Presentation to the Parliamentary Standing Committee on Indigenous and Northern Affairs

Re:

Bill S-3 – An Act to amend the Indian Act (elimination of sex-based inequities in registration)

Submitted by

Dr. Pamela D. Palmater

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Ottawa, Ontario

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I. INTRODUCTION

Kwe, n'in teluisi Pam Palmater of the sovereign Mi'kmaw Nation from the unceded territory of Mi'kmak'i.[1] Thank you for inviting me to speak to you today on *Bill S-3 An Act to amend the Indian Act (elimination of sex-based inequities).*[2] I first want to acknowledge that we are here on sovereign Algonquin Territory and I do not presume to speak for the Algonquin Nation even though we may share many of the same views.

Secondly, it is important to acknowledge the long, hard road of Indigenous women to address the targeted discrimination against us and our descendants in the *Indian Act*.[3] I would not be registered as an Indian today were it not for determined advocacy and prolonged legal battles of Mary Two- Axe-Earley[4], Jeanette Corbiere-Lavell[5], Yvonne Bedard[6], Sandra Lovelace[7], and Sharon McIvor[8]. Finally, it is also important to recognize the next generation of Indigenous descendants who have been burdened with this legal battle to address gender discrimination in the *Indian Act*, including, but not limited to, Jeremy Matson[9], Lynn Gehl[10], Nathan McGillivary[11], and, of course Stephane Descheneaux[12].

This committee must study *Bill S-3* as it is currently written and decide to approve it, reject it or make amendments to it. While I welcome the fact that *Bill S-3* addresses some of the known gender discrimination, it does not address all gender discrimination which is the stated intention of this bill. To this end, I echo the serious concerns raised by Association of Iroquois and Allied Indians (AIAI) Deputy Grand Chief Denise Stonefish, Quebec Native Women (QNW-FAQ) President Viviane Michel (House), Sharon McIvor, Women's Legal Education Action Fund (LEAF), and Feminist Alliance for International Action (FAFIA) to date. I further acknowledge

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[1] An abbreviated c.v. is attached for your consideration.
[2] *Bill S-3 An Act to amend the Indian Act (elimination of sex-based inequities in registration*), (25 October 2016) 1st reading, 1st session, 42nd Parliament, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8532512> [*Bill S-3*].
[3] *Indian Act*, R.S.C. 1985 c. I-5 [*Indian Act*].
[4] Wayne Brown, "Mary Two-Axe Earley – Footprints" (Edmonton: Windspeaker, November 2003), online: <http://www.ammsa.com/content/mary-two-axe-earley-footprints>.
[5] Michael Erskine, "Jeanette Corbiere Lavell, a lifelong advocate for women" (Manitoulin: Manitoulin Expositor, 9 April 2014), online: <http://www.manitoulin.ca/2014/04/09/jeanette-corbiere-lavell-a-lifelong-advocate-for-women/>.
[6] *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349. This case included Yvonne Bedard as well.
[7] *Sandra Lovelace v. Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977.
[8] *Sharon McIvor and Jacob Grismer v. Canada*, Communication No.2020/2010 (24 November 2010) to United Nations Human Rights Committee, online: <http://povertyandhumanrights.org/wp-content/uploads/2011/08/McIvorApplicantsPetition1.pdf>. Gwen Brodsky, "McIvor v. Canada: Legislated Patriarchy Meets Aboriginal Women's Equality Rights" Chapter 5 in Joyce Green, *Indivisible: Indigenous Human Rights* (Winnipeg: Fernwood, 2014) [*Legislated Patriarchy*].
[9] *Jeremy Matson v. Canada*, Communication No.68/2014 to United Nations Committee on the Elimination of Discrimination Against Women, CEDAW/OP/CAN (6), CE/IP/ak 68/2014.
[10] *Lynn Gehl v. Attorney General of Canada*, (2015) ONSC 3481.
[11] *Dakota McGillivary et al. v. Her Majesty the Queen in Right of Canada*, (File No. T-1975-93) (RE (x6) Amended Statement of Claim. The original statement of claim referred to Nathan McGillivary and others and has since been amended. *Nathan McGillivary et al. v. Her Majesty the Queen*, (File No. T-1975-93) (Re 5x Amended Statement of Claim of the Plaintiff).
[12] *Descheneaux c. Canada (Procureur général)*, (2015) QCCS 3555.

and understand the pain and frustration of Stephane Descheneaux who is the reason we are here today.

I am here today to speak against Bill S-3 as currently drafted.

