GRAND CONSEIL DE LA NATION
WABAN-AKI

Press Release

For immediate release
August 6, 2015

Indian Act rules on status declared discriminatory: The Abenaki win a historic victory

Wôlinak, Québec, August 6, 2015 – The discrimination based on gender that Indian woman and their descendants suffered from in the past concerning registration ("Indian status") has continued to the present day and must cease, according to a decision from the Québec Superior Court handed down on August 3rd in Montréal.

Justice Chantal Masse gave the federal government 18 months to correct the relevant provisions concerning registration under the Indian Act, before they are declared invalid as an unjustifiable breach of the right to equality guaranteed by section 15 of the Canadian Charter of Rights and Freedoms.

"It must be reiterated that this situation had been allowed to continue for a bit more than 30 years, without a complete solution," she wrote.

The Abenaki communities of Odanak and Wôlinak brought two different cases of discrimination suffered by their members before the court, discrimination the government must now correct.

- Susan Yantha's case: a woman who is a registered Indian and who was born outside marriage before 1985 to an Indian father and a non-Indian mother cannot transmit status to her children – however, a son born of the same parents would have children entitled to be registered.

- Stéphane Descheneaux's case: an Indian born to a couple married before 1985, if his right to registration is based on an Indian grandmother who married a non-Indian man, cannot transmit status to his children – however, if an Indian's right to status is based on an Indian grandfather who married a non-Indian woman, his or her children would be entitled to be registered.

"Instead of appealing this judgment, the federal government should now work with First Nations to end the discrimination that it created," declared Chief Denis Landry of Wôlinak.

Before 1985, Indian women lost their status if they married men without status and their children had no right to be registered as Indians. In 1985, the Indian Act was amended to give back status to the women who had lost it and to give status to their children. However, the British Columbia Court of Appeal ruled in 2009 in the McIvor case that continuing

discrimination deprived the women's grandchildren of Indian status. As a result, the Indian Act was amended again in 2010.

"We warned the government during the parliamentary committee hearings in 2010 that its bill would not put an end to all the cases of gender discrimination and now the Court has proved us right," said Chief Landry.

According to Justice Masse, the government failed to consider the broader implications of the McIvor decision "by restricting them to their strict minimum," which forced the Abenaki to litigate related issues of discrimination again.

The government has 30 days within which to appeal to the Québec Court of Appeal.

– 30 –

Information:

Joanie Rancourt, Communications officer
T: 819-294-1686 | @ : bpellerin@gcnwa.com
Grand Conseil de la Nation Waban-Aki

GRAND CONSEIL DE LA NATION
WABAN-AKI

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, registered under the C-31 rules adopted in 1985 with the coming into force of section 15 of the Charter, but the father of her children is not a registered Indian.

The status to which she is entitled as the daughter born before 1985 outside of marriage 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, he 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 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 arising from discrimination in the past.

Under the 1985 amendments, the grandchildren of Indian men who married non-Indian women were always entitled to status based on their Indian grandfather and his wife who obtained Indian status by marriage. However, the grandchildren of Indian women who had

married non-Indian men could not have status unless another grandparent was 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 children unless the other parent is a registered 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 as the child of a single Indian parent and therefore without the right to pass on status unless they were in a relationship with a man registered as an Indian.

However the sons born outside marriage to Indian men and non-Indian women enjoyed an acquired right to status that allowed them to transmit status to their children even if they were in a relationship with 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 whose situation was exactly identical" to that of Ms. McIvor's grandchildren.

According to Justice Masse, the federal government's failure to consider the broader implications of the McIvor decision in 2010 forced the Abénaki "to enforce their constitutional rights in a judicial forum, at great cost, in multiple closely-related cases, rather than benefitting from the broader effects of a landmark decision and rather than relying on those who exercise legislative authority to ensure that their rights were respected when adopting and amending the law."

Next steps

The principal provisions of the Indian Act governing registration have been ruled invalid because they violate the right to equality protected by section 15 of the Canadian Charter of Rights and Freedoms.

The effect of this ruling has been suspended for 18 months in order to giver Parliament the opportunity to amend the Indian Act in order to make it compliant with the Charter.

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 government of Canada has 30 days within which to appeal to the Québec Court of Appeal.

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.