights and liberties:

> 1. 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.

[175] The AGC has the burden of justifying the violation of the plaintiffs' rights under subsection 15(1). It must first demonstrate that the objective of the impugned provision is pressing and substantial and the means chosen are proportional to that objective. An infringing provision is proportional to its objective if:

- the means adopted are rationally connected to the objective;
- the right at issue is infringed minimally;
- there is proportionality between its prejudicial and beneficial effects.

[176] This is essentially the test set out in *Oakes*[43] and applied in *McIvor*. In the proportionality analysis, courts must show a certain amount of deference to Parliament, as proportionality does not require perfection but merely that the limitations on fundamental rights and freedoms be reasonable. Also, when several solutions are possible, a complex regulatory measure is owed great deference.[44]

[177] The infringement on the plaintiffs' rights is prescribed by a legal rule, namely, section 6 of the Act.

5.1 *Pressing and substantial objective*

[178] In *McIvor*, the BCCA decided that preserving the rights of persons vested under the applicable legislative provisions prior to the coming into force of the 1985 Act is a pressing and substantial objective. This is how the BCCA expressed itself on this point, referring to the five objectives that Parliament itself had set:

> [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.

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43 [1986] 1 S.C.R. 103.

44 See *Carter v. Canada (Attorney General)*, *supra* note 19 at para. 102 and the case law referred to in this paragraph.

(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.[45]
>
> (Emphasis added.)

[179] The evidence the AGC has adduced on this issue is essentially that which was filed in the record before the BCCA in *McIvor*. Regarding the issue of the objective of the 1985 Act, the plaintiffs' evidence adds nothing sufficiently different to give the Court the latitude to reconsider the BCCA's reasoning on the point.

[180] With great respect, the Court nevertheless has reservations with regard to the BCCA's analysis of the existence of a pressing and substantial objective justifying the refusal to grant status identical to that of Indians with vested rights to groups that have historically suffered from discrimination whose personal characteristics relevant to being granted such status are the same, except for the characteristic related to a prohibited ground of discrimination. Here is why.

[181] The specific considerations relating to vested rights, i.e. the practical consequences of the failure to respect those rights as described by the BCCA, are undeniable. The issue of why equal treatment was not given to Indian women and their descendants, when they possess the same characteristics in terms of their Indian forebears as those who benefit from the vested rights, poses a problem.

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[45] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 123–133.

[182] First, such a refusal is contrary to the primary objective identified by Parliament itself, namely, the eradication of any discrimination in the Act, and is not necessary to achieve the objective of maintaining the vested rights. The objective of eradicating all provisions conferring or withdrawing Indian status because of a marriage is not at issue. Neither the plaintiffs in *McIvor* nor those in this case have maintained that this objective is not valid or have asked that their spouses be given status because of their marriage. Their claims are limited to themselves and their capacity to obtain status and pass it on to their descendants. In any event, in terms of substantive equality and the justification, if this issue were ever raised, it would not necessarily receive the same treatment as claims made by Indian women and their descendants.

[183] Moreover, by referring to an objective that Parliament had not itself identified and that became apparent only upon a broader consideration of the provisions and objectives of the 1985 Act, the BCCA exempted the AGC from producing actual evidence of justification, taking as it did in paragraph 129 of its judgment the "concerns" expressed by interested groups as established.

[184] Thus, the concerns of some regarding the dilution of the cultural identity of First Nations could be considered in the context of the justification of an infringement of the right to equality only at the risk of giving weight to stereotypes. Indeed, the trial judge refers instead to evidence that runs contrary to her judgment,[46] and the BCCA did not point out any error on her part on this issue and makes no reference to specific evidence other than the concerns expressed by interested groups during consultations.

[185] In addition, in *Corbière v. Canada (Minister of Indian and Northern Affairs)*,[47] the Supreme Court held that it would be inconsistent with an approach seeking to achieve substantive equality to take into account stereotypes that assume that the very persons who were alienated from the First Nations because of the discrimination they suffered – in this case off-reserve members of Indian Bands, including those who had to leave the reserve because of discrimination – are not interested in participating meaningfully in the life of their band or in preserving their cultural identity:

> [18] Taking all this into account, it is clear that the s. 77(1) disenfranchisement is discriminatory. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on

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[46] See the judgment of the BCSC in *McIvor, McIvor v. The Registrar, Indian and Northern Affairs Canada*, *supra* note 8 at paras. 312–314.

[47] *Corbière v. Canada (Minister of Indian and Northern Affairs Canada)*, [1999] 2 S.C.R. 203 at paras. 17 and 18.

> reserves. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.
>
> (Emphasis added.)

[186] Similarly, the concerns for resources that were expressed are problematic, particularly if they are used as sole justification for the fact that appropriate measures were not taken to confer equality on persons suffering from discrimination based on a prohibited ground. Even if duly established, budgetary restrictions alone do not justify an infringement and could very well be greeted with skepticism by the courts.[48] The BCCA could not refer to these concerns as an element grounding its conclusion that there was a pressing and substantial objective justifying the refusal of equal benefits to a group that has historically been discriminated against, even if it was obvious that granting them these advantages would incur additional costs.[49] When an advantage is refused on the basis of a prohibited ground, equality often involves additional costs for society. The argument that there are suddenly insufficient resources for everyone once it is necessary to satisfy the requirements of the right to equality may in fact constitute another affront to this right.

[187] Admittedly, if the legislative choice had been to give Grismer the right to status under 6(1)(*a*), as was done for those who were entitled to be or were already registered, a new anomaly in terms of the neutrality of the established regime would have been created; in other words, it would have made it impossible to preserve the integrity of this part of the new regime as much as possible.

[188] The failure to decide that this new anomaly should be created to bring the group that continued to suffer discrimination when applying to register after April 16, 1985, to the same level as the advantaged group perpetuates the discrimination, making the new regime discriminatory in part. The "anomaly" favouring persons benefiting from vested

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48 See on this issue the nuanced analysis of Binnie J., who drafted the reasons of the Supreme Court in *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at paras. 59 et seq., urging the courts in particular to "continue to look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints" because "there are *always* budgetary constraints and there are *always* other pressing government priorities", while also indicating that the courts cannot close their eyes to the periodic occurrence of financial emergencies (para. 72).

49 In this case, the effects of the 1985 Act as well as the different scenarios of the increased numbers of persons entitled to be registered and their budgetary impact, taking for granted that health and postsecondary benefits would be maintained, were examined by the expert Stewart Clatworthy in his amended report D-276 and were the subject of his testimony for the defence at the hearing. The cost aspect could not be considered for all of the scenarios submitted and is subject to a number of reservations. The scenarios considered do not necessarily correspond exactly to what is contemplated in this judgment and are worded as though the pre-1985 statutes should be retroactively amended, which is not the case, as we have seen. This expert also filed another, more recent report under D-277, but the issue of costs was not updated. Furthermore, nothing in the record indicates that Parliament considered a detailed cost analysis before legislating in 1985. It should also be noted that this same expert also testified for the plaintiff on another issue.

rights is an integral part of the new regime. Maintaining the integrity of such a regime cannot be considered an objective justifying discrimination.

[189] Moreover, if an additional "anomaly" is necessary to eradicate discrimination – which is one of the objectives of the 1985 Act – it is at least as justified as the anomaly arising from the objective of maintaining the vested rights.

[190] For all of these reasons, and with the greatest respect, the Court has significant reservations with respect to the reasoning of the BCCA on the existence of a pressing and substantial objective justifying the refusal to treat persons in the situation of McIvor, Grismer, and their descendants equally to persons with vested rights.

[191] The reasoning of the BCCA, however, in a case very similar to Descheneaux's, is binding authority from a higher court. Despite its reservations, the Court considers itself bound by its assessment and therefore applies it in this judgment.

[192] It must be reiterated, however, that the remedy granted the plaintiffs would not be different if the Court did not feel itself bound by *McIvor*.

[193] In the case of the plaintiffs Yantha, giving them a status equivalent to 6(1) would also create new anomalies with respect to the neutral part of the new regime. The reasoning of the BCCA in *McIvor* also applies to them and is equally binding on the Court in their respect.

[194] Here, however, as in *McIvor*, the alleged violation does not arise solely from vested rights but also from additional rights granted persons to whom the Double Mother Rule applied. For this group, Parliament clearly ignored its objectives – particularly that of preserving vested rights but also that of eliminating discrimination. It also restored status to those who were victims of the Double Mother Rule, when these persons had not suffered from sex discrimination but had in fact received advantageous treatment because of the greater value placed on Indian identity transmitted by male Indians.

