COMMENTARY

SECTION 6 OF THE INDIAN ACT AND "THE SECOND GENERATION CUT-OFF RULE" – A FACTUM

By Roger Wah-Shee*

CITED: (2008) 13 Appeal 14-21

In the Appeal Law Review Court

BETWEEN

Roger Wah-Shee, Shaeden Wah-Shee

PLAINTIFFS

and

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

DEFENDANTS

I - OVERVIEW

Despite Parliament's efforts to eliminate inequities in the *Indian Act*[1] (the "*Act*") in 1985, status Indians continue to be discriminated against in relation to their ability to pass Indian or treaty status to their children. The passing of *Bill C-31*[2] resulted in numerous categories of Indians and restrictions on status which continue to target the core of Indian families for assimilation into Canada.

This factum was inspired by the recent British Columbia Supreme Court ("BCSC") decision *McIvor v. Canada*[3] ("*McIvor*") which successfully challenged s. 6 of the *Act*[4] on similar grounds. It was held that s. 6 continues to prefer descendants who trace their Indian ancestry along paternal lines over those who trace it along maternal lines.[5] The BCSC declared s. 6 to be unconstitutional insofar as it authorized the differential treatment of matrilineal and patrilineal

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1 *Indian Act,* R.S.C. 1985, c. I-5.

2 *An Act to Amend the Indian Act*, S.C. 1985, c.31.

3 *McIvor v. Canada (Registrar, Indian and Northern Affairs),* 2007 BCSC 827, [2007] B.C.J. No. 1259 (QL) [*McIvor* cited to B.C.J.].

4 *Indian Act*, *supra* note 1, s. 6.

5 *McIvor*, *supra* note 3 at para. 343.

descendants born prior to 1985 in conferring Indian status. Canada will continue to defend this discriminatory scheme at the upcoming appeal with a view to continuing the assimilation of status Indians into the Canadian mainstream.

This factum addresses yet another fault with s. 6 of the *Act*; the "second generation cut-off rule", which results in the loss of Indian status after two successive generations of parenting by non-status Indians. It is submitted that Indians registered under s. 6(2) (registration based on one entitled parent) of the *Act* have fewer rights than do those registered under s. 6(1) (primary registration or registration based on two entitled parents) because they cannot pass on status to their child unless the child's other parent is also a registered Indian.[6]

II - FACTS

1. Shaeden Wah-Shee (SW) was born in Yellowknife, Northwest Territories on April 28, 2007.
2. Roger Wah-Shee (RW), SW's father, is a status Indian within the meaning of the *Act.* RW is registered in the Indian Registry System under s. 6(2) of the *Act*.
3. Jillian Wah-Shee (JW), SW's mother, has maternal roots in the Sepwepemc Nation but is not recognized by the government as an Indian within the meaning of the *Act.*
4. In July, 2007, RW submitted an application for SW's Indian status at the Department of Indian and Northern Affairs Canada ("INAC").
5. On July 27, 2007 the INAC Membership Clerk responded with a letter denying the application for SW's Indian status. The letter stated, "Roger, you are registered in the Indian Registry System under Section 6(2) of the *Indian Act*. This states that you have only one entitled parent and the mother of the child is Non-Indian. Therefore, you are not entitled to pass your status onto your children."
6. On August 3, 2007, RW requested INAC's final decision regarding the application.
7. On August 7, 2007, the INAC Manager of Registration, Revenue and Band Governance, affirmed the Membership Clerk's decision to deny the application. The letter of denial noted, "Any person who has one parent entitled under subsection 6(2) and, whose other parent is a non-Indian or not identified as an Indian, is not entitled to be registered as an Indian. In this case, the father of Shaeden is registered under subsection 6(2) and the mother is a non-native, therefore, your child is not entitled to registration under the *Indian Act*."
8. Further, RW and SW are "Tlicho Citizens" as defined under s. 1.1.1 of the *Tlicho Agreement*[7] (the "*Agreement*").
9. The Tlicho Nation is a First Nation in the Northwest Territories.
10. On August 22, 1921, the Tlicho signed *Treaty 11*[8] with the Government of Canada at Fort Rae, Northwest Territories.
11. On August 25, 2003, the Tlicho, the Government of Canada, and the Government of the Northwest Territories signed the *Agreement* which is protected under s. 35 of the *Constitu-*

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6 Jill Wherrett, "Indian Status and Band Membership Issues"(February 1996) Political and Social Affairs Division, Research Branch.

7 Indian and Northern Affairs Canada, *Tlicho Agreement,* (2003) Queen's Printer for Canada, online: <www.ainc-inac.gc.ca/pr/ agr/nwts/tliagr2_e.html> [*Agreement*].

