IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***McIvor v. The Registrar, Indian and Northern Affairs Canada,*** 2007 BCSC 827

Date: 20070608
Docket: A941142
Registry: Vancouver

Between:

Sharon Donna McIvor, Charles Jacob Grismer

Plaintiffs

And

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

Defendants

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiffs	Robert W. Grant Gwen Brodsky
Counsel for the Defendants	Sarah P. Pike Glynis Hart Brett C. Marleau
Date and Place of Trial:	October 16 to November 10, 2006 Vancouver, B.C.

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I. INTRODUCTION

[1] In this action the plaintiffs, Sharon Donna McIvor ("Sharon McIvor"), and her son, Charles Jacob Grismer ("Jacob Grismer"), challenge the constitutional validity of ss. 6(1) and 6(2) of the ***Indian Act***, R.S.C. 1985, c. I-5 (the "***1985 Act***"). These provisions deal with entitlement to registration as an Indian, or status as it is frequently termed. The plaintiffs do not challenge any other provisions of the ***1985 Act***, and in particular, do not challenge the provisions relating to entitlement to membership in a band.

[2] Under previous versions of the ***Indian Act***, the concept of status was linked to band membership and the entitlement to live on reserves. In addition, under previous versions of the ***Indian Act***, when an Indian woman married a non-Indian man, she lost her status as an Indian and her children were not entitled to be registered as Indians. By contrast, when an Indian man married a non-Indian woman, both his wife and his children were entitled to registration and all that registration entailed.

[3] For years there were calls for an end to this discrimination. Eventually in 1985, the government introduced and parliament subsequently passed Bill C-31, ***An Act to Amend the Indian Act***, S.C. 1985, c. 27 ("***Bill C-31***"). Part of the purpose of the legislation was to eliminate what was acknowledged to be discrimination on the basis of sex from the criteria for registration. Another significant aspect of the amendments introduced as part of ***Bill C-31*** was that for the first time the issue of eligibility for registration or status was separated from the issue of membership in a

band.

[4] The plaintiffs submit that this remedial effort was incomplete and that the registration provisions introduced in ***Bill C-31*** that form the basis for registration in the ***1985 Act*** continue to discriminate contrary to ss. 15 and 28 of the ***Canadian Charter of Rights and Freedoms*** (the "***Charter***"). The plaintiffs submit that the registration provisions continue to prefer descendents who trace their Indian ancestry along the paternal line over those who trace their Indian ancestry along the maternal line. The plaintiffs submit further that the provisions continue to prefer male Indians who married non-Indians and their descendents, over female Indians who married non-Indians and their descendents.

[5] In this action the plaintiffs seek the following relief:

1. A declaration that section 6 of the ***1985 Act*** violates section 15(1) of the ***Charter*** insofar as it discriminates between matrilineal descendants and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status.
2. A declaration that section 6 of the ***1985 Act*** violates section 15(1) of the ***Charter*** insofar as it discriminates between descendants born prior to April 17, 1985, of Indian women who had married non-Indian men, and descendants of Indian men who married non-Indian women.
3. A declaration that section 6 of the ***1985 Act*** violates section 15(1) of the ***Charter*** insofar as it discriminates between descendants born prior to April 17, 1985, because they or their ancestors were born out of wedlock.
4. An order that the following words be read in to section 6(1)(a) of the ***1985 Act***: "or was born prior to April 17, 1985, and was a direct descendant of such a person".
5. In the alternative:

   An order that for the purposes of section 6(1)(a) of the ***1985 Act***, section 11(1)(c) and (d) of the ***Indian Act***, S.C. 1951, c. 29, as amended (the "***1951 Act***"), in force immediately prior to April

> 17, 1985 shall be read as though the words “male” and “legitimate” were omitted.
>
> And a further order that for the purposes of section 6(1)(a) of the ***1985 Act***, s. 12(1)(b) of the ***1951 Act*** in force immediately prior to April 17, 1985, shall be read as though it had no force and effect.
>
> 6. A declaration that the plaintiffs are entitled to register under s. 6(1)(a) of the ***1985 Act***.
>
> 7. …
>
> 8. An order that the relief granted in this proceeding applies exclusively to registration under section 6 of the ***1985 Act*** and does not alter sections 11 and 12 of the ***1985 Act*** or any other provision defining entitlement to Band membership.
>
> …

[6] The defendants’ response to the plaintiffs’ claims can be organized around three principal themes:

> (a) granting the relief sought by the plaintiffs would constitute an impermissible retroactive or retrospective application of the ***Charter*** in that it would require the court to apply the ***Charter*** to pre-1985 legislation and to amend repealed provisions of prior versions of the ***Indian Act***;
>
> (b) the plaintiffs suffered no injury. The only difference between the plaintiffs and Indians entitled to registration pursuant to s. 6(1)(a) of the ***1985 Act*** is in relation to the status of their children. There is no right to transmit Indian status, which is purely a matter of statute. Accordingly, there has been no denial of the plaintiffs’ rights; and
>
> (c) any infringement of the plaintiffs’ rights is justified in light of the broad objectives of the 1985 amendments to the ***Indian Act*** which was a policy decision, made after extensive consultation, balancing the interests of all affected and which is entitled to deference.

[7] For the reasons that follow, I have concluded that the registration provisions contained in s. 6 of the ***1985 Act*** discriminate on the basis of sex and marital status contrary to ss. 15 and 28 of the ***Charter*** and that such discrimination has not been

justified by the government. The following conclusions form the crux of my decision:

(a) The plaintiffs' claim, properly understood, requires neither a retroactive nor a retrospective application of the ***Charter***. It is rather an application of the ***Charter*** to the present registration provisions of the ***Indian Act***.

(b) Although the concept "Indian" is a creation of government, it has developed into a powerful source of cultural identity for the individual and the Aboriginal community. Like citizenship, both parents and children have an interest in this intangible aspect of Indian status. In particular, parents have an interest in the transmission of this cultural identity to their children.

(c) The registration provisions of the ***1985 Act*** did not eliminate discrimination. The registration provisions contained in s. 6 continue to prefer descendents who trace their Indian ancestry along the paternal line over those who trace their Indian ancestry along the maternal line and continue to prefer male Indians who married non-Indians and their descendents, over female Indians who married non-Indians and their descendents. This preference constitutes discrimination on the basis of sex and marital status contrary to ss. 15 and 28 of the ***Charter***.

(d) This discrimination has not been justified by the government pursuant to s. 1 of the ***Charter***. In that regard, as part of the 1985 amendments, the government elected to sever the relationship between status and band membership. Status is now purely a matter between the individual and the state. There are no competing interests. No pressing and substantial objective has been identified with respect to the discriminatory provisions in the registration scheme.

II. LEGISLATIVE HISTORY

Early Legislation

[8] The concept "Indian" is a creation of statute. Prior to the arrival of Europeans, the Aboriginal peoples who inhabited the region that would become Canada had their own forms of social organization with their own names by which to identify their social groups. Fundamental aspects of these forms of social organization included

rules for the identification of members of the group, the transmission of membership status in the event of marriage and the transmission of membership status to descendants. These rules were diverse and often quite different from the forms of social organization of the colonists. For example, some Aboriginal societies were matrilineal. Among the Iroquois, descent and inheritance were transmitted through the female line. Post-marital residence was matrilocal: see *Indian Women and the Indian Act*, Standing Committee of Indian Affairs and Northern Development (the "Standing Committee"), September 13, 1982, testimony of Pauline Harper, President, Indian Rights for Indian Women at p. 4:33. In the Kwawkewith Nation of the west coast, inheritance followed a matriarchal line. A child took her mother's family name and inheritance: see Standing Committee, September 10, 1982, testimony of Donna Tyndell at p. 3:37.

[9] In many Aboriginal societies woman exercised considerable political power. This too stood in contrast to the situation of women in the colonial societies at the time. For example, the Iroquois had a socio-political structure that took the form of a confederacy held together by a socio-political system of clans headed by women in a true matrilineal political and familial system. This clan system, which was inherently a matriarchal system of family government and political organization, was the foundation upon which a political system was built that created a democratic structure of government: see Standing Committee, September 13, 1982, testimony of Mary Two-Axe Earley, President Quebec Equal Rights of Indian Women at pg. 4:49; *Perspectives and Realities*, Vol. 4, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996) (the "*Royal*

Commission Report"); and Sayers, MacDonald, Fiske, Newell, George and Cornett, *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Status of Women Canada's Policy Research Fund, November, 2001).

[10] The report, Native Women and the Constitution: background paper presented to the Women and the Constitutional Conference by the Native Women's Association of Canada, September 6, 1980, noted at p. 3:

> Native people are the descendants of the original people of this land. Before the Europeans arrived, Native people called themselves by their own names using their own languages. Native people are not the descendants of one nation but rather of hundreds of sovereign nations that lived on this land before the Europeans. When treaties were signed, they were signed by one nation entering into agreements with another nation. But as history has shown, treaties were not honoured in this way. Instead, the federal government developed an attitude of paternalism and assimilation towards Native people, legislating a process of defining who is an Indian and who is not, and confining Native people to specific sections of land.

[11] One of the profound developments introduced by colonialism was the creation of the concept of "Indian" which was the term created by the colonists to describe Aboriginal persons. Following settlement in Upper and Lower Canada and the creation of treaties with Aboriginal peoples, legislation was passed in relation to the Aboriginal peoples that the colonial powers had named "Indians". The first such statute was ***An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury***, S.C.1850, c.74 (the "***1850 Act***"). The ***1850 Act*** made reference to Indian and any person inter-married with any Indian.

[12] Subsequent legislation contained evolving definitions of the term “Indian”. With these definitions came situations of loss of status for Aboriginal women and their children. The legislation mirrored the colonial societies’ attitudes toward women. These attitudes were embodied in both Napoleonic and British common law:

> Both Napoleonic and British common law, from which Canadian law derived, deprived married woman of legal personhood, independence, and equality. The traditional status of married women at law is summarized in Blackstone’s famous aphorisms: “Husband and wife are one person and the husband is that one”, and “The very being or legal existence of the woman is suspended during marriage.”
>
> Upon marriage, a woman’s property customarily passed to her husband. Monies she earned, gifts she was given, or property she inherited all belonged to her husband. A married woman had no right to contract or to make a will, nor could she sue or be sued independently.
>
> Marriage also resulted in a woman’s physical person and her sexuality becoming her husband’s property. He had the right to physically “correct” her, to rape her, to control her physical movement, and to determine her domicile and place of residence.
>
> Children were also entirely in the control of the husband, as he was the sole legal guardian of them, with the right to make all decisions regarding their care, discipline, and education.
>
> Married women assumed the names and nationalities of their husbands, and lost their own. The husband was responsible for any illegal actions of his wife. She could not testify in court against her husband, nor could she sue him for actions against her.
>
> A married woman could not divorce and only in extreme circumstances could she live apart from her husband. Her only basic legal right was to have her husband supply the necessities of life.
>
> (Day, Shelagh, “*The Charter and Family Law*” in E. Sloss ed., *Family in Canada: New Directions* (Ottawa: Canadian Advisory Council on the Status of Women, 1985) at p. 28 [references omitted]).

[13] The involuntary loss of Indian status by Aboriginal women and children began with the passage in 1857 of ***An Act to Encourage the gradual Civilization of***

Indian Tribes in the Province and to amend the Laws respecting Indians, S. Prov. C. 1857, 20 Vict., c. 26 (the "***1857 Act***"). The preamble of the ***1857 Act*** identifies the assimilation of the Indian people as the purpose of the enactment:

> WHEREAS it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such Individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

[14] Section 1 of the ***1857 Act*** provided that the ***1850 Act*** would apply to:

> Indians or persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown (or which having been so surrendered have been set apart or shall then be reserved for the use of any Tribe or Band of Indians in common) and who shall themselves reside upon such lands, and shall not have been exempted from the operation of the said section, under the provisions of this Act; and such persons and such persons only shall be deemed Indians within the meaning of any provision of the said Act or of any other Act or Law in force in any part of this Province by which any legal distinction is made between the rights and liabilities of Indians and those of Her Majesty's other Canadian Subjects. (Emphasis added)

By this provision, the government assumed control over the determination of who was Indian.

[15] The ***1857 Act*** provided for the enfranchisement of Indian men over the age of twenty-one who met certain specified criteria. Upon enfranchisement, the Indian men ceased to be Indians. So too did their wives and children.

[16] One consequence of such legislation was the disruption of Aboriginal culture

through the imposition of colonial concepts of social organization. Madam Justice L'Heureux-Dube described this in ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203 at para. 86 [***Corbiere***]:

> Legislation depriving Aboriginal women of Indian status has a long history. The involuntary loss of status by Aboriginal women and children began in Upper and Lower Canada with the passage of *An Act to encourage the gradual Civilization of the Indian Tribes in the Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26. A woman whose husband "enfranchised" had her status removed along with his. This legislation introduced patriarchal concepts into many Aboriginal societies which did not exist before: see Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), vol. 1, *The Justice Systems and Aboriginal People*, at pp. 476-79. As the Royal Commission stated in *Perspectives and Realities*, *supra*, at p. 26:
>
> > In the pre-Confederation period, concepts were introduced that were foreign to Aboriginal communities and that, wittingly or unwittingly, undermined Aboriginal cultural values. In many cases, the legislation displaced the natural, community-based and self-identification approach to determining membership – which included descent, marriage, residency, adoption and simple voluntary association with a particular group – and thus disrupted complex and interrelated social, economic and kinship structures. Patrilineal descent of the type embodied in the *Gradual Civilization Act*, for example, was the least common principle of descent in Aboriginal societies, but through these laws, it became predominant. From this perspective, the *Gradual Civilization Act* was an exercise in government control in deciding who was and was not an Indian.

[17] With Confederation, s. 91(24) of the ***Constitution Act, 1867***, 30-31 Vict., c. 3 (U.K.) (the "***Constitution Act, 1867***") granted parliament exclusive legislative authority over "Indians and land reserved for Indians". After Confederation, Parliament first defined Indian in s. 15 of the 1868 statute, ***An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands***, S.C. 1868, c. 42 (31 Vict.), s. 15.

(the "***1868 Act***"). Section 15 provided that the following persons and none other were to be considered Indians:

> *Firstly*. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;
>
> *Secondly*. All persons residing among such Indians, whose parents where or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And
>
> *Thirdly*. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

[18] Section 15 stated that only persons who met the statutory criteria were entitled to hold, use, or enjoy lands and property belonging to or appropriated to the use of bodies of Indians, tribes, or bands.

[19] From that time forward, the Government of Canada has utilized the concept of the status Indian in relation to the exercise of its s. 91(24) powers.

[20] The ***1868 Act*** was amended in 1869 by ***An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42***, S.C. 1869, c. 6. (32-33 Vict.) (the "***1869 Act***"). The ***1869 Act*** amended the definition of Indian in s. 15 of the ***1868 Act*** by adding a provision that any Indian woman marrying a non-Indian man lost her Indian identity. So too did the children of the marriage. The ***1869 Act*** also provided that when an Indian woman married an Indian man of a different tribe or band, she ceased to be a member of her own band or tribe and became a

member of her husband's band or tribe. The children of the marriage became members of only the father's tribe or band.

[21] The official explanation for the adoption of this policy was a concern about control over reserve lands and the need to prevent non-Indian men from gaining access to them. For example, the following correspondence is quoted in the *Royal Commission Report* at p. 27:

> Thus, in 1869 the secretary of state wrote to the Mohawks of Kahnawake regarding the marrying out provisions of the new legislation, stressing that the goal was 'preventing men not of Indian Blood having by marrying Indian women either through their Wives or Children any pretext for Settling on Indian lands.

And see Weaver, S., Report on Archival Research Regarding Indian Women & Status 1868 – 1869 (University of Waterloo, 1971).

[22] The discriminatory treatment of Aboriginal women thus introduced into the legislation was summarized as follows in the *Royal Commission Report* at p. 28:

> In the relatively short period between the 1850 Lower Canada legislation and the 1869 *Gradual Enfranchisement Act*, it seems apparent that Indian women were singled out for discriminatory treatment under a policy that made their identity as Indian people increasingly dependent on the identity of their husbands. They were subject to rules that applied only to them as women and that can be summarized as follows: they could not vote in band elections; if they married an Indian man from another band, they lost membership in their home communities; if they married out by wedding a non-Indian man, they lost Indian status, membership in their home communities, and the right to transmit Indian status to the children of that marriage; if they married an Indian man who became enfranchised, they lost status, membership, treaty payments and related rights and the right to inherit the enfranchised husband's lands when he died. Despite strong objections, these discriminatory provisions were carried forward into the first *Indian Act* in 1876.

[23] It is noteworthy that already objections were being made to such provisions by Aboriginal groups. For example, the *Royal Commission Report* cites the following in a footnote to the above quote:

> ... In 1872, the Grand Council of Ontario and Quebec Indians (founded in 1870) sent the minister in Ottawa a strong letter that contained the following passage:
>
> > They [the members of the Grand Council] also desire amendments to Sec. 6 of the Act of [18]69 so that Indian women may have the privilege of marrying when and whom they please, without subjecting themselves to exclusion or expulsion from their tribes and the consequent loss of property and rights they may have by virtue of their being members of any particular tribe. (NAC RG10, Red Series, Vol. 1934, file 3541)

[24] The definition of Indian was modified in the ***Indian Act***, S.C. 1876, c. 18 (39 Vict.) (the "***1876 Act***"). Pursuant to s. 3 of the ***1876 Act*** the term Indian now meant:

> (a) any male person of Indian blood reputed to belong to a particular band;
> (b) the child of such person; and
> (c) any woman who is or was lawfully married to such person.

[25] The ***1876 Act*** continued the provision that any Indian woman marrying a non-Indian lost her Indian status and her band membership. The ***1876 Act*** also continued the provision that an Indian woman marrying an Indian man who belonged to a different band or tribe would lose the membership in her band and become a member of her husband's band or tribe. These provisions continued, essentially unchanged, until the enactment of the ***Indian Act***, S.C. 1951 c. 29 (the "***1951 Act***").

[26] By virtue of these provisions, an Indian woman who married a man who was not a status Indian lost her Indian status. Her children did not acquire Indian status.

By contrast, an Indian man who married a woman who was not a status Indian suffered no such fate. He retained his Indian status. Moreover, both his wife and any children of the union acquired Indian status.

[27] The ***1951 Act*** created the Indian Register in which the name of everyone registered as an Indian was recorded. It also created the position of the Registrar, an officer of the Crown who was in charge of the Indian Register and who determined entitlement to registration in the Indian Register under the ***1951 Act***. The Indian Register consisted of Band Lists and General Lists. Those persons who were members of bands and entitled to be registered as an Indian were entered in the Band List for that band. The General List contained those people entitled to be registered as an Indian, but with no band affiliation.

[28] Section 2(1)(g) of the ***1951 Act*** defined Indian as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". Those persons entitled to be registered pursuant to the ***1951 Act*** were defined in ss. 11 and 12 which provided:

> 11. Subject to section twelve, a person is entitled to be registered if that person
>
> (a) on the twenty-sixth day of May, eighteen hundred and seventy-four, was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, chapter forty-two of the statues of 1868, as amended by section six of chapter six of the statutes of 1869, and section eight of the chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

(b) is a member of a band

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

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

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

(d) is the legitimate child of

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

(ii) a persons described in paragraph (c);

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

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

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

(a) a person who

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

(ii) is a descendant of a person described in sub-paragraph (i),

(iii) is enfranchised, or

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

(b) a woman who is married to a person who is not an Indian.

[29] Pursuant to s. 14 of the ***1951 Act***, a woman who was a member of a band

ceased to be a member of that band if she married a person who was not a member of the band. If she married a man who was a member of another band, she became a member of his band.

[30] Sections 11(e) and 12 of the ***1951 Act*** were amended by ***An Act to amend the Indian Act***, S.C. 1956, c. 40 (the "***1956 Act***") as follows:

> 3(1) Paragraph (e) of section 11 of the said Act is repealed and the following substituted therefor:
>
> "(e) is the illegitimate child of a female person described in paragraph (1), (b) or (d); or".
>
> (2) Section 12 of the said Act is amended by adding thereto, immediately after subsection (1) thereof, the following subsection:
>
> "(1a) The addition to a Band List of the name of an illegitimate child described in paragraph (e) of section 11 may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under paragraph (e) of section 11."
>
> (3) This section applies only to persons born after the coming into force of this Act.
>
> 4 Paragraph (b) of subsection (1) of section 12 of the said Act is repealed and the following substituted therefor:
>
> "(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11."

[31] The registration provisions contained in ss. 11 and 12 of the ***1951 Act*** as amended by the ***1956 Act*** remained virtually unchanged until the ***1985 Act*** came into force.

[32] Opposition to these provisions however, continued to be expressed. For example, the final report of the *Royal Commission on the Status of Women*

(Government of Canada, 1970) at para. 106 contained a recommendation that the ***Indian Act*** be amended "to allow an Indian woman upon marriage to a non-Indian to (a) retain her Indian status; and (b) transmit her Indian status to her children".

[33] The intention of the legislature with respect to the registration provisions was addressed in ***Martin v. Chapman***, [1983] 1 S.C.R. 365, a decision dealing with the eligibility for registration of the illegitimate child of an Indian father. Madam Justice Wilson, writing for the majority, described this intent as follows at 370:

> It seems to me that the one thing which clearly emerges from ss. 11 and 12 of the Act is that Indian status depends on proof of descent through the Indian male line.

[34] In summary, in relation to the matters at issue in this litigation, the following are the important developments in the history of the legislation leading up to the ***1985 Act***:

(a) the government created the concept of Indian and then used it as a general concept in relation to peoples of the First Nations in substitution for the First Nations' own identifications;

(b) the government endowed the concept of Indian with great significance in including in relation to such matters as band membership, the right to membership in communities, the right to live on reserve lands, and the right to treaty payment;

(c) the government assumed exclusive control over the identification of who was and was not entitled to be classified as an Indian; and

(d) the rules created by the government and embodied in the successive versions of the legislation, favoured descent through the male line and discriminated against women and those who traced their descent through the maternal line. In particular, if an Indian woman married a non-Indian man, she lost her status and her children were not entitled to be classified as Indian. However, a man who married a non-Indian woman retained his status as an Indian. In addition, his wife acquired

the status of Indian and his children were classified as Indian.

