



**FAFIA-AFAI**

Feminist Alliance for  
International Action

L'Alliance Féministe pour  
l'Action Internationale

**CANADA**

## **Equal Status for Women in the Indian Act: the *Indian Act* and Bill S-3**

In its 2015 report on *Missing and Murdered Indigenous Women and Girls in British Columbia, Canada*, (<http://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf>) issued in January 2015, the IACHR found that:

- historical *Indian Act* sex discrimination is a root cause of high levels of violence against Indigenous women and the “existing vulnerabilities that make Indigenous women more susceptible to violence” (at paras 93, 129) and
- with regard to the Canada's international human rights obligations, the IACHR found that “[a]ddressing violence against women is not sufficient unless the underlying factors of discrimination that originate and exacerbate the violence are also comprehensively addressed.”(at para 306).

Despite these clear findings that 1) *Indian Act* sex discrimination is a root cause of the human rights crisis of murders and disappearances, and 2) the Government of Canada has an obligation to address this discrimination, the Government of Canada is pushing forward to pass Bill S-3, which, one more, time re-enacts the historic sex discrimination in the registration provisions of the *Indian Act*, rather than eliminating it.

After considering Bill S-3 and hearing witnesses, the Senate Committee on Aboriginal Peoples amended Bill S-3 in May 2017, by adding a clause that has been dubbed '6(1)(a) all the way'. This amendment, if it were adopted, would have the effect of eliminating the core of the sex discrimination which remains in the registration provisions of the *Indian Act*. Although this amendment was adopted by the full Senate, it has been rejected by Government of Canada.

It is anticipated that the Government of Canada will request the Senate to pass Bill S-3, in its unamended form this fall, and to push for its passage before December 15, 2017.

Canada's perpetuation of sex discrimination in the *Indian Act*, and its current determination to pass Bill S-3 without eliminating all the sex discrimination from the registration provisions, violates the rights of Indigenous women and girls to equality under international and regional human rights laws to which Canada is a signatory.

The Canadian Feminist Alliance for International Action seeks the support of the Government of Canada, all Parliamentarians, and all Canadians who support equality for women for the Senate's 6(1)(a) all the way amendment and the elimination of sex discrimination from the *Indian Act* now.

## **Indian Act Sex Discrimination and Bill S-3: Time Lines**

### ***History of Discrimination***

Since its inception, the *Indian Act* has accorded privileged forms of Indian status to male Indians and their descendants compared to Indian women and their descendants, treating the latter as second-class Indians. In earlier versions of the *Indian Act*, an Indian was defined as 'a male Indian, the wife of a male Indian, or the child of a male Indian.' For the most part from 1876 to 1985, Indian women had no ability, or limited ability, to transmit status to their descendants. There was a one-parent rule for transmitting status and that parent was male. Indian women lost status when they married a non-Indian. On the other hand, Indian men who married non-Indians kept their Indian status and endowed status on their non-Indian wives.<sup>1</sup>

Since the 1970s, sex discrimination in the *Indian Act* has been repeatedly challenged, and Canada has failed repeatedly to take effective remedial action to eliminate it.

Highlights of this history are:

- In 1970, forty-seven years ago, the Royal Commission on the Status of Women recommended that "[L]egislation should be enacted to repeal the sections of the [*Indian Act*] which discriminate on the basis of sex."<sup>2</sup> Although at the time, the Government of Canada was proposing to repeal the *Indian Act* and treat all Indians the same as all Canadians, [1969 White Paper] the Royal Commission was firm that as long as the *Indian Act* existed all sex discrimination must be removed.
- In 1971, Jeannette Corbiere Lavell and Yvonne Bedard brought suit under the sex equality provision of the *Canadian Bill of Rights*. They lost,

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<sup>1</sup> Royal Commission on Aboriginal Peoples, Volume I, *Looking Forward, Looking Back*, pp. 251-262, online: [https://qspace.library.queensu.ca/bitstream/handle/1974/6874/RRCAP1\\_combined.pdf?sequence=5&isAllowed=y](https://qspace.library.queensu.ca/bitstream/handle/1974/6874/RRCAP1_combined.pdf?sequence=5&isAllowed=y), Volume 4, *Perspectives and Realities*, pp. 20 - 43 online: [https://qspace.library.queensu.ca/bitstream/handle/1974/6874/RRCAP4\\_combined.pdf?sequence=2&isAllowed=y](https://qspace.library.queensu.ca/bitstream/handle/1974/6874/RRCAP4_combined.pdf?sequence=2&isAllowed=y)

<sup>2</sup> Report of the Royal Commission on the Status of Women in Canada, 28 September 1970, p. 238, paragraph 58. <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/bird1970-part3-eng.pdf>

although, four out of nine judges of the Supreme Court of Canada agreed with Lavell and Bedard.<sup>3</sup> The decision became notorious, and was used as an example of why protections for 'equality before the law' and 'equal protection of the law' were insufficient without guarantees of 'equality under the law' and 'equal benefit of the law' - guarantees which were subsequently included in the *Canadian Charter of Rights and Freedoms* section 15 guarantee of equality.

