April 18, 2017

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

Dear Senators,

We are writing to you now because we expect that the Government of Canada will re-introduce Bill S-3 in early May 2017 and ask your Committee to consider it again, once more with the ostensible pressure of a court deadline before you. The signatories of this letter testified before the Senate Committee in December 2016 and sent correspondence to the Committee at that time. As you will know from these interventions, we were dismayed that in October 2016 the Government of Canada introduced Bill S-3 to amend the *Indian Act*, because, one more time, it is legislation that does not remove all the sex discrimination in the status registration provisions. Bill S-3 was designed only to cure the discrimination identified by the Quebec Superior Court in *Deschenaux v. AG Canada*, not to remove all remaining sex discrimination.

Now, despite the extension granted by the Quebec Superior Court, and despite your Committee urging the Government "to make every effort to ensure that all scenarios of gender-based discrimination are resolved" so that your Committee would be presented "with amendments or a new bill that achieves the stated goal of eliminating all gender-based inequities," we do not believe that this will happen, or even that Indigenous and Northern Affairs and Justice Canada are making genuine efforts to achieve that goal. As far as we can tell officials are now consulting Indigenous organizations and others on Bill S-3 as it was introduced in October 2016, and on a single amendment brought forward at the time of the Senate Committee hearings by the Indigenous Bar Association, but not on further amendments needed to eliminate all gender-based inequities.

You will know from our testimony and correspondence that we are concerned that the almost fifty years of struggle by Mary Two-Axe Early, Jeanette Corbière Lavell, Yvonne Bedard, Sandra Lovelace and Sharon McIvor (one of the signatories of this letter) to put male and female Indians on the same footing with respect to status and transmission of status, and to end the hierarchy which privileges male Indians and their descendants, has been only partially successful. Canada has repeatedly made piecemeal amendments, which remove some aspects of the sex discrimination but re-enact the bulk of it. We do not believe that in 2017 the Senate should support another piecemeal approach to making amendments to the *Indian Act.*

We note that the Quebec Superior Court has urged Canada - twice now - not to take a narrow approach to new amendments.[1] However, indications are that a re-introduced Bill S-3 will still not remove all the sex discrimination from the *Indian Act*.

We took comfort from explicit assurances made last summer by Canada and Minister Bennett that the Government of Canada intended, not just to cure *Deschenaux*, but to remove "all known sex discrimination" from the *Indian Act*, as part of the first stage of reforms. These assurances were made by Canada to the United Nations Human Rights Committee on June 28, 2016[2] and by Minister Bennett in a public statement issued on July 28, 2016.[3]

We understand, however, from subsequent interactions, and testimony by Minister Bennett at the Senate Committee, that "all known sex discrimination" means not, as we believed, "all sex discrimination" but rather "only that discrimination that has been identified by a court." In other words, the Government of Canada is not willing to remove remaining sex discrimination that has been identified by the Native Women's Association of Canada,[4] Sharon McIvor,[5] the Union of B.C. Indian Chiefs,

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[1] Descheneaux c. Canada (Procureur général), 2015 QCCS 3555, August 3, 2015; Descheneaux v. Canada (Procureur général), 2017 QCCS No. 500-17-048861-093, January 20, 2017, online: <http://povertyandhumanrights.org/2017/03/mcivor-v-canada-2017/>

[2] Second Supplemental Request 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, Revised Submission, 28 June 2016, paras 4 and 17, online: <http://povertyandhumanrights.org/2016/06/mcivor-v-canada-2016/>

[3] "The Government of Canada takes action to eliminate known Sex-Based Discrimination in the Indian Act," July 28, 2016, online: <http://news.gc.ca/web/articleen.do?crtr.sj1D=&crtr.mnthndVl=8&mthd=advSrch&crtr.dpt1D=6680&nid=1105479&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl=2016&crtr.kw=Indian+Act&crtr.dyStrtVl=2&crtr.aud1D=&crtr.mnthStrtVl=7&crtr.page=1&crtr.yrndVl=2016&crtr.dyndVl=1>

