COURT OF APPEAL FOR ONTARIO

CITATION: Gehl v. Canada (Attorney General), 2017 ONCA 319
DATE: 20170420
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Sharpe, Lauwers and Miller JJ.A.

BETWEEN

Lynn Gehl

Applicant (Appellant)

and

Attorney General of Canada

Respondent (Respondent)

Mary Eberts, Christa Big Canoe, and Emilie Lahaie, for the appellant

Christine Mohr and Andrea Bourke, for the respondent

Renée Pelletier and Krista Nerland, for the intervener, the Women's Legal Education and Action Fund

Heard: December 20, 2016

On appeal from the judgment of Justice Elizabeth M. Stewart of the Superior Court of Justice, dated June 2, 2015, with reasons reported at 2015 ONSC 3481, [2015] 3 C.N.L.R. 35.

Sharpe J.A.:

A. OVERVIEW

[1] The issue on this appeal is whether the appellant, Dr. Lynn Gehl, is entitled to be registered as an "Indian"[1] under the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act"). Dr. Gehl's entitlement turns on amendments made in 1985 to bring the Act into compliance with s. 15 of the *Charter of Rights and Freedoms* (the "*Charter*"). Those amendments repealed discriminatory provisions in the Act that had deprived several of Dr. Gehl's ancestors of their Indian status, and retrospectively restored their status.

[2] Dr. Gehl's paternal grandmother became a status Indian as a result of the 1985 amendments. Dr. Gehl's father was born in 1935. The identity of his father, Dr. Gehl's paternal grandfather, is unknown.

[3] Following the 1985 amendments, Dr. Gehl brought an application to register as an Indian. The Registrar for Aboriginal Affairs and Northern Development Canada (the "Registrar") denied Dr. Gehl's application for registration on the ground that to qualify for status under the Act, Dr. Gehl had to prove that both her paternal grandmother and grandfather had status, and she had failed to prove the status of her unknown grandfather.

[4] Dr. Gehl, supported by the intervener LEAF, argues that s. 6(1)(f) of the Act and the Proof of Paternity Policy (the "Policy"), adopted by the Registrar for

[1] In these reasons, I use the word "Indian" and the phrase "status Indian" interchangeably to refer to a person who is entitled to register under the *Indian Act*. I use the words "non-status" and "non-Indian" to refer to persons who are not entitled to register under the Act.

determining paternity, infringe s. 15 of the *Charter* by discriminating against her and other descendants of illegitimate children of aboriginal women on grounds of sex. As I will explain, stripped to its essentials, Dr. Gehl's argument is that, on the basis of the evidence she presented, she is entitled to status.

B. INDIAN STATUS AND THE 1985 AMENDMENTS TO THE *INDIAN ACT*

[5] Entitlement to Indian status is determined by the Act.

[6] Before 1951, the Act provided that registration was to be done by Indian agents and other local officials. Section 29 of the *Indian Act*, S.C. 1951, c. 29, created a centralized Indian Registry.

[7] Prior to 1985, entitlement to register as an Indian was transmitted solely through the male line. The child of an Indian man was entitled to registration, even if the mother of the child was non-Indian. A non-Indian woman who married an Indian man was also entitled to register. Conversely, Indian women lost their Indian status upon marrying a non-Indian man, and the children of an Indian woman and a non-Indian man were not entitled to register.

[8] The only exception to the patrilineal rule was in relation to illegitimate children. Although the exact procedures differed over time, the pre-1985 *Indian Act* contained what amounted to a rebuttable presumption that the illegitimate children of Indian women were fathered by Indian men, and that therefore these children were entitled to register as Indians. Conversely, Indian fathers could

pass on status to their illegitimate sons, but not to their illegitimate daughters: see *Martin v. Chapman*, [1983] 1 S.C.R. 365. In *Descheneaux c. Canada (Procureur général),* 2015 QCCS 3555, [2016] 2 C.N.L.R. 175, the Quebec Superior Court held that the denial of status to an illegitimate daughter born to an Indian father before 1985 was contrary to s. 15 of the *Charter*.

[9] There was widespread dissatisfaction with the pre-1985 statutory regime for determining Indian status. Many within the aboriginal community considered the rules to be at odds with First Nations traditions. Although a majority of the Supreme Court held in *A.G. Canada v. Lavell*, [1974] S.C.R. 1349, that depriving an Indian woman of her status upon marriage to a non-Indian man did not violate the guarantee of equality in the *Canadian Bill of Rights*, S.C. 1960, c. 44, that decision was widely criticized and it became apparent that a major overhaul was required in light of the *Charter.*

[10] In 1985, Parliament amended the Act with a view to making it compliant with the *Charter*'s s. 15 guarantee of equality. These amendments followed extensive consultation with relevant stakeholders. The amendments sought to balance the claims of equality-seeking groups with the need to respect the autonomy of First Nations and their control over band membership, as well as the potential impact on communities and resources resulting from adding large numbers of new registrants. I attach as Appendix A the relevant provisions from the legislation, present and past.

[11] When introducing the amendments, David Crombie, then Minister for Indian Affairs, stated that the amendments sought to achieve and balance the following objectives (*House of Commons Debates*, 33rd Parl., 1st Sess., March 1, 1985, at p. 2645):

> a) to end discrimination against women created by their loss of entitlement to registration through marriage to non-Indians;
>
> b) to restore entitlement to registration to those who had lost it due to this discrimination, including restoring membership in a band;
>
> c) to ensure that no one should gain or lose entitlement to registration due to marriage;
>
> d) to ensure that anyone who had acquired status under the registration scheme prior to the 1985 amendments would not lose it; and,
>
> e) to provide the First Nations that desired the ability to determine their own membership with a statutory mechanism to do so on a going forward basis.

