

Translated from the original French

**SUPERIOR COURT
(CLASS ACTIONS)**

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-001005-194

DATE: June 15, 2023

PRESIDING: THE HONOURABLE SYLVAIN LUSSIER, J.S.C.

FEMMES AUTOCHTONES DU QUÉBEC INC.

and

ISABELLE PAILLÉ

Plaintiffs

v.

ATTORNEY GENERAL OF CANADA

Defendant

**JUDGMENT ON AN APPLICATION FOR AUTHORIZATION
TO INSTITUTE A CLASS ACTION AND TO BE DESIGNATED REPRESENTATIVE
PLAINTIFF**

JL4908

[1] **IN VIEW OF** the Amended application for authorization to institute a class action and to be designated representative plaintiff of the applicants;

[2] **IN VIEW OF** the exhibits filed in the record;

[3] **IN VIEW OF** the written submissions of counsel for the parties;

[4] **IN VIEW OF** the defendant's consent to the authorization, the notices, and the notice dissemination protocol;

[5] **WHEREAS** the applicants ask the Court to approve the notice to members and the abridged notice to members, both the French and English versions, appended as Schedules to this judgment;

[6] **WHEREAS** the notices comply with the requirements of art. 579 of the *Code of Civil Procedure*;

[7] **WHEREAS** the applicants propose that the notices be disseminated according to the dissemination protocol appended as a Schedule to this judgment;

[8] **IN VIEW OF** arts. 571 and following of the *Code of Civil Procedure*;

[9] **FOR THESE REASONS, THE COURT:**

[10] **GRANTS** the *Amended application for authorization to institute a class action and to be designated representative plaintiff*;

[11] **AUTHORIZES** the institution of the class action in compensatory and punitive damages against the defendant;

[12] **ATTRIBUTES** to Femmes autochtones du Québec the status of representative plaintiff and to Isabelle Paillé the status of designated member for the purpose of instituting the class action on behalf of the group of persons described below:

1. **CATEGORY A (GRANDCHILDREN OF AN INDIAN WOMAN WHO LOST STATUS THROUGH MARRIAGE, IF BORN BEFORE APRIL 17, 1985, OR OF A MARRIAGE FORMED BEFORE THAT DATE, AS WELL AS THEIR DIRECT DESCENDANTS)**

1. Any individual in Canada:

(a) whose grandmother lost Indian status upon marrying a non-Indian man before April 17, 1985;

and

(b) whose only Indian parent was eligible for Indian status under s. 6(1)(c.1) of the *Indian Act*, as amended in 2010 (*Gender Equity in Indian Registration Act*, S.C. 2010, c. 18);

and

- (c) who himself or herself was eligible for Indian status under s. 6(1)(c.2) of the *Indian Act*, as amended in 2017 (*An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, S.C. 2017, c. 25)

and

- (d) who has had a child who was ineligible for Indian status before the coming into force of the *Indian Act* as amended in 2017;
- 2. and his or her Indian ascendants;
- 3. and his or her descendants who are eligible for Indian status under the 2017 amendments to the *Indian Act*.

2. CATEGORY B (WOMEN BORN OUT OF WEDLOCK TO AN INDIAN MAN AND A NON-INDIAN WOMAN AND THEIR DIRECT DESCENDANTS)

- 1. Any woman in Canada:

- (a) who was born out of wedlock to an Indian man and a non-Indian woman before April 17, 1985;

and

- (b) who became eligible for Indian status under s. 6(2) of the *Indian Act* upon the 1985 amendments to that *Act*;

and

- (c) who was eligible for Indian status under s. 6(1)(c.3) of the *Indian Act*, as amended in 2017;
- 2. and her Indian ascendants;
- 3. and her direct descendants who are eligible for Indian status under the 2017 amendments to the *Indian Act*;

3. CATEGORY C (EMANCIPATED MINORS AND THEIR DIRECT DESCENDANTS)

- 1. Any individual in Canada:

- (a) Whose father is Indian or undeclared and whose mother lost Indian status upon marrying a non-Indian man before April 17, 1985;

and

- (b) who himself or herself lost Indian status upon the marriage of his or her mother to a non-Indian man after the individual's birth and before he or she reached the age of majority;

and

- (c) who recovered Indian status under s. 6(1)(c) of the *Indian Act* upon the 1985 amendments to that *Act*,
1. and his or her Indian ascendants;
 2. and his or her direct descendants in the first degree who were eligible for Indian status under s. 6(1)(c.01) of the *Indian Act* as amended in 2017 or his or her other direct descendants who are eligible under the 2017 amendments to the *Indian Act*.

[13] **IDENTIFIES** the common issues to be addressed collectively:

- a. With respect to the amendments to s. 6 of the *Indian Act* by way of the 2010 *Act*:
 - i. Are they constitutionally invalid because they violate s. 15 of the *Canadian Charter of Rights and Freedoms* in a manner that is unjustified under s. 1 of the *Charter*?
 - ii. Do they constitute a fault?
 - iii. Do they violate the Crown's fiduciary duty?
- b. If the answer is yes, does Crown immunity or s. 10 of the 2017 *Act* apply and therefore defeat this Application?
- c. If Crown immunity or s. 10 does not apply, are the members of the class entitled to damages or compensation under:
 - i. s. 24(1) of the *Canadian Charter of Rights and Freedoms*?
 - ii. the general rules of civil liability (arts. 1376 and 1457 C.C.Q.)?
 - iii. the principles of unjust enrichment (art. 1493 C.C.Q.)?
 - iv. the federal Crown's fiduciary duty towards Indigenous peoples?

[14] **IDENTIFIES** the conclusions sought on the merits of the class action as follows:

[15] **ALLOW** the applicants' action on behalf of all the class members;

[16] **DECLARE** that the 2010 amendments perpetuated discrimination contrary to s. 15 of the *Canadian Charter of Rights and Freedoms* that was only corrected by the 2017 Act;

[17] **DECLARE** that neither the doctrine of Crown immunity nor s. 10 of the 2017 amendments prevents a condemnation against the Crown to repair the damages suffered as a result of this discriminatory provision;

[18] **CONDEMN** the defendant to pay the class members an amount to be fixed at trial:

1. for the amounts they should have received but for the discriminatory provisions, including but not limited to:

- a. benefits under Health Canada's Non-Insured Health Benefits program
- b. funding under the post-secondary education program of Indian and Northern Affairs
- c. annuities under historic treaties;
- d. amounts under the Indian Moneys program

2. compensatory damages, plus interest and the additional indemnity;

2. moral damages, plus interest and the additional indemnity;

3. punitive damages, plus interest and the additional indemnity;

THE WHOLE subject to individual recovery of claims to be ordered in accordance with arts. 599 to 601 C.C.P.

[19] **DECLARE** that the members of the group are bound by the judgment to be rendered in this class action unless they have opted out;

[20] **DETERMINES** the opting-out period to be 60 days following the date of Notice to Members; upon expiry of the opting-out period, class members who have not opted out will be bound by any judgment to be rendered;

[21] **APPROVES** the content and form of the Notice to Members, both abridged and long versions (in French and in English), appended as Schedules A, B, C, and D to this judgment.

[22] **ORDERS** the publication of the Notice to Members within 30 days of this judgment, in accordance with the terms in the Dissemination Protocol, appended as Schedule E to this judgment;

[23] **APPROVES** the contents and form of the Opt-out Forms (in French and in English), appended as Schedules F and G to this judgment;

[24] **ORDERS** the splitting of the proceeding to deal with the following issues first:

a. With respect to the amendments to s. 6 of the *Indian Act* by way of the 2010 Act:

i. Are they constitutionally invalid because they violate s. 15 of the *Canadian Charter of Rights and Freedoms* in a manner that is unjustified under s. 1 of the *Charter*?

ii. Do they constitute a fault?

iii. Do they violate the Crown's fiduciary duty?

b. If the answer is yes, does Crown immunity or s. 10 of the *2017 Act* apply and therefore defeat this Application?

[25] **DETERMINES** that the class action will be instituted in the judicial district of Montreal;

[26] **THE WHOLE WITHOUT LEGAL COSTS**, save the costs of publication, which will be paid by the defendant.

[signed]

SYLVAIN LUSSIER, J.S.C.

Hearing on record