- In 1978, the Government of Canada issued a report prepared for the Department of Indian Affairs and Northern Development, entitled *Indian Act Discrimination Against Sex*, acknowledging the sex discrimination against Indian women in the “marrying out” rule and other provisions of the *Indian Act*.
- In the late 1970s, Sandra Lovelace from the Tobique First Nation in New Brunswick, challenged the discriminatory marrying out rule in a petition to the UN Human Rights Committee. In its 1981 decision, *Lovelace v Canada*, the Committee found that the loss of Indian women’s status pursuant to section 12(1)(b) of the 1951 *Indian Act* violated the right to the enjoyment of cultural life under the *International Covenant on Civil and Political Rights*.
- In 1985, the Government of Canada enacted Bill C-31,<sup>4</sup> both in response to *Lovelace* and because of the introduction of Canada’s new constitutional equality rights guarantee, section 15 of the *Canadian Charter of Rights and Freedoms*. The promise made by the Government of Canada was to eliminate all of the sex discrimination.<sup>5</sup> Instead, Bill C-31 removed some of the sex discrimination and carried forward the rest.

Bill C-31 did not remove the male-female hierarchy that is intrinsic to the legislative scheme. In fact, it entrenched inequality by creating the category of 6(1)(a) for all those (mostly male) Indians and their descendants who already had full status prior to April 17, 1985, and the lesser category of 6(1)(c) for women whose status had been denied, or whose status had been removed because of marriage to a non-Indian. The women were considered “re-instated”, and were re-instated to a lesser category of status. Their ability to transmit full Indian status to their children was restricted by their 6(1)(c) status.

For the first time, Bill C-31 introduced a two-parent rule, but delayed its application to those born prior to April 17, 1985 who had 6(1)(a) status for two generations; the two-parent rule applied to 6(1)(c) women after one generation. In other words, the “re-instated” women could pass status to their children, but not to their grandchildren, while their male

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<sup>3</sup> *Canada (AG) v Lavell*, [1974] SCR 1349.

<sup>4</sup> Bill C-31, *An Act to Amend the Indian Act*, SC 1985, c 27. Bill C-31 was enacted as *Indian Act*, RSC 1985, c 1-5.

<sup>5</sup> *Minutes of Proceedings and Evidence of the Standing Committee on Legal and Constitutional Affairs*, 33rd Parl, 1st Sess (7 March 1985) at 12:7–12:9 (David Crombie, Minister of Indian Affairs and Northern Development).

counterparts could pass status to all their descendants born prior to April 17, 1985. The children of 6(1)(c) women were consigned to inferior 6(2) status, which is non-transmissible.

- Consigning women to 6(1)(c) status has devalued them, treated them as lesser parents, and denied them the legitimacy and social standing associated with full s. 6(1)(a) status. Throughout the years, the so-called "Bill C-31 women" have been treated as though they are not truly Indian, or 'not Indian enough,' less entitled to benefits and housing, and obliged to fight continually for recognition by male Indigenous leadership, their families, communities, and broader society. In many communities, registration under section 6(1)(c) is worn by Indian women like a 'scarlet letter' – a declaration to other community members that they are lesser Indians. As a result, many women have faced painful forms of discrimination as they are branded as 'traitors' for having married out – a burden their male counterparts do not carry under the section 6(1)(a) category. Similarly, the 6(2) status which was given to the children of "Bill C-31 women" is a lesser form of Indian status, and it tells the community that these are the children of Indian women who married out, or who had children out of wedlock. The profound hurt that has been caused and the injustice that has been suffered by the women who are often referred to pejoratively as "6(1)(c) women" or "Bill C-31 women" has been neither recognized nor remedied.

Many legal cases since then have attempted to unwind this discriminatory hierarchy and its effects, but the Government of Canada since 1985 has made only piecemeal reforms - never completely eliminating the gender discrimination.

- In 1991, the Manitoba Aboriginal Justice Inquiry which examined racism and violence against Indigenous peoples, recommended that "The Indian Act be amended to eliminate all continuing forms of discrimination, regarding the children of Indian women who regain their status under Bill C-31."<sup>6</sup> In 1996, the Royal Commission on Indigenous Peoples also criticized the 1985 *Indian Act's* continuation of sex discrimination.<sup>7</sup>
- At periodic reviews of Canada between 2003 and 2008, various UN human rights treaty bodies, including the Human Rights Committee,<sup>8</sup> the Committee on Economic, Social and Cultural Rights,<sup>9</sup> the Committee on the Elimination of Racial Discrimination,<sup>10</sup> and the Committee on the

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<sup>6</sup> Report of the Manitoba Aboriginal Justice Inquiry, Appendix I Recommendations, Indian Act, online: <http://www.ajic.mb.ca/volumel/recommendations.html#The%20Indian%20Act>

<sup>7</sup> *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996), pp. 20 - 50, Volume 4, Chapter 2.

