FAFIA-AFAI

Feminist Alliance for International Action

l'Alliance Féministe pour l'Action Internationale

CANADA

Ibrahim Salama, Chief, and CCPR follow-Up Team
Human Rights Treaty Branch
United Nations, Geneva

June 15, 2021

Re: Implementation by Canada of the 11 January 2019 Decision of the Committee concerning the Petition of Sharon McIvor and Jacob Grismer (CCPR/C/124/D/2020/2010)

Dear Mr. Salama,

The Canadian Feminist Alliance for International Action (FAFIA) wishes to provide information to the UN Human Rights Committee for consideration in its Follow-up Process to its decision in *McIvor v. Canada*.

FAFIA is an alliance of over sixty women's organizations. Our mission is to defend the human rights of women in Canada, and to advance women's equality through working to secure the domestic implementation of Canada's international and regional human rights commitments.

Since 2016, FAFIA has worked with a group of First Nations women leaders and organizations to defend the rights of First Nations women and their descendants who, for over 140 years, have been discriminated against by the status provisions of the *Indian Act*. This group first worked to secure the '6(1)(a) all the way amendment' to Bill S-3, which amended the *Indian Act* in 2017. This amendment, first proposed and adopted by the Senate of Canada, was dubbed the '6(1)(a) all the way' amendment because its purpose was to entitle First Nations women to full 6(1)(a) status on the same footing as men.

The Group then worked to persuade the government to bring that amendment into force because it was not promulgated in December 2017 when other provisions of Bill S-3 were. It was finally promulgated on August 15, 2019. Since that time the Group has been working to secure the registration of the estimated 270,000 to 450,000 First Nations women and their descendants who are newly entitled to status.[1] [2]

This group, who, for ease of reference we will call the Indian Act Sex Discrimination Working Group, or just the Working Group, includes Sharon McIvor, who is a member of FAFIA, other First Nations women who have been the plaintiffs in leading cases challenging *Indian Act* sex discrimination over a fifty year period, Canada's leading experts on *Indian Act* sex discrimination, two of Canada's largest First Nations women's organizations – the Ontario Native Women's Association and the Quebec Native Women's Association – and the Union of B.C. Indian Chiefs. More detailed description of the members of the Working Group is provided in Appendix A to this letter.

Since November 2019, the Working Group has met with the Honourable Marc Miller, Minister of Indigenous Services Canada, and the Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations, and their officials, on seven different occasions.[3] Discussions were specifically focused on the implementation

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[1] This is the estimated number of First Nations women and their descendants who are newly entitled to status by the Bill S-3 amendment which came into force on August 15, 2019. This figure, which the Government of Canada accepts, is based on the work of independent demographers and was endorsed by the Parliamentary Budget Officer in his report on Bill S-3. See: Office of the Parliamentary Budget Officer, *Bill S-3: Report on Sex-Based Inequities in Indian Registration*, 5 December 2017, online at: https://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf. It is also the figure cited by Indigenous Services Canada in *The Final Report to Parliament on the Review of S-3*, December 2020, at 3, online at: https://www.sac-isc.gc.ca/eng/1608831631597/1608832913476

[2] When the Government of Canada brought the '6(1)(a) all the way amendment into force on August 15, 2019, it stated that the amendment "is in line with the United Nations Human Rights Committee decision on the claim brought forward by Sharon McIvor and Jacob Grismer" and " could result in between 270,000 and 450,000 individuals being newly entitled ot registration under the Indian Act…" See Crown-Indigenous Relations and Northern Affairs Canada, "Removal of all sex-based inequities in the Indian Act",15 August 2019, online at: https://www.newswire.ca/news-releases/removal-of-all-sex-based-inequities-in-the-indian-act-890690227.html

[3] Meetings with Minister Miller (Indigenous Services Canada - ISC) were held by videoconference on July 23, 2020, September 24, 2020, and April 29, 2021. Meetings with

of Bill S-3 and the urgent need to register the newly entitled First Nations women and their descendants in a timely way, and, in particular, to ensure that First Nations women and their descendants are effectively informed of their new entitlement, have adequate assistance in the registration process, and do not have to deal with unconscionably slow, complex, and erratic procedures.