[12] Provisions in the pre-1985 Act stipulating exclusive patrilineal transmission of status were repealed, as were the provisions stipulating that Indian women lost status upon marriage to a non-status male. Pursuant to s. 6(1)(c), Indian status was retroactively returned to women who had lost their status after marrying non-Indian men. Under s. 6(1)(a), those who had Indian status in 1985 were entitled to maintain this status even if they would not otherwise have status under the new regime. For example, the status of a non-Indian woman who had gained the right to register by marrying an Indian man was protected.

[13] The 1985 amendments also established a new two-tier system of registration. Children with two Indian parents now receive s. 6(1)(f) or "full" status, whereas a child with only one Indian parent receives s. 6(2) or "partial" status. Those with full status can pass on Indian status to their own children, regardless of the Indian status of the other parent. In contrast, those with partial status can pass on Indian status to their own child only if the other parent also has Indian status (whether full or partial). This is known as the "two-parent rule", and creates what is known as the "second generation cut-off".

[14] The 1985 amendments also removed all reference to illegitimacy. The rules apply equally to all children, whether or not their parents are married. The presumption of Indian paternity in favour of illegitimate children born to Indian women was repealed. To maintain the two-parent rule, the second generation cut-off and the distinction between full and partial status, the status of both parents must be determined by the Registrar when deciding the status of the child.

[15] Further amendments were introduced in 2010 in response to the decision of the British Columbia Court of Appeal in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, 91 B.C.L.R. (4th) 1. In that case, aspects of the old legislation favouring male parentage and disfavouring female parentage were found to have been carried forward in the 1985 amendments, and s. 6(1)(a) and s. 6(1)(c) were struck down. A temporary suspension of the

declaration of invalidity afforded Parliament the opportunity to amend the Act. The amendment, adding s. 6(1)(c.1), was made in the *Gender Equity in Indian Registration Act*, S.C. 2010, c. 18.

[16] The Act provides, in s. 14.2 that the Registrar is to determine eligibility for registration. The office of the Registrar investigates the applicant's ancestry and makes a determination. If registration is refused, the applicant can protest the decision, and if the protest is refused, an appeal lies to the provincial superior court pursuant to s. 14.3.

[17] Following the 1985 amendments, the Registrar developed the Policy. The Policy, at least as it stood at the time the Registrar considered Dr. Gehl's application and protest, is an internal departmental guide. It is not expressly contemplated by the Act and it is not a regulation. At the time of Dr. Gehl's application for registration and protest, the Policy was in draft form and not generally available to the public.

[18] The Policy sets out five types of evidence of paternity that the Registrar will accept, in the following order of preference:

> 1) Birth certificates of provincial, territorial or state Vital Statistics authorities naming the father;
>
> 2) Court orders declaring paternity;
>
> 3) Statutory declarations, preferably by the mother and father, but two close relatives will suffice if they can identify the father from their own personal knowledge;

> 4) If the father denies paternity, it is preferable if the mother works with the Vital Statistics Authorities to find other types of acceptable evidence to have the father's name added to the birth certificate;
>
> 5) Where confidentiality or personal safety is a concern and none of the above is available, the Registrar may consider other evidence, such as a hearing or DNA testing.

C. DR. GEHL'S FAMILY TREE

[19] In order to understand how the 1985 amendments affect Dr. Gehl's entitlement to register, a review of her family tree is required. I attach a chart showing Dr. Gehl's family tree as Appendix B to these reasons.

[20] Prior to the 1985 amendments, Dr. Gehl's status was as follows. When her father, Rodney Gagnon, was born out of wedlock in 1935, he had no Indian status because his mother, Mary Viola Bernadette Gagne, had no status at the time of his birth. The reason Mary Gagne had no status was because her mother, Annie Menes, lost her status when she married Joseph Gagnon. Joseph Gagnon lacked status because his mother, Angeline Jocko, lacked status at the time of his birth because of her marriage to a non-status man whose identity is unknown.

D. HISTORY OF THESE PROCEEDINGS

[21] Dr. Gehl applied for registration in 1994. The Registrar determined that s. 6(1)(c) of the 1985 amendments retroactively restored the status Annie Menes had lost upon her marriage to Joseph Gagnon. Joseph Gagnon retroactively

acquired status as the status of his mother, Angeline Jocko, was restored by s. 6(1)(c). The restoration of Indian status to both of Mary Gagne's parents retroactively provided her with s. 6(1)(f) "full" Indian status. However, in the view of the Registrar, as the identity of Rodney Gagnon's father was unknown, he could only claim status through one parent, his mother, and accordingly, he only acquired partial status. As Dr. Gehl's mother had no status, the Registrar considered her to be the child of one status Indian parent with s. 6(2) or partial status. Accordingly, Dr. Gehl could not satisfy the two-parent rule, and had no right to be registered.

[22] Dr. Gehl protested the Registrar's decision and then appealed the refusal of her protest to the Superior Court. That appeal has been held in abeyance following the commencement of this action for *Charter* relief but the appeal remains open.

[23] This claim was originally framed as one for damages, but after it was struck out with leave to amend, the claim became one for declaratory relief. The action lay dormant for a lengthy period, but as the relevant facts were not in dispute, the parties eventually agreed to have the issue resolved by way of a motion for summary judgment in 2014.