<sup>8</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee*, CCPROR, 85th Sess, UN Doc C/CAN/CO/5 (2006).

<sup>9</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UNGAOR, 36th Sess, UN Doc E/C.12/CAN/CO/5 (2006).

<sup>10</sup> Committee on the Elimination of Racial Discrimination (CERD) CERD/C/CAN/CO/8, 25 May 2007, para. 15

Elimination of Discrimination against Women,<sup>11</sup> criticized Canada for its continuing discrimination against Indigenous women.

- In 1994 Sharon McIvor launched her constitutional sex equality challenge, which was preceded by nearly a decade of unsuccessful litigation and administrative efforts involving the Registrar of Indian and Northern Affairs who has sole jurisdiction over the determination of who is and is not an Indian under the *Indian Act*.
- After more than twenty years of litigation in *McIvor v Canada* (Registrar of Indian and Northern Affairs Canada), and findings of sex discrimination by two levels of court,<sup>12</sup> in 2010 the government passed Bill C-3, *Gender Equity in Indian Registration Act*.<sup>13</sup>
- On the government's count, Bill C-3 restored status entitlement to approximately 45,000 individuals.<sup>14</sup> On the one hand, this was an important step. On the other hand, the reforms, once again, were piecemeal. At the same time as removing the bar to some 6(1)(c) women transmitting status to their grandchildren (albeit in limited form), the Government of Canada re-enacted the 6(1)(a) - 6(1)(c) hierarchy, thereby failing to remove all the limitations on acquiring and transmitting status for Indian women and their descendants. The effect of maintaining the 6(1)(a) - 6(1)(c) hierarchy is that, to this day, Indian women and their descendants are still being denied equal status with Indian men and their descendants because the scheme treats the female line as inferior and affords their descendants lesser or no status. Indian women, like Sharon McIvor, Lillian Dyck and Sandra Lovelace-Nicholas can never have full 6(1)(a) Indian status like their male counterparts.
- Since Bill C-3 was passed in 2010, three complaints and constitutional challenges to post-*McIvor* sex discrimination have been before the Canadian Human Rights Tribunal and the courts: *Matson v. Canada (Indian Affairs and Northern Development)*,<sup>15</sup> *Lynn Gehl v. Attorney General of Canada*,<sup>16</sup> and *Descheneaux c. Canada (Procureur General)*.<sup>17</sup> To date, the effects of the sex discrimination complained of in these cases stands uncorrected. This ongoing sex discrimination signals to all concerned that

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<sup>11</sup> Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, CEDAWOR, 42nd Sess, UN Doc C/CAN/CO/7 (2008); CEDAW, *Report of the Committee on the Elimination of Discrimination against Women*, UNGAOR, 58th Sess, Supp no 38, UN Doc A/58/38 (2003).

<sup>12</sup> *McIvor v. Canada* (Registrar of Indian and Northern Affairs), 2009 BCCA 153; *McIvor v. Canada* (Registrar, Indian and Northern Affairs) 2007 BCSC 827.

<sup>13</sup> Bill C-3, *Gender Equity in Indian Registration Act*, 3rd Sess, 40th Parl, 2010 (received royal assent on 15 December 2010); *Gender Equity in Indian Registration Act*, SC 2010, c 18.

<sup>14</sup> Indigenous and Northern Affairs Canada, "Registration Process for Bill C-3 Applicants", Government of Canada <[www.aadnc-aandc.gc.ca](http://www.aadnc-aandc.gc.ca)>

<sup>15</sup> *Matson v. Canada* (Indian Affairs and Northern Development), [2013] C.H.R.T. No. 13; *Canada (Canadian Human Rights Commission) v. Canada* (Indian and Northern Affairs) [2015] F.C.J. No. 400.

<sup>16</sup> *Lynn Gehl v. Attorney General of Canada*, 2015 ONSC 3481 (CanLII).

<sup>17</sup> *Descheneaux c. Canada* (Procureur Général), 2015 QCCS 3555.

Indigenous women and their descendants are not equal and less worthy.<sup>18</sup>

### **Bill S-3 Timeline**

- In August 2015, the Quebec Superior Court ruled in *Descheneaux c. Canada (Procureur General)*<sup>19</sup> that the registration provisions of the *Indian Act* unjustifiably violate s. 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) because they deny status to Stéphane Descheneaux and his children on the basis of the sex of his forebears. Descheneaux was unable to transmit his Indian status to his three daughters because his status came through his Indian grandmother, who lost her status when she married a non-Indian man. Had his Indian grandparent been a man, he would have been able to keep his status, as well as being able to pass it on to his wife, their children and grandchildren. The Court declared subsections 6(1)(a), (c) and (f) and subsection 6(2) of the *Indian Act* to be invalid, but suspended the effect of its declaration for 18 months – until 3 February 2017 – to allow Parliament to make necessary legislative amendments.