Early Challenges

[35] The provisions of the ***1951 Act***, pursuant to which an Indian woman who married a man who was not a registered Indian would lose her Indian status, were challenged under the ***Canadian Bill of Rights***, S.C. 1960, c. 44 (the "***Bill of Rights***"), as a violation of the right to equality. In ***Attorney General of Canada v. Lavell***, [1974] S.C.R. 1349 [***Lavell***], the court, in dismissing the challenge, held that the ***Bill of Rights*** was not effective to render inoperative legislation passed by Parliament in discharge of its constitutional function under s. 91(24) of the ***Constitution Act, 1867***, and that equality before the law under the ***Bill of Rights*** meant equal treatment in the enforcement and application of the law. Mr. Justice Laskin, in dissent, however, described the provisions at issue as effecting a statutory excommunication or statutory banishment of Indian women and their children, a separation to which no Indian man who marries a non-Indian is exposed: see ***Lavell*** at 1386.

[36] In 1976, Canada became a signatory to the International Covenant on Civil and Political Rights ("ICCPR") (adopted December 16, 1966, entry into force March 23, 1976) G.A. Res. 2200A (XXI) (accession by Canada 19 May 1976, Can. T.S. 1976 No. 47). Article 27 of the ICCPR provides:

> In those States in which ethnic, religions or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to process and practice their own religion, or to use their own language.

[37] In 1975, following the Supreme Court of Canada's dismissal of the ***Lavell*** case under the ***Bill of Rights***, Sandra Lovelace, a Maliseet Indian who lost her Indian status upon marriage to a non-Aboriginal man, challenged the marrying out provision of the ***Indian Act*** under Article 27. On July 30, 1982, the United Nations Committee on Human Rights found Canada in violation of Article 27 of the ICCPR because it effectively denied Sandra Lovelace the right to access her culture, her religion and her language: see ***Lovelace v. Canada***, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981) [***Lovelace UN***].

> **Movements for Reform**
>
> We are stripped naked of any legal protection and raped by those who would take advantage of the inequities afforded by the Indian Act. We are raped because we cannot be buried beside the mothers who bore us and the fathers who begot us, although dogs from neighbouring towns are buried on our reserve land: because we are subject to eviction from the domiciles of our families and expulsion from the tribal roles; because we must forfeit any inheritance or ownership of property; because we are divested of the right to vote; because we are unable to pass our Indian-ness and the Indian culture that is engendered by a woman in her children: because we live in a country acclaimed to be one of the greatest cradles for democracy on earth, offering asylum to refugees while, within its borders, its native sisters are experiencing the same suppression that has caused these people to seek refuge by the great mother known as Canada.
>
> (Standing Committee, September 13, 1982, testimony of Mary Two-Axe Earley, President, Quebec Equal Rights for Indian Women, at p. 4:46.)

[38] Whatever had been the attitude and motivations of previous generations, by the 1970's and through the 1980's successive federal governments recognised the need for reform of the provisions with respect to registration that discriminated against women and their descendants. The impetus toward reform of these

provisions grew with the ***Charter***, and in particular, with the impending coming into force of s. 15 on April 17, 1985. In addition, successive federal governments undertook a re-evaluation of the relationship between the government and First Nations, and in particular, the role of the government in determining band membership.

[39] These themes were mirrored in two major movements for reform within the First Nations. In the years leading up to the passage of ***Bill C-31*** in 1985, there were two major movements for reform of the ***Indian Act***. The first was the movement for women's rights that sought to eradicate the different treatment of men and women with respect to the determination of status pursuant to the ***Indian Act***. Arguing that the different treatment constituted discrimination, reformers pressed for the restoration of status to those who had lost status, and the amendment of the ***Indian Act*** to create a non-discriminatory scheme for the determination of status.

[40] A second movement, which may be characterized as an Aboriginal rights movement, sought increased powers of self-government for bands. One argument advanced by advocates was that Aboriginal people had never given up their right to define their own membership. Accordingly, it was not for the federal government to decide on the terms of band membership, even for the purpose of effecting reform.

[41] These two movements were to some degree at odds on the issue of reforms to the ***Indian Act*** concerning status as an Indian. For example, in 1982 Dr. David Ahenakew, National Chief of the Assembly of First Nations, testified that the bands must take control over all issues related to membership including reinstatement of

women [Standing Committee, September 8, 1982, at p. 1:72]. Chief Sol Sanderson of the Federation of Saskatchewan Indians spoke about the conflict between group and individual rights which would occur if only the discrimination under s. 12(1)(b) was addressed:

> All we are saying is that if you deal with the individual right in isolation from the collective right, part of the collective right being the right of men and women to form their own governments and to determine their own policy on citizenship questions, that is part of the civil and political right issue that you are talking about under international standards. So you are taking away from it. By dealing with the one issue on a sex basis, you are discriminating against all Indians, never mind women, under those standards that you are citing to me now.
>
> (Standing Committee, September 8, 1982, at p. 1:89.)

See also the evidence of the Neskainlith Indian Band; Standing Committee September 20, 1982 at pp. 5:42-5:43, and the evidence of the Indian Association of Alberta; Standing Committee, September 20, 1982, at pp. 5:104-5:105.

[42] The women's groups, while not opposed to increased self-government on the part of bands, including control over membership, argued that a prerequisite to any such reform must be a restoration of status to those who had been stripped of their status through the discriminatory provisions. For example, at hearings before the Standing Committee in 1982, the Native Women's Association of Canada recommended three changes and stated that they would support band control of membership if these three recommendations were adopted:

> (a) the deletion or amendment of any section of the Indian Act which discriminates against Indian women on the basis of sex;
>
> (b) the reinstatement of all Indian women who lost Indian status because of s. 12(1)(b) and the registration of their first-generation

> children; and the “de-listing” of all non-Indians who gained status through marriage; and
>
> (c) the placement of the first-generation children of women who lost status, regardless of whether the mother is still living, on the band list of their mother’s band.
>
> (Standing Committee, September 20, 1982, pp. 5:121-122.)

[43] Some of the representatives expressed a distrust of band governments. The representative of the United Native Nations, representing non-status Indians and Métis in British Columbia, gave the following testimony:

> We refuse vehemently to accept allowing present band governments to legislate rules regarding band membership. We totally reject band control in this instance, and the reason is this: At the present time you would only replace discrimination by the DIA with discrimination by Indian governments, band governments. The band governments are not the true governments of their people, because so many of their people are unable to vote in the elections or are unable to live anywhere near the reserves. The bands do not truly represent the tribes. And until all that is corrected and there is a true membership with a true mandate and real constituents, a government representing everyone who wants to be recognized, everyone who traces their lineage back to that tribe and who wants to be recognized, they should all be allowed to participate in voting; then band government would have some meaning and we would be less wary of allowing them to legislate any rules governing our lives.
>
> I just have a note here. We must be given a better route home. The route we have right now is impossible. Some people say you can go to your chief, you can go to your band; they will take you back. This is not so. The monetary problems of course are a very real reason. But I have lost my status and I want to go back home to my ancestral home, which is my mother’s home, and which the Indian Act never provided me. Even when I was registered I was registered with my father’s band, which I have no cultural ties with at all. I want to go home. I want to go to Kingcome Inlet some day when I retire. I would like that route to be one where I would not have to go home and beg someone, or lay a guilt trip on all my people back home to put me back on the band membership list. I could do that, but I would rather the way be easier, a better route home. That is what we want.
>
> (Standing Committee, September 10, 1982, at p. 3:35.)

[44] There were in addition, some First Nations groups that opposed the restoration of status of those women and their children who had lost status as a result of the provisions of the ***Indian Act***. The concern expressed was that restoration, given the numbers involved, would flood the bands with members, many of whom had little or no contact with the reserves. The result, it was argued, would be cultural genocide. For example, the representative of the Indian Association of Alberta expressed vehement opposition to ***An Act to amend the Indian Act*** ("***Bill C-47***"), a prior effort to amend the ***Indian Act*** that died on the order paper, stating that "in attempting to bring about sexual equality [***Bill C-47***] will instead bring about cultural genocide": Minutes of Proceedings and Evidence of the Standing Committee respecting Bill C-47, June 28, 1984, p. 19:30.

[45] The context in which this opposition was addressed, was the existing legislation in which entitlement to registration or status was linked to band membership and entitlement to live on a reserve.

[46] Arguably, at least in part due to the complexity of the interaction of these forces, the process leading eventually to the passage of ***Bill C-31*** was particularly protracted. For example, in 1984 Minister Munro, speaking in relation to ***Bill C-47*** stated:

> The difficulty that has delayed presentation of this Bill is the same delay that has attended the work of both the sub-committee on the rights of Indian women and the special committee on Indian self-government; this is, we are dealing with a conflict between two deeply cherished ideas.
>
> On the one hand, there is the right of women to be treated equally with men; on the other hand, Indian bands want to be able to decide,

> without outside interference, who is and who is not a member of an Indian band. This latter position is recognized as being a key power of Indian nation governments.
>
> (Standing Committee, June 26, 1984 at p. 17:9.)

Process Leading to *Bill C-31*

[47] The process that culminated in the 1985 amendments is summarized below.

[48] In 1960, the federal government held a series of special hearings with First Nations associations in contemplation of amendments to the ***Indian Act***. The result of these meetings was the development of regional Indian Advisory Committees comprised of provincial and federal government officials who gathered for the purpose of encouraging dialogue between Indian communities and the government on Indian-related policy issues and legislation: Weaver, S., "Proposed Changes in the Legal Status of Canadian Women: The Collision of Two Social Movements" (Paper read at the 1973 Annual Meeting of the American Anthropological Association, November 30, 1973).

[49] The *Royal Commission on the Status of Women* was established in February 1967 to inquire into and report upon the status of women in Canada and to recommend what steps might be taken by the Federal Government to ensure for women equal opportunities with men in all aspects of Canadian society. Among those groups presenting to the Royal Commission in 1968 was Equal Rights for Indian Women, a group founded to protest the gender-biased sections in the ***Indian Act***: Standing Committee, March 26, 1985, testimony of Mary Two-Axe Earley, at p. 24:32

[50] The Royal Commission released its report in 1970: *Royal Commission on the Status of Women* (Government of Canada, 1970). Recommendation 106 recommended "that the Indian Act be amended to allow an Indian woman upon marriage to a non-Indian to (a) retain her Indian status and (b) transmit her Indian status to her children."

[51] In 1973, the Indian Association of Alberta, under the *aegis* of the National Indian Brotherhood ("NIB"), conducted a review of the ***Indian Act*** and outlined their goals for revisions. With respect to marriage to non-Indians, the report recommended that neither the non-Indian spouse nor the children of a "mixed" marriage should gain status or membership. Status Indians who married non-Indians would always retain status and membership, although they would not be able to live on reserve while married to the non-Indian: National Indian Brotherhood, "Report of Indian Act Study Team", October 31, 1974.

[52] In 1974, Parliament, following requests for a more open and co-operative relationship between Indians and the government, established the Joint Sub-Committee of Cabinet and the National Indian Brotherhood on Indian Rights and Claims (the "Joint Committee"). This committee was to develop proposals for amendment of the ***Indian Act***. Among other things, the Joint Committee considered "the issue of Indian women losing their status when they marry non-Indian men". During the consideration of the issue of Indian women who had lost their entitlement to registration, the NIB emphasized the need to amend the ***Indian Act*** to provide bands with the right to control their own membership. The NIB withdrew from the Joint Committee in 1978, without any major progress being made on proposed

amendments to the ***Indian Act***: see the Minutes of Joint Sub-Committee and the National Indian Brotherhood on Indian Rights and Claims, October 31, 1977, and Weaver, S., "The Joint Cabinet/National Indian Brotherhood Committee: A Unique Experiment in Pressure Group Relations" (University of Waterloo, 1982).

[53] In August 1978 a report titled "*Indian Act Discrimination Against Sex*" was prepared for the Department of Indian Affairs and Northern Development ("DIAND"), and stated in part:

> INDIAN ACT: DISCRIMINATION AGAINST SEX
>
> I. INTRODUCTION
>
> The Indian Act, it is alleged, discriminates on the grounds of sex and is, therefore, contrary to the provisions of the Human Rights Act. Sections 12(1)(b) and 11(1)(b) apply in particular.
>
> II. PROPOSAL
>
> The object of this paper is to propose that discrimination on the grounds of sex in the Indian Act be eliminated by the following formulation:
>
> > Indians who marry non-Indians would remain entitled to be registered; their non-Indian spouses would not be entitled to be registered. Their children would be entitled to be registered if the parents of the Indian parent were both Indian.

[54] A discussion paper prepared for the DIAND titled "*Revison to the Indian Act*" dated November 10, 1978, makes reference to the Cabinet commitment to end discrimination on the basis of sex in a revised ***Indian Act***.

[55] In July 1979 the National Committee, Indian Rights for Indian Women ("IRIW") made a submission to the DIAND calling for:

> [T]he criteria for registration as a status Indian be that of any person who can establish that they are ¼ or more by blood a Canadian Indian and that this blood line can be established through either mother or father or both.
>
> ("Some Proposed Changes to the Indian Act" (National Committee, Indian Rights for Indian Women, July 1999) at p. 3.)

[56] The submission stated:

> While there is bound to be considerable resistance by some of the "Treaty Indians", it should be pointed out that under the existing Act, 1/4 blood is recognized as long as the blood line is established through the father. However, Section 12(1)(a)(iv) (so called double mother rule) would indicate that a person with less than 1/4 Indian blood, even when established through the father's line and whose father is a "Treaty Indian" should not be registered as a status or Treaty Indian. Clearly the recognition of a 1/4 blood line when established through the father, but nonrecognition when established through the mother is discriminatory on the basis of sex and cannot be acceptable for Canadian society.
>
> ("Some Proposed Changes to the Indian Act" (National Committee, Indian Rights for Indian Women, July 1999) at p. 4.)

[57] In a July 27, 1979, letter, the Minister of Indian Affairs and Northern Development, Arthur Jake Epp, corresponded with Chiefs about a proposed revision to the ***Indian Act*** stating:

> In recent months, as many Indians are aware, some proposals have been discussed about revising certain aspects of the present ***Indian Act*** without endangering the special relationship of Indians to the Federal Government. The basic principles for revision include:
>
> 1) the need to recognize Indian self-government and to develop a legislative base upon which bands, which choose to do so, can exercise responsibility for their own social, economic, cultural and political development;
> 2) the need for strengthened band control of Indian education;
> 3) bands should be able to continue to exercise some control over reserve land when it is surrendered for developmental purposes;

4) discrimination within the *Act* against Indian women should be eliminated;
5) certain outdated and unduly restrictive sections of the *Act* should be changed or removed.

[58] The Minister was in the process of preparing amendments to the ***Indian Act*** with a view to eliminating discrimination and enhancing self-government. However, the Conservative Government lost a confidence vote on December 13, 1979, leading to an election on February 18, 1980, which returned Prime Minister Trudeau and the Liberal Government to power.

[59] Revisions to the ***Indian Act*** aimed at eliminating discrimination however remained a priority of the new government. This intention was reflected in the remarks of both Prime Minister Trudeau and Minister Munro who in April 1980 addressed the National Conference of Indian Chiefs and Elders, which included representatives of both the NIB and the IRIW. Prime Minister Trudeau stated:

> When we address the subject of amending the *Indian Act*, one problem poses a real dilemma for the government. What should be done with those sections which deprive Indian women of status if they marry non-Indians?
>
> The government made a commitment to remove that discriminatory provision [s. 12(1)(b)] from the *Act*. That commitment has generated controversy among Indians, some of who believe band councils should be free to decide who has status and who has not.
>
> I hope we can soon reach an agreement which will respect the rights of both Indian women and band councils. I also hope that, in reaching that agreement, we will all welcome the involvement of the group known as “Indian Rights for Indian Women”, which I am happy to see represented here tonight.
>
> (Notes for Remarks by the Prime Minister at a National Conference of Indian Chiefs and Elders, April 29, 1980.)

[60] Due to mounting pressure to amend the ***Indian Act***, and despite an inability to gain consensus on what amendments should be made, Minister of Indian Affairs John Munro announced on July 24, 1980, that he was going to use a provision of the ***Indian Act*** to suspend the effect of s. 12(1)(b) when requested to do so by Band Councils, pending further legislative amendments. Section 4(2) of the ***Indian Act*** then in force allowed the Governor in Council to declare, by proclamation, that any portion of the ***Indian Act*** did not apply to any Indians or group or band of Indians: Press Release, "Government Ready to Lift Discrimination", July 24, 1980.

[61] The Minister used s. 4(2) to declare, at a band's behest, that various parts of s. 12 of the ***Indian Act***, R.S.C. 1970, c. I-6 (the "***1970 Act***") did not apply to members of that band. As of July 1984, it appears that 107 of the approximately 580 bands in Canada had sought exemption from s. 12(1)(b) (the women marrying out clause) while 311 had sought exemption from s. 12(1)(a)(iv), (the 'double mother' clause): Draft DIAND Report, "The Potential Impacts of Bill C-47 on Indian Communities", November 2, 1984.

[62] On October 9, 1981, Minister Munro presented a Memorandum to Cabinet (the "MC") dated September 25, 1981, entitled, "Amendments to Remove the Discriminatory Sections of the Indian Act". The MC dealt both with proposed amendments to remove discriminatory clauses in the ***Indian Act*** affecting future generations, as well as reinstatement for those who lost status as a result of the discriminating provisions. With respect to future generations, the MC proposed that children of "mixed" marriages would have Indian status, but that children "with one parent and one grandparent on the Indian side who is not Indian" would not have

status (para. 22(iii)).

[63] In the following months, consideration was given to developing a process of consultation with the First Nations community about the proposed amendments. On August 3, 1982, the Cabinet Committee on Priorities and Planning, approved the Minister's recommendation and authorized the Minister "to refer the subject matter of Indian Band Government, in addition to the subject of the elimination of discrimination on the basis of sex in the Indian Act, to the Standing Committee on Indian Affairs and Northern Development for study", according to the proposed terms of reference: Minutes of Cabinet Committee on Priorities and Planning, August 3, 1982.

[64] Then, on August 4, 1982, the House of Commons empowered the Standing Committee to study the provisions of the ***Indian Act*** and report to the House concerning how the ***Act*** might be amended to remove those provisions that discriminate against women on the basis of sex and to make recommendations with respect to improving the arrangements with respect to Band government on the reserves: House of Commons, Hansard, August 4, 1982.

[65] In August, 1982, the DIAND published a report entitled "*The Elimination of Sex Discrimination from the Indian Act*". The report was prepared to serve as an information source in conjunction with the consultation process. The report states the problem as follows at p. 7:

> Who is an Indian is defined in the *Indian Act*. The *Act* defines Indians in terms of who has the right to use and benefit from reserve lands and Indian monies. Only those Indians who are members of a particular

> band have the right to reside on reserve land set apart for that band; have the right to share in the capital assets held for or by the band; have a voice in the decision-making process affecting band assets and a vote in the political institutions of the band.
>
> All band members are Indians. For all intents and purposes, all Indians are also band members (there are now approximately 80 Indians, out of approximately 300,000 who are not members of bands). The criteria for defining Indian status (and therefore membership in a band) discriminate on the basis of sex and marital status since they are based on a patrilineal and patrilocal system.

[66] In furtherance of its new mandate, the Standing Committee created the "Sub-Committee on Indian Women and the Indian Act" (the "Sub-Committee"). The Sub-Committee heard from 41 witnesses on behalf of 27 groups, as well as from Minister Munro. These groups held divergent views as to how the proposed amendments to the ***Indian Act*** to 'remove those provisions that discriminate against women on the basis of sex' should be dealt with. For example, the Assembly of First Nations ("AFN") wanted band control over the reinstatement of women to band membership, while the Native Women's Association of Canada ("NWAC") wanted immediate reinstatement of all women who had lost membership before granting bands control over membership: see the Minutes of Proceedings and Evidence of the Sub-Committee on Indian Women and the Indian Act ("Sub-Committee Evidence"), September 8, 9, 10, 13 and 14, 1982, and the Sixth Report of the Sub-Committee ("Sub-Committee Report"), September 1982.

[67] The Sub-Committee produced a final Report, which the Standing Committee adopted and presented to the House of Commons. A theme throughout the Report is the tension between those who wanted to regain entitlement to registration and to band membership and the bands who wanted to gain increased control over their

own membership: Sub-Committee Report, September 1982.

[68] With respect to the question of restoring the entitlement of women who had become disentitled to Indian registration by marriage to non-Indians, the Sub-Committee Report recommended the passage of:

> amendments to the *Indian Act* that would permit Indian women and their first generation children who lost status under s. 12(1)(b) to regain their status immediately upon application and would require bands to re-admit such women and children to band membership after a period of 12 months from the date of application. Regardless of whether the mother is still living, these children will be placed on the band list of the mother's band.
>
> (Sub-Committee Report, September 1, 1982 at p. 36.)

[69] The Report also noted that,

> Under reinstatement we are concerned about women who lost status and their children who may have formerly been on band lists. All descendants not otherwise mentioned would come under the provisions dealing with children of mixed marriages.
>
> (Sub-Committee Report, September 1, 1982 at p. 35.)

[70] With respect to the future registration of children of 'mixed marriages', the Report recommended as follows:

> Your Sub-committee recommends that all first generation children of unions where only one parent is of Indian status, born after the date of enactment of the amendments recommended in this report, automatically becomes a member of the band of the Indian parent.
>
> Your Sub-committee recommends that further consideration of the question of status or band membership of descendants of children of these mixed marriages be undertaken by the Sub-committee on Indian self-government.
>
> (Sub-Committee Report, September 1, 1982 at p. 32.)

