IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***McIvor v. The Registrar, Indian and Northern Affairs Canada,*** 2007 BCSC 1732

Date: 20071203
Docket: A941142
Registry: Vancouver

Between:

Sharon Donna McIvor and Charles Jacob Grismer

Plaintiffs

And

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

Defendants

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiffs	R. Grant G. Brodsky
Counsel for the Defendants The Registrar, Indian and Northern Affairs Canada and the Attorney General of Canada	S. Stynes G. Hart B. Marleau M. Taylor
Date and Place of Hearing:	October 4, 2007 Vancouver, B.C.

Introduction

[1] This action dealt with the plaintiffs' challenge to the constitutional validity of ss. 6(1) and 6(2) of the ***Indian Act***, R.S.C. 1985, c. I-5 (the "***1985 Act***"). These provisions deal with entitlement to registration as an Indian, or status as it is frequently termed. The plaintiffs did not challenge any other provisions of the ***1985 Act***, and in particular, did not challenge the provisions relating to entitlement to membership in a band. I concluded that the registration provisions contained in s. 6 of the ***1985 Act*** discriminate on the basis of sex and marital status contrary to ss. 15 and 28 of the ***Canadian Charter of Rights and Freedoms*** (the "***Charter***") and that such discrimination has not been justified by the government. The Reasons for Judgment in this matter are found at 2007 BCSC 827.

[2] At trial, in the event that the court concluded that the impugned provisions were unconstitutional and not saved by s. 1 of the ***Charter***, the defendants submitted that the appropriate remedy was a declaration of invalidity coupled with a suspension of relief. The rationale was summarized as follows at para. 345 of the Reasons:

> The defendants seek a suspension of any relief for a period of 24 months. Such a suspension would, in their submission, serve two purposes. First, an immediate declaration of invalidity would "deprive deserving persons of benefits without providing them to the applicant": see ***Schacter v. Canada***, [1992] 2 S.C.R. 679 at 715-716. A suspension would enable the registration process to continue and afford Parliament time to seek input from Aboriginal groups in its development and implementation of a scheme consistent with the court's ruling.

[3] I agreed with the concerns expressed by the defendants with respect to the appropriate role of the court as noted at para. 345 of the Reasons:

> In this regard, I agree with the defendants' submission with respect to the concern over judicial scrutiny of legislation as expressed in ***Hunter v. Southam Inc.***, [1984] 2 S.C.R. 145 at 169 as follows:
>
> > While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

[4] However, given the history of the litigation and the length of time that the plaintiffs had been without a remedy, I was not prepared to suspend relief. The Reasons state at para. 351:

> It is the intention of these reasons to declare that s. 6 of the ***1985 Act*** is of no force and effect insofar, and only insofar, as it authorizes the differential treatment of Indian men and Indian women born prior to April 17, 1985, and matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status. The court remains seized of the case in order to give the parties the opportunity to draft appropriate relief in light of these reasons. Should the parties fail to reach agreement, I will hear further submissions on the issue of remedy.

[5] The parties have not been able to reach agreement with respect to the appropriate relief. I have heard further submissions with respect to that issue and as well with respect to the issue of costs.

Relief

[6] The plaintiffs' form of order took the approach of providing declaratory relief specifying general principles that must be satisfied in any amended legislation

without actually drafting the language of that amended legislation. In the plaintiffs' submission, s. 6 of the ***1985 Act*** could be re-drafted in a variety of ways to comply with the Reasons and the ***Charter***. The plaintiffs submit that the government should be permitted to amend the legislation using the form and language it deems appropriate, provided the amendments comply with the Reasons.

[7] The defendants' form of order adopted the approach of reading in to essentially re-draft the provisions of s. 6. The defendants submit that this approach is necessary in order to provide the clarity that is required for the administration of the registration provisions of the ***1985 Act.***

[8] However, by oral Reasons for Judgment dated September 17, 2007, Madam Justice Newbury granted a stay pending the appeal of this matter. Any concerns with respect to the administration of the ***1985 Act*** are surely addressed by the stay. In the circumstances, I am of the view that the plaintiffs' approach is more respectful of Parliament's legislative authority.

[9] I have concluded that the following paragraphs most clearly express the intention of the decision, and the proper role of the courts and of Parliament. Accordingly, this Court declares that:

> (a) Section 6 of the ***Indian Act***, R.S.C. 1985, C. 1-5 (the "***1985 Act***") violates ss. 15 and 28 of the ***Canadian Charter of Rights and Freedoms*** in that it discriminates, on the grounds of sex and marital status, against matrilineal descendents, born prior to April 17, 1985, and Indian women born prior to April 17, 1985, who married non-Indian men, in the entitlement to be registered as Indians, and is not saved by s. 1 of the ***Charter***;

(b) Section 6 of the ***1985 Act*** is of no force and effect in so far, and only in so far, as it provides for the preferential treatment of Indian men over Indian women born prior to April 17, 1985, and the preferential treatment of patrilineal descendents over matrilineal descendents born prior to April 17, 1985, in the right to be registered as an Indian;

