Federal Court of Appeal | Cour d'appel fédérale

Date: 20141216

Docket: A-269-13

Citation: 2014 FCA 299

CORAM: **PELLETIER J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

ANGEL SUE LARKMAN

Appellant

And

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on September 8, 2014.

Judgment delivered at Ottawa, Ontario, on December 16, 2014.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.

DISSENTING REASONS BY: STRATAS J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Angel Sue Larkman has appealed the judgment of O'Keefe J. (2013 FC 787) dismissing her application for judicial review of the Order in Council P.C. 4582, dated December 4, 1952 (the 1952 OIC). That Order in Council enfranchised Ms. Larkman's grandmother, Laura Flood, under the *Indian Act*, SC 1951, c. 29 (the 1951 *Act*). She was enfranchised under the 1951 Act because the Revised Statutes of Canada, 1952 did not come into force until September 15, 1953 (Proclamation, July 2, 1953, R.S.C. 1952 Vol. VI, p. xv).

Background – Enfranchisement

[2] Stratas J.A., in an earlier decision related to this matter (*Canada v. Larkman*, 2012 FCA 204), described enfranchisement under the 1951 *Act* (and earlier versions) as follows:

> **10** "Enfranchisement" is a euphemism for one of the most oppressive policies adopted by the Canadian government in its history of dealings with Aboriginal peoples: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward*, vol. 1 (Ottawa: Canada Communication Group Publishing, 1996) at page 271.
>
> **11** Beginning in 1857 and evolving into different forms until 1985, "enfranchisement" was aimed at assimilating Aboriginal peoples and eradicating their culture or, in the words of the 1857 Act, encouraging "the progress of [c]ivilization" among Aboriginal peoples: *An Act to Encourage the Gradual Civilization of Indian Tribes in the Province and the Amend the Laws Respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26 (initial law); *An Act to Amend the Indian Act*, S.C. 1985, c. 27 (the abolition).
>
> **12** Under one form of "enfranchisement" - the form at issue in this case - Aboriginal peoples received Canadian citizenship and the right to hold land in fee simple. In return, they had to renounce - on behalf of themselves and all their descendants, living and future - their legal recognition as an "Indian," their tax exemption, their membership in their Aboriginal community, their right to reside in that community, and their right to vote for their leaders in that community.
>
> **13** The Supreme Court has noted the disadvantage, stereotyping, prejudice and discrimination associated with "enfranchisement": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. With deep reluctance or at high personal cost, and sometimes under compulsion, many spent decades cut off from communities to which they had a deep cultural and spiritual bond.
>
> **14** On April 17, 1985, the day on which the equality provisions of the *Canadian Charter of Rights and Freedoms* came into force, amendments to the *Indian Act* also came into force, doing away with the last vestiges of "enfranchisement" and permitting those who lost Indian registration through "enfranchisement" to register and regain registration: *An Act to Amend the Indian Act*, *supra*. However, under these amendments, only some of the descendants of those who were "enfranchised" could be added to the Indian Register. In other words, only some were able to regain their recognition as an "Indian" and their membership in their Aboriginal community.

[3] Ms. Larkman's grandmother was able to regain her Indian registration under paragraph 6(1)(d) of the *Indian Act*, R.S.C. 1985, c. I-5, (the 1985 *Act*) and her mother was registered under subsection 6(2) of the 1985 *Act*. Subsections 6(1) and (2) of the 1985 *Act* provide, in part, as follows:

6. (1) Subject to section 7, a person is entitled to be registered if	**6**. (1) Sous réserve de l'article 7, toute personne a le droit d'être inscrite dans les cas suivants :
(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;	a) elle était inscrite ou avait le droit de l'être le 16 avril 1985;
…	[…]
(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, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;	d) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(1), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;
…	[…]
(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).	(2) Sous réserve de l'article 7, une personne a le droit d'être inscrite si l'un de ses parents a le droit d'être inscrit en vertu du paragraphe (1) ou, s'il est décédé, avait ce droit à la date de son décès.

[4] Since Ms. Larkman's mother was registered under subsection 6(2) of the 1985 *Act* (and not subsection 6(1)), Ms. Larkman is unable to be registered under the 1985 *Act*. If Laura Flood had not been enfranchised, Ms. Larkman would be entitled to be registered under paragraph 6(1)(a) of the 1985 *Act*.

Argument of Ms. Larkman – Standard of Review

[5] Ms. Larkman's argument is that the 1952 OIC should be set aside as her grandmother, who, in 1952, could not read or write anything other than her own name, did not understand the effect of the documents that were submitted under her name. Therefore, Ms. Larkman argues that there was no valid application for enfranchisement of her grandmother in 1952 and as a result the Governor in Council did not have jurisdiction to enfranchise Laura Flood. Ms. Larkman submits that the standard of review for this question is correctness. However, I am unable to agree.

