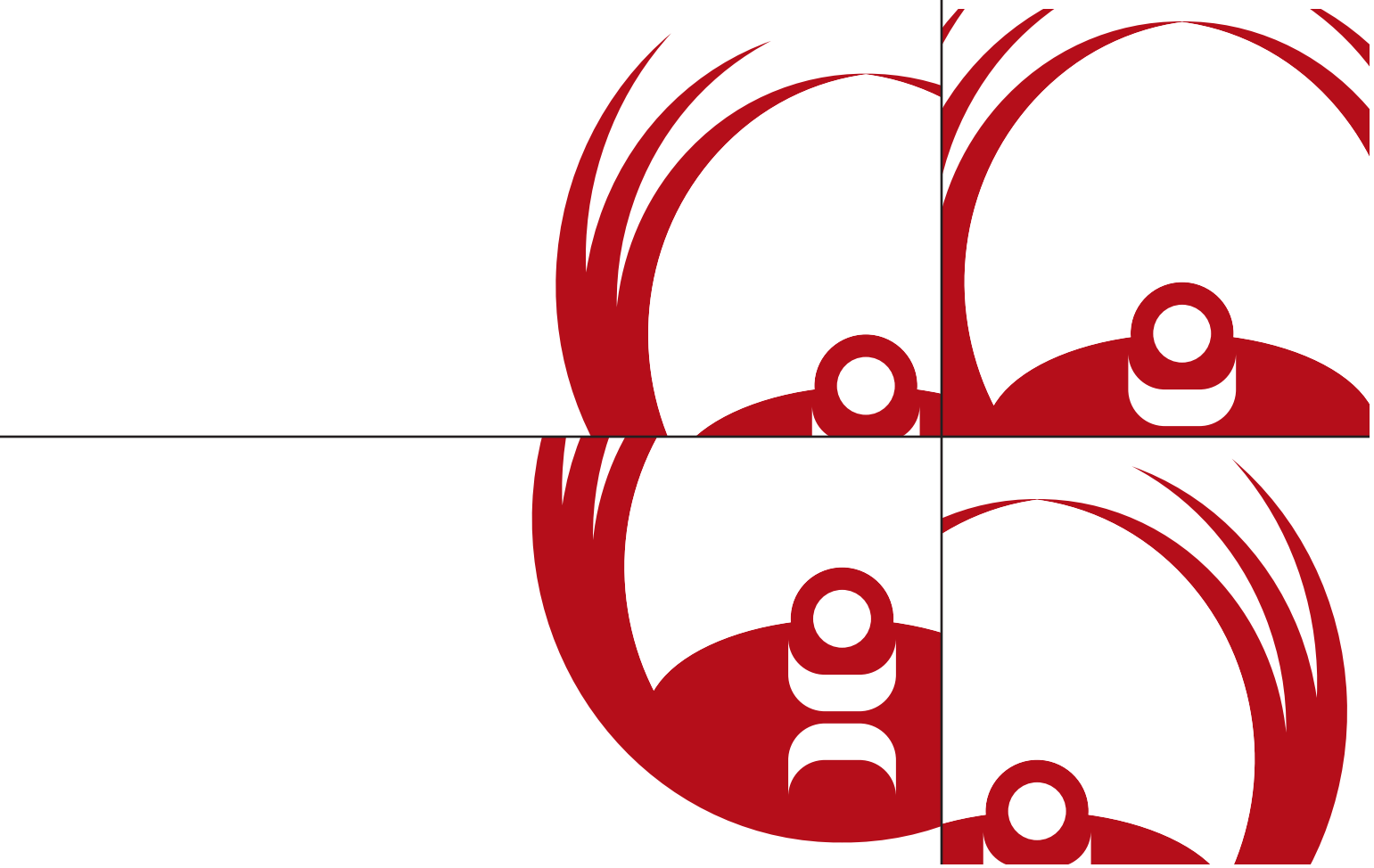

Memorandum:

