GRAND CONSEIL DE LA NATION
WABAN-AKI

Press Release

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Indian Act rules on status declared discriminatory: Canada withdraws its appeal

Wôlinak, Québec, February 23, 2016 – The federal government withdrew its appeal on February 22nd against a Superior Court decision that held the rules on Indian status are discriminatory.

The two communities of the Abenaki nation, Odanak and Wôlinak, had brought two different cases of discrimination suffered by their members before the court.

The Superior Court held in an August 3, 2015 decision that discrimination based on gender – which Indian women and their descendants had suffered from in the past concerning the right to be registered ("Indian status") – has continued to the present day and must cease.

"We are now counting on the federal government to work with First Nations to finally eliminate discrimination based on sex in the Indian Act," said Chief Denis Landry of the Abénaki Council of Wôlinak.

Justice Chantal Masse had given the federal government 18 months to correct the relevant provisions concerning registration under the Indian Act, after which they would be declared invalid as an unjustifiable breach of the right to equality guaranteed by the Canadian Charter of Rights and Freedoms.

The federal government had filed an appeal of the decision before the Québec Court of Appeal on September 2, 2015, which suspended the effect of the judgment.

The Abenaki communities of Odanak and Wôlinak are pleased with the federal government's decision to withdraw its appeal.

The federal government will now have to amend the Indian Act to make it consistent with the Charter by the end of August 2017 at the latest. It can be anticipated that thousands of individuals will gain the right to be registered as a result.

The Abénaki were represented in this case by the law firm of Dionne Schulze.

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BACKGROUNDER ON THE CASE OF DESCHENEAUX v. CANADA

The case

The Abenaki communities of Odanak and Wôlinak brought two different cases before the Court concerning their members and the Superior Cout of Québec held on August 3rd that both are discriminatory.

Susan Yantha is a member of the community in Odanak and a status Indian, but the father of her children is not a registered Indian.

The status to which she is entitled as the daughter born outside of marriage, before 1985, to an Indian father and a non-Indian mother does not allow her to transmit status to her children – however, in the case of a son born to the same parents, he and his children would be entitled to be registered, even if the mother of those children was not an Indian.

Stéphane Descheneaux is a member of the community in Odanak and a status Indian, registered under the rules adopted in 2010 after the McIvor judgment, but the mother of his children is not a registered Indian.

The status to which he is entitled as the descendant of a an Indian grandmother who married a non-Indian does not allow him to transmit status to his children – however, in the case of the grandson of an Indian man who married a non-Indian woman before 1985, the grandson and his children would be entitled to be registered, even if the mother of those children was not an Indian.

Amendments to the registration rules since 1985

Before 1985, Indian women lost their status if they married men without Indian status and their children had no right to be registered as Indians. However, Indian men not only kept their own status if they married non-Indian women, but they gave status to their wives and children.

The 1985 amendments to the Indian Act, adopted when section 15 of the Canadian Charter of Rights and Freedoms came into effect to guarantee the right to equality, gave Indian status back to the women who had lost it and gave status to their children.

The 1985 amendments also created new registration rules without regard to gender. In principle, the new rules required at least two grandparents who were entitled to be registered in order for an individual to be entitled to registration.

However, by preserving the rights of the women who had acquired status by marriage – without giving Indian status to the non-Indian husbands of the Indian women who regained

status – the amendments created a new advantage for men, arising from discrimination in the past.

The law's effect was to ensure that the grandchildren of Indian men who married non-Indian women would always be entitled to status based on their Indian grandfather and his wife who obtained Indian status by marriage: these grandchildren had the two grandparents needed to be registered.

However, the grandchildren of Indian women who had married non-Indian men could not have status because they had only one registered grandparent (except in a case where the child of an Indian woman who regained her status in 1985 had his or her children with a registered Indian).

In 2009, the British Columbia Court of Appeal held in the McIvor case that the registration rules had a discriminatory effect on certain descendants of Indian women who had lost their status. Rather than appeal to the Supreme Court of Canada, the federal government amended the registration rules in order to give status to grandchildren born after 1951.

However, all those grandchildren registered under the new rules obtained status under section 6(2) of the Indian Act, a status that cannot be transmitted to their own children (unless the other parent is a registered Indian)

On the other hand, the grandchildren of an Indian man who married a non-Indian woman before 1985 can transmit status to their own children, even if the other parent to those children is not an Indian.

On a different issue, among the children born outside marriage to Indian men and non-Indian women before 1985, only the sons were entitled to be registered as Indians, not the daughters.

The 1985 amendments gave daughters the right to be registered, but without the right to pass on status unless the other parent was a man registered as an Indian.

However the sons born outside marriage to Indian men and non-Indian women could transmit status to their children even if the other parent was a non-Indian woman. The amendments to the Indian Act in 2010 did nothing to change this situation.

The Superior Court noted in the Descheneaux case that the changes to the Indian Act in 2010 only put an end to discrimination in the case of individuals "in situations strictly identical" to the grandchildren of Sharon McIvor, the plaintiff in the British Columbia case.

According to Justice Masse, the federal government's failure to consider the broader implications of the McIvor decision in 2010 forced the Abénaki "to argue their constitutional rights in the judicial arena in many closely related cases and at great cost, instead of benefiting from the broader effects of a leading case and rather than counting on

those who exercise legislative authority to ensure that their rights are respected when statutes for which they are responsible are adopted and revised."

Next steps

The principal provisions of the Indian Act governing registration have been ruled invalid because they violate the right to equality protected by the Canadian Charter of Rights and Freedoms.

However, the effect of this ruling was suspended for 18 months in order to giver Parliament the opportunity to amend the Indian Act to make it conform to the Charter.

The federal government will now have to amend the Indian Act to make it consistent with the Charter by the end of August 2017 at the latest. It can be anticipated that thousands of individuals will gain the right to be registered as a result.

Justice Masse was careful to point out that even if her judgment only concerned the two cases before her, "it does not thereby exempt Parliament from taking the appropriate measures to identify and settle all the other discriminatory situations that could arise from the issues identified, whether based on sex or other prohibited grounds, in conformity with Parliament's constitutional obligation to ensure that its laws respect the rights enshrined in the Canadian Charter."

The Abénaki

The Abénaki are in two communities whose reserves are in central Québec: Odanak (near Sorel) and Wôlinak (near Trois-Rivières). However, the majority of the communities' members do not live on reserve.

The rules for registration as an Indian have had a particularly severe effect on the Abenaki communities: according to an expert report filed in Court, within about 100 years, no child born in these communities will have the right to be registered as an Indian.