

COURT OF APPEAL FOR ONTARIO

BETWEEN

LYNN GEHL

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (LEAF)

Intervener

FACTUM OF THE INTERVENER,

WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (LEAF)

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**FACTUM OF THE INTERVENER,
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PART I - OVERVIEW

1. This appeal addresses provisions of the *Indian Act*, RSC 1985 c I-5 [“the *Indian Act*”] and the associated Proof of Paternity Policy [“the Policy”] that set out the evidentiary requirements for proving a child’s paternity. Together, they impose an impossible burden on Registered Indian women who are unable to prove the paternity of their children, or are only able to do so at an unacceptable cost, and

functionally prevent many women from passing on their Indian status to their children and grandchildren. The appeal is the latest in a string of cases that have sought to address sex discrimination in registration under the *Indian Act*.¹

2. Section 15 of the *Charter of Rights and Freedoms* [“the *Charter*”] guarantees substantive, rather than formal, equality. A substantive equality approach “recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages.”² It requires careful attention to the history, context and lived experience of the claimant group. Applying a substantive equality approach, LEAF submits that the registration provisions of the *Indian Act*, as they are implemented by the Policy, create a distinction on the basis of sex and marital status that constitutes discrimination. They serve to “widen the gap” between Registered Indian women and other members of society, and fail to account for the lived realities of Registered Indian women who cannot, or effectively cannot, prove the paternity of their children. The *Indian Act* provisions as implemented by the Policy therefore constitute discrimination under the meaning of s. 15(1).

3. LEAF submits that it is possible to remedy this discrimination without striking down s. 6 by amending the Policy to allow Registered Indian women who cannot, or effectively cannot, prove the paternity of their children to benefit from a rebuttable presumption of Indian paternity. If the Court concludes such a presumption is inconsistent with the wording of s. 6, however, then s. 6 must be struck down.

¹ See, for example, *Lovelace v Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977 [“*Lovelace*”]; *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 [“*McIvor*, BCCA”]; *Descheneaux v Canada (Procureur Général)*, 2015 QCCS 3555 [“*Descheneaux*”].

² *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548, 2015 SCC 30 at para 17 [“*Taypotat*”].

PART II - FACTS

A. The benefits associated with registration under the *Indian Act*

4. Section 6 of the *Indian Act* governs entitlement to registration under the Act – often simply called “Indian status”. Registration acts as a portal for access to material benefits, including tax exemptions, extended health coverage and financial assistance with post-secondary education,³ as well as intangible benefits such as a sense of belonging, recognition and cultural connection.⁴ In many First Nations, registration is also tied to band membership, and the ability to vote and run in band elections.⁵

5. The ability to pass on Indian status to one’s child is a significant benefit of the registration provisions. As the British Columbia Court of Appeal held:

Parents are responsible for their children’s upbringing, and financial benefits that an Indian child receives will, accordingly, alleviate burdens that would otherwise fall on the parent. Quite apart from such benefits, though, it seems to me that the ability to transmit Indian status to one’s offspring can be of significant spiritual and cultural value... the ability to pass on Indian status can be a matter of comfort and pride for a parent, even leaving aside the financial benefits that accrue to the family.⁶

³ Olthuis, Kleer Townshend LLP, *Aboriginal Law Handbook*, 4th ed (Toronto: Carswell, 2011) at 247-248; *McIvor*, BCCA, *supra* note 1 at para 70.

⁴ *McIvor v The Registrar, Indian and Northern Affairs Canada* 2007 BCSC 827 at para 143 [“*McIvor*, BCSC”], affirmed by the British Columbia Court of Appeal in *McIvor*, BCCA *supra* note 1 at para 70.

⁵ Section 10 of the *Indian Act* sets out a procedure by which First Nations can assume control of their own membership. Section 11 provides for the management of a band list by the Department of Indigenous Affairs and Northern Development where a First Nation has not assumed control of its own membership. The procedures and processes for management of a First Nations membership list by the Department are explicitly tied to the status provisions in s 6.

⁶ *McIvor*, BCCA, *supra* note 1 at para 71.

B. The history of discrimination in the provisions governing Indian status

6. Throughout the long history of the *Indian Act*, its provisions governing entitlement to and transmission of Indian status have discriminated against Indigenous women.⁷ Starting in 1869, Registered Indian women who married non-Indian men lost their status.⁸ These women were permanently stripped of their entitlement to *all* benefits of status, including their membership in their band and their right to live on reserve, even if they were later widowed or divorced, and their children were ineligible for status. In contrast, starting in 1876,⁹ Indian men who married non-Indian women not only preserved their Indian status, but were able to confer that status on the women they married, and pass it on to their children.¹⁰

7. Early versions of the *Indian Act* also singled out “illegitimate children” for differential treatment. Under the 1876 *Indian Act*, at the request of their band and with the approval of the Superintendent General, children born outside of marriage could be excluded from status.¹¹ After 1880, the Superintendent General had the power to exclude these children directly.¹² Under the 1951 *Indian Act*, illegitimate male children of an Indian man could be registered, but illegitimate female children could not. Illegitimate children of either sex born to Indian women were entitled to be registered unless the Registrar concluded their father was not an Indian.¹³ Thus, from 1951 until

⁷ Lovelace, *supra* note 1; McIvor, BCCA, *supra* note 1; Descheneaux, *supra* note 1.