E. MOTION FOR SUMMARY JUDGMENT

[24] On the summary judgment motion, Dr. Gehl asserted that s. 6 of the Act and the Policy infringed s. 15 of the *Charter* because they discriminated against her on the enumerated grounds of race and sex and on the analogous grounds of family or marital status. She argued that the mother of a child will always be known, but there will frequently be situations where the Indian mother of a child either does not know the identity of the father of her child, or cannot reveal that identity except at unacceptable personal cost. Additionally, Dr. Gehl alleged that s. 6 of the Act and the Policy discriminated on grounds of marital status and/or illegitimacy. Dr. Gehl argued that she and her father should benefit from the same positive presumption of Indian paternity that had existed under the pre-1985 Act in relation to the illegitimate children of status Indian mothers.

[25] The Attorney General asserted that the denial of Dr. Gehl's Indian status did not turn on race, gender, family or marital status, or illegitimacy. It was the unknowable identity of Dr. Gehl's paternal grandfather that prevented her from proving entitlement to registration, and the Attorney General submitted that unknowable paternity was not an analogous ground and therefore did not engage *Charter* considerations.

[26] The motion judge found that s. 6 of the Act and the Policy treated all applicants the same. An onus is placed on all applicants to establish entitlement

to registration as an Indian by establishing the Indian status of their parents. The motion judge agreed with the Crown that "unknowable paternity" was the factor preventing Dr. Gehl from registration as an Indian, and that this was not an analogous ground under s. 15. Adopting a positive presumption of paternity for the illegitimate children of Indian women would contradict the clear statutory requirement that registration be granted only to individuals with at least two status Indians as grandparents. The first step of the s. 15 test was therefore not met, as the law did not create a distinction based on an enumerated or analogous ground. However, were discrimination to have been found, the motion judge noted that she would not consider it to create a disadvantage by perpetuating prejudice or stereotype. Based on those findings, the motion judge did not proceed to consider s. 1 of the *Charter* or the issue of remedy.

[27] The motion judge went on to make several *obiter* comments about the application of the Policy to Dr. Gehl. The motion judge indicated that the evidence the Policy allows is distinctly problematic in situations such as Dr. Gehl's, where, through no fault of her own, an applicant has no information about her grandfather, and thus cannot prove entitlement to registration. The motion judge stated, at para. 90, that "[r]equiring anything more from Gehl than her statutory declaration attesting to her lack of any reasonable basis for belief that the father of her father would not have been entitled to registration may go beyond the requirements of the legislation". She concluded that such a statutory

declaration might constitute acceptable evidence to satisfy the two-parent requirement of the Act, and would not amount to establishing a positive presumption of Indian paternity. This type of evidence would be no less probative than the residential and other circumstantial details that the Registrar, pursuant to the Policy, already viewed as acceptable. In the motion judge's view, such an approach could prevent injustice in cases akin to Dr. Gehl's while remaining consistent with the statutory language, history and objectives of the Act "which must include cultural preservation and vitality" (para. 91).

F. ISSUES

[28] Before the motion judge, and to some extent before this court, Dr. Gehl's submissions were presented as a challenge to the constitutional validity of s. 6. However, in my view, the essential point is the proposition advanced by Ms. Eberts on Dr. Gehl's behalf and by LEAF, namely, that the Registrar should accept evidence of the kind submitted by Dr. Gehl as to the paternity of her grandfather as sufficient to establish status.

[29] Dr. Gehl also moves for the admission of fresh evidence relating to directives issued by the Registrar to deal with the 2010 amendments that followed the *McIvor* case.

G. ANALYSIS

[30] I will first dispense with two preliminary matters, namely the Attorney General's argument that the challenge to the interpretation of s. 6 reflected by the Policy is barred by an earlier court ruling, and Dr. Gehl's application to admit fresh evidence.

(1) *Ruling striking out the original statement of claim*

[31] The Attorney General submits that Dr. Gehl's challenge to the Policy is barred by a ruling made by a Superior Court judge on November 8, 2001, striking out the statement of claim with leave to amend: [2002] 4 C.N.L.R. 108 (Ont. S.C.J.). The original statement of claim sought damages for denial of Dr. Gehl's s. 15 equality rights and a declaration that she is entitled to registration under the Act. Various causes of action were asserted, including misfeasance in public office.

[32] I do not agree with the Attorney General's argument that the 2001 decision striking the original statement of claim precludes Dr. Gehl from challenging application of the Policy to her situation. No mention of the Policy was made in the 2001 decision. This matter proceeded to summary judgment in 2014 on the basis of an amended statement of claim asking for various forms of declaratory relief, including the following:

- that s. 6 of the Act "in its application to the plaintiff, is contrary to s. 15 of the *Charter*";
- that s. 6 violates the s. 15 rights of applicants for registration "whose ancestors were born out of wedlock";
- that s. 6 violates the s. 15 rights of applicants for registration "who do not know their or their ancestors' paternity";
- that s. 6 of the Act "be interpreted and applied in a manner that does not disadvantage individuals or descendants of individuals whose paternity is unknown"; and,
- that the plaintiff is entitled to be registered pursuant to s. 6.

[33] In my view, the current statement of claim is fundamentally different from that struck out in 2001. The claim for damages is gone and the focus is on declaratory relief. The amended claim directly puts in issue how an applicant is to establish the paternity of an unknown ancestor. I reject the submission that Dr. Gehl should be precluded from raising those issues on the basis of the 2001 order.

(2) *Fresh evidence*

[34] Dr. Gehl moves for the admission as fresh evidence of directives issued by the Registrar following the 2010 amendments to the Act indicating that, in some circumstances, the pre-1985 presumption of paternity is applied to persons born

before 1985. While this evidence was not known or available to Dr. Gehl at the time of the summary judgment motion, I am not persuaded that it is relevant to the issues before us. The proposed fresh evidence shows that the Registrar applies the pre-1985 presumption of paternity to individuals who had status under the pre-1985 Act at the time of their birth. That does not assist Dr. Gehl, as Mary Gagne did not have status at the time of Rodney Gagnon's birth, but only acquired status as a result of the 1985 amendments.