In her reasons for judgment in *Descheneaux*, Madam Justice Masse criticized Canada for not passing legislation to remove all the discrimination in the *Indian Act*, and commented adversely on Canada's practice of passing only limited legislative relief after a successful court challenge and leaving the remaining discrimination in the act until the next court challenge was successful.<sup>20</sup>

- On February 22, 2016, the newly-elected Liberal Government led by Prime Minister Justin Trudeau, announced that it had withdrawn the Government of Canada's appeal of the Superior Court's decision in *Descheneaux*, and would develop new legislation.
- On 28 July 2016, the Minister of Indigenous and Northern Affairs, Carolyn Bennett, announced a two-staged approach that would (1) eliminate sex-based inequities in Indian registration and (2) begin a collaborative process with First Nations and other Indigenous groups on broader issues related to Indian registration and band membership. The first phase would involve the development of legislation to cure the discrimination identified in *Descheneaux*, and eliminate "all known sex discrimination." The second phase would involve in-depth consultation on: other distinctions in Indian registration; issues relating to adoption;

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<sup>18</sup> With permission, this history is drawn from PETITIONER OBSERVATIONS IN RESPONSE TO CANADA'S REQUEST FOR SUSPENSION OF THE COMMITTEE'S CONSIDERATION OF THE PETITION OF SHARON MCIVOR AND JACOB GRISMER, Communication No. 2020/2010 (UN Human Rights Committee), submitted by Gwen Brodsky, June 20, 2016, online: <https://povertyandhumanrights.org/wp-content/uploads/2016/06/Mcivor-Petitioners-Objection-to-Suspension-Request.pdf>

<sup>19</sup> Supra, note 24. *Descheneaux c. Canada* (Procureur Général), 2015 QCCS 3555.

<sup>20</sup> Ibid, at paras 235-243.

the 1951 cut-off date for eligibility to registration specific to Bill C-3; the second-generation cut-off; unstated/unknown paternity; cross-border issues; voluntary de-registration; the continued federal role in determining Indian and band membership under the *Indian Act*; and First Nations authorities to determine membership under the *Indian Act*.<sup>21</sup>

- On 25 October 2016, Bill S-3, *An act to amend the Indian Act (elimination of sex-based inequities in registration)* was introduced in the Senate.<sup>22</sup> Bill S-3 proposed to address the particular sex-based inequities identified in *Descheneaux*, and three scenarios in particular: 1) the differential treatment in the acquisition and transmission of Indian status that arises between first cousins of the same family, depending on the sex of their Indian grandparents in situations where the grandparent was married to a non-Indian prior to 1985; 2) the differential ability to transmit status of male and female children born out of wedlock between 1951 and 1985; and 3) the ineligibility for status of the minor children of Indian mothers who lost their status, along with her, if she married a non-Indian man after their birth. Bill C-31 restored Indian status to women and their children in this situation, but it did not make eligible the children of the reinstated minor child.<sup>23</sup>

Bill S-3 proposed to address these inequities by creating new categories of s. 6(1)(c) Indians, while leaving the 6(1)(a) - 6(1)(c) hierarchy firmly in place. If, prior to 1985, the female Indian ancestors in these scenarios had been treated in the same way that their male counterparts were treated with respect to entitlement to, and transmission of, status, or had they been reinstated in 1985 to 6(1)(a) status instead of 6(1)(c) status, this discrimination would never have occurred.

Bill S-3, without the Senate's amendment, perpetuates discrimination against Indigenous women and their descendants. In particular, Bill S-3 does not address the sex-based exclusion of descendants of Indian women born prior to April 4, 1951, nor does it address the fact that the scheme only grants non-transmissible s. 6(2) status to some female-line descendants born prior to April 17, 1985, whereas no descendants of 6(1)(a) Indians born prior to April 17, 1985 are subject to the 6(2) cut-off. Further, Bill S-3 does not address the fact that Indian women and their descendants do not enjoy all the intangible benefits of status on a basis of equality with their peers because the scheme denies them the

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<sup>21</sup> Government of Canada's Response to the Descheneaux Decision, online: <https://www.aadnc-aandc.gc.ca/eng/1467227680166/1467227697623#chp5>

<sup>22</sup> SENATE OF CANADA, SÉNAT DU CANADA, BILL S-3 PROJET DE LOI S-3, An Act to amend the Indian Act (elimination of sex-based inequities in registration) First Reading, October 25, 2016, online: [http://www.parl.ca/Content/Bills/421/Government/S-3/S-3\\_1/S-3\\_1.PDF](http://www.parl.ca/Content/Bills/421/Government/S-3/S-3_1/S-3_1.PDF).