⁸ *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria*, c 42, SC 1869, c6, s 15.

⁹ *Indian Act*, SC 1876, c 18, s 3.

¹⁰ The only restriction on the ability of Registered Indian men to pass on their status to their children was the “Double Mother rule”, instituted in 1951. Under the Double Mother rule, a child would lose their Indian status at age 21 if they had 1) an Indian father whose mother gained status through marriage, and 2) a mother who had gained status through marriage. Exceptions to the Double Mother rule were readily and widely granted. Descheneaux, *supra* note 1 at paras 20, 27.

¹¹ *Indian Act*, SC 1876, c 18, s 3.

¹² *Indian Act*, RS 1880, c 28 (43 Vict), s 10.

¹³ *Indian Act*, SC 1951 c 29 (15 Geo Vi), s 11.

amendments to the *Indian Act* in 1985, unmarried Registered Indian women were able to pass on status to their children through a presumption of Indian paternity.

C. Contemporary status regime

8. In 1985, in an effort to bring the *Indian Act* into compliance with s. 15 of the *Charter*, Parliament amended the provisions governing registration.¹⁴ The *Indian Act* now establishes a two-tiered system of status. Under s. 6(1)(f), “full” status is available to people with two parents who are entitled to be registered.¹⁵ A person registered under s. 6(1) may enjoy all the benefits of registration, and may pass her Indian status onto her children regardless of the status of the children’s other parent.

9. Where a person has only one parent who is entitled to be registered, on the other hand, she is entitled to a lesser form of status under s. 6(2). A person with status under s. 6(2) may enjoy the benefits of Indian status in her lifetime, but cannot pass on that status to her child unless the child’s other parent has status. This is known as the “second-generation cut-off”.

10. The Registrar has developed a Policy to guide the application of the second generation cut-off. It sets out the evidence the Registrar may accept to establish paternity and therefore determine how a child should be registered under the *Indian Act* – pursuant to s. 6(1), pursuant to s. 6(2), or not at all. Under the Policy, the preferred evidence of paternity is a birth certificate issued by provincial or territorial authorities naming the father. Generally speaking, the form required to obtain a birth certificate is filled out and signed by both

¹⁴ *McIvor*, BCCA, *supra*, note 1 at para 10.

¹⁵ *Indian Act*, RSC 1985 c I-5, s 6(1).

parents in the hospital just after birth.¹⁶ If the birth certificate does not identify the child's father, the Registrar may consider other evidence, such as a court order declaring paternity, or a statutory declaration from both parents or from two close family members who can identify the father from their own personal knowledge. In cases where confidentiality or safety is a concern, the Registrar may consider other evidence such as DNA paternity testing or a paternity hearing.¹⁷

11. Where a mother is unable to prove the Indian status of the father of her child to the satisfaction of the Registrar, the Policy provides that the mother's Indian status alone will be relied on to register the child. This means that the other parent will, by default, be presumed to be without status. If the mother has status under s. 6(1), her child will be entitled only to s. 6(2) status. If she is registered under s. 6(2), her child will have no status at all.¹⁸ The Policy therefore removes the presumption of Indian paternity that operated under the 1951 *Indian Act* and imposes a new burden on Registered Indian women.

PART III - ISSUES

12. The issues in this appeal are: 1) whether s. 6 of the *Indian Act*, RSC 1985, c I-5, as implemented by the Policy that sets out the evidence required to establish that a child is entitled to Indian status, discriminates against Indigenous women in contravention of s. 15(1) of the *Charter*; and 2) if so, the appropriate remedy for this discrimination.

¹⁶ Status of Women Canada, *Indian Registration: Unrecognized and Unstated Paternity*, by Michelle Mann (Ottawa: Status of Women Canada, June 2005) at 9- 10 [*"Mann"*].

¹⁷ *Gehl v Attorney General of Canada*, 2015 ONSC 3481 at paras 49-55 [*"Gehl"*].

¹⁸ *Ibid* at paras 49-55.

PART IV - ARGUMENT

A. A substantive equality approach to s. 15(1) of the *Charter*

13. Section 15(1) requires a “flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group.”¹⁹ It proceeds in two parts. At the first stage, the question is whether, “on its face or in its impact, a law creates a distinction based on an enumerated or analogous ground.”²⁰ At the second stage, the focus is on “whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.”²¹

14. Throughout the analysis, the focus is on whether the impugned law or policy undermines *substantive* equality.²² As the Supreme Court recently explained in *Kahkewistahaw First Nation v Taypotat*, a substantive equality approach “recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages.”²³ This analysis requires close attention to the larger social, political and legal context in which the impugned law or policy operates:

¹⁹ *Quebec v A*, [2013] 1 SCR 61, 2013 SCC 5 at para 331 [“*Quebec v A*”], per Abella J for the majority on the scope and application of s 15(1).

