COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***McIvor v. Canada (Registrar of Indian and Northern Affairs),*** 2010 BCCA 168

Date: 20100401
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
(Defendants)

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

Supplementary Reasons (Extension of Suspension of Declaration of Invalidity) to Court of Appeal for British Columbia, April 6, 2009 (*McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, No. CA035223)

Counsel for the Appellants: Mitchell R. Taylor, Q.C.
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Dates of Written Submissions:	March 9, 2010 March 16, 2010 March 19, 2010
Place and Date of Judgment:	Vancouver, British Columbia April 1, 2010

Supplementary Reasons of the Court

Supplementary Reasons of the Court:

[1] In our judgment of April 6, 2009, we found that certain aspects of ss. 6(1)(a) and (c) of the *Indian Act,* R.S.C. 1985, c. I-5, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*, and are not saved by s. 1. We declared the impugned sections of the *Indian Act* to be of no force and effect, but suspended the declaration's operation for one year, in order to allow Parliament to amend the legislation to bring it into conformity with the *Charter*. Our order provided that any party was at liberty to apply to extend the period of suspension.

[2] The Attorney General of Canada now applies for an extension of the period of suspension to July 5, 2010. The extension is not opposed by the respondents, but they seek an order that Jacob Grismer's two children be immediately registered under s. 6 of the *Indian Act*.

The Period of the Suspension of the Declaration of Invalidity

[3] When the order was made, we considered a one-year period to be a somewhat optimistic timetable for bringing amended legislation into force. There were several reasons for our concern. The judgment that we issued was complex, and we expected that it would take some time for the parties to analyze it. We recognized that either side might apply for leave to appeal our decision to the Supreme Court of Canada, and were also cognizant of the fact that it was desirable for government to consult with First Nations before proceeding with amendments to the legislation. We were also aware that in the context of a minority government, inter-party consultation on legislation can lead to some delays in the legislative process. Under the circumstances, we might well have acceded to a request for a longer suspension of our declaration had it been sought. The Attorney General's factum, however, sought only a 12-month suspension of any declaration of invalidity.

Government Action Since the Pronouncement of the Order

[4] The evidence placed before us on this application indicates that it did, indeed, take government some weeks to analyze our reasons and to brief the appropriate

officials on it. Both sides considered seeking leave to appeal. Eventually, toward the end of the time limited for an application for leave, the appellants elected not to proceed with such an application. The respondents did file an application for leave. The application was dismissed on November 5, 2009.

[5] Following the decision of the appellants not to seek leave to appeal, Indian and Northern Affairs Canada developed and implemented a process to solicit the views of both Aboriginal and non-Aboriginal people with respect to amendments to the legislation. The process was developed by late August, 2009. A discussion paper was then released and distributed, proposing changes to the legislation. Interested persons were given an opportunity to comment on the proposal and to provide suggestions and feedback. A number of briefings, "engagement" and "national" sessions were held with First Nations organizations. There was also intra-governmental consultation.

[6] In mid-November 2009, Indian and Northern Affairs Canada began the process of drafting legislative amendments. By late December 2009, a draft bill had been prepared.

[7] Unfortunately, it was not possible to proceed with the draft bill in a timely manner, as Parliament was prorogued on December 30, 2009, and a new session did not commence until March 3, 2010.

[8] On March 11, 2010, the government introduced Bill C-3, *An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs).* The short title of the resulting statute, if enacted, will be the *Gender Equity in Indian Registration Act*. The bill is currently before the House of Commons, having received first reading. If it is ultimately passed in its current form, it will come into force on a date fixed by order in council.

[9] It is currently anticipated that the House of Commons will rise for the summer recess on June 23, 2010, while the Senate will sit until June 30.

Extension of the Period of Suspension

[10] We are satisfied that the appellants have been diligent in moving forward with legislative amendments and that there have not been undue delays in the process. In the circumstances, and given that the application for an extension of the period of suspension of the declaration is not opposed, we are prepared to accede to the appellants' application.

[11] The application before us seeks an order that the suspension of the Court's declaration be until July 5, 2010, "or the coming into force of amending legislation, whichever is sooner". In our view, there is no purpose to be served by including language that terminates the suspension of the declaration on the coming into force of amending legislation. When amending legislation is brought into force, there will be nothing for the declaration to attach to, and so no urgency in its revival. Because the terms of the bill currently before Parliament appear to allow it to be brought into force retroactively, we are also concerned that tying our order to the date that the legislation comes into force may also lead to confusion or ambiguity. In the circumstances, we will extend the suspension of our declaration to July 5, 2010.

[12] The division of the Court that heard the appeal will remain seized of this matter until the end of the period of suspension, and will retain the power to vary the period of suspension on the application of any party.

Should Mr. Grismer's Children be Entitled to Immediate Registration?

[13] The respondents say that, as a condition of the extension, Mr. Grismer's two children ought to be given entitlement to immediate registration under the *Indian Act*. They note that "[t]hey were entitled to registration under the Reasons of Madam Justice Ross [in the Supreme Court of British Columbia] and their entitlement was affirmed in the Reasons of this Court."

[14] We do not think it is accurate to describe our reasons as affirming the rights of Mr. Grismer's children to registration under the *Indian Act*. Rather, we found that aspects of the current regime put them within a class of persons who had been

treated less favourably than others under the *Act*, in a manner that infringed their equality rights. We recognized that an obvious option open to the government to redress the inequality was to extend the right to Indian status to persons in the positions of Mr. Grismer's children. We also recognized, however, that other methods of eliminating the inequality might also be available to government, and left it to Parliament to formulate an appropriate response.

[15] While Bill C-3 would give Mr. Grismer's children the right to register as Indians, and while it seems likely that the bill will be approved by Parliament, it would be wrong, in our opinion, to treat the passage and bringing into force of the bill as a *fait accompli*. In our decision of April 2009, we recognized that it was for Parliament to decide how to remedy the inequality. We remain of the view that Parliament is the appropriate institution to deal with the matter. To grant a remedy based on the Bill that is currently before the House of Commons would be to presume that the will of the Executive Council is the will of Parliament. To do so would ignore the constitutional roles of the elected members of the House of Commons and the appointed members of the Senate in passing the legislation, the constitutional role of the Queen's representative in giving Royal Assent, and the role of the Governor General in Council in bringing the legislation into force.

[16] In *Schachter v.* Canada, [1992] 2 S.C.R. 679 at 720, 93 D.L.R. (4th) 1, Lamer C.J.C. indicated that individual remedies will rarely be available where legislation is struck down under s. 52 of the *Constitution Act, 1982*:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.

[17] We recognize that in some cases, where the Supreme Court of Canada has found a legislative scheme to be unconstitutional, it has fashioned remedies that

give special consideration to the parties before the Court: *R. v. Swain*, [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 231 D.L.R. (4th) 385. Those were cases, however, in which the legal rules under consideration affected the rights of parties in adjudicative proceedings. The case before us is not an analogous one.

[18] While we recognize that the respondents have waited a long time for their rights to be vindicated, we are not persuaded that this is a case in which, at least at this juncture, the Court should grant a special personalized order in favour of Mr. Grismer's children.

[19] In the result, we extend the suspension of our declaration that ss. 6(1)(a) and (c) violate the *Canadian Charter of Rights and Freedoms* to July 5, 2010.

"The Honourable Madam Justice Newbury"

"The Honourable Mr. Justice Tysoe"

"The Honourable Mr. Justice Groberman"