[4] Native Women's Association of Canada, *Aboriginal Women's Rights Are Human Rights*, Canadian Human Rights Act Review: A Research Paper, 2000, online: <https://www.nwac.ca/wp-content/uploads/2015/05/2000-NWAC-Aboriginal-Womens-Rights-Are-Human-Rights-Research-Paper.pdf>

[5] *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, 2010, online: http://povertyandhumanrights.org/wp-content/uploads/2011/08/McIvorApplicantsPetition1.pdf

the First Nations Summit and the B.C. Assembly of First Nations,[6] the Standing Committee on Aboriginal Affairs and Northern Development in its Report on Bill C-3 in April 2010,[7] United Nations treaty bodies,[8] and the Inter-American Commission on Human Rights,[9] unless that discrimination has also been identified by a court.

Taking this approach means leaving in place, as was pointed out at the Senate Committee hearings, the sex-based exclusion of descendants of status females born prior to September 4, 1951. Descendants of status males born prior to September 4, 1951 are granted Indian status, but descendants of status females born prior to September 4, 1951 are not. We understand that this discrimination is now being called "date of birth" discrimination by government officials, or not discrimination at all because the B.C. Court of Appeal in *McIvor v. Canada* did not require it to be addressed.

There will continue to be groups like the descendants of females born prior to September 4, 1951, who are excluded from Indian status because of the female sex of their Indian ancestor until the Government of Canada takes the step of removing the sex-based hierarchy between s. 6(1)(a) status and s. 6(1)(c) status that was created by Bill C-31 in 1985.

The effect of this sex-based hierarchy was to 'grandfather' the male privilege that has existed in the *Indian Act* since 1906, preserving for male Indians and the descendants of male Indians the best category of status - 6(1)(a) - and relegating female Indians and their descendants who had lost status, or never been recognized as entitled to status, because of sex discrimination, to the new and second-class category - 6(1)(c) - with only partial rights to transmit status and the stigma of not being "a real Indian."

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[6] Union of B.C. Indian Chiefs, First Nations Summit, and B.C. Assembly of First Nations, Consensus agreement – Collective support for amendments to Bill C-3 (*Gender Equity in Indian Registration Act*).

[7] The amendment to Bill C-3 that was initiated by Todd Russell, M.P., for the Liberal Party in Opposition, adopted by the Standing Committee on Aboriginal Affairs and Northern Development in 2010, and subsequently disallowed by the Speaker of the House, went well beyond the amendments proposed six years later by the Liberal Government in S-3. The 2010 Liberal initiated amendment would have cured the sex discrimination in the registration provisions of the *Indian Act*.

[8] Human Rights Committee, CCPR/C/CAN/CO/6, 13 August 2015, para 17; Committee on the Elimination of Discrimination against Women, CEDAW/C/CAN/CO/8-9, 18 November 2016, para 13.

[9] Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada*, Inter-Am Ct HR OEA/Ser.L/V/II. Doc.30/14, (21 December 2014), [IACHR Report] at paras 7 and 61 - 72, online: OAS <http://www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf>

Bill C-31 was a gesture towards addressing some of the sex discrimination caused by s. 12(1)(b) of the *Indian Act*, which deemed Indian women who "married out" to have lost their status, while Indian men who "married out" endowed status on their non-Indian wives. But it was failed remedial legislation; it removed a sliver of the discrimination and re-enacted the bulk of it. This legislative failure necessitated court cases (*McIvor*; *Deschenaux; Matson*), UN petitions (*McIvor; Matson*) and legislative amendments (Bill C-3; Bill S-3) all of which represent continued attempts to challenge and cure the sex discrimination that has existed since the early days of the 20th century. Bill S-3, as introduced in 2016, adds new sub-categories of s. 6(1)(c), (c.2, c. 3, c.4) thereby extending forms of inferior status to more people. This does not eliminate the sex discrimination. It perpetuates it.