²⁰ *Taypotat*, *supra* note 2 at para 19.

²¹ *Taypotat*, *supra* note 2 at para 20.

²² *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 166 [“*Andrews*”]; *Withler v Canada (Attorney General)*, [2011] 1 SCR 396, 2011 SCC 12 at para 2 [“*Withler*”].

²³ *Taypotat*, *supra* note 2 at para 17.

It is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster discrimination...

If the larger context is not examined, the s. 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation.²⁴

15. A substantive equality approach to s. 15(1) in this case rests on three key principles. First, a distinction based on unstated or unknown paternity is necessarily a distinction based on sex. To conclude otherwise is to ignore the fundamental realities of child bearing, and the process by which paternity is proven for the purposes of registration for Indian status. Second, particularly at the second stage of the s. 15(1) analysis, careful attention must be paid to the lived experience of claimants, understood in its full historical context. In light of this context, if the impugned law or policy widens the gap between a historically disadvantaged group and the rest of society, it is discriminatory. Finally, the reasonableness and integrity of the registration system are appropriately considered as part of the s. 1 analysis, not as part of the inquiry into whether s. 15(1) has been violated.

i. The Act and Policy draw a distinction on the basis of the protected grounds of sex and marital status.

16. The first stage of the s. 15(1) test asks whether the impugned law or policy draws a distinction on the basis of an enumerated or analogous ground.

17. Section 6, as it has been implemented by the Policy, makes a distinction on the basis of sex. There is a fundamental and necessary connection between sex and unstated paternity. It is only women who are inescapably identifiable as having given birth. As a result, in

²⁴ *R v Turpin*, [1989] 1 SCR 1296 at 1331-1332.

any situation in which only one parent is identifiable for the purposes of registration, it is likely to be a woman. A woman may be unable to identify her child's father for the purposes of registration for a number of reasons. She may not know the name of the child's father – for instance, if the mother had multiple partners, engaged in sex in exchange for payment, or was sexually assaulted by a stranger. A woman may also be unable to prove paternity because the father refuses to acknowledge paternity, fearing the social and/or financial consequences.

18. In other circumstances, a woman may be effectively unable to prove paternity because of the high personal cost of doing so. It is women, rather than men, who are likely to face serious risks that could functionally prevent them from identifying the other biological parent of their children for the purposes of registration. Women²⁵ – and especially Indigenous women²⁶ – are much more likely than men to experience intimate partner violence, particularly rape and sexual assault. A Registered Indian woman who has been subject to violence from the father of her child may justifiably decide that asking him to sign a birth registration form or to produce a statutory declaration of paternity creates an unacceptable risk of continued violence.

19. The result is that s.6, as it has been implemented by the Policy, applies uniquely to Registered Indian women. It is difficult to provide a comprehensive account of how many Registered Indian women are unable or effectively unable to prove the paternity of their child, since the Registrar has a record only of those women who successfully register their child – that is, only those women who are

²⁵ In 2013, Statistics Canada data indicated that 8/10 police reports of intimate partner violence were assaults against women, including 98% of reported sexual assaults in intimate partner relationships Canadian Centre for Justice Statistics, *Family Violence in Canada: A statistical profile, 2013*, (Ottawa: Statistics Canada, January 15, 2015) at 23, 25, 31.

²⁶ Statistics Canada, "Violent Victimization of Aboriginal women in the Canadian provinces, 2009", *Juristat Article*, by Shannon Brennan (Ottawa: Statistics Canada, May 17 2011) at 10.

registered pursuant to s. 6(1), and who thus may register their children pursuant to s. 6(2) without identifying the child's father.²⁷ However, the experts called to give evidence in this case agreed that there were approximately 46,060 children born to women registered under s. 6(1) with "unstated" fathers as of December 31, 2004.²⁸ This represents approximately 19% of children born to women registered under s. 6(1).²⁹ They estimate that a further 14,735 children born to women registered under s. 6(2) were ineligible for registration in the same period because of unknown or unstated paternity.³⁰ There is no evidence of any Registered Indian men who were unable to identify the mother of their child for the purposes of registration.

20. In spite of this, Stewart J. concluded that "unknowable paternity is not an analogous ground" and the "impugned provisions... treat all applicants the same."³¹ By failing to recognize the inevitable relationship between unstated or unknown paternity and sex, her reasons replicate the formalistic and narrow approach to equality in *Bliss v Canada (Attorney General)*. At issue in *Bliss* were provisions in the *Unemployment Insurance Act*, 1971, that excluded pregnant workers from regular unemployment benefits and instead required them to take special maternity benefits subject to more stringent eligibility requirements. Ritchie J. concluded that the exclusion did not draw a distinction on the basis of sex, infamously observing that, "Any inequality in this area is not created by legislation but by nature."³²

²⁷ Stuart Clatworthy, *Analysis of Select Population Impacts of the 1985 Amendments to the Indian Act (Bill C-31) and Select Hypothetical Amendments to the 1985 Indian Act*, (24 April 2013), prepared for the Department of Justice. Joint Motion Record, Tab 27, at 18 ["Clatworthy"].

