

RE FROMAN

(1973), 33 D.L.R. (3d) 676 (also reported: [1973] 2 O.R. 360, 12 R.F.L. 237)

Ontario County Court, Fanjoy Co.Ct.J., 15 February 1973

Civil rights -- Equality before the law -- Indians -- Entitlement of illegitimate children of Indian parents to be registered as Indians -- Whether illegitimate children of female persons treated differently from illegitimate children of male persons -- Whether discrimination on basis of sex of parents of children -- Indian Act (Can.), ss. 11(1)(c), (d), (e), 12 -- Canadian Bill of Rights, s.1(b).

Indians -- Registration -- Entitlement of illegitimate children of Indian parents to be registered as Indians -- Whether illegitimate children of female persons treated differently from illegitimate children of male persons -- Whether discrimination on basis of sex of parents of children -- Indian Act (Can.), ss. 11(1)(c), (d), (e), 12 -- Canadian Bill of Rights, s. 1(b).

Section 11(1) (c) of the *Indian Act*, R.S.C. 1970, c. I-6, providing that a male person who is a direct descendant in the male line of a male person described in para. (a) or (b) is entitled to be registered as an Indian does not include an illegitimate child of a male person. Consequently, except in so far as by s. 12(2) of the Act the registration of the name of an illegitimate child of a female person may be removed if, upon protest, it is determined that the father of the child is not an Indian, illegitimate children of male persons are not treated differently from illegitimate children of female persons and there is no discrimination by reason of the sex of the Indian parents of the child in question. Further, s. 12(2) providing for protest does not discriminate on the basis of sex. The availability of the protest procedure with respect to paternity (and not with respect to maternity) recognizes the fact that, while maternity is always identifiable, paternity has a degree of uncertainty and since, in the normal course of events, when a non-Indian mother bore an illegitimate child, the question of the registration of that child under the *Indian Act* would not arise, no provision was made in the Act for the protesting of such registration.

[*Re Makein*, [1955] 1 All E.R. 57; *Sydall v. Castings Ltd.*, [1967] 1 Q.B. 302, apId; *Re Lavell and A.-G. Can.* (1971), 22 D.L.R. (3d) 188, [1971] F.C. 347; *Bedard v. Isaac et al.*, [1972] 2 O.R. 391, 25 D.L.R (3d) 551, refd to]

REVIEW of a decision of the Registrar under the *Indian Act* (Can.).

M. B. Daboll, for Children's Aid Society.

B. H. Kellock, for Six Nations Band Council.

C. D. Wilson, for Mary Gilchrist.

E. A. Bowie, for Attorney-General of Canada.

FANJOY, CO.CT.J.:--This matter comes before me as a review of the decision of the Registrar pursuant to s. 9(3) of the *Indian Act*, R.S.C. 1970, c. I-6, on the request of the Six Nations Band Council. The Registrar, in his decision, concluded that he was not satisfied that David Froman, born on January 12, 1970, to Ruth Ann Froman was of non-Indian paternity and, accordingly, declared him to be entitled to be registered in the Upper Mohawk Nations Band. At the conclusion of the review, I indicated that the issue on the law merited careful study and consideration and accordingly reserved my decision. Counsel suggested that the decision might be delayed pending the results of an appeal to the Supreme Court of Canada on *Bedard v. Isaac et al.* referred to hereafter. However, it would appear that the issue in the *Bedard* case is not similar to that in the instant matter and in any event the parties are entitled to a decision without further delay.

The facts are straightforward. Ruth Ann Froman was an unmarried Indian. She gave birth to David Froman, hereafter referred to as the "child". The simple factual question is whether the father of the child is an Indian or a non-Indian. The burden of proof as set out in s. 9(6) of the Act rests on the Six Nations Band Council of establishing that the Registrar is erroneous in his decision.