[6] This jurisdictional argument is based on the wording of subsection 108(1) of the 1951 *Act* (which later became subsection 109(1) by R.S.C. 1970, c. I-6):

108. (1) On a report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian,	**108.** (1) Lorsque le Ministre signale, dans un rapport, qu'un Indien a demandé l'émancipation et qu'à son avis, ce dernier
(a) is of full age of twenty-one years,	a) est âgé de vingt et un ans révolus;
(b) is capable of assuming the duties and responsibilities of citizenship, and	b) est capable d'assumer les devoirs et responsabilités de la citoyenneté, et
(c) when enfranchised, will be capable of supporting himself and his dependents,	c) pourra, une fois émancipé, subvenir à ses besoins et à ceux des personnes à sa charge,
the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.	le gouverneur en conseil peut déclaré par ordonnance que l'Indien, son épouse et ses enfants mineurs célibataires sont émancipés.

[7] For the purposes of this subsection, the Minister was the Minister of Citizenship and Immigration. Ms. Larkman's argument is that her grandmother did not apply to be enfranchised. Although Ms. Larkman argues that the Federal Court Judge focused on the wrong issue by

stating that the issue was whether the decision of the Governor in Council in 1952 to enfranchise Laura Flood was reasonable, Ms. Larkman did commence this proceeding as a judicial review of the 1952 OIC. In a judicial review application the issue will generally be whether the decision was reasonable (*Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190). The Attorney General agreed that if Laura Flood had not applied to be enfranchised, then the decision of the Governor in Council would be unreasonable and should be set aside. Therefore, the central issue in this case is whether Laura Flood applied to be enfranchised in 1952.

[8] Whether Laura Flood applied to be enfranchised in 1952 is mainly a question of fact. Since the facts related to Laura Flood's "application" in 1952 were first submitted before the Federal Court Judge, his findings of fact in relation to whether Laura Flood applied to be enfranchised should be reviewed on the standard of palpable and overriding error (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, paragraph 10).

Did Laura Flood Apply to be Enfranchised in 1952?

[9] Ms. Larkman submitted that Forestell J. of the Ontario Superior Court of Justice in *Etches v. Canada (Registrar, Department of Indian Affairs and Northern Development)*, [2008] O.J. No. 859; 89 O.R. (3d) 599 had already found that Laura Flood did not apply to be enfranchised. That case was an appeal from a decision of the Registrar who had found that the enfranchisement of Laura Flood was valid and that Ms. Larkman could not be registered under the 1985 *Act*. In her Memorandum of Fact and Law Ms. Larkman refers to several findings made by Forestell J. In addressing this decision of Forestell J., the Federal Court Judge noted that:

> **64** I begin by addressing the judgment of Madame Justice Forestell, which the applicant would have me agree with in outcome on the facts, despite its being reversed on jurisdictional grounds. While this Court is certainly not bound by the Ontario Superior Court and it would be unwise to follow the factual findings of any court that made a decision without the proper jurisdiction to do so, I wish to make clear that I understand that decision as being unhelpful to this Court's determination.
>
> **65** Madame Justice Forestell did not preside over the matter in a Court of first instance. Her Court's role was to review the decision of the Registrar. Notably, she appears to have reviewed the Registrar's decision on a standard of correctness and the statutory standard of "clearly wrong" (OSCJ decision above, at paragraph 58). While she did conclude that the applicant and her family had"met the onus upon them to prove on the balance of probabilities that the enfranchisement of Laura Floor was not valid" (at paragraph 82), this was based on the process of evaluating how the evidence should have been considered by the Registrar. Indeed, her conclusion indicates that her chief concern was with the Registrar's flawed procedure rather than with her Court's independent factual findings (at paragraphs 76 to 78). Since she found that the Registrar was not bound by the Order in Council, her analysis also did not consider the presumption of validity or the standard of review attached to the decisions of the Governor in Council. Her Court also did not have the benefit of the cross-examination of the applicant, or the affidavit, exhibits and cross-examination of Gary Penner, the respondent's witness. In short, while that decision concerned a factual matrix that overlaps greatly with this proceeding, it is a decision that answered a different question by applying a different standard of review to different evidence.

[10] Ms. Larkman in her Memorandum of Fact and Law does not identify any error made by the Federal Court Judge in not accepting the findings of Forestell J. In *H.L. v. Canada*, 2005 SCC 25; [2005] 1 S.C.R. 301, Fish J. writing on behalf of the majority of the Supreme Court of Canada noted that:

> **80** The appeal is a review for error, and not a review by rehearing.
>
> (emphasis in original)

[11] Since the findings of Forestell J. were not accepted by the Federal Court Judge and since Ms. Larkman has not identified any error made by the Federal Court Judge in not accepting these

findings, there is no basis to now accept the findings made by Forestell J. This is an appeal, not a rehearing.

