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APC Briefing Note – Legal Ruling

Mclvor v. Canada (Registrar of Indian and Northern Affairs) 2009 BCCA 153

Background

On April 6, 2008, the BC Court of Appeal issued the ***Mclvor*** decision. This appeal concerns the constitutionality of section 6 of the ***Indian Act*** which sets out who is entitled to be registered as an Indian.

The Plaintiffs in this case (Ms. Mclvor and her son, Mr. Grismer) argued that section 6 violates their equality rights under section 15 of the ***Charter*** because it discriminates on the basis of sex and marital status.

Section 15.(1) of the Charter states:

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

The Plaintiffs claim that they should be entitled to transmit Indian status to their children despite the fact that Mr. Grismer's father was non-Indian and his wife is non-Indian.

The plaintiffs succeeded at trial but the trial judge ordered that a stay of the decision pending appeal. In 2007, the BC Supreme Court agreed with the trial judge but expanded to its application to include anyone who could show that somewhere in their pre-1985 ancestry a woman had lost status through marriage. The BCCA took a much narrower approach in their decision.

Overview

As you are aware, prior to 1985, the ***Indian Act*** treated women and men differently. An Indian woman who married a non-Indian man ceased to be an Indian. An Indian man who married a non-Indian woman, on the other hand, remained an Indian and his wife became entitled to be registered as an Indian under the Act.

Children of an Indian and a non-Indian were considered non-Indians if their father was non-Indian. On the other hand, the children of an Indian father were Indian, subject only

to the 'double mother rule' which provided that if a child's mother and paternal grandmother did not have a right to Indian Status other than by virtue of having married Indian men, the child had Indian status only up to the age of 21.

In 1985, Parliament amended the *Indian Act* in an attempt to address the discrimination on the basis of sex, however, many argue it did not go far enough – but it did reinstate Indian status to women who had lost their status prior to 1985 by marrying non-Indian, their children and to certain other persons, including those who lost it by virtue of the "double mother rule." Since 1985, no person gains or loses Indian Status by reason of marriage.

Primary Issue

Is section 6 of the *Indian Act* discriminatory and, thus, violate the Plaintiffs' equality rights under s. 15 of the Charter?

Decision

Yes – the Court held that specifically section 6(1)(a) and 6(1)(c) of the *Indian Act* violated the Plaintiffs' section 15 equality rights under the *Charter* and declared those particular sections only to be of no force and effect. It suspended its ruling for a period of one year to allow Parliament time to amend the legislation to make it comply with the *Charter*.

The Court took a narrower approach than what the trial judge had decided. It held that the trial judge had erred in defining the extent of the *Charter* violation – which was that trial judge tried to address all pre-1985 discrimination. The Court also felt that the trial judge erred in the remedy granted. The trial judge granted the Plaintiffs (and those in similar situations), an immediate remedy and drafted legislative options for Parliament to consider. The Court preferred not to interfere with what they believe was a legislative function of Parliament. It felt that it was Parliament's role to decide how the existing inequality under the Indian status rules should be remedied.

Potential Impacts/Implications

It is very difficult to assess at this point the potential impacts/implications of this ruling on First Nation governments because the Court was not willing to go any further than simply declaring the section null and void. **It is not clear at this point whether Parliament will choose to expand the definition to include other persons eligible for Indian Status or remove the Indian status of those that are currently eligible.** Thus, APC recommends that this is the response Chiefs should provide in response to any questions that arise regarding this ruling.

Some lawyers in media reports have suggested that the ruling could mean "hundreds of thousands of natives are now 12 months away from losing their status entirely" (referring perhaps to non-native women who gained status through marriage prior to

1985). Parliament could do this but alternatively, they could also create a new definition that complies with the **Charter** which could mean a dramatic increase in the number of persons eligible for status.

If Parliament expanded the definition to include, for example, children of s.6(2) status Indians, it will also have a significant funding impact on the federal (as well as First Nation) governments as those persons would then qualify for federal coverage of non-insured health benefits as well as post-secondary funding assistance. APC has heard previously that the number of potential new registrants could be as high as 200,000 to 300,000.

Regardless, the ruling will have a significant impact on First Nation communities and families across Canada who have long struggled with divisions created as a result of the Indian Act's definitions.

Next Steps

Several options are available for the Crown, namely:

- (a) request a deadline extension;
- (b) develop amendments to the **Indian Act** to be considered by Parliament; or
- (c) file a leave to appeal application to the Supreme Court of Canada (SCC).

It has been reported by the media that the INAC Minister is quoted as stating that the Government is considering its options now.

APC will continue to monitor the status of this case and report to the Chiefs.

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For full copy of the decision, go to: <http://www.courts.gov.bc.ca/jdb-txt/CA/09/01/2009BCCA0153.htm>