²⁸ *Joint Statement of the Parties' Expert Demographers, Stewart Clatworthy and James S. Fideres*, signed September 25 & 26, 2013 at p1, Joint Motion Record, Tab 28 ["*Joint Statement of the Parties Expert Demographers*"] at 1.

²⁹ Clatworthy, *supra* note 27 at 17.

³⁰ *Joint Statement of the Parties Expert Demographers*, *supra* note 28 at p 1.

³¹ *Gehl*, *supra* note 17 at para 81.

³² *Bliss v Attorney General of Canada*, [1979] 1 SCR 1283 at 190.

21. Subsequent case law has rejected this narrow and formalistic reasoning as the antithesis of a substantive equality approach.³³ In *Brooks v. Safeway*, a human rights challenge under human rights legislation to a benefits plan that excluded pregnant employees from disability benefits, Dickson C.J. explained:

[*Bliss* was] wrongly decided, or in any event would not be decided now as it was decided then.... It is difficult to conceive that distinctions or discrimination based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.³⁴

22. A law or policy that makes a distinction on the basis of unknown or unknowable paternity has strong parallels with a law that makes a distinction on the basis of pregnancy. Not all Indigenous women seeking to register their children under the *Indian Act* are unable or effectively unable to identify the other parent of their children, but those who are unable or effectively unable to identify the other parent of their children for the purposes of registration are exclusively Indigenous women, particularly Indigenous women who are confronting intimate partner violence. To ignore this fundamental link between unknown and unstated paternity and sex is inconsistent with a substantive equality approach to s. 15(1).

23. The law, as implemented by the Policy, also has a disproportionate effect on unmarried Indigenous women, who are more likely to be unable or effectively unable to establish the paternity of their children. Where the father of the child has another spouse, for instance, there may be serious social and community repercussions to gathering the evidence required to prove paternity. As a result, in its effect,

³³ *Andrews*, *supra* note 22 at 167-168.

³⁴ *Brooks v Canada Safeway Ltd*, [1989] 1 SCR at 1243-1244 [emphasis added].

the law, as implemented by the Policy, also draws a distinction on the basis of the analogous ground of marital status.³⁵ This, too, satisfies the first stage of the s.15(1) analysis.³⁶

ii. A contextual and historical approach to whether s.6 of the *Indian Act* and the “Proof of Paternity Policy” perpetuates arbitrary disadvantage

24. At the second stage of the s. 15(1) analysis, the question is whether the impugned law and policy is discriminatory because it perpetuates arbitrary disadvantage against members of the protected group – that is, “whether the impugned law fails to respond to the actual capacities and needs of the members of the group” and instead “has the effect of reinforcing, perpetuating or exacerbating their disadvantage.”³⁷

25. As the Supreme Court has repeatedly emphasized, a substantive equality approach to whether a law or policy is discriminatory requires consideration, from the claimants’ perspective, of the “actual impact of the impugned law, taking full account of social, political, economic, and historic factors.”³⁸ The analysis is “grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.”³⁹ Taking this context into account, where a law or policy “widens the gap between the historically disadvantaged

³⁵ *Miron v Trudel*, [1995] 2 SCR 418.

³⁶ See, for example, *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, where the Supreme Court recognized that the government’s failure to fund sign language interpretation for medical services violated s. 15(1) even though the impugned law and program treated everyone the same, because in effect, it denied deaf people equal access to medical care. See also *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, where the Supreme Court similarly held that a facially “neutral” fitness requirement for fire fighters in fact imposed a disproportionate burden on women, and therefore discriminated on the basis of sex. Although this case dealt with discrimination under human rights legislation, like other human rights cases, this has been treated as an applicable authority under s. 15(1) of the *Charter*. *Andrews*, *supra* note 22 at 172-174. See also: *Taypotat*, *supra* note 2 at para 23.

³⁷ *Taypotat*, *supra* note 2 at para 20.

³⁸ *Withler*, *supra* note 22 at paras 2, 37, 39.

³⁹ *Ibid* at para 37.

group and the rest of society rather than narrowing it, then it is discriminatory.”⁴⁰ In this case, the distinction made by s. 6 and the Policy discriminates against Indigenous women by denying them equal benefit of the law.

a) Section 6 and the Proof of Paternity Policy “widens the gap” between a historically disadvantaged group and the rest of society

26. This Court may take judicial notice of “facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy,”⁴¹ including census data.⁴² It is appropriate for this Court to take judicial notice of the broad systematic disadvantage confronted by Indigenous women, both historically and in contemporary Canada.⁴³ This pattern of systematic disadvantage has been widely recognized by international human rights bodies⁴⁴ and is confirmed by census data.

27. Indigenous women in Canada have lower incomes and higher rates of unemployment than Indigenous men and other women.⁴⁵ They are also much more likely to be lone parents. Data from the 2006 census reveals that 27.2% of families of Registered Indian families living on reserve and 22.5% of families of Registered Indian women living off reserve are lone parent families headed by women,

⁴⁰ *Quebec v A*, *supra* note 19 at para 332, per Abella J for the majority on the scope and application of s. 15(1); *Taypotat*, *supra* note 2 at para 20.