Members of the Working Group pointed out to Ministers and their officials that until the First Nations women and their descendants are actually registered, the discrimination continues. Until they are actually registered, the women and their descendants continue to be denied status and the benefits that go with it, and therefore continue to be denied equality in law and equal enjoyment of their culture.

According to figures provided to the Working Group by the Honourable Carolyn Bennett, as of March 25, 2021, only 17,500 new Indians have been registered since 2017, when the first provisions of Bill S-3 came into effect.[4] Earlier we had asked for information regarding how many applicants applied or were registered under the August 15, 2019 amendment, which enacts the UN Human Rights Committee's *McIvor* Decision. We were told that the Registrar does "not track whether an applicant is registered under the 2019 amendments vs. the 2017 amendments. They are all tracked as one S-3 workload or inventory."[5]

This means that the number of registrations related to the *McIvor* Decision (the 2019 amendment) is less than 17,500, perhaps much less, since some of the 17,500 will be related to 2017 amendments (resulting from the *Descheneaux* decision in the Quebec Superior Court). In short, the overwhelming majority of First Nations women and their descendants who are now entitled to status have not been registered to date, nor have, despite our repeated requests, any adequate plans been put in place by Canada to ensure that they will be registered in a timely way.

Minister Bennett (Crown Indigenous Relations and Northern Affairs – CIRNA) were held by videoconference on March 29, 2021 and April 7, 2021. Meetings with ISC officials were held by videoconference November 27, 2020 and January 15, 2021.

[4] See Appendix B to FAFIA Letter: Information provided to the Working Group, March 30, 2021, by Chloe Van Bussel, Operations Manager, Office of Minister Bennett, Minister of Crown Indigenous Relations.

[5] See Appendix C to FAFIA Letter: Information provided to the Working Group, October 8, 2020, by Jordano Nudo, Policy Advisor to Minister Miller, Indigenous Service Canada.

Nonetheless, the Government of Canada reported to Parliament on December 11, 2020,[6] and claims, in its Final Report on Review of Bill S-3, that the "sex-based inequities"[7] in the *Indian Act* have been eliminated. FAFIA considers this claim inaccurate for a number of reasons. Below are the highlights of concerns that have been shared with Ministers in meetings and correspondence.

Registration

Until the First Nations women and their descendants are actually registered, the sex discrimination continues. Facial changes to the legislation, without the necessary changes in procedures, protocols, practices and resource allocations that will make registration a reality for the First Nations women and their descendants who have been banished from their communities by sex discrimination, extend only an empty promise of equality.

a) Pro-Active Information Campaign

A pro-active, broad information campaign is necessary to reach First Nations women and their descendants in order to ensure that they know that they may be newly entitled to status. Information provided by Indigenous Services Canada, and what we learn through networks on the ground, indicates that efforts at reaching those who are newly entitled are, so far, minimalist and ineffective. Indigenous Services Canada has provided information about new entitlement to Bands, some national Indigenous organizations, and has posted it on the Indigenous Services Canada website. These are not effective ways to reach the First Nations women and their descendants who are newly entitled, since they are not likely to be connected to Bands or national organizations, and are more likely to be living off reserve. They are most likely to be reachable through grass roots Indigenous women's organizations, community centres, women's shelters, and urban Indigenous support groups. A pro-active information campaign needs to be easy to understand, and popular; to be effective it should be collaborative and involve the grass roots organizations that represent and work with First Nations women.[8]

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[6] *The Final Report to Parliament on the Review of S-3*, December 2020, online at: https://www.sac-isc.gc.ca/eng/1608831631597/1608832913476

[7] We reject this terminology, since in Canadian and international law there is no such thing as an "inequity." There are guarantees of equality and non-discrimination, and there are violations of them.

[8] FAFIA is concerned that the Government of Canada will justify the low numbers of women and their descendants registered under the 2019 amendment as an expression

FAFIA is concerned that the Government of Canada will justify the low numbers of women and their descendants registered under the 2019 amendment as an expression of their choice. We reject this. Unless every woman and every matrilineal descendant who is newly entitled *knows* that they are entitled, they cannot be said to have chosen. In our view, it is the Government of Canada's responsibility to ensure that it mounts an information campaign that effectively reaches the women and their descendants who are entitled, and that takes every possible step to reverse the decades of discrimination and exclusion.

b) Supports for those Seeking Registration

The registration process is cumbersome and complicated. Many First Nations women and their descendants do not have access to internet and communication with Indigenous Services Canada is not easy. Gatherin the necessary documentation is difficult and costly, and the bureaucratic process is hard to deal with. To make registration accessible, support services, including paralegal assistance, are needed in communities to give applicants advice and help.

c) Delay

For those who apply there is unacceptable delay. Information provided by Minister Bennett on March 30, 2021 (see Appendix B) shows that the standard time frame for processing a registration application is from 6 months to 2 years ("standard analytic"). This processing time is neither reasonable nor acceptable.

