

## Unknown / Unstated Paternity and the *Indian Act* Lynn Gehl versus the Attorney General of Canada

### The History of Sex Discrimination

Through a series of legislative acts dating back to the 1857 *Gradual Civilization Act*, Indian women and their children were enfranchised when their husband or father was enfranchised. It was through the 1869 *Gradual Enfranchisement Act* where Indian women, along with their children, who married non-Indian men were enfranchised, denied Indian status registration and their treaty rights. At this time, as per the European model, women were considered appendages of their husbands and therefore if, and when, they married a non-Indian man they too became a non-Indian. Eventually the process of eliminating status Indians through sex discrimination was codified in section 12(1)(b) of the 1951 *Indian Act*.

### Indigenous Women's Actions

On the national and international level it was Mary Two-Axe Early who, in 1966, began to speak publicly about the matter. Eventually she approached the Royal Commission on the Status of Women. It was in 1971 when Jeannette Corbiere took the matter to court arguing it violated the *Canadian Bill of Rights*. Yvonne Bedard was also addressing it where in 1973 the case was heard at the Supreme Court of Canada level. Relying on a patriarchal line of reasoning the SCC ruled that because Indian women who married non-Indian men had equality with all other Canadian married women there was no sex discrimination. Although this decision was a setback, in 1981 Sandra Lovelace appealed to the United Nations Human Rights Committee regarding section 12(1)(b). Because her marriage and loss of Indian status registration occurred prior to the *International Covenant on Civil and Political Rights* the UNHRC declined to rule on the sex discrimination.

### The Legislative History of Unknown / Unstated Paternity

In 1927, section 12 of the *Indian Act*, which remained in place until 1951, stated that any illegitimate child may, unless s/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. This criterion was broad and inclusive in that all that was required was the sharing of band funds. From 1951 through 1956 the criteria of who was an Indian shifted slightly where the test was that the Registrar had to be satisfied that the father was not an Indian in order to omit adding a name to the register. This shifted again from 1956 through 1985 where section 12(2) stated that illegitimate children were automatically added to the Indian register whereby the band had twelve months to protest. This provision protected Indigenous mothers and their children. That said, if and when a protest was made and the Registrar determined that the father of the child was a non-Indian person, then the child's name was removed from the official Indian register. In sum, although regulated and although the inclusive process was once narrowed, it was eventually re-expanded to include all children regardless of non-paternity disclosure unless a successful protest was made. This process of inclusion remained in place until 1985.

### The 1985 and 2011 Amendments to the Indian Act

Despite decades of advocacy and litigation work by Indigenous women that led to amendments to the *Indian Act* in 1985 and 2011, under Aboriginal Affairs' current regime, and as of 1985, a father must sign his baby's birth certificate for his Indian status registration to be factored into the child's eligibility. Otherwise, through an unstated paternity policy, the Registrar applies a negative assumption of paternity whereby the child may not be entitled to Indian status, and consequently band membership and her/his treaty rights. This assumption of non-Indian paternity is sex discrimination. What is particularly disturbing about this is the way it targets Indigenous mothers and children. Women sometimes conceive through an abuse of power such as in situations of incest, rape, gang rape, sexual slavery, and prostitution where as such the terms un-reported, unnamed, unacknowledged, un-established, unrecognized, and unknown paternity are more appropriate descriptors.

# Gehl Section 15 Charter Challenge Timeline

1985	Indian Act amended to comply with Charter; Oral research stage begins
Feb 1990	Sent away for applications and birth certificates
July 1990	Grandmother and great grandmother are registered: 6(2) and 6(1)c respectively
1990-4	Genealogical archival research; Goal is to link great great grandmother to a band member so she gains entitlement, then grandmother will be upgraded to a 6(1), and father will be entitled
Nov 1994	I find the archival link
Feb 1995	Grandmother is upgraded to 6(1)f; Father is now 6(2); I am denied
Mar 1995	Aboriginal Legal Services Toronto (ALST) submits protest to INAC
Feb 1997	INAC argues my name is correctly omitted from the Indian register
May 1997	ALST submits second stage protest to INAC
Apr 1998	INAC argues they did not violate the Charter
May 2001	Statement of Claim (S of C) is filed: Lynn Gehl versus Attorney General of Canada (AGC)
Oct 2001	Department of Justice (DOJ) motions to strike S of C arguing there is no basis to challenge an administrative decision; Court hears Motion to strike S of C
Nov 2001	Court ruled in the DOJ's favour; ALST appeals
Sept 2002	The Ontario Court of Appeal upholds lower court decision
Oct 2002	Second S of C is filed
2006	Discovery / Production period; ALST receives more than 7 000 documents
Feb 2006	Action is changed to Application to avoid documents dumped; Affidavits will be relied on instead
Nov 2006	My affidavit is complete
Jan 2007	ALST provides two additional affidavits
Mar 2007	DOJ provides six affidavits
Sept 2007	DOJ cross-examination regarding my affidavit
Dec 2007	DOJ expert report submitted
Mar 2010	DOJ expert revises report
Jan 2011	ALST expert report submitted
Apr 2011	ALST second expert report submitted
Nov 2012	Application is ordered dismissed due to delay, with costs; Court sets aside Order to Dismiss
May 2013	Court date for Summary Judgment Motion (SJM) hearing: May 26-28, 2014
Apr 2014	May court date lost; New court date: October 20-22, 2014
June 2014	Joint Motion Record is complete
July 2014	ALST Factum complete
Sept 2014	DOJ Factum complete
Oct 2014	Joint Book of Authorities
Oct 20-22, 2014	Summary Judgement Motion is heard in court

## Court House – Public

Ontario Superior Court of Justice  
393 University Avenue, Toronto  
October 20 – 22, 2014 at 9:00 am

A fund  
raising book  
is available  
for purchase  
for \$17.95



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