As long as the Government of Canada maintains the 6(1)(a) - 6(1)(c) hierarchy, groups affected by the sex discrimination, like those born prior to September 4, 1951, those identified in *Deschenaux*, and those identified by the Indigenous Bar Association during recent Senate hearings, will continue to appear. The *Indian Act* registration provisions have become complicated by the piecemeal and inadequate attempts to fix the sex discrimination (Bill C-31, Bill C-3, Bill S-3). This means that predicting all the circumstances and relationships in which sex discrimination will play an illegitimate and exclusionary role is difficult. There are only a few scholars, lawyers and officials in Canada who can correctly interpret the current registration provisions. The result is that leaving the sex-based 6(1)(a) - 6(1)(c) hierarchy in place, with all the complications it has caused, consigns those who learn they are affected by it, to undertaking protracted litigation. We believe that this is cruel, costly and unnecessary.

It is past time for Canada to clean up the sex discrimination that affects Indian women and to end the differential treatment of Indian men and Indian women born prior to April 17, 1985, whether married or not, and of matrilineal and patrilineal descendants born prior to April 17, 1985. The way to do this is by entitling the women and their descendants as well as the men and their descendants to full s. 6(1)(a) status. This takes away nothing from male Indians and their descendants; it puts female Indians and their descendants on the same footing, as they should have been all along. Our long-standing question is: why does the Government of Canada refuse this obvious and effective solution to curing the sex discrimination in the registration provisions in the *Indian Act*?

In addition to this being the most effective and reliable cure for the sex discrimination in the *Indian Act*, there is also a dignity issue.

As the *Indian Act* stands now, women like Sharon McIvor can never have s. 6(1)(a) status, even though a brother, with the same parents, can. 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. Sharon McIvor and thousands of other Indigenous women have suffered the indignity of

being denied status entirely and banished from their communities, then being given partial status that did not permit them to transmit the status to their children and grandchildren on an equal footing with their brothers, other male relatives or descendants of male Indians. 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. The Native Women's Association of Canada in its report *Aboriginal Women's Rights Are Human Rights* found that Bill C-31 women and their descendants "are branded as second class", not "real Indians" or "pure Indians", and that these attitudes have been absorbed at the reserve level from the larger society and the "stratification" in the *Indian Act*.[10] In *Corbiere v. Canada*, Justice Claire L' Heureux-Dubé took particular note of the "racism, culture shock, and difficulty maintaining their identity" that Aboriginal women experience when they are separated from their communities by legislation and other circumstances beyond their control.[11] 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. The continuing denial of full s. 6(1)(a) status to these women and their descendants conveys the invidious message that they are still not equal to male Indians and their descendants.

Further, the *Indian Act* sex discrimination that has been a part of Indian women's lives for decades puts them at risk.[12] Treatment as less than equal human beings by the Government of Canada in legislation, and by their own communities as a result, helps to construct Indigenous women as a "population of prey."[13] The dislocation,

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[10] Native Women's Association of Canada, *Aboriginal Women's Rights Are Human Rights*, *supra* note 4, at p. 14.

[11] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, May 20 1999, at para. 72.

[12] The fact that Constance Jacobs was not fully accepted in her own First Nation because she was a Bill C-31 Indian was found by the Honourable Thomas R. Goodson to be a contributing factor to the overwhelming sense of powerlessness and despair felt by Ms. Jacobs. Ms. Jacobs picked up a rifle to try to prevent her children from being apprehended, and was fatally shot by an RCMP Officer along with her nine year old son Ty on March 22, 1998. When Justice Goodson conducted an Inquiry into the shooting deaths, which occurred on the Tsuu T'ina Nation, Alberta, he not only explored the facts of what happened on the day of the deaths, but the social factors which lead to them. The Honourable Thomas R. Goodson, *Report to the Attorney General under the Fatalities Inquiries Act on an Inquiry into the deaths of Constance Brenda Jacobs and Tyundanaikah Jacobs*, Province of Alberta, 15 May 2000, at para. 103, online: <http://www.turtleisland.org/healing/tyandconniejacobs.htm>

[13] Mary Eberts, "Victoria's Secret: How to Make a Population of Prey", *Indivisible: Indigenous Human Rights*, ed. Joyce Green, Fernwood Books, October 2014.

banishment, humiliation, resentment, hostility, stigma and legislated second class status that Indian women and their descendants experience led both the United Nations CEDAW Committee and the Inter-American Commission on Human Rights[14] to conclude that *Indian Act* sex discrimination is a root cause of the violence being experienced by Indigenous women and girls today. It led them to call urgently for change.

This discrimination, and its effects, will not end until the Government of Canada is willing, in legislation, to grant the same full 6(1)(a) status to Indian women and their descendants born before April 17, 1985 that they grant to comparable Indian males and their descendants. Indian women and their descendants are owed the same legitimacy and cultural validation that their male counterparts enjoy.

In her petition to the United Nations Human Rights Committee, Sharon McIvor requested that she be granted full 6(1)(a) status. Canada claims in its response that Ms. McIvor, because of Bill C-3, (*Gender Equity in Registration Act*) receives the same benefits of status as her brother, and her desire to be granted 6(1)(a) status is merely based on her "personal perception" that s. 6(1)(a) endows greater legitimacy.[15] Canada also claims that if Ms. McIvor, 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." Since the Government of Canada constructed and maintained a legislative scheme that for more than 100 years has assigned Indian women to second class status, and still does, this is neither a credible, nor an honourable, claim.

What we anticipate now is a process that we have seen unfold several times before. In 2010 when Bill C-3, the Harper Government's response to *McIvor v. Canada*, was being considered, Parliamentarians were pressed to move quickly and pass an unsatisfactory and incomplete amendment, ostensibly because of a court deadline. This occurred once more in the fall of 2016 when members of the Senate Committee on Aboriginal Peoples were pressed to approve inadequate amendments to meet a February 2017 deadline set by the Quebec Superior Court in *Deschenaux*. We expect this will occur again now that the Government of Canada is trying to meet a new deadline of July 3, 2017.

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[14] Committee on the Elimination of Discrimination against Women, *Report of the Inquiry concerning Canada*, CEDAW/C/OP.8?CAN/1, 30 March 2015; Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women and Girls in British Columbia, Canada,* 21 December 2014.

[15] 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.

The problem is not that there is not enough time. The problem comes when the government of the day puts pressure on Parliamentarians to pass bad legislation using a court deadline as a stick. Eliminating sex-based discrimination is not difficult. It does not require creating ever-more categories of status for groups that were left out because of sex discrimination. As we have stated, the solution is to end the differential treatment of Indian men and Indian women born prior to April 17, 1985, whether married or not, and of matrilineal and patrilineal descendants born prior to April 17, 1985, so that all are entitled to full s. 6(1)(a) status.

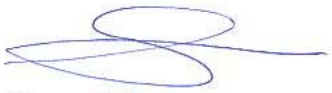
When Bill S-3 is re-introduced, the Government of Canada may claim that it has done what the Senate Committee required by taking time to consult, but it will not have made all efforts to eliminate all the sex discrimination, entirely and finally, as you urged.

Since the Liberal Party made a proposal in the House of Commons in 2010 that would have cured the sex discrimination entirely and finally, it is clear that the Liberal administration knows how to do it. We believe that Indigenous women and girls deserve respect and equality from their Government. The time has come to show it.

We ask you not to support amendments to the *Indian Act* unless they entitle Indian women and their descendants to full 6(1)(a) status and eliminate all sex-based discrimination from the *Indian Act*.

We would be pleased to answer questions or to engage in discussion with you about this matter.

Sincerely,



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