<sup>23</sup> Indigenous and Northern Affairs Canada, Plain Text Description of Bill S-3, An Act to amend the Indian Act (elimination of sex-based inequities in registration), online: <https://www.aadnc-aandc.gc.ca/eng/1478177979520/1478178031024>

legitimacy, social standing and full equality associated with full 6(1)(a) status.

- On December 13, 2016, the Senate Committee on Aboriginal Peoples, after holding hearings on Bill S-3, sent a letter to the Minister of Indigenous and Northern Affairs recommending that the Government seek an extension from the Court. The Senate Committee noted that the majority of witnesses testified that Bill S-3 would not remove all the sex-based discrimination from the *Indian Act*, and urged the government to seek an extension and come back with amendments to S-3 or a new bill "that achieves the stated goal of eliminating all gender-based inequities."
- On 20 January 2017, in response to a request by the Attorney General of Canada, the Quebec Superior Court agreed to extend the suspension of the declaration of invalidity in *Descheneaux* for an additional 5 months, until 3 July 2017.
- In the interim, on April 20, 2017, the Ontario Court of Appeal handed down its decision in the case of *Gehl v. Canada (Attorney General)*.<sup>24</sup> Gehl challenged the Indian Registrar's policy to give lesser or no status to the children of Indian women who would not, or could not, name the father (because of rape, incest, father's denial of paternity, or other reasons). This is known as the 'Unstated Paternity' policy which targets Indian women and their children. The Ontario Court of Appeal ruled that, on the evidence, the Registrar's decision to deny status to Lynn Gehl because the Indian status of her grandfather was 'unstated or unknown' was unreasonable.
- On 9 May 2017 the Senate resumed consideration of Bill S-3. The Government of Canada tabled a revised Bill S-3 in the Senate which clarified wording in some sections, and added a section to address the unknown or unstated paternity issue. The Government's 2017 version of Bill S-3 still did not remove all the sex discrimination, and once more re-enacted the sex-based 6(1)(a) - 6(1)(c) hierarchy.
- On May 10, 2017 Senator McPhedran introduced an amendment to Bill S-3 [the '6(1)(a) all the way' amendment] which would have the effect of collapsing the 6(1)(a) - 6(1)(c) hierarchy and entitling Indian women and their descendants born before April 17, 1985 to full 6(1)(a) status on the same footing as Indian men and their descendants. This amendment was adopted by the Senate Standing Committee on Aboriginal Peoples (APPA Committee).
- On June 1, 2017, Bill S-3 as amended by Senator McPhedran was passed by the full Senate.

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<sup>24</sup> *Gehl v. Canada (Attorney General)*, 2017 ONCA 319.

- Bill S-3, with the new Senate '6(1)(a) all the way' amendment, was referred to the House of Commons Committee on Indigenous and Northern Affairs, whose members voted on June 15, 2017 to remove the Senate's gender equality amendment and pass Bill S-3 in its unamended form.<sup>25</sup>
- On June 21, 2017 (National Aboriginal Day in Canada), the House of Commons, in which the party of the Government has a strong majority, rejected Bill S-3 with the Senate's amendment,<sup>26</sup> and also adjourned for the summer until September 18, 2017. Because the Bill was re-amended by the House of Commons, Bill S-3 has to return to the Senate for re-consideration, as the House of Commons and the Senate must agree before a legislative bill can become law. However, on June 22, 2017, the Senate also adjourned for the summer recess, without having considered and voted on the re-amended Bill.
- On June 26, 2017, the Government asked the Quebec Superior Court to extend the suspended declaration of invalidity again. The Court rejected the motion, and the Government appealed the Court's decision to the Quebec Court of Appeal. On August 18, 2017, the Quebec Court of Appeal allowed the appeal and extended the suspension of the declaration of invalidity to December 22, 2017.<sup>27</sup>
- It is expected that the Senate will consider Bill S-3, as re-amended by the House of Commons, in the fall 2017 session.

## **Explanations Provided by the Government of Canada for its Refusal to Eliminate the Sex Discrimination<sup>28</sup>**

<sup>25</sup> House of Commons Standing Committee on Indigenous and Northern Affairs, Minutes of Proceedings, June 15, 2017, online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/INAN/meeting-65/minutes>

<sup>26</sup> Parliament of Canada, Legisinfo, Bill S-3, online: <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8532485&View=0>

<sup>27</sup> *Descheneaux v. Canada (Attorney General)*, 2017 QCCA 1238.