II. PROBLEMS WITH BILL S-3

(1) *Bill S-3* does not eliminate all known gender discrimination from the registration provisions of the *Indian Act*.

The Courts have ordered Canada to address gender discrimination – that is, the unequal treatment of Indigenous women and our descendants under the *Indian Act's* registration provisions. Yet gender discrimination in the *Act* remains outstanding. This bill does not eliminate all known gender discrimination – the stated intention of the bill.

There was nothing in the UN decision in *Lovelace* preventing Canada from eliminating all gender discrimination in the *Bill C-31* amendments to the *Indian Act* in 1985 – it simply chose not to. Again, there was nothing in the trial or Court of Appeal decisions in *McIvor* which prevented Canada from addressing all gender discrimination in 2010 with *Bill C-3*.[13] It chose not to do so. At any time, the federal government could make a policy decision to do what is right, but each time they chose against Indigenous women and our descendants. Here we are again, with yet another case in *Descheneaux*, where the Court specifically encouraged Canada to make broader amendments to address gender discrimination and it is choosing not to. Contrary to earlier testimony from INAC and DOJ officials that *Bill S-3* addresses all known gender discrimination and goes beyond the court ruling, Minister Bennett confirmed that it only addresses what she refers to as "simple" gender discrimination and they crafted Bill S-3 to be in line with their view of the Court decision. This is despite Canada's submissions to the UN and Minister Bennett's public commitment to eliminate all known gender discrimination.

Witnesses like Sharon McIvor, LEAF, Assembly of First Nations Women's Council, and QNW have testified (in the House and/or Senate) that they have found examples where *Bill S-3* has not addressed all known gender discrimination. The following represents a non-exhaustive list of examples of known gender discrimination. By "known discrimination", I mean those areas of discrimination that have been identified in one of the following public and authoritative ways: it has been litigated or is in litigation; has been identified by subject-matter experts in research and publications; has been identified by First Nations and/or Indigenous women's organizations; has been identified by INAC and/or DOJ as known legal risks; and/or have been identified by various domestic and international human rights bodies United Nations.

It should be kept in mind that we had very little time to study the bill and run it through all possible fact scenarios. This submission does not suggest that all exclusions have yet been identified. Other witnesses have suggested other aspects of gender discrimination not addressed by this bill.

[13] *Legislated Patriarchy*, *supra* note 8.

Therefore, the following list identifies only some of the areas of remaining gender discrimination against Indian women and/or their descendants who are denied equal registration with Indian men and/or their descendants on the basis of gender, lack of marriage, illegitimacy and/or arbitrary cut-off dates not applied equally to Indian men and their descendants:

(i) Grandchildren who trace their descent through Indian women who married out will be denied status if they were born prior to Sept.4, 1951;

(ii) Illegitimate female children and their descendants who trace descent from male line will continue to be denied status if born prior to Sept 4, 1951;

(iii) The differentiation and hierarchy of Indian status between 6(1)(a) (seen as male category) and 6(1)(c) (female category) discriminates against Indian women and their descendants by relegating them to a different status from Indian men and their descendants – identifying them as lesser Indians which has created divisions and exclusions within First Nations. First Nations can easily identify Indian women who married by 6(1)(c), whereas First Nation men who married out can never be identified in 6(1)(a);

(iv) The even more complex differentiation of those who are identified by further subsets of the female category (born female, born illegitimate, marrying out – all assigned "sins" associated with female gender) known as 6(1) (c.1) which, under *S-3* will create even further subsets of the descendants known as 6(1) (c.01), (c.2), (c.3) and (c.4). This is a violation of privacy and a targeting of Indigenous women and their descendants – being identified as those who married out or were born illegitimately.

There is no legal or policy justification for Canada's continued use of multiple sub-sets of Indian status other than to cause divisions in First Nations – especially given that programs and services are not administered by category.

(v) The hierarchy of Indian status between section 6(1) and 6(2) have and continue to disproportionately impact Indigenous women and their descendants since its creation in 1985. It is an unconscionable formula based on racist ideas related to blood quantum that were designed to legislate Indians out of existence.[14]

As a result, Canada's own demographer can pin point with relative accuracy the extinction dates of each First Nation in Canada based on birth, death and out-marriage rates[15];

[14] Pamela Palmater, *Beyond Blood: Rethinking Indigenous Identity and Belonging* (Saskatoon: Purich Publishing, 2010) [*Beyond Blood*]. Pamela Palmater, "Genocide, Indian Policy and the Legislated Elimination of Indians in Canada" (2014) vol.3, no.3, *Aboriginal Policy Studies Journal* 27.
[15] *Beyond Blood, supra* note 14.