[35] Accordingly, I would not admit the fresh evidence.

(3) ***The Policy and the decision denying Dr. Gehl status***

[36] While her action was framed as a constitutional challenge, during the argument of this appeal it became clear that Dr. Gehl does not press her challenge to the constitutional validity of s. 6(1)(f) or the "two-parent" rule. Dr. Gehl does, however, challenge the adequacy and reasonableness of the Policy. Her central submission is that, on the evidence she has presented and on a proper application of s. 6(1)(f), it is unreasonable to deny her status.

[37] This argument should have been advanced by way of her statutory appeal from the Registrar's dismissal of Dr. Gehl's protest against the decision denying her status. However, the focus of this action has considerably evolved over time and, as it has evolved, it has largely overtaken the statutory appeal. The issue has been argued fully before us. In these circumstances, it is in the interest of

justice for this court to deal with that issue, subject to the procedural confines of this appeal. As I have already noted, the Policy has no statutory force. It is not a regulation or instrument adopted pursuant to any provision of the Act. The version of the Policy before us on this appeal, and the version the Registrar considered in relation to Dr. Gehl's case, is marked "DRAFT FOR DISCUSSION PURPOSES ONLY". It was not published or available to the public at the time the Registrar dealt with Dr. Gehl's protest. We were advised in oral argument by counsel for the Attorney General that the Draft Policy has now been adopted by the Registrar. Whatever status it may now have, at the time the Registrar dealt with Dr. Gehl's protest, the Draft Policy is properly characterized as an exercise of administrative discretion. It was an informal and internal document, adopted by the Registrar to assist departmental officials when making determinations of entitlement to registration. It was administrative rather than legislative in nature: see *Greater Vancouver Transportation Authority*, [2009] SCC 31, at paras. 58-66; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 85.

[38] It is a basic proposition that "administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values": *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at para. 24. The courts accord deference to the administrative decision-maker's exercise of discretion. Provided "the decision-maker has properly balanced the *Charter*

value with the statutory objectives, the decision will be found to be reasonable": *Doré* at para. 58. On the other hand, if the decision-maker fails to balance the *Charter* rights or values at issue with the statutory objective in a reasonable manner, the decision is vulnerable to review: see *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 79, and *Doré* at para. 49.

[39] I now turn to the relevant *Charter* rights and values that bear upon the Policy as it applies to Dr. Gehl.

[40] Section 15 of the *Charter* provides:

> 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.

[41] There is no dispute that denial of Indian status constitutes denial of the benefit of the law. Indian status carries with it an important bundle of legal rights. Registration entails access to significant material benefits, including some tax exemptions, extended health coverage and financial assistance with post-secondary education. There are also very significant intangible benefits. Registration represents the right to belong to and be recognized as a member of a community, and to participate in its life and governance. Registration also includes the right to pass on Indian status to one's children, described by the British Columbia Court of Appeal in *McIvor*, at para. 71, as being "of significant

spiritual and cultural value". In many First Nations communities, registration is also tied to band membership and rights of participation in band elections.

[42] Section 15 involves a flexible and contextual two-part inquiry: *Quebec v. A.,* 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 331. At the first stage, the question is whether "on its face or in its impact, the law creates a distinction based on an enumerated or analogous ground": *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at para. 19. At the second stage, the inquiry is "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 benefits in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage": *Taypotat*, at para. 20.

[43] I agree with the Attorney General that the determination of entitlement to registration on the basis of the entitlement of both parents is, on its face, a gender-neutral rule. However, I also agree with Dr. Gehl's submission that the Registrar was required to guard against an exercise of discretion that results in substantive inequality.

[44] Proof of identity of a parent is, as a matter of biology and common experience, more difficult for a mother to establish than a father. There can hardly ever be any doubt about maternity, but there may be considerable doubt about paternity. Moreover, a woman may have good reason for her reluctance or

inability to disclose the identity of her child's father. The child may be the product of a relationship the mother is reluctant or unable to disclose. The pregnancy may be the result of a relationship with a man the mother is fearful of identifying, for example, a relative, or the spouse or partner of a friend or family member. The pregnancy may be the product of abuse, rape or incest. The mother may have had multiple sexual partners.

[45] The Policy imposes a relatively strict burden of proof essentially based upon documentary evidence. The Policy provides that where confidentiality or personal safety is a concern and documentary proof of paternity is not available, the Registrar may consider conducting a hearing and considering other evidence. However, the Policy falls well short of what is required to address the circumstances that I have just described making proof of paternity problematic for many women. This failure perpetuates the long history of disadvantage suffered by Indigenous women. As Parliament itself recognized in 1985, the historic practice of stripping and denying Indigenous women of status represented a significant disadvantage that was inconsistent with the *Charter's* promise of equality.

[46] A pertinent feature of the 1985 amendments is that they removed all reference to illegitimacy. This change flowed from implementation of the two-parent rule, and it removed the only right a woman had to confer status upon her child in her own right in the years prior to 1985.

[47] At the time of Rodney Gagnon's birth in 1935, the *Indian Act*, R.S.C. 1927, c. 98, s. 12, provided that the illegitimate child of an Indian woman had band membership unless the child was excluded from membership by the Superintendent General. Section 11(e) of *the Indian Act,* S.C. 1951, c. 29, provided that the illegitimate child of an Indian woman was entitled to register "unless the Registrar is satisfied that the father of the child was not an Indian".