[195] By granting them this treatment, Parliament also failed to preserve the integrity of the newly established neutral regime. As the BCCA indicates in *McIvor*, the treatment of this group is also an anomaly in the context of the new regime. This anomaly is even more significant when we consider the treatment given the specific comparator group selected in this case, i.e., persons to whom the Double Mother Rule applied before 1985, when the parents of children who would have been excluded at the age of 21 were married before 1985.

[196] *McIvor* addressed this issue at the minimal impairment stage. It could also have been discussed at the pressing and substantial objective stage. Not only was it not demonstrated that there was such an objective justifying the grant of a more extensive right to this group while refusing it to persons in the plaintiffs' situation, but this legislative choice totally contradicts the objectives of the 1985 Act. Therefore, these

objectives could in no way be used to justify the discrimination arising from the additional rights granted this group in 1985.

5.2 *Proportionality of the chosen methods*

The rational connection between the methods chosen and the pressing and substantial objective

[197] If we accept that the objectives identified are pressing and substantial but only in relation to the preservation of vested rights, there is a rational connection between the measure – granting 6(1) status to persons registered or entitled to be registered while refusing to do the same to persons in the plaintiffs' position – and these objectives, which are to preserve rights vested under the former statute and to preserve the integrity of the neutral regime established as much as possible. A rational or logical causal connection between the violation and the benefit sought is established. This is what the BCCA found in *McIvor*, although it expressed a reservation as to the very existence of a pressing and substantial objective related to the additional benefits conferred on the group to which the Double Mother Rule applied.[50]

[198] In the absence of a pressing and substantial objective justifying the grant of additional benefits to the group to which the Double Mother Rule applied while simultaneously refusing them to comparable groups, the 1985 Act also fails this part of the test.

Minimal impairment

[199] The AGC will meet its burden with regard to minimal impairment if it demonstrates a lack of less infringing means to achieve the objective in a real and substantial manner. This stage of the analysis "is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's objective".[51]

[200] The BCCA found that, even when deference is shown to Parliament, which must reach a compromise between various interests, the 1985 Act cannot be considered to minimally impair the rights of Grismer and his group, specifically with respect to the rights it confers on the group to which the Double Mother Rule applied. The BCCA states the following on this issue:

> [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

[50] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 132–134.
[51] *Carter v. Canada (Attorney General)*, *supra* note 19 at para. 102.

> 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.[52]

[201] This same reasoning, with which the Court is this time in full agreement and by which it is bound, applies to the situation of the three plaintiffs.

[202] The AGC has of course tried to persuade the Court to distance itself from the BCCA's judgment on the issue of minimal impairment.

[203] Largely on the basis of the same evidence as that presented to the BCCA in *McIvor*, which was also filed in this case, it argues that it would not have been fair or reasonable to refuse to give more to persons affected by the Double Mother Rule than what might have resulted from the preservation of rights vested under the former legislation. In its written submissions, it maintains that it would not have been reasonable to perpetuate a policy that removed the right to register at the age of 21 in the name of preserving vested rights and that this would have been contrary to the general thrust of the 1985 Act. Here are its precise arguments on this issue:

> [TRANSLATION]
>
> 106. First, we submit that the DMR resulted in a unique situation in which the strict application of the principle of the "preservation of vested rights" in 1985 would not have been reasonable for the persons directly affected. The

[52] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 140–143.

> government cannot be faulted for refusing in 1985 to perpetuate a policy that removed the right to register from persons at the age of 21. It would have been contrary to the general thrust of Bill C-31.
>
> 107. In other words, removing a person's right to be registered after the age of 21 after having spent his or her entire life as a registered Indian is not something that the government could reasonably have done in the name of strictly preserving vested rights. Removing the right to register from an adult, taking away a right on which he or she has relied while growing up, is problematic in itself.
>
> 108. If we apply the reasons of the BCCA (on the minimal impairment test) to the facts of this case, it would render the government's justification of the line it drew after re-establishing the right to registration (in this case not going so far as to allow the registration of the great-grandchildren of women who got married) conditional on the perpetuation of a practice that was found untenable in 1985, namely, the DMR.[53]
>
> (Emphasis added.)

[204] Arguments closely related to those above were submitted before the BCCA in the *McIvor* case[54] and were not accepted. The Court is also of the view that they should not be accepted in this case.

[205] The first remark to be made is that the general thrust of the 1985 Act was to put an end to sex discrimination, not to emphasize it, and to restore status to persons who had suffered discrimination, not to improve the fate of advantaged groups who had not. The AGC's argument that it would be contrary to the general thrust of the 1985 Act not to grant further recognition to the rights of persons to whom the Double Mother Rule applied is therefore without merit.

[206] The second point to be made concerns the scope of the additional rights conferred by the 1985 Act on this group, which was already better treated than the groups to which the plaintiffs belong. These additional rights benefit not only those who were likely to be or were already excluded by the Double Mother Rule, but also their Indian fathers who married their mothers who were non-Indian (before the marriage) before the 1985 Act came into effect. Because of this additional advantage, these fathers may in fact transmit their status to their children, both those born before the 1985 Act came into effect and those born after, and this status is passed on for life, whereas under the Double Mother Rule they could pass on their status only for the first 21 years of their children's lives. Grandparents also benefit, as they have the increased possibility of transmitting their status to their grandchildren even though their mother and grandmother were non-Indian (before they were married).

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53 Notes and authorities of the AGC at paras. 106–108.

54 See in particular para. 62 of the written submissions of the AGC submitted on the issue raised by Groberman J. at the hearing, Exhibit P-50.

[207] Third, the AGC's argument that it was necessary to go beyond preserving rights vested under the former statute is tantamount to considering a concern for fairness for an already advantaged group to be a pressing and substantial objective justifying an emphasis on sex discrimination against persons belonging to historically disadvantaged groups. Such an outcome is unacceptable in law.

[208] It is very true, as counsel for the AGC ably argued, that there is something odious about withdrawing Indian status from a person at the age of 21, given how such status is intrinsic to identity. It certainly must be borne in mind, and it is to Parliament's credit that it had the sensitivity to grant persons affected by the Double Mother Rule a status that lasted beyond their vested right to hold it until the age of 21.

[209] It is no less odious, however, to totally refuse to grant such a status, so intimately linked as it is to identity, to a person in the same situation with respect to their Indian forebears as others who have it, and to do so for discriminatory reasons. Such discrimination was ignored by Parliament in the 1985 Act, and this infringement on the fundamental right to equality was deemed to be justified by the BCCA precisely on the basis of the maintenance of vested rights.

[210] The preservation of the integrity of the new neutral regime was also invoked by the BCCA as justification for the infringement, but this integrity is not preserved by recognizing the vested rights, and even less by granting a new, superior benefit.

[211] Taking the additional step of determining that the discrimination arising from the grant of rights beyond vested rights to the already advantaged group to whom the Double Mother Rule applied was justified would be tantamount to finding that Parliament may add insult to injury with impunity.

[212] In short, to the extent that Parliament wished to treat these persons fairly by granting them additional rights in the 1985 Act, it was required to respect the right to equality in so doing, given the enactment of the *Canadian Charter*.

[213] It follows from the foregoing that the differential treatment alleged by the plaintiffs is not limited to what is reasonably necessary to achieve the objectives of the Act, which would have been the case if only the vested rights had been preserved. This is what the BCCA decided in *McIvor*. Again according to the BCCA, this less infringing option would have made it possible to achieve the pressing and substantial objectives identified by Parliament.

The proportionality between the prejudicial and beneficial effects

[214] Given the preceding, it is not necessary to decide the issue the proportionality of the prejudicial and beneficial effects of the measures at issue. The BCCA, however, did rule on the issue. The Court shall refrain from making any comment on this part of the judgment in *McIvor*, noting only that this analysis did not modify the conclusion that the AGC had not successfully shown that the discrimination observed in comparison with

the persons to whom the Double Mother Rule applied was justified under section 1 of the *Canadian Charter*.

5.3 *The 2010 Act*

[215] The evidence also reveals that the 2010 Act sought to bring a solution to the discrimination identified by the BCCA only in the case of persons with situations identical to Grismer's by bringing them to the same level as the group affected by the Double Mother Rule when the parents of children who would have been excluded at the age of 21 under that rule were married after 1985, as was Grismer's case. It did not correct the situation of the plaintiffs compared to that of the comparator group selected in this case, which is the same except the parents of children who would have been excluded at age 21 were married before 1985.

[216] The 2010 Act therefore did not entirely correct the situation of increased discrimination resulting from the 1985 Act. Its objective of correction, which was limited to persons in the same situation as Grismer, does not justify the augmented discrimination caused by the 1985 Act, which continued to exist in the plaintiffs' cases even after the 2010 Act.