(vi) Children of unwed Indian mothers who cannot or will not name the father, or whose fathers deny paternity or refuse to sign the application forms, are registered with lesser or no status (INAC officials do this through discretionary policy choices, not through any mandated legislation). This policy targets only Indian women and does not impact Indian men;

(vii) Denial of compensation to various categories of Indigenous women and their descendants for *Charter* violations aggravates the original violation and is itself an additional form of gender discrimination in relation to Indian registration.[16]

(2) *Bill S-3* do not provide adequate protections for those to be registered under *Bill S-3* with regards to band membership.

Pre-1985, Canada was in control of band membership lists. Canada is legally responsible for all liabilities related to band membership pre-1985 and remains liable for band membership for the majority of bands in Canada today. First Nations had absolutely no legal control over band membership pre-1985. That is why limited protections were provided under *Bill C-31* regarding membership rights of some reinstatees. No such protections were made for those registered under *Bill C-3*. The situation with those entitled to be registered under *Bill C-3* and *Bill S-3* born pre-1985 is the same. Gender discrimination that occurred prior to 1985 (prior to the time when band's controlled their own membership lists) should be remedied in its entirety.

It would violate the honour of the Crown and Canada's fiduciary and legal duties to Indigenous women and their descendants born pre-1985 to ensure equality between men and women in all aspects of registration, but not membership. Pre-1985 registration was associated with automatic membership. Relegating this subject to Phase II is breach of this legal and fiduciary duty. Post-1985 membership issues are well within the sphere of Phase II subjects, but not pre-1985 membership which was synonymous with registration – something to which all these Indigenous women and are descendants should have had but for the ongoing gender discrimination.

It should also be noted that during the study of *Bill C-3*, INAC officials appeared before the House and Senate committees and stated that even though *Bill C-3* didn't deal with the larger gender and related discrimination issues, that the repeal of section 67 of the *Canadian Human Rights Act (CHRA)* would provide an avenue for individuals to bring claims of discrimination regarding status and band membership.[17] What they failed to explain was that Canada was vigorously denying those claims before the Canadian Human Rights Commission (CHRC) on the basis that the CHRC does not have the jurisdiction to hear discrimination complaints regarding status because status is not a "service". This was the result in the Jeremy Matson case who has been forced to take his discrimination claim to the United Nations. During testimony with regards to this bill, federal officials again referred to the *CHRA*, but failed to mention that to date – no claims for discrimination in relation to Indian registration have been adjudicated.

[16] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] at s.15.
[17] *Canadian Human Rights Act* R.S.C. 1985, c. H-6 [*CHRA*].

(3) Section 8 of *Bill S-3* is an unconstitutional provision which creates additional gender discrimination for Indigenous women and their descendants who have already been denied justice for many decades.

Denial of compensation to various categories of Indigenous women and their descendants for *Charter* violations aggravates the original violation and constitutes another form of gender discrimination in relation to Indian status. They are the only group in Canada that have been targeted and singled out as not being entitled to compensation for *Charter* violations – yet Indian men and their descendants are open to make such claims on other grounds. There is simply no need for this section. We are talking about federal legislation that, post-1982, was in violation of the *Charter.* With *Bill C-31*, Canada refused to compensate Indian women and their children because it said prior to 1982, there was no *Charter.* After 1982, there was and continues to be a *Charter* right under section 15 that guarantees equality for men and women. So does section 35(4) of the *Constitution Act, 1982*. There is no grey area here.

Any gender discrimination created by *Bill C-31* (1985), *Bill C-3* (2010) and now *S-3* (2017) is grounds for a constitutional remedy under section 24 of the *Charter*. To take that right away from Indigenous women and our descendants is another act of discrimination and unconstitutional. Justice's claims that this is to protect the bands in disingenuous when they know it is federal legislation over which the bands had no control. There could be a clarity section that protects bands against liability for claims related to registration only – but there should not be any protection against claims for Canada. This scenario is markedly different than regular changes to ordinary legislation.

To allow Canada to deny *Charter* remedies to Indigenous women and our descendants further results in unjust enrichment for Canada by (1) denying them benefits based on gender for decades (saving money for Canada) and then (2) denying them compensation for those lost benefits (keeping money gained by discrimination). Unjust enrichment gained through the proceeds of illegal legislation, Canada is unilaterally creating new laws to allow it to "discriminate for free" – i.e., without punishment or consequence. There is no disincentive for Canada to stop the discrimination against Indigenous women and their descendants any time soon. Indigenous women and their descendants are the most vulnerable people in Canada – yet they bear the heaviest burdens of Canada's discrimination.