[12] Ms. Larkman also relied on three affidavits of Laura Flood. As Laura Flood had passed away prior to the hearing before the Federal Court, her only direct evidence was contained in these affidavits. In the first affidavit, sworn on February 26, 1996 (over 40 years after the 1952 OIC), Laura Flood stated that:

> 3 In December of 1952, the Chief of the Matchewan First Nation, Chief Alfred Batisse, requested that I sign some papers. At the time I was not able to read or write, so I had no idea what the documents were that the Chief asked me to sign. I trusted the Chief's direction and signed the documentation as requested.
>
> 4 I later discovered that I had in fact signed an Application for Enfranchisement. At the time of signing I did not know what Enfranchisement was, or what its consequences were. If I had know [sic], I would never have signed the documentation. At no time did I intend to forfeit my registration under the Indian Act.
>
> 5 To the best of my knowledge and recollection I did not receive any money from the Chief, or from the government, for Enfranchisement. I do recall receiving $500.00 from the Chief, however, I was under the impression that the money was given to me as compensation for the "stumpage" that was occurring on the First Nation's land at the time.

[13] In her second affidavit, sworn on August 13, 1996, Laura Flood confirmed that "[a]t the time of my enfranchisement of December 4, 1952 I was not married to Wycliffe Flood, nor was I married to any other person, native or non-native".

[14] In her third affidavit, sworn on April 22, 1998, Laura Flood made the following statements in relation to the application for enfranchisement:

> 16. I have reviewed my Application for Enfranchisement. The signature is my signature, however, as I have stated before, I did not know what I was signing. I

> could not read in 1952. I trusted my Chief and always obeyed instructions from the Indian Agent. I signed whatever documentation I was asked to sign. I was not informed that by signing the documentation I was giving up my status as an Indian.…

[15] Ms. Larkman points to a number of errors in the application and related correspondence to support her position that Laura Flood did not apply to be enfranchised in 1952. The Federal Court Judge addressed these as follows:

> **81** The factual errors are more relevant to the applicant's theory that the correspondence was prepared for a fraudulent purpose without the knowledge of Laura Flood. This theory is supported by the affidavits of Laura Flood, which are presumed to be true unless there are reasons to doubt their truthfulness (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1979] F.C.J. No. 248 (CA).
>
> **82** In this case, however, there are such reasons to doubt their truth: chiefly, the confusion relating to who exactly it was who asked Laura Flood to sign the application for enfranchisement. The passage of time is also a reason to doubt the truth of affidavit evidence, if only because it is the applicant's own explanation for that evidence's errors. I also must agree with the respondent that Laura Flood's possession of the enfranchisement certificate and the explanation of her voluntary enfranchisement it represents between 1953 and 1996, provides another reason to doubt the truthfulness of Laura Flood's description of her understanding of the terms of her enfranchisement.

[16] By making comments on the truthfulness of Laura Flood's statements in her affidavits, the Federal Court Judge was drawing an inference in relation to her credibility. In relation to when an appellate court should intervene when a Judge has drawn inferences, Fish J. in *H.L.* made the following comments:

> **74** I would explain the matter this way. Not infrequently, <u>different</u> inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot <u>reweigh the evidence</u> by substituting, for the reasonable inference preferred by the trial judge, an equally - or even more - persuasive inference of its own. This

> fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in *Housen*.

[17] In her first affidavit (which would be the affidavit signed closest to the time of the application for enfranchisement, although still over 43 years after such application), Laura Flood stated that "Chief Alfred Batisse, requested that I sign some papers". In the memorandum of the respondents, the Attorney General states that:

> … Alfred Batisse was a sixteen year old boy in 1952, and therefore could not have been the Chief. The actual Chief was Ms. Flood's own brother, George Batisse.

[18] Ms. Larkman did not contest these statements. In my view, the Federal Court Judge did not make a palpable and overriding error in drawing the inference that the truthfulness of Laura Flood's statements that she did not intend to apply for enfranchisement should be doubted.

[19] In this case the onus was on Ms. Larkman to establish that Laura Flood did not apply to be enfranchised in 1952. Unfortunately given the lengthy passage of time since 1952, there were no witnesses who were available for the hearing before the Federal Court Judge and who were also present when Laura Flood signed the application. In her affidavits, Laura Flood confirmed that she trusted the Chief's direction, the Chief was her brother, and she signed the application for enfranchisement. There was no indication that she was told that the application was anything other than an application for enfranchisement. There is no indication that she did not sign the application voluntarily.