Summary of the McIvor Decisions

NCFNG
NATIONAL CENTRE FOR FIRST NATIONS GOVERNANCE

CNGPN
CENTRE NATIONAL POUR LA GOUVERNANCE DES PREMIÈRES NATIONS

Prepared for the NCFNG by Ratcliff & Company, LLP

June 14, 2009

MEMORANDUM

To: National Centre for First Nations Governance

From: R. Brent Lehmann

Date: June 14, 2009

File: 09-0061

Re: Summary of the McIvor Decisions

You have asked us to review the following series of cases: *McIvor v. Canada (the Registrar, Indian and Northern Affairs)*, 2007 BCSC 26 (the "Statutory Appeal"); *McIvor v. Canada (the Registrar, Indian and Northern Affairs)*, 2007 BCSC 827 (the "Constitutional Case"); *McIvor v. Canada (the Registrar, Indian and Northern Affairs)*, 2007 BCSC 1732 (the "Trial Order"); and *McIvor v. Canada (Registrar of Indian and Northern Affairs)* 2009 BCCA 153 (the "Appeal") (collectively, the "McIvor Decisions").

I. The Trial

Background to the Indian Act Provisions

The McIvor Decisions concern whether or not the registration provisions of section 6 of the current *Indian Act* discriminate against women. Before 1985, an Indian woman would lose her status if she married a non-Indian man, however, an Indian man would not lose his status if he married a non-Indian woman. Following political and legal pressure, the *Indian Act* sections relating to registration were amended in 1985, these amendments were known as "Bill C-31".

The amendments under Bill C-31 modified the entitlement provisions and are now found in section 6 of the *Indian Act* as follows: section 6(1)(a) confirmed status for those already registered; section 6(1)(f) gives status to individuals if both parents are registered; section 6(2) gives status to individuals if one parent is registered under 6(1); and section 6(1)(c) provides that the following people, previously removed or omitted from registration, are now entitled to status:

- Those whose mothers and paternal grandmothers are not Indians;
- Women who had married non-Indians; and
- Illegitimate children of Indian women.

As will be seen below, these amendments resulted in different eligibility rules for men and women:

> **Category 1**: A woman, previously disentitled to status because she married a non-Indian, would, after Bill C-31, be entitled to status under section 6(1)(c). A child of this woman

would then be entitled to status under section 6(2). However, if that child had a child (grandchild of the above woman) with a non-Indian, that grandchild would not be entitled to status. This means that only **two** generations are given status by Bill C-31: the woman and her child.

Category 2: A man, previously entitled to status, would, after Bill C-31, have his status confirmed under section 6(1)(a) as would his non-Indian wife (if married prior to Bill C-31). A child of this man and his wife with status would then be entitled to status under section 6(1)(a) (if born before Bill C-31) or section 6(1)(f) (if born after Bill C-31). If that child had a child (grandchild of the above man) with a non-Indian, that grandchild would be entitled to status under section 6(2). This means that **three** generations would be given status: the man, his child and his grandchild.

Please see Appendix 1 for a chart summarizing these differences in entitlement to status.

It should be noted that prior to Bill C-31, the third generation child in Category 2 above would be subject to the "Double Mother Rule". This rule provided that if a child's mother and paternal grandmother did not have a right to Indian status, other than by virtue of having married an Indian man, the child only had Indian status up to the age of 21. Bill C-31 did away with this restriction known as the "Double-Mother Rule" so that the third generation child in Category 2 kept his or her status beyond the age of 21. This became important in analyzing the appeal Court's decision, discussed below.

The Plaintiffs

The Plaintiffs ("Plaintiffs") were Sharon McIvor ("Sharon") and her son, Jacob Grismer ("Jacob"), who are descendants of members of the Lower Nicola Indian Band. The following is the Plaintiffs' family tree:

	Paternal Side		**Maternal Side**	
Grandparent	**Alex McIvor** (non-Indian)	**Cecilia McIvor** (entitled to status)	**Jacob Blankinship** (non-Indian)	**Mary Tom** (Indian, Lower Nicola band member)
Parents	**Ernest McIvor** (born out of wedlock, not registered but entitled pre-1985 as illegitimate child of an Indian woman)		**Susan Blankinship** (born out of wedlock, not registered but entitled pre-1985 as illegitimate child of an Indian woman)	
	Sharon McIvor (born out of wedlock, married Charles Terry Grismer, a non-Indian)			
Son	**Jacob Grismer** (born in wedlock, married Deneen Simon, a non-Indian)			
Grandsons	**Jason Grismer, Christopher Grismer**			