8 TREATY No. 11 (JUNE 27, 1921) AND ADHESION (JULY 17, 1922) WITH REPORTS, ETC. Reprinted from the Edition of 1926 by Edmond Cloutier, c.m.g., o.a., d.s.p. Queen's Printer and controller of Stationery Ottawa, 1957.

tion Act, 1982[9] (the "*Constitution*"). The *Agreement* is a new treaty that recognizes the historical and cultural importance of *Treaty 11*.[10]

III - ISSUES

1. Does s. 6 of the *Act* violate s. 15(1) of the *Canadian Charter of Rights and Freedoms*[11] (the "*Charter*") insofar as it discriminates between a status Indian who has one parent with status and an Indian who has both parents with status; in relation to their ability to pass Indian status onto their children?
2. Is a parent, who is part of an Indian treaty, able to transmit that treaty Indian status to their child as a treaty right?

IV – ARGUMENTS

Issue 1 - Does s. 6 of the Indian Act violate s. 15(1) of the Charter?

12. 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.[12] The general purpose of s. 15(1) of the *Charter* is to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice and to promote a society where all persons are considered worthy of respect and consideration.[13]

13. INAC's final decision to deny SW Indian status based on s. 6(2) of the *Act* cannot withstand the scrutiny of the test in *Law v. Canada*[14]:

> 1. Does the impugned law (a) draw a formal distinction between the claimant and others based on one or more personal characteristics, or (b) fail to take account of the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
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> 2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
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> 3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of promoting the view that the individual is less capable or worthy of recognition as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

With respect to the third question, the court is to consider contextual factors, such as:[15]

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9 *Constitution Act*, *1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 s. 35 [*Constitution*].

10 *Agreement, Supra* note 7, s. 2.5.1: "The historical and cultural important of Treaty 11 is hereby recognized and there shall be annual meeting to affirm this recognition, to make annual treaty payments and to recognize the importance of the Agreement."

11 *Canadian Charter of Rights and Freedoms*, s.15(1), Part I of the *Constituion Act, 1982*, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11 [*Charter*].

12 *Ibid*.

13 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 5, McLachlin C.J.C and Bastarache JJ [*Corbiere*].

14 *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 at 548-9, Iacobucci J [*Law*].

15 *Ibid*. at para. 88.

a) pre-existing disadvantage;
b) correspondence between the distinction and the claimant's characteristics or
c) circumstances; ameliorative purposes or effects; and
d) the interest affected.

14. The *Act* draws a formal distinction between status Indian parents registered under s. 6(2) and status Indian parents registered under s. 6(1) in regards to their ability to pass status on to their children.

15. Alternatively, a parent registered under s. 6(2) who procreates with a non-status Indian, as opposed to a status Indian, is deemed less worthy and unable to pass Indian status.

16. This legislation fractures the family unit by denying Indian status based on family status, marital status, parental status, race and Indian status.

17. Discrimination of this nature touches the essential dignity and worth of an individual in the same way as recognized grounds of discrimination violative of fundamental human rights norms. It touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from *Charter* consideration on the ground that its recognition would trivialize the equality guarantee.[16]

18. Further, INAC's decision to deny SW Indian status violates human dignity and freedom by imposing disadvantages. It reinforces the stereotype that Indians are vanishing or being absorbed into the socio-political mainstream in Canada. The decision embodies social prejudice and fails to promote a society in which Indian people can enjoy equal recognition at law as human beings equally capable and equally deserving of concern, respect and consideration.[17]

19. The decision strikes at the heart of the cultural identity of both parents and their children registered under s. 6(2) in yet another stereotypical way by presuming that neither are interested in preserving this aspect of their cultural identity, and are therefore less deserving of continuity in their Indian status. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.[18]

20. The question of transmission of status as a benefit of the law in which both the parent and the child have an interest arose in *Benner v. Canada (Secretary of State)*.[19] Iacobucci J. cited with approval, "in this situation, the discrimination against the mother is unfairly visited upon the child."[20]

21. A denial of status Indian benefits negatively affects both the parent and child.[21] The discrimination is twofold because parents are responsible for supporting their children. INAC's letters state "…*your child is not entitled* to registration under the *Indian Act*"[22] and "…*you are not entitled* to pass your status onto your children."[23] The authors' choices in words indicate the dual nature of the discrimination.

22. INAC's decision to deny SW Indian status withholds benefits including annual treaty pay-

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16 *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 151, McLachlin J for the majority.

17 *Corbiere, supra* note 13, at para. 58.

18 *Ibid.* at para. 18.

19 *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 [*Benner*].