[48] The Attorney General opposes Dr. Gehl's argument that she should be able to benefit from both the pre- and the post-1985 legislation. The 1985 amendments restored rights unjustly taken away by discrimination, but it repealed rather than preserved the pre-1985 presumption of paternity upon which Dr. Gehl seeks to rely. It was only by virtue of the 1985 amendments that Dr. Gehl's paternal grandmother acquired status. Dr. Gehl therefore cannot rely on the presumption of paternity, which was no longer available by the time her paternal grandmother gained status. If Dr. Gehl is to qualify for status, the Attorney General submits, she must do so on the basis of the provisions of the post-1985 amendments to the Act.

[49] I agree that Dr. Gehl cannot rely on the pre-1985 presumption of paternity. I would point out, however, that the 1985 amendments did not replace the former presumption of paternity with a presumption of non-paternity. Section 6(1)(f) is silent on the issue of standard and burden of proof, and the post-1985 Act imposes no presumption, one way or the other.

[50] While the identity of Dr. Gehl's paternal grandfather is unknown, as the motion judge observed there is some evidence to support an inference that he had Indian status, and there is no evidence that her unknown paternal grandfather did not have status. There is evidence that Dr. Gehl's great grandparents lived on the Golden Lake Reserve, as did her grandmother. Dr. Gehl's father's birth certificate states that he was born on the "Renfrew" or Golden Lake reserve. There is evidence that he was accepted by the community and that he lived on the reserve for some time after his birth. His godfather was a prominent elder from the reserve. There is no evidence that he was ever excluded from the Golden Lake community. That evidence is, of course, far from conclusive but, as the motion judge suggested, in the absence of any evidence to the contrary, it is capable of supporting an inference that Dr. Gehl's father's situation satisfies the two-parent rule, and that he therefore had full status.

[51] I agree with Dr. Gehl's submission that when applied to her situation, the Policy unreasonably fails to take into account evidence of the kind that she has submitted and to the fact that Dr. Gehl's father was born 50 years before the 1985 amendments. He was born in an era when illegitimacy carried with it significant social stigma, and when Indigenous women suffered from even greater discrimination and disadvantage than they do today. He was also born in an era when the law would have given him the benefit of a presumption favouring status had his mother not been unjustly deprived of her status.

[52] The imposition of a relatively strict burden of proving paternity may well be appropriate to circumstances arising after 1985, when the new regime came into force and after the iniquities of the prior regime had been eliminated. However, it is unreasonable to apply that same burden to Dr. Gehl's circumstances in relation to a birth that occurred 50 years prior to the amendments and to individuals who had been unjustly deprived of status. To impose such a burden fails to take into account and reflect both the equality-enhancing and the remedial purposes of the 1985 amendments. Those amendments reached back in time and restored rights lost over 100 years ago because of the iniquitous provisions of the pre-1985 Act. That restorative purpose would be frustrated if some allowance were not given for the difficulty in establishing the identity of the unknown father of an illegitimate child born over 80 years ago on a reserve to an Indigenous woman who herself had been wrongly deprived of status.

[53] In summary, the Registrar's application of the Policy to Dr. Gehl's circumstances failed to take into account the equality-enhancing values and remedial objectives underlying the 1985 amendments, and was therefore unreasonable.

H. DISPOSITION

[54] Ordinarily, in a proceeding of this nature, a court will not substitute its decision for that of an administrative decision-maker, but rather will remit the

matter back to the administrative decision-maker for further consideration. However there is an exception where doing so would be "pointless" as there is only one possible outcome in view of the court's decision: *Giguère v. Chambre des Notaires du Quebec*, 2004 SCC 1, [2004] 1 S.C.R. 3, at para. 66. In my view, this case falls within that category. Dr. Gehl presented some evidence from which it could be inferred that her paternal grandfather had status. There is no evidence to the contrary. As the motion judge suggested, requiring more from Dr. Gehl than the evidence she has provided and a statutory declaration that she has no basis for believing that her paternal grandfather would not have been entitled to registration goes beyond what, on a reasonable interpretation, the Act requires. Accordingly, it is appropriate for this court to grant Dr. Gehl a declaration that she is entitled to be registered pursuant to s. 6(2) of the Act as the child of one parent with full status.

[55] If the parties are unable to agree as to the costs of this appeal, they may make brief written submissions to the panel.

"Robert J. Sharpe J.A."

Lauwers and Miller JJ.A. (Concurring):

[56] We concur with our colleague in the result, and agree with much of his reasoning. We would, however, resolve this appeal solely on the basis of administrative law principles, without resort to the concept of *Charter* values. Before setting out our approach to these issues, we review some of the procedural context and history.

A. PROCEDURAL OVERVIEW

[57] In the ordinary course, a person such as Dr. Gehl who seeks registration under s. 14.1 of the *Indian Act*, R.S.C. 1985, c. I-5, makes a request to the Registrar to have her name included on the Indian Register or on a "Band List". Dr. Gehl applied to be registered on November 28, 1994. Her application was denied on February 13, 1995. She protested the decision under s. 14.2 of the Act on March 16, 1995. The Registrar responded in a letter dated February 4, 1997, advising Dr. Gehl of the intention to uphold the decision, and explaining the factual basis and reasoning behind the decision. The Registrar invited Dr. Gehl to provide further written submissions if she wished to challenge either the Registrar's factual findings or reasoning. Dr. Gehl did so by letter dated May 2, 1997. The Registrar issued a final denial on April 27, 1998.

[58] Dr. Gehl was entitled to appeal the Registrar's decision to the Ontario Superior Court of Justice within six months under s. 14.3 of the *Indian Act*, and she did so. The appeal went into abeyance.