⁴¹ Sopinka, Lederman, Bryant. *The Law of Evidence in Canada*, 2nd Ed, (Markham: LexisNexis, 1999) at 1055; See *R v Edward Books*, [1986] 2 SCR 173 at para 195.

⁴² The Supreme Court has taken judicial notice of census data in a number of *Charter* cases, including *M v H*, [1999] 2 SCR 3 at para 353; *Quebec v A*, *supra* note 19 at paras 125, 237-239, 249, per Lebel J.

⁴³ *R v Gladue*, [1999] 1 SCR 688 at para 83.

⁴⁴ UN Committee on the Elimination of Discrimination against Women (CEDAW), *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/OP.8/CAN/1 (30 March 2015); United Nations General Assembly, Human Rights Council, *Report of the Special Rapporteur on the rights of Indigenous Peoples, Victoria Trauli*, UNHCR, 30th Session, Agenda Item 3 A/HRC/30/41 (6 August 2015)

⁴⁵ Mann, *supra* note 16 at 8.

compared to just 12.4% of non-Indigenous families. There are between three and five times as many lone parent families headed by Registered Indian women as by Registered Indian men.⁴⁶ In addition, lone parent families headed by First Nations women tend to be larger than lone parent families headed by non-Indigenous women.⁴⁷

28. Functionally, this means that Indigenous women, and particularly Registered Indian women, are more likely than others to be in the precarious position of raising children alone and in poverty. Their families are likely to include more children and have fewer resources. Given the significant material benefits associated with Indian status, to make it difficult or impossible for Indigenous women who are unable or effectively unable to identify the father of their children to register those children exacerbates their economic and social disadvantage. It also contributes to a sense of cultural isolation and exclusion for lone parent families headed by Registered Indian women because it sends the message that their families are somehow “less Indigenous” than families with two parents with Indian status. As the British Columbia Supreme Court recognized in *McIvor*:

The concept of Indian has become and continues to be imbued with significance in relation to identity that extends far beyond entitlement to particular programs [...] The *Royal Commission Report* at c. 2, p. 23 stated that, “the *Indian Act* has created a legal fiction as to cultural identity.” The reference to legal fiction is ... an apt reminder of the fact that the concept did not emanate from the Aboriginal people, but was an artificial construct created by the colonists and imposed upon the Aboriginal people. However, the description of the

⁴⁶ The disparity between families headed by Indigenous women and those headed by Indigenous men is greater on reserve than off. Aboriginal Affairs and Northern Development Canada, *Aboriginal Women in Canada: A Statistical Profile from the 2006 Census*, (Ottawa: Aboriginal Affairs and Northern Development Canada, 2012) at Table 12. The range results from differences between people living on and off reserve. There are approximately five times as many lone parent families headed by Registered Indian women as Registered Indian men living on reserve, and three times as many living off reserve.

⁴⁷ Statistics Canada, “First Nations, Métis, and Inuit Women,” in *Women in Canada: A gender-based statistical report*, by Viviane O’Donnell and Susan Wallace, (Ottawa: Statistics Canada, Social and Aboriginal Statistics Division, July 2011) at 20.

concept as a fiction should not be taken to suggest that the concept lacks meaning or substance. On the contrary... this legal fiction has become an important aspect of cultural identity.⁴⁸

29. The disadvantaged position of Indigenous women in Canadian society is the result of complex social and legislative forces tied to colonization, racism and misogyny, including the *Indian Act* itself. A number of decisions have recognized that the registration provisions set out in prior versions of the *Indian Act* amounted to an attempt by the Canadian state to impose patriarchal structures on Indigenous societies.⁴⁹ Status rules that excluded Indigenous women who “married out” and their children from Indian status and the benefits of community life exposed them to poverty, dislocation, political disenfranchisement and social exclusion.⁵⁰

30. The registration provisions of the 1985 *Indian Act*, as implemented by the Policy, exacerbate rather than dismantle this legacy by imposing a unique and disproportionate burden on Registered Indian women seeking to register their children, exposing both Registered Indian mothers and their children to additional disadvantage. This is therefore a quintessential case where the impugned law and policy operate to “widen the gap” between a historically disadvantaged group and the rest of society, a gap that arose in part as a result of sex discrimination in prior versions of the *Indian Act* over generations.

31. Section 6 as implemented by the Policy has the harshest and most punitive impact on women registered under s. 6(2), who are unable to register their children if they are unable to prove the identity of the child’s father or can do so only at unacceptably high personal cost. A woman registered under s. 6(1) in the same situation can register her child under s. 6(2), but still loses the intangible

⁴⁸ *McIvor*, BCSC, *supra* note 4 at paras 133-134; affirmed by the British Columbia Court of Appeal in *McIvor*, BCCA, *supra* note 1 at para. 71.

⁴⁹ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paras 85-87, per L’Heureux-Dubé J, concurring; *Martin v Chapman*, [1983] 1 SCR 365 at 370.

