DISPROPORTIONATE & UNJUSTIFIABLE: TEEN FIRST NATIONS MOTHERS AND UNSTATED PATERNITY POLICY

Michelle M. Mann holds a B.A. in history from the University of Guelph (1991) and an LL.B. from the University of Ottawa (1994). She was called to the Ontario Bar in 1996 and practiced Aboriginal law with both the federal Department of Justice and the Indian Claims Commission of Canada. Samples of her work as a writer and consultant in Aboriginal, gender and human rights issues can be viewed at **www.michellemann.ca**.

ABSTRACT / RÉSUMÉ

This article explores the issue of unstated and unacknowledged paternity particular to the context of teen First Nations mothers and their children, and the implications of this phenomenon in terms of access to Registered Indian status and associated program benefits. The paper canvasses the causes of unstated paternity among teen First Nations mothers and their children, and the socio-economic implications of unstated paternity and resultant incorrect – or denied access to Registered Indian status. It is argued that the effects of policies that contribute to the high incidence of unstated paternity among young First Nations mothers may be considered discriminatory, and that redress via the *Charter of Rights and Freedoms* may be possible. The paper concludes with a discussion of policy options for dealing with unstated paternity particular to the context of teen First Nations mothers and their children.

L'auteur de cet article explore la question de la paternité non déclarée et non reconnue particulière au contexte des mères adolescentes des Premières nations et de leurs enfants ainsi que les implications de ce phénomène en ce qui concerne l'accès au statut d'Indien inscrit et aux avantages connexes découlant de programmes. Cet article examine à fond les causes de la non-déclaration de la paternité de leurs enfants par les mères adolescentes des Premières nations, ainsi que les implications socioéconomiques de la non-déclaration de la paternité et l'accès incorrect – ou le refus de l'accès au statut d'Indien inscrit qui en résulte. L'auteur soutient que les effets des politiques qui contribuent à l'incidence élevée de non-déclaration de la paternité chez les jeunes mères des Premières nations peuvent être considérés discriminatoires, et que le recours à la *Charte des droits et libertés* pourrait être un moyen d'obtenir réparation. L'auteur conclut par présentation de pistes d'action pour aborder la question de la non-déclaration de la paternité particulière au contexte des mères adolescentes des Premières nations et de leurs enfants.

While the issue of unstated or "unacknowledged" paternity can impact detrimentally 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 (under 20) have retained high fertility since 1986 at about 100 births per 1,000 women (Guimond & Robitaille 2008). In conjunction with this high fertility rate for First Nations teenage girls are high rates of unstated paternity of their children. It is these families who suffer disproportionately from government proof of paternity policy.