Background to the Court Challenge

Prior to Bill C-31, Sharon and Jacob believed they could not be registered as Indians because they traced their Indian ancestry along the female, rather than male, line. The evidence in the Statutory Appeal, however, revealed that Sharon's parents both were entitled to be registered because there had never been a declaration by the Registrar that their fathers were non-Indian. As a consequence, Sharon was entitled to status until she got married in 1970. Sharon, however, was not aware that she had been entitled up to that point in time.

In 1985 when Bill C-31 came into effect, Sharon applied on behalf of herself and her children to be registered as Indians. In 1987, Sharon was advised, in error, that she was entitled to be registered pursuant to section 6(2), but that her children were not entitled to membership. Sharon appealed this decision in the Statutory Appeal, seeking an order that she be registered under section 6(1)(c) and that Jacob be registered under section 6(2). In the Constitutional Case, Sharon also challenged the constitutionality of the *Indian Act* provisions relating to registration, claiming that they discriminated against women on the basis of sex contrary to the *Charter of Rights and Freedoms* (the "Charter").

The Trial Court's Decision

The Supreme Court of British Columbia issued two substantive judgments relating to the McIvor Decisions: the Statutory Appeal mentioned above (which concerned the factual background relating to the registration of Sharon and Jacob) and the Constitutional Case which concerned whether the current *Indian Act* is unconstitutional because it discriminates against women. Sharon and Jacob were successful in both cases at the trial level. The Statutory Appeal confirmed Sharon's entitlement to status under 6(1)(c) and Jacob's entitlement to status under 6(2). In the Constitutional Case, the trial Court also held that section 6 of the *Indian Act* violated the Charter. As a consequence of the decision of the Court in the Constitutional Case, the Court issued the Order which sets out the appropriate remedies for this violation of the Charter.

In the Constitutional Case, the trial Judge also held the following:

- Although the concept of "Indian" is a creation of government, it has developed into a powerful source of cultural identity for the individual and the Aboriginal community. Like citizenship, both parents and children have an interest in this intangible aspect of Indian status. In particular, parents have an interest in the transmission of this source of cultural identity to their children.

- If all of Jacob's Indian ancestors had been male, but the details were otherwise unchanged, and he was applying for registration now, he and his mother would both be entitled to full registration under section 6(1)(a).

- Section 6 violates section 15 of the Charter in that it discriminates in the conferring of Indian status between matrilineal and patrilineal descendants born prior to April 17, 1985. Section 6 also discriminates between descendants born prior to April 17, 1985 to Indian women who married non-Indian men and the descendants of Indian men who married non-Indian women. This discrimination is not justified by section 1 of the Charter.

Trial Court Order

Because the trial Court found that section 6 of the *Indian Act* constitutes discrimination under the equality provisions of the Charter, the trial Court in the Order held:

In respect of status:

1. Section 6 of the *Indian Act* is of no force and effect "in so far, and only in so far, as it authorizes the differential treatment of Indian men and Indian women born prior to April 17, 1985, and matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status."

This means that:

- *Generation 1*: a woman previously registered under section 6(1)(c) would now be entitled to status under section 6(1)(a);
- *Generation 2*: a child of the woman mentioned above, previously registered under section 6(2), would now be entitled to status under section 6(1)(a);
- *Generation 3*:
    - If a Generation 2 person with status has a child with a non-Indian, the child of these two persons would now be entitled to status under section 6(2); and
    - If a Generation 2 person with status has a child with a another person with status, the child of these two persons would now be entitled to status under section 6(1)(f).

The result is that a new generation of persons is entitled to registration under the *Indian Act*.

In respect of membership:

2. The Court stated that, "Nothing in this order shall entitle any person to membership in an Indian band, under s. 11 of the 1985 Act, or under the membership rules enacted by an Indian band which has assumed control of its own membership under s. 10 of the 1985 Act."