<sup>28</sup> See: The Globe and Mail, "Senators amend legislation aimed at removing sexism from Indian Act", May 24, 2017, online: <https://beta.theglobeandmail.com/news/politics/senators-amend-legislation-aimed-at-removing-sexism-from-indian-act/article35110342/?ref=http://www.theglobeandmail.com&>; The Globe and Mail, "Bennett urges MPs to kill Senate amendment that aims to take sexism out of the Indian Act", June 8, 2017, online: <https://beta.theglobeandmail.com/news/politics/bennett-urges-mps-to-kill-senate-amendment-that-would-take-sexism-out-of-the-indian-act/article35256574/?ref=http://www.theglobeandmail.com&>. These explanations can also be found in the Proceedings of the Senate Standing Committee on Aboriginal Peoples and the House of Commons Standing Committee on Indigenous and Northern Affairs: Proceedings of the Senate Standing Committee on Aboriginal Peoples, Issue 13, Evidence, November 22, 2016, online: <https://sencanada.ca/en/Content/SEN/Committee/421/appa/13ev-52913-e>; Proceedings of the Standing Committee on Aboriginal Peoples, Issue 14, Evidence, November 30, 2016, online: <https://sencanada.ca/en/Content/SEN/Committee/421/appa/14ev-52958-e>; Proceedings of the Standing Committee on Aboriginal Peoples, Issue 21, Evidence, May 21, 2017, online: <https://sencanada.ca/en/Content/SEN/Committee/421/appa/21ev-53295-e>; Meeting of the House of Commons Standing Committee on Indigenous and Northern Affairs, June 8, 2017, online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/INAN/meeting-62/evidence>.

Throughout the course of the deliberations on Bill S-3, representatives of Indigenous and Northern Affairs and Justice have provided the following unpersuasive explanations for the fact that Bill S-3 does not eliminate all the sex discrimination from the registration provisions of the *Indian Act*.<sup>29</sup>

- **The Government must consult those affected.** As advocates for Indigenous women, we fully support and expect governments to comply with their duty to consult Indigenous peoples when decisions affecting them are being considered.<sup>30</sup> However, we do not support governments using the duty to consult as an excuse for delaying the implementation of rights. The duty to consult is intended to facilitate the fulfillment of human rights, not to serve as an obstacle or delaying tactic.

The Government of Canada has been consulting about whether it should eliminate the sex discrimination from the *Indian Act* since the 1970s.<sup>31</sup> The most recent consultation on this subject was conducted only 7 years ago after the former Prime Minister Stephen Harper's Conservative Government introduced Bill C-3. At that time, many rejected the need for further consultation, and supported removing the discrimination completely. For example, B.C. First Nations, who are more than three hundred of approximately 600 Bands in Canada, rejected the need for any further consultation and one of the signatories of the BC consultation report was then BC representative of the Assembly of First Nations, Jody Wilson-Raybould, now Canada's Attorney General and Minister of Justice.<sup>32</sup>

Sharon McIvor, the plaintiff in *McIvor v. Canada*, has noted on many occasions that no government can legitimately consult about *whether* it will continue to discriminate based on sex.<sup>33</sup> The Government of Canada is obliged by the Canadian Constitution, by statute, and by international human rights treaties and agreements, not to discriminate based on sex; nothing anyone says during a consultation process can change this obligation. Specifically, section 35(4) of the *Constitution Act, 1982*, guarantees all Aboriginal and treaty rights equally to male and female persons. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees equality between male and female persons – the same standard being used in the court cases challenging the *Indian Act*. Federal and provincial human rights legislation prohibit discrimination on the basis of sex/gender and race. Article 44 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) specifically guarantees all the

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<sup>29</sup> See BC Coalition on Missing and Murdered Indigenous Women and Girls, letter to Prime Minister Trudeau, September 1, 2017. Explanations given by Government of Canada are set out in the BC Coalition letter.

<sup>30</sup> United Nations Declaration on the Rights of Indigenous Peoples, Resolution adopted by the General Assembly 61/295, Article 19.

<sup>31</sup> Research of Mary Eberts, in the possession of FAFIA.

<sup>32</sup> 2010 Consensus Agreement – Collective support for amendments to Bill C-3 (*Gender Equity in Indian Registration Act*), Union of B.C. Indian Chiefs, First Nations Summit, B.C. Assembly of First Nations.

<sup>33</sup> McIvor letters to APPA Committee, attached.

rights and freedoms contained therein equally to male and female Indigenous persons. There is no domestic or international law which permits ongoing gender discrimination against Indian women and their descendants – regardless of what the governments may or may not have heard during decades of consultations.

Ms. McIvor has also pointed out that status and band membership have been separated in the *Indian Act* and that status is a relationship between individual Indigenous persons and the federal government. The Government of Canada can remove sex discrimination from the status provisions; it can then legitimately consult Bands and others about resources and services needed to ensure that communities can include new members, and about how they wish to deal with their own membership issues, as they are already entitled to do.