(4) The constitutional protection for gender equality requires a proper balancing of immediate legislative relief for court-impacted individuals versus the additional time required for larger-scale, more comprehensive relief for the whole group impacted by gender discrimination.

It is absolutely critical that Canada take legislative steps that minimally impact the rights of Indigenous peoples. With regards to gender, there is more at stake than the small number of litigants in *Descheneaux* – there are potentially as many as 200,000 or more who stand to be impacted if all gender discrimination is not removed. It is incumbent upon Canada to balance these interests and ensure all gender discrimination is removed from *Indian Act* while minimizing any further delays to the *Descheneaux* litigants. This could have been done, but Canada chose not to do so. Now we are faced with having to request an extension or letting time

lapse while proper amendments are sought. However, given the rights at stake, the balancing weighs in favour of seeking an extension or letting the time lapse over rushing to approve what is clearly unconstitutional legislation.

Contrary to the testimony of INAC officials, even if the worst case scenario happened and the time did lapse before passing a new bill, this would NOT halt all registration in Canada. On November 22, 2016, federal officials testified that if the time lapses, no registration would happen nationally which would have the effect of halting 28-35,000 registrations. However, federal officials provided conflicting information to CEDAW stating that the *Descheneaux* case only "has legal force in Quebec only".[18] It is my opinion, supported by the Canadian Bar Association (CBA)[19] and that of Canada's own CEDAW submissions, that the case would only have legal effect in Quebec and only for the brief period of any potential time lapse. Thus registration could and would continue everywhere else in Canada for the brief period of time needed for a new bill to be enacted. No one would lose status due to any time lapse. It would result in a minor delay of processing new applications in Quebec only.

The potential time lapse (if no extension granted by the court) would impact less than 3000 people in the province of Quebec for a minimal period of time. Quebec's registered First Nation population (82,457) comprises less than 10% of the total First Nation population (968,621).[20] *Bill S-3* is projected to result in 28,000 (possibly as high as 35,000) new registrants.[21] This means that even if every possible entitled person in Quebec would all apply on the first say of the time lapse, less than 3000 people would be impacted for a short period of time. Knowing that these applications would likely be spread out over a year, this means 250 applications/month. Assuming an extension or time lapse of six months, this would mean only 1500 applications would be on temporary hold. The rest of Canada, with the majority of the First Nation registered population would be unaffected.

Federal officials testified that they receive on average 30,000 regular registration applications a year. A court extension or time lapse would have minimal impact on regular registration. More than 90% of applications could proceed as usual as the court case only impacts Quebec. This is not to belittle the rights of First Nations in Quebec – it is instead to counter federal official's doomsday predictions related to taking the time to do this right. When balancing rights, it is important to consider the actual impact of a minor delay to ensure the larger constitutional obligations to remedy all gender discrimination once and for all. While Justice Canada may have a different legal interpretation of what is and is not gender discrimination, I would refer you to their record on this matter – losing in the *Lovelace* case, *McIvor* case and *Descheneaux* cases. Perhaps the Indigenous women's legal interpretation should be given greater weight.

[18] Government of Canada, "Second Supplemental Submission (revised) 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 (28 June 2016) at para.16.
[19] Testimony of Canadian Bar Association to Standing Senate Committee on Aboriginal Peoples Tuesday, November 29, 2016.
[20] Testimony of federal officials Tuesday, November 29, 2016 (nationwide numbers) and for Quebec numbers: INAC, "Registered Indian Population by Residence and Gender, 2013" (Ottawa: INAC, 2013), online: <https://www.aadnc-aandc.gc.ca/eng/1394032502014/1394032901691>.
[21] *Testimony of officials, supra* note 19.

(5) Canada cannot move toward Phase II of their engagement process without first remedying all known sex discrimination in Phase I – it is a legal pre-requisite.

It is absolutely critical that Canada remedy all remaining gender discrimination in the registration provisions of the *Indian Act* before it enters Phase II of their engagement process. Phase II is intended to deal with broader discrimination and jurisdiction issues related to registration and band membership. Phase II would be tainted if Canada does not do what they promised to do in Phase I, i.e. remedy all known gender discrimination. Further, by failing to address all known gender discrimination, Phase II would not be able to consider the voices of tens of thousands of Indigenous women and their descendants who are currently excluded from registration. In many cases, they will be denied membership without this registration and many risk being denied a political voice on the basis of their non-registration or their lower assignment of status.