5.4 *Conclusion on justification*

[217] The AGC has not successfully discharged its burden of showing that the impairment is minimal or that there were no less infringing means or, even more fundamentally, that there was a pressing and substantial objective justifying the more marked discriminatory treatment suffered by the plaintiffs since the 1985 Act came into effect.

[218] Given the finding of an unjustified infringement of the plaintiffs' right to equality under section 15 of the *Canadian Charter*, it is not necessary to analyze the plaintiffs' arguments regarding the other potential sources of a right to equality.[55]

6. What is the appropriate remedy?

[219] Paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the Act violate subsection 15(1) of the *Canadian Charter*, and the AGC has not shown that this discrimination is justified under section 1.

[220] The Court is not bound by the wording of the conclusions for declaratory relief in the plaintiffs' motion, as long as the Court's conclusions do not stray from the issue in

[55] See paragraphs 189 to 196 of the eighth amended motion and its conclusions.

dispute. According to the case law, the Court may even add to the conclusions sought to bring a more complete solution to the legal debate.[56]

[221] In this case, paragraph 3 of the motion specifically asks the court to grant the plaintiffs the [TRANSLATION] "appropriate remedy", and one of the conclusions asks that it render any other order it deems just. Moreover, during arguments, the AGC explicitly submitted that a declaration whereby the provisions at issue are constitutionally invalid should be suspended.

[222] For the reasons that follow, however, the Court finds that it would not be appropriate to impose solutions as precise as the ones suggested by the plaintiffs. In their conclusions, they ask the Court to require that new provisions be enacted to allow the plaintiffs to register.

[223] The year now is 2015. The 1985 Act from which the discrimination arises has been in force for a little more than 30 years. The general finding of discrimination in the 2009 judgment of the BCCA in *McIvor* could have enabled Parliament to make more sweeping corrections than what was accomplished by the measures in the 2010 Act. The discrimination suffered by the plaintiffs arises from the same source as the one identified in that case.

[224] While it may be tempting to impose a remedy immediately, given the specific facts of this case, the Court instead finds that Parliament should once again be given the opportunity to play its role. The following remarks by the BCCA in 2009 on the remedy, however, have become more weighty due to the years that have passed since that judgment and the inclusion of a new group in the 2010 Act:

> [155] The legislation would have been constitutional if it had preserved only the status that such children [TRANSLATION: children affected by the Double Mother Rule] had before 1985. By according them enhanced status, it created new equalities, and violated the *Charter*.
>
> [156] There are two obvious ways in which the violation 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 [TRANSLATION: including his children]. 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.
>
> [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,

[56] *Centre québécois du droit de l'environnement v. Junex*, J.E. 2014-850 (C.A.) at para. 28, *Québec (Ville) v. Québec (Curateur public)*, [2001] R.J.Q. 954 (C.A.) at paras. 41–42 and *Syndicat canadien des communications de l'énergie et du papier v. St-Jean*, J.E. 2006-591 (C.A.) at para. 43.

> 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. 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.
>
> (Emphasis added.)

[225] In view of these observations, the BCCA chose to suspend the declaration of invalidity for one year, as the Supreme Court suggests be done when the benefits granted in a statute is underinclusive, to allow Parliament to determine whether to extend or cancel the benefits.[57] This suspension, however, had to be extended twice.

[226] Although the Court considers it highly unlikely that Parliament will choose to cancel the benefits conferred on persons to whom the Double Mother Rule applied, the lawmakers must nevertheless have sufficient room to maneuver when drafting the details of the provisions to remedy the discrimination.

[227] Indeed, it is in a better position than the Court to determine what these details should be and how consistent they are with the new regime in place, especially given the highly technical and complex nature of the Act. For example, there must be a connection between what is stated in this judgment and sections 8 and following of the Act with regard to Band Lists and the membership rules that may be established by a Band that has assumed control of its List, as was the case when paragraph 6(1)(*c*.1) was added in 2010.

[228] Thus, even if the Court considered it appropriate to circumscribe the legislative measures that should be taken, it would refrain from imposing precise wording and would merely frame the issue in terms of the result that Parliament should seek to comply with the requirements of the fundamental right to equality. Such a conclusion, which would be consistent with the reasons of this judgment, could have read as follows:

> **DECLARE** that paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the *Indian Act* unjustifiably infringe section 15 of the *Canadian Charter of Rights and Freedoms* and are inoperative insofar as:
>
> (a) they do not allow persons belonging to the following groups:
>
> (i) persons whose only Indian grandparent is a woman who lost her status through marriage, and whose parents are not both Indian; the

[57] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 715–716.

> plaintiff Stéphane Descheaux is one of the persons belonging to this group, and
>
> (ii) persons whose parents are not both Indian and whose mother is a daughter born out of wedlock of an Indian father and a non-Indian mother and without status (i.e., between September 4, 1951, and April 16, 1985, inclusively); the plaintiff Tammy Yantha is one of the persons belonging to this group,
>
> to add their name to the Indian Register with an Indian status equivalent to paragraph 6(1) or that permits transmitting a status equivalent to 6(2) to their children with non-Indian parents; and
>
> (b) as long as they do not grant status equivalent to 6(1) to persons in the situation of the plaintiff Tammy Yantha, they do not allow persons belonging to the following group:
>
> - girls born without status and out of wedlock to Indian fathers and non-Indian mothers, i.e. between September 4, 1951, and April 16, 1985, inclusively, who have one or more children with a non-Indian man; the plaintiff Susan Yantha is one of the persons belonging to this group;
>
> to pass on to their children with a non-Indian man a status equivalent to that under subsection 6(1), which would allow them in turn to transmit status to their children with a non-Indian.

[229] But even this conclusion would not be appropriate. Parliament may in fact choose other avenues than those suggested in this judgment, although the options do appear rather limited. It is also possible that it selects even more inclusive options than those dictated by the imperatives of the right to equality out of a concern for fairness or for some other reason. Indeed, this is what it did in 1985 for persons to whom the Double Mother Rule applied.

[230] It also goes without saying that the issue of the costs that more inclusive provisions would incur is one element among many that Parliament may consider.[58] Some remarks have already been made, however, regarding the skepticism that the courts may display when faced with such an approach. Moreover, because the factual situation has persisted, as the BCCA points out in the above-quoted excerpt, and because Parliament preferred to extend the 6(1) benefit to another group in 2010 instead of withdrawing it from others, its room to manoeuvre is likely more limited. With respect to costs, it should also be noted that, according to expert Stewart Clatworthy, the logic of section 6 and its "second generation cut off" dictates that, given the current state of affairs, in about 100 years, no new child will be entitled to have his or her name added to the Register in the plaintiffs' Bands. If there are more people registered under

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[58] See notes 48 and 49 and the explanations therein.

6(1), this evolution will be slightly slower, but because of the nature of the mechanism in subsection 6(1), there will eventually be no more children born with an entitlement to be entered in the Register.[59] There is no evidence on other Indian Bands specifically, but it should be noted that the same mechanism is at work.

[231] In view of the preceding, it would also not be appropriate for the Court to render orders directly granting status to the plaintiffs. Moreover, such decisions fall under the purview of the Registrar.

[232] A year and a half to decide which measures to take seems reasonable, in light of the current pre-election context and the fact that this is not the first time that Parliament has been asked to analyze the issue and that consultations on this subject are planned. It should be reiterated that the situation has persisted for a little more than 30 years now without a complete solution. And the Court is not taking into consideration discussions on the discrimination arising from the 1951 Act, which took place long before there were even plans for the enactment of the *Canadian Charter*.[60] The time period takes into account the fact that the issues raised here have been known for several years. Although new consultations are in the works, they must take place promptly.

[233] In determining this suspension, the Court is well aware that the plaintiffs and other persons in their situation will continue to suffer discrimination during the eighteen-month period granted, unless Parliament acts more quickly. This is nevertheless the price that must be paid to respect the fundamental role of the legislative power in our society, a role that the Court cannot usurp.

CONCLUSION

[234] This judgment aims to dispose of the plaintiffs' action.

[235] It does not, however, exempt Parliament from taking the appropriate measures to identify and settle all other discriminatory situations that may arise from the issue identified, whether they are based on sex or another prohibited ground, in accordance with its constitutional obligation to ensure that the laws respect the rights enshrined in the *Canadian Charter*.

[236] This task incumbent on Parliament is complex and commensurate with the general impact of the statutes it enacts. It must take into account the effects of a statute in all the situations to which it will likely apply, and do so in light of the reports, studies and factual situations discussed and raised during the enactment process, and in light of the applicable law, including the principles set out in judicial decisions.

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59 Exhibits P-20 and P-21, and the testimony of Stewart Clatworthy at the hearing on the application.