[71] In September 1982, the Standing Committee established a sub-committee on Indian Self-Government. In December of that year the House of Commons created a higher level Special Committee on Indian Self-Government to act as a "Parliamentary Task Force" to review all legal and related institutional factors affecting the status, development, and responsibilities of Band Governments on Indian reserves: see Standing Committee Minutes, September 20, 1982; the Minutes of The Special Committee on Indian Self-Government, October 7, 1983; and the Minutes of the Special Committee on Indian Self-Government, October 20, 1983 ("Penner Report"). The Special Committee an Indian Self-Government produced its report, dated October 20, 1983, (the "Penner Report") in September 1983 after an extensive period of consultation including 60 public hearings.

[72] Ultimately, the government introduced ***Bill C-47***, ***An Act to amend the Indian Act***, in relation to the elimination of discrimination and "***Bill C-52***", the companion legislation, granting increased self-government to Indian bands. An election was called on June 29, 1984, leaving ***Bill C-47*** on the Senate order paper and ***Bill C-52*** on the order paper of the House of Commons: see the House of Commons Debates on ***Bill C-47***, June 29, 1984; ***Bill C-47*** as passed by the House of Commons, June 29, 1984; Senate Debates on ***Bill C-47***, June 29, 1984; ***Bill C-52***, First Reading, June 27, 1984; and the House of Commons Debates on ***Bill C-52***, June 29, 1984.

[73] During the fall and winter of 1984, the new government headed by Prime Minister Mulroney, took up consideration of amendments to the ***Indian Act***. ***Bill C-31*** was introduced for First Reading on February 28, 1985. Minister of Indian Affairs

and Northern Development, David Crombie, stated in introducing ***Bill C-31*** for Second Reading:

> ... today I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.
>
> (House of Commons Debates on Second Reading of Bill C-31, March 1, 1985 at 2644.)

[74] Minister Crombie enunciated the principles upon which ***Bill C-31*** was based:

> The first principle is that discrimination based on sex should be removed from the *Indian Act*.
>
> The second principle is that status under the *Indian Act* and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the *Indian Act*.
>
> The third principle is that no one should gain or lose their status as a result of marriage.
>
> The fourth principle is that persons who have acquired rights should not lose those rights.
>
> The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership.
>
> (House of Commons Debates on Second Reading of Bill C-31, March 1, 1985 at 2645.)

[75] Minister Crombie spoke of the balance ***Bill C-31*** struck between the wishes of the two main interest groups:

> This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. While there are some who would draw the line there, in my view fairness also demands that the first-generation descendants of those who were wronged by discriminatory legislation should have status under the *Indian Act* so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership

> and residency should be determined by the relationship with the Indian communities to which they belong.
>
> ...
>
> While there may be other ways to reach these objectives, I have to reassert what is unshakeable for this Government with respect to this Bill. First, it must include removal of discriminatory provisions in the *Indian Act*; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals.
>
> (House of Commons Debates on Second Reading of Bill C-31, March 1, 1985, at 2645-2646.)

[76] After the second reading, ***Bill C-31*** was referred by the House of Commons to the Standing Committee and by the Senate to the Senate Standing Committee on Legal and Constitutional Affairs ("SSCLA").

[77] During his introductory comments to the Standing Committee Minister Crombie described how the Government had sought to strike a balance in ***Bill C-31***, as follows:

> As I stated in tabling the bill, and as I repeated elsewhere, three basic underlying principles are contained in Bill C-31; and I am committed to each of those three: first of all, the removal of discrimination from the *Indian Act*; secondly, recognition of band control of membership; and thirdly, the restoration of rights to those who lost them. These three principles form the core of the government's approach to this issue. In the future status will be determined by the federal government on a totally non-discriminatory basis. Sex and marital status will not affect an individual's entitlement to be registered. No one will gain or lose status as a result of marriage, and in general the only criterion for status will be that at least one parent is registered.
>
> The only role to be played by the federal government in the future, then, will be to determine Indian status. Federal registration of status

has and will continue to be an indication of the special relationship between the Government of Canada and Indian people. In doing so, it will be a means of determining the eligibility for programs which the federal government offers to individual Indians. The recognition of band control of membership has long been demanded by Indian people. Bill C-31 recognizes that bands are the only ones who should legitimately decide who is a band member. The bill provides that bands can assume control over membership if a majority of electors agree. The federal government will no longer have a role in membership unless bands do not act to assume control. Membership, therefore, will be determined by the bands themselves.

The third objective is the restoration of rights. This is essential if the bill is to pass the test of fairness. Approximately 22,000 people who directly lost status and membership as a result of the discrimination will have both status and band membership restored upon application. To do less would perpetuate a particularly blatant form of discrimination. Similarly, fairness demands that special recognition be given to first-generation descendants of those who directly lost status, and that is why this bill proposes that such people be entitled to first-time registration of status. As I stated on Friday last, I believe the bill constitutes a balanced approach to a complex issue, and above all, in my view it is fair to both the individuals and the bands.

Mr. Chairman, several people have expressed concerns regarding the treatment of first-generation descendants, and as I understand it, this concern is that these people who are entitled to status will in some way be second class if they do not receive automatic band membership through government legislation. This is not true with respect to Indian status. All registered Indians will have the same status. The difference will be in band membership, and the determination of band membership will be by the band.

It is true that first-generation descendants of restored people will not automatically have band membership. In this respect, they will be different from their cousins, but this goes back to the question of balance and fairness. Giving band membership automatically by government fiat to all first-generation descendants would make a mockery of band control, of band membership. That is why I firmly believe that drawing the line on first-generation registration for status is fair and reasonable.

It is rare for governments, in proposing amendments, to redress past wrongs. However, in this instance I think to not do so would be to fail in the test of fairness. What we are learning, however, is that in dealing with the effects of past wrongs it is not always possible to remove all the residue of that wrong without creating new injustices and new problems. This is the situation before us, and that is why I have dealt with it in the way I have.

> Many spokespersons for bands and organizations have expressed concern that bands will be forced to accept large numbers of new members, and they fear that these people will flood the reserves which are already overcrowded, and I can understand their concern. I would like to remind them that the only people with the right to membership will be those who directly lost it. These people were band members previously. In most cases they spent their formative years on the reserves, and fairness demands that they be given back what they lost.
>
> (Minutes of Proceedings and Evidence of the Standing Committee, March 7, 1985, p. 12:7-12:9.)

[78] In summary, with respect to the matters at issue in these proceedings the key elements of the government's intentions with respect to these amendments were:

(a) the federal government retained control over the determination of Indian status. This was to reflect and recognise the special relationship between Indian people and the Government of Canada;

(b) the issue of Indian status was separated from the issue of band membership. Control over band membership was given to bands. The only role of the federal government with respect to band membership in the future was with respect to those bands who chose not to assume control over their own membership; and

(c) status was to be determined on a "totally non-discriminatory basis". Sex and marital status would no longer affect an individual's entitlement to registration.

[79] It is the plaintiffs' contention in these proceedings that the remedial efforts with respect to this last element were incomplete and that the registration provisions continue to discriminate on the basis of sex and marital status.

The *1985 Act* Registration Provisions

[80] The ***1985 Act*** was proclaimed on June 28, 1985, but made retroactive to April 17, 1985, the date when s. 15 of the ***Charter*** came into effect. The ***1985 Act*** preserved all of the registration entitlements that existed prior to April 17, 1985, and

established a new scheme of registration for those not previously entitled to be registered. Section 6 provides:

> *Persons entitled to be registered*
>
> 6. (1) Subject to section 7, a person is entitled to be registered if
>
> (a) that person was registered or entitled to be registered immediately prior to April 17, 1985;
>
> (b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
>
> (c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
>
> (d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
>
> (e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,
>
> (i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or
>
> (ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or
>
> (f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.
>
> *Idem*
>
> (2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

Deeming provision

(3) For the purposes of paragraph (1)(f) and subsection (2),

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a); and

(b) a person described in paragraph (1)(c), (d), (e) or (f) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision.

[81] Pursuant to s. 6, the categories of persons entitled to registration as Indians are:

(1) 6(1)(a): persons who were registered or entitled to be registered prior to April 17, 1985;

(2) 6(1)(b): members of bands declared by the Governor in Council after April 17, 1985;

(3) persons who were previously removed or omitted from the Register or from a band list prior to September 4, 1951, because:

(a) s. 6(1)(c):

(i) their mothers and paternal grandmothers were Indians (Double Mother clause) [s. 12(a)(iv)];

(ii) women who had married non-Indians [s. 12(1)(b)];

(iii) illegitimate children of Indian women who had been protested out [s. 12(2)];

(iv) women who married non-Indians and were enfranchised or commuted, and their children [s. 12(1)(a)(iii) pursuant to an order under s. 109(2) or equivalent];

(b) s. 6(1)(d): men and women enfranchised on application [s. 12(1)(a)(iii) pursuant to an order under s. 109(1) or equivalent];

(c) s. 6(1)(e):

(i) men and women enfranchised after spending five years out of Canada without permission [s. 13];
(ii) men and women enfranchised after being admitted to the clergy, practicing medicine or law, or obtaining a university degree [s. 111];

(4) s. 6(1)(f): people whose parents are or were entitled to be registered under s. 6 when they died; and

(5) s. 6(2): people with one parent entitled to be registered under s. 6(1).

[82] Section 6(1)(a) confirmed the registration of Indian men, their wives and descendants who, prior to 1985, fell within the definition of Indian under prior ***Indian Acts.*** Following the passage of the ***1985 Act***, and pursuant to s. 6, if someone entitled to registration pursuant to s. 6(1)(a) was married to someone who was not entitled to registration, their children would be entitled to registration pursuant to s. 6(1)(a) or s. 6(1)(f), depending on whether they were born before or after the coming into force of the ***1985 Act***. By contrast, the children of a person who was registered pursuant to s. 6(1)(c), would be registered pursuant to s. 6(2). If a person registered pursuant to s. 6(2) married a person not entitled to registration, their children would not be entitled to register as Indians. This is referred to as the "second generation cut-off". The following chart illustrates the operation of the second generation cut-off:

Indian man marries non-Indian woman		**Indian woman marries non-Indian man**	
Man	Woman [gains status]	Man [no status]	Woman [loses status]
Child #1 born status		Child #1 born [no status] (Jacob's position)	
---------- ***1985 Act*** comes into force ----------			
Man [6(1)(a)]	Woman [6(1)(a)]	Man [no status]	Woman [regains status, 6(1)(c)]
Child #1 [6(1)(a)] Child #2 born after ***1985 Act*** came into force [6(1)(f)]		Child #1 [6(2)] Child #2 born after ***1985 Act*** came into force [6(2)]	
----------Assume all children marry non-Indians----------			
Grandchild under Child #1 [6(2)] Grandchild under Child #2 [6(2)]		Grandchild under Child #1 [no status] Grandchild under Child #2 [no status]	
----------Assume all grandchildren marry non-Indians----------			
Great grandchild under Child #1 [no status] Great grandchild under Child #2 [no status]		Great grandchild under Child #1 [no status] Great grandchild under Child #2 [no status]	

[83] Prior to the 1985 amendments, there was no distinction between Indian registration or status, and band membership, with the limited exception of those on the "General List" who were registered under the ***Indian Act***, but not members of any band. As of 1981, there were only approximately 80 people registered on the General List: see Beauregard, A., DIAND Briefing Note, June 22, 1981.

[84] The 1985 amendments distinguished the concepts of registration and band membership. The rules governing registration are, as has been reviewed, set out in s. 6. The rules governing band membership are contained in ss. 10 and 11 of the ***1985 Act***. As stated at the outset, the plaintiffs do not bring any challenge with respect to the sections of the ***1985 Act*** dealing with band membership.

[85] Pursuant to the 1985 amendments, entitlement to membership in a band does not follow automatically from Indian status. Section 10 of the ***1985 Act*** provides bands with the ability to assume control of their own membership. For example, under the ***1985 Act***, bands that assumed control of their membership in the period between April 17, 1985, and June 28, 1987, are not required to accept into their band all those entitled to registration under s. 6 of the ***1985 Act***. It is therefore possible to be registered as an Indian and not be a member of a band. The terms of the membership codes of some bands illustrate this separation of status and membership: see the *Royal Commission Report* at c. 2, p. 43, and Clatworthy, S.*, Indian Registration, Membership and Population Changes in First Nations Communities* (Winnipeg, Four Directions Project Consultants, 2005) [***Clatworthy, 2005***].

[86] As of December 31, 2002, more than one-third of all Indian bands had adopted their own rules for membership and approximately 28 percent of those Bands are applying membership rules that differ significantly from the rules governing registration. Many Bands elected to exclude Indians with s. 6(2) status from initial membership resulting in a population of registered Indians who do not possess band membership: ***Clatworthy, 2005*** at pp. 12 and 14. Some bands employ membership rules that provide Band membership to persons who do not have registration status: ***Clatworthy, 2005*** at pp. 24 and 33.

[87] At present, nearly all of those who lack eligibility for Band membership are the descendants of women who lost their registration as a consequence of the prior ***Indian Act's*** rules concerning mixed marriages. Over the course of the next and

future generation(s), the non-eligible population is expected to grow rapidly and to also include many individuals who are the descendants of current members: ***Clatworthy, 2005*** at p. 41.

III. THE PLAINTIFFS AND THE PROCEEDINGS

Genealogical Background

[88] Sharon McIvor and Jacob Grismer are descendants of members of the Lower Nicola Indian Band. Prior to the passage of the ***1985 Act***, they understood that they could not be registered as Indians because they traced their Indian ancestry along the female line rather than the male line.

[89] Sharon McIvor's maternal grandmother was Mary Tom. Ms. Tom was born in 1888. Mary Tom's parents, the Enalks, were both Indians and members of the Lower Nicola Band. Mary Tom was an Indian pursuant to the ***Indian Act*** in force when she was born, the ***Indian Act***, R.S.C. 1886, c. 43 (the "***1886 Act***"), and a member of the Lower Nicola Band. Sharon McIvor's maternal grandfather was Jacob Blankinship, who was a man with no First Nations ancestors, and who did not fall within the classification of Indian pursuant to any ***Indian Act***. Ms. Tom and Mr. Blankinship were never married. They lived in a common law relationship. Ms. Tom and Mr. Blankinship were the parents of Susan Blankinship, Sharon McIvor's mother.

[90] Susan Blankinship was born on May 28, 1925. She died on October 30, 1972. Ms. Blankinship was never registered as an Indian under any ***Indian Act***.

Sharon McIvor testified that her understanding growing up was that her mother was not entitled to be registered because of her non-Indian paternity. Ms. McIvor's father was Ernest McIvor, who was born April 5, 1925. Susan Blankinship and Ernest McIvor were never married. They lived in a common law relationship.

[91] Ernest McIvor was of First Nations descent, but he was not registered as an Indian. Sharon McIvor testified that it was her understanding growing up that her father was not entitled to be registered. Ernest McIvor's mother was Cecelia McIvor. Cecelia McIvor was entitled to have been a member of a band. His father was Alexander McIvor, who was not of first Nations ancestry, and who was not registered as an Indian pursuant to any ***Indian Act***. Cecelia McIvor and Alexander McIvor were never married.

[92] Sharon McIvor, was born on October 9, 1948. Prior to 1985, she was not registered as an Indian pursuant to any ***Indian Act***. It was her understanding that, prior to the 1985 amendments to the ***Indian Act***, she could not be registered as an Indian pursuant to the ***Indian Act*** in force at her birth or as amended. Ms McIvor testified that she did not apply for registration prior to the 1985 amendments to the ***Indian* Act** because it was her understanding that she was not eligible for registration.

[93] Ms. McIvor married Charles Terry Grismer on February 14, 1970. Mr. Grismer was not of First Nations ancestry and he was not registered as an Indian pursuant to any ***Indian Act***. Upon her marriage to someone who was not entitled to be registered under the ***Indian Act***, Ms. McIvor lost entitlement to

registration pursuant to the ***1951 Act***.

[94] Charles Grismer and Sharon McIvor had three children, Jacob, born June 3, 1971; Jaime, born September 27, 1976; and Jordana, born February 6, 1983. The children could not be registered as Indians pursuant to the ***Indian Act*** then in force, because they were the legitimate children of an Indian mother and a non-Indian father.

[95] Ms. McIvor has another son, Payikeesik Beatty-Smith. Ms. McIvor adopted Payikeesik by custom when he was born. He is a registered Indian and a member of the Montreal Lake Band in Saskatchewan.

[96] At the outset of the action, Jaime and Jordana were also plaintiffs. However, on November 27, 2001, Teressa Nahanee, who is registered under s. 6(1)(a) of the ***1985 Act***, and Sharon McIvor, who was at that time registered under s. 6(2) of the ***1985 Act***, were granted an adoption order, as a result of which Jaime and Jordana were granted status under s. 6(1)(f) of the ***1985 Act***. Jaime and Jordana then withdrew from the action, by consent. Because of his age, Jacob Grismer was not eligible to be adopted.

[97] On April 2, 1999, Jacob Grismer married Deneen Joy Simon, a woman with no First Nations ancestry. They are raising two children, Jason, born November 9, 1993, and Christopher, born November 15, 1991. The following chart is a summary of the plaintiffs' family tree.

Paternal side		**Maternal side**	
Alex McIvor (non-Indian)	Cecelia McIvor (entitled to be a band member)	Jacob Blankenship (non-Indian)	Mary Tom (band member)
Ernest McIvor (born out of wedlock, never registered)		Susan Blankenship (born out of Wedlock – never registered)	
Sharon McIvor (born out of wedlock, married Charles Terry Grismer, a non-Indian)			
Charles Jacob Grismer (born in wedlock, married Deneen Simon, a non-Indian)			
Jason Grismer, Christopher Grismer			

Proceedings Regarding Registration

[98] On September 25, 1985, Sharon McIvor applied on her own behalf and on behalf of her children, including Jacob Grismer, to be registered as Indians pursuant to s. 6(1) of the ***1985 Act***. The application was made to the Registrar, the officer of the DIAND, who is in charge of the Indian Register [the "Register"] and the Band Lists maintained in DIAND, pursuant to the ***1985 Act***. This was the first application for registration made in relation to Ms. McIvor or her children.

[99] By letter dated February 12, 1987, the Registrar advised the Chairman of the Area Council, Nicola Valley Indian Administration, that he had concluded that Sharon McIvor was eligible for registration under s. 6(2) stating:

> I have the Certificate of Birth of Sharon Donna McIvor indicating that she was born on October 9, 1948, the child of Susan Mary Blankinship and Ernest Dominic McIvor. I have identified her mother as Susan Mary Blankinship who was entitled to be registered as an Indian with the Lower Nicola Band at the time of the applicant's birth. I also have the verification of Death Particulars indicating that she died on October 30, 1972 and that she was born on May 28, 1925, the child of Mary

> Tom and Jacob Blankinship. I have identified her mother as Mary Tom who was registered under Band No. 118 at the time of the applicant's mother's birth.
>
> Our records indicate that the name of Susan Mary Blankinship was deemed to have been omitted from the Band List for the Lower Nicola Band prior to September 4, 1951 because of non-Indian paternity. She would have therefore been entitled to have her name entered in the Indian Register under paragraph 6(1)(c) of the *Indian Act* and in the Lower Nicola Band List under paragraph 11(1)(c) of the *Indian Act* as she is a person whose name was deemed to have been omitted from the Lower Nicola Band List under a former provision of the *Indian Act* relating to the same subject matter as subsection 12(2) referred to in said paragraph 6(1)(c), the subject matter which is non-Indian paternity.
>
> As Sharon Donna McIvor is a person one of whose parents is entitled to be registered under subsection 6(1) of the *Indian Act*, she is entitled to be registered under subsection 6(2) of the *Indian Act*. I have therefore added the name of Sharon Donna McIvor to the Indian Registrar. Her entitlement to membership in the Upper Nicola Band is subject to the provisions of subsection 11(2)(b) of the *Indian Act*.
>
> [emphasis added]

[100] By letter of the same date, the Registrar advised Ms. McIvor of his conclusion with respect to her registration status and that her children were not eligible for registration, stating:

> I refer to your Application for Registration dated September 23, 1985.
>
> I am pleased to confirm that you are now registered as an Indian in the Indian Register maintained in this Department in accordance with paragraph 6(2) of the *Indian Act* under the name of Sharon Donna McIvor. Your entitlement to membership in the Lower Nicola Band is subject to the provisions of paragraph 11(2)(b) of the Act.
>
> Unless the band has assumed control of its membership by June 28, 1987, your name will be added to the Lower Nicola Band List on that date. Should the band assume control of its Band List prior to that date, you will have to apply to the band for membership.
>
> In reference to the registration of your children, there is no provision in the *Indian Act* for the registration of a person, one of whose parents is entitled to be registered under subsection 6(2) and whose other parent is not entitled to be registered as an Indian.

> As you have indicated that the father of your children is a non-Indian, I regret to inform you that your children are not eligible for registration.

[101] Ms. McIvor protested the decision pursuant to s. 14.2 of the ***1985 Act*** by letter dated May 29, 1987. In that letter, Ms. McIvor states in part:

> I am eligible for registration under section 6(1)(c) and my children are eligible to be registered under section 6(2). As I explained in my original application dated September 23, 1985 I am the illegitimate daughter, born before 1951, of an Indian woman eligible for status. My mother, Susan Blankinship also known as Susan Earnshaw and Susan McIvor, was the illegitimate daughter of Mary Tom. Susan born in 1925 was eligible for registration. Susan died in 1972 having never married. She did, however, maintain two common-law relationships during her lifetime. One of very short duration, in the early 1920's with George Earnshaw, a member of the Upper Nicola Band, and one from mid 1940's to her death with my father Ernest McIvor.

[102] The Registrar confirmed his decisions by letter dated February 28, 1989, stating:

> I have a copy of your Certificate of Birth indicating that you were born on October 9, 1948, the child of Susan Mary Blankinship and Ernest Dominic McIvor. I also have the verification of Death Particulars of your mother, Susan Mary Blankinship, indicating that she died on October 30, 1972 and that she was born on May 28, 1925, the child of Mary Tom and Jacob Blankinship. I have identified her mother as Mary Tom who was registered under Band No. 118 at the time of your mother's birth.