The Court also stated: "For greater certainty: … a person who, solely as a result of this Order, becomes entitled to be registered as an Indian under s. 6 of the 1985 Act, and who would not otherwise be entitled to band membership shall not be entitled to membership in an Indian Band under s. 11 of the 1985 Act, or under the membership rules enacted by an Indian band …" [emphasis added]

II. The Appeal

The B.C. Court of Appeal upheld the basic finding of discrimination made by the Supreme Court but did not grant the same order. The appeal Court said the trial Court had gone too far in the Order and that there were other options, including removing Indian status from persons who

previously qualified for it, that were possible. The appeal Court left it to Parliament to decide how to remedy this discrimination, stating it was not appropriate for a Court to impose a solution by opening up Indian status to a wider group of people. The appeal Court suspended the effect of the declaration for 12 months and has left it to Parliament to decide how to fix the problem.

In its review of the trial Court's decision, the appeal Court identified two substantive errors.

First, the Court found that the trial Judge had gone too far in describing the discrimination as being based on "matrilineal as opposed to patrilineal descent." This resulted in a retroactive application of the Charter which is not allowed. The appeal Court found that the discrimination only applied to individuals caught in the transition between the old *Indian* Act and the new regime brought in by Bill C-31.

Second, the Court found that the discrimination could be "saved" by s. 1 of the Charter but for the fact that the legislation conferred an advantage on certain persons based on sex. Section 1 of the Charter is the section that allows the crown to justify an infringement of a Charter right where there is a compelling and substantial purpose for doing so and the means adopted to achieve that purpose minimally impair the right. The appeal Court found that purpose of the legislative provisions that conferred rights on Category 2 persons to pass on Indian status was valid in that it served to protect the vested rights of persons who were entitled to status as of 1985. However, the Court found that Sharon's equality rights were not minimally impaired because Parliament allowed the Category 2 persons to pass on full Indian status to their grandchildren. Prior to Bill C-31, they could only pass on a limited status that expired when the grandchild reached the age of 21 under the Double-Mother Rule. The Court found that if Parliament had preserved the Double-Mother Rule when Bill C-31 was brought in, the legislative scheme would have passed the section 1 test and there would be no Charter violation.

To summarize, the appeal Court found that section 6 of the *Indian Act* discriminated against persons in the position of Sharon and her son Jacob by precluding them from passing on status to Jacob's children and Sharon's grandchildren and that this discrimination was contrary to section 15 of the Charter. Further, since the Double-Mother Rule was not preserved in Bill C-31, the section 15 violation was not saved by section 1 of the Charter.

However, unlike the trial judge, the appeal Court did not impose a solution. Rather, the appeal Court held that Parliament has a choice as to how this discrimination should be corrected. The Court noted two "obvious" choices but also noted that there may be other more complicated ones that Parliament may wish to choose. The "obvious" choices are to amend section 6 of the *Indian Act* to extend to persons in Sharon's and Jacob's circumstance the ability to pass on Indian status or to revoke Indian status from the third generation of Category 2 persons. However, Parliament may choose something else all together. The appeal Court gave Parliament 12 months to make this choice through the implementation of new legislation.

Thus, while the effect of the trial Court's decision was to immediately allow Sharon's grandchildren (Jacob's children) status, the effect of the appeal Court's decision was to defer to Parliament to correct the discrimination. If Parliament does not act within one year and absent any extension of the time period, sections 6(1)(a) and 6(1)(c) will be of no force or effect. This would lead to a chaotic result and thus it may be fully expected that Parliament will respond in some way.

III. Notable Comments by the Appeal Court

Like the trial Court, the appeal Court commented on the role "status" plays in an aboriginal person's life. Besides certain financial benefits, the appeal Court noted that the granting of status and the ability to pass status on to one's children "…can be of significant and cultural value." The Court also noted that the ability to pass on status "…can be a matter of comfort and pride for a parent…".

The appeal Court also commented briefly on whether or not "status" was an aboriginal or treaty right protected by section 35 of the Charter. Because there was no evidence or argument made on the record to deal with this question as the trial level, the appeal Court declined to make any sort of decision on the issue. However, the appeal Court did state "It seems likely that, at least for some purposes, Parliament's ability to determine who is and who is not an Indian is circumscribed [by aboriginal and treaty rights]." It is left to another day for this type of argument to be made.