60 In her additional reasons on the remedy, the trial judge refers to discussions on this subject in the early 1970s: *McIvor v. The Registrar, Indian and Northern Affairs Canada*, *supra* note 8.

[237] Judges hear only one specific dispute and are privy only to what is adduced and argued before them. They are not in the best position to grasp all of the implications of the laws and their potentially discriminatory effects.

[238] In the 2010 Act, Parliament chose to limit the remedy to the parties in *McIvor* and those in situations strictly identical to theirs. It did not attempt to identify the full measure of the advantages given the privileged group identified in that case.

[239] When Parliament chooses not to consider the broader implications of judicial decisions by limiting their scope to the bare minimum, a certain abdication of legislative power in favour of the judiciary will likely take place. In such cases, it appears that the holders of legislative power prefer to wait for the courts to rule on a case-by-case basis before acting, and for their judgments to gradually force statutory amendments to finally bring them in line with the Constitution.

[240] From the perspective of Canadian citizens, all of whom are potential litigants, the failure to perform this legislative duty and the abdication of power that may result are obviously not desirable.

[241] First, it would compel them to argue their constitutional rights in the judicial arena in many closely related cases and at great cost, instead of benefiting from the broader effects of a policy decision and counting on those who exercise legislative power to ensure that their rights are respected when statutes concerning them are enacted and revised. What is more, limited judicial resources used on disputes that a well-interpreted prior judgment should have settled are squandered instead of being used efficiently, with unfortunate effects for all litigants.

[242] It is clear that, because of the technical nature of the Act, its evolution over time, and its multi-generational effects, the task of ensuring that it has no unjustifiable discriminatory effects is a significant challenge. These are not, however, reasons that justify not taking on that challenge once again.

[243] Parliament should not interpret this judgment as strictly as it did the BCCA's judgment in *McIvor*. If it wishes to fully play its role instead of giving free reign to legal disputes, it must act differently this time, while also quickly making sufficiently significant corrections to remedy the discrimination identified in this case. One approach does not exclude the other.

[244] Given the plaintiffs' constitutional right to equality, paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the Act must be declared inoperative. The effect of this judgment will be suspended, however, for a period of eighteen months.

FOR THESE REASONS, THE COURT:

[245] **DECLARES** that paragraphs 6(1)(*a*),(*c*) and (*f*) and subsection 6(2) of the *Indian Act* unjustifiably infringe section 15 of the *Canadian Charter of Rights and Freedoms* and are inoperative;

[246] **SUSPENDS** this declaration of invalidity for a period of eighteen months;

[247] **WITH COSTS**, including expert fees.

CHANTAL MASSE, J.S.C.

Mtre David Schulze
Mtre Marie-Ève Dumont
Dionne Schulze
Mtre Mary Eberts
Counsel for the plaintiffs and interveners

Mtre Nancy Bonsaint
Mtre Dah Yoon Min
Minister of Justice Canada
Counsel for the defendant

Dates of hearing: January 6, 7, 8, 12, 13, 14, 27, 28, 29 and 30, 2015, and February 3, 4, 5 and 6, 2015. Additional written notes following the hearing received on February 23 and 27, 2015.

SCHEDULE

Most relevant excerpts from legislation

1. *Indian Act,* R.S.C. 1927, c. 98 (excerpts).

2. *Indian Act*, S.C. 1951, c. 29 (excerpts).

3. *Act to amend the Indian Act*, S.C. 1956, c. 40, s. 3.

4. *Act to amend the Indian Act*, S.C. 1985, c. 27, s. 4.

5. *Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs)*, S.C. 2010, c. 18.

6. *Indian Act,* R.S.C. 1985, c. I-5, s. 6 (as currently in force).

Canada

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.

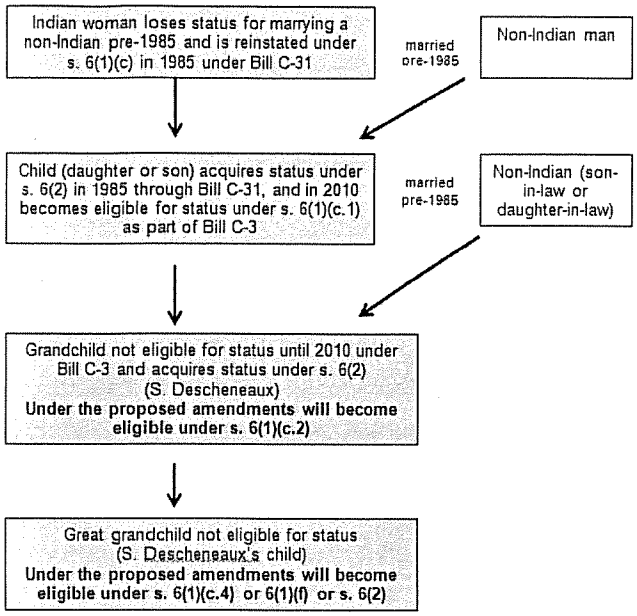
Consistent with the government's commitment to reconciliation and a nation-to-nation relationship with Indigenous peoples, the collaborative process will be launched following the passage of Bill S-3. This will open the door to comprehensive consultation and collaborative work with First Nations, Indigenous 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)

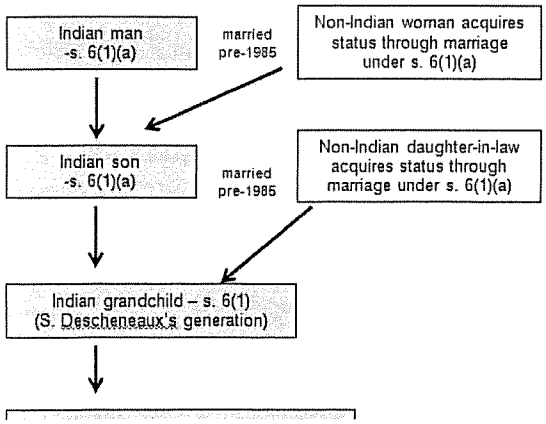


▼ Text description of Figure 1a: maternal line (situation of Stéphane Descheneaux)

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)



Indian great grandchild – s. 6(1) or s. 6(2)
(Generation of S. Descheneaux's child)

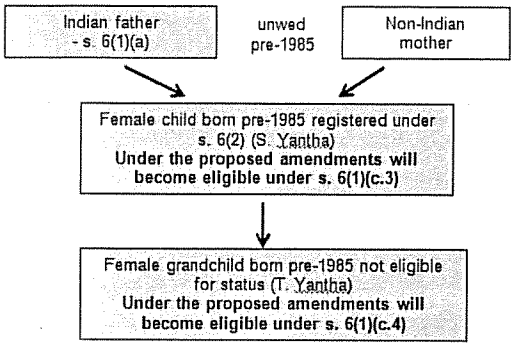
▼ Text description of Figure 1b: paternal line (Comparator group)

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)

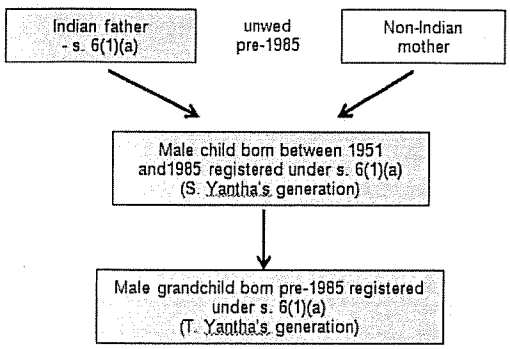


▼ Text description of Figure 2a: Female born out of wedlock to an Indian father between 1951 and 1985 (situation of Susan and Tammy Yantha)

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)

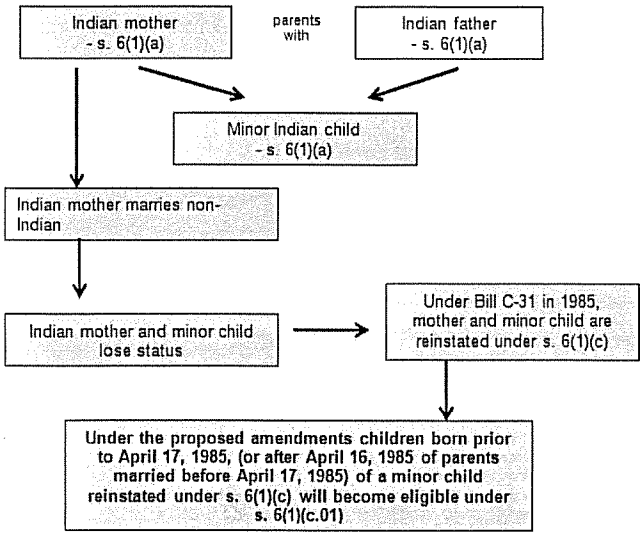
Figure 2b describes the treatment of a male grandchild born before April 17, 1985, to an Indian man who was born out of wedlock, between September 4, 1951 and April 17, 1985, of an Indian father registered under paragraph 6(1)(a) of the *Indian Act* and a non-Indian mother. Prior to 1985, if a status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