⁵⁰ *McIvor*, BCSC, *supra* note 5 at para 37.

cultural and material benefits of passing on her status to her grandchildren. Although it was not “strictly necessary” to resolve the issues at stake in the appeal in *McIvor*, the British Columbia Court of Appeal agreed that, “in view of the cultural importance of being recognized as an Indian and the requirement to give s. 15 a broad purposive interpretation”, to deny a grandmother the ability to transmit status to a grandchild on the basis of sex constitutes discrimination under s. 15(1).⁵¹

32. In addition, the children of women registered under s. 6(1) and an unproven father may one day face additional material disadvantage as a result of discrimination against their mothers, as they will be unable to register their own children under the *Indian Act* unless their child’s other parent is entitled to status. It is well-established that imposing a disadvantage on or denying a benefit to a child on the basis of the sex of their parent or grandparent constitutes discrimination against that child under s. 15(1). In *Benner v Canada (Secretary of State)*, for example, the Supreme Court concluded that a law that imposed more onerous requirements to obtain Canadian citizenship on children of a Canadian mother than on children of a Canadian father discriminated against the children on the basis of sex.⁵²

This case is analogous.

b) Section 6 and the Proof of Paternity Policy fail to respond to the actual situation of Registered Indian Women

⁵¹ *McIvor*, BCCA, *supra* note 1 at paras 73-74, 92.

⁵² *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at paras 78-90; see also *McIvor*, BCCA, *supra* note 1.

33. The combination of s. 6 and the Proof of Paternity Policy gives Registered Indian women no real option for equal access to registering their children and therefore fails to respond to their lived reality, needs and capacities.

34. As noted above, some Registered Indian women cannot prove paternity because the father's identity is unknown or uncertain, where, for instance they have multiple partners or engage in sex in exchange for payment. Others can only prove paternity at an unacceptably high personal cost. Where the father of their child is married to another person, establishing paternity may result in profound stigma, loss of community, and loss of support networks. For women who have experienced rape, intimate partner violence or incest, proving paternity may expose them to the risk or reality of further violence and abuse, and at the very least the trauma of continued or renewed contact with the perpetrator. Other women may be unable to prove paternity because the Registered Indian father of their child refuses to acknowledge it.

35. None of the forms of evidence accepted under the Proof of Paternity Policy offer viable options for these women to access the registration provisions on behalf of their children. Any form of evidence that requires the participation of the father or close relatives poses risks for women who are refusing to state paternity because of violence or because of serious social repercussions. Any such form of evidence similarly offers no assistance to women who cannot identify the father of their children or to women who seek but cannot get the father or his family members to acknowledge his paternity. A court order stating paternity, a DNA sample or hearing into paternity are costly, invasive and potentially risky alternatives which may still require contact with the child's father. They invite a potentially searching interrogation of a woman's sexual life and her experiences of violence, which may be traumatizing. Through s. 6 of the *Indian*

Act as it is applied by the Policy, the state puts Registered Indian women into an impossible bind, forcing them to choose between access to benefits for their children and a potentially wrenching or risky experience of disclosure, if disclosure is even possible.

36. In any event, “choice” should not protect a distinction from a finding of discrimination:

In contrast to formal equality, which assumes an ‘autonomous, self-interested and self-determined’ individual, substantive equality looks not only at the choices that are available to individuals but at ‘the social and economic environments in which [they play] out.’⁵³

Due to violence, social conditions, and/or unknown paternity, for many Registered Indian women, the “choice” to prove paternity is no choice at all.

iii. The integrity and reasonableness of the scheme should be analyzed as part of the s. 1 proportionality analysis

37. Without considering the historical disadvantage confronted by Indigenous women, or the real impact of the law and policy, Stewart J. concluded that there had been no violation of s. 15(1). Her conclusion rested primarily on her view that alternatives to the Policy may compromise the integrity of the registration scheme.⁵⁴

38. Even if one accepts this conclusion as valid, it has no place in the s. 15(1) analysis:

An emphasis [during the s 15(1) analysis] on whether the claimant group’s exclusion was well motivated or reasonable is inconsistent with this substantive equality approach to s. 15(1) since it redirects the analysis from the *impact* of the distinction on the affected individual or group to the legislature’s *intent* or *purpose*

⁵³ *Quebec v A*, *supra* note 19 at para 342, per Abella J, for the majority on the scope and application of s. 15(1).

⁵⁴ *Gehl*, *supra* note 17 at paras 79, 81.

[...] Assessment of legislative purpose is an important part of a *Charter* analysis, but it is conducted under s. 1 once the burden has shifted to the state to justify the reasonableness of the infringement.⁵⁵

39. The burden accordingly lies on Canada to demonstrate that the discriminatory disadvantage imposed on Indigenous women under s. 6 as implemented by the Policy is justified under the *Oakes* framework.⁵⁶ In this regard, it is worth noting that the integrity of the registration scheme survived between 1951 and 1985, when there was a rebuttable presumption that the illegitimate children of Registered Indian women were entitled to be registered. It is therefore unlikely the current regime – which imposes a new burden on Registered Indian women who cannot, or effectively cannot, prove the paternity of their children – could survive the minimal impairment stage of the *Oakes* test.