[20] Since Laura Flood could not read or write in 1952, the fact that the application and related correspondence was completed by someone else (with errors), does not necessarily lead to a conclusion that it was not her application. She would have needed someone else to complete these in any event and she would not have been able to detect the errors in 1952. There is unfortunately no basis to find that the application for enfranchisement made by Laura Flood in 1952 should not be considered to be her application.

[21] As a result, I would dismiss the appeal, without costs.

"Wyman W. Webb"
J.A.

" I agree,
J.D. Denis Pelletier J.A."

STRATAS J.A. (Dissenting Reasons)

[22] I have read my colleague's reasons for judgment. As will be seen, I characterize the problem before us differently. This leads me to a different analysis and a different result.

A. Introduction

[23] Ms. Larkman, indisputably an Aboriginal person, has never had the status of "Indian" and all associated rights and privileges under the *Indian Act*, R.S.C. 1985, c. I-5. How did that happen?

[24] Ms. Larkman's grandmother was "enfranchised," a practice described as one of the most oppressive ever adopted against Aboriginal peoples: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward,* vol. 1 (Ottawa: Canada Communication Group Publishing, 1996) at page 271. Once Ms. Larkman's grandmother was enfranchised, all of the grandmother's living and future descendants, including Ms. Larkman, lost their Indian status, rights and privileges.

[25] In 1985, Parliament abolished enfranchisement and enacted rights-affirming, remedial measures. From 1986 until now – a quest stretching over four separate decades – Ms. Larkman's mother, Ms. Larkman herself, or both have tried to use those remedial measures to secure Ms. Larkman's Indian status: *Canada (Attorney General) v. Larkman*, 2012 FCA 204 at paragraphs 15-59; *R. v. Etches* (2008), 98 O.R. (3d) 599 at paragraphs 32-41 (S.C.J.).

[26] As we shall see, the primary remedial measure in this case is paragraph 6(1)(*a*) of the *Indian Act*. Paragraph 6(1)(*a*) allows an administrative decision-maker, the Registrar, to add to an Indian Register all those who were "entitled" to Indian status before April 17, 1985, the day the anti-discrimination provisions of section 15 of the Charter came into force.

[27] In her quest for relief, Ms. Larkman has gone to the Registrar multiple times and to four separate provincial and federal courts. She has argued that certain nefarious circumstances, including circumstances even amounting to fraud, call into serious question, if not invalidate, the enfranchisement of her grandmother. If that is true, then Ms. Larkman says that paragraph 6(1)(*a*) is met – before April 17, 1985, Ms. Larkman (then 13 years old) was "entitled" to be added to the Register because, in law or in equity, the enfranchisement of her grandmother cannot be recognized; or, alternatively, the circumstances are such that the legal effects of her grandmother's enfranchisement cannot be fairly applied to her.

[28] Acting under paragraph 6(1)(*a*), the Registrar refused to add Ms. Larkman to the Register.

[29] But on appeal, the Ontario Superior Court, holding that the Registrar erred, added Ms. Larkman to the Register: *R. v. Etches*, *supra*. In the Court's view, the Registrar applied the wrong burden of proof and erred in requiring corroboration of certain evidence. Exercising its powers under subsection 14.3(4) of the *Indian Act*, the Court went on to examine the evidence in Ms. Larkman's case with a view to making the order the Registrar should have made. The Court was satisfied it had a rich and complete record before it, including evidence from the grandmother who was alive at the time and whose evidence the Crown chose neither to rebut nor to cross-examine. Based on that record, the Court found that the circumstances created considerable doubt surrounding the acceptability, if not the validity, of the grandmother's enfranchisement (at paragraphs 66-75 and 82). On the basis of those circumstances, the Court

held that Ms. Larkman was "entitled" to be added to the Register within the meaning of paragraph 6(1)(*a*).

[30] On appeal, the Ontario Court of Appeal reversed the Superior Court: *Etches v. Canada (Indian and Northern Affairs)*, 2009 ONCA 182, 94 O.R. (3d) 161. The Court of Appeal held that even on the Ontario Superior Court of Justice's findings of fact, Ms. Larkman could not be added to the Register under paragraph 6(1)(*a*). In its view, Ms. Larkman was foreclosed by Order-in-Council P.C. 4582, dated December 4, 1952. That 1952 Order in Council – the instrument of enfranchisement in this case – stripped Ms. Larkman's grandmother and all of her descendants, including Ms. Larkman, of their Indian status, and accompanying rights and privileges. According to the Court of Appeal, before Ms. Larkman could avail herself of paragraph 6(1)(*a*), she had to go the Federal Court and set aside the Order in Council. Only then could she be "entitled" to be added to the Register.

[31] As is apparent below, I disagree with the Ontario Court of Appeal based on the text of paragraph 6(1)(*a*), the context in which it appears, and the purpose behind the 1985 legislative initiative. I conclude that the Registrar or, on appeal, the Ontario Courts could have added Ms. Larkman to the Register. The Federal Court should have declined the referral of jurisdiction to it.