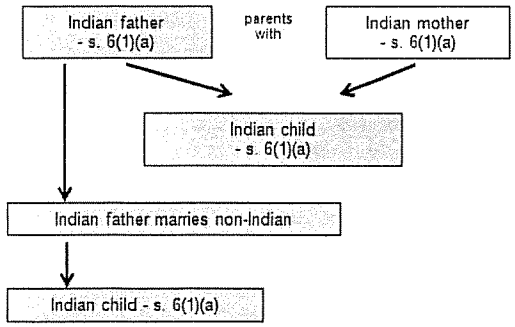


▼ Text description of Figure 3a: Minor child born of Indian parents; mother marries a non-Indian man, between 1951 and 1985, after the birth of the minor child; minor child loses status

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



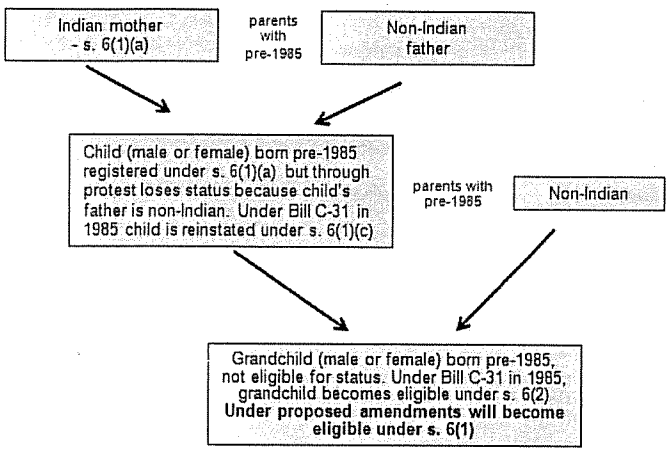
▼ Text description of Figure 3b: Child born of Indian parents; father marries a non-Indian woman prior to 1985, after the birth of the child; child retains Indian status

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



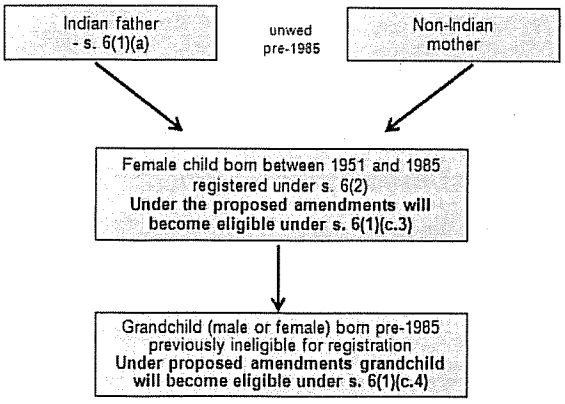
▼ Text description 4a: Children born out of wedlock, prior to 1985, to an Indian mother and non-Indian father, but through protest could lost Indian status)

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).

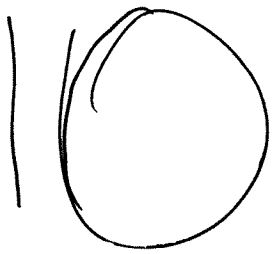
The proposed remedy would address the situation of the grandchildren born prior to 1985 (or after and their parents married each other before 1985), of an Indian grandmother who parented out of wedlock with a non-Indian by granting them eligibility for status under subsection 6(1). This would eliminate 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



Harry Daniels, Gabriel Daniels, Leah Gardner, Terry Joudrey and Congress of Aboriginal Peoples *Appellants/ Respondents on cross-appeal*

v.

Her Majesty The Queen as represented by the Minister of Indian Affairs and Northern Development and Attorney General of Canada *Respondents/ Appellants on cross-appeal*

and

Attorney General for Saskatchewan, Attorney General of Alberta, Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, Native Council of Prince Edward Island, Metis Settlements General Council, Te'mexw Treaty Association, Métis Federation of Canada, Aseniwuche Winewak Nation of Canada, Chiefs of Ontario, Gift Lake Métis Settlement, Native Alliance of Quebec, Assembly of First Nations and Métis National Council *Interveners*

Harry Daniels, Gabriel Daniels, Leah Gardner, Terry Joudrey et Congrès des peuples autochtones *Appelants/ Intimés au pourvoi incident*

c.

Sa Majesté la Reine représentée par le ministre des Affaires indiennes et du Nord canadien et procureur général du Canada *Intimés/Appelants au pourvoi incident*

et

Procureur général de la Saskatchewan, procureur général de l'Alberta, Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, Native Council of Prince Edward Island, Metis Settlements General Council, Te'mexw Treaty Association, Fédération Métisse du Canada, Aseniwuche Winewak Nation of Canada, Chiefs of Ontario, Gift Lake Métis Settlement, Alliance autochtone du Québec, Assemblée des Premières Nations et Ralliement national des Métis *Intervenants*

INDEXED AS: DANIELS *v.* CANADA (INDIAN AFFAIRS AND NORTHERN DEVELOPMENT)

2016 SCC 12

File No.: 35945.

2015: October 8; 2016: April 14.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

RÉPERTORIÉ : DANIELS *c.* CANADA (AFFAIRES INDIENNES ET DU NORD CANADIEN)

2016 CSC 12

N° du greffe : 35945.

2015 : 8 octobre; 2016 : 14 avril.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Aboriginal law — Métis — Non-status Indians — Whether declaration should be issued

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Droit des Autochtones — Métis — Indiens non inscrits — Y a-t-il lieu de rendre un

that Métis and non-status Indians are "Indians" under s. 91(24) of Constitution Act, 1867 — Whether declaration would have practical utility — Whether, for purposes of s. 91(24), Métis should be restricted to definitional criteria set out in R. v. Powley, [2003] 2 S.C.R. 207 — Constitution Act, 1867, s. 91(24) — Constitution Act, 1982, s. 35.

Three declarations are sought in this case: (1) that Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*; (2) that the federal Crown owes a fiduciary duty to Métis and non-status Indians; and (3) that Métis and non-status Indians have the right to be consulted and negotiated with.

The trial judge's conclusion was that "Indians" under s. 91(24) is a broad term referring to all Indigenous peoples in Canada. He declined, however, to grant the second and third declarations. The Federal Court of Appeal accepted that "Indians" in s. 91(24) included all Indigenous peoples generally. It upheld the first declaration, but narrowed its scope to exclude non-status Indians and include only those Métis who satisfied the three criteria from *R. v. Powley*, [2003] 2 S.C.R. 207. It also declined to grant the second and third declarations. The appellants sought to restore the first declaration as granted by the trial judge, and asked that the second and third declarations be granted. The Crown cross-appealed, arguing that none of the declarations should be granted. It conceded that non-status Indians are "Indians" under s. 91(24).

Held: The first declaration should be granted: Métis and non-status Indians are "Indians" under s. 91(24). The appeal should therefore be allowed in part. The Federal Court of Appeal's conclusion that the first declaration should exclude non-status Indians or apply only to those Métis who meet the *Powley* criteria, should be set aside, and the trial judge's decision restored. The trial judge's and Federal Court of Appeal's decision not to grant the second and third declarations should be upheld. The cross-appeal should be dismissed.

jugement déclaratoire selon lequel les Métis et les Indiens non inscrits sont des « Indiens » visés à l'art. 91(24) de la Loi constitutionnelle de 1867? — Un jugement déclaratoire aurait-il une utilité pratique? — Y a-t-il lieu, pour l'application de l'art. 91(24), de restreindre la portée du terme « Métis » aux critères définitoires énoncés dans l'arrêt R. c. Powley, [2003] 2 R.C.S. 207? — Loi constitutionnelle de 1867, art. 91(24) — Loi constitutionnelle de 1982, art. 35.

Trois jugements déclaratoires sont demandés en l'espèce, lesquels portent respectivement : (1) que les Métis et les Indiens non inscrits sont des « Indiens » visés au par. 91(24) de la *Loi constitutionnelle de 1867*; (2) que la Couronne fédérale a une obligation de fiduciaire envers les Métis et les Indiens non inscrits; (3) que les Métis et les Indiens non inscrits ont droit à la tenue de consultations et de négociations.