These Proceedings

[103] The plaintiffs appealed the Registrar's decision pursuant to s. 14.3 of the ***1985 Act*** by writ of summons dated July 18, 1989, filed in County Court. Ms. McIvor sought an order that she be registered under s. 6(1)(c) of the ***1985 Act***. Mr. Grismer sought an order that he be registered under s. 6(2) of the ***1985 Act***.

[104] On May 13, 1994, the plaintiffs filed a statement of claim in the British Columbia Supreme Court invoking ss. 15 and 28 of the ***Charter*** alleging *inter alia* that First Nations women have been discriminated against on the basis of sex in relation to registration provisions. Paragraph 34 of the statement of claim states:

> First Nations women have historically been discriminated against on the basis of sex. For example, pursuant to the various *Indian Acts*, prior to 1985, First Nations women registered as Indians who married men who were non-Indians lost their Indian status, band membership, and Indian rights. In contrast, men registered as Indians who married women who were not registered as Indians not only retained their status and rights under the *Act* but the wives of all such men (including non-First Nations women), were deemed to be Indian under the *Act* (*1970 Act*, section 11(1)(f)). [Underlining added.]

[105] The defendants filed a statement of defence on March 29, 1995, in which they admitted the allegations of fact contained in paragraph 34 of the statement of claim.

[106] The plaintiffs filed amended statements of claim in 2000 and 2001. They then filed notices of constitutional question dated January 28, 2003, and later on January 3, 2006.

[107] The resulting action combined a statutory appeal from the decision of the Registrar, dated February 28, 1989 [the "Decision"], brought pursuant to the ***1985 Act***, with an action seeking remedies under the ***Charter***.

[108] In July 2003, the plaintiffs brought a notice of motion seeking to have the matter proceed by way of summary trial pursuant to Rule 18A. Then in April 2005, the proceeding came under case management at the request of the plaintiffs. A hearing date for the 18A application was set for January 30, 2006.

[109] On October 25, 2006, the defendants applied for leave to file an amended statement of defence raising new defences: namely Sharon McIvor's marrying out and the illegitimacy of Sharon McIvor and Susan Blankinship. The defendants were granted leave to amend by consent.

[110] The defendants also objected to the form of proceedings, taking the position that ***Charter*** remedies cannot be granted in a statutory appeal. The plaintiffs discontinued the statutory appeal in response to that objection.

[111] The defendants obtained an adjournment of the summary trial on the basis that they needed time to undertake additional work to respond to "new allegations": see reasons indexed at 2006 BCSC 96.

[112] The plaintiffs, with leave, filed a further amended statement of claim dated February 6, 2006, addressing the marrying out and illegitimacy arguments. The defendants then filed an amended statement of defence dated July 26, 2006, disputing the standing of the plaintiffs to challenge the ***1985 Act*** on the basis of illegitimacy.

[113] Shortly before trial, the defendants conceded that the plaintiffs were entitled to the relief that they had been seeking in the statutory appeal and withdrew their objection to the form of proceeding that combined the statutory appeal with an action seeking remedies under the ***Charter***. The defendants suggested that the appeal be reinstated. A further amended statement of defence dated September 1, 2006, was filed reflecting the concession.

[114] The Attorney General (Canada) then applied to have the proceedings struck pursuant to Rule 19(24) on the basis that it was plain and obvious, given the defendants' recent concession, that the issue was moot and that the plaintiffs had no interest in the relief sought. That application was dismissed in reasons dated September 6, 2006.

[115] The plaintiffs then applied, with consent, to reinstate the statutory appeal. At the commencement of the trial, on application of the plaintiffs and with the consent of the defendants, I ordered the reinstatement of the plaintiffs' statutory appeal brought pursuant to s. 14.3 of the ***1985 Act*** and restored the Registrar as a party. In reasons indexed at 2007 BCSC 26, I allowed the appeal varying the decision of the Registrar, ordered that Sharon Donna McIvor is entitled to be registered as an Indian pursuant to s. 6(1)(c) of the ***1985 Act***, and that Charles Jacob Grismer is entitled to be registered as an Indian pursuant to s. 6(2) of the ***1985 Act***.

[116] The essence of those reasons was that Mary Tom, Sharon McIvor's maternal grandmother, was a member of the Lower Nicola Indian Band. Susan Blankinship, Ms. McIvor's mother, was the illegitimate daughter of a female band member. The defendants conceded that Susan Blankinship was therefore entitled to be registered pursuant to s. 11(e) of the ***1951 Act*** unless the Registrar had declared that the child was not entitled to be registered because of non-Indian parentage. There was no evidence that the Registrar made such a declaration. Accordingly, Ms. Blankinship was entitled to be registered pursuant to s. 11(e) of the ***1951 Act***.

[117] The defendants conceded further that Ms. Blankinship was entitled to have

been a member of the Lower Nicola Indian Band. The defendants conceded that she was therefore, pursuant to s. (2)(1)(j) of the ***1951 Act***, a member of a band. It follows that Ms. McIvor is the illegitimate child of a female band member. The defendants conceded that Sharon McIvor was also entitled to registration pursuant to s. 11(e) of the ***1951 Act***, unless the Registrar had declared that the child was not entitled to be registered because of non-Indian parentage. As was the case with Ms. Blankinship, there was no evidence that the Registrar made such a declaration in relation to Sharon McIvor. Accordingly, Sharon McIvor was entitled to be registered as an Indian pursuant to s. 11(e) of the ***1951 Act***.

[118] Ms. McIvor then lost her entitlement to registration under s. 12(1)(b) of the ***1951 Act*** when she married Mr. Grismer, who was not an Indian. The defendants conceded that Ms. McIvor was, therefore, a person whose name was omitted or deleted from the Indian Register pursuant to s. 12(1)(b) of a former provision of the ***Indian Act*** and, that she is therefore entitled to registration pursuant to s. 6(1)(c) of the ***1985 Act***. It follows that Jacob Grismer as the child, one of whose parents is entitled to registration under s. 6(1), is entitled to registration under s. 6(2) of the ***1985 Act***.

[119] The same result is also obtained from a different route. The defendants conceded that Ernest McIvor's mother, Cecelia McIvor, was entitled to have been a member of a band and therefore would have been entitled to be registered as an Indian under the provisions of 11(b) of the ***1951 Act***. Ernest McIvor was the illegitimate son of a female band member and therefore he was also qualified to be a band member and to be registered pursuant to s. 11(e) of the ***1951 Act*** unless the

Registrar declared that the father of the child was not an Indian. There was no evidence that the Registrar made such a declaration. Accordingly, Ernest McIvor was entitled to be registered as an Indian and to be a member of the band under the ***1951 Act***.

[120] The defendants conceded that because of her father's entitlement to be a band member, Ms. McIvor would have been entitled to membership in her father's band and registration as someone entitled to be a member of a band pursuant to s. 11(b) of the ***1951 Act***. She then lost her entitlement to registration pursuant to s. 12(1)(b) of the ***1951 Act*** upon her marriage in 1970 to someone who was not entitled to be registered.

[121] The defendants conceded that Ms. McIvor was, on this basis as well, a person whose name was omitted or deleted from the Indian Register pursuant to s. 12(1)(b) of a former provision of the ***Indian Act***, and that she is therefore entitled to registration pursuant to s. 6(1)(c) of the ***1985 Act***. It follows that Jacob Grismer, as the child, one of whose parents is entitled to registration under s. 6(1), is entitled to registration under s. 6(2) of the ***1985 Act***.

[122] There is a certain irony to the defendants' present position. The defendants' concessions were based upon the fact that the exclusions from registration had never been triggered because there had never been a declaration by the Registrar regarding paternity in the case of either Susan Blankinship or Sharon McIvor. Their concession is consistent with the provisions of the relevant versions of the ***Indian Act***. However, I think it is fair to say that the Registrar's initial response to the

plaintiffs' applications for registration reflected what the response would have been had an application been made under the previous legislation. This is consistent with the plaintiffs' understanding that they were not entitled to registration. There were no applications made for registration of Susan Blankinship or Sharon McIvor prior to the amendments reflected in the ***1985 Act***. If they had applied prior to 1985, they almost certainly would have been refused.

IV. IMPORTANCE OF REGISTRATION

[123] Prior to the 1985 amendments to the ***Indian Act***, registration as an Indian was associated with a number of consequences both tangible and intangible. Registration as an Indian was linked in all but a few cases to band membership, to entitlement to live on a reserve, and to the benefits provided by the federal government to persons registered as Indian. The tangible benefits included the benefit of expenditures of Indian moneys, the use and benefit of lands in a reserve, the possession of reserve land allotted to the Indian by the band council, and the exemption from taxation of the interest of the Indian in reserve lands and personal property situated on a reserve.

[124] Persons who were registered as Indians were entitled to other benefits including eligibility for federally funded programs and assistance, such as non-insured health benefits and post-secondary education funding.

[125] When a woman who was registered as an Indian married a non-Indian and lost her status, she was forced to leave her home and her reserve. She was required to divest herself of any property she owned on the reserve and was

precluded from inheriting reserve lands. She could not pass her status on to her children and so her children could not be registered as Indians. Even if she subsequently divorced, she could not return to the reserve or even be buried on the reserve: see *Royal Commission Report* at c. 2, pp. 21-23.

[126] The absence or loss of status resulted in a form of banishment from the Aboriginal community. Ms. McIvor testified about the pain that she experienced because of this legal banishment. She described being barred, because she was not registered as an Indian, from participating in important cultural activities and in traditional activities such as hunting, fishing, and gathering. She stated, regarding anything that happened on the reserve, in the traditional territory, ceremonies, gatherings and the like "… that status made the difference. We were just not welcome to go."

[127] Ms. McIvor deposed that:

> For my siblings and me it was lonely and painful to be excluded from the Indian community on the one hand and to be the only Indian children in any of the school, social, and recreational activities that we attended on the other.
>
> My family and I suffered various forms of hurt and stigmatization because we did not have status cards. For example, members of my family wanted to observe our traditional lifestyle including the harvesting of berries, roots, and hunting and fishing. In fact, my father and my siblings and I did our best to engage in these traditional activities. But because we lacked status cards we were required to do it covertly.
>
> I remember sneaking down to the Fraser River to get salmon, which was a major traditional food source, which we required year round. My siblings and I were involved in packing the fish. This too had to be done secretively. On more than one occasion my father was arrested for hunting or fishing, and his hunting guns and trucks were confiscated. It was stigmatizing to be the daughter of someone who

> had been criminalized, and for all of us in the family it was demeaning to have to sneak around to exercise our Aboriginal rights.
>
> Each fall Indian people catch Kokanee fish in the Quilchena Creek that runs from Douglas Lake into Nicola Lake. Status Indians were allowed to do this. Our family could not do this for two reasons: it was illegal because we were non-status Indians and we faced the danger of being charged. But as well because the fishing took place on the Upper Nicola Reserve, we could be denied access by our own people. We were confronted by members of the Indian community who told us to leave the reserve because we were not status Indians. They said that we were not Indians because we did not have status cards.

[128] Ms. McIvor described being made to feel unwelcome at important ceremonies such as marriages, funerals, and healing ceremonies. She deposed:

> It also affected me profoundly. It is hard to describe just how much it hurts to be in a place where you are told that you do not belong when it is the home of your ancestors. It was deeply upsetting to my mother which added to my distress.
>
> Although I am now able to live on the Lower Nicola Reserve, I have chosen not to do so because of the hurt of so many years of mistreatment.
>
> The sense of not belonging to the Indian community because of not having Indian status has also extended to other socially and culturally important activities, where participants are not fully accepted unless they have status.
>
> For example, as a non-status Indian I felt unwelcome to participate in Aboriginal healing ceremonies. When I took my children to the annual Aboriginal Christmas party, there were no presents under the community tree for them because they were non-status Indians. There are recognition ceremonies for young people when they graduate from high school. When my children graduated, there were no recognition ceremonies for them because they are non-status Indians. Through incidents such as these I was made to feel the stigma that is attached to Indian women who have non-status children.

[129] At trial, she described the impact this had upon her:

> 83 Q How did you feel about your treatment by members of the Aboriginal community?

> A Well, I think I was hurt mostly, and angry, hurt and angry. It just didn't seem fair, it didn't seem right that – that we couldn't be part of the community.

[130] Jacob deposed that he was excluded from the annual all Native hockey tournament because he did not have Indian status. He was allowed to play only in his senior year, when his mother acquired status. The students whose parents were status Indians received funding for their registration fees in athletic activities. Jacob's parents had to pay these fees, at some struggle.

[131] Jacob deposed that as he was growing up, he wanted to participate in traditional hunting and fishing activities. When he was in high school, he sometimes accompanied friends or relatives who had Indian status on fishing trips to the Fraser River. However, because he did not have status, he could only pack the fish that others caught. He was never taught the traditional fishing and hunting skills such as how to use a dip net, and so feels a great sense of loss.

[132] The intangible aspects of status relate to a sense of cultural identity. Despite the imposition of the ***Indian Act*** regimes, the original First Nations concepts of identity have survived and remain a powerful source of cultural identity. This is vividly illustrated both in the testimony of Ms. McIvor and that of many of those who testified before the Standing Committee. As but one example, Donna Tyndell testified before the Standing Committee on September 9, 1982, that her real name is Makh-wah-Lo-Gwa. She is from the Kwawkewith Nation, a member of the Eagle Clan. She regards herself as a member of the Kwawkewith Nation.

[133] However, the concept of Indian, has come to exist as a cultural identity

alongside traditional concepts. The concept of Indian has become and continues to be imbued with significance in relation to identity that extends far beyond entitlement to particular programs. This too was evident both in the testimony at this trial and from the testimony given before the Standing Committee.

[134] The *Royal Commission Report* at c. 2, p. 23 stated that, "the *Indian Act* has created a legal fiction as to cultural identity." The reference to legal fiction is, in my respectful view, an apt reminder of the fact that the concept did not emanate from the Aboriginal people, but was an artificial construct created by the colonists and imposed upon the Aboriginal people. However, the description of the concept as a fiction should not be taken to suggest that the concept lacks meaning or substance. On the contrary, is evident from the testimony of Sharon and Jacob McIvor, and from that given before the Standing Committee, that this legal fiction has become an important aspect of cultural identity.

[135] The strength and significance of this identity is exemplified in the testimony of Ms. Jane Gottriedson, the President of the Native Women's Association of Canada, given before the Standing Committee, September 9, 1982.

> Discrimination based on sex is, of course, contrary to the *Canadian Bill of Rights* and now contrary to the *Charter* contained in the *Canadian Constitution Act, 1981*. Discrimination based on sex goes against international covenants which Canada has signed. It is therefore within the realm of human rights protection. This is the federal government's primary interest, and one which has caused this nation so much embarrassment. If a denial of Indian rights to a certain segment of Indian women were not contrary to the human rights principle of equality of the sexes, there would be no keen interest in this issue.
>
> To Indian women, the issue has never been solely one of a denial of

> human rights, but a denial through sex discrimination of Indian rights to those Indian women who have married a non-Indian.
>
> The first concern of Indian women is that they have been denied their birthright. They have been denied the right to call themselves Indian. They have been denied their nationality. By birth and by blood, Indian women are a part of the First Nations of Canada. It is not so important how or in what manner they have been denied their nationality; what is important is that they have been denied this right. It so happens that Indian women have been systematically discriminated against on the basis of their sex in federal Indian acts since 1869.
>
> However, Indian women are not merely saying that they do not want to be discriminated against on the basis of sex; what they have been saying is that they do not want to be denied their birthright for any reason. Indian women are as aware as Indian men that Indians are specifically mentioned in the *British North America Act*, now called the *Canada Act*. Indian women are as aware as Indian men that certain rights flow to Indians in Canada because of the Constitution of this country. They will not accept any recommendation which continues to deny Indian women the same rights enjoyed by Indian men. Equality of the sexes is an issue here because the federal government, through the *Indian Act*, chose to discriminate against Indian women and deny them their heritage because they married non-Indians. The bottom line for Indian women in the country is that by birth and by blood they are Indians and will not accept any proposal which continues to deny Indian women this recognition. There is a need here to distinguish between human rights and Indian rights.
>
> (Standing Committee, September 9, 1982; pp. 2:37-2:38.)

[136] Sharon McIvor deposed that in her experience being registered as an Indian reinforced a sense of identity, cultural heritage and belonging associated with Indian status. She stated in her testimony that:

> 121 Q Has your – the experiences that you have described of growing up without status had any effect on your identification as First Nations?
>
> A I have never doubted my identification as an Aboriginal person, and I have never – I have never denied that I was of Aboriginal ancestry. The status itself, the official recognition is a very significant piece of that, very significant piece.

And see *Impacts of the 1985 Amendments to the Indian Act (Bill C-31)* (Ottawa:

Indian and Northern Affairs Canada Summary Report, 1990) at p. ii; and *Royal Commission Report* at c. 2, p. 22-23 and p. 49.

[137] Jacob deposed that while he was growing up he was hurt to be treated as if he was not a "real Indian" by members of the Aboriginal community because he did not have status. He believed that he was a "real Indian", but the exclusion caused him to doubt who he was and to make him feel as if he did not belong anywhere. He felt inferior to his cousins who had Indian status, and felt like an outsider in his own family.

[138] Ms. McIvor's observations about the importance of registration with respect to a sense of identity were echoed in the *Royal Commission Report* at pp. 22-24, which reported that the Department of Indian and Northern Affairs conducted a survey of 2,000 ***Bill C-31*** registrants, and almost two-thirds of those canvassed reported that they had applied for Indian status for reasons of identity or because of the culture and sense of belonging that it implied.

[139] The exclusion of women from registration as Indian also had an impact on the cultural life of Aboriginal communities. Ms. McIvor deposed that:

> It has been my experience that the exclusion of First Nations women pursuant to previous versions of the *Indian Act* had a negative impact on the cultural flourishing of Aboriginal communities which, for purposes of passing on Indian languages and culture heritage, require the participation in their communities of women and their offspring who possess the knowledge of Indian languages and culture.

[140] Ms. McIvor testified that even though she now is entitled to registration, the experience of rejection left an ongoing legacy:

120 Q Has your experience of rejection by the Indian community had any ongoing impact on you?

A The division that happened when I was a child and as I grew up by not being accepted by the Indian community has had a long outstanding effect for me. It was constant rejection, be it going down to attend a funeral, going down to attend my niece's graduation or anything like that, it was a clear divide, and a lot of mean things that were said, it's hard to sort of just put that all behind because magically one day here I am, I have my status and, okay, now you're welcome to go on your home territory without that kind of rejection. And for me it had long – I don't know, I think there may be a bit of – a lot of hurt, a lot of hurt, and the rejection very deep felt, because as a kid you have no idea why, and then when you get older and you realize that why, and then the why doesn't make any sense. It has affected my relationship with my community to a certain degree. It's better that I'm welcome now, but I don't know if the divide will ever be totally healed or that hurt that happened will be totally gone.

[141] Although under the ***1985* Act** registration as an Indian, or status, has now been separated from band membership and entitlement to live on a reserve, registration continues to have significant tangible benefits. Ms. McIvor deposes that as a status Indian, she is exempt from Provincial Sales Tax and the Goods and Services Tax on purchases of goods sold to her on a reserve, regardless of whether or not she is a member of the band to whom the reserve belongs. She is exempt from the requirement to pay income tax on income earned on reserve property. She is entitled to apply for non-insured health benefits and post-secondary education funding.

[142] In Aboriginal communities registration status continues to carry significance that is independent of membership in a particular band. Currently Sharon McIvor is raising a child who is a status Indian, but not a member of the Lower Nicola Band.

Payikeesik Beatty-Smith, born January 12, 1998, is a member of the Montreal Lake Band. He lives with Sharon McIvor, in Merritt. Although he is not a member of the Lower Nicola Band, because he has Indian status, he is permitted to attend the Lower Nicola Band School, and the Lower Nicola Band automatically gives Payikeesik access to the full range of educational and social benefits provided through the school including a lunch programme, access to play therapy, and counselling. Sharon McIvor's other children did not have access to these benefits because they did not have Indian status.

[143] The intangible consequences of registration also continue. Ms. McIvor described her personal experience of the intangible benefits of being registered. Sharon McIvor was encouraged by the passing of ***Bill C-31*** because she thought that at last the exclusion, loss of cultural connection, and erosion of her identity and sense of self-worth that she had felt at a non-status Indian would come to an end. Gaining formal recognition of her status has been important to her. It is affirming, and there is no doubt, that she is more accepted in her community than she was previously. She is able to attend ceremonies and other events in her community and feels as though she belongs. It was her testimony that being registered made a big difference in her acceptance in Aboriginal communities:

> 128 Q And does having status make a – make any difference in your dealings with Aboriginal people now?
>
> A Absolutely. It's actually this card has had a profound affect on my recognition, and it's – for me it's kind of sad, but true that I have one of these it makes a difference, not only at home, but if I go to any – I have spent time up in Haida Gwaii, for instance, and I've worked up there in their community Legal Aid clinic, and having the status card

> makes me more acceptable, being registered makes me more acceptable, and it's – it's really sad. I find it sad. It's quite profound that that magic number that I got actually makes me more acceptable.
>
> 129 Q Is it that you have status or that you are a band member that makes a difference in your dealings with Aboriginal people?
>
> A It's the recognition, the official recognition that I'm an Indian, and that status.

V. RETROSPECTIVITY

[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.

[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] 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] 2 S.C.R. 595 at para. 40, a right whose purpose is to protect against an ongoing 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***.

VI. SECTION 15

Introduction

[159] Section 15(1) of the ***Charter*** provides:

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

[160] The Supreme Court of Canada in ***Law v. Canada (M.E.I.)***, [1999] 1 S.C.R. 497 at 548-49 [***Law***] stated a three-stage test to guide the analysis of a s. 15(1) challenge:

> 1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take account of the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
> 2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
> 3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of promoting the view that the individual is less capable or worthy of recognition as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[161] With respect to the third question, the court is to consider contextual factors,

such as:

> (a) pre-existing disadvantage;
> (b) correspondence between the distinction and the claimant's characteristics or circumstances;
> (c) ameliorative purposes or effects; and
> (d) the interest affected.
>
> (***Law*** at 550-582.)