[59] In 2001, a few years after she filed her statutory appeal, Dr. Gehl started an action in the Superior Court of Justice seeking damages against the Crown pursuant to s. 24(1) of the *Charter* and for misfeasance in public office. She also sought a declaration that the legislation was unconstitutional and declarations that she and her father were entitled to registration under the legislation. The Crown moved to strike the statement of claim as disclosing no cause of action. The motion was heard by Swinton J., who allowed the motion but granted Dr. Gehl leave to amend. Her reasons are found at *Gehl v. Canada (Attorney General)*, [2001] 4 C.N.L.R. 108 (Ont. S.C.). Justice Swinton found, at para. 13:

> [T]he Registrar is not exercising a broad discretion as in *Eldridge* [*v. British Columbia (Attorney General)*, [1997] 3 S.C.R 624], when making a decision about entitlement to registration; rather, the Registrar is required to determine eligibility for registration in accordance with the criteria found in s. 6 of the Act and to determine protests in accordance with procedure set out in s. 14.2(4).

She added, at para. 14: "it is the current *Indian Act* that sets out Indian status, and it creates the barrier to the plaintiff's registration, not a policy decision taken by the Registrar." Since "it is not an administrative policy which places obstacles to the plaintiff's registration," she noted at para. 15, the action based on s. 24(1)

of the *Charter* must fail. Justice Swinton therefore struck the statement of claim, with leave to amend, stating at para. 15: "if there is denial of equality rights, the proper method to proceed is by way of a request for declaration under s. 52(1) of the *Charter* that the statute is invalid."

[60] Taking her cue from Swinton J., Dr. Gehl responded by issuing an amended statement of claim dated October 18, 2002 seeking a declaration that s. 6 of the *Indian Act* violates s. 15(1) of the *Charter*, and an order striking it down under s. 52. In addition to the attack on s. 6 of the *Indian Act*, Dr. Gehl also sought the following declarations:

> (b) A declaration that section 6 of the 1985 Act be interpreted and applied in a manner that does not disadvantage individuals or decedents of individuals whose paternity is unknown, or whose ancestors had never been registered or recognized as Indians;
>
> (c) A declaration that the plaintiff's father, Rodney Peter Gagnon, has entitlement to be registered pursuant to section 6(1)(a) of the 1985 Act;
>
> (d) A declaration that the plaintiff has entitlement to be registered pursuant to section 6(1)(a) of the 1985 Act.

[61] We concur with our colleague that the arguments advanced in the summary judgment motion could have and should have been advanced in the statutory appeal from the Registrar's dismissal of Dr. Gehl's protest.

B. PROCEDURAL CONCERNS

[62] Dr. Gehl let the action languish for many years until 2014 when the parties agreed to schedule a motion for summary judgment, which was heard by the motion judge and is the subject of this appeal.

[63] The motion judge dismissed the motion on the basis that Dr. Gehl had failed to prove that the *Indian Act* provided for differential treatment based on an enumerated or analogous ground under s. 15 of the *Charter* (at para. 82).

[64] The radical change in the Dr. Gehl's position before this court is that she has effectively abandoned her challenge to the constitutional validity of s. 6(1)(f) of the *Indian Act* or the "2-parent" rule. Instead, she challenges the Registrar's Policy and the Registrar's decision.

[65] There are procedural obstacles to the challenge to the Registrar's Policy. There was no formal policy in existence in 1998 when the Registrar's decision was made. The Policy, which formalized the practices that had developed within the Registrar's office over time, did not come into existence until well after the litigation had been started. Further, as our colleague notes, the Policy is not law and is not amenable to *Charter* review: *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 58; *Little Sisters Book and Art*

Emporium v. Canada (Minister of Justice), 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 85.

[66] There are also procedural difficulties with the claim for declaratory relief based on legal entitlements under the Indian Act. To be clear, ordinarily a superior court should decline to hear an application for declaratory relief where another procedure has been legislatively provided, as in this case. Although the court has a broad jurisdiction to grant declaratory relief under s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the court can, on a discretionary basis, decline to issue a declaration where, as here, Parliament has provided access to as broad a remedy through another process: *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at paras. 36, 40; *Peiroo v. Canada* (1989), 69 O.R. (2d) 253 (C.A.).

[67] However, we concur with our colleague that in these circumstances "it is in the interest of justice for this court to deal with [the] issue". This court is in as good a position as the appeal judge would have been in the normal statutory appeal process to decide the issues. While it would be procedurally correct to require Dr. Gehl to resume the statutory appeal, with the possibility of another appeal to this court, it would serve no useful purpose and would waste scarce judicial resources. We propose to resolve this appeal on the same grounds as were brought in the statutory appeal to the Superior Court.

C. SUBSTANTIVE CONCERNS

[68] Our colleague proposes to resolve this appeal on the basis that the Registrar's decision is inconsistent with *Charter* values. However, in our view there is no reason to resort to either *Charter* rights or *Charter* values in what is essentially the appeal of the Registrar's decision. In prioritizing administrative law analysis, we follow the practice of the Supreme Court in cases such as *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 11 and *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at paras. 19-20, 24. We first address the administrative law resolution of this appeal, and then explain why we are unable to agree with our colleague's approach.

(1) The administrative law solution is sufficient

[69] In light of the way the case has evolved, it should be resolved on straightforward administrative law grounds on the basis that the Registrar's decision is simply unreasonable. We concur with our colleague, who notes at para. 52, "when applied to [Dr. Gehl's] situation, the Policy unreasonably fails to take into account evidence of the kind that she has submitted". There is no need to resort to *Charter* rights or *Charter* values to provide Dr. Gehl with the remedy she seeks.

[70] The result of the Registrar's decision is that Ms. Gehl is prevented from accessing benefits – benefits constitutionally guaranteed by s. 35 of the *Constitution Act, 1982* – because of an imposed burden that she prove something that, in the circumstances, cannot be proven.