- **The '6(1)(a) all the way amendment' would entitle 80, 000 to 2 million more Indian women and their descendants to Indian status.** Senator Murray Sinclair called this explanation 'fear-mongering', as the numbers given by Minister Bennett and INAC officials were not backed up with by factual scenarios, and appeared to be introduced in order to make the Indigenous women's claim for justice appear just too overwhelming to be dealt with. Such unsubstantiated statements serve no helpful purpose; instead they are intended to cause divisions in and amongst communities. This fear-mongering is a practice of the past that does not belong in a Nation-to-Nation relationship based on respect for Indigenous rights, including the rights of Indian women and children.

However, FAFIA is also concerned that the underlying assumption is that 80,000 to 2 million more Indians would be bad. The Report of the Truth and Reconciliation Commission noted that Canada's treatment of Indigenous peoples amounted to not only cultural genocide, but also physical and biological genocide.<sup>34</sup> Canada's attempts to eliminate or assimilate Indians have targeted Indian women in many ways, including forced sterilizations to reduce population numbers, or the theft of their children into residential schools where thousands died, or the theft of thousands of their children from Indigenous mothers to white families. Sex discrimination in the *Indian Act* is another example of Canada's targeted tools of assimilation, used by the Government of Canada to define Indians out of existence through discriminatory treatment of matrilineal descent, and discrimination against Indian women, but not Indian men, who "married out."

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<sup>34</sup> Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future*, Executive Summary, at 1, online: [http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec\\_Summary\\_2015\\_05\\_31\\_web\\_o.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf)

This raises obvious questions: is the Government of Canada concerned about money that would be needed to support benefits for newly entitled Indians or about expanding the pool of those to whom it has a fiduciary duty? Does the Government of Canada, in fact, not want more Indians, and will it only accept those Indian women and their descendants whom it is forced to accept, bit by bit, by a continuing stream of litigants who are suing in courts and tribunals to obtain their rightful entitlement?

Over the summer, INAC contracted with Stewart Clatworthy, a demographic expert, to provide a more scientific estimate of the numbers of Indian women and their descendants who would be newly entitled to status if the '6(1)(a) all the way' amendment was adopted. No results of this research have been made public. However, whatever Mr. Clatworthy's estimates reveal, FAFIA submits that 'the numbers are too great' can never be a justification for continuing sex discrimination.

- **Bill S-3 unamended is Charter compliant and the Government is not required to do anything further.**

This claim, that the unamended version of Bill S-3 is *Charter* compliant, relies on Justice Harvey Groberman's 2009 decision in the B.C. Court of Appeal in *McIvor v. Canada*. Justice Groberman wrote that the 6(1)(a) - 6(1)(c) hierarchy contravened section 15 of the *Charter* but could be justified, in part, under section 1 as a reasonable limit on the equality rights of Indigenous women because it preserves the acquired rights of the male line. Notwithstanding the Court of Appeal decision, this acquired rights defence is not consistent with Canada's international human rights obligations, including those articulated in the *American Declaration on the Rights of Man* and the *Charter* of the Organization of American States. The claim that the Government of Canada relies on is, in essence, that since Indian men and their descendants had preferred status because of their sex from as early as 1876, that sex-based privilege should be continued, even though extending the same rights to Indian women and their descendants would take away nothing from the Indian men and their descendants. In other words, the gender discrimination itself is used as the basis to justify ongoing gender discrimination. This analysis holds in place the assimilationist policy of the past. The Government of Canada should be moving past this policy, in order to undo the decades of discrimination which the 6(1)(a) - 6(1)(c) hierarchy has caused, not clinging to it.

**The *Indian Act* is a colonial law and the Government of Canada wishes to move forward quickly to replace it.** Given the complex nature of the *Indian Act* and the many other Acts, regulations, modern treaties, self-government agreements and other legal agreements tied to various provisions of the *Indian Act* – it will not be repealed in the near future. As long as the *Indian*

*Act* is in place, be it one year or twenty, the *Act* cannot discriminate on the basis of sex. Further, if the *Indian Act* is replaced before eliminating the sex discrimination, the sex discrimination and injustice to Indian women and their descendants will be incorporated into any post-*Indian Act* regime – including self-government agreements, modern treaties, land claim settlements and other related social, cultural and political organizations.

The Government of Canada has provided no reasonable justification for continuing the sex discrimination in the *Indian Act* registration provisions, and for re-enacting the s. 6(1)(a) - 6(1)(c) hierarchy, as Bill S-3 does.