Canada cannot have these critical Nation to Nation discussions without ensuring that Indigenous women and their descendants have an equal opportunity to be at those tables – speaking not as excluded individuals, but as true representatives of their First Nations. It would not meet legal consultations tests or gender equality tests. There is simply no choice but to remedy gender discrimination first. Gender equality in Indian registration is an absolute constitutional pre-requisite to engaging in legal consultations on constitutional matters with First Nations.

(6) *Bill S-3* needs to be accompanied by a federal submission for additional funds for First Nations and Indigenous Women's organizations.

It is essential that in addition to Canada allocating millions of dollars for itself to be able to hire and train more people to administer *Bill S-3* applications, that it provide adequate funding to First Nations so they can hire and train people in registration and membership and prepare for Phase II consultations. Otherwise, the only people to benefit from this bill will be the ever-increasing INAC bureaucracy which already eats up almost a half of First Nation funding. Funds should be provided to participate in consultations, hire researchers and advisors, manage the intake of membership and have extra funding for homes, post-secondary and all on and off reserve programs and services.

(7) Canada failed to meet its legal obligations to obtain the free, informed and prior consent of First Nations prior to drafting *Bill S-3* on how to eliminate all gender discrimination – not whether to do so.

The *Descheneaux* case was issued August 15, 2015. The new government was elected October 19, 2015. INAC's engagement process did not really begin until nearly a year later and well after Justice officials had begun drafting *Bill S-3*. The Supreme Court of Canada has been relatively consistent its decisions on the federal government's constitutional duty to consult, accommodate and obtain consent of First Nations before taking actions that would impact our rights.[22] The Federal Court has held that this duty is extended to legislation.[23] Furthermore, Canada has

[22] *Tsilhqot'in Nation v. British Columbia*, [2014] 4 SCC 44.
[23] *Mikisew Cree Nation v. Canada*, (2014) FC 1244.

publically committed to fully implementing the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* which includes the legal obligation in Article 19 for Canada to obtain our "free, prior and informed consent of Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them."[24]

Good faith consultations require more than simply handing out information after the fact. INAC officials testified that they knew they were not consulting and instead chose to conduct a very fast "engagement" session with several groups and no First Nations specifically. In fact, INAC is still in the process of conducting "engagement sessions" while we are here debating a bill that's a done deal. Canada's legal duty to consult applies whether they have 1 day or 2 years to amend the legislation. Our legal rights to be consulted are not dependent on the "good will" of the Crown – it is the highest law in the land. They made a conscious choice not to consult and this committee should not overlook this for the sake of INAC's administrative convenience.

Canada could have and should have used the *Descheneaux* case as a way to consult broadly with First Nations, Indigenous women's organizations and subject matter Indigenous experts to determine how best to amend the registration provisions to address the larger scope of discrimination issues. Officials had more than enough time to do so but made the choice not to, citing the federal election. Some of these officials have been working on this matter for decades – none of them were in an election process. Canada's administrative processes are no defense to the continued denial of equality rights for Indigenous women and our descendants, or to ignore their constitutional obligation to consult.

It is disingenuous for Canada to plead lack of time when its own officials said that Phase 2 on the broader issues would be completed within a year. They could have done both processes at once. Instead, like every other amendment before, Canada says it must do these tiny amendments and promises big changes in another future process. As history shows, the magical future process never happens. A promise of a future process is no process at all. Many of us are still waiting to hear about *McIvor's* larger process that was supposed to bring about changes to registration. Canada knowingly breached our First Nation rights to be consulted and now risks additional litigation for that failure.

Even if Canada is right that consulting would have taken longer, they could have, with the consent of Descheneaux, asked for an extension from the court, who has testified that he would have consented. Knowing that the intent of the extension was to ensure all gender discrimination was remedied, it is likely the court would have agreed. It must also be noted that Canada was able to successfully obtain two extensions in relation to the *McIvor* case, so the precedent has been set. There is simply no excuse for this alleged time crunch. As federal officials testified, they, by their own consideration and analysis, chose this path, i.e. chose this time crunch. It was a time crunch manufactured to ram through legislation they knew would not address all gender discrimination.

[24] *United Nations Declaration on the Rights of Indigenous Peoples*, resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295 [*UNDRIP*].

There are two types of simultaneous consultations that should have happened in relation to *Bill S-3*. The first relates to the specific issue of gender equality and how Canada could have drafted the bill in such a way as to ensure it did not leave any remaining gender discriminatory provisions in the registration provisions. For these consultations, Canada should have consulted directly with Indigenous women organizations, First Nation women, and Indigenous subject-matter experts to co-draft the legislation. These consultations could have been circumscribed by the legal requirement to address gender discrimination, as opposed to broader consultations which would have asked whether and to what extent the *Act* should be amended.

