MCIVOR V CANADA (REGISTRAR OF INDIAN AND NORTHERN AFFAIRS)

Court of Appeal for British Columbia (Groberman, Newbury, Tysoe JJ)
6 April 2009
2009 BCCA 153

Canada – constitutional law – *Canadian Charter of Rights and Freedoms* – right to equality – discrimination on the basis of gender – *Indian Act* – protection under s 15 and s 28 of the Canadian *Charter of Rights and Freedoms* – Indian status

Facts:

In 1985 the *Indian Act*, RSC 1985, c I-5 ('*Indian Act*') was amended to remedy discrimination on the basis of sex and marital status in relation to the provisions that entitle a person to be registered as an Indian. Prior to 1985, the *Indian Act* differentiated between men and women in that when an Indian woman married a non-Indian man she lost her status as an Indian and her children were not entitled to be registered as Indians (the 'Marrying Out Rule'). In contrast, when an Indian man married a non-Indian woman both his wife and his children were entitled to registration and all that registration entailed, subject only to the 'Double Mother Rule' that if the Indian man's mother, who married a non-Indian, was also non-Indian before marriage, the child would cease to have status upon attaining the age of 21.

Amendments to the *Indian Act* came into force on 17 April 1985. Section 6(1)(a) preserves the status of all persons who were entitled to it prior to the 1985 amendments. Section 6(1)(c) restores Indian status to people who were disqualified from status under the Marrying Out Rule and the Double Mother Rule. Section 6(2) extends Indian status to a person with one Indian parent, however a person with status under s 6(2) is unable to pass on Indian status to their children unless those children are the product of a union with another person with Indian status (the 'Second Generation Cut-off').

The appellants claimed that the remedial effort was not complete in that provisions of s 6 of the *Indian Act*, particularly s 6(2), continue to violate ss 15 and 28 of the *Canadian Charter of Rights and Freedoms* in that they favourably distinguish between male Indians who have married non-Indians and their descendants on the one hand, and female Indians who have married non-Indians and their descendants on the other. The appellants did not challenge the Second Generation Cut-off but claimed that it is discriminatory to give s 6(2) status to persons born prior to 17 April 1985.

Before 1985, Ms McIvor had been deprived of status only by virtue of her marriage to a non-Indian man. Following the amendments, she was entitled to status under s 6(1)(c). As only one of his parents was entitled to status, Mr Grismer, her son, was found to have status under s 6(2). Mr Grismer has a non-Indian wife and is unable to pass on Indian status to his children.

In this appeal, the Court of Appeal of British Columbia initially had to determine whether, contrary to ss 15 and 28 of the *Canadian Charter of Rights and Freedoms*, Mr Grismer suffered discrimination because his Indian status derives from his mother rather than his father, with his children being denied Indian status based on differences between men and women in the pre-1985 law, which were preserved by the 1985 amendments. If it was established that Mr Grismer was discriminated against contrary to ss 15 and 28 of the *Canadian Charter of Rights and Freedoms,* the Court subsequently had to decide whether this would have the effect of making ss 6(1) and 6(2) of the *Indian Act* invalid in that the discrimination was not justified pursuant to s 1 of the *Canadian Charter of Rights and Freedoms*.

Held, allowing the appeal and substituting 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, suspended for one year, per Groberman J (Newbury and Tysoe JJ agreeing):

1. The appellants' claim does not require the Court to engage in a prohibited retroactive or retrospective application of the *Charter* as the discrimination faced by Mr Grismer is ongoing. The claim is based on continuing status and the differential treatment between men and women, rather than a discrete event (marriage): [57]–[58], [61].

2. 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: [69]; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 ('*Law*') considered.

3. It is a benefit of the law to which s 15 of the *Charter* applies that Mr Grismer is able to pass on Indian status to his children. Ms McIvor's claim is more remote and unnecessary to determine due to Mr Grismer's involvement as a plaintiff, but nevertheless the Court's view is that the ability to transmit Indian status to a grandchild is a sufficient benefit of the law to come within s 15: [70]–[73].