[162] These contextual factors are to be considered from a 'subjective-objective' perspective. The relevant viewpoint is that of "the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant": ***Law*** at 533.

[163] Women's constitutional equality rights are buttressed by s. 28 of the ***Charter*** which states:

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

[164] The plaintiffs submit that s. 28 was included in the ***Charter*** specifically to make clear that the equality of women is a fundamental constitutional principle. The language of "notwithstanding" makes this the strongest of the ***Charter*** sections of general application: see Katherine de Jong, "Sexual Equality: Interpreting Section 28", in Anne Bayefsky and Mary Eberts eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) at 510-512, and "Summary of Conference Resolutions" [Summary of Conference Resolution] in the same book at 643-644.

[165] The plaintiffs submit that the sex equality rights of Aboriginal women are

further affirmed by s. 35(4) of the ***Constitution Act, 1982***, being Schedule B to the ***Canada Act 1982*** (U.K.), 1982, c. 11 (the "***Constitution Act, 1982***"), which provides that:

> Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[166] The plaintiffs submit that the amendments to the ***Indian Act*** regime contained in the ***1985 Act***, ss. 6(1) and (2), discriminate on the grounds of sex, or a combination of sex and marital status, in that the two-tiered system of entitlement established under the amendments provides preferential s. 6(1)(a) entitlement to persons born prior to April 17, 1985, who claim entitlement to registration as status Indians through the male line of descent, and through marriage to a male Indian. In contrast, the ***1985 Act*** withholds full s. 6(1)(a) registration status from women who married men who lacked Indian registration status, and withholds full s. 6(1)(a) registration status from direct descendants born prior to April 17, 1985, who claim entitlement through the female line of descent, including through descent from an Aboriginal woman who married a non-Indian man.

[167] The plaintiffs submit that the purpose of the 1985 amendments was to eliminate discrimination. However, the ***1985 Act*** did not achieve its goal. The ***1985 Act*** is incomplete remedial legislation. Instead of eliminating discrimination, it transferred and incorporated the preference for male lineage, legitimacy, and marriage to a male Indian, into the new regime.

[168] The plaintiffs submit that preserving the privileged position of those who

acquired registration status under the discriminatory provisions of previous ***Indian Acts*** is not a juristically valid purpose for the ***1985 Act***. Rather, it is a discriminatory purpose. A discriminatory purpose is, they submit, always inconsistent with the ***Charter***.

[169] Discriminatory effects also constitute a violation of s. 15. Further, exclusionary effects that undercut the purpose of a scheme indicate discrimination. The Supreme Court of Canada has explained:

> If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular group.
>
> ***Auton (Guardian ad litem of) v. British Columbia (Attorney General)***, [2004] 3 S.C.R. 657 at para. 42 [***Auton***].

[170] The ***1985 Act*** is a comprehensive code for the determination of Indian status, based on Indian ancestry. It is the plaintiffs' submission that the continuation and perpetuation of discrimination in the ***1985 Act*** "undercuts the overall purpose" of the ***1985 Act*** amendments, namely to eliminate discrimination from the scheme. More particularly, s. 6 of the ***1985 Act*** provides preferential entitlement to registration through the male line of descent, and through marriage to a male Indian. This is accomplished by means of s. 6(1)(a) which preserves "full" status for male Indians who married non-Indian women, and for persons born prior to April 17, 1985, who claim entitlement to registration through the male line of descent and through marriage to a male Indian.

[171] Section 6 withholds full s. 6(1)(a) registration status from Sharon McIvor and

other women who married non-Indian men. The ***1985 Act*** also withholds full s. 6(1)(a) registration status from Jacob and other direct descendants who claim entitlement through the female line of descent, including through descent from an Aboriginal woman who married a non-Indian man. In doing so, s. 6 draws distinctions that are based on personal characteristics, namely, sex and or a combination of sex, and marital status.

[172] Before s. 6 of the ***1985 Act*** came into force, if an Indian man married a woman not entitled to registration, his wife would have become entitled to registration as an Indian. If the couple had children, the children would have been entitled to registration. Once the ***1985 Act*** came into force, pursuant to s. 6 of the ***1985 Act***, the husband, wife and children would be entitled to registration pursuant to s. 6(1)(a). If the couple did not have children prior to the ***1985 Act*** coming into force, but had children after s. 6 came into force, those children would be entitled to be registered under s. 6(1)(f) because both parents were entitled to be registered as Indians. If, after the ***1985 Act*** came into force, any of the children married persons not entitled to registration, their children would be entitled to registration under s. 6(2) of the ***1985 Act***.

[173] If, before s. 6 of the ***1985 Act*** came into force, an Indian woman married a man not entitled to registration, she lost her entitlement to registration. The children of the marriage were not entitled to registration. After the ***1985 Act*** came into force, she became entitled to registration pursuant to s. 6(1)(c). Her children were entitled to registration pursuant to s. 6(2). If, after the ***1985 Act*** came into force, any of the children married persons not entitled to registration, their children would not be

entitled to registration. This is, in fact, the situation of the plaintiffs.

[174] The defendants' submit that there is no discrimination in either purpose or effect. It is the defendants' submission that, once the proper comparator group is applied, it is clear that the plaintiffs have not been denied a benefit given to others. The defendants submit further that any differences in treatment are not based on an enumerated or analogous ground. Finally, it is the defendants' submission that the impugned legislation does not demean the dignity of the plaintiffs.

[175] The defendants submit that s. 28 does not function independently of s. 15 and the other rights and freedoms under the ***Charter***. Section 28 serves an interpretive, confirmatory and adjunctive function. It does not create a separate equality rights regime, but ensures that all ***Charter*** provisions are applied without discrimination on the basis of sex: see ***R. v. Hess, R. v. Nguyen***, [1990] 2 S.C.R. 906 at paras. 40-47 and ***Campbell v. Canada***, 2004 TCC 460 at para. 80, [2005] 1 C.T.C. 2020, reversed on other grounds 2005 F.C.A. 420.

Benefit of the Law

[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***, [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] 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, [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] 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 essence or significance of the concept.

[194] The defendants further submit that the remedy the plaintiffs seek, to be registered under s. 6(1)(a) of the ***1985 Act***, is not possible since that would require that both parents are registered as Indians. Accordingly, the defendants submit, since the remedy they seek is impossible, they have not been deprived of a benefit of law. The defendants submit that the plaintiffs want Mr. Grismer to be entitled to be registered under s. 6(1)(a), just like his cousin. However, when the identity of a child's mother and father are both known, being registered under s. 6(1)(a) means that both parents are registered as Indians (unless the child was illegitimate and entitled to be registered under a pre-***1985 Act***). Mr. Grismer has one Indian parent and one non-Indian parent. As a result, he cannot, argue the defendants, be registered under s. 6(1)(a) without violating the ***1985 Act*** registration provisions.

[195] The defendants submit that to register Mr. Grismer under s. 6(1)(a) by retroactively entitling his father to registration, would contradict Parliament's decision to end the practice of having marriage affect entitlement to registration because his father would become entitled to be registered by virtue of having married someone who was entitled to be registered. It would also require the amendment of a

provision which is no longer in force and which was repealed at the time that s. 15 of the ***Charter*** came into force. Moreover, it would, argue the defendants, seem arbitrary to register Mr. Grismer under s. 6(1)(a) while not permitting all other children having only one Indian parent to be registered pursuant to s. 6(1)(a).

[196] It appears to me that this submission misconstrues the nature of the remedy sought by the plaintiffs, which is to be registered pursuant to s. 6(1)(a) as they propose that it be amended. That would not require that Mr. Grismer's father be registered as an Indian. It would also not, in my view, contradict Parliament's decision to end the practice of having marriage affect the entitlement to registration. The defendants' submission confounds two aspects of the earlier ***Indian Acts***. One aspect was that women who married Indian men became entitled to registration. A separate aspect is that the children of male Indians are entitled to registration. What Mr. Grismer seeks is not to have his father retroactively registered as an Indian, but to be treated for purposes of registration in the same manner as if he were the child of a male Indian. This, in my view, does not engage the question of the acquisition or loss of status through marriage.

[197] In any event, it is not appropriate, as I stated earlier, to work backwards from the relief sought. Rather the focus at this stage should be on the substance of the claim. The particular relief sought by a plaintiff may not be granted or found to be appropriate. That fact however does not invalidate an otherwise meritorious claim.

[198] In summary, I conclude that registration status and the ability to transmit status to one's children is a benefit of the law, and that the claim, with respect to

each plaintiff, is for a benefit provided by law.

Were the Plaintiffs Denied a Benefit that was Granted to a Comparator Group?

[199] The first step is the identification of the appropriate comparator group. In that regard, the Supreme Court of Canada has held that:

> 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 SCC 65 at para. 23, [2004] 3 S.C.R. 357.

[200] The Court has explained further that it is necessary to look beyond the words of the challenged legislative provision. In ***Auton***, the Court stated:

> As pointed out in Hodge, supra, at para. 25:
>
> > ...the legislative definition, being the subject matter of the equality rights challenge, is not the last word. Otherwise, a survivor's pension restricted to white protestant males could be defended on the ground that all surviving white protestant males were being treated equally.
>
> We must look behind the words and ask whether the statutory definition is itself a means of perpetrating inequality rather than alleviating it. Section 15(1) requires not merely formal equality, but substantive equality: *Andrews*, *supra*, at p. 166.
>
> (***Auton*** at para. 40).

[201] The natural starting point is the claimant's view; see ***Law*** at para. 58. However, as the Supreme Court of Canada noted in ***Hodge***, the correctness of that choice is for the court to determine: see ***Hodge*** at para. 21.

[202] The plaintiffs submit that the remedial objective of the ***1985 Act*** necessarily

requires a comparison between the group that was privileged by the discrimination and the group that was denied equality. The ***1985 Act*** denies equality, the plaintiffs submit, to those who, like Jacob Grismer, claim full registration status through the female line of descent, and to matrilineal progenitors who, like Sharon McIvor, married out. Regarding this unequal treatment of female Indians and their children, the plaintiffs submit that the appropriate comparator group for the s. 15 analysis is male Indians, including those who married out, and children of male Indians who claim entitlement to registration through the male line of descent, who are entitled to s. 6(1)(a) status under the ***1985 Act***.

[203] The plaintiffs submit that this satisfies the criteria identified in ***Hodge*** for determining the correct comparator group. Sharon McIvor and Jacob mirror the characteristics of Indians eligible for s. 6(1)(a) status except that s. 6(1)(a) has a requirement for male Indian lineage (or marriage to a male Indian) embedded in it; and that requirement excludes the plaintiffs from s. 6(1)(a) status. The plaintiffs are within the universe of people potentially entitled to s. 6(1)(a) status but for the patriarchal definition of Indian that has been carried forward into the ***1985 Act***: see ***Hodge***, *supra*.

[204] The logic of the plaintiffs' claim is consistent with that of the plaintiffs in ***Corbiere*** in which the claimants were comparable to those who were favoured by the legislation except that they lived off reserve. It is also similar to that of the claimants in ***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur***, [2003] 2 S.C.R. 504 [***Martin and Laseur***] who were wrongfully excluded from the class of potential claimants

based on a prohibited ground of discrimination. In every way relevant to the determination of Indian status, the plaintiffs are comparable to those who are favoured by s. 6(1)(a) except that Jacob is the descendant of an Indian woman rather than an Indian man, and Sharon McIvor is an Indian mother rather than an Indian father.

[205] The defendants submit that Ms. McIvor and Mr. Grismer's choice of comparator being the descendants of male registered Indians, in other words, Indians born before 1985 and now registered under s. 6(1)(a), is not the appropriate comparator group for Ms. McIvor or Mr. Grismer. The defendants submit that the plaintiffs' comparator group selection is inconsistent with the reasoning of Mr. Justice Binnie in ***Granovsky v. Canada (Minister of Employment and Immigration)***, [2000] 1 S.C.R. 703 [***Granovsky***].

[206] The plaintiff in ***Granovsky*** was temporarily disabled, and sought access to a "drop-out" provision in calculating his eligibility for a permanent disability pension under the ***Canada Pension Plan***, R.S.C. 1985, c. C-8 (the "***Pension Plan***"). The ***Pension Plan*** required people to have made contributions for a certain number of years before the disability claim (five out of the last ten years or two of the last three years). The "drop-out" provision allowed people with serious and permanent disabilities to discount years in which they were disabled when assessing their recent contributions.

[207] Mr. Granovsky argued that able-bodied people were the appropriate comparator group and alleged that his inability to meet the required contribution level

for a permanent disability pension – something able-bodied persons could generally achieve – discriminated on the basis of disability.

[208] Mr. Justice Binnie found that Mr. Granovsky had identified the wrong comparator group, since able-bodied workers who contribute regularly to CPP before suffering a sudden permanent disability would have no need for the "drop-out" provision. Able-bodied workers would have made regular contributions and, therefore, qualified for the pension without a "drop-out" provision. The proper comparison was thus between Mr. Granovsky and those who both needed and received the benefit in question, that is, people who had the permanent disability both at the time of application and for part of the contribution period. Those people needed the "drop-out" provision and would benefit from it; ***Granovksy*** at paras. 49-50.

[209] In ***Granovsky*** at para. 69, Mr. Justice Binnie wrote that an able-bodied person who had made more or less regular CPP contributions "will have no need ... to resort to the drop-out provision. He or she neither comes within the purpose of the drop-out provision, nor is disadvantaged by its effects." The defendants submit that when these statements are applied to the present case, it becomes clear that the plaintiffs have chosen the wrong comparator group. Individuals registered under s. 6(1)(a) have no need to rely on any other subsection for entitlement to registration. One of s. 6's purposes was to preserve the vested rights of individuals entitled to registration under s. 6(1)(a). However, another of s. 6's purposes was to reinstate classes of persons previously omitted or deleted from the Indian Register or band lists prior to September 4, 1951. Those who are entitled to be registered

under s. 6(1)(a) had not been omitted or deleted, so this purpose does not relate to them, nor are they disadvantaged by its effects. Section 6(1)(a) Indians were already entitled to registration prior to the enactment of the 1985 amendments to the ***Indian Act***, and they continue to be entitled after the enactment of those amendments.

[210] Applying this analysis to the case at bar, the defendants submit that the appropriate comparator group for Ms. McIvor is those entitled to registration under s. 6(1)(c), (d), and (e). The appropriate comparator group for Mr. Grismer is the children of Ms. McIvor's group, where that person has parented with a person not entitled to registration. To select the appropriate comparator group, the court must determine whose situation mirrors the plaintiffs as closely as possible. The defendants submit that Ms. McIvor is entitled to be registered under s. 6(1)(c). In her case, the "universe" of people "potentially entitled to equal treatment in relation to the subject matter of the claim" (***Hodge*** at para. 25) is not, as she claims, those registered pursuant to s. 6(1)(a). Those people registered as Indians under s. 6(1)(a), by definition, were entitled to registration pre-1985.

[211] The defendants submit that people in Ms. McIvor's comparator group are those who, like her, became entitled to registration as an Indian again after having had their name omitted or deleted from the Indian Register or band list because of the operation of previous ***Indian Acts***. Section 6(1)(c), (d), and (e) registrants all share the critical characteristic of having been ineligible for registration prior to the enactment of s. 6; therefore, they rely on the changes under s. 6 for entitlement to registration. The only difference between Ms. McIvor and her comparator group is

the reason for her entitlement.

[212] The defendants submit that no one in Ms. McIvor's comparator group was given the benefit sought in this case, i.e. registration under s. 6(1)(a). Everyone in her comparator group was ineligible for registration immediately prior to 1985, so the vested rights provision of s. 6(1)(a) would not apply to them. The impugned legislation restored their entitlements.

[213] The plaintiffs submit that to view the ***1985 Act*** as sex-neutral on the theory that it treats all reinstatees the same, and/or that Sharon McIvor is treated the same as other similarly situated ***Bill C-31*** reinstatees, would reduce s. 15 to a "shell game". I agree with that submission. Such an approach would be similar in logic to the reasoning in ***Bliss v. Attorney General of Canada***, [1979] 1 S.C.R. 183 [***Bliss***] to the effect that the denial of benefits to pregnant women was not discrimination based on the ground of sex, since the class into which Stella Bliss fell was that of pregnant *persons*, and within that class, all persons were treated alike. However, the Supreme Court of Canada has rejected the approach in ***Bliss***, in ***Andrews v. Law Society of British Columbia***, [1989] 1 S.C.R. 143 at 167 [***Andrews***], highlighting it as an example of shortcomings in ***Bill of Rights*** jurisprudence, and expressly overruling ***Bliss*** in the case of ***Brooks v. Canada Safeway***, [1989] 1 S.C.R. 1219. In ***Vriend v. Alberta***, [1998] 1 S.C.R. 493 at paras. 84-86, the Supreme Court of Canada referred to the approach in ***Bliss*** as having been "emphatically rejected".

[214] In the case of Mr. Grismer, the defendants submit that the comparator group

that most closely mirrors his particular “universe” is other children who have one parent who is entitled to registration under s. 6(1)(c), (d), or (e), and one parent who is not entitled to registration. Just like the plaintiffs in ***Hodge*** and ***Auton***, no one in Mr. Grismer’s “universe” is getting the benefit he seeks – registration under s. 6(1)(a) – they are all registered under s. 6(2) because they have only one parent entitled to registration. This submission suffers in my view from the same flaw discussed in its application to Ms. McIvor.

[215] In the alternative, the defendants submit that the appropriate comparator group for Mr. Grismer is children of those entitled to be registered under s. 6(1) who were born after s. 6 came into effect. In that regard, the defendants submit there is no benefit to the comparator group that is not available to Mr. Grismer, hence there is no discrimination.

[216] Much of the thrust of the defendants’ argument is that the distinction is purely temporal. This argument was recently considered and rejected by the Supreme Court of Canada in ***Hislop v. Canada (Attorney General)***, 2007 SCC 10 [***Hislop***]. In ***Hislop***, Justices LeBel and Rothstein, writing for the majority, addressed this reasoning as follows at para. 37-39:

> As the Court of Appeal observed, essential to the question of differential treatment is the choice of comparator group. Throughout this litigation, the government has argued that s. 44(1.1) draws a temporal distinction only. The government's position is that the provisions of the *MBOA* do not differentiate between same-sex couples and opposite-sex couples, but rather, between two groups of survivors of same-sex relationships, based on the date their relationships ended as a result of one partner's death. It cannot, therefore, violate s. 15(1) because a temporal basis for a distinction is not an enumerated or recognized analogous ground of discrimination. In our opinion, the

> courts below were correct in rejecting this argument.
>
> To frame the comparator group in terms of the express distinction made in s. 44(1.1) between survivors whose partners died before January 1, 1998 and those whose partners died on or after that date would be to miss the fundamental reason for the enactment of the *MBOA*. In *M. v. H.*, this Court held that the distinction in the spousal support regime between same-sex and opposite-sex couples was unconstitutional and that it could not be saved under s. 1. The *MBOA* was expressly intended to extend equal treatment to same-sex partners in a wide range of statutes. It is the purpose of the *MBOA* itself that determines the appropriate comparator group. What must be compared is the subset of same-sex survivors that remains excluded from the *CPP* survivor's benefits, i.e. those whose partners died before January 1, 1998, and similarly situated opposite-sex survivors. The appropriate comparator group in respect of the s. 44(1.1) analysis is survivors of opposite-sex conjugal relationships whose partners died before January 1, 1998.
>
> If the government was correct, remedial legislation intended to address the constitutional infirmity of existing legislation, but which limited eligibility for relief on a temporal basis, could never be the subject of a successful s. 15(1) *Charter* challenge. That is because a temporal basis of distinction is not one based upon grounds enumerated in s. 15(1) or grounds analogous thereto. When the government enacts remedial legislation, that legislation may still violate s. 15(1) requirements. The fact that it is remedial legislation does not immunize it from *Charter* review.

[217] The ***Indian Act*** is a code for the determination of Indian status based on ancestry. Parliament's purposes in its enactment included the removal of discrimination based on sex and that no one should gain or lose their status as a result of marriage. In my view, given the purposes of the legislation, the appropriate comparator group with respect to Sharon McIvor, are males who as at April 17, 1985, were registered or entitled to be registered as Indians, who were married to persons who were not Indian and who had children. These persons mirror Sharon McIvor's circumstances in every way relevant to registration under the ***1985 Act***, but for the personal characteristic, sex, at issue. With respect to Jacob Grismer, the

appropriate comparator group is children of males who as at April 17, 1985, were registered or entitled to be registered as Indians, and who were married to persons who were not Indian. In other words, the appropriate comparison is to those persons who traced their entitlement through the male line of descent. Again, the members of this group mirror Mr. Grismer's circumstances in every way relevant to the benefit at issue except for the personal characteristic at issue.

[218] The plaintiffs do not receive the same treatment as the members of the comparative group with respect to the benefit at issue. The members of Ms. McIvor's comparator group would be registered under s. 6(1)(a) of the ***1985 Act***, as would their wives and their children. It is important to note that the comparator group's children would not be registered under s. 6(1)(a) solely because, as a consequence of the previous versions of the ***Indian Act***, both their parents were Indians, but in addition, because pursuant to the previous ***Indian Acts*** they were the children of a male Indian. If, after the passage of the ***1985 Act***, those children parented with persons who were not registered Indians, their children were entitled to register under s. 6(2) of the ***1985 Act***.

[219] Ms. McIvor was entitled to registration under s. 6(1)(c) of the ***1985 Act***. While she personally was entitled to receive the same tangible benefits as those registered under s. 6(1)(a), her children were not entitled to registration under s. 6(1), but under s. 6(2). If her children parented with persons who were not registered as an Indian, their children were not entitled to registration.

[220] With respect to the first branch of the test, I find that the law makes a

distinction or results in differential treatment on the basis of a personal characteristic and that the plaintiffs were denied a benefit granted to the comparator group.

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

[221] The plaintiffs submit that the legislation discriminates on the basis of sex, marital status, and illegitimacy. The plaintiffs have conceded that they did not suffer discrimination on the basis of illegitimacy. I will not deal with that ground.