On this point, I agree with Sharon McIvor's submissions. There is no reason to consult on whether to abide by the law of gender equality. The laws of our traditional Nations, Canada and the international community are clear on gender equality.[25] There is no optioning out of equality, nor can it be negotiated away. Traditional Indigenous Nations did not permit inequality between genders.[26] The constitutionally-protected Aboriginal right to determine one's own citizens is conditioned on section 35(4)'s guarantee of equality for Indigenous men and women.[27] *UNDRIP* which provides extensive protections for Indigenous peoples also guarantees these rights equally between Indigenous men and women.[28] There is simply no legal mechanism by which to consult out of gender equality.

We know, as Indigenous women, that if these changes are not made in this bill – there is a good chance they never will be. There is no such as "simple" and "complex" gender discrimination as claimed by Minister Bennett in testimony. Discrimination is discrimination – whether five layers of discrimination are piled on top of us or "only" one layer – Indigenous women and our descendants bear an unfair burden of trying to convince others it should end. Consulting on equality has never, in the history of humans, resulted in a consensus on equality. Minister Bennett's impossible standard of "consensus" means that the equality rights of Indigenous women and our descendants will never be realized in Phase II and this committee should not take any comfort in this "promised" but not legally committed Phase II.

The second set of simultaneous consultations should have been directly with First Nations in the manners in which they chose to be consulted, i.e. as individual First Nations, national-regional-local First Nation organizations, treaty collectives and/or Nations, as well as with interested Indigenous individuals and Indigenous subject-matter experts – making sure that those currently excluded under the *Act* are guaranteed a voice. These consultations would have looked at how to address the remaining discriminatory registration provisions, what the amendments should look like, how to jointly amend related policies and procedures around registration, how to transition away from INAC controlling registration, band membership, funding formulas for programs and so forth.

Had INAC engaged in consultations as soon as they had withdrawn their appeal, and before this bill was drafted, they could have done Phase I and Phase II at the same time and made a jointly formed plan to seek the necessary extensions from the Court to get the amendments done right.

[25] *Beyond Blood, supra* note 14.
[26] *Ibid.*
[27] *Constitution Act, 1982*, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Constitution Act, 1982*] at s.35(4).
[28] *UNDRIP, supra* note 24 at Article 44.

They chose not to do this. In so doing, they breached our legal, constitutionally-protected rights to be consulted and have real input into possible amendments. They are not now entitled to rely on their illegal actions to justify circumscribing the gender remedy in *Bill S-3* – a further unconstitutional act. We ask this committee not to allow this to happen – again. Address all gender discrimination in *Bill S-3* (Phase I) and ensure legal consultations for Phase II.

III. IMPACT OF INDIAN REGISTRATION

The *Indian Act's* registration criteria has the power to substantially change lives. What may have started out as an administrative way to identify those entitled to federal programs and services, has morphed into something much more complex and insidious. Due to a gender-based lack of legal recognition as Indians, many descendants of Indian women are not considered treaty beneficiaries. This is not because the law says this is the case; it is because various federal and provincial enforcement agencies have developed policies based on the premise that only status Indians are "real" Indians. For example, this means that when they hunt and fish, they are often stopped, their guns are confiscated and charges laid. Even if the charges are eventually dropped, they are treated like criminals on our own traditional territories, for the sole reason that they descend from Indian women.

The denial of Indian status or a lower assignment of Indian status impacts Indigenous women and their descendants in many, over-lapping ways:

(i) equal access to status and band membership;
(ii) equal access to citizenship in self-government agreements (often created from registration and/or membership lists);
(iii) equal access to beneficiary status under treaties (historic and modern);
(iv) equal access to beneficiary status under land claim agreements (specific & comprehensive);
(v) an equal political voice in our First Nations (as electors and/or nominees for chief and council);
(vi) equal access to programs and services from Canada in relation to health, education, economic development, and tax exemptions;
(vii) equal access to band programs and services like on-reserve education & training, head start, on-reserve schooling, housing, treaty and land claim pay-outs, and tax exemptions;
(viii) equal access to elders, mentors, leaders, community members, land bases, cultural traditions, customs and practices, cultural events, and language training;
(ix) unequal and disproportionate risks of homelessness, poverty, child welfare, and violence.
(x) Continued discrimination in the *Indian Act*, which results in lesser or no Indian status and/or band membership is recognized as a root cause of murdered and missing Indigenous women and girls.