By contrast, in Canada, a person can get a new passport in 10 to 20 working days. Obtaining a new passport requires verification of identity, birth, citizenship – similar requirements to those for status registration.[9]

Further, this unacceptably poor standard is not being met in most cases.[10]

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[9] In the case of status registration, the process may require identification of relatives going back one, or several, generations. However, this cannot justify the extreme difference between 20 working days for a passport and 6 months to 2 years, or more, for status registration.

d) COVID-19 Emergency

The pandemic has caused additional delays in the registration process. It has also exacerbated the vulnerability of the First Nations women and their descendants who are not registered. The delays during the pandemic compound vulnerability for those with disabilities. [11]
The Working Group has repeatedly requested that *Indian Act* registration be declared an essential service during the COVID-19 pandemic, to ensure that the First Nations women and their descendants who are entitled to status can be registered and enjoy the health benefits and other protections they are owed. These urgent requests have not been answered.

f) Resource Allocation

Information provided to the Working Group (See Appendix B and Appendix C) indicates that there are 53 staff working on Bill S-3 registration in the Winnipeg office[12], and that an additional 15 million dollars has been allocated to hire more staff over three years.[13] Very rough calculations[14] indicate that this means that

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[10] See Appendix C. Most applicants reported on (over 10,000) faced delays greater than the standard, that is, more than two years. Members of the Working Group regularly receive complaints from women and matrilineal descendants who have waited more than two years, even up to five, to obtain their registration.
[11] As rates of disability and poor health are high among First Nations peoples because of Canada's history of impoverishment, poor water, poor housing, and racism in services, Indigenous people, on and off reserve, are especially susceptible to COVID-19 and especially in need of protection. During this crisis, First Nations women and their descendants desperately need the benefits of status that they are entitled to, including extended health benefits, and COVID-19 services. First Nations women and their descendants who have disabilities are in particular need of these benefits and services. Delays in registration, caused by under-resourcing and lack of effective communication, deepen the harms that *Indian Act* discrimination has caused. The Government of Canada has offered specific assistance to Indigenous communities during the pandemic, including accelerated vaccination. However, this assistance is only available through Bands or to those who have status.
[12] See Appendix C.
[13] See Appendisx B.
[14] Calculations are based on estimating how many registrations per year each clerk handles in light of known figures; how many additional clerks can be hired for 5 million each year for 3 years, and, in light of number of clerks and number of registrations per year per clerk, how many additional registrations per year ISC could process over the coming three years.

Indigenous Services Canada might be able to process 10,000 new registrations per year for three years.[15] In light of the Government's estimates of 270,000 to 450,000 who are newly entitled, this does not appear to be an adequate response, or an indication of willingness to fully implement the Bill S-3 amendment and the *McIvor* remedy.

Residual Discrimination

The Working Group has also repeatedly expressed its concerns to Ministers and officials about the related discriminatory effects of loss of status and exile from Bands and communities that Indian Act sex discrimination has caused. The women lost services and facilities extended to status Indians and Band members, including the ability to hold land on reserve, to be buried on reserve, to access housing provided or supported by the Band, to have children attend reserve schools, to access support for higher education for oneself or one's children, to access health care provided on or through the reserve/Band.

The children of the women also suffer from this consequential discrimination affecting their mothers, for they too are, and have been, denied membership, services and benefits.

Because for decades Canadian policy was that only a status Indian could benefit from a Treaty which included her family and community, women and their descendants also lost Treaty rights and benefits.