[32] To understand paragraph 6(1)(*a*) and the 1985 legislative initiative, one must more fully appreciate what enfranchisement was. I begin there.

B. Enfranchisement

[33] For 128 years, under the euphemistic label of "enfranchisement," Canadian law tried to assimilate Aboriginal peoples, eradicate their culture, and fold them into so-called mainstream culture: *An Act to Encourage the Gradual Civilization of Indian Tribes in the Province and the Amend the Laws Respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26; *An Act to Amend the Indian Act*, S.C. 1985, c. 27; and see *Report of the Royal Commission on Aboriginal Peoples*, *supra* at page 271.

[34] Under one form of enfranchisement, the form at issue in this case, Aboriginal peoples received Canadian citizenship and the right to hold land in fee simple. In return, they had to renounce – on behalf of themselves and all their descendants, living and future – their legal recognition as an "Indian," their tax exemption, their membership in their Aboriginal community, their right to reside in that community, and their right to vote for their leaders in that community.

[35] With deep reluctance or at high personal cost, sometimes under compulsion, and sometimes through the machinations of Indian agents, many Aboriginal people found themselves enfranchised and, as a result, spent decades cut off from communities to which they had a deep cultural and spiritual bond, separated from their friends and relatives.

[36] Persons became enfranchised when they were the subject of an Order in Council passed by the Governor in Council under subsection 109(1) of the Act:

109. (1) On the report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian	**109.** (1) Lorsque le ministre signale, dans un rapport, qu'un Indien a demandé l'émancipation et qu'à son avis, ce dernier, à la fois
(*a*) is of the full age of twenty-one years,	*a*) est âgé de vingt et un ans;
(*b*) is capable of assuming the duties and responsibilities of citizenship, and	*b*) est capable d'assumer les devoirs et les responsabilités de la citoyenneté;
(*c*) when enfranchised, will be capable of supporting himself and his dependants,	*c*) pourra, une fois émancipé, subvenir à ses besoins et à ceux des personnes à sa charge.
the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.	Le gouverneur en conseil peut déclarer par décret que l'Indien, son épouse et ses enfants mineurs célibataires sont émancipés.

[37] Some years later, the Supreme Court examined these and other enfranchisement provisions, as did the Royal Commission on Aboriginal Peoples: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at paragraphs 85-90; *Report of the Royal Commission on Aboriginal Peoples, supra*. They found that enfranchisement was a discriminatory practice.

[38] Some elements of enfranchisement targeted women and can be regarded as discriminatory on the basis of gender. Other elements aimed at assimilating aboriginal people and eradicating their culture and can be regarded as discriminatory on the basis of race.

[39] Long before *Corbiere* and the *Report of the Royal Commission on Aboriginal Peoples*, Parliament was already aware of this. In 1985, it passed amending legislation, *An Act to amend*

the Indian Act, *supra*, just before the coming into force of the equality and anti-discrimination provisions in section 15 of the Charter. This 1985 legislative initiative is central to this appeal.

C. The 1985 legislative initiative

[40] The 1985 legislative initiative is rights-affirming and remedial. Broadly speaking, it did two things:

- *Abolition of enfranchisement*. It ended the Governor in Council's power to make orders in council under subsection 109(1).

- *Remedying the damage*. It introduced new rules governing the Register and, injecting a new remedial purpose into this administrative regime, gave new force to other rules governing the Register. As we shall see, some of these rules could be used to reverse the effects of orders in council made under subsection 109(1).

D. Some of the rules governing the Register and how they apply in this case

[41] Those listed on the Register that existed immediately before April 17, 1985 were automatically included on the new Register: subsection 5(2). Those deleted from the Register as a result of enfranchisement were to be added: paragraph 6(1)(*d*).

[42] Paragraph 6(1)(*d*) says that "a person is entitled to be registered if…the name of that person was…deleted from the Indian Register…pursuant to an [enfranchisement] order made

under subsection 109(1).” It says nothing about invalidating or repealing the orders in council that caused enfranchisement. But by requiring in the clearest language those deleted from the Register as a result of enfranchisement to be added, the orders in council that caused enfranchisement have no further force. In short, paragraph 6(1)(*d*) legislatively reverses the legal effects of the orders in council without invalidating or repealing them.

[43] Parliament, acting as the supreme law-maker in our system of government, can reverse the legal effect of subordinate instruments like orders in council. This it has done in much of section 6 of the *Indian Act* as part of its 1985 legislative initiative. It did not need to add the words “notwithstanding any earlier order in council.” The old orders in council may still exist but the point of section 6 is to neuter their legal effects.