[71] Dr. Gehl gave the Registrar circumstantial evidence capable of supporting the inference that her paternal grandfather was, more likely than not, entitled to registration. Her application was denied on the basis that a claimant must that specifically identify an ancestor by name, in all circumstances, as a precondition to registration:

> It is unfortunate that there is no possibility of identifying Rodney Gagnon's birth father. However, for the purposes of registration under the *Indian Act*, a determination is made on the entitlement to registration of each parent, as far as such information is available. *Without knowing the identity of Rodney Gagnon's father, I cannot reasonably conclude that he is entitled to registration under the Act*. [Emphasis added.]
>
> Letter from the Registrar, April 27, 1998

[72] The wrong in the Registrar's decision is caused by the application of a categorical evidentiary rule that works in an exclusionary manner to deny registration and status to an entitled individual who cannot identify a relevant ancestor by *name*. It is the demand for evidence of specific identity when, in some circumstances, only circumstantial evidence of Indian status of an ancestor whose actual identity is not known (and is not knowable) is available.

[73] The application of this rule – by which the Registrar refused Dr. Gehl's application – is unreasonable because it is at odds with the purpose of s. 6 of the *Indian Act*, which is to provide for the registration of persons who are entitled to registration. It potentially denies the benefit of registration to some persons whom the Act entitles to registration – as the Registrar acknowledged on cross-examination – solely because of their inability to satisfy an unreasonable evidential demand not mandated by the Act. The demand for evidence of a specific identity is unreasonable because it is a demand for evidence which is not only superfluous, but now, through the passage of time, unobtainable in this instance.

[74] The circumstantial evidence advanced by Dr. Gehl is capable of supporting an inference that her paternal grandfather was of aboriginal ancestry: his baptismal certificate indicates her father was born on the reserve; his godparents were members of the reserve community; he resided on the reserve during his childhood; there is no record of his being denied participation in the activities of the community.

[75] In the circumstances of an historical claim such as this one, it is sufficient for the claimant to provide some evidence capable of giving rise to the inference that an unknown father may have had status, which constitutes sufficient proof of paternity for the purposes of the legislation, in the absence of any evidence to the contrary. We would grant the remedy sought on this basis alone.

(2) A *Charter* values analysis should be avoided where possible

[76] The foregoing analysis is sufficient to resolve this appeal. We make two substantive observations on our colleague's proposal to resolve the appeal through the application of *Charter* values. First, where a case can be resolved without reference to *Charter* values, prudence suggests they should not be invoked. In our view, a *Charter* values analysis would unnecessarily inject subjectivity and uncertainty into the legal analysis. Second, there is no need to resort to *Charter* values to displace any deference that an appellate body might owe to the original decision-maker, because in Dr. Gehl's case no deference is owed to the Registrar.

(a) *Charter* rights and values should not be invoked in this case

[77] Dr. Gehl has abandoned her constitutional challenge to the legislation and is now focused on whether the Registrar's decision, which applied a rule later formalized into a policy, deprives her of rights under the legislation. As we have explained, any child who is unable to identify either her father or mother is denied the benefits of registration because of an evidential rule that in some circumstances frustrates the purpose of the statute. As our colleague rightly points out, the difficulty faced by a claimant who is unable to identify a parent will almost always be in establishing the identity of a father. But the unreasonableness of the Registrar's decision does not turn on whether the

unknown parent is the mother or father, and is not best described as a matter of discrimination or inequality. The decision would be no less unreasonable if Dr. Gehl had been denied registration because of an inability to identify her biological mother or grandmother. The appeal to *Charter* values does not add anything to the substantive administrative law analysis, as we noted above, and does no work in reaching the outcome.

[78] Our objection to the use of *Charter* values in this appeal is not simply because it is unnecessary to the result. There are good reasons why the role that *Charter* values can play in judicial reasoning has been carefully circumscribed. One reason is the risk that an appeal to *Charter* values can pre-empt *Charter* rights analysis, and thus risk subordinating *Charter* rights. A party bringing a *Charter* challenge is entitled to a judicial determination of whether the *Charter* right has been limited, and the government must have the opportunity to argue that such a limit is justified under s. 1 of the *Charter*: *Symes v. Canada*, [1993] 4 S.C.R. 695, [1993] S.C.J. No. 131, at para. 105 (QL) [*per* Iacobucci J.]. Our colleague's reasons elide the two distinct legal concepts of *Charter* rights and *Charter* values.

[79] Furthermore, there is good reason to maintain a modest role for *Charter* values in judicial reasoning generally and in statutory interpretation specifically. *Charter* values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. Their use injects a

measure of indeterminacy into judicial reasoning because of the irremediably subjective – and value laden – nature of selecting some *Charter* values from among others, and of assigning relative priority among *Charter* values and competing constitutional and common law principles. The problem of subjectivity is particularly acute when *Charter* values are understood as competing with *Charter* rights.

[80] With respect to the identification and selection of *Charter* values, it must be noted that they are not a discrete set, like *Charter* rights, which were the product of a constitutional settlement and are easily ascertained by consulting a constitutional text. The identification of *Charter* values has been *ad hoc*. Sometimes (as in our colleague's reason) they track the language of an enumerated right, in this case, equality.

[81] Other times *Charter* values have been formulated at a much higher level of abstraction – as concepts such as justice, liberty, autonomy or dignity: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. The meaning of these concepts – and their juridical application – is both contestable and contested. Philosophers have debated the requirements of justice, for example, for thousands of years. The same could be said of many other *Charter* values.