B. To remedy this discrimination, a positive presumption of paternity may be applied under s. 6

40. Section 6 of the *Indian Act* is silent about who counts as a parent or how parentage must be established for the purposes of registration. In the face of this ambiguity, the Policy imposes an interpretation of s. 6 that makes it impossible for women who cannot or effectively cannot prove their child's paternity to register their child on an equal basis. A declaration that the Policy must be amended to allow Registered Indian women who cannot or effectively cannot prove the paternity of their children to register their children under s. 6(1), unless there is evidence (for instance, from the child's father) to show that the child's father is not a Registered Indian, would

⁵⁵ *Quebec v A*, *supra* note 19 at para 331, per Abella J, for the majority on the scope and application of s. 15(1).

⁵⁶ *R v Oakes*, [1986] 1 SCR 103.

remedy the discrimination at issue in this case by removing the burdens to registration tied to unknown or unstated paternity without requiring the Court to strike down s. 6.

41. This approach conforms with the principle that Parliament can be presumed to intend to conform with the *Charter*:

Although the Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, [...] it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force and effect.⁵⁷

42. It also resolves the ambiguity in s. 6 over how parentage must be demonstrated in a way that protects the *Charter* rights and material interests of Registered Indian women. This is consistent with the principle, articulated in *Nowegijick*, that ambiguous statutory provisions that apply to First Nations should be construed “liberally” with “doubtful expressions resolved in favour of Indians.”⁵⁸ As Dickson C.J. explained, this interpretive principle is an attempt to respond to the historic wrongs that Canada has committed against Indigenous peoples:

The *Nowegijick* principles must be understood in the context of the Court’s sensitivity to the historical and continuing status of aboriginal peoples in Canadian society [...] It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians...Underlying *Nowegijick* is an appreciation of the societal responsibility and a concern with remedying disadvantage....⁵⁹

⁵⁷ *Slaight Communications Inc v. Davidson*, [1989] 1 SCR 529 at para 87.

⁵⁸ *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36. See also: *Mitchell v Peguis* [1990] 2 SCR 85 at paras 119-120 [“*Mitchell*”].

⁵⁹ *Mitchell*, *supra* note 58 at para 15.

43. Finally, a declaration that the Policy must be amended comports with the principle that Parliament can be presumed to intend to respect the values and principles enshrined in international law.⁶⁰ Discrimination on the basis of sex is prohibited by a number of international human rights instruments to which Canada is a signatory, including Art. 26 of the International Convention on Civil and Political Rights,⁶¹ and the Convention on the Elimination of All Forms of Discrimination Against Women.⁶²

44. If this Court concludes that it is not possible under s. 6 to allow women who cannot or effectively cannot prove the paternity of their child to rely on a positive presumption of Indian paternity to register their children under s. 6(1), however, then it follows that the registration provisions themselves contravene s. 15(1) of the *Charter*. In this circumstance, s. 6 must be struck down to allow Parliament to redraft it in conformity with the *Charter*.

PART V – ORDER SOUGHT AND SUBMISSION ON COSTS

45. LEAF seeks no costs and respectfully requests that none be issued against it. LEAF takes no position on the disposition of the appeal, but respectfully requests that it be determined in light of the submissions set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of September, 2016

⁶⁰ *R v Hape*, [2007] 2 SCR 292, 2007 SCC 26 at para 53; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 70-71; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 539.

⁶¹ *International Covenant on Civil and Political Rights*, 19 October 1966, 172 UNTS 1976, No. 14668

⁶² *Convention for the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, Adopted GA Res. 34/180, Art 9.

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**SCHEDULE “A”
LIST OF AUTHORITIES**

Canadian Case Law

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Bliss v. Attorney General of Canada, [1979] 1 SCR 1283

British Columbia (Public Service Employee Relations Commission) v BCGSEU, [1999] 3 SCR 3

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Quebec v A, [2013] 1 SCR 61, 2013 SCC 5

R v Edward Books, [1986] 2 SCR 173

R v Gladue, [1999] 1 SCR 688

R v Hape, [2007] 2 SCR 292, 2007 SCC 26

R v Oakes, [1986] 1 SCR 103

R v Turpin, [1989] 1 SCR 1296

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International Instruments and Decisions

Convention for the Elimination of All Forms of Discrimination Against Women, 18 December 1979, Adopted GA Res. 34/180

International Covenant on Civil and Political Rights, 19 October 1966, 172 UNTS 1976, No. 14668

Lovelace v Canada, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977

UN Committee on the Elimination of Discrimination against Women (CEDAW), *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW, CEDAW/C/OP.8/CAN/1 (30 March 2015)

United Nations General Assembly, Human Rights Council, *Report of the Special Rapporteur on the rights of Indigenous Peoples, Victoria Trauli*, UNHCR, 30th Session, A/HRC/30/41 (6 August 2015)

**SCHEDULE “B”
RELEVANT STATUTES**

An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, c 42, SC 1869, c6

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Indian Act, SC 1876, c 18

Indian Act, RS 1880, c 28 (43 Vict)

Indian Act, SC 1951 c 29 (15 Geo Vi)

Indian Act, RSC 1985 c I-5

***An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act
31st Victoria, c 42, SC 1869, c6, s 15.***

15. The wife or unmarried daughters of any deceased Indian who may, in consequence of the operation of the thirteenth and sixteen sections of this Act be deprived of all benefit from their husband's or father's land, shall in the periodical division of the annuity and interest money or other revenues of their husband's or father's tribe or band, and so long as she or they continue to reside upon the reserve belonging to the tribe or band, and remain in widowhood or unmarried, be entitled to and receive two shares instead of one share of such annuity and interest money.