[44] Ms. Larkman’s grandmother, enfranchised by an order in council in 1952, went to the Registrar to reverse its legal effects while she was alive. She invoked paragraphs 6(1)(*d*) and 6(1)(*a*). The Registrar added Ms. Larkman’s grandmother to the Indian register, relying upon paragraph 6(1)(*d*) but not paragraph 6(1)(*a*).

[45] Why was paragraph 6(1)(*a*) invoked before the Registrar in addition to paragraph 6(1)(*d*)? Why did paragraph 6(1)(*a*) matter in this case?

[46] It will be recalled that enfranchisement worked to strip not only the person being enfranchised of their Indian status but also all their descendants, living and future. Paragraph

6(1)(*d*) repaired the status of Ms. Larkman's grandmother, but not the status of her grandchild, Ms. Larkman. Paragraph 6(1)(*a*) was needed to repair Ms. Larkman's status.

[47] Paragraph 6(1)(*a*) allows a person to be added to the Register if that "person was…entitled to be registered immediately prior to April 17, 1985." Ms. Larkman took the position that because of the considerable doubt, indeed fraud, surrounding her grandmother's enfranchisement, she was "entitled" to be added to the Register because, in law or in equity, the enfranchisement of her grandmother that took away her Indian status could not be recognized; or, alternatively, the circumstances were such that the legal effects of her grandmother's enfranchisement could not be fairly applied to her.

[48] Is Ms. Larkman right? That depends on how one interprets paragraph 6(1)(*a*) and, in particular, the meaning of the word "entitled."

E. Interpreting paragraph 6(1)(*a*) and the word "entitled"

[49] Before us are two competing views of paragraph 6(1)(*a*). Is paragraph 6(1)(*a*) broad enough to include those like Ms. Larkman who satisfy the Registrar that, owing to unusual or questionable circumstances surrounding an earlier enfranchisement, they are entitled to be added to the Register? Or is it just a narrow, limited provision available to those who, through some minor administrative error, were left off the Register?

[50] Which view prevails depends upon the scope of the word "entitled" in paragraph 6(1)(*a*). "Entitled" in a broad, equitable sense? Or "entitled" in a narrow administrative sense?

[51] In my view, "entitled" has the broad, equitable sense:

- Section 12 of the Interpretation Act, R.S.C. 1985, c. I-21 requires us to give paragraph 6(1)(a) "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

- As the Ontario Superior Court noted (at paragraphs 46-57), through a series of legislative amendments over many years culminating in the 1985 legislative initiative, the Registrar has become the only official empowered to resolve issues of Indian status, replacing the Governor in Council. It is anomalous today to interpret paragraph 6(1)(*a*) as requiring recourse to someone other than the Registrar to resolve issues of status.

- Everything about paragraph 6(1)(a) – its coming into being to comply with the coming into force of section 15 of the Charter, its enactment alongside the abolition of the discriminatory policy of enfranchisement, and its membership in a group of rules governing the Registry that were designed to remedy the effects of discrimination – suggests that the broader interpretation should be adopted.

- The Charter values of equality and multiculturalism are admissible in this case and resolve any ambiguity in favour of the broader view: *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584 at paragraph 44-48; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68 at paragraph 67.

[52] The contrary view – the narrow view – would be startling. A hypothetical illustrates this. Subsection 109(1), repealed as part of the 1985 legislative initiative, required that orders in council could only be made upon application by the person affected. Suppose that today rock-solid evidence proves that AB had never applied for enfranchisement and was mistakenly included in a subsection 109(1) order in council. As a result of the mistake, AB was wrongly enfranchised, affecting all of AB's descendants. AB, illiterate and relatively powerless as many were at that time, did nothing to correct the situation during his lifetime. Today, AB's granddaughter says that the rock-solid evidence shows that AB's enfranchisement should never have happened and so she is "entitled" under paragraph 6(1)(*a*) to be added to the Register.

[53] In its rights-affirming 1985 initiative, did Parliament intend that AB's granddaughter, injured by the mistake, is not "entitled" in paragraph 6(1)(*a*) and, as a result, must continue to live with the consequences of AB's wrongful enfranchisement? Did Parliament intend that AB's granddaughter must first go to the Federal Courts system to attack an order in council made decades ago under discriminatory legislation that no longer exists before she can avail herself of paragraph 6(1)(*a*)? Did Parliament intend that paragraph 6(1)(*d*), silent about orders in council, can reverse the legal effect of an order in council, yet paragraph 6(1)(*a*), similarly silent about orders in council, cannot? To ask these questions is to answer them.