This has led to deteriorating socio-economic conditions for Indigenous women and their descendants which includes high rates of violence, disappearances and murders; lack of basic necessities of life like food, water and housing; lower rates of education; higher rates of poor

health; over-incarceration in prisons, high rates of child abductions into child welfare, and higher numbers of suicide attempts.[29] The UN CEDAW committee recently recommended that Canada take urgent action to alleviate this socio-economic crisis, including eliminating all gender discrimination from the *Indian Act.*[30] Indian registration has a significant impact.

Canada's Indian policy has not changed for as long as it has had an Indian policy. Its sole objective is to (1) gain Indigenous lands and resources and (2) reduce financial obligations it has acquired through treaties and other agreements.[31] It's primary methods for doing this were either (1) elimination of Indians (physically & biologically) or (2) assimilating Indians (residential schools and Indian registration).[32] This is why the Indian registration has only been changed by force – through court cases like Lovelace's, McIvor's, and now Descheneaux's.

This is also why federal officials work so hard to create such insanely complex amendments to the registration provisions – to limit the number of Indians and maintain our legislative extinction dates. Based on all of the legal, policy and historical research done to date, it would appear that Canada is waiting for us to die off. With Indigenous women and little girls, the fact that we are murdered or disappeared is happening at increasing rates – in part because of ongoing gender discrimination in the *Indian Act*. If the intention of the bill was to eliminate all gender discrimination, they could have done that easily by making all Indian men and Indian women and their descendants born pre-1985 equal [registered under section 6(1)(a)]. This could still be done in relatively short order.

It was estimated at the time, that the trial decision in *McIvor* to address all gender discrimination would have added approximately 300,000 people to the registration list. The limited amendments in *Bill C-3* only added 38,467 people – less than the 45,000 predicted.[33] The limited amendments in *Bill S-3* are expected to only register between 28,000 and 35,000 people.[34] *Bill C-3* and *S-3* together would have added 66,467 on the low end and 73,467 on the high end. As a result, there remains over 200,000 people that would still be excluded on the basis of gender discrimination. It appears to me that *Bill S-3* perpetuates more gender discrimination than it eliminates.

Witnesses like Sharon McIvor, myself and others are advocating to eliminate all gender discrimination, which could mean adding another 200,000+ to the registration list. Why is it that the subject of finances plays such a central role in the discussion of equality rights only when we

[29] Pamela Palmater, Kim Pate, "Reply to Issues 2, 3, 16 & 18: Indigenous Women and Women in Detention: Report to the Committee on the Elimination of Discrimination Against Women on the Occasion of the Committee's Eighth and Ninth Periodic Review of Canada" (Toronto: Chair in Indigenous Governance, Ryerson University, Feminist Alliance for International Action, Canadian Association of Elizabeth Fry Societies, October 2016), online: <http://fafia-afai.org/wp-content/uploads/2016/10/Canadian-Association-of-Elizabeth-Fry-Societies-Chair-in-Indigenous-Governance-FAFIA.pdf>

[30] Committee on the Elimination of Discrimination against Women, "Concluding Observations on the combined eighth and ninth periodic reports of Canada" CEDAW/C/CAN/CO/8-9 (18 November 2016).

[31] Pamela Palmater, "Stretched Beyond Human Limits: Death by Poverty in First Nations" (2011) 65/66 *Canadian Review of Social Policy*.

[32] Pamela Palmater, "Death by Poverty: The Lethal Impacts of Colonialism" in W. Anthony, L. Samuelson, eds. *Power and Resistance* (Winnipeg: Fernwood Publishing, 2017) 6th ed. (forthcoming). Truth and Reconciliation Commission, "Report of the Truth and Reconciliation Commission" (Ottawa: TRC, 2015).

[33] *Testimony of officials, supra* note 19.

[34] *Ibid.*

are talking about the equality rights of Indigenous women and our descendants? The thought of registering another 200,000 Indigenous women and our descendants who were wrongly excluded from registration, raises instant questions around affordability? Yet, Canada sees almost 400,000 new births every year[35] and welcomes over 250,000 immigrants every year.[36] Those 650,000 people added every year to Canada's programs and services represents 70% of our entire status Indian population – added to Canada every year. Every two years, new Canadians dwarf our tiny registration numbers. Therefore, adding 200,000 extra registrants is peanuts compared to the massive financial implications of Canada adding 650,000+ new Canadians every year.