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 15, s 1

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

- **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Indian Act, SC 1876, c 18 (39 Vict), s 3

3. The following terms contained in this Act shall be held to have the meaning hereinafter assigned to them, unless such meaning be repugnant to the subject or inconsistent with the context:

1. The term “band” means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible; the term “the band” means the band to which the context relates; and the term “band”, when action is being taken by the band as such, means the band in council.

2. The term “irregular band” means any tribe, band or body of persons of Indian blood who own no interest in any reserve or lands of which the legal title is vested in the Crown who possess no common fund managed by the Government of Canada, or who have not had any treaty relations with the Crown.

3. The term “Indian” means

First. Any male person of Indian blood reputed to belong to a particular band;

Secondly. Any child of such person;

Thirdly. Any woman who is or was lawfully married to such a person:

(a) Provided that any illegitimate child, unless having shared with the consent of the band in the distribution moneys of such band for a period exceeding two years, may, at any time, be excluded from membership thereof by the band, if such a proceeding be sanctioned by the Superintendent-General:

(b) Provided that any Indian having for five years continuously resided in a foreign country shall with the sanction of the Superintendent-General, cease to be a member thereof and shall not be permitted to become again a member thereof, or of any other band, unless the consent of the band with the approval of the Superintendent-General or his agent, be first had and obtained; but this provision shall not apply to any professional man, mechanic, missionary, teacher or interpreter, while discharging his or her duty as such:

(c) Provided that any Indian woman marrying any other than an Indian or a non-treaty Indian shall cease to be an Indian in any respect within the meaning of this Act, except that she shall be entitled to share equally with the members of the band to which she formerly belonged, in the annual or semi-annual distribution of their annuities, interest moneys and rents; but this income may be commuted to her at any time at ten years' purchase with the consent of the band:

(d) Provided that any Indian woman marrying an Indian of any other band, or a non-treaty Indian shall cease to be a member of the band to which she formerly belonged and become a member of the band or irregular band of which her husband is a member:

(e) Provided also that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of a family (except the widow of an Indian, or a half-breed who has already been admitted into a treaty), shall, unless under very special circumstances, to be determined by the Superintendent-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty.

Indian Act, RS 1880, c 28 (43 Vict), s 10

10. Any illegitimate child, unless having shared with the consent of the band whereof the father or mother of such a child is a member in the distribution moneys of such band for a period exceeding two years, may, at any time, be excluded from the membership thereof by the Superintendent-General.

Indian Act, SC 1951, c 29, ss 11-12

11. Subject to section twelve, a person is entitled to be registered if that person

(a) on the twenty-sixth day of May, eighteen hundred and seventy-four was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, chapter forty-two of the statutes of 1868, as amended by section six of chapter six of the statutes of 1869, and section eight of chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada,

(b) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy-four have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act,

(c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b),

(d) is the legitimate child of

(i) a male person described in paragraph (a) or (b), or

(ii) a person described in paragraph (c),

(e) is the illegitimate child of a female person described in paragraph (a), (b), or (d) unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered, or

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d), or (e).

12. (1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been allotted half-breed lands or money scrip,

(ii) is a descendant of a person described in sub-paragraph (i)

(iii) is enfranchised, or

(iv) is a person born of a marriage entered into after the coming into force of this Act and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (a), (b), or (d) or entitled to be registered by virtue of paragraph (e) of section eleven, unless, being a woman, that person is the wife or widow of a person described in section eleven, and

(b) a woman who is married to a person who is not an Indian.

(2) The Minister may issue any Indian to whom this Act ceases to apply, a certificate to that effect.

Indian Act, RSC 1985 c I-5, s. 6

- **6 (1)** Subject to section 7, a person is entitled to be registered if
 - (a)** that person was registered or entitled to be registered immediately prior to April 17, 1985;
 - (b)** that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
 - (c)** the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
 - (c.1)** that person
 - (i)** is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(b) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions,
 - (ii)** is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,
 - (iii)** was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and
 - (iv)** had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;

(d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

- **(3)** For the purposes of paragraph (1)(f) and subsection (2),

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a);

(b) a person described in paragraph (1)(c), (d), (e) or (f) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision; and

(c) a person described in paragraph (1)(c.1) and who was no longer living on the day on which that paragraph comes into force is deemed to be entitled to be registered under that paragraph.

GEHL

v. ATTORNEY GENERAL (CANADA)

Court of Appeal File No. C60706

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

**FACTUM OF THE WOMEN'S LEGAL
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