FAFIA-AFAI

Feminist Alliance for International Action

l'Alliance Féministe pour l'Action Internationale

CANADA

Design Of The Collaborative Process On The Broad Issues Related To Indian Registration, Band Membership And First Nation Citizenship

Submission of the
Canadian Feminist Alliance for International Action (FAFIA)

March 8, 2018

The Canadian Feminist Alliance for International Action (FAFIA) is an alliance of more than 70 women's organizations, Indigenous and non-Indigenous. FAFIA participated in the Engagement Process on Bill S-3, working in collaboration with Sharon McIvor, Dr. Pamela Palmater, Dr. Gwen Brodsky and Mary Eberts, Canada's leading experts on sex discrimination in the *Indian Act*. FAFIA was invited by email dated February 5, 2018 from Mr. Eric Guimond to participate in the design of the collaborative process on the broad issues related to Indian registration, Band membership, and First Nation citizenship. FAFIA requested funds to support our participation in this design process, but was informed that no funds could be made available because FAFIA does not have an existing funding agreement with Canada. Necessarily, this contribution to the design of the collaborative process is brief.

Bill S-3 and Section 15(2)

In Bill S-3, the Government of Canada agreed to include language in sections 2.1, 3.1 and 3.2 that will entitle women and their descendants born prior to April 17, 1985 to full 6(1)(a) status on the same footing as men and their descendants born prior to April 17, 1985.

Unfortunately, these provisions did not come into force when Bill S-3 received Royal Assent in December 2017. Instead, section 15(2) of Bill S-3 states that these provisions will come into force "on an [unknown] day to be fixed by Governor in Council."

By including sections 2.1, 3.1, and 3.2, the Government of Canada acknowledged that the *Indian Act*, even after the enactment of the remaining provisions of Bill S-3, continues to discriminate based on sex.

The reason given by the Government of Canada for not bringing ss. 2.1, 3.1 and 3.2 into force immediately is that the Government must consult.

However, FAFIA submits that there is no legal, moral, or political justification for any delay in bringing these provisions into force.

Consultation On Continuing Discrimination Is Not Valid

Throughout the Engagement Process on Bill S-3, FAFIA, and its advisors, took exception to the Government of Canada's repeated assertion that it must consult before it removes the sex discrimination from the status registration provisions of the *Indian Act*.

Sharon McIvor, Dr. Gwen Brodsky and Shelagh Day were informed on April 26, 2017 by Mr. Martin Riehr (then Assistant Deputy Minister, Indigenous and Northern Affairs, Resolution and Individual Affairs) that the Government of Canada was not prepared to grant full 6(1)(a) status to women born before April 17, 1985, and certainly could not take such a step without full consultation with Bands and First Nations communities. Mr. Riehr stated that the Government of Canada is concerned about the reaction of communities to the potential need to include more Indians.

FAFIA rejects this argument. Indian bands and communities have no legitimate say in whether the Government of Canada continues to discriminate against Indian women because of their sex. The Government of Canada has an obligation under constitutional and international law and a fiduciary duty not to discriminate on the basis of sex, whether Indigenous Bands and communities agree or not. By now most Indigenous Bands and communities do not wish to see discrimination on the basis of sex continue. They can have legitimate concerns about whether Canada will ensure that they have access to adequate resources, about which they should be consulted; they do not need to be, and should not be, consulted, about *whether* the Government of Canada will continue to discriminate.

It is our view that the Government of Canada is using consultation to delay implementing the rights of First Nations women and their descendants, despite the fact that the discrimination inherent in the status registrations provisions of the *Indian Act* has been contested for more than fifty years, and despite the fact that consultation on the sex discrimination in the registration provisions has been held repeatedly - before and after *Indian Act* amendments made in 1981, 2010, and 2017.

We recognize and support the duty of governments to consult Indigenous peoples before decisions are taken which affect their rights. However, we do not support

consultation as a delay tactic, or an obstruction to the implementation of the human rights of women.

FAFIA, and advisors, submit that the finding of the Canadian Human Rights Tribunal on the issue of consultation in its latest decision in *First Nations Family and Child Caring Society v. Attorney General of Canada* (2018 CHRT 4, February 1, 2018) is applicable here. The Canadian Human Rights Tribunal rejected Canada's claim that consultation with all First Nations communities had to be undertaken before implementing the Tribunal's ruling regarding child welfare on reserves.