Le juge de première instance a estimé que le mot « Indiens » au par. 91(24) est un terme général faisant référence à tous les peuples autochtones canadiens. Il a toutefois refusé de rendre les deuxième et troisième jugements déclaratoires demandés. La Cour d'appel fédérale a reconnu que le terme « Indiens » au par. 91(24) visait tous les peuples autochtones en général. Elle a confirmé le premier jugement déclaratoire, mais elle a restreint sa portée afin d'exclure les Indiens non inscrits et d'inclure seulement les Métis qui répondent aux trois critères énoncés dans l'arrêt *R. c. Powley*, [2003] 2 R.C.S. 207. Elle a également refusé de prononcer les deuxième et troisième jugements déclaratoires demandés. Devant la Cour, les appelants ont sollicité le rétablissement du premier jugement déclaratoire tel qu'il a été rendu par le juge de première instance, et ont demandé que soient prononcés les deuxième et troisième jugements déclaratoires. La Couronne a interjeté un pourvoi incident, dans lequel elle fait valoir qu'aucun des jugements déclaratoires ne devrait être accordé. Elle a concédé que les Indiens non inscrits sont des « Indiens » visés au par. 91(24).

Arrêt : Le premier jugement déclaratoire est accordé : les Métis et les Indiens non inscrits sont des « Indiens » visés au par. 91(24). Le pourvoi est donc accueilli en partie. La conclusion de la Cour d'appel fédérale selon laquelle le premier jugement déclaratoire devrait exclure les Indiens non inscrits ou ne s'appliquer qu'aux Métis qui satisfont aux critères énoncés dans l'arrêt *Powley* est annulée, et la décision du juge de première instance est rétablie. La décision du juge de première instance et de la Cour d'appel fédérale de ne pas rendre les deuxième et troisième jugements déclaratoires demandés est confirmée. Le pourvoi incident est rejeté.

A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties. The first declaration, whether non-status Indians and Métis are "Indians" under s. 91(24), would have enormous practical utility for these two groups who have found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution. A declaration would guarantee both certainty and accountability. Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences. While finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, it has the undeniably salutary benefit of ending a jurisdictional tug-of-war.

There is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians. They are all "Indians" under s. 91(24) by virtue of the fact that they are all Aboriginal peoples. "Indians" has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis. Before and after Confederation, the government frequently classified Aboriginal peoples with mixed European and Aboriginal heritage as Indians. Historically, the purpose of s. 91(24) in relation to the broader goals of Confederation also indicates that since 1867, "Indians" meant all Aboriginal peoples, including Métis.

As well, the federal government has at times assumed that it could legislate over Métis as "Indians", and included them in other exercises of federal authority over "Indians", such as sending many Métis to Indian Residential Schools — a historical wrong for which the federal government has since apologized. Moreover, while it does not define the scope of s. 91(24), s. 35 of the *Constitution Act, 1982* states that Indian, Inuit, and Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court has noted that ss. 35 and 91(24) should be read together. "Indians" in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term "aboriginal peoples of

Un jugement déclaratoire ne peut être rendu que s'il a une utilité pratique, c'est-à-dire s'il règle un « litige actuel » entre les parties. Le premier jugement déclaratoire demandé, à savoir que les Indiens non inscrits et les Métis sont des « Indiens » visés au par. 91(24), aurait une utilité pratique considérable pour ces deux groupes, lesquels ont dû compter davantage sur une forme de « Noblesse oblige » que sur le respect des obligations imposées par la Constitution. Un jugement déclaratoire garantirait à la fois certitude et responsabilité. Le gouvernement fédéral et les gouvernements provinciaux ont tour à tour nié avoir le pouvoir de légiférer à l'égard des Indiens non inscrits et des Métis. Ces collectivités autochtones se retrouvent donc dans une sorte de désert juridique sur le plan de la compétence législative, situation qui a des conséquences défavorables importantes et évidentes. Bien que le fait de conclure que les Métis et les Indiens non inscrits sont des « Indiens » visés au par. 91(24) ne crée aucune obligation de légiférer, une telle conclusion a indéniablement l'effet bénéfique de mettre fin au bras de fer sur la question de la compétence législative.

Il n'est pas nécessaire d'identifier les collectivités d'ascendance mixte formées de Métis et celles formées d'Indiens non inscrits. Tous ces groupes sont des « Indiens » visés au par. 91(24), puisqu'ils sont tous des peuples autochtones. Le mot « Indiens » a longtemps été utilisé comme terme générique désignant tous les peuples autochtones, y compris les collectivités d'ascendance mixte comme les Métis. Avant et après la Confédération, le gouvernement a fréquemment qualifié d'Indiens les peuples autochtones ayant des origines mixtes européennes et autochtones. Historiquement, considéré dans la perspective des objectifs plus généraux de la Confédération, l'objet du par. 91(24) indique également que, depuis 1867, le mot « Indiens » s'entend de tous les peuples autochtones, y compris les Métis.

D'ailleurs, le gouvernement fédéral a parfois considéré qu'il pouvait légiférer sur les Métis en tant qu'« Indiens », et les a inclus dans l'exercice de sa compétence sur les « Indiens », par exemple en envoyant de nombreux Métis dans des pensionnats indiens, un tort du passé pour lequel il a depuis présenté ses excuses. De plus, bien qu'il ne définisse pas la portée du par. 91(24), l'art. 35 de la *Loi constitutionnelle de 1982* énonce que les Indiens, les Inuit et les Métis sont des peuples autochtones pour l'application de la Constitution. La Cour a souligné que l'art. 35 et le par. 91(24) doivent être interprétés conjointement. Le terme « Indiens » a donc deux sens en contexte constitutionnel : un sens large, au par. 91(24), qui inclut tant les Métis que les Inuit et que l'on peut assimiler à celui

Canada" used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. It would be constitutionally anomalous for the Métis to be the only Aboriginal people to be recognized and included in s. 35 yet excluded from the constitutional scope of s. 91(24).

The jurisprudence also supports the conclusion that Métis are "Indians" under s. 91(24). It demonstrates that intermarriage and mixed-ancestry do not preclude groups from inclusion under s. 91(24). The fact that a group is a distinct people with a unique identity and history whose members self-identify as separate from Indians, is not a bar to inclusion within s. 91(24). Determining whether particular individuals or communities are non-status Indians or Métis and therefore "Indians" under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future.

As to whether, for purposes of s. 91(24), Métis should be restricted to the three definitional criteria set out in *Powley* in accordance with the decision of the Federal Court of Appeal, or whether the membership base should be broader, there is no principled reason for presumptively and arbitrarily excluding certain Métis from Parliament's protective authority on the basis of the third criterion, a "community acceptance" test. The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights. Section 91(24) serves a very different constitutional purpose.

The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, as well as the *Report of the Royal Commission on Aboriginal Peoples* and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal.

The historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis. The first declaration should accordingly be granted.

de l'expression « peuples autochtones du Canada » employée à l'art. 35; et un sens plus restreint, qui distingue les bandes indiennes des autres peuples autochtones. Il serait anormal d'un point de vue constitutionnel que les Métis constituent le seul peuple autochtone à être reconnu et inclus à l'art. 35, tout en étant par ailleurs exclu du champ d'application du par. 91(24).

La jurisprudence permet également de conclure que les Métis sont des « Indiens » visés au par. 91(24). Elle montre que les mariages entre Indiens et non-Indiens et l'ascendance mixte n'empêchent pas l'inclusion d'un groupe dans le champ d'application du par. 91(24). Le caractère distinct d'un groupe qui forme un peuple ayant une identité et une histoire uniques et dont les membres s'identifient comme un groupe distinct des Indiens ne fait pas obstacle à l'inclusion dans le champ d'application du par. 91(24). La question de savoir si des personnes données sont des Indiens non inscrits ou des Métis, et donc des « Indiens » visés au par. 91(24), — ou encore si une collectivité en particulier est formée de telles personnes — est une question de fait qui devra être décidée au cas par cas dans le futur.

Relativement à la question de savoir s'il y a lieu, pour l'application du par. 91(24), de restreindre la portée du terme « Métis » aux trois critères définitoires énoncés dans l'arrêt *Powley*, conformément à la décision de la Cour d'appel fédérale, ou s'il faut plutôt élargir les critères d'appartenance, il n'existe aucune raison logique justifiant de priver présomptivement et arbitrairement certains Métis de la protection qu'offre le pouvoir de légiférer du Parlement sur la base du troisième critère, soit celui requérant leur « acceptation par la collectivité ». Les critères de l'arrêt *Powley* ont été établis spécialement pour l'application de l'art. 35, lequel a pour objet de protéger des droits collectifs historiques. Le paragraphe 91(24) vise pour sa part un objectif constitutionnel très différent.