The Registrar made his decision solely on the basis of documentary evidence. At the hearing I had the benefit not only of this evidence but of oral evidence as well. The mother of the child, Ruth Ann Froman, testified that one William Gilchrist was the father. She stated that she had had sexual intercourse with no person other than William Gilchrist for a period of one year prior to the birth of the child and that the pregnancy was of normal duration. Mrs. Margaret Yake, the sister of Ruth

Ann Froman, at whose home Ruth Ann Froman was living for approximately two years prior to the birth of the child, corroborated the evidence of Ruth Ann Froman. She stated that the said William Gilchrist was "going with" Ruth Ann Froman during the relevant period of time and after the birth of the baby and to her knowledge was "going with" no one else. She stated that if her sister had gone out with another man or other men, she would have known. Furthermore, she testified that shortly after the birth of the child, when Miss Froman returned from the hospital to the Yake home, William Gilchrist came to her house and acknowledged paternity. When he was informed that Miss Froman planned to have the child adopted, he expressed some unhappiness with the decision and referred to the child as "his child".

There is no question that William Gilchrist was not an Indian. I accept the evidence not only of Miss Froman but of her sister, Mrs. Yake, who impressed me as a truthful, reliable and very careful witness. I have no difficulty whatsoever in finding on the evidence that the father of David Froman is William Gilchrist who is not an Indian.

However, the matter does not rest there. Counsel for the Children's Aid Society submitted that the *Indian Act* deprives an illegitimate child of a female Indian band member of his registration right and does not effect a similar result with respect to the illegitimate child of a male Indian band member. He argues that as a result such illegitimate child of a female does not have equality before the law and that the sections of the *Indian Act* which effect this result are inoperative under the provisions of the *Canadian Bill of Rights*.

Counsel's specific argument is that by the provisions of s. 11 (c) and (d) of the *Indian Act*, a male person, whether legitimate or illegitimate, who is a direct descendant of a male band member is entitled to be registered on the band list and there is no further provision in the *Indian Act* for protests of such registration and for removal of that person's name from the band list.

He points out further that pursuant to s. 11(e) of the *Indian Act*, the illegitimate child of a female band member is in the first instance entitled to be registered on the band list. However, pursuant to s.12(2), the addition of the name of that illegitimate child to the band list may be protested and, if it is decided that the father of the child is not an Indian, the child is not entitled to be registered. He argues, therefore, that the effect of the legislation is to discriminate within a class (Indians) by reason of the sex of the Indian parent of the child in question; that such discrimination leads to inequality before the law with the consequent comparable loss of property and other rights to the illegitimate child of a female band member.

He suggests that the *Lavell* and *Bedard* decisions (referred to hereafter) which declare s. 12(1) (b) of the *Indian Act* inoperative because it prescribes a different result with respect to the rights of an Indian woman who marries a person other than an Indian or an Indian from another band from that which is to obtain when a male Indian marries a person other than an Indian or an Indian who is a member of another band, support the proposition put forth in his argument concerning illegitimate children. He suggests further that the Indian adult who chooses to marry within or without the band exercises a certain amount of freedom of choice, whereas on the other hand an illegitimate child whose Indian parent is either male or female faces a situation entirely beyond his own control.

Both the Attorney-General of Canada and the Attorney- General of Ontario were served with notice by Mr. Daboll of his submissions and the Attorney-General of Canada was represented at the hearing.

In the light of this submission, it is necessary to carefully examine both the *Indian Act* and the *Canadian Bill of Rights*, as well as the decisions referred to by counsel for the Children's Aid Society. Sections 11 and 12 of the *Indian Act* read as follows:

11(1) Subject to Section 12, a person is entitled to be registered if that person

(a) on the 26th day of May 1874 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 Ordinance Lands*, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 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 26th day of May 1874, 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); 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).

(2) Paragraph (1) (e) applies only to persons born after the 13th day of August 1956.

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 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1) (a), (b) or (d) or entitled to be registered by virtue of paragraph 11(1) (e), unless, being a woman, that person is the wife or widow of a person described in section 11, and

(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) 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 that paragraph.

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

(4) Subparagraphs (1) (a) (i) and (ii) do not apply to a person who

(a) pursuant to this Act is registered as an Indian on the 13th day of August 1958, or

(b) is a descendant of a person described in paragraph (a) of this subsection.