F. How the Ontario Courts interpreted paragraph 6(1)(*a*): an analysis

[54] As I mentioned above, the Ontario Superior Court agreed that the Registrar had the power under paragraph 6(1)(*a*) to consider whether Ms. Larkman was entitled to be added to the Register by virtue of the circumstances surrounding her grandmother's enfranchisement. As a matter of statutory interpretation, it held that there was no need for Ms. Larkman to first set aside the 1952 Order in Council before she could avail herself of paragraph 6(1)(*a*). For the reasons above, I agree with the Ontario Superior Court of Justice.

[55] That Court went on to consider the merits of Ms. Larkman's application. It ordered that Ms. Larkman be added to the Register under paragraph 6(1)(*a*). In its view, the circumstances surrounding her grandmother's enfranchisement were such that the Registrar had to add Ms. Larkman to the Register.

[56] But the Ontario Court of Appeal disagreed on the legal point, deciding that only the Federal Court and this Court have the "exclusive" jurisdiction to set aside an order in council, in this case the 1952 Order in Council enfranchising Ms. Larkman's grandmother. To it, the legal effects of the 1952 Order in Council continued to bind Ms. Larkman and, until the Order was set aside, the Ontario Superior Court could not consider the circumstances surrounding it under paragraph 6(1)(*a*).

[57] In this regard, the decision of the Ontario Court of Appeal conflicts with the Quebec Court of Appeal's decision in *Innu Takuaikan Uashat mak Mani-Utenam v. Noël*, [2004] 4

C.N.L.R. 66. In *Innu Takuaikan*, the Registrar considered herself bound by a Quebec Provincial Court order and, thus, foreclosed from taking into account the circumstances underlying it. The Quebec Court of Appeal disagreed, holding that the Registrar had to look at the circumstances underlying the Order and take them into account. The order was not determinative, nor did it have to be set aside before the Registrar could do her job. My analysis, above, is consistent with that of the Quebec Court of Appeal.

[58] Decisions of provincial Courts of Appeal are deserving of the greatest respect. But in this Court they are not binding. In this unusual case, I disagree with the Ontario Court of Appeal.

[59] In paragraphs 20 and 22 of its reasons, the Ontario Court of Appeal says that orders in council are presumed to be binding and the Registrar was bound by the 1952 Order in Council. These points overlook the fact that Parliament can legislatively reverse the legal effects of orders in council without invalidating them. Above, I have suggested that throughout section 6 of the *Indian Act*, Parliament has done just that.

[60] Of note, the Court of Appeal for Ontario does not spend much time interpreting paragraph 6(1)(*a*), the key issue before us. In paragraph 28 of its reasons, the Court of Appeal asserts the narrower interpretation of paragraph 6(1)(*a*) but offers no supporting analysis. Perhaps counsel before it did not devote much attention to the proper interpretation of paragraph 6(1)(*a*).

[61] The remainder of the Court of Appeal's reasons on this point rely heavily upon subsection 18(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the exclusive jurisdiction of the Federal Courts to invalidate federal orders, such as the 1952 Order in Council affecting Ms. Larkman: see, *e.g.*, paragraphs 21-22. But if paragraph 6(1)(*a*) gives the Registrar the power, despite any order in council, to add a person to the Register because of unsettling circumstances surrounding an ancestor's enfranchisement, the order in council need not be invalidated.

[62] I would add that the Court of Appeal's heavy reliance upon the exclusive jurisdiction of the Federal Courts to invalidate federal orders smacks of the approach adopted by this Court in *Grenier v. Canada*, 2005 FCA 348, [2006] 2 F.C. 287. But just after the Court of Appeal for Ontario released its decision in the case at bar, the Supreme Court of Canada overruled *Grenier*: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585. *TeleZone* stands for the proposition that the exclusive jurisdiction of the Federal Courts to invalidate federal orders does not prevent others from deciding matters related to the legal effect of those orders if their governing legislation so empowers them. Here, in my view, paragraph 6(1)(*a*) allows the Registrar to do just that.

G. The decision under appeal: the Federal Court's decision in this case

[63] The narrow interpretation of paragraph 6(1)(*a*) adopted by the Court of Appeal for Ontario meant that Ms. Larkman had to take her fight to the Federal Court. So off to that Court she went, seeking to quash the 1952 Order in Council that enfranchised her grandmother.

[64] It will be recalled that the Ontario Superior Court had before it the evidence of Ms. Larkman and her grandmother, then alive – evidence that the Crown declined to challenge at any time by way of rebuttal evidence or cross-examination. Making findings of fact, the Ontario Superior Court found the evidence credible. But the Federal Court found this same evidence not to be credible (at paragraph 82). Re-doing the Ontario Superior Court's fact finding on essentially the same evidence and focused on the need to quash the 1952 Order in Council, the Federal Court refused relief to Ms. Larkman.