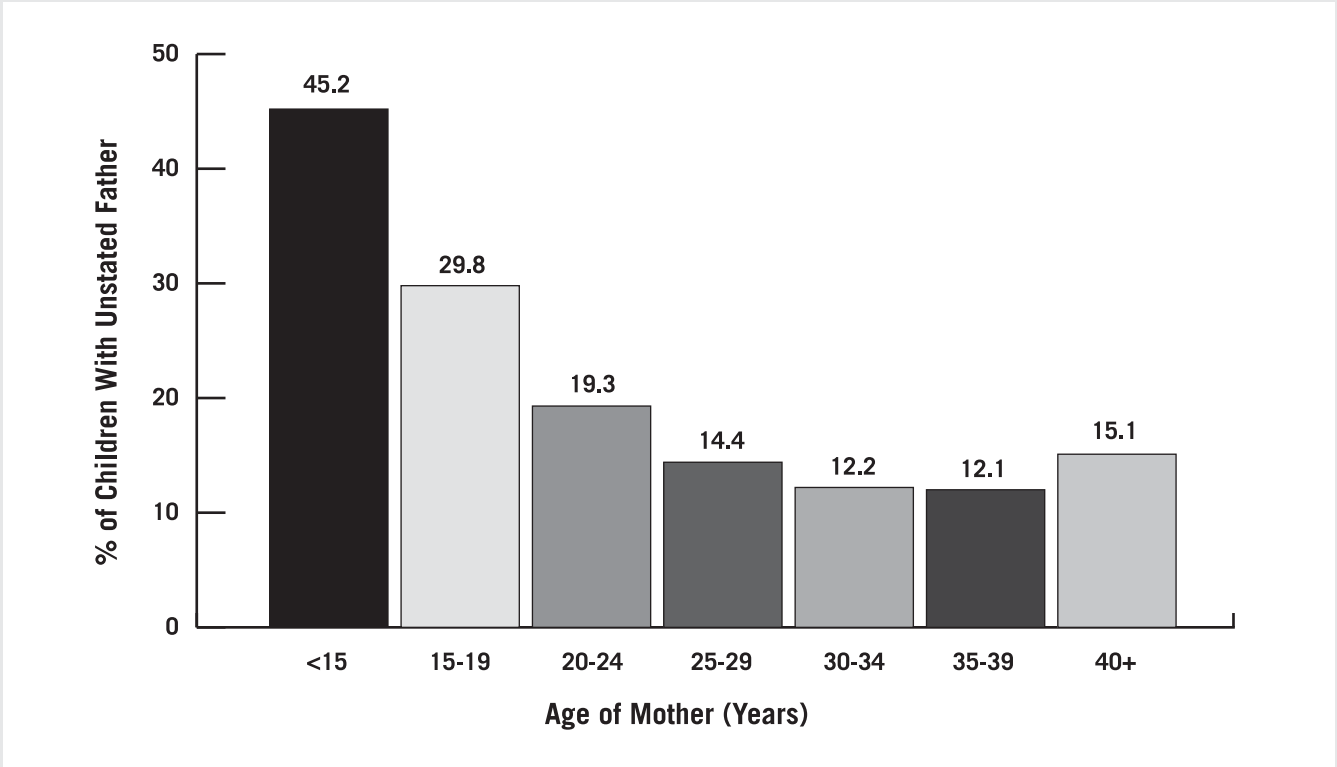
ORIGINS

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.[1] This can result in the loss of benefits and entitlements to either the child or the child's subsequent children, where there is successive "out-parenting".

Where parents are unmarried, Vital Statistics in most jurisdictions require the father's signature on the birth form. If there are any problems in obtaining the father's signature on the birth form, Indian registration is affected because 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.

Approximately 50% of unstated paternity cases are considered to be unintentional, while the other 50% are deemed intentional (Clatworthy 2003b). Unintentional unstated paternity can stem from logistical problems due to the requirement for paternal signatures on the registration of birth and other forms; and, with the difficulties and expenses associated with amending forms after the fact. At the other end of the spectrum, the mother may decide not to state the father or the father may refuse to acknowledge

CHART 1: Children Born April 17, 1985 to December 31, 2004.



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 or her own registration and membership (Clatworthy 2003a). 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 rates of First Nations teen sexual activity (AFN 2007), 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 indicated in teen First Nations pregnancies include: a casual attitude to sex that can cause youth to feel pressured; alcohol and drugs; and, abuse (Bobet 2005). In one study, 61% of the First Nations female youth questionnaire respondents reported having experienced some sort of sexual abuse; abused youth were found to be more likely to have unprotected sex, to have had more partners and to be involved in a teen pregnancy (White Circle 2002).

OUTCOMES

Early motherhood increases the vulnerability of a young First Nations woman, who is already disadvantaged socio-economically. She is at greater risk of academic under-achievement, reduced employability, an elevated risk of lone parenthood and an increased dependence on income assistance (Guimond & Robitalle 2008). In 2001, almost 16% of Registered Indian women aged 15 to 24 years were lone mothers (Hull 2004), and 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 20 years plus (Guimond and Robatille 2008).

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% of those born to mothers under the age of 15 had unstated paternity and 30% of those born to mothers aged 15-19 had unstated paternity. This is considerably higher than the comparable figures for mothers aged 20-24 (19%) and 30-34 (12%). (See Figure One)

It is worth noting that Indian registration confers tax benefits for those with reserve-based property, membership (and accompanying access to resources and programs) in bands whose membership is determined by INAC. Registration also provides access to national programs, such as post-secondary education and non-insured health benefits (NIHB). For example, Health Canada's NIHB program funds benefit claims for specified presecription 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 financial benefits could be indispensable for her and her child. There are also additional non-tangible benefits of registration, such as personal, community and cultural identification that can be vital to well-being.