[82] With respect to their operation in judicial reasoning, problems can arise from a lack of clarity about the subordinate relationship of *Charter* values to *Charter* rights, the plurality of *Charter* values, and their uncertain relationship to each other and to constitutional and common law principles. Unlike *Charter* rights, which are largely negative and will thus rarely conflict, multiple *Charter* values can simultaneously apply in a given dispute, and can easily be in conflict. In this case, for example, although equality seems like an apposite value, it is a capacious concept that goes beyond the legal right established in s. 15 of the *Charter*. Every conception of equality, as the Supreme Court noted in adopting the words of J.H. Schaar in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6, "is at once a psychology, an ethic, a theory of social relations, and a vision of the good society" (at para. 26 (QL)). The *Charter* value of equality potentially competes and conflicts with the autonomy and liberty of native bands, principles that were identified as *Charter* values in *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at paras. 44-48, and which, according to the s. 1 *Charter* evidence tendered in this case, informed the compromise that underlies s. 6 of the *Indian Act*.

[83] In light of these and other problems, the Supreme Court has limited the role *Charter* values can play in statutory interpretation. In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 28, 60-66, the Supreme Court held that *Charter* values have no role in the interpretation of

legislation unless the text is ambiguous, in the sense that one or more meanings are available that are equally in accordance with the intentions of the statute: see, most recently, *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300, at para. 25. Absent such ambiguity, *Charter* values have no role to play in statutory interpretation. This stance reinforces our view that a *Charter* values analysis should be avoided where it is not necessary to the outcome sought by the party.

(b) Deference is not owed to the Registrar

[84] Although we agree with our colleague that deference is not owed to the Registrar, we do not arrive at that conclusion on the basis that the Registrar failed "to balance the *Charter* rights or values at issue with the statutory objective in a reasonable manner," citing *Loyola*, at para. 79, and *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at para. 49.

[85] We take a more direct route. The Registrar was not exercising discretionary power in refusing Dr. Gehl's registration request, and therefore her decision does not attract deference.

[86] Deference is required only if the administrative decision maker is exercising, as *Doré* prescribes, a relevant "grant of discretion". But, as Swinton J. observed, no discretionary power is exercised by the Registrar in determining whether Dr. Gehl is entitled to registration under the *Indian Act*. The concept of

discretion is explained in *Baker*, at para. 52: "The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries." No such choice of options is given to the Registrar by s. 6 of the *Indian Act*. In "Another View of *Baker*" (1999), 7 R.A.L. 163 at 164, James L.H. Sprague observed, and we agree:

> Filling in legislative gaps and making choices among various options is not true discretion. That is trying to discern what the legislator meant to say. The legislator never said, or intended to say, that where there is a gap, the law is to be whatever a decision-maker may decide it should be. No, where the decision-maker has to fill in gaps or otherwise interpret law he or she is not exercising discretion. He or she is simply doing his or her best to ascertain what the law is – he or she is not a law-maker (or at any rate is not supposed to be).

[87] The Registrar's obligation is to administer legislation that determines the question of Dr. Gehl's entitlement. It follows that the Registrar must get it right in accordance with the statutory criteria, and is subject to an appeal to the Superior Court of Justice on the standard of correctness. (In our view it is significant that the statutory appeal is to the Superior Court rather than to a statutory body with subject-specific expertise.) Although the Registrar, or more likely the officials working under the Registrar, might develop some kind of "field sensitivity" and facility in researching historical records, in no sense does the Registrar exercise discretionary power. Nor is any special expertise exercised by the Registrar in

determining entitlement. This court does not owe deference to the Registrar and does not need to invoke *Charter* values in order to overcome deference, as our colleague proposes.

D. REMEDY

[88] We agree with our colleague that this falls within the category of exceptional cases in which remitting the matter to the decision-maker would pointless since there is only one possible outcome. Dr. Gehl presented evidence from which it could be inferred that her paternal grandfather had status. There is no evidence to the contrary. As the motion judge suggested, requiring more from Dr. Gehl than the evidence she has provided and a statutory declaration that she has no basis for believing that her paternal grandfather would not have been entitled to registration goes beyond what, on a reasonable interpretation, the Act requires.

[89] Accordingly, we would allow the appeal and grant the declaration that Dr. Gehl is entitled to be registered under s. 6(2) of the *Indian Act* as the child of one parent with full status

Released: “RJS” “APR 20 2017”

“P. Lauwers J.A.”
“B.W. Miller J.A.”

Appendix "A"

***Indian Act*, R.S.C. 1927, c. 98**

2. In this Act, unless the context otherwise requires...

(**d**) "Indian" means

(**i**) any male person of Indian blood reputed to belong to a particular band;

(**ii**) any child of such person; or

(**iii**) any woman who is or was lawfully married to such person; ...

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

14. Any Indian woman who marries any person other than an Indian, or a non-treaty Indian, shall cease to be an Indian in every 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 such income may be commuted to her at any time at ten years' purchase, with the approval of the Superintendent General.

***Indian Act*, S.C. 1951, c. 29**

10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be.

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 subparagraph (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), (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.

***Act to amend the Indian Act*, S.C. 1956, c. 40**

3. (**1**) Paragraph (e) of section 11 of the said Act is repealed and the following substituted therefor:

(**e**) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or.

(**2**) Section 12 of the said Act is amended by adding thereto, immediately after subsection (1) thereof, the following subsection:

(**1a**) The addition to a Band List of the name of an illegitimate child described in paragraph (e) of section 11 may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under paragraph (e) of section 11.

(**3**) This section applies only to persons born after the coming into force of this Act.

***Indian Act*, R.S.C. 1985, c. I-5 (as amended in by the *Gender Equity in Indian Registration Act*, S.C. 2010, c. 18, which added ss. 6(1)(c.1))**

Persons entitled to be registered

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, 1(985, 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.

Appendix "B"