IV. Status of the McIvor Decisions

The appeal Court gave its decision on April 6, 2009. We understand Sharon has appealed this decision. As far as we are aware, the Supreme Court of Canada has not yet determined whether or not it will hear that appeal.

V. Impact of the McIvor Decisions on Membership

At this point, we cannot say for sure if or how the McIvor Decisions will impact membership in any Indian Band. While the trial Court clearly stated in its Order that its decision concerned entitlement to be registered as an Indian and not entitlement to band membership, the appeal Court felt Parliament should be the one deciding this question, not the courts, and gave Parliament a year to deal with the matter. Stated differently, before we can fully assess the impact of the McIvor Decisions on membership in any Indian Band, we need to see what Parliament actually does or whether the Supreme Court of Canada weighs in on the issue.

How quickly we can expect Parliament to act will depend on whether the Supreme Court of Canada agrees to hear Sharon's appeal. If the Supreme Court agrees to hear Sharon's appeal, Canada will likely apply for an extension to the one year period ordered by the appeal Court while the appeal is pending. If the Supreme Court refuses to hear Sharon's appeal, Parliament may introduce amendments to the *Indian Act* as early as this fall.

For discussion purposes, however, assuming Parliament decides to entitle persons in Sharon and Jacob's position to registration under section 6(1)(a) and thereby entitle persons in the position of Jacob's children to registration under section 6(2), as suggested by the trial Court, the impact on a First Nation's membership would depend on whether that First Nation is an Indian Band whose membership list is maintained by the Department of Indian and Northern Affairs Canada ("INAC"), an Indian Band who has assumed control of its membership under section 10 of the *Indian Act* or a Treaty First Nation.

Indian Bands whose Membership List is Maintained by INAC

Under the *Indian Act*, membership in an Indian Band whose membership list is maintained by INAC mirrors Indian status. A person who is entitled to Indian status under section 6 of the *Indian Act* and has the appropriate parental connections to an Indian Band is entitled to membership in that Indian Band. Thus, if Parliament decides to extend Indian status to persons previously disentitled, the persons who acquire Indian status as a result and have the appropriate parental connections to an Indian Band whose membership list is maintained by INAC would be entitled to membership in that Indian Band. This would increase the number of persons entitled to membership in that Indian Band.

Indian Bands who have Assumed Control of their Membership

For Indian Bands who have assumed control of their membership under section 10 of the *Indian Act*, membership is determined in accordance with the Membership Code established by the Indian Band and does not necessarily mirror Indian status. Some individuals may be entitled to membership under the Membership Code but not be entitled to Indian status. If Parliament decides to entitle persons in Sharon and Jacob's position to registration under section 6(1)(a) and thereby entitle persons in the position of Jacob's children to registration under section 6(2), the number of persons who would be entitled to membership as a result would depend on the particular provisions of the Membership Code and whether the Indian Band assumed control of its membership before or after June 28, 1987.

Pursuant to section 10(4) of the *Indian Act*, an Indian Band who assumes control of its membership must confer membership on any person who had the right to have his or her name entered on the band list for that Indian Band immediately prior to the coming into effect of the Membership Code. However, pursuant to section 11 of the *Indian Act*, Indian Bands who assumed control of their membership between April 17, 1985 and June 28, 1987 had no obligation to place persons entitled to Indian status under section 6(2) onto their membership list. Indian Bands who assumed control of their membership after June 28, 1987 have an obligation to place such persons onto their membership list.

It is arguable, then, that persons in the position of Jacob's children, who would now qualify for Indian status under section 6(2) of the *Indian Act*, would also qualify for membership in an Indian Band if they are seeking membership in an Indian Band which has assumed control of its membership after 1987, but not if they are seeking membership in an Indian Band which assumed control of its membership between April 17, 1985 and June 28, 1987. This would be based on the provision in that Indian Band's Membership Code which incorporates section 10(4) of the *Indian Act* which protects persons entitled to status as a result of Bill C-31 in 1985.