20 *Ibid.* at para. 85. See also *McIvor, supra* note 3 at para. 180, per Ross J.

21 *Ibid.* at para. 179.

22 INAC letter, August 7, 2007 [emphasis added].

23 INAC letter, July 27, 2007 [emphasis added].

ments at the anniversary of *Treaty 11*, health benefits including prescription medication, dental services, eyeglasses, and scholarship support.

23. A reasonable person in the position of the claimants, fully apprised of the context, would see the differential treatment contained in s. 6 as suggesting that parents registered under s. 6(2), and their children, are less worthy or valuable as Aboriginal people. They are offered less concern, respect, and consideration than status Indians, and their children, registered under s. 6(1).

24. Although the government constructed the notion of Indian status, it is clear that this notion has come to form an important aspect of cultural identity.[24] This is especially so in the context of Crown-Indian treaties and the continuity of the treaty relationship between successive generations of treaty Indians and the Crown.

25. Finally, as human beings, one of our most basic expectations is that we will acquire the cultural identity of our parents, and that as parents, we will transmit our cultural identity to our children.[25]

Issue 2 - Is a parent, who is part of an Indian treaty, able to transmit that treaty Indian status to their child as a treaty right?

26. The existing aboriginal and treaty rights of the aboriginal people of Canada are recognized and affirmed by the supreme law of Canada.[26] Further, the *Constitution* enshrines and protects the historical and cultural importance of *Treaty 11*.[27]

27. Extinguishing Indian status in Indian families is unconstitutional and inconsistent with treaty rights interpretation in Canada and in the international community at large.

28. Harold Cardinal describes the Indian perspective on the importance of treaties: "To the Indians of Canada, the treaties represent an Indian *Magna Carta*. The treaties are important to us, because we entered into these negotiations with faith, with hope for a better life with honour."[28]

29. Section 6 of the *Act* is inconsistent with Canada's fiduciary duty to First Nations in Canada.[29] The Crown owes this duty to RW and SW because of the sacred nature of *Treaty 11* and the impact that INAC's decision has on the family's connection to that solemn relationship with the Crown.[30] The decision undermines this relationship's cultural and historical importance between the family and the *Treaty* itself.

30. The honour of the Crown is always at stake in dealing with Indians and the Crown's arbitrary, sharp dealing in this case should not be sanctioned.[31]

31. Treaties must be construed not according to the technical meaning of their words but in the sense that they would naturally be understood by the Indians. Evidence as to how the parties understood the treaty, or conduct thereof, is of assistance in giving treaties content.[32]

32. Notwithstanding the challenges created by the use of oral histories as proof of historical

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24 *McIvor, supra* note 3 at paras. 179, 193.

25 *Ibid.* at paras. 186, 191.

26 *Constitution, supra* note 9, s. 35(1), s. 52(1).

27 *Tlicho Agreement, supra* note 7, s. 2.5.1.

28 Harold Cardinal, "*The Unjust Society: The Tragedy of Canada's Indians*" (Edmonton:Hurtig, 1969) at 28-29.

29 *Guerin v. R.* (1984), 13 D.L.R. (4th) 321 at 326.

30 Peter Hogg, *Constitutional Law of Canada,* 4th ed. (Toronto: Carswell, 1997), 27.6(c) at 691.

31 *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41. See also, *Claxton v. Saanichton Marina Ltd.*, [1989] 57 D.L.R. (4th) 161 (QL).

32 *Ibid.*

facts, the laws of evidence must be adapted in order for this type of evidence to be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with; mainly being historical documents.[33]

33. According to Dene elder Adele Lafferty, who was present at the *Treaty 11* signing on August 22, 1921:

> But Chief Monfwi (who signed on behalf of the Tlicho) told the Indian Agent, "If the season will be closed for my people I will not take treaty money. Not one of my people will take the money." The RCMP, the Bishop and the Indian Agent were all seated. The Indian Agent said "They will not be closed for you (the hunting seasons). As long as the river flows and the sun rises from east to west in this land of yours, nothing will be closed. You can continue on hunting fishing, and trapping they way you have always done, like for ducks, caribou and fur-bearing animals of all types, for the reason that you have depended on them. Your children after you will also continue on living your ways of life. It will not be closed for you nor for your children." The old people said it would good then, if their children were taken care of by treaty.[34]

34. Based on the elder's testimony, it is clear that the treaty was intended to extend to children and the treaty was understood as being, without limitations, based on family status. The phrase "as long as the river flows and the sun rises from east to west" indicates a limitless, temporal aspect, or "forever".

