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Brief to the Senate Committee on Aboriginal Peoples

Study on Bill S-3

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Follow-Up to Appearances on March 28, 2022

Section 6(2) of the *Indian Act* – "The Second Generation Cut-off"

During the APPA Committee hearing on March 28, 2022, **Senator Dan Christmas** asked a question regarding section 6(2) of the *Indian Act*, and Pamela Palmater replied. This brief expands on that exchange, providing background and a recommended remedy for the continuing harms caused by section 6(2).

Senator Dan Christmas: "I haven't heard much discussion since Bill S-3 about the two-generation cut-off that's inherent within the *Indian Act*. If I remember correctly when we were debating *Bill S-3*, there was a lot of discussion about the Crown engaging First Nations people on the double generation cut-off, the two-generation cut-off. Could you explain to the committee and to our listening audience what that is and why it's so important that the Crown address that issue now?"

Pamela Palmater: "Thank you. We feel the section 6(2) cut-off is basically something that was enacted in 1985 in retaliation for having to reinstate all of the First Nations women that they had kicked out of communities, to find a way to continue the legislative extinction and forced assimilation of First Nations, because that's exactly what it results in. Section 6(2), the second-generation cut-off, relates to out-parenting, parenting with a non-registered person. So you combine that with the high rates of out-parenting in First Nations because our First Nation communities were divided up and separated and put into smaller areas. So we're intermarried with our treaty partners, we work with our treaty partners, but we're punished for it. It means that every First Nation

in this country has a legislated extinction date that you can calculate based on their birth, death and out-parenting and section 6(2) of the *Indian Act*.

Canada continues in every court case to defend this formula over and over, even at the United Nations. I don't know how on earth you can claim to stand up for human rights and defend the legislative right to legislate Indians out of existence. That's exactly what section 6(2) does."

History of 6(2) and Impact on Women

With the coming into force of section 15 of the *Charter* in 1985, Canada had a choice about how to eliminate the sex discrimination from the status provisions of the *Indian Act*.

From Confederation to 1985, status had passed down through the male line: only men could give status to their children. Women could give status in only one narrow case: if they were not married, and the authorities could not establish that the father of the child was not a status Indian.

Reform could have involved simply saying that from 1985 on, both the mother and the father were equally entitled in their own right to give status to a child.

Canada chose not to do that. Instead, *Bill C-31* passed in 1985 requires that there must be two status parents in order for the child to have status. Let's call that "full status", which not only lasts for the child's life but can be passed on to their children. This provision is in s. 6(1)(f) of the *Indian Act*.

Section 6(2) provides that someone who has only one status parent will get status for their lifetime. However, that is the only generation where having one status parent will get you status. In the future, the 6(2) person has to have children with another status person in order to ensure that the children have status. This is called the "second generation cut-off".

The second generation cut-off causes many problems, especially for women. Who is a child's mother is usually pretty apparent. Who is the father is not always apparent. Whether the father acknowledges his paternity and thus can be "counted" as the second status parent for purposes of s. 6(1)(f) is essentially his decision. Moreover, there are some cases where it is not desirable or possible to name the father. A child may be born of incest, and putting that on the birth certificate or status application will have

negative effects on both the child and the mother. The father of the child may be unknown, as in cases of rape or gang rape.

Where the father of the child is unnamed or unknown, the "Gehl provision" introduced in 2017 in *Bill S-3* allows the mother to bring forward such evidence as she can to establish the father's Indian status, and the Registrar must give that evidence a reasonable interpretation. The father need not be named. However, if she does not have that evidence, the child will not receive Indian status; the mother being "a 6(2)" guarantees that. She cannot give status in her own right because she herself got status from one status parent, not two of them.

Section 6(2), and the requirement of two status parents, eliminate the one right that a woman had under the *Indian Act* before 1985: conferring status on her own where the father could not be established to be a non-status male. Under that old provision, the onus was on the state to eliminate the possibility of status passing through the mother. Under the two-parent scheme, the mother has the onus of establishing that the father of the child is a status person.

While it may be possible for the non-status child and "6(2)" mother to stay on reserve during the child's early years, preventing an immediate severance from family and community, the child's life on reserve will not be the same as the life of children with status. That child will not be eligible for any benefits under the *Indian Act* and thus will not have access to the same medical care and education as the child's status peers. In the long run, the child will be required to leave the reserve, as only status people can live there. Even if the mother and child live off the reserve anyway, the child will still be ineligible for *Indian Act* benefits, making their life even more difficult than the life of other young single status women with children. They will probably be living as the poorest of the poor.

In addition, Bill *C-31* preserved the old advantages of men by providing that non-status women who had gained status by marrying a status man before 1985 would henceforth be able to pass status on to a child (something they could not do before 1985).

In this way, a whole population of eligible two-parent status families came into being in 1985. By contrast, the non-status men who had married status women and cost them their status were **not** given status, so the women restored to status were left out of the privileged circle of families with two status parents. It was thus much more likely that the children of families led by status women would become "6(2)s" before the children

of families led by status men. The new rules simply perpetuate the old discrimination against the female line under a new guise.

Canada's choice of the restrictive two-parent rule thus permits the continuation of Canada's program of forced assimilation by legally defining out of the pool of 'Indians' those with only one 'Indian' parent. In three to four generations, demographer Stewart Clatworthy predicts that over half of Indigenous individuals will not be entitled to status.[1]

Remedy

As noted, the 1985 introduction of the two parent rule and the second generation cut-off was punitive and perpetuates the genocidal impact of the Government of Canada's control of 'Indians'. The Government of Canada chose to make Indian men and women "equal" in 1985 by placing on both a requirement that they parent children with another status parent. In short, instead of extending the old one-parent rule to women, the Government of Canada decided to impose a two- parent rule on both women and men. This is an approach to law reform that Kathleen Lahey has referred to as "equality with a vengeance."[2]

This new requirement seems to provide formal equality to men and women, treating them both in the same way. However, in practice, as described above, the mother will invariably have a more difficult time establishing the Indian status of the father, than the father will have to establish the Indian status of the mother, unless the father voluntarily self-identifies. Also the long-lasting penalty on women who marry out, compared with the advantage for men who marry out, continues to influence which families will have the two status parents required to pass on "full" status to their children and grandchildren.

We note that under Canada's *Citizenship Act* (R.S.C., 1985, c. C-29), only one parent is required to transmit Canadian citizenship to a child. While for many decades women were not able to pass on Canadian citizenship to their children if their husbands were

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[1] Spolnik, M. (2021). The Second-Generation Cut-Off: Effect on Indigenous People in Canada, at p. 18, (Unpublished master's project). University of Calgary, Calgary, AB. http://hdl.handle.net/1880/114210.

[2] (Kathleen Lahey, ''Until Women Themselves Have Told All They Have to Tell'' (1985) 23(3) Osgoode Hall Law Journal 519.

not Canadian citizens, the restrictions on women's independent ability to transmit citizenship status were gradually removed between 1947 when the *Citizenship Act* was introduced and 1997.[3] In the case of Canadian citizenship, equality between the sexes was achieved not by imposing a two-parent rule on men, but by entitling women and men to the same right as parents to transmit citizenship status to a child.

We submit that the same approach to achieving equality between Indian women and Indian men should have been taken in *Bill C-31* in 1985. Since it was not done then, it should be done now. The *Indian Act* should have a one-parent rule for transmittal of status for both women and men.

[3] The additional barriers to citizenship facing those born abroad of a Canadian mother before 1977 were declared contrary to the *Charter* in *Benner v. Canada* (Secretary of State), [1997] 1 SCR 358.