This argument may be moot if persons in the position of Jacob's children already qualify for membership under another provision in the Membership Code. The argument may be significant, however, if such persons do not qualify for membership under another provision in the Membership Code or if the Membership Code provides for different categories of membership with differing ability to pass on entitlement to membership and persons under the provision which incorporates section 10(4) of the *Indian Act* have a greater ability to pass on entitlement to membership than persons under the other provision.

Treaty First Nations

Membership in Treaty First Nations is determined in accordance with the Citizenship Legislation enacted by the First Nation. Unless a Treaty First Nation has chosen or was required by the Treaty or its Constitution to include a provision in its Citizenship Legislation granting entitlement to membership to individuals who were on or entitled to be on the band list of that First Nation immediately prior to the effective date of the Treaty, membership in that First Nation is not linked to Indian Status and any changes to Indian status instituted by Parliament as a result of the McIvor Decisions would have no direct impact on the number of persons entitled to be members of that First Nation. If, however, a Treaty First Nation's Citizenship Legislation contains such a provision, it is arguable that persons in the position of Jacob's children would qualify for membership under that provision. That being the case, the comments in the previous paragraph regarding Membership Codes are applicable.

VII. Conclusion

Although the appeal Court agreed with the trial Court that section 6 of the *Indian Act* was discriminatory and that discrimination was not saved by section 1 of the Charter, it overruled the trial Court on how to overcome that discrimination, leaving it to Parliament to correct the problem through amendments to the *Indian Act*. Canada has 12 months to enact such amendments but will likely apply for an extension to that period if the Supreme Court of Canada agrees to hear Sharon's appeal.

Because we are still awaiting the final disposition of this case we cannot say for sure if or how it will impact membership in any Indian Band. However, as discussed above, if the trial Court's views do become the law, there will very likely be an impact on the number of persons entitled to membership in Indian Bands whose membership list is maintained by INAC. There may also be an impact on the number of persons entitled to membership in Indian Bands who have assumed control of their membership under section 10 of the *Indian Act* and Treaty First Nations. For Indian Bands who have assumed control of their membership, this will depend on the particular provisions of their Membership Codes and whether they assumed control of their membership before or after June 28, 1987. For Treaty First Nations, this will depend on the particular provisions of their Citizenship Legislation.

Appendix I

The following chart illustrates the difference between entitlement to status under the *Indian Act* depending on whether a parent was an Indian male married to a non-Indian female or an Indian female married to a non-Indian male.

The chart also notes the *Indian Act* section number under which the person has or lost status. The 1970 *Indian Act* section number is in red, and the 1985 *Indian Act* section number is in yellow.

<table>
<tr><th colspan="2">Indian man marries non-Indian woman</th><th colspan="2">Indian woman marries non-Indian man</th></tr>
<tr><td>Man
(status)
11(1)
6(1)(a)</td><td>Woman
(gains status)
11(1)(f)
6(1)(a)</td><td>Man
(no status)</td><td>Woman
(loses status)
12(1)(b)</td></tr>
<tr><td colspan="2">Child #1 born prior to Bill C-31 (status)</td><td colspan="2">Child #1 born prior to Bill C-31 (no status)</td></tr>
<tr><th colspan="4">1985 Act is enacted</th></tr>
<tr><td>Man
(status confirmed)
6(1)(a)</td><td>Woman
(status confirmed)
6(1)(a)</td><td>Man
(no status)</td><td>Woman
(regains status)
6(1)(c)</td></tr>
<tr><td colspan="2">Child #1 born prior to Bill C-31
(status)
11(1)(d)
6(1)(a)

Child #2 born after Bill C-31
(status)
6(1)(f)</td><td colspan="2">Child #1 born prior to Bill C-31
(gains status)
6(2)

Child #2 born after Bill C-31
(status)
6(2)</td></tr>
<tr><th colspan="4">- Assume all children marry non-Indians (married after April 17, 1985) -</th></tr>
<tr><td colspan="2">Grandchild under Child #1 and #2
(status)
6(2)</td><td colspan="2">Grandchild under Child #1 and #2
(no status)</td></tr>
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