35. Dene elder Jonas Lafferty recalled Chief Monfwi's reaction to the Catholic bishop's encouragement to sign the treaty, "Bishop Breynat said: 'That's understood. I will write my name on the paper and there will be no restrictions. I will read the paper to you.' Louis Lafferty interprets: 'No restrictions as long as the sun rises and as long as the river flows downstream.' Monfwi said: 'Because of your word, I will take the treaty.'"[35]

36. INAC's decision to deny SW Indian status violates the spirit of *Treaty 11* and ignores the promises which induced Chief Monfwi into signing on behalf of the Tlicho. At the signing, had the Commissioner stated or implied, "but there will come a day when your children will no longer be part of this treaty and they will not be allowed to receive annual treaty payments or receive medicine when they are sick", the old people and Chief Monfwi would have surely rejected it because of the negative impact on future Tlicho children who would be cut-off by the second generation rule.

Indigenous Peoples – The International Perspective

37. Up until the election of the current minority Conservative government, Canada supported the *UN Declaration on the Rights of Indigenous Peoples*[36] (the "*Declaration*"). The federal government's current stance against the *Declaration* does not invalidate the overwhelming majority of support for Indigenous rights from the international community.[37]

38. The doctrine of adoption states that customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation.[38] We

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33 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 87.

34 Rene Fumoleau, "*As Long as This Land Shall Last. A History of Treaty 8 and 11, 1870-1939*", 2nd ed. (Calgary: University of Calgary Press, 2004) at 247 [emphasis added].

35 *Ibid*. at 249 [emphasis added].

36 *Declaration on the Rights of Indigenous Peoples*, (13 September 2007) A/RES/61/295, online: <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.

37 *Ibid.* 104 for, 4 against, 11 abstaining (US, Canada, New Zealand and Australia).

38 *R. v. Hape*, [2007] S.C.J. No. 26 at para. 37.

submit that the current legislation, although contrary, is of no force and effect due to the supremacy of s. 15 of the *Charter* and s. 35 of Canada's *Constitution*.

39. On October 17, the Supreme Court of Belize held that the *Declaration* embodies guiding principles for domestic law and used the *Declaration* to interpret in favour of the indigenous Maya in their land dispute with the state.[39]

40. The following principles of the *Declaration* must be used to inform Aboriginal and treaty rights, including *Treaty 11*:

> Article 2: Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.[40]
>
> Article 5: Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[41]
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> Article 8.1: Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.[42]
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> Article 8.2: States shall provide effective mechanisms for prevention of, and redress for:
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> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnical identities;
>
> (d) Any form of forced assimilation or integration.[43]
>
> Article 13.1: Indigenous peoples have the right to revitalize, use, develop and transmit their histories to future generations.[44]
>
> Article 13.2: States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.[45]
>
> Article 22.1: Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.[46]

41. Denying Indians registered under s. 6(2) the right to pass this identity onto their children violates all of the above principles.

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39 Ed John, (Indigenous Bar Association Conference, delivered in Victoria B.C., October 27, 2007). See *Aurelio Cal in his own behalf and on behalf of the Maya Village of Santa Cruz et al. v. The Attorney General of Belize and The Minister of Natural Resources and Environment*, Supreme Court of Belize, Claims 171 and 172 of 2007.

40 *Supra* note 36, Article 2.

41 *Ibid*., Article 5.

42 *Ibid.*, Article 8.1

43 *Ibid*., Article 8.2 (a) and (d).

44 *Ibid.,* Article 13.1.

45 *Ibid*., Article 13.2.

46 *Ibid.,* Article 22.1.

V - CONCLUSION

42. Although Parliament constructed the notion of Indian status, it is clear that it has come to form an important aspect of cultural identity. INAC's decision to deny SW Indian status based on the "second generation cut-off rule" contravenes s. 15(1) of the *Charter* and must be reviewed based on Iacobucci J.'s analysis in *Law v. Canada*.[47]

43. The decision discriminates on the analogous grounds of marital status, family status, parental status, Indian status, and race, and effectively severs the continuity of treaty-Indian status in the Wah-Shee family. This severance results in a breach of s. 35[48] treaty rights, degraded human dignity and an arbitrary denial of numerous intangible and tangible benefits otherwise available to those parents and children whose Indian status flows from s. 6(1) of the *Act*. Finally, the decision fails to conform with international law and its binding force on domestic law in the face of invalid domestic legislation.

VI – ORDER SOUGHT

The plaintiffs request declarations that SW is a status Indian and also that s. 6 of the *Act* is of no force and effect insofar as it discriminates against status Indians affected by the "second generation cut-off rule".

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Roger Wah-Shee

47 *Law*, *supra* note 14.

48 *Constitution*, *supra* note 9.