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Disproportionate and Unjustifiable: Teen First Nations Mothers and Unstated Paternity Policy

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Introduction

While the issue of unstated or unacknowledged paternity can detrimentally impact many First Nations women and the Indian status registration of their children, teenage mothers and their offspring suffer disproportionately. The two-parent rule (contained in the *Indian Act*) combined with proof of paternity requirements arguably constitutes discrimination against unmarried First Nations women and their children. This discrimination is even less justifiable when impacting teen First Nations mothers.

Contrary to general fertility statistics for First Nations women of all ages, First Nations teenage girls (those under twenty) have retained high fertility since 1986 at about one hundred births per one thousand women.¹ In conjunction with this high fertility rate are high rates of unstated paternity of the children. It is these families who suffer disproportionately from government proof of paternity policies.

Origins

Under the current *Indian Act*, a child's right to be registered as a status Indian is based on the registration characteristics of that child's parents. Where paternity is unstated by the mother, or stated but unacknowledged by the father or by Indian and Northern Affairs Canada (INAC), the child's entitlement can only be based on the mother's registration.² This can result in the loss of benefits and entitlements to either the child or, later, the child's children.

Where parents are unmarried, Vital Statistics requires the father's signature on the birth form in most jurisdictions. Problems with registering the father with Vital Statistics lead to problems with Indian registration given that INAC's policy requirements include paternal birth registration and other proof of paternity. While the two-parent descent rule is contained in the *Indian Act*, the requirements for proof of paternity are established entirely as a matter of INAC policy. Administratively, logistical problems have been identified with the requirement for paternal signatures on the registration of birth certificates and other forms, and with the difficulties and expense inherent in subsequent amendments.

Approximately 50% of unstated paternity cases are considered to be unintentional, while the other 50% are deemed intentional.³ The mother may decide not to state the name of the father, or the father may refuse to acknowledge paternity. Underlying causal factors may include the mother and father having an unstable relationship, concerns about confidentiality in a small community, the father's concerns of support payments and the mother's concerns about child custody, and access to the mother's own registration and membership.⁴ In addition, the pregnancy may be the result of abuse, incest, or rape, in which case the mother may be unwilling (or unable) to identify the father.

There are some unique causal factors impacting First Nations teen pregnancy and unstated paternity. Despite high rates of First Nations teen sexual activity,⁵ access to reproductive health services including contraception, emergency contraception, and abortion services may not always be readily available, particularly on-reserve and in remote areas.

Additional factors in teen First Nations pregnancies include a casual attitude to sex that can cause youth to feel pressured, alcohol and drugs, and abuse.⁶ In one study, 61% of the First Nations female youth questionnaire respondents reported having experienced some sort of sexual abuse. The data indicated that abused youth were more likely to have unprotected sex and more partners, and were more likely to be involved in a teen pregnancy.⁷

Outcomes

Early motherhood increases the vulnerability of a young First Nations woman, who is often already disadvantaged socio-economically. She is at greater risk of academic underachievement, reduced employability, lone parenthood, and dependence on income assistance.⁸ In 2001, among registered Indian women aged fifteen to twenty-four years, 15.5% were found to be lone mothers.⁹ That same year, 80% of First Nations teenage mothers lived in a family with a total income of less than \$15,000 per year, compared to 27% of First Nations mothers aged twenty years or older.¹⁰

The gravity of the unstated paternity problem for teen First Nations mothers is evident. For children born to mothers registered under Subsection 6(1) of the *Indian Act* between 1985 and 2004, 45.2% of those born to mothers under the age of fifteen had unstated paternity, and 29.8% of those born to mothers aged fifteen to nineteen had unstated paternity. This shows a significant increase in unstated paternity compared to 19.3% for mothers aged twenty to twenty-four and 12.2% for mothers aged thirty to thirty-four.¹¹

First Nations women and their children can suffer from unstated paternity due to the inaccurate registration or loss of status that can accompany it. Indian registration confers tax benefits for those with reserve-based property, and membership in bands whose inclusion is determined by INAC along with the accompanying access to resources and programs, and access to national programs, such

as post-secondary education funding and non-insured health benefits (NIHB). For example, Health Canada's NIHB program funds benefit claims for specified prescription and over-the-counter drugs, dental care, vision care, medical supplies and equipment, short-term crisis intervention, mental-health counselling, and medical transportation for status Indians. For a teen First Nations mother struggling for survival, these benefits could be indispensable for her and her child. In addition, there are other, non-tangible benefits of registration, such as personal, community, and cultural identification that can be vital to well-being.