[65] Consistent with much jurisprudence, my colleague finds that this Court should not interfere with the Federal Court's factually-suffused decision. Normally I would agree with that assessment. But here the Federal Court should not have re-done the Ontario Superior Court's fact-finding and should not have reached different factual and credibility conclusions without sufficient reason: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at paragraphs 51-52.

[66] The Federal Court embarked upon its factual re-do without sufficient reason. It had before it a new affidavit from someone not involved in the events in issue. That affidavit attached some documents existing around the time the 1952 Order in Council was made, documents that did not cast any different light on the matter. In the Federal Court, this previously uninvolved person with unhelpful documents was cross-examined, and the Federal Court relied in part upon this as justification for its factual re-do (at paragraph 65). The Federal Court also relied upon the fact that the evidence of Ms. Larkman had never been cross-examined in the

Ontario Superior Court (at paragraph 65). But, back then, that was the Crown's choice. Its choice should not have counted against Ms. Larkman.

[67] At the end of its decision, the Federal Court regretted that the grandmother, the central figure in this matter, was no longer alive (at paragraph 83). But it overlooked that the grandmother was alive when the matter was before the Registrar. Her evidence – unchallenged and unrebutted – was the core of the evidence before the Ontario Superior Court when it gave relief to Ms. Larkman under paragraph 6(1)(*a*).

[68] In the end, despite differing from the Ontario Superior Court and rejecting the credibility of the evidence put forward by Ms. Larkman (at paragraph 82), the Federal Court concluded that that evidence "certainly raises doubts regarding [the 1952 enfranchisement] decision" (at paragraph 84). In its view, however, that was not enough to offset the presumption of validity that orders in council enjoy.

[69] This reliance upon a presumption of validity, albeit encouraged by some passing comments in Supreme Court jurisprudence, is questionable. While the margins of appreciation administrative decision-makers should be afforded varies according to the circumstances (see, *e.g.*, *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23), there is no room for treating certain decision-makers specially by presuming an entire class of their decisions to be valid regardless of the particular circumstances of a case – especially a case as unusual as this.

[70] In any event, in the end, the nub of the Federal Court's decision is the validity of the 1952 Order in Council. But, as I have explained above, that is not the real issue. The real issue is whether Ontario Superior Court had the power to do what it did under paragraph 6(1)(*a*) of the *Indian Act*. I have answered that in the affirmative. This matter belongs not in the federal system, but in the Ontario system, exactly as section 6 of the *Indian Act* says.

H. Conclusion

[71] For the foregoing reasons, I conclude that Ms. Larkman did not have to bring an application for judicial review in the Federal Court to set aside the 1952 Order in Council enfranchising her grandmother. Instead, she may obtain redress from the Registrar and the Ontario courts system under paragraph 6(1)(*a*) of the *Indian Act*. The Federal Court should have granted a declaration to that effect.

I. Postscript

[72] Ms. Larkman now finds herself in an unusual position. The Ontario Court of Appeal has told her the Federal Courts govern the matter. Under my view of the matter, the Federal Courts would tell her that the Registrar and the Ontario Courts govern the matter. Had my view prevailed, this might have been the sort of highly exceptional case where this Court should grant leave to the Supreme Court under section 37.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 so that it could break the tie.

[73] What now? If Ms. Larkman wishes to pursue the matter further she will have to apply to the Supreme Court for leave to appeal from this Court's judgment. But even if leave were granted, the judgment of the Court of Appeal for Ontario would remain in place, barring her from registration. And she has already tried to seek leave from that judgment, unsuccessfully: [2009] 3 S.C.R. vi. Her only option is to move under Rules 73 and 6(1) of the *Rules of the Supreme Court of Canada*, SOR/2002-156 asking the Supreme Court to reconsider its earlier denial of leave from the judgment of the Court of Appeal for Ontario, and an extension of time for that motion.

[74] Relief may be had under Rule 73 only where the circumstances are "exceedingly rare." In this case, the earlier denial of leave did not end the matter – rather, this matter remained in the litigation system, diverted to the Federal Courts. Further, the decision on which leave was denied now conflicts with these reasons and an earlier decision of the Quebec Court of Appeal. Finally, if Ms. Larkman's quest for relief spanning over four decades is now at an end, if the state of the authorities is left as it is, the full promise of Parliament's 1985 legislative initiative will go unfulfilled.

J. Proposed disposition

[75] Therefore, for the foregoing reasons, I do not agree with my colleague's proposed disposition of the appeal. Instead, I would allow the appeal and, pronouncing the judgment the Federal Court should have made, I would declare that Ms. Larkman did not need to apply for judicial review in the Federal Court to invalidate the 1952 Order in Council enfranchising her grandmother. I would also grant Ms. Larkman her costs here and below.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Asha James Junaid K. Subhan	FOR THE APPELLANT
Michael Beggs	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Falconers LLP Toronto, Ontario	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT