The Honourable Senator Lillian E. Dyck,
Chair, Senate Committee on Aboriginal Peoples

The Honourable Senator Dennis Patterson
Deputy Chair, Senate Committee on Aboriginal Peoples

Members of the Standing Committee on Aboriginal Peoples

May 5, 2017

Dear Senators,

Further to our letter of April 18, 2017, I am writing to share information I obtained from Martin Riehr, Assistant Deputy Minister, Indigenous and Northern Affairs, Resolution and Individual Affairs, and Candice St. Aubin, Executive Director, New Service Offerings, Individual Affairs Branch, Indigenous and Northern Affairs at our meeting with them on April 26, 2017 in Toronto. The meeting was also attended by Gwen Brodsky, one of Canada's leading constitutional equality rights litigators and my counsel in *McIvor v. Canada*, and Shelagh Day, Chair of the Human Rights Committee of the Canadian Feminist Alliance for International Action. They have seen and endorse the contents of this letter.

I wish to inform you of my grave concerns about the current process of consultation, which is termed Phase I of the Indian Act Reform Process, and about the complete inadequacy of Bill S-3.

Background

You will know that since 1989, I have been trying to get equal registration status under the *Indian Act* for myself and my son Jacob Grismer. Despite more than twenty years of litigation and advocacy, I have been unsuccessful. I have managed to improve my status and that of my son, but I have not yet obtained equal registration status with my brother, who has the same parents, and who has full 6(1)(a) status. The only reason for this difference is my female sex. Of course I am not the only Indian woman who experiences this discrimination and I have kept fighting because the dignity and equality of so many Indian women and their descendants are at stake.

Since its inception the *Indian Act* has accorded privilege to male Indians and their descendants, and treated female Indians and their descendants as non-persons, or second-class Indians. In 1906 the *Indian Act* defined an Indian as a male Indian, the wife of a male Indian or the child of a male Indian. Under successive versions of the *Indian Act*, for the most part, Indian women had no independent status or ability to

transmit it to their descendants. There was a one-parent rule for transmitting status and the parent was male. Indian women lost status when they married a non-Indian, while Indian men endowed status on their non-Indian wives.

In 1985, when the Charter equality guarantees were about to come into force, the Government of Canada introduced Bill C-31 to make some amendments. But Bill C-31 did not remove the male-female hierarchy; in fact, it entrenched it by creating the category of 6(1)(a) for male Indians and their descendants who already had full status prior to April 17, 1985 and the lesser 6(1)(c) category for women who had never had status because of the sex discrimination, or who had lost status because of marriage to a non-Indian. They were considered re-instatees. A new two-parent rule for transmitting status was imposed on the female line. This rule applied to the reinstated women immediately, but was delayed for the 6(1)(a) male line. Since 1985, the deeply rooted sex discrimination, and the perpetuation of it by Bill C-31, has spawned a generation of litigation, including *McIvor v. Canada*, *Matson v. Canada, Deschenaux v. AG Canada, and Gehl v. Canada.* None of these cases would have been necessary if Indian women and their descendants had been put on an equal footing with Indian men and their descendants in Bill C-31. Bill C-3, the post-*McIvor* amendment of 2010, and Bill S-3, the proposed post-*Deschenaux* amendment of 2017, address some manifestations of the sex discrimination by piecemeal improvements to the status of particular sub-groups, but they leave the heart of the sex discrimination that is inherent in the 6(1)(a) - 6(1)(c) hierarchy in place. Until this fundamental sex discrimination is removed, costly and time-consuming litigation will be necessary, as more sub-groups identify how the sex discrimination affects them, and challenge it.

Current Deliberations and Concerns

1) Consultations

Your letter of December 13, 2016 to the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, made it explicit that you had two concerns: 1) that there had been insufficient consultation on Bill S-3 and 2) that Bill S-3 does not eliminate all the sex-based inequities in the *Indian Act*. You asked the Minister "to make every effort to ensure that all scenarios of gender-based discrimination are resolved" so that you would be presented "with amendments or a new bill that achieves the stated goal of eliminating all gender-based inequities."

I am sorry to inform you that this request has not been complied with. At our meeting with Mr. Riehr and Ms. St. Aubin, which was a part of the consultation process you requested, it became clear that the consultation process was not an open one. In short, INAC has been consulting groups and individuals about Bill S-3 as it stands, not on amendments, or a new bill, that will remove the sex discrimination from the registration provisions of the *Indian Act*. Frankly, after these consultations, the Senate Committee is in no different position than it was in

December 2016. Considering what I hoped for, and what the Senate Committee requested, I conclude that this consultation process has failed.

2) Substance

Mr. Riehr made it clear that Indigenous and Northern Affairs is not considering, and has no intention to consider in future - i.e. under Phase II - any amendment to Bill S-3, or a new bill, that will place 6(1)(c) female Indians and their descendants on the same footing with respect to status registration as 6(1)(a) male Indians and their descendants. Thus Bill S-3, which is about to be returned to the Senate Committee, will not repair the sex discrimination that is fundamental to the scheme, and no amendments are contemplated by INAC that would do so.

Mr. Riehr also informed us that INAC has not estimated how many Indigenous people might be newly entitled to Indian status if s. 6 (1)(c) women born prior to April 17, 1985 were given s. (6)(1)(a) status, like their male counterparts. I understand that the Senate Committee has now asked INAC for this information, and I look forward to seeing the results.

I believe that there are still thousands of living women and their descendants who are entitled to Indian status, but who are currently denied it because the female sex of their Indian ancestor precludes them from being accorded full s. 6(1)(a) status. As we have said previously, groups of Indian women and their descendants, who are not covered by the ever-expanding sub-categories of s. 6(1)(c) status, will continue to emerge, until such time as the 6(1)(a) - 6(1)(c) hierarchy is completely dismantled. The exclusionary effects of this continuing sex discrimination will be felt by Indian women and their descendants for generations to come.

Mr. Riehr appeared to agree that there are many more women and their descendants who could be entitled to Indian status if Indian women born before April 17, 1985 were granted full 6(1)(a) status like their male counterparts. I say this because Mr. Riehr informed us that INAC is trying to "balance individual and collective rights" and is concerned about the reaction of communities to the potential need to include more Indians.

As I have explained in the past, I take fundamental exception to this argument. Indian bands and communities have no legitimate say in whether the Government of Canada continues to discriminate against me and other Indian women because of our 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.

Further, the women and their descendants who are excluded from Indian status because of sex discrimination have both the individual right to equality and the collective right to be recognized equally as members of their communities, and to participate in promised nation-to-nation talks. If the women and their descendants are not recognized because of continuing sex discrimination, they are robbed of their rights to culture and to participate in decision-making regarding lands and resources. Continuing the sex discrimination means that the pool of Indigenous people with whom the Government of Canada will negotiate a new nation-to-nation relationship will be diminished and distorted by sex discrimination.

Mr. Riehr informed us that INAC's position is that the 6(1)(a) - 6(1)(c) hierarchy is not sex discrimination. This is the position that Canada has taken in response to my petition to the United Nations Human Rights Committee, where Canada contends that it is justified in maintaining the sex-based privilege of male Indians and their descendants because it is entitled to preserve "previously acquired rights."[1] In other words, if male Indians and their descendants were privileged in the past because of their male sex, they are entitled to the continuation of that privilege. Conversely, if I and my descendants were discriminated against in the past because of my female sex, we are consigned to the continuation of that discrimination. Canada maintains this position even though extending equal rights to Indian women and their descendants would take nothing away from Indian men or their descendants. Moreover, Canada is not only preserving "previously acquired rights", Canada is preserving a legislated, sex-based hierarchy of rights, which is indefensible. As long as there is no change in this position, as Senator Sandra Lovelace said in 2010, "Aboriginal women will always be at the bottom of the totem pole."

You will understand that, for me, as a woman who first had no Indian status because my Indian ancestor was female, and then has been categorized as a "6(1)(c) woman" or a "Bill C-31 woman", this is a deeply personal issue. My descendants and I are no less deserving of Indian status than my brother. My brother has the same parents. However, he and his descendants are all 6(1)(a) Indians. If my mother's, and her mother's, status as Indians had been recognized as equal to their male counterparts, I would never have had to go to court to fight for status. I would have been recognized as entitled to status from birth. Further, had I been male, I could have married out, retained my 6(1)(a) status and transmitted that status to my husband, just as my brother who married out is entitled to retain his 6(1)(a) status and transmit it to his wife.

For Canada to say that my being denied 6(1)(a) status is not sex discrimination lacks all credibility. My situation is not any less a matter of sex discrimination even if

[1] Submission of the Government of Canada on the Admissibility and Merits of the Communication to the Human Rights Committee of Sharon McIvor and Jacob Grismer, Communication No. 2020/2010, at paras. 23, 40, 41, 109 - 112, August 22, 2011.

some wish to argue that sex discrimination and marital status discrimination intersect.