4. The appellants propose a comparator group of people born prior to 17 April 1985 of Indian men who were married to non-Indian women. The trial judge was correct in accepting this comparator group: [76]–[78]; *Hodge v Canada (Minister of Human Resources Development)* [2004] 3 SCR 357 considered; *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 considered.

5. Mr Grismer's group is treated less favourably than the comparator group under the *Indian Act.* Mr Grismer is denied a benefit of the law in relation to the comparator group as he is unable to transmit Indian status to his children who are the product of his marriage to a non-Indian woman: [83]–[86].

6. The case is properly construed as one of discrimination on the basis of sex rather than marital status. A broad, purposive approach to determining issues of discrimination and standing is required by the Court due to the multi-generational nature of the legislation. The extent to which discrimination directed at a person's descendants or ancestors is able to raise a *Charter* claim depends on the context of the legislation and the effects on the claimant. However, it is dubious whether matrilineal or patrilineal descent qualifies as an analogous ground under s 15 of the *Charter*. It is unnecessary for the Court in this case to decide the extent to which historical distinctions can be the foundation of discrimination claims: [87]–[94], [95]–[101]; *Benner v Canada (Secretary of State)* [1997] 1 SCR 358 considered.

7. The impugned legislation is discriminatory and under-inclusive. The distinctions are not based on actual differences in culture, ability or merit and do not serve the purpose of ameliorating the position of women or assisting more disadvantaged groups: [102]–[117], [122]; *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 considered.

8. *Law* suggested factors that should be considered in determining whether legislative distinctions demean a claimant's dignity. *Law* does not impose a new and distinctive test for discrimination. The factors must not be applied in a mechanical fashion. The third *Law* factor is whether the impugned law or program has an ameliorative purpose. This is not to be expanded into an analysis of whether the law, while discriminatory, is nonetheless justifiable. It is an inquiry properly undertaken under s 1: [106]–[109]; *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 considered, *Law* [1999] 1 SCR 497 considered, *R v Kapp* [2008] 2 SCR 483 applied.

9. The *prima facie* infringement of a *Charter* right is saved by s 1 of the *Charter* if the legislation meets the four-part test in *R v Oakes* [1986] 1 SCR 103: (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?: [119]; *R v Oakes* [1986] 1 SCR 103 followed; *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 cited.

10. The governmental objective of the legislation of preserving vested rights of persons who had status prior to 17 April 1985 is properly considered to be pressing and substantial: [123]–[133]; *R v Oakes* [1986] 1 SCR 103

applied; *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 cited.

11. There is a rational connection between the legislation and its objectives. The legislation permitted those who had status prior to 17 April 1985 to continue to have status in order to protect vested rights: [134]; *R v Oakes* [1986] 1 SCR 103 applied; *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 cited.

12. The legislation, however, is not tailored to its objective as the 1985 amendments further disadvantaged Mr Grismer and his group in relation to the comparator group. The 1985 legislation did not merely preserve rights but appears to have given a further advantage to an already advantaged group by enabling those to whom the Double Mother Rule previously applied to have status under s 6(2) for life. This result is not in keeping with the requirement of minimal impairment of the equality rights of the appellant: [140], [165]; *R v Oakes* [1986] 1 SCR 103 applied, *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 cited, *McKinney v University of Guelph* [1990] 3 SCR 229 considered.

13. The discriminatory effects of the 1985 legislation are not permanent or disproportionate to the legislation's objective. The denial of status to Mr Grismer's children is in keeping with the current legislative regime and does not have any permanently discriminatory effects. It is the treatment of the comparator group that is an extraordinary exception: [144]–[150].

14. Due to the failure to meet the minimal impairment test, the infringement of the plaintiffs' s 15 rights is not saved by s 1 of the *Charter*. The legislation does pass all other facets of the s 1 test: [151].

15. The trial judge erred in defining the extent of the *Charter* violation and in seeking to redress all discrimination that had occurred prior to 1985. The trial judge also erred in granting an immediate remedy that refashioned the legislation. The decision as to how the inequality should be remedied is one for Parliament: [152]–[161]; *Shachter v Canada* [1992] 2 SCR 679 considered.

Note: The appellants have announced their intention to appeal the decision to the Supreme Court of Canada.