Les modifications constitutionnelles, les excuses pour les torts du passé, la reconnaissance grandissante du fait que les peuples autochtones et non autochtones sont des partenaires dans la Confédération, de même que le *Rapport de la Commission royale sur les peuples autochtones* et le *Rapport final de la Commission de vérité et réconciliation du Canada* indiquent tous qu'une réconciliation avec *l'ensemble* des peuples autochtones du Canada est l'objectif du Parlement.

Les contextes historique, philosophique et linguistique établissent que les « Indiens » visés au par. 91(24) englobent *tous* les peuples autochtones, y compris les Indiens non inscrits et les Métis. Il y a donc lieu d'accorder le premier jugement déclaratoire demandé.

Federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. As this Court has recognized, courts should favour, where possible, the operation of statutes enacted by both levels of government.

Cases Cited

Distinguished: *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236; **considered:** *Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104; *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170; **referred to:** *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257.

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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.
Act to amend the Indian Act, S.C. 1958, c. 19.
Canadian Bill of Rights, S.C. 1960, c. 44.
Canadian Charter of Rights and Freedoms, s. 15.
Constitution Act, 1867, s. 91(24).
Constitution Act, 1982, ss. 35, 37, 37.1.

Le fait que le gouvernement fédéral ait compétence à l'égard des Métis et des Indiens non inscrits ne signifie pas que toute mesure législative provinciale les concernant est intrinsèquement *ultra vires*. Comme l'a reconnu notre Cour, il importe que les tribunaux privilégient, dans la mesure du possible, l'application des lois édictées par les deux ordres de gouvernement.

Jurisprudence

Distinction d'avec les arrêts : *R. c. Powley*, 2003 CSC 43, [2003] 2 R.C.S. 207; *R. c. Blais*, 2003 CSC 44, [2003] 2 R.C.S. 236; **arrêts examinés :** *Reference as to whether « Indians » in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] R.C.S. 104; *Procureur général du Canada c. Canard*, [1976] 1 R.C.S. 170; **arrêts mentionnés :** *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44; *Solosky c. La Reine*, [1980] 1 R.C.S. 821; *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; *Lovelace c. Ontario*, 2000 CSC 37, [2000] 1 R.C.S. 950; *Beckman c. Première nation de Little Salmon/Carmacks*, 2010 CSC 53, [2010] 3 R.C.S. 103; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Manitoba Metis Federation Inc. c. Canada (Procureur général)*, 2013 CSC 14, [2013] 1 R.C.S. 623; *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388; *Bande indienne des Lax Kw'alaams c. Canada (Procureur general)*, 2011 CSC 56, [2011] 3 R.C.S. 535; *Alberta (Affaires autochtones et Développement du Nord) c. Cunningham*, 2011 CSC 37, [2011] 2 R.C.S. 670; *Renvoi relatif au mariage entre personnes du même sexe*, 2004 CSC 79, [2004] 3 R.C.S. 698; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *NIL/TU,O Child and Family Services Society c. B.C. Government and Service Employees' Union*, 2010 CSC 45, [2010] 2 R.C.S. 696; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; *Nation Tsilhqot'in c. Colombie-Britannique*, 2014 CSC 44, [2014] 2 R.C.S. 257.

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Charte canadienne des droits et libertés, art. 15.
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Game and Fish Act, R.S.O. 1990, c. G.1.
Indian Act, R.S.C. 1970, c. I-6, s. 43.
Indian Act, R.S.C. 1985, c. I-5.
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Joseph Eliot Magnet, *Andrew K. Lokan* and *Lindsay Scott*, for the appellants/respondents on cross-appeal.

Mark R. Kindrachuk, *Q.C.*, *Christopher M. Rupar* and *Shauna K. Bedingfield*, for the respondents/appellants on cross-appeal.

P. Mitch McAdam, *Q.C.*, for the intervener the Attorney General for Saskatchewan.

Angela Edgington and *Neil Dobson*, for the intervener the Attorney General of Alberta.

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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel fédérale (les juges Noël, Dawson et Trudel), 2014 CAF 101, [2014] 4 R.C.F. 97, 371 D.L.R. (4th) 725, 457 N.R. 347, [2014] 3 C.N.L.R. 139, 309 C.R.R. (2d) 200, [2014] A.C.F. nº 383 (QL), 2014 CarswellNat 1077 (WL Can.), qui a infirmé en partie une décision du juge Phelan, 2013 CF 6, [2013] 2 R.C.F. 268, 357 D.L.R. (4th) 47, 426 F.T.R. 1, [2013] 2 C.N.L.R. 61, [2013] A.C.F. nº 4 (QL), 2013 CarswellNat 9 (WL Can.). Pourvoi accueilli en partie et pourvoi incident rejeté.

Joseph Eliot Magnet, *Andrew K. Lokan* et *Lindsay Scott*, pour les appelants/intimés au pourvoi incident.

Mark R. Kindrachuk, *c.r.*, *Christopher M. Rupar* et *Shauna K. Bedingfield*, pour les intimés/appelants au pourvoi incident.

P. Mitch McAdam, *c.r.*, pour l'intervenant le procureur général de la Saskatchewan.

Angela Edgington et *Neil Dobson*, pour l'intervenant le procureur général de l'Alberta.

Written submissions only by *D. Bruce Clarke, Q.C.*, for the interveners the Native Council of Nova Scotia, the New Brunswick Aboriginal Peoples Council and the Native Council of Prince Edward Island.

Garry Appelt and *Keltie Lambert*, for the intervener the Metis Settlements General Council.

Written submissions only by *Robert J. M. Janes* and *Elin R. S. Sigurdson*, for the intervener the Te'mexw Treaty Association.

Christopher G. Devlin, *John Gailus* and *Cynthia Westaway*, for the intervener the Métis Federation of Canada.

Karey M. Brooks and *Claire Truesdale*, for the intervener the Aseniwuche Winewak Nation of Canada.

Scott Robertson, for the intervener the Chiefs of Ontario.

Paul Seaman and *Maxime Faille*, for the intervener the Gift Lake Métis Settlement.

Marc Watters and *Lina Beaulieu*, for the intervener the Native Alliance of Quebec.

Guy Régimbald and *Jaimie Lickers*, for the intervener the Assembly of First Nations.

Jason T. Madden, *Clément Chartier, Q.C.*, *Kathy Hodgson-Smith* and *Marc Leclair*, for the intervener the Métis National Council.

The judgment of the Court was delivered by

[1] ABELLA J. — As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought. Many revelations have resulted in good faith policy and legislative responses, but the list of disadvantages remains robust. This case represents another chapter in the

Argumentation écrite seulement par *D. Bruce Clarke, c.r.*, pour les intervenants Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council et Native Council of Prince Edward Island.

Garry Appelt et *Keltie Lambert*, pour l'intervenant Metis Settlements General Council.

Argumentation écrite seulement par *Robert J. M. Janes* et *Elin R. S. Sigurdson*, pour l'intervenante Te'mexw Treaty Association.

Christopher G. Devlin, *John Gailus* et *Cynthia Westaway*, pour l'intervenante la Fédération Métisse du Canada.

Karey M. Brooks et *Claire Truesdale*, pour l'intervenante Aseniwuche Winewak Nation of Canada.

Scott Robertson, pour l'intervenant Chiefs of Ontario.

Paul Seaman et *Maxime Faille*, pour l'intervenant Gift Lake Métis Settlement.

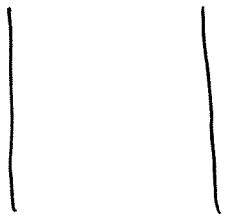
Marc Watters et *Lina Beaulieu*, pour l'intervenante l'Alliance autochtone du Québec.

Guy Régimbald et *Jaimie Lickers*, pour l'intervenante l'Assemblée des Premières Nations.

Jason T. Madden, *Clément Chartier*, *c.r.*, *Kathy Hodgson-Smith* et *Marc Leclair*, pour l'intervenant le Ralliement national des Métis.

Version française du jugement de la Cour rendu par

[1] LA JUGE ABELLA — À mesure que le rideau continue de se lever sur l'histoire des relations entre le Canada et ses peuples autochtones, de plus en plus d'iniquités se font jour et des réparations sont instamment réclamées. Bon nombre de ces révélations ont donné lieu à des politiques et à des mesures législatives prises de bonne foi, mais la liste



Date: 20090421

Docket: A-154-08
A-112-08

Citation: 2009 FCA 123

CORAM: RICHARD C.J.
EVANS J.A.
SHARLOW J.A.