[222] Marital status has been held to be a protected ground of discrimination under s. 15. In ***Miron v. Trudel***, [1995] 2 S.C.R. 418 at paras. 150-154, holding that marital status is a protected ground of discrimination under s. 15, McLachlin J. (as she then was) stated:

> What then of the analogous ground proposed in this case -- marital status? The question is whether the characteristic of being unmarried -- of not having contracted a marriage in a manner recognized by the state -- constitutes a ground of discrimination within the ambit of s. 15(1). In my view, it does.
>
> First, discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from *Charter* consideration on the ground that its recognition would trivialize the equality guarantee.
>
> Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1) of the *Charter*. Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons

> living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.
>
> A third characteristic sometimes associated with analogous grounds -- distinctions founded on personal, immutable characteristics -- is present, albeit in attenuated form. In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints -- these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in *Andrews*: the individual exercises limited but not exclusive control over the designation.
>
> Comparing discrimination on the basis of marital status with the grounds enumerated in s. 15(1), discrimination on the ground of marital status may be seen as akin to discrimination on the ground of religion, to the extent that it finds its roots and expression in moral disapproval of all sexual unions except those sanctioned by the church and state.

[223] The plaintiffs submit that without doubt, the preference for male lineage and marriage to a male Indian embodied in s. 6 of the ***1985 Act*** is based on sex. In drawing a distinction between those who were entitled to status prior to April 17, 1985, and those who for discriminatory reasons were not so entitled to status, the ***1985 Act***, in effect, makes a sex-based distinction.

[224] The Supreme Court of Canada has also held that sex discrimination does not cease to be sex discrimination just because not all women are affected, nor because not all members of the affected group are women: ***Janzen v. Platy Enterprises Ltd.***, [1989] 1 S.C.R. 1252; ***Brooks***, *supra*; and ***Martin and Laseur***, *supra*, at paras. 75-80.

[225] Finally, the plaintiffs submit that protection for patrilineal descent and marriage to a male Indian embedded in the ***1985 Act*** is not a neutral distinction that is merely generational or based on the protection of acquired rights. In their submission, an analogous situation that arose in the United States Supreme Court in 1915 demonstrates the flaw in such an analysis. The case of ***Guinn v. United States***, 238 U.S. 347 (1915) [***Guinn***] concerned a literacy test prescribed by the government of Oklahoma as a condition of voting. Historically, "negro" citizens were not allowed to vote in Oklahoma. Pursuant to the Fifteenth Amendment of the United States Constitution it was impermissible to discriminate as to suffrage because of race. In response to the Fifteenth Amendment, in 1910 the State of Oklahoma adopted an amendment to its state constitution which on its face was race-neutral. It excluded from voting persons who could not read or write. Simultaneously, the government introduced a so-called Grandfather Clause which preserved the voting rights of those who had previously been entitled to vote, and descendants of such persons, prior to the enactment of the Fifteenth Amendment in 1866. Members of the grandfathered group were not subject to the literacy requirement. The State of Oklahoma argued that there was no discrimination based on race since everyone, whether "negro" or white was subject to the requirement. This argument was rejected. The Court said at pp. 364-365:

> We have difficulty in finding words to more clearly demonstrate the conviction we entertain that this standard has the characteristics which the Government attributes to it than does the mere statement of the text. It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into

> existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment.

[226] The Court in ***Guinn*** struck down the literacy requirement. Just as in ***Guinn***, where the literacy rule combined with a Grandfather clause created and perpetuated the race discrimination that the Fifteenth Amendment was intended to eradicate, so too, the plaintiffs submit, s. 6 of the ***1985 Act*** creates and perpetuates the sex discrimination that the ***Charter*** is intended to eradicate.

[227] As noted above, the defendants submit that any difference in treatment between the comparator group and the plaintiffs arises from the date of entitlement to registration and the date of entitlement is not an enumerated or analogous ground. In support of this proposition the defendants rely upon the observations of Gonthier J. in ***Martin and Laseur*** para. 73.

[228] The plaintiffs in ***Martin*** suffered from the disability of chronic pain that was attributable to a work-related injury. The ***Workers' Compensation Act***, S.N.S. 1994-95, c. 10 [***Workers' Compensation Act***] provided only temporary assistance for chronic pain sufferers—a four-week Functional Restoration program—after which no further benefits were available. The Court ultimately held that s. 15 was breached and was not saved by s. 1. The defendants, however, rely upon the Court's comments on the plaintiffs' proposed alternative comparator group.

[229] The Court held that the correct comparator group in ***Martin*** was workers subject to the ***Workers' Compensation Act*** who are eligible for compensation for their employment-related activities but who, unlike the plaintiffs in ***Martin***, did not suffer from chronic pain. Some workers with chronic pain were given some benefits. These workers fell under s. 10E of the statute, which "grandfathered" people who had already been receiving such benefits. Section 10E only applied to those with chronic pain who were injured between March 23, 1990 and February 1, 1996. The plaintiffs were injured after that timeframe. When considering this potential comparator group, Mr. Justice Gonthier assumed, without deciding, that such workers would be an appropriate comparator group. Writing for a unanimous Court, he noted at para. 73 that "the distinction between this group and the appellants would be the date of their injury and the status of their case before the Board, rather than the nature of their disability." He concluded that the second stage of the ***Law*** analysis would not be met.

[230] Turning back to the present case, the defendants submit that the difference between Mr. Grismer and his "hypothetical" cousin is the date on which the benefit, entitlement to registration, was given. Both received entitlement. The fact that Mr. Grismer's cousin is entitled to be registered under s. 6(1)(a) and Mr. Grismer is entitled to be registered under s. 6(2) is because his cousin became entitled to registration at an earlier date, that is, before 1985. The chronic pain sufferers in ***Martin*** who injured themselves between 1990 and 1996 got a better benefit than the ones who injured themselves after those dates, but that was not, in itself, discriminatory. The fact that Mr. Grismer is not in exactly the same position as his

cousin is because his cousin was entitled to registration before 1985 and has been "grandfathered" like the people to whom s. 10E of the ***Workers' Compensation Act*** applied. The difference between Mr. Grismer and his cousin, therefore, the defendants submit, stems from the date that they were entitled to be registered. The defendants submit that this is not an enumerated or analogous ground, so it does not pass the ***Law*** test for discrimination.

[231] In my view, the problem with this submission is that this "grandfathering" amounts to an exclusion that undercuts the purpose of the legislation; namely, to eliminate discrimination from the registration system. This type of exclusion was noted in ***Auton*** at para. 42 to likely constitute discrimination. Moreover, this reasoning was rejected by the Supreme Court in ***Hislop*** as discussed above.

[232] The defendants submit that if there is a difference between Ms. McIvor and her "hypothetical" brother, it stems from the way in which their non-Indian spouses were treated by previous ***Indian Acts***. To impose absolutely equal treatment, one would have to either remove entitlement from the hypothetical brother's wife, or give entitlement to Ms. McIvor's ex-husband.

[233] The "hypothetical" brother's wife, however, was already registered as an Indian when s. 6 came into effect—she now has what is referred to as an acquired or "vested" right. In ***Dikranian v. Quebec (Attorney General)***, 2005 SCC 73 at para. 32, [2005] 3 S.C.R. 530, Mr. Justice Bastarache reaffirmed the legislative presumption against interfering with acquired rights. He quoted with approval a passage from ***Upper Canada College v. Smith*** (1920), 61 S.C.R. 413 at 417,

where Duff J. said:

> ... speaking generally it would not only be widely inconvenient but a “flagrant violation of natural justice” to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.

[234] The defendants submit that when Ms. McIvor’s brother married, his wife was registered by operation of law. It would not be just to disentitle her now. They submit that to comply with the plaintiffs’ request, Terry Grismer would have to be registered under s. 6(1)(a) retroactively, because he would need to be made an Indian before his son was born and before April 17, 1985, but this is impermissible. Alternatively, if Terry Grismer were granted registration prospectively, his son would be entitled to registration under s. 6(1)(f), this would be an impermissible retrospective ***Charter*** application.

[235] There is no issue, with respect to Terry Grismer, of removing vested rights, as he never had any rights under the pre-1985 ***Indian Acts***. Therefore, the defendants submit, if the legislation has made a distinction, it is made solely because it would be unfair to take away rights that were already granted by pre-***Charter*** legislation. The rights that were given have become vested. Any distinction thus made is not made on the basis of an enumerated or analogous ground, but rather on the basis of date of entitlement.

[236] Strictly speaking, it is correct to say that the only way to give absolutely equal treatment to all persons would be to either grant status to spouses of Indian women who, prior to April 17, 1985, married persons who were not status Indians, or to take

away the status of the women who married status Indians prior to April 17, 1985, and acquired status from their husbands. However, the plaintiffs do not seek any relief in relation to the non-Indian spouses of status Indians. That is, the plaintiffs do not seek equal treatment with respect to the non-Indian spouses of Indians, either in the form of granting or removing status. Rather, they seek treatment for Indian women and their children who claim Indian descent through them that is equal to that afforded to Indian men and their descendants. The defendants' submission overlooks the provisions of earlier versions of the ***Indian Act*** that granted registration status to the legitimate child of a male person who was registered or entitled to be registered as an Indian, for example, s. 11(d) of the ***1951 Act.***

[237] The more fundamental problem with the defendants' submission, however, is that, in my view, neither the date of application nor the treatment of non-Indian spouses is the basis or the reason for the difference in treatment. Rather, the basis for the difference in treatment is the continuing preference for descendants who trace their lineage along the male line. This can be demonstrated through the following example presented by the plaintiffs that uses the initial determination of the Registrar of the plaintiffs' application for registration based on s. 6(1)(c) and s. 6(2) and contrasting it with the new decision on the plaintiffs' status which is based on the combined application of s. 6(1)(a), s. 6(1)(c), and s. 6(2).

> (a) The Registrar assumed that Sharon McIvor and Jacob Grismer were ineligible under section 6(1)(a) for reasons of the illegitimacy and non-Indian paternity of Susan Blankinship and therefore applied the new eligibility criteria of s. 6(1)(c), (d) & (e), 6(1)(f), s. 6(2), and s. 6(3). Under these criteria, the first of Sharon McIvor's ancestors to have lost status as a result of non-Indian paternity was Susan Blankinship. Since she is the

deceased parent of the living applicant, Sharon McIvor, Susan Blankenship is notionally granted status under of s. 6(1)(c) and s. 6(3)(b). As the second-generation, with a non-Indian parent, Sharon McIvor is granted status under s. 6(2).

(b) Under the new decision, Sharon McIvor and Jacob Grismer are treated as being entitled to be registered under s. 6(1)(a) until Sharon McIvor notionally became disentitled to registration following her marriage to Terry Grismer. This analysis depends upon the peculiar formulation for excluding the illegitimate children of Indian mothers with non-Indian paternity. The eligibility criteria involved a two-step process. First, the illegitimate children of Indian mothers were eligible for registration (s. 11(e) of the ***1951 Indian Act*** which, under s. 6(1)(a), is the provision applicable to Susan Blankinship and Sharon McIvor). Second, the Registrar could declare the child ineligible for registration if the child was known to have non-Indian paternity, which clearly applied to Susan Blankinship. No such declaration was ever made, however, because the exclusion of Susan Blankinship and Sharon McIvor from registration was never protested and Sharon McIvor did not apply for registration prior to the coming into force of section 15 of the ***Charter***. After the ***1985 Act*** was passed, the power of the Register to exclude for non-Indian paternity was, for the first time, removed. The second stage of the two-stage process governing illegitimacy therefore ceased to exist and as of April 17, 1985, the illegitimate children of Indian women became entitled to registration under s. 6(1)(a) regardless of the status of the father. At this point, the marriage of Sharon McIvor became relevant because it provided a further basis for her exclusion from registration. This exclusion is only addressed by the more restrictive provisions of s. 6(1)(c), together with s. 6(2) and s. 6(3). For this reason, Sharon McIvor is now entitled to status under s. 6(1)(c) and Jacob is entitled to status under s. 6(2).

[238] These two decisions help to illustrate the important differences between an entitlement under s. 6(1)(a) and an entitlement under s. 6(1)(c), (d) and (e), s. 6(1)(f), s. 6(2), and s. 6(3).

[239] Under s. 6(1)(c), (d) and (e), s. 6(1)(f), s. 6(2), and s. 6(3), an applicant born prior to April 17, 1985, can only seek status as a result of a previous discriminatory

exclusion against themselves or their deceased parents. They cannot look back beyond their deceased parents to a disentitlement of their grandparents or great-grandparents.

[240] In contrast, under section 6(1)(a) a current applicant can obtain registration by establishing direct descent along the male line to an Indian ancestor regardless of how many deceased generations stand between them and that ancestor.

[241] This discriminatory distinction is illustrated by the hypothetical example of Mary Tom marrying Jacob Blankinship. In this case, the loss of status would be two deceased generations removed from a living applicant (Sharon McIvor) and therefore under s. 6(1)(c), s. 6(2), and s. 6(3) neither Sharon McIvor nor Jacob Grismer would be entitled to any status.

If Mary Tom and Jacob Blankenship had married	
Jacob Blankenship (non-Indian)	Mary Tom [loses status on marriage, then regains it under s. 6(1)(c)].
Susan Blankenship [s. 6(2)]	
Sharon McIvor [no status]	
Charles Jacob Grismer [no status]	

[242] For the same reason, if Susan Blankinship had married Ernest McIvor, the loss of status would be only one deceased generation removed from a living applicant and therefore Sharon McIvor would be entitled to registration under s. 6(2) and Jacob Grismer would not be entitled to registration at all.

If Susan Blankenship and Ernest McIvor had married	
Ernest McIvor (born out of wedlock, never registered)	Susan Blankenship [loses status on marriage, then regains it under s. 6(1)(c)]
Sharon McIvor [s. 6(2)]	
Charles Jacob Grismer [no status]	

[243] As actually occurred, it was Sharon McIvor who was further disentitled to registration as a result of her marriage to Terry Grismer. She is therefore entitled to be registered under s. 6(1)(c) and Jacob is entitled to be registered under s. 6(2).

[244] In contrast, there is no previous generation cut-off under s. 6(1)(a) and if all of Jacob Grismer's Indian ancestors had been male, but were otherwise unchanged, and he was only applying for registration now, he and (the now male) Sharon McIvor would both be entitled to full registration under s. 6(1)(a).

[245] Further, under s. 6(1)(c), (d), and (e), s. 6(1)(f), s. 6(2), and s. 6(3), applicants born prior to April 17, 1985, whose status is now permitted can only convey s. 6(2) status to their children if the other parent is a non-Indian even if the children were born prior to April 17, 1985.

[246] In contrast, there is no second generation cut-off for those individuals who satisfy the s. 6(1)(a) criteria provided only that they were born prior to April 17, 1985 (other than the double mother clause which operated for only 13 years, from September 4, 1972 to April 17, 1985, and affected only 2000 individuals as it was inapplicable to the members of most bands because 311 of 580 bands were granted

an exemption under section 4 by order in council: Draft DIAND report, “The Potential Impacts of Bill C-47 on Indian Communities”, November 2, 1984 at pg. 2).

[247] For example, if Sharon McIvor had not married out, she and Jacob would both be entitled to be registered under s. 6(1)(a). However, because Sharon McIvor married out, she and Jacob must obtain their status under the new registration criteria with the second generation cut-off which results in Jacob receiving only s. 6(2) status.

[248] It is therefore simply incorrect to allege, as the defendants do, that because s. 6(1)(f), s. 6(2), and s. 6(3) can be applied to applicants born both before and after April 17, 1985, that there is no continuing discrimination.

[249] The continuing discrimination arises from the continuing difference in the treatment of those born before April 17, 1985, who obtain status through s. 6(1)(a), and those born before April 17, 1985, who obtain status from s. 6(1)(c), (d) and (e) and s. 6(1)(f), s. 6(2), and s. 6(3). The former are not subject to any generational cut-offs while the latter are subject to the prior generation cut-off and the subsequent second-generation cut-off. The discrimination arises in the different treatment of descendents of mixed ancestry who trace their lineage along the maternal rather than the paternal line.

[250] I conclude that the basis of the difference in treatment in substance is not the date of application, but the enumerated and analogous grounds of sex and marital status.

Does the Difference in Treatment Amount to Substantive Discrimination?

[251] As stated earlier in these reasons, the Supreme Court of Canada in ***Law*** identified a number of contextual factors to be considered in determining whether differential treatment constitutes discrimination.

[252] These factors are to be considered in the context of a concern with human dignity, defined in ***Law*** in the context of a s. 15 claim as follows:

> What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General*), [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?
>
> The equality guarantee in s. 15(1) of the *Charter* must be understood and applied in light of the above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis.
>
> (***Law*** at paras. 53-54).

[253] As Iacobucci J. stated at para. 70:

> The focus must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity.

[254] As noted above, in ***Law*** at paras. 62-75 Iacobucci J. discussed four contextual factors to be considered in determining whether the impugned legislation has the effect of demeaning the dignity of persons it affects. These factors can be summarized as follows:

(a) whether the distinction in question reflects and reinforces pre-existing disadvantage, stereotyping and prejudice or vulnerability experienced by the individual or group at issue;
(b) whether the ground of discrimination corresponds to the actual needs, capacity, or circumstances of the claimants;
(c) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and
(d) the nature and scope of the interest affected by the challenged law.

Does the Distinction Perpetuate Historic Disadvantage?

[255] The plaintiffs submit that the distinction perpetuated by s. 6 between those who claim their entitlement to Indian status through the maternal line and those who claim it through the paternal line, reflects and reinforces a prejudice against Aboriginal women and reinforces a stereotype of Indian culture and character as male, and Indian women as property.

[256] They submit that the establishment of limited and half status for those born before 1985 reflects and reinforces the disadvantages and vulnerability of generations of Aboriginal women and their descendants who are already

disadvantaged and vulnerable because of past sex discrimination imposed by previous ***Indian Acts***. The historic pattern of sex discrimination has resulted in a loss of culture, belonging, identity, and access to financial and other benefits associated with registration.

[257] They submit that the perpetuation of sexist stereotypes of Aboriginal women as incapable of transmitting Indian culture and heritage to their children has discriminatory effects on Aboriginal women, and their descendants. The invidious message of this stereotype is that neither Aboriginal women nor their descendants are deserving of equal concern and respect: see ***Vriend*** at para. 103-104. This message, the plaintiffs submit, is particularly damaging to Aboriginal women who are ineligible for s. 6(1)(a) status under the ***1985 Act*** because they embody the sexist stereotype of female inferiority.

[258] The plaintiffs submit that the ***1985 Act*** perpetuates the historic disadvantage experienced by Aboriginal women who have not been able to transmit status, and that of Aboriginal persons who were denied Indian status under previous ***Indian Acts***, either because they were women who married non-Indian men, or because they trace their Indian descent through the maternal line. Because of the history of discrimination they have experienced, the plaintiffs submit, this group of Aboriginal people has suffered exclusion, loss of identity, and loss of culture. The continuing preference embodied by the ***1985 Act*** for male Indian progenitors and their descendants reinforces the disadvantage and vulnerability of the previously excluded marginalized group, because the ***1985 Act*** denies them full s. 6(1)(a) Indian status.

[259] Finally, the plaintiffs submit that the continuing discrimination under the ***1985 Act*** makes those who are affected by it legitimately feel that they are not equal to their peers in self-respect, self-worth, and membership in their Aboriginal communities.

[260] The defendants' response is that the legislation treats all male and female Indians equally. All registered Indians are now subject to the second generation cut-off. Those who are not entitled to registration are ineligible because of successive generations of parenting with those not entitled to registration. This legislation does not impose further differential treatment that contributes to the perpetuation or promotion of unfair social characterization: see ***Corbiere***.

[261] It is not contested that the regime for registration in its application going forward is a gender-neutral scheme. The plaintiffs' focus is on the application of the legislation to people born prior to 1985, who would have had status under s. 6(1)(a) of the ***1985 Act*** but for discriminatory provisions of prior versions of the ***Indian Act***. It is a focus on the impact of the registration scheme on those entering the new scheme. I have concluded that the ***1985 Act*** does impose different treatment upon persons in the situation of the plaintiffs from that received by the comparator group. In that respect, the legislation does not treat all persons equally. The ***1985 Act*** does continue to draw distinctions between men and women and children who trace their descent through their mothers or fathers with respect to registration.

[262] Minister Crombie quite properly described the discriminatory treatment based on sex in the prior versions of the ***Indian Act*** as a "historic wrong" and as a

"particularly blatant form of discrimination". In my view, the distinctions at issue continue to perpetuate the historic disadvantage experienced by Aboriginal women and those who trace their status through the maternal line. I agree with the submission of the plaintiffs that in so doing the ***1985 Act*** reflects and reinforces the pre-existing disadvantage of a vulnerable group.

Does the Ground of Discrimination Correspond to the Actual Needs, Capacity or Circumstances of the Claimants?

[263] The plaintiffs submit that continuing sex discrimination in the criteria for determining status does not correspond to the actual needs, capacity, or circumstances of any group.

[264] The defendants' position is that s. 6 of the ***1985 Act*** was designed to take into account the circumstances of those who, like Ms. McIvor, were no longer entitled to be registered as Indians under the ***Indian Act***. Many of those who had lost their entitlement to registration became entitled under s. 6, as did their children. Those who had lost their entitlement to registration under the old ***Indian Acts*** for certain reasons were, therefore, one of the primary targets of the ameliorative program. Section 6's provisions reflected the circumstances and needs that those people faced, while still being alive to the needs of those with vested rights and the interests of the Indian bands.

[265] The fact that s. 6 did not, at the same time, guarantee registration for all subsequent generations regardless of whether one or both parents are Indian is not, in the defendants' submission, discriminatory. Like the legislation in ***Granovsky***,

one of s. 6's goals was to meet the needs of a particular group of disadvantaged people, namely, people who had lost their entitlement to registration. These people correspond to the class of people in ***Granovsky*** who were permanently disabled. They had been personally affected by a loss of entitlement to registration. Section 6 aimed to reinstate such people, and the legislation accomplished this goal; they were the people whose "greater need at the time corresponded to the purpose of creating the statutory benefit in the first place": ***Granovsky*** at para. 63.