The impact on First Nations women imparted via the two-parent rule and proof of paternity requirements has been alleged to constitute discrimination against First Nations women and their children. When both the causes of unstated paternity and its impacts are most egregious with respect to teen First Nations mothers, their situation could present a strong case scenario for the purposes of a legal challenge.

Canadian Charter of Rights and Freedoms

While there has been no definitive court decision on issues relating to Indian status registration and unstated paternity to date, the Canadian Charter of Rights and Freedoms applies. Section 7 provides the right to life, liberty, and security of persons and the right not to be deprived thereof except in accordance with the principles of fundamental justice. It could be argued that, given the socio-economic conditions of children of teen First Nations mothers, the deprivation of Indian status due to unstated paternity contravenes their right to life and security in a manner that is arbitrary. However, Section 7 jurisprudence has typically been conservative—concluding that Section 7 protects the citizen from government, but does not require that government provides access to resources.

Subsection 15(1) provides for the equality of individuals before and under the law, and the right to equal protection and benefit of the law without discrimination. Where disadvantage is imposed based on negative stereotypes attached to a personal characteristic such as sex or family status, and the effect is the impairment of human dignity, discrimination will often be found.

Children of unwed parents and their mothers are impacted by the unstated paternity policy. First Nations lone mothers and their children might compare with married First Nations parents and their children to establish discrimination on the basis of family status in the application of the unstated paternity policy. Where parents are married, most jurisdictions only require one signature, resulting in recognition of paternity under the registrar's policy. The requirement of two signatures where the parents are unmarried can result in incorrect status for a child where the father is nonetheless a status Indian. As a result, it could be argued that both the lone mother and the child suffer discrimination based on family status.

Disadvantage based on age-old stereotypes concerning the trustworthiness and truthfulness of married versus unmarried women pertaining to the paternity of

their children impairs the human dignity of at least some First Nations women and their children with unstated paternity.

The unstated paternity policy could also be said to be discriminatory on the basis of gender. While on the surface the policy appears to apply equally to men and women, the reality of its application shows gendered disadvantage. Women are present at birth to sign forms, and as primary caregivers, women suffer the impacts of the policy. Women, particularly teen mothers, may not be providing the father's identity for gender specific reasons that include abuse and rape; equally, the father may be unwilling. It could be argued that in not taking into account the realities of women's lives, the policy effectively discriminates against them and their child, impairing their human dignity and stripping the child of a benefit for reasons related to gender.

The Supreme Court of Canada has concluded that discrimination constitutes a violation of Section 15 of the Charter of Rights and Freedoms, and that a benefit program which excludes a particular group in an arbitrary way, undercutting the overall purpose of the program is likely to be discriminatory.¹² Status Indian registration could represent a benefits program from which children with unstated paternity may be arbitrarily excluded.

Interestingly, in a non-Aboriginal case, the Supreme Court of Canada concluded that while an absolute discretion conferred on mothers to "unacknowledge" biological fathers was discriminatory, there are circumstances where a biological father will be appropriately unacknowledged, including the case of a mother who has become pregnant as a result of rape or incest. The court concluded that an unacknowledgement process could be said to have ameliorative purposes for both disadvantaged groups (the women who have valid reasons not to acknowledge the father and their children) pursuant to Subsection 15(1) of the Charter.¹³

Many First Nations teen mothers, not yet adults under the law, experience age-related, disproportionate causes and effects related to unstated paternity. Legal arguments aside, one might question whether there is a moral obligation for the government to provide remedial measures pertaining to status registration when they are dealing with kids having kids.

Justification

Section 1 of the Charter allows the government to save a discriminatory law or policy where it can prove the impugned provision is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society. In order to save the unstated paternity policy in the wake of a successful Charter challenge, government would have to show that policy-makers had considered the ramifications of the policy on status registration, specifically on First Nations mothers and their children. Were the consequences comprehended? Were best efforts made to prevent/remedy these consequences while still achieving the governmental objective?

Clearly, there must be some delineation for Indian status so long as government delivers benefits based on it. However, does the paternity policy meet the minimal impairment test under Section 1? Are the rights of First Nations women and their children minimally impaired in order to meet the desired governmental objective? Is there no way of achieving the objective via lesser or no impairment of rights? The justification test is complex, but the government might fight an uphill battle should the paternity policy be found to be discriminatory.