In its fourth decision on remedy, the Tribunal found that consultation is important to long term reform, but the need to consult does not excuse Canada from the obligation to provide immediate relief from discrimination.[1] This reasoning is applicable to the current process: consultation regarding reform to the *Indian Act* cannot displace, or delay implementation of, the obligation to provide immediate relief to women and their descendants from long-standing sex discrimination.

Consultation Based On Faulty Premise: There Is No Collective Right To Discriminate

During the Engagement Process, FAFIA was informed that the Government of Canada must consult before eliminating sex discrimination in order to strike "a balance between collective and individual rights."

However, FAFIA submits that there is no collective right to discriminate against Indigenous women and their descendants, and consequently there are no collective rights in issue here. Articles 1, 9 and 22 of the *Universal Declaration on the Rights of Indigenous Peoples* (UNDRIP) set out the rights of women to participate in their Nations without discrimination and to be protected from discrimination by both States and Indigenous collectivities. Under Article 22, States have the obligation to ensure that Indigenous women are protected from all forms of violence and discrimination.

Canada has agreed to treat UNDRIP as a centerpiece of its new relationship with Indigenous peoples. FAFIA submits that UNDRIP obligates the Government of Canada to end the sex discrimination in the registration provisions of the *Indian Act*, and it clarifies that the Government of Canada cannot justify continuing discrimination in the name of respecting the right to self-determination by Indigenous collectivities.

Since the Government of Canada can only legitimately consult Bands or communities about additional resources they may need to accommodate persons newly entitled to status, and those resources are within the control of the

[1] *First Nations Family and Child Caring Society v. Attorney General of Canada*, 2018 CHRT 4, February 1, 2018, at para. 55.

Government of Canada, it is neither necessary nor legally justifiable to continue the sex discrimination while such discussions are carried out.

Eliminating Sex Discrimination Must Come First

FAFIA submits that the Government of Canada must eliminate the sex discrimination first, before continuing any consultation regarding long term reforms to the *Indian Act*, or the repeal and replacement of it. As long as the sex discrimination continues, the pool of Indigenous persons with whom the Government of Canada is consulting is diminished and distorted by sex discrimination. This poisons the process, and makes it a discriminatory process, in itself. By definition, it is a consultation with those Indigenous persons who have been able to benefit from the historical privilege accorded to men and the descendants of men by the *Indian Act*.

The Government of Canada, under the direction of Prime Minister Justin Trudeau, has endorsed equality for women and a new relationship with Indigenous peoples as fundamental values for the nation. FAFIA applauds these commitments. What is under consideration here is a public exercise in which these values must intersect; together, they must be embodied in the design of any consultation regarding the broad issues related to Indian registration, Band membership and First Nation citizenship. If women are not equal and full participants, because of long-standing discrimination, no legitimate change can be designed.

What Does the Government of Canada Need to Know?

During the debate over Bill S-3, FAFIA was informed by Minister Bennett and others that the Government of Canada required information that it did not have regarding the number of persons that would be newly entitled to registration if the '6(1)(a) all the way' provisions were enacted, and the estimated cost of benefits to which those persons would be entitled. Since this information was provided in the report of the Parliamentary Budget Officer, *Bill S-3: Addressing sex based inequities in Indian registration*,[2] issued December 5, 2017, the ball is in the Government's court. What does the Government of Canada still need to know before it eliminates the sex discrimination from the *Indian Act*?

Act Now

FAFIA urges the Government of Canada to bring sections 2.1, 3.1 and 3.2 into force immediately.

[2] Jean-Denis Fréchette, Parliamentary Budget Officer, *Bill S-3: Addressing sex based inequities in Indian registration*, 5 December 2017.

For further information, please contact:

Angela Cameron
Chair, Steering Committee
Canadian Feminist Alliance for International Action
acameron@uottawa.ca

Shelagh Day, C.M.
Chair, Human Rights Committee
Canadian Feminist Alliance for International Action
shelagh.day@gmail.com