### **Recent Recommendations from United Nations Treaty Bodies**

On March 6, 2015 the UN Committee on the Elimination of Discrimination against Women released a report on its Article 8 inquiry into missing and murdered women in Canada.<sup>35</sup> The CEDAW Committee made the same finding as the IACHR, and recommended that Canada:

amend the Indian Act to eliminate discrimination against women with respect to the transmission of Indian status, and in particular to ensure that [Indigenous] women enjoy the same rights as men to transmit status to children and grandchildren, regardless of whether their [Indigenous] ancestor is a woman, and remove administrative impediments to ensure effective registration as a Status Indian for [Indigenous] women and their children, regardless of whether or not the father has recognized the child.<sup>36</sup>

Similarly, the UN Human Rights Committee, following the 2015 periodic review of Canada, urged Canada to “remove all remaining discriminatory effects of the Indian Act that affect indigenous women and their descendants, so that they enjoy all rights on an equal footing with men.”<sup>37</sup>

In addition, Canada has been urged at periodic reviews of Canada in 2016 by the CEDAW Committee and the Committee on Economic, Social and Cultural Rights, and through the 2013 Universal Periodic Review Process of the Human Rights Council to eliminate any remaining sex discrimination from the *Indian Act* registration provisions.<sup>38</sup>

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<sup>35</sup> CEDAW, Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women Committee on the Elimination of Discrimination against Women, CAN/CEDAW/C/O P.8/CAN/1 (2015),

<sup>36</sup> Ibid. at para 219(e).

<sup>37</sup> United Nations Human Rights Committee, Concluding Observations of the Human Rights Committee, CCPR, 114th Sess, UNDOC C/CAN/CO/7 (2015), at paras 17 - 18.

<sup>38</sup> See, for example, CEDAW/C/CAN/CO/8-9, 18 November 2016, para. 13; E/C.12/CAN/CO/6, 23 March 2016, para 22 (b); Report of the Working Group on the Universal Periodic Review, Canada, A/HRC/24/11, 28 June 2013, para 128.59.

There are also two outstanding petitions with United Nations treaty bodies seeking a remedy for the sex discrimination in the registration provisions of the *Indian Act*, which has not been available through Canada's domestic laws: the Petition of Sharon McIvor and Jacob Grismer to the United Nations Human Rights Committee,<sup>39</sup> and the Petition of Jeremy Matson to the Committee on the Elimination of Discrimination against Women.<sup>40</sup> The Government of Canada has made repeated requests for delay of the adjudication of these petitions, ostensibly because there is legislative reform process in play. At the same time, the Government of Canada has blocked efforts to ensure that the legislative process actually eliminates all the sex discrimination that is complained of.

## Conclusion

There is no valid justification for waiting any longer to eliminate the sex discrimination from the *Indian Act*. It can and should have been eliminated by now, and no credible reasons have been, or can be, given for delay in 2017. This discrimination is 150 years old, and the rights of Indigenous women need to be finally recognized and fulfilled by Canada. The only entity that benefits from continued discrimination is the Government of Canada which – through its denial of status to descendants – does not have to provide critical programs and services, and does not have to make annual treaty payments or per capita payments related to land claims. This is an unjust enrichment on Canada's part, which is not penalized for ongoing discrimination, but instead legislatively insulates itself from liability for this discrimination in both Bills C-3 and S-3.<sup>41</sup> Even a finding of discrimination will not entitle any of the women or their descendants to compensation for their damages. In other words, there is no disincentive, no deterrence for Canada to stop discrimination where there is no penalty for doing so. All of the Government's rationales, including prolonged consultations, allow it to continue discrimination with complete impunity – a concept repugnant to the law of human rights.

## The Current Situation

Because it is expected that the Government of Canada will press the Senate to pass Bill S-3 without the Senate's '6(1)(a) all the way' amendment before December 15, 2017, this is a pivotal moment.

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<sup>39</sup> SHARON MCIVOR AND JACOB GRISMER v. CANADA, COMMUNICATION SUBMITTED FOR CONSIDERATION UNDER THE FIRST OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, November 24, 2011, online: <https://povertyandhumanrights.org/wp-content/uploads/2011/08/McIvorApplicantsPetition1.pdf>

<sup>40</sup> Communication of Jeremy Matson to the Committee on the Elimination of Discrimination against Women, Communication No. 68/2014.

<sup>41</sup> Bill C-3, *Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs)* (assented to December 15, 2010), at s.9, online: <http://www.parl.ca/DocumentViewer/en/40-3/bill/C-3/royal-assent/page-30#2>; BILL S-3, PROJET DE LOI S-3, An Act to amend the Indian Act (elimination of sex-based inequities in registration) First Reading, October 25, 2016, at s. 8.

Bill S-3 in its present form perpetuates discrimination against Indigenous women and their descendants. Bill S-3:

- perpetuates the sex-based exclusion of descendants of status females born prior to September 4, 1951;
- perpetuates the sex-based exclusion of descendants on the female line who are affected by premature application of the two-parent rule;
- perpetuates the denigration and stigmatization of Indian women and their descendants by withholding from them the legitimacy and social standing associated with full 6(1)(a) status, and restricting their ability to transmit status to their descendants.

The Canadian Feminist Alliance urges the Government of Canada, all Members of Parliament and Senators to support the Senate's 6(1)(a) all the way amendment, and to fully remove the sex discrimination from the registration provisions of the *Indian Act* in 2017.