Docket: A-154-08

BETWEEN:

SAWRIDGE BAND

Appellant
(Plaintiff)

and

HER MAJESTY THE QUEEN

Respondent
(Defendant)

and

CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA

Respondents
(Interveners)

Docket: A-112-08

AND BETWEEN:

TSUU T'INA FIRST NATION
(formerly the Sarcee Indian Band)

Appellant
(Plaintiff)

and

HER MAJESTY THE QUEEN

Respondent
(Defendant)

and

CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA

Respondents
(Interveners)

Heard at Ottawa, Ontario, on April 20 and 21, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on April 21, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW J.A.

Date: 20090421

Docket: A-154-08
A-112-08

Citation: 2009 FCA 123

CORAM: RICHARD C.J.
EVANS J.A.
SHARLOW J.A.

BETWEEN:

Docket: A-154-08

BETWEEN:

SAWRIDGE BAND

Appellant
(Plaintiff)

and

HER MAJESTY THE QUEEN

Respondent
(Defendant)

and

CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
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AND BETWEEN:

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Appellant
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CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA

Respondents
(Interveners)

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on April 21, 2009)

SHARLOW J.A.

[1] These are appeals of the decision of Justice Russell to dismiss the appellants' action and to award costs totalling approximately $1.7 million in favour of the Crown and the other respondents (interveners at trial). That award includes a substantial amount as increased costs in excess of full indemnity. The reasons for dismissing the action are reported at 2008 FC 322. The reasons for the costs award are reported at 2008 FC 267. The appellants are seeking a retrial.

[2] Despite the thorough and lengthy written and oral submissions of counsel for the appellants, we can discern no error on the part of Justice Russell that warrants the intervention of this Court. We do not consider it necessary to discuss the grounds of appeal in detail. We will offer only the following comments.

[3] The dismissal of the action was the end of the retrial of an action commenced on January 15, 1986. The appellants were seeking an order declaring that certain amendments to the *Indian Act*, R.S.C. 1985, c. I-5, breached the appellants' rights under section 35 of the *Constitution Act, 1982*. The statutory amendments compelled the appellants, against their wishes, to add certain individuals to the list of band members. The appellants argue that the legislation is an invalid attempt to deprive them of their right to determine the membership of their own bands.

[4] The first trial began in September of 1993 and ended with a dismissal of the action on July 6, 1995 (*Sawridge Band v. Canada (T.D.)*, [1996] 1 F.C. 3). That decision was set aside by this Court on the basis of a reasonable apprehension of bias (*Sawridge Band v. Canada (C.A.*, [1997] 3. F.C. 580, application for leave to appeal dismissed December 1, 1997). A new trial was ordered. It began in January of 2007, after almost 10 years of procedural disputes and delays.

[5] The action was dismissed again because, on January 7, 2008, the appellants informed Justice Russell that they would not be calling further evidence. This was in response to Justice Russell's oral ruling on September 11, 2007 striking all of the appellants' past and future lay witnesses because of non-compliant will-says. There being no case for the Crown to answer, the action necessarily failed. The action was formally dismissed on March 7, 2008.

[6] In deciding to call no further evidence on the retrial, the appellants were not abandoning the cause that led them to begin the action in 1986. Rather, they chose to end the action when they did in order to challenge a series of rulings made by Justice Russell precluding the appellants from

eliciting any evidence from lay witnesses that had not been disclosed in the will-says for those witnesses, as well as the oral ruling on September 11, 2007. The appellants also argue that Justice Russell's conduct since his appointment as trial judge raises a reasonable apprehension of bias.

[7] It is not necessary to recount the lengthy procedural history of this matter, which is described in detail by Justice Russell. We note, however, that during the process of case management and after the discovery process had become hopeless, Justice Hugessen made an order requiring the appellants to produce will-say statements for all lay witnesses proposed to be called at trial. In June of 2004, Justice Russell found the appellants' first attempt at will-says to be inadequate and ordered new will-says (2004 FC 933). He found the second attempt also to be inadequate (2004 FC 1436) and ordered a third attempt (2004 FC 1653). None of these orders was appealed.

[8] In November of 2005 Justice Russell made an order permitting the appellants to call 24 of their 57 potential lay witnesses, but prohibiting them from calling the other 33 because of various failures to comply with the will-say orders (2005 FC 1476). The appellants' appeal of that order was dismissed (2006 FCA 228, application for leave to appeal dismissed, February 8, 2007).

[9] The 2006 interlocutory appeal settled a number of issues. One was that the will-says were intended to provide a substitute for oral discovery, which "the parties had shown themselves incapable of conducting in a productive and focused manner" (see paragraph 9 of the reasons of Justice Evans, speaking for the Court). Another was that it was within the discretion of Justice

Russell not to permit witnesses to be called because of the appellants' non-compliance with Court orders regarding the filing of will-says (see paragraph 13 of the reasons of Justice Evans).

[10] In oral argument, counsel for the appellants argued that, despite the long history of controversy about will-says and what would constitute a compliant will-say, they were not aware when they prepared the third set of will-says that the evidence they could elicit from a witness for whom a will-say had been served could not include anything not set out in the will-say. Our review of the record discloses that the appellants should have been aware by the commencement of the retrial that they could be precluded from adducing any evidence from a witness for whom no compliant will-say had been produced, and that they could also be limited to eliciting evidence disclosed in the will-say. If they were confused on those points, however, they did little to clarify the situation when they indicated to Justice Russell that, although they considered their will-says to be compliant with the standard he had set, their ability to make their case would be compromised if they were barred from eliciting any evidence from a witness that did not appear in the will-say for that witness.

[11] The appellants' equivocation when asked if their will-says were compliant led Justice Russell to conclude that if the appellants could not adequately make their case based on what was stated in the will-says, the will-says must necessarily have been non-compliant. The appellants take issue with Justice Russell's interpretation of their submissions and his reasoning. However, based on our review of the record, Justice Russell's understanding of the appellants' position, as expressed many times in his reasons, was reasonably open to him.

[12] In our view, all of the orders and directions which the appellants now seek to challenge were discretionary decisions made by Justice Russell in furtherance of his obligation to control the trial process. He was required to discharge that obligation in circumstances that became increasingly difficult because of the appellants' apparent reluctance to accept that a trial judge may exclude relevant evidence on the basis that it was not properly disclosed in the discovery process or, as in this case, will-say statements that were intended to stand in the place of oral discoveries. A failure to make disclosures required by a court order may and occasionally does result in the exclusion of relevant evidence.

[13] Finally, without endorsing every statement made by Justice Russell in his voluminous reasons, we find no factual foundation in the record for the appellants' argument that there was a reasonable apprehension of bias on the part of Justice Russell. On the contrary, we agree with the other panel of this Court in the 2006 interlocutory appeal that, given the circumstances facing him, Justice Russell displayed an appropriate mix of "patience, flexibility, firmness, ingenuity, and an overall sense of fairness to all parties" (paragraph 22, per Justice Evans).

[14] We express no opinion on the comments of Justice Russell to the effect that he remains seized of matters relating to the possibility of proceedings against appellants' former counsel for contempt of court or professional disciplinary proceedings. No ground of appeal can arise in relation to those matters unless and until Justice Russell makes an order or renders judgment.

[15] The Crown and other respondents have argued that this appeal is based largely on debates that were decided against the appellants in prior proceedings, some going so far as to say that the appeal itself is abusive. While there is some force in this argument, on balance we have concluded that, after the action was dismissed, it was open to the appellants to appeal the decision of Justice Russell to strike the evidence of the witnesses. While we have concluded that there is no merit in that appeal, it does not follow that the appeal itself is an abuse of process.

[16] As to the appellants' appeal of the costs awarded at trial, we are not persuaded that Justice Russell erred in law or failed to exercise his discretion judicially when he awarded increased costs as he did. In particular, having considered the entire history of the retrial, we can detect no palpable and overriding error in Justice Russell's findings of misconduct on the part of the appellants.

[17] This appeal will be dismissed with costs to the Crown and each of the other respondents (interveners at trial) on the ordinary scale (that is, the mid-range of Column III of Tariff B of the *Federal Courts Rules*). These reasons will be placed in Court file A-154-08 and a copy will be placed in Court file A-112-08.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-154-08 & A-112-08
(APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MARCH 7, 2008, FEDERAL COURT DOCKET NUMBER T-66-86)	
STYLE OF CAUSE:	SAWRIDGE BAND v. HER MAJESTY THE QUEEN et al. (A-154-08) TSUU T'INA FIRST NATION v. HER MAJESTY THE QUEEN et al. (A-112-08)
PLACE OF HEARING:	Ottawa, Ontario
DATES OF HEARING:	April 20 and 21, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(RICHARD C.J., EVANS J.A. and SHARLOW J.A.)
DELIVERED FROM THE BENCH BY:	Sharlow J.A.

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