The Working Group has expressed its concerns about how the exile of the women will affect the women, and First Nations as a whole, in future. Canada states that it wishes to "get out of the business of Indian registration." In practice, however, for the purposes of resource allocation and self-government agreements, Canada only recognizes, and counts, persons with status as members of a nation. Consequently, if Canada exits from Indian registration before it restores First Nations women and their descendants to their rightful place, it will be establishing self-government for nations that have been stripped of thousands of women and their descendants, whose return will then not be affordable, and perhaps not desirable for the nation. Canada cannot get out of the business of Indian registration until it restores the women to their nations, and undoes the enormous damage of its discriminatory regime.

[15] Since Canada is in the best position to make an accurate calculation, the State party should provide its prediction of how many new Bill S-3 registrations it can process with current resources.

Outstanding Sex Discrimination Issues

a) Section 10 Block to Compensation

The *Indian Act* specifically bars women and their descendants who were previously excluded from 6(1)(a) status because of sex discrimination from claiming or receiving compensation.[16] Contrary to Canada's claim that "sex-based inequities" have been eliminated from the *Indian Act*, this bar to compensation constitutes explicit discrimination based on sex.

The Working Group has repeatedly brought this bar to compensation to the attention of Ministers and officials, and requested that it be removed.[17]

b) Involuntary Enfranchisement

We have also brought to the attention of Ministers and officials the continuing sex discrimination inherent in the loss of status of wives and descendants of Indian men who were enfranchised. Whether the men were enfranchised voluntarily or involuntarily, the women and children automatically lost their status and were treated as the property of the men. The sex-based hierarchy in s. 6 of the *Indian Act* perpetuates sex discrimination against these women and their descendants.

c) Unknown and Unstated Paternity

In addition, there is ongoing sex discrimination inherent in the requirement that a woman provide proof that the father of her child is a status Indian in order to register the child, when the father refuses to acknowledge the child, or the

[16] Section 10.1 of the *Indian Act,* as amended by S.C. 2017 c. 25.

[17] Residential school survivors, and Sixties Scoop survivors, among others, have been granted compensation for the harms done to them. *Indian Act* sex discrimination has done terrible harm to First Nations women and their children over decades. Women have been expelled from their communities, from their homes, languages, and cultures, and families have been torn apart. Women have been deemed to be lesser parents, unable to pass on status in the way men can, and branded as traitors for 'marrying out'. They have been denied belonging, identity, services, and voice in decision-making for their communities. But the women and their descendants who have suffered this discrimination, and all its complex effects, are explicitly barred from seeking any compensation.

woman, for understandable reasons, such as rape, cannot or will not identify the father. The difficulties of obtaining and providing evidence of paternity falls on the mother, making evident one of the discriminatory effects of the two-parent rule, which is that it bestows privilege on the male Indian who can always identify the mother of his child.

Reparations

The Working Group has asked Ministers about reparations in light of the *McIvor* Decision. We have been told (see Appendix C) that: "We do not currently have a mandate to negotiate on this matter. Discussions regarding reparations for those affected by sex-based discrimination in the registration provisions of the *Indian Act* would require support from Cabinet." Repeated questions elicit the same response.

Mandate

The Working Group also asked repeatedly: who has the mandate to fully implement Bill S-3 and to implement the McIvor remedy? The Prime Minister writes mandate letters for his Cabinet Ministers which are public documents. Neither the mandate letter of Minister Bennett, nor Minister Miller includes a mandate to fully implement Bill S-3 and to implement the remedy in *McIvor v. Canada*.

Conclusion

The Working Group has made extensive attempts to persuade the Ministers responsible to implement Bill S-3 and the McIvor remedy. It is evident from our interactions that the Government of Canada has no plan to ensure that the First Nations women and their descendants who are newly entitled to status, as required by the *McIvor* Decision, will be actually registered, and in a timely way. The Government of Canada also has no plans to address the residual sex discrimination, or the remaining sex discrimination in the *Indian Act*. Promises to engage with First Nations and to consult with Indigenous organizations at some unspecified time, and in some unspecified way, do not discharge the obligation to provide an effective remedy, including non-repetition.

First Nations women fought hard through marches, lobbying, and repeated litigation and petitions to the United Nations Human Rights Committee for over fifty years before Canada finally, in August 2019, removed the core of the pre-

1985 sex discrimination from the *Indian Act*. Now Canada is failing to implement its own legislation and to perform the *McIvor* remedy in good faith.

We ask the Committee to support the requests of the Petitioners.

Sincerely,

Shelagh Day, C.M.
Chair, Human Rights Committee