(c) Every person who was registered or was entitled to be registered as an Indian under s. 6(1)(a) of the ***1985 Act*** shall continue to be registered or entitled to be registered under s. 6(1)(a) as the case may be. Section 6(1)(a) of the ***1985 Act*** shall, however, be interpreted so as to entitle persons to be registered under s. 6(1)(a), who were previously not entitled to be registered under s.6(1)(a) solely as a result of the preferential treatment accorded to Indian men over Indian women born prior to April 17, 1985, and to patrilineal descendants over matrilineal descendents, born prior to April 17, 1985;

(d) Nothing in this order shall entitle any person to membership in an Indian band, under s. 11 of the ***1985 Act***, or under the membership rules enacted by an Indian band which has assumed control of its own membership under s. 10 of the ***1985 Act***. For greater certainty:

a. the terms of this order respecting s. 6 of the ***1985 Act*** and the interpretation of paragraph 6(1)(a) in paragraph (c) of this Order apply only to a person's entitlement to be registered as an Indian and not to an entitlement to band membership;

b. a person who, solely as a result of this Order, becomes entitled to be registered as an Indian under section 6 of the ***1985 Act***, and who would not otherwise be entitled to band membership, shall not be entitled to membership in an Indian band under s. 11 of the ***1985 Act***, or under the membership rules enacted by an Indian band which has assumed control of its own membership under s. 10 of the ***1985 Act***;

c. nothing in this order prevents an Indian band which has assumed control of its own membership under s. 10 of the ***1985 Act*** from amending its membership rules after the entry of this order so as to add to its Band List the name of any person who solely as a result of this order, becomes entitled to be registered as an Indian under s. 6 of the ***1985 Act***;

(e) Nothing in this order shall deprive any person who is a member of an Indian band or entitled to be a member of an Indian band, under s. 11 of the ***1985 Act***, or under the membership rules enacted by an Indian band which has assumed control of its own membership under s. 10 of the ***1985 Act***, from that membership or entitlement;

...

[10] The plaintiffs have sought to add the following declaration:

> The Plaintiff Sharon Donna McIvor is entitled to be registered as an Indian under section 6(1)(a) of the ***Indian Act*** and the Plaintiff Charles Jacob Grismer is entitled to be registered as an Indian under section 6(1)(a) of the ***Indian Act***;
>
> ...

However, I agree with the submission of the defendants that such relief would duplicate the s. 52 relief and is therefore unnecessary and, in light of the jurisprudence, inappropriate: see ***Schachter v. Canada***, [1992] 2 S.C.R. 679. I therefore do not make such a declaration.

[11] The plaintiffs also sought to add the following declaration:

> The decision of the Registrar dated February 28, 1989, holding that the Plaintiff Sharon Donna McIvor be registered as an Indian under section 6(2) of the ***Indian Act*** and that the Plaintiff Charles Jacob Grismer be denied registration under the ***Indian Act*** be further varied to give effect to the Plaintiffs' entitlement to be registered under section 6(1)(a) of the ***Indian Act***;

However, I agree with the submission of the defendants that the court is *functus officio* vis-à-vis the statutory appeal because the order from that appeal has been entered. Accordingly, the relief sought by the plaintiffs would result in an impermissible variation of the order of December 22, 2006.

Costs

[12] The plaintiffs sought an order for costs at Scale C and the defendants submitted that Scale B was appropriate. With respect to the appropriate scale of costs, it is clear in my view that this matter involved difficult issues of fact and law

and that the issues were of importance to a body of persons beyond the individual plaintiffs. This was clearly a matter of more than ordinary difficulty. Costs are fixed at Scale C.

[13] The plaintiffs seek, in addition, an order that the value of each unit allowed in the action be 1.5 times the value that would otherwise apply to a unit in Scale C.

[14] The applicable provisions of Appendix B of the ***Rules of Court***, B.C. Reg. 221/90 are as follows:

> 2(4.1) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).
>
> (4.2) For the purposes of subsection (4.1), an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

[15] At the time this matter came under case management, it had been set down for a 120 day trial. The plaintiffs had also set down a summary trial pursuant to Rule 18A. The defendants took the position that the matter was not suitable for summary determination and that the estimated trial length was not sufficient. It was the defendants' estimate that six months or more would be required to try the matter. As part of the case management process, the parties adopted a trial process in which, while most of the evidence was introduced in the form of documents, some was given *viva voce*. As a result, the length of trial was reduced significantly. The

plaintiffs submit that while this form of proceeding was more efficient, it resulted in a reduction in the units that the plaintiffs could claim under the tariff for days of trial without a corresponding reduction in the time required to deal with the issues. This is the ground advanced by the plaintiffs in support of an order pursuant to s. 2(4.1).

[16] In my view, the reduction in the length of trial was not an unusual circumstance justifying an order under s. 2(4.1). The assumption is that the tariff of costs does not represent a full indemnity. Accordingly, the longer the trial, one would assume the greater the disparity between the actual legal expenses and costs under the tariff. Moreover, I am not able to conclude on the present state of the record that an award of costs at Scale C would be grossly inadequate or unjust.

"Ross J."

December 14, 2007 – ***Revised Judgment***

Corrigendum (2007 BCSC 1802 only) to the Reasons for Judgment issued advising that in the style of cause, counsel's name should read: G. Brodsky.

December 24, 2007 – ***Revised Judgment***

Corrigendum (2007 BCSC 1859 only) to the Reasons for Judgment issued advising that in paragraph 9(d)a, the words "paragraph 2 of this Order" shall be deleted and replaced with "paragraph (c) of this Order"/