Conclusions

Given the breadth of reasons for unstated paternity, particularly among First Nations teenage girls, numerous policy initiatives could be implemented in an attempt to ameliorate the situation. Enhanced educational initiatives pertaining to paternity and Indian registration targeted to both male and female youth could be undertaken. Young men must receive an equal education on the subject, since they are the fathers whose signatures may be missing or withheld. Paternity and Indian registration information could be disseminated to teens through sex education in schools, and through family planning services and prenatal programs. Birth and Indian registration materials could be distributed to expectant parents prior to giving birth. Greater efforts could be made by INAC to facilitate access to necessary resources, financial and educational, where changes to birth registration are required.

Certainly, securing the father's paternity designation by remedying administrative barriers is an important step in facilitating fatherhood. However, given that the reasons behind First Nations teen pregnancy may skew more towards mothers who have a reason for not disclosing paternity and fathers who are missing in action, and given the unconscionable burden borne by these mothers and their children, the registrar's policy should be revised.

A policy wherein the child of a registered Indian woman who swears that the father is also registered would remedy any discrimination arising from the current policy. The previous 1970 incarnation of the *Indian Act* provided that the child of a registered mother was entitled to registration unless the child's father was proven non-registered by the First Nation. There is no indication that this approach opened the floodgates to registration for children not so entitled. This would be even more likely if the mother bears some burden of proof by virtue of swearing a declaration. In order to obviate incorrect registrations, First Nations could once again have the right to challenge such declarations based on contrary evidence. Such an approach requires further investigation.

Alternatively, INAC policy could be changed to allow women whose pregnancies are the result of abuse, incest, or rape, and who want to "unacknowledge" the father, to make a declaration as to registered Indian paternity. Such a declaration could also be made where the father refuses to acknowledge paternity.

This would be an ameliorative approach for all First Nations women with reasons to not state paternity and who are disadvantaged on the basis of sex, as well as for those children who are disadvantaged based on the conditions of their birth. Most particularly, this approach would improve the situation of the most disadvantaged: First Nations mothers who are not yet adults themselves and their children.

Clearly, an approach to such a declaration that does not inflict further harm on the First Nations woman would need to be developed in consultation with First Nations organizations and women's groups. The declaration on Indian status, however, seems far the lesser of two evils.

Current paternity policy can have the effect of revictimizing the victim (young mothers) and creating new victims in the children born into families where the fathers' paternity cannot be identified. It is an ongoing cause of oppression that impairs human dignity, one that inherently imposes an age-old value judgment on unmarried First Nations women and their children. It impacts teenage First Nations mothers and their children most gravely, as they have the highest rates of unstated paternity, and are most in need of the benefits Indian status confers.

Endnotes

- 1 Guimond, E., and N. Robitaille. 2008. "When Teenage Girls Have Children: Trends and Consequences." In *Horizons* vol. 10, no. 1. Ottawa, Government of Canada, Policy Research Initiative, 49. <www.policyresearch.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf>. Last accessed August 26, 2008.
- 2 For the purposes of this paper, unacknowledged paternity will be subsumed in the language of "unstated paternity."
- 3 Clatworthy, S. "Factors Contributing to Unstated Paternity" Lecture. February 21, 2003. Video.
- 4 Clatworthy, S. 2003. *Factors Contributing to Unstated Paternity*. Ottawa: Indian and Northern Affairs Canada, 18.
- 5 Assembly of First Nations/First Nations Information Governance Committee. "First Nations Regional Longitudinal Health Survey (RHS) 2002–03, Results for Adults, Youth and Children Living in First Nations Communities. Revised 2nd ed." Ottawa: First Nations Information Governance Committee.
- 6 Bobet, E. 2005 "Teenage Pregnancy: Literature Review and Scan for Programs in First Nation Communities." James Bay: Public Health Department, James Bay Cree Board of Health and Social Services.
- 7 The Write Circle. 2002 *Tenuous Connections Urban Aboriginal Youth Sexual Health & Pregnancy*. Toronto: Ontario Federation of Indian Friendship Centres, 32. <www.ofifc.org/Page/WC_OFIFC_report.pdf>. Last accessed August 26, 2008.
- 8 Guimond and Robitaille. Page 50.
- 9 Hull, J. 2004 *Aboriginal Single Mothers in Canada, 2001 A Statistical Profile*. Ottawa: unpublished, 29.
- 10 Guimond and Robitaille at 50–5, 1 citing Statistics Canada, 2001.
- 11 Clatworthy, S. "Percent of children with fathers unstated among children born to mothers registered under Section 6(1) by age of mother at birth of child, Canada, 1985–2004." Unpublished.
- 12 *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 at para. 42.
- 13 *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835.