In short, First Nations women and their children suffer from an inaccurate registration or loss of status that can accompany unstated paternity. The more disadvantaged the mother and her child, the more they experience this loss.

THE *CHARTER*

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 strongest case scenario for the purposes of a legal challenge. 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* (the *Charter*) applies.

Section 7 provides for the right to life, liberty and security of the person 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 of the person 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 provide 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 impairment of human dignity, discrimination will often be found.

Two separate but interconnected groups are impacted by the Registrar's unstated paternity policy: children of unwed parents and their mothers. First Nations lone mothers and their children might be compared to 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,

"The unstated paternity policy could also be said to be discriminatory on the basis of gender. While the Registrar's policy appears to apply equally to men and women, the reality of its application shows gendered disadvantage."

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 a Registered Indian. As a result, it could be argued that both the lone mother and the child suffer discrimination based on family status.

The unstated paternity policy could also be said to be discriminatory on the basis of gender. While the Registrar's 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 it is women, as primary caregivers, who suffer the impacts of the policy. Women, particularly teen mothers, may not provide the father's identity for gender specific reasons that include abuse and rape; equally, the father may be unwilling to be indentified. 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 and family status. To the extent that negative stereotypes regarding the character of unmarried versus married mothers remain prevalent in certain contexts, the unstated paternity policy can also be said to impair the human dignity of at least some women and their children.

The Supreme Court of Canada has concluded that discriminatory effects constitute a violation of section 15 and that a benefit program which excludes a particular group in an arbitrary way that undercuts the overall purpose of the program is likely to be discriminatory (Supreme Court of Canada 2004). 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 two disadvantaged groups pursuant to subsection 15(1) of the *Charter*: women who have valid reasons "to" "unacknowledge" a father and children (Supreme Court of Canada 2003).

Many First Nations teen mothers, not yet adults under the law, experience age related disproportionate causes and impacts related to unstated paternity. Legal arguments aside, one might question whether there is a moral obligation for 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. It would be necessary to show that the consequences of the policy were comprehended and that best efforts were made to prevent/remedy them 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? Was and is there no way of achieving the objective via lesser or no impairment of rights? The justification test is complex, but government might face 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 educational focus, 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 pre-natal programs. Birth and Indian registration materials could be distributed to expectant parents prior to their departure for hospital to give birth. Greater efforts could also 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, is entitled to registration on the basis of both parent's heritage 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 likely be even more the case where 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 and 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. It would also help those children that 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, such an approach would need to be developed in consultation with First Nations organizations and women's groups, so as to ensure the declaration rule does not inflict further harm on the First Nations woman. The declaration, however, seems to be the lesser of two evils by far.

Current paternity policy can have the effect of revictimizing the victim and even creating new victims – women with reason to 'unacknowledge' the father and their children. 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 those persons with the highest rates of unstated paternity and most in need of the benefits Indian status confers.

NOTE

[1] For the purposes of this paper, unacknowledged paternity will be subsumed in the language of unstated paternity.

REFERENCES

Assembly of First Nations/First Nations Information Governance Committee. (2007). *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.

Bobet, Ellen. (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, October.

Clatworthy, Stewart. (2003a). *Factors Contributing to Unstated Paternity*. Ottawa: Indian and Northern Affairs Canada.

Clatworthy, Stewart. (2003b). *Factors Contributing to Unstated Paternity Lecture.* February 21. Video.

Guimond, Eric & Robitaille, Norbert. (2008). "When Teenage Girls Have Children Trends and Consequences" in *Horizons* vol. 10, no. 1. Ottawa, Government of Canada, Policy Research Initiative. **http://www.policyresearch.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf.** Last accessed August 26, 2008.

Hull, Jeremy. (2004). *Aboriginal Single Mothers in Canada, 2001 A Statistical Profile*. Ottawa: unpublished.

The Write Circle.(2002). *Tenuous Connections Urban Aboriginal Youth Sexual Health & Pregnancy.* Toronto: Ontario Federation of Indian Friendship Centres. **http://www.ofifc.org/Page/WC_OFIFC_report.pdf** Last accessed August 26, 2008.

Supreme Court of Canada (2004). A*uton (Guardian ad litem of) v. British Columbia (Attorney General),* 3, 657.

Supreme Court of Canada. (2003). *Trociuk v. British Columbia (Attorney General),* 1, 835.