Sex Equality under the Indian Act: Will the Supreme Court or Parliament Have the Last Word?

The federal government is not appealing a recent British Columbia court decision that declared a key feature of the *Indian Act* unconstitutional. Under the decision, a major amendment to the Act would be necessary by April 2010. However, this timetable may have been disrupted by the plaintiff's decision to seek leave to appeal to the Supreme Court of Canada, in hopes of winning a bigger legal victory.[1]

British Columbia Trial Decision and Appeal

In June 2007, the B.C. Supreme Court found the *Indian Act*'s[2] criteria for Indian status (as set out in section 6 of the Act) discriminatory, and struck them down. It found unjustifiable gender discrimination (under section 15 of the *Charter*) in the section's effect on men and women born before 1985.[3] The decision's immediate effect was to make a large category of individuals, descended from status Indian mothers who married non-Indian fathers, newly eligible for Indian status and the associated benefits.[4] The Government of Canada appealed the decision.

In April 2009, in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*,[5] the B.C. Court of Appeal upheld only part of the lower court's declaration of invalidity, and struck down just two subsections[6] of section 6.

The appeal court found that the trial judge wrongly

> *... considered it necessary to redress all discrimination that had occurred prior to 1985. Accordingly, she would have granted Indian status to all individuals who could show that somewhere in their ancestry there was a person who had lost Indian status by virtue of being a woman married to a non-Indian.[7]*

The narrower, more specific unjustified *Charter* violation, in the Court of Appeal's view, was as follows:

> *The 1985 legislation violates the Charter by according Indian status to children*
> *i) who have only one parent who is Indian (other than by reason of having married an Indian),*
> *ii) where that parent was born prior to April 17, 1985, and*
> *iii) where that parent in turn only had one parent who was Indian (other than by reason of having married an Indian),*

> *if their Indian grandparent is a man, but not if their Indian grandparent is a woman.... 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.[8]*

In other words, the inequality does not arise from a failure to make the status criteria gender-neutral for *all* individuals after 1985. Instead, it arises from gender-based criteria that improve the situation of *some* individuals after 1985, thanks to the details of their ancestry, but not all of them.

The Court of Appeal could have remedied the inequality by immediately striking down parts of section 6, but it opted not to do so as "it would be entirely unfair for this Court to instantaneously deprive persons who have had status since 1985 of that status as a result of a dispute between the government and the plaintiffs."[9] To give Parliament time to reconsider section 6 and enact new provisions consistent with the *Charter*, its declaration of constitutional invalidity is to take effect in April 2010.[10]

Background to the Case

The history of the present-day *Indian Act* is older than Canada itself. Originally established by the British to protect Indian property and land, the definition of status Indian was narrowed over time.[11] By 1876, Indian status was determined solely through patrilineal lines.[12]

In the second half of the twentieth century, Canadian policy toward its Indian citizens began to modernize. The enactment of the *Charter* in 1982 – and the coming into effect of section 15 (equality rights) in 1985 – prompted a renewed effort in Parliament to redress gender inequality in the *Indian Act*.[13]

Parliament finally amended the status criteria in the *Indian Act* in 1985: the patrilineal determination of Indian status was altered so that children of a status mother and non-status father could be considered status Indians. However, the grandchildren would still lose Indian status.[14]

Sharon McIvor began her legal action soon after the new criteria took effect.[15] When she applied for her Indian status (for which she had just become eligible under the 1985 amendment), she found that her children were not eligible: "she learned that rather than eliminating the discrimination, the amendments simply postponed it for a couple of generations."[16] McIvor responded with the *Charter* challenge she won in 2007 in the B.C. Supreme Court.[17]

Another Appeal before *Indian Act* Amendments?

Compared to the trial decision, the B.C. Court of Appeal's declaration pointed to a relatively slight administrative and financial burden for the federal government. Indian status provides access to federally-funded medical benefits and some educational funding, along with services from First Nations governments. An expert estimated that the appeal decision would only confer Indian status on a few thousand additional individuals, in contrast to 100,000 new status Indians under the trial decision.[18]

Shortly after the federal government decided it would not appeal to the Supreme Court, Sharon McIvor announced that she would seek leave to appeal, dissatisfied that "the B.C. Court of Appeal narrowed the decision so much and gave the government license to add as few people as they possibly can."[19] If the Supreme Court grants her leave to appeal, it will almost certainly delay a legal resolution until after the B.C. Court of Appeal's deadline of April 2010.

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[1] "Indian status case going to Supreme Court," *The Globe and Mail* (4 June 2009).
[2] R.S.C. 1985, c. I-5.
[3] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 at para . 343.
[4] *Ibid*. at paras. 141-143.
[5] 2009 BCCA 153 ("*McIvor v. Canada*").
[6] *Supra* note 2 at sections 6(a) and 6(c).
[7] *McIvor v. Canada* at para. 152.
[8] *Ibid*. at paras. 154-155.
[9] *Ibid*. at para. 160.
[10] *Ibid*. at paras. 165-166.
[11] Barbara Barker and Tyler McCreary, "Sharon McIvor's fight for gender equality in the Indian Act,"*Briarpatch Magazine* (1 March 2008).
[12] *Ibid*.
[13] *Supra* note 3 at paras. 47-79.
[14] "Ottawa looks to redefine rules for Indian status" *The Globe and Mail* (3 June 2009).
[15] *Supra* note 11.
[16] *Ibid*.
[17] *Ibid*.
[18] *Supra* note 14.

[19] *Supra* note 1.