(5) Subsection (2) applies only to persons born after the 13th day of August 1956.

(I have italicized the subsections with which we are particularly concerned.)

The relevant sections of the *Canadian Bill of Rights* are as follows:

1. *It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,*

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

2. *Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to*

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

I have been referred to the following cases: *R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R.(3d) 473, [1970] 3 C.C.C. 355; *Re Lavell and A.-G. Can.* (1971), 22 D.L.R. (3d) 188, [1971] F.C. 347, and *Bedard v. Isaac et al.*, [1972] 2 O.R. 391, 25 D.L.R. (3d) 551. For convenience I will refer to these decisions as *Drybones*, *Lavell* and *Bedard* respectively.

In all of these decisions the respective Courts found that because of discrimination, particular sections of the *Indian Act* were inoperative. In the *Drybones* case the discrimination was between the rights of Drybones as an Indian to whom the *Indian Act* applied and those of other Canadians.

In the *Lavell* case the discrimination was one where it was found that the consequences of a marriage of an Indian woman to a person who was not Indian were worse than for males marrying non-Indians. The *Bedard* decision was on a similar principle to that of *Lavell*. In all three decisions certain sections of the *Indian Act* were declared to be inoperative. Mr. Daboll does not argue that the entire *Indian Act* is inoperative and in none of these decisions do I find any dicta which would lead to such a conclusion.

In the instant case the question is a different one. Obviously, the sex of the child whose registration privileges are under question has no bearing on the child's status. If the child had been female, the result would be no different. The alleged discrimination could only arise with respect to the sex of the parent. The question must, therefore, be considered and examined as to whether there is actual discrimination with respect to the parent.

Does s. 11(1) (c) include an illegitimate child of a male person? If it does, there is obviously discrimination on the basis of sex, since the result would be that no right of protest would exist in the event that the mother of the illegitimate child was a non-Indian.

It becomes necessary to determine the meaning of the word "descendant". The word "descendant" has been continually interpreted as referring only to legitimate issue. This interpretation has continued to the present day, as indicated in the more recent English authorities, *Re Makein*, [1955] 1 All E.R. 57, and *Sydall v. Castings Ltd.*, [1967] 1 Q.B. 302.

In my opinion, s. 11(1) (c) has reference only to male legitimate children. It therefore follows that there is no difference under the *Indian Act* between an illegitimate child of a male Indian and an illegitimate child of a female Indian when the other parent is a non-Indian, subject, of course, to the fact that there is the right of protest contained in s. 12(2) of the Act which applies only to the illegitimate child of a female person and has no application to the illegitimate child of a male person.

I now pass to the question whether this right of protest leads to inequality under the law in that it discriminates against the illegitimate child of a female person.

The general scheme of the *Indian Act* must be considered. One of its general objects is to preserve Indian reservations and benefits to Indians and to no one else. I would go so far as to state that these rights are intended to be confined to full-blooded Indians. This proud and dignified race is thus given some opportunity to retain its identity and culture in the face of the onslaught by an alien society on its way of life.

In my opinion, the provision for protest contained in s.12(2) is not discrimination on the basis of sex. The fact that the protest procedure is available with respect to paternity and not with respect to maternity is simply recognition of the facts of life. Maternity is always identifiable. Paternity always has a degree of uncertainty, even for legitimate issue. No Legislature can change the fundamental biological differences between men and women. These differences as they affect children have been recognized through the centuries by the common law and in recent years by child welfare legislation in all the Provinces of Canada.

In the normal course of events, when a non-Indian mother bore an illegitimate child, the question of the registration of that child under the *Indian Act* would not arise. Accordingly, no provision was made in the Act for the protesting of such registration. I, therefore, conclude that s. 12(2) of the *Indian Act* is not inoperative in the face of the *Canadian Bill of Rights*.

I, therefore, find that the infant, David Froman, is not entitled to have his name included in the Indian Register under the provisions of the *Indian Act*, because his father was not an Indian.

Order accordingly.