COURT OF APPEAL FOR BRITISH COLUMBIA

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

Date: 20090406
Docket: CA035223

Between:

Sharon Donna McIvor and Charles Jacob Grismer

Respondents
(Plaintiffs)

And

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

Appellants
(Defendants)

And

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

Intervenors

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

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

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Place and Date of Hearing:	Vancouver, British Columbia October 14 - 17, 2008
Additional Written Submissions	October 31, November 14 & 20, 2008
Place and Date of Judgment:	Vancouver, British Columbia April 6, 2009

Written Reasons by:
The Honourable Mr. Justice Groberman

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

Reasons for Judgment of the Honourable Mr. Justice Groberman:

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

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

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

Overview

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

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

[5] Children who were the product of a union of an Indian and a non-Indian were non-Indian if their father was non-Indian. On the other hand, the legitimate children of an Indian father were Indian, subject only to the "Double Mother Rule", which provided that if a child's mother and paternal grandmother did not have a right to Indian status other than by virtue of having married Indian men, the child had Indian status only up to the age of 21.

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

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

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

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

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

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

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

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

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

Legislative History Prior to the 1985 Amendments

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) is a member of a band

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

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

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

(d) is the legitimate child of

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

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

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

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

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

(a) a person who

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

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

(iii) is enfranchised, or

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

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

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

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

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

Growing Discontent with the Status Regime

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

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

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

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

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

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

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

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

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

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

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

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

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

17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

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

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

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

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

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

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

The Plaintiffs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Retrospectivity and the *Charter*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis Under s. 15 of the *Charter*

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

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

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

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

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

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

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

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

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

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

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

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

The Appropriate Comparator Group

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

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

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

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

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

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

[79] Here, Mr. Grismer says that the benefit or advantage sought is the ability to transmit Indian status to one's children. The relevant characteristic is Indian ancestry. The personal characteristic that is a requirement of the statute, and which is allegedly offensive to the *Charter* is that the Indian parent be the father. While it is true that that personal characteristic is not expressly referred to in the current

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

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

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

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

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

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

Is there Differential Treatment?

[83] It is apparent that the *Indian Act* treats Mr. Grismer's group less well than the comparator group. Unlike those in the comparator group, Mr. Grismer is unable to transmit Indian status to the children of his marriage to a non-Indian woman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discrimination on the Basis of Matrilineal of Patrilineal Descent

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

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

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

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

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

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

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

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

Is the Distinction Discriminatory?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Arguments Under Section 1 of the Charter

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

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

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

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

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

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

[122] The discrimination in this case is the result of under-inclusive legislation. The combination of s. 6(1)(a) and 6(2) of the *Indian Act* results in a situation in which people in Mr. Grismer's position are unable to transmit Indian status to their children only because their mothers, rather than their fathers, are entitled to status as Indians. This discrimination applies only to a group caught in the transition between the old regime and the new one.

Pressing and Substantial Governmental Objective

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rational Connection

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

Minimal Impairment

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

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

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

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

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

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

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

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

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

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

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

Proportionality

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

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

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

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

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

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

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

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

Conclusion on Section 1

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

Remedy

[152] The trial judge erred, in my view, in defining the extent of the *Charter* violation. She considered it necessary to redress all discrimination that had occurred prior to 1985. Accordingly, she would have granted Indian status to all individuals who could show that somewhere in their ancestry there was a person who had lost Indian status by virtue of being a woman married to a non-Indian.

[153] In my view, the trial judge erred, as well, in the remedy she granted. In view of the length of time that had passed since the coming into force of the 1985 legislation, she considered it necessary to provide an immediate remedy to the plaintiffs and those in a similar situation. She granted a complex order refashioning the legislation, which she would have had take effect immediately. As I will indicate, I do not think that such an order was in keeping with the proper role of a court in making legislative choices.

[154] The *Charter* violation that I find to be made out is a much narrower one than was found by the trial judge. The 1985 legislation violates the *Charter* by according Indian status to children

> i) who have only one parent who is Indian (other than by reason of having married an Indian),
>
> ii) where that parent was born prior to April 17, 1985, and
>
> iii) where that parent in turn only had one parent who was Indian (other than by reason of having married an Indian),

if their Indian grandparent is a man, but not if their Indian grandparent is a woman.

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

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

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

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

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

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

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

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

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

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

Disbursements Occasioned to the Parties as a Result of Interventions

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

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

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

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

Conclusion

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

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

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

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Tysoe"