[266] Section 6 also ensured that the first generation children of those people would also be registered as Indians. The plaintiffs, however, complain that the legislation failed to include a further possible generation. That generation, the defendants submit, who are not even plaintiffs in this case, is analogous to the class of people in ***Granovsky*** who were temporarily disabled in that the legislation was not designed to meet their needs, however unfair that might seem to the plaintiffs. The defendants submitted that the fact that s. 6 targeted a specific set of needs in no way implies that any people outside of the legislation's purpose are somehow less deserving of dignity. Further, as the Supreme Court of Canada noted in ***Gosselin v. Quebec (Attorney General)***, [2002] 4 S.C.R. 429 at para. 55, a benefit program and the needs and circumstances of a claimant group do not have to correspond perfectly.

[267] The defendant's submission is premised on an assumption that the plaintiffs have suffered no disadvantage or difference in treatment. For the reasons stated earlier, I have concluded that is not the case. Moreover, the comparison of the status provisions in the ***1985 Act*** to a benefit program is not, in my view, apt. While

it is the case that there are some benefit programs associated with registration under the ***1985 Act***, the concept of status, in part as a consequence of the role that the federal government assumed historically, has a more encompassing significance, more closely related to personal identity.

[268] In my view, it cannot be said that the maintenance of the differential treatment by reason of sex and marital status in the present legislation, corresponds to the characteristics or circumstances of any group.

Ameliorative Purpose or Effect

[269] Both parties agree that the legislation at issue has an ameliorative purpose. The plaintiffs submit that persons in their situation were the targets of the ameliorative program. There is no more disadvantaged group that benefits.

[270] The defendants rely upon ***Lovelace v. Ontario***, [2000] 1 S.C.R. 950 [***Lovelace***] as support for the proposition that where the purpose of legislation is consistent with s. 15, ameliorative legislation need not target all potential groups who have been or will be subject to unfair circumstances. Under inclusive ameliorative legislation in such circumstances does not offend s. 15.

[271] In ***Law***, Iacobucci J. had this to say on the subject of ameliorative purpose or effects at para. 72:

> Another possibly important factor will be the ameliorative purpose or effects of impugned legislation or other state action upon a more disadvantaged person or group in society. As stated by Sopinka J. in *Eaton*, supra, at para. 66: "the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical

> characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society". An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense. Underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination: see *Vriend*, supra, at paras. 94-104, per Cory J.

[272] In ***Vriend***, Cory J. distinguished between legislation that sought to address one specific problem from legislation that purports to provide comprehensive protection, but excluded one group from that protection. ***Lovelace*** concerned a challenge to the First Nations Fund, a program providing funds to Ontario First Nations communities that were registered as bands. The challenge was brought by groups whose members were or were entitled to be registered as Indian pursuant to the ***Indian Act***, but which were not registered as bands and did not have reserve lands. The program was found to be constitutional. In ***Lovelace***, Iacobucci J. commented upon the ameliorative purpose as follows at paras. 85-87:

> This appeal raises yet another situation where both the claimant and the targeted group are equally disadvantaged, and although this scenario was not adverted to in *Law*, I think it is appropriate to extend the ameliorative purpose analysis to situations where disadvantage, stereotyping, prejudice or vulnerability describes the excluded group or individual. Taking such an approach ensures that the analysis remains focused on whether the exclusion conflicts with the purpose of s. 15(1), and directs us away from reducing the equality analysis to a simplistic measuring or balancing of relative disadvantage. Here, the focus of analysis is not the fact that the appellant and respondent groups are equally disadvantaged, but that the program in question was targeted at ameliorating the conditions of a specific disadvantaged group rather

> than at disadvantage potentially experienced by any member of society. In other words, we are dealing here with a targeted ameliorative program which is alleged to be underinclusive, rather than a more comprehensive ameliorative program alleged to be underinclusive.
>
> Having said this, one must recognize that exclusion from a targeted or partnership program is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society.
>
> The ameliorative purpose of the overall casino project and the related First Nations Fund has clearly been established. In particular, the First Nations Fund will provide bands with resources in order to ameliorate specifically social, health, cultural, education, and economic disadvantages. It is anticipated that the bands will be able to target the allocation of these monies within these specified areas, thereby increasing the fiscal autonomy of the bands. This aspect of the First Nations Fund is consistent with the related ameliorative purpose of supporting the bands in achieving self-government and self-reliance. Without a doubt, this program has been designed to redress historical disadvantage and contribute to enhancing the dignity and recognition of bands in Canadian society. Furthermore, both of the above ameliorative objectives can be met while, at the same time, ensuring that on-reserve commercial casino gaming is undertaken in compliance with the strict regulations applicable to the supervision of gaming activities. The First Nations Fund has, therefore, a purpose that is consistent with s. 15(1) of the *Charter* and the exclusion of the appellants does not undermine this purpose since it is not associated with a misconception as to their actual needs, capacities and circumstances.

[273] In my view, this case is not comparable to the sort of targeted program at issue in ***Lovelace***. In the case at bar, it is common ground that persons in the situation of the plaintiffs were the target of the ameliorative program. The objection is not that they are excluded, but that the program failed in that it carried forward the very discrimination it was created to address. Moreover, the result is associated with the perpetuation of a misconception about the actual needs, capacities, and circumstances of persons in the situation of the plaintiffs.

Nature and Scope of the Interest Affected

[274] The plaintiffs submit that in the case at bar the affected interests in cultural identity and belonging, and in fairness and sex equality, are fundamentally important and go to the heart of human dignity. For the plaintiffs and others, Indian status is a dignity-conferring benefit: see ***Corbiere*** at paras. 17-18 and 83-94. The plaintiffs submit that the same stereotype about women and their inability to transmit Indian citizenship status to their children that was embodied in previous versions of the ***Indian Act***, has been maintained in the ***1985 Act***, as a result of the continuing distinctions drawn based on matrilineal descent and marital status.

[275] The plaintiffs submit further that the importance of the affected interests in non-discriminatory access to Aboriginal cultural identity and heritage is underscored by Canada's obligations under international human rights law.

[276] The Supreme Court of Canada has held that Canada's obligations under international human rights treaties are an aid to the interpretation of the ***Charter***: see ***Slaight Communications Inc. v. Davidson***, [1989] 1 S.C.R. 1038, ***United States v. Burns***, [2001] 1 S.C.R. 283 at para. 69-80

[277] The effect of the continuation of discrimination against Aboriginal women and their descendants is, in the plaintiffs' submission, a breach of international human rights law:

1. ICCPR, articles 2(1), 2(2), 3, 23, 24(1), 24(3), 26, and 27.
2. International Covenant on Economic, Social and Cultural Rights ("ICESCR") (adopted December 16, 1966, entry into force on January

3, 1976) G.A. Res. 2200A (XXI), articles 2(2), 3, 11, and 15.

3. Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW") (adopted December 18, 1979, entry into force September 3, 1981) G.A. Res. 34/180, articles 2(a), 2(c), 2(d), 2(e), 2(f), 3, 5, 13(a),15(1), 15(2),16(a), and 16(d).

4. Convention on the Rights of the Child, (adopted November 20, 1989, entry into force September 2, 1990) G.A. res. 44/25, articles 8 and 30.

5. Universal Declaration of Human Rights, (adopted and proclaimed December 10, 1948) G.A. Res. 217A (III), articles 2, 15, 16, 22, and 25.

[278] As noted above, international human rights bodies have expressed concern about the disadvantaged position of Aboriginal women in Canadian society. In particular, these bodies have criticized Canada, as a party to the major human rights treaties, for continuing discrimination against Aboriginal women under the ***1985 Act*** with respect to registration status, which constitutes non-compliance with Canada's treaty obligations to Aboriginal women.

[279] In 1999 the U.N. Human Rights Committee which monitors State Party compliance with the ICCPR expressed concern about ongoing discrimination against Aboriginal women, and in particular that the ***1985 Act*** amendments which were introduced following the Committee's 1981 decision in the ***Lovelace UN*** case denied status to descendants of Aboriginal women: Concluding Observations of the Human Rights Committee: Canada (April 7, 1999) at 17.

[280] The plaintiffs submit that any reasonable person in the position of the claimants would legitimately feel that s. 6 is demeaning to human dignity. Jacob Grismer's evidence exemplifies this response:

> Being ineligible for registration under the *1985 Act* because of the unequal treatment of persons descendant along the female line has deprived me of the sense of identity and cultural heritage associated with Indian status. It has also deprived me of the ability to pass on this official recognition of cultural identity to my children.
>
> However, because my immediate family members were not recognized as status Indians, we received none of the benefits associated with being Indian. We were not allowed to live on the reserve, or to participate in the activities of the status Indian community. Most of the status Indian children my age attended a different elementary school, which was closer to the reserve. I was excluded from their community because of my lack of Indian status, which labeled me as an outsider and a “half-breed”. It was hurtful to be treated as though I was not a “real” Indian.
>
> Because I was not registered under the *Indian Act*, I could not participate in programs for status Indians in the schools and community. These included Native days, tutorial assistance programs, and the annual Aboriginal Christmas party. Being excluded from these programs further undermined my sense of self-worth and self-identity. It was hurtful to be treated as an outsider when I believed myself to be a “real” Indian. It also caused me to doubt who I was. Finally, being excluded from the status Indian community made me feel as though I did not belong anywhere.
>
> My inability to obtain Indian status also placed me on the wrong side of a divide within my extended family. There were always two groups in my family, those who had status, and those who did not. I always felt somewhat inferior to my cousins who had Indian status, and I experienced the pain that comes with being an ‘outsider’ in one’s own family.
>
> I was in high school when my mother received her status, and I remember her explaining to me that I was not allowed to be registered because my grandfather was not Aboriginal. I came very close to giving up on my Aboriginal heritage that day, but I know that I am no less Aboriginal than my cousins who have status because they can trace their Aboriginal descent through the male line. Gaining the legal recognition to which I believe I am entitled is important to my sense of fairness and identity.

[281] The submission of Ms. Celestine Gilday to the Standing Committee described her feelings of humiliation upon losing her status when she married a man who was not an Indian:

> I cannot explain to you what it feels like. It is the ultimate humiliation of a human being. I do not know how else to put it. The Government of Canada was denying me the fundamental human right to be who I am. That is the fundamental human right, as far as I am concerned. I was humiliated, embarrassed.
>
> (Sixth Report of the Standing Committee on Indian Affairs and Northern Development, September 1, 1985, at p. 8).

[282] As indicated by the concerns expressed by the CEDAW committee and the ICESCR Committee, lack of equal access to registration status not only affects interests in access to Aboriginal culture. It can also impair the rights of women to the equal enjoyment of an adequate standard of living. Access to financial assistance for post-secondary education and health benefits, are benefits of registration status that are relevant to the equal enjoyment of an adequate standard of living.

[283] The defendants submit that given the nature and scope of the interest affected, the dignity of the plaintiffs is not affected by the impugned legislation. The defendants rely upon ***Egan v. Canada***, [1995] 2 S.C.R. 513, in which L'Heureux-Dube J., dissenting, stated at paras. 63-64:

> As I noted earlier, the *Charter* is not a document of economic rights and freedoms. Rather, it only protects "economic rights" when such protection is necessarily incidental to protection of the worth and dignity of the human person (i.e. necessary to the protection of a "human right"). Nonetheless, the nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*.

> Although a search for economic prejudice may be a convenient means to begin a s. 15 inquiry, a conscientious inquiry must not stop here. The discriminatory calibre of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society (e.g. voting, mobility). Finally, does the distinction constitute a complete non-recognition of a particular group? It stands to reason that a group's interests will be more adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction does recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like.

[284] The defendants submit that this is not a case of complete exclusion or non-recognition, but of a more restrictive recognition. The defendants emphasize that the plaintiffs are entitled to registration under s. 6 of the ***1985 Act***. They are entitled to the benefits that go with such registration. Any aspects of the registration that are inferior to the comparator group are, they submit, peripheral at best. The defendants submit that one's dignity cannot be significantly hurt by the inability to transmit status to one's children and grandchildren.

[285] In my view, the first problem with the defendants' submission is that it glosses over the basis for the more narrow recognition; namely, the continuation of distinctions on the basis of sex and marital status. The defendants' submission also fails to take into account the significance of Indian status as an aspect of identity.

[286] The record in this case clearly supports the conclusion that registration as an Indian reinforces a sense of identity, cultural heritage, and belonging. A key element of this sense of identity, heritage, and belonging is the ability to pass this heritage to one's children. The evidence of the plaintiffs is that the inability to be registered with

full s. 6(1)(a) status because of the sex of one's parents or grandparents is insulting and hurtful and implies that one's female ancestors are deficient or less Indian than their male contemporaries. The implication is that one's lineage is inferior. The implication for an Indian woman is that she is inferior, less worthy of recognition.

[287] It is my conclusion that the current registration provisions have been a blow to the dignity of the plaintiffs. Moreover, they would be so to any reasonable person situated in the plaintiffs' position.

Conclusion Regarding Discrimination

[288] I have concluded that the registration provisions embodied in s. 6 of the ***1985 Act*** continue the very discrimination that the amendments were intended to eliminate. The registration provisions of the ***1985 Act*** continue to prefer descendants who trace their Indian ancestry along the paternal line over those who trace their ancestry through the maternal line. The provisions prefer male Indians and their descendants to female Indians and their descendants. These provisions constitute discrimination, contrary to ss. 15 and 28 of the ***Charter*** based on the grounds of sex and marital status.

VII. IS THE INFRINGEMENT JUSTIFIED UNDER S. 1 OF THE *CHARTER*?

Introduction

[289] Section 1 provides that the ***Charter*** "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."

[290] As established in ***R. v. Oakes***, [1986] 1 S.C.R. 103, and summarized in ***Lavoie v. Canada***, [2002] 1 S.C.R. 769 at para. 53:

> At the s. 1 stage, it is for the government to demonstrate that, on a balance of probabilities, s. 16(4)(c) is a "reasonable limit" on equality that can be "demonstrably justified in a free and democratic society": see *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 136-37. To qualify as such, the provision must (1) pursue an objective that is sufficiently important to justify limiting a *Charter* right, (2) be rationally connected to that objective, (3) impair the right no more than is reasonably necessary to accomplish the objective, and (4) not have a disproportionately severe effect on the persons to whom it applies: see *Oakes*, *supra*, at pp. 138-39.

[291] The ***Oakes*** requirements are to be applied flexibly, having regard to the contextual elements of the nature of the legislation and the nature of the rights at issue: see ***R. v. Edwards Books & Art Ltd***., [1986] 2 S.C.R. 713 [***Edwards Books***] and ***RJR MacDonald v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 [***RJR MacDonald***].

[292] Specific contextual factors to be addressed in this regard were identified in ***Thompson Newspapers Co. v. Canada (Attorney General)***, [1998] 1 S.C.R. 877:

> (a) does the legislation seek to balance the interests of competing groups;
> (b) is the state the antagonist to the individual;
> (c) what is the vulnerability of the group the legislature seeks to protect;
> (d) is there an inability to measure scientifically a particular harm; and
> (e) what is the nature of the activity that is infringed?

[293] In ***RJR MacDoanld***, McLachlin J. (as he then was) provided this useful

summary with respect to the question of deference in relation to the s. 1 analysis at para. 136:

> As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

Level of Deference

[294] The defendants' approach to the s. 1 analysis was premised upon the assertion that the amendments to the ***1985 Act*** must be considered as a package and that s. 6 cannot be considered in isolation. The defendants submit that when viewed as a package, the complex web of interrelated and conflicting interests at play in the factual and social context surrounding the 1985 amendments to the ***Indian Act*** represent exactly the type of situation to which Parliament is entitled to deference in the judicial assessment of the reasonableness of the legislative balance which Parliament struck.

[295] The defendants submit that the 1985 amendments reflect fifteen years of Parliamentary study and Aboriginal consultations on how to achieve the amendments reflected in that package. The package represents a fine balance

struck between often widely divergent interests. This is a package that cannot be judicially adjusted without widespread and unknown implications for Aboriginal people, and all other interests involved.

[296] On the other hand, the plaintiffs' approach to the s. 1 analysis was premised on the assumption that the analysis of the s. 6 amendments should be taken in isolation. This is because the plaintiffs' challenge is directed only to the issue of registration under the ***1985* Act**. The plaintiffs do not challenge the provisions of the ***1985 Act*** dealing with band membership and reserves. Accordingly, they submit, there are no diverse and divergent interests brought into the analysis. The registration provisions concern only the relations between the citizen and the Crown.

[297] It is the case that the government introduced the amendments to the ***Indian Act*** as a package. However, an essential part of the package was the severance of the relationship between registration as an Indian and the other elements. The intention of the government was that henceforth band membership would be independent from registration. The government's intention in this regard was made very clear by Minister Crombie:

> I would ask committee members, however, to consider again the principles upon which I dealt with the question of status and dealt with the question of band membership. They are not the same and they do not mean the same; they have different effects and they cast different responsibilities on different parties. Sometimes that point has been lost. Status and membership are very different events. I might say, by the way, that I did not invent that difference.
>
> I have, however, I think, tried to articulate and crystalize it so that people would understand that there is a significant difference. For example, status is that thing which defines the special relationship between the federal government and individual Indians. Therefore, it

> gives that individual Indian certain opportunities granted in policy. The two best examples I know are in post-secondary school education and uninsured health benefits. They used to have an off-reserve housing policy but the subsidies were so lousy no one could use it.
>
> ...
>
> You do not have to live in a community to [be registered]. Now if you go to band membership, that is a matter between you and the community and the assets and the voting, and all of that. It is a relationship between you and that Indian community. It is a relationship between the Indian community and you—not the Government of Canada and you as an Indian.
>
> It seemed to me that no matter what the community does, the Government of Canada has an obligation to Indian people who do not live in the communities. It seems to me that the primary discussion about that should be between the Government of Canada and the individual. Not with the band; it is not a band decision. That is a federal government decision.
>
> Now, what happens if somebody says, okay, I am going to join the band and I would also like to be status. It seems to me that is a decision which the Government of Canada has to make. I am prepared for a discussion or argument on it, but it seemed to me when I drew the bill, and it still does, that it is an obligation the Government of Canada is taking on—not the band. That is because whether that person chooses to live in the Indian community or not, that person ought to have that special relationship and those programs.
>
> So that is why I wanted to maintain the distinction. I think it is still valuable because the obligation is between the federal government and that Indian person, and does not involve the band. What involves the band is the band membership.
>
> (Minutes of Proceedings and Evidence of the Standing Committee respecting Bill C-31, March 13, 1985; pg. 14:13 and 14:14.)

[298] It is the case that the government was engaged in an exercise of mediation between divergent and competing interests in relation to the issues surrounding band membership and entitlement to live on reserves. The evidence with respect to competing interests relates to those issues. Those competing interests, as

discussed earlier in these reasons, were the desires of those who lost membership rights to regain band membership and the right to live on reserves, and the desire of bands for increased control over their own membership.

[299] However, the defendants have not identified any group or individual that has an interest that conflicts with, or that must be balanced with, the goal of adopting non-discriminatory criteria for eligibility for registration. Indeed, the Native Womans Association of Canada, the Native Council of Canada, now the Congress of Aboriginal People, and the Assembly of First Nations all support the plaintiffs' claim.

[300] As Minister Crombie stated, "status is a special relationship between the federal government and an Indian individual". The government's intention was that status would henceforth be separate from the issue of band membership. There are no competing interests to be considered and balanced with respect to this special relationship. Accordingly, it is my conclusion that with respect to the s. 1 analysis, the registration provisions need not, and should not, be considered as a package with the provisions dealing with band membership. Rather, it is the particular provisions at issue that must be justified by the government. Because these provisions relate to the relationship between the individual and the state, the heightened deference proposed by the defendants is not appropriate.

Pressing and Substantial Objective

[301] In the first stage of the analysis, the government must show that the objective of the legislation "relates to concerns that are pressing and substantial in a free and democratic society": see ***Oakes*** at pp.138-139. It is the objective of the specific

infringing measure that is to be justified: see ***RJR MacDonald*** per McLachlin J. at para. 143-144. However, that analysis is to be conducted in light of the "place and function of the challenged provisions in the legislative scheme", and in that regard, "the nature of the system and its broader objectives have to be kept in mind": see ***R. v. Advance Cutting & Coring Ltd.***, [2001] 3 S.C.R. 209 at paras. 255-260 per LeBel J. [***Advance Cutting***].

[302] The ***Indian Act*** as a whole is a comprehensive code whose objective is to determine who has Indian status; who is a member of a band; and who is entitled to the benefits such as the right to live on a reserve. It is legislation to govern Canada's relationship with "Indians, and Lands reserved for Indians" pursuant to s. 91(24) of the ***Constitutional Act, 1867***. The Minister of Indian and Northern Affairs, David Crombie, stated in the House of Commons on March 1, 1985, when the ***1985 Act*** was in second reading:

> The *Indian Act* deals with three basic things: who is considered to be an Indian within the meaning of the *Indian Act*; who can be a member of a particular Indian nation; who can live on reserves.
>
> (House of Commons Debates on Second Reading of Bill C-31, March 1, 1985, at p. 2644 (Hon. David Crombie)).

[303] The amendments, including the impugned section, introduced in ***Bill C-31*** were proposed, in the words of Minister Crombie:

> to eliminate two historic wrongs in Canada's legislation regarding Indian People. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.
>
> (House of Commons Debates on Second Reading of Bill C-31, March 1, 1985, at p. 2644 (Hon. David Crombie)).

[304] The amendments were based upon the following principles as identified by Minister Crombie:

> (a) the removal of discrimination based on sex from the ***Indian Act***;
>
> (b) the restoration of status under the ***Indian Act*** and band membership to those whole status and band membership were lost as a result of discrimination under the ***Indian Act***;
>
> (c) that no one should gain or lose status as a result of marriage;
>
> (d) that persons who have acquired rights should not lose them;
>
> (e) that Indian First Nations which desire to do so will be able to determine their own membership.
>
> (House of Commons Debates on Second Reading of Bill C-31, March 1, 1985, at p. 2645.)