The benefits of status are both tangible and intangible. Section 6(1)(c) status is inferior to 6(1)(a) with regard to the tangible ability to transmit status, and will continue to be so under Bill S-3. The further harm of maintaining the 6(1)(a) - 6(1)(c) hierarchy that is intangible, but nonetheless very real, is that it perpetuates the deeply stigmatizing stereotype that Indian women like me are not "real Indians" and are not truly equal. We wrote about this in our letter of April 18, 2017, which is attached here for your information. The damage done by the exclusion of "Bill C-31 women" or "6(1)(c)" women from their communities, and their treatment by their own communities, and by society at large, as though we are outsiders, not entitled, second class Indians, and less than equal human beings, has been, and continues to be, profoundly damaging to Indian women and their descendants for decades, and has been identified as one of the root causes of the crisis of murders and disappearances of Indigenous women and girls.

I have been told by Canada that I receive the same tangible benefits of status as my brother, and that my desire to be granted 6(1)(a) status is merely based on my "personal perception" that s. 6(1)(a) endows greater legitimacy.[2] Canada also claims that if I, and presumably, other similarly situated Indian women, have been treated as having less legitimacy as Indians, that is probably due to the actions of family or community. "It cannot be attributed to government." This is a wholly incredible and dishonourable claim, since the Government of Canada constructed and maintained a legislative scheme that for more than 100 years has assigned Indian women like me to second class status, and still does.

I am dismayed that representatives of the Government of Canada find it hard to understand the profound insult to Indian women and their descendants that is embedded in the s. 6(1)(a) - s. 6(1)(c) status hierarchy. The Government of Canada designed the original patriarchal status scheme in early colonial days and has maintained it ever since by creating the 6(1)(a) "full status" category, and relegating Indian women and their descendants to the separate, and not equal, s. 6(1)(c) category. The refusal to recognize the harms that this status hierarchy has created, and that it perpetuates, despite piecemeal - and only partially successful - efforts to make the tangible benefits of the categories the same, brings to mind the fight for gay men and lesbians over the right to marry.

When gay men and lesbians were fighting for equal marriage laws, they were told that civil registration would provide them with the same tangible benefits as marriage - the rights to inherit property, transfer pension credits, and so on. Why should they care, if the tangible benefits were the same, whether it was called civil

[2] Submission of the Government of Canada on the Admissibility and Merits of the Communication to the Human Rights Committee of Sharon McIvor and Jacob Grismer, Communication No. 2020/2010, at para 110, August 22, 2011.

registration or marriage? But gay men and lesbians were insistent that until they were granted the right to equal marriage, their relationships were not seen as equal, and as worthy of respect as those of their heterosexual counterparts. This is now easy for most Canadians to understand. I am asking that the members of the Senate Committee understand the claim to s. 6(1)(a) status, not only as the way to allow in many thousands who are still excluded because of sex discrimination, but also, in the same way we now understand the claim by gay men and lesbians for the right to equal marriage - as a fundamental claim to be treated as equal persons in dignity and rights.

Canada has a feminist Prime Minister, a commitment to a new nation-to-nation relationship, a 150th birthday, and has just launched a National Inquiry into the hundreds, perhaps thousands, of murders and disappearances of Indigenous women and girls. There will not be another moment like this one.

It is my conclusion from our meeting with Mr. Riehr and Ms. St. Aubin that if the sex discrimination in the *Indian Act* is not dealt with now, it never will be. INAC does not believe it needs to be addressed, and one of the goals of Phase II appears to be to get rid of the registration scheme entirely and devolve determination of issues of status and membership to bands and communities, precluding the possibility of any remedy for the excluded and maltreated Indian women and their descendants.

I conclude that what INAC wishes to do is address the *Deschenaux* discrimination, and then wash its hands of the continuing sex discrimination and the terrible harms it has done, by declaring that it is moving on to a new future of nation-to-nation relationships.

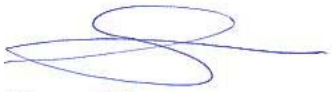
But this is a discriminatory and unpromising start for a new relationship between Canada and Indigenous peoples. What would make a truly promising start to a new nation-to-nation relationship would be a new relationship of equality and respect with Indigenous women and their descendants. That would show that Canada respects Indigenous women as equal members of Canadian society and as equal members of their Indigenous communities and bands, expecting them to fully and equally participate in their nations and in Canadian society. That would be a new day.

Finally, I recommend that the Senate Committee move to amend Bill S-3, or request a new bill, that will ensure that:

Section 6(1)(a) of the *1985 Act* is interpreted so as to entitle to registration under s. 6(1)(a) persons who were previously not entitled to be registered under s. 6(1)(a) as a result of the preferential treatment accorded to Indian men over Indian women born prior to April 17, 1985, including Indian women whose status was removed by s. 12(1)(b) and similar provisions, and to patrilineal descendants over matrilineal descendants, born prior to April 17, 1985.

I look forward to further engagement and discussion with members of the Senate Committee on this subject. Thank you for your attention to these concerns.

Sincerely,



Sharon McIvor