[305] Those objectives may well be pressing and substantial, however, I agree with the submission of the plaintiffs that they are not related to the objective furthered by the discriminatory scheme that was adopted. This is self evident in relation to the first, second and third principles. The fifth principle is not engaged by the provisions at issue in the litigation.

[306] The defendants have argued that the fourth principle is engaged in that the creation of a regime without discrimination would have entailed removal of registration from non-Indian women who, prior to 1985, had married men who were registered as Indians. There is some suggestion in the documents filed in evidence in these proceedings that that the government viewed this as a factor. A document entitled Possible Questions and Answers for Standing Committee, March 13, 1985, directed to Minister Crombie contained the following:

> How can you say Bill C-31 removes discrimination? In fact, it perpetuates it. For example, a brother and a sister who both marry non-Indians would find that their descendants are treated differently under the Bill. The brother's descendants can be registered for at least

> one generation longer if they marry non-Indians than the sister's descendants.
>
> Explanation: This issue arises because the wives of Indian males became Indians thus their children would be registerable under Section 6(1)(f) of the new Bill whereas the reinstated sister's children would be registerable under 6(2).
>
> Answer:
>
> - This situation is the result of the acquired rights of women who gained status through marriage.
> - It would not be fair to take away their status.
> - It would not be practical to treat their children as if the mother had no status since many such children are already registered and have full status.
> - For future marriages, the brothers and sisters will be treated identical.

[307] However, as discussed earlier in these reasons, the creation of a regime without discrimination would not necessarily entail the removal of registration from anyone, nor is that sought by the plaintiffs in this litigation. This mistaken notion is not therefore a pressing and substantial objective.

[308] In that same document, the response proposed to the suggestion that the legislation should treat the children of women who are reinstated the same as the children of men with non-Indian wives, was that "this would be going too far. The Government was under no legal obligation to provide any form of restoration of rights." However, as ***Benner*** made clear, that view is not correct insofar as it applies to the legislative regime put in place by the amendments. If the new regime discriminates contrary to s. 15, it will be vulnerable to challenge unless it can be justified pursuant to s. 1. In any event, the view that the government was not obliged to go any farther is not a pressing and substantial objective.

[309] The defendants submitted that an additional objective of the government with respect to the provisions at issue was "to retain Indian registration as a means of continuing the federal government's relationship with individuals of sufficient proximity to the historical population with whom the Crown treated or for whom reserves were set aside". The source is the same Possible Question and Answers document referred to above which contained a similar statement in relation to a suggested question about why the legislation could not treat the descendants of women who are reinstated the same as the children of men with non-Indian wives:

> To go further would swell the ranks of those living off reserve without band membership. It would also involve giving status to people who are two generations away from the reserve and who would not likely have had much contact with their Indian culture.

[310] In my view it is clear that one of the objectives of Government in preserving its role in status or registration was the recognition and preservation of the special relationship between the Government of Canada and Indian people. Minister Crombie stated as much on several occasions. For example, on introducing ***Bill C-31*** for First Reading, he stated:

> The Indian Act deals with three basics things: who is considered to be an Indian within the meaning of the Act; who can be a member of particular Indian nation; and who can live on reserves. Status defines those individuals whom the federal Government wishes to include within the meaning of the Indian Act. It is the right of the federal Government to make that decision. As a result of certain government policies, these individuals who have status are eligible as individuals for certain programs, most particularly those in the fields of education and health.
>
> (House of Commons Debates on Second Reading of Bill C-31, March 1, 1985 at p. 2644.)

[311] He returned to this theme in his introduction of ***Bill C-31*** to the SCIAND on March 7, 1985, in which he stated:

> As I stated in tabling the bill, and as I repeated elsewhere, three basic underlying principles are contained in Bill C-31; and I am committed to each of those three: first of all, the removal of discrimination from the Indian Act; secondly, recognition of band control of membership; and thirdly, the restoration of rights to those who lost them. These three principles form the core of the government's approach to this issue. In the future status will be determined by the federal government on a totally non-discriminatory basis. Sex and marital status will not affect an individual's entitlement to be registered. No one will gain or lose status as a result of marriage, and in general the only criterion for status will be that at least one parent is registered.
>
> The only role to be played by the federal government in the future, then, will be to determine Indian status. Federal registration of status has and will continue to be an indication of the special relationship between the Government of Canada and Indian people. In doing so, it will be a means of determining the eligibility for programs which the federal government offers to individual Indians. The recognition of band control of membership has long been demanded by Indian people. Bill C-31 recognizes that bands are the only ones who should legitimately decide who is a band member. The bill provides that bands can assume control over membership if a majority of electors agree. The federal government will no longer have a role in membership unless bands do not act to assume control. Membership, therefore, will be determined by the bands themselves.
>
> (Minutes of the Proceedings of the SCIAND, March 7, 1985, at pp. 12:7-12:8 (emphasis added).)

[312] However, those comments are directed to the importance of maintaining a role for the government in the determination of status or entitlement to registration as an Indian. They are not directed to the issue of where the line should be drawn for purposes of eligibility to register. Lack of historical connection was not raised by the Minister as a justification for discrimination.

[313] In any event, to the extent that the defendants are suggesting that those previously excluded on discriminatory grounds have a more remote cultural proximity to the original population, there is simply no evidence in support of this assertion. In fact, the only evidence on this point, the direct evidence of Sharon McIvor is that she and Jacob Grismer continue to have a strong and direct cultural identity with the original Aboriginal population.

[314] But even if there had been evidence that the new population was more culturally removed from the original Indian population, their cultural removal would be entirely the result of historic sex discrimination. In other words in advancing this new purpose, the government is attempting to rely upon an invidious effect of its previous discrimination. Consequently, even if there were any evidentiary basis for the claim, and there is none, the purpose is in fact a discriminatory purpose and therefore could not justify perpetuating discrimination under section 1.

[315] Finally, it was submitted that the government's pressing and substantial objective was to avoid creating discrimination in the future which would have compromised the goal of the adoption of a non-biased registration scheme. The notion is that if one were to treat men and women in the same fashion going into the new scheme, a future unfairness would be created in the next generation. This inequity would be that a woman who was married to a non-Indian prior to 1985 would be entitled to registration pursuant to s. 6(1) as would her children, while the

children of a woman who married a non–Indian after the new scheme came into force would only be entitled to registration under s. 6(2).

[316] In the Proceedings and Evidence of the Standing Committee, April 23, 1985, there was an exchange with Minister Crombie that illustrated this thinking. The Minister was responding to a proposed amendment to ***Bill C-31*** that was intended to ensure that the children of Indian women married to non-Indian men will have the same status with the federal government and the same right to transmit status as the children of Indian men and non-Indian women.

[317] Minister Crombie stated:

> Mr. Chairman, there are a couple of things. One is that we have hewed as best we could throughout this act—and as you have heard me say before, I will not bore you with the details of each one, but there are three fundamental principles. One of those fundamental principles was restoration. One of the difficulties was that... anywhere throughout the act where we have encountered the possibility, we have tried to make sure that we were operating on the principle of restoration and not on the principle of reinstatement. Therefore, our concern was to make sure that we did not breach the principle of restoration. That was one difficulty with respect to this section.
>
> I think also it has the effect, and Mr. Lahey can correct me, that as you go through the impact it will make a difference between those who had children before the act and those who have children after the act. In short, in one family you will create a situation whereby there will be a difference as a consequence of moving away from the principle of restoration. In a sense, we would be creating a cousins problem, which would be even greater than the problem we have now, and therefore creating a further inequity. Those were two considerations we had with respect to it.
>
> ...

> I just want to make sure the point being made here is that in attempting to deal with a recognized inequity, we did not want to create an unrecognized inequity. This act has tried desperately not to create an inequity in the future.
>
> This amendment, I think, would create an inequity between the two cousins in the next generation. It seems to me that, no matter what else we did in terms of past discrimination, we do not want by this act to be creating a future discrimination between cousins.
>
> (Minutes of Proceedings and Evidence of the Standing Committee, April 23, 1985, pg. 34:51-52.)

[318] If this was indeed the government's reason for continuing the discrimination, I must confess, I find it difficult to comprehend. ***Bill C-31*** as proposed and passed in fact creates that very distinction with respect to male Indians. Consider the following comparison. The child of a male registered Indian who married a non-Indian prior to the passage of the ***1985 Act*** would have been entitled to be registered pursuant to s. 11 of the previous ***Indian Acts*** as the legitimate child of a male person who was entitled to be registered. With the passage of the amendments introduced in ***Bill C-31***, both the father and his child would be entitled to registration pursuant to s. 6(1)(a) as persons entitled to be registered under previous ***Indian Acts***. If, after ***Bill C-31*** came into force, that child married a person who was not entitled to be registered under the ***1985 Act***, their children would be entitled to be registered under s. 6(2) as persons with one Indian parent.

[319] On the other hand, the child of a brother registered pursuant to s. 6(1)(a) who married a non-Indian after the enactment of ***Bill C-31*** would be entitled to registration pursuant to s. 6(2) and if that child married a non-Indian, their children would not be entitled to be registered.

Brother #1 [6(1)(a)]	**Brother #2 [6(1)(a)]**
Marries non-Indian Child born [Registered]	
---------- ***1985 Act*** comes into force ----------	
Child registered [6 (1)(a)]	Marries non-Indian Child born [6(2)]
----------Assume all children marry non-Indians----------	
Grandchild [6(2)]	Grandchild [no status]
----------Assume all grandchildren marry non-Indians----------	
Great grandchild [no status]	Great grandchild [no status]

[320] This is precisely the “inequity between generations” and “future discrimination” that Minister Crombie asserts it was the government’s intention to avoid at all costs.

[321] What the Minister describes as the “inequity between generations” is the inevitable consequence of adopting a new system of entitlement to registration. There will inevitably be those who would have had a different status under the previous system. However, the government could have chosen to treat men and women and their respective descendants equally under the new regime, which was intended to eliminate discrimination on the basis of sex in the system of registration. If it had done so, the inequities or differences would be solely the result of the application of a new gender-neutral set of rules.

[322] The government did not make this choice. It chose, as I have found, to preserve and continue discrimination on the basis of sex going forward into the new regime. If the reason for that choice was that it was not prepared to accept the

"inequity between generations" with respect to Indian women and their descendants that it was prepared to accept with respect to male Indians and their descendants, this reason is simply a further manifestation of discrimination. As such, a desire to avoid inequality between generations is not a pressing and substantial objective in a free and democratic society.

[323] I agree with the submission of the plaintiffs that while the stated objectives of the legislation as a whole are pressing and substantial, the defendants have failed to advance any pressing or substantial purpose for the discriminatory registration scheme that was adopted.

Proportionality Analysis

[324] The next step in the s. 1 analysis requires the government to show that, on a balance of probabilities, the means chosen are reasonable and demonstrably justified. This is, as Chief Justice Dickson stated in ***Oakes***, a form of proportionality test. The impugned provision must have been "carefully designed to achieve the objective in question" and the law must not be "arbitrary, unfair or based on irrational considerations". There are three components to this inquiry.

Rational Connection

[325] The first step in the proportionality analysis requires an analysis of the connection between the impugned provisions and the objective of the legislation. The measures adopted must be rationally connected to the objective: see ***Oakes*** at p. 139.

[326] The defendants have submitted that the impugned provisions are rationally connected to the objectives in that to eliminate the discrimination would have upset the fair balance achieved by Parliament. The defendants submit further that elimination of the discrimination would have compromised the primary goals of the legislation – the adoption of a non-biased registration scheme, the granting of further autonomy to bands, the preservation of acquired rights, and the preservation of the government's historical relationship with Indians.

[327] As I have discussed in the previous section, given the decision of Parliament to sever the connection between status and band membership, the issue of fair balance does not arise. The only relevant relationship with respect to the issue of entitlement to registration is that between the individual and the state. Accordingly, the impugned provisions do not further the objective of achieving a "fair balance" between the competing interests.

[328] In addition, again as I have discussed in the previous section, the preferential treatment afforded to the paternal lineage contained in the impugned provisions cannot be said to be rationally connected to the objectives of the legislation. It cannot be said that the preservation of discrimination removes discrimination in the system of registration. Entitlement to registration is no longer related to band membership and hence is unconnected to the goal of providing greater band autonomy. It would not be necessary to compromise acquired rights in order to eliminate discrimination against matrilineal descendants. Accordingly, the impugned provisions are not rationally connected to this objective. Finally, to the extent an objective of the legislation was the preservation of the government's historical

relationship with Indians, it cannot be said that there is any rational basis for concluding that the relationship with those who trace their descent along the maternal line is inferior to that of those who trace their descent along the paternal line. Such a suggestion would be, in the words of ***Oakes***, "arbitrary, unfair or based on irrational considerations."

Minimal Impairment

[329] The next step in the proportionality analysis is that the impugned provision should "impair as little as possible the right or freedom affected": see ***Oakes*** at p. 139. The defendants have submitted that deference to parliament's choices is required with respect to this phase of the analysis because:

(a) parliament was striking a balance between the claims of competing groups, see ***Stoffman v. Vancouver General Hospital***, [1990] 3 S.C.R. 483 [***Stoffman***]; ***Advance Cutting***;

(b) parliament was dealing with the distribution of scarce resources, see ***Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island***, [1997] 3 S.C.R. 229 at para. 283-284 [***Reference re Provincial Court Judges***]; and

(c) parliament established cut-off points in the legislation: see ***Stoffman*** at 531, ***Edwards Books*** at pp. 781-782.

[330] With respect to the first element, as discussed above, there were no competing interests and rights with respect to the issue of the criteria for registration.

No group has been identified that would be disadvantaged by removing discrimination from the s. 6 criteria. The government has not demonstrated that any group has an interest in perpetuating this discrimination. Accordingly, a heightened standard of deference is not called for in the present case in relation to this element.

[331] With respect to the issue of financial considerations, "while purely financial considerations are not sufficient to justify the infringement of ***Charter*** rights, they are relevant to determining the standard of deference for the test of minimal impairment when reviewing legislation which is enacted for a purpose which is not financial": ***Reference Re Provincial Court Judges*** at para. 283. In the present case, it is clear that the government was dealing in part with cost and the distribution of resources: see Minister David Crombie's Memorandum to Cabinet, dated January 24, 1985, and the Memorandum to the Minister of Indian Affairs, dated January 11, 1985. In that regard, however, Minister Crombie stated in his Memorandum to Cabinet: "The costs of redressing past discrimination may be substantial. Given our objective of restoring fairness in the *Indian Act*, however, they are unavoidable."

[332] It is also clear that there would be cost implications with respect to the relief sought by the plaintiffs. In that regard, the defendants introduced the expert opinion of Stewart Clatworthy concerning an estimate of the size of the additional population of registered Indians in the event that the plaintiffs succeed in obtaining the relief that they seek, and an estimate of the costs associated with such an increase in the population of registered Indians. Mr. Seth Klein provided an opinion on behalf of the plaintiffs the effect of which was to illustrate difficulties with the some of the assumptions upon which Mr. Clatworthy's opinions were based, and to suggest that

his costs estimates may well be high.

[333] The extent to which the government's choice is entitled to deference with respect to this element must be tempered. First, there is no evidence either at the time of passing the legislation or at present, of financial emergency or severe financial crisis. There is no evidence that the costs associated with the relief sought could not be absorbed by the government. Further, the plaintiffs do not assert a constitutional right to particular financial benefits. They claim a constitutional right to status and incidentally to whatever benefits the government chooses to associate with status. The nature of such programs, entitlements and benefits are within the control of the government.

[334] With respect to the third element, the defendants rely upon the following passage of Chief Justice Dickson in ***Edwards Books*** at para. 141 and 142:

> Nevertheless, while the number of detrimentally affected retailers may be small, no legislature in Canada is entitled to do away with any of the religious freedoms to which these or any other individuals are entitled without strong reason. In my view, the balancing of the interests of more than seven employees to a common pause day against the freedom of religion of those affected constitutes justification for the exemption scheme selected by the Province of Ontario, at least in a context wherein any satisfactory alternative scheme involves an inquiry into religious beliefs.
>
> I might add that I do not believe there is any magic in the number seven as distinct from, say, five, ten, or fifteen employees as the cut-off point for eligibility for the exemption. In balancing the interests of retail employees to a holiday in common with their family and friends against the s. 2(a) interests of those affected the legislature engaged in the process envisaged by s. 1 of the Charter. A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

[335] Those observations were reiterated by Justice La Forest in ***Stoffman*** who stated at para. 70:

> As a final comment on this branch of the appeal, I would simply say that it is not appropriate for this Court to "second-guess" the government's determination that 65 is the appropriate age at which to implement its policy of de facto mandatory retirement. On this issue, I refer to the comments made in *R. v. Edwards Books and Art Ltd*., supra, at pp. 781-82, 800-801, to the effect that the exercise of "line-drawing" was one that should generally be left to the legislature.

[336] In my view the sort of “line drawing” at issue in ***Edwards*** and ***Stoffman*** i.e. whether an exemption should apply to an enterprise with five employees rather than one with ten, or whether the age for retirement should be 65 or 66 is far removed and different in kind for the distinction at issue in the case at bar.

[337] The impugned provision in the case at bar draws a distinction that I have found to be discriminatory on the basis of sex. It is clear that a system could have been established that would have treated matrilineal descent on an equal basis with patrilineal. It is clear that the impairment was not minimal, nor was it reasonably necessary to reach any of the goals of the legislation. I find that the impugned provisions did not impair the right no more than reasonably necessary.

Is the Impact Disproportionate?

[338] The final step in the s. 1 analysis is to weigh the benefits associated with the limitation against its deleterious effects in light of the values underlying the ***Charter***. With respect to this element, the defendants returned to the theme of the “fair balance” and submitted that the amendments struck a necessary and appropriate

balance between the rights of individuals and the need to accommodate the collective identity of Aboriginal communities. The amendments were able to reverse in large measure the effects of previously discriminatory legislation while minimizing the scale of dislocation experienced by bands and the collective interest of band communities. Thus, the defendants submit, the benefits are of the impugned provisions are great.

[339] The defendants submit that the impairment is minimal because both the plaintiffs are now registered under the ***1985 Act*** and acquired all of the rights and benefits associated with being registered. They submit further that there is no right to pass on status and that there is only impairment minimal with respect to the entitlement to registration of the Ms. McIvor's grandchildren.

[340] However, for all of the reasons stated earlier, I have concluded that the "fair balance" is not an appropriate consideration in assessing the impugned provisions. Neither the collective identity of Aboriginal communities nor the collective interests of band communities are affected by the registration provisions at issue, which relate solely to the relationship between the individual and the state. Moreover, I have found that the damaging effects of the continuing discrimination against Aboriginal women and their descendants are significant.

[341] I agree with the submission of the plaintiffs that such harms cannot be justified where, as here, the impugned measures actually undermine the objectives of the legislation. Other than cost, I am unable to identify any salutary effect of the impugned measures. Other than cost, the defendants have not identified any

countervailing interests furthered by the provisions.

[342] I find that the harm associated with impugned provisions is not proportional to the salutary measure. In the result, the violation of the plaintiffs' rights has not been justified under s. 1.

VIII. REMEDY

[343] I have concluded that s. 6 of the ***1985 Act*** violates s. 15(1) of the ***Charter*** in that it discriminates between matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status, and discriminates between descendants born prior to April 17, 1985, of Indian women who married non-Indian men, and the descendants of Indian men who married non-Indian women. I have concluded that these provisions are not saved by s. 1.

[344] The final issue is that of remedy.

[345] The defendants seek a suspension of any relief for a period of 24 months. Such a suspension would, in their submission, serve two purposes. First, an immediate declaration of invalidity would "deprive deserving persons of benefits without providing them to the applicant": see ***Schacter v. Canada***, [1992] 2 S.C.R. 679 at 715-716. A suspension would enable the registration process to continue and afford Parliament time to seek input from Aboriginal groups in its development and implementation of a scheme consistent with the courts ruling. In this regard, I agree with the defendants' submission with respect to the concern over judicial scrutiny of legislation as expressed in ***Hunter v. Southam Inc.***, [1984] 2 S.C.R. 145

at 169 as follows:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

[346] However, further delay for these plaintiffs must be measured against the backdrop of the delays that they have already experienced. The record discloses that from the late 1970's forward, successive governments recognized that the registration provisions discriminated on the basis of sex. It was not until 1985 that legislation was passed to remedy this discrimination, legislation that I have found continued to perpetuate the problem.

[347] Ms. McIvor applied for registration pursuant to the ***1985 Act*** on September 23, 1985. The Registrar responded some sixteen months later by letter dated February 12, 1987, granting her registration under s. 6(2) and denying registration to Jacob. Ms. McIvor protested the decision by letter dated May 29, 1987. The Registrar confirmed his decision some twenty-one months later by letter dated February 28, 1989. These proceedings were then initiated.

[348] At the time these proceeds came under case management in April 2005, the defendant's position was, and continued to be, that a substantial adjournment was required to afford the Crown sufficient time to prepare. This position was maintained notwithstanding the fact that the statutory appeal had been commenced in 1989 and the claim under the ***Charter*** in 1994. The defendants also asserted at that time that up to six months would be required for the trial of this action.

[349] The defendant's concession with respect to the plaintiffs' registration status, was made shortly before trial. It was based on an interpretation of the legislation and in my view could have been advanced at any time following the 1989 Decision of the Registrar. Having made the concession, the defendants immediately applied to strike the plaintiffs' claim.

[350] Against this backdrop, I conclude that the plaintiffs should not be told to wait two more years for their remedy.

[351] Plaintiff's counsel submitted that the course adopted in ***Benner*** should be followed, and that is the approach that I have decided to adopt. It is the intention of these reasons to declare that s. 6 of the ***1985 Act*** is of no force and effect insofar, and only insofar, as it authorizes the differential treatment of Indian men and Indian women born prior to April 17, 1985, and matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status. The court remains seized of the case in order to give the parties the opportunity to draft appropriate relief in light of these reasons. Should the parties fail to reach agreement, I will hear further submissions on the issue of remedy.

"Ross J."