It is time we put these financial considerations into proper perspective as they serve only to further discriminate against Indigenous women and our descendants. It is also important to remember where all the funding comes from to subsidize all these new Canadians – from our lands, waters natural resources, trading routes and powers stolen from us. Our wealth pays for Canadian well-being, it should go without saying that Indigenous women and our descendants deserve their fair share.

IV. PENDING LITIGATION

It is also important for this committee to note that failing to address all remaining gender discrimination in the *Indian Act* has and continues to expose Canada to additional legal and financial risks and liabilities. There are many pending legal cases that will require additional amendments to the *Indian Act* if Canada doesn't proactively address them.

I agree completely with Sharon McIvor (UN petition decision pending) that all gender discrimination in registration must be addressed in *Bill S-3.*

I agree with Descheneaux (cases pending if *Bill S-3* not amended) that all discrimination in registration needs to be amended in the future, beyond only gender discrimination.

I agree with Lynn Gehl (court case in progress) that INAC's unstated/unknown paternity rules amounts to gender discrimination and needs to change.

I agree with Jeremy Matson (UN petition filed) that the arbitrary cut-off date of Sept 4, 1951 introduced in *Bill C-3* discriminates against Indigenous women and their descendants and needs to be eliminated.

I agree with Nathan McGillivary (Statement of Claim filed) that federal control over Indian registration and the arbitrary differentiation of status in section 6 represents discrimination and needs to be addressed.
I agree with numerous CHRT claimants that amendments to registration should include amendments to band membership pre-1985 to prevent gender discrimination in membership.

[35] Statistics Canada, "Births, estimates, by province and territory" (Ottawa: INAC, 2016), online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo04a-eng.htm>.
[36] Statistics Canada, "150 years of immigration in Canada" (Ottawa: Statistics Canada, 2016), online: <http://www.statcan.gc.ca/pub/11-630-x/11-630-x2016006-eng.htm>.

I agree with the *Bill C-3* class action litigants that the denial of compensation for *Charter* violation against Indigenous women and our descendants is discriminatory and unconstitutional.

I do not think that it is practical to only address some gender discrimination now and some later in the larger Phase II process for reasons mentioned earlier. In fact, I have little faith in Canada's "future processes". The track record for "joint processes" between Indigenous peoples and Canada does not offer much hope for this one:

> (i) During *Bill C-31* engagement sessions, federal officials promised Indigenous women there would be a future process to deal with all those left out by the amendments – which never happened;
>
> (ii) *Royal Commission on Aboriginal Peoples* was a significant joint process to study, analyze and recommend solutions to the very problems that were raised in *McIvor,* yet Canada has not acted on those recommendations to address status, membership, citizenship or First Nations' jurisdiction;
>
> (iii) Section 67 of the *CHRA* was repealed under the guise that section 67 prevented equal access to justice and equality for Indigenous peoples for over 25 years, yet it was only meant to be temporary while Canada engaged in a "joint process" with Aboriginal peoples to make the *Indian Act Charter* compliant – which it didn't;
>
> (iv) Federal officials again promised First Nations a process after the *Bill C-3* amendments to deal with the larger registration and membership issues which did not result in changes;
>
> (v) The First Ministers' Meetings which led to the *Kelowna Accord* resulted in a later rejection by Canada to honour even the spirit and intent of that joint process, let alone the actual agreement;

Now we are being promised another future process – Phase II – which promises to address all the larger issues. This is just another delay tactic that Canada is using strategically to (1) rush Bill S-3 through knowing it doesn't address all gender discrimination and (2) push the issue of whether or not to address gender discrimination off to First Nations knowing there will never be consensus.

If Phase II it takes place at all, it won't address gender discrimination. It would be irresponsible for any one of us, including this committee, to trade gender equality in *Bill S-3* now, for a promised future process which Minister Bennett has severely limited with the high standard of consensus – a standard no Canadian government can or will ever meet in their own politics.

V. RECOMMENDATIONS

(1) 6(1)(a) all the way

Amend *Bill S-3* to eliminate all remaining gender discrimination by eliminating any differentiation in status between Indian women and their descendants and Indian men and their descendants born prior to April 17, 1985 – whether married or not - making them all 6(1)(a). If you cannot amend the *Bill S-3* in this way, then you should reject the bill and force Canada to start over with a new bill and seek a court extension of time to do so.

(2) Rightful Compensation

Delete section 8 in its entirety and any reference to a denial of compensation for those who have been discriminated against and set up a negotiation process to resolve such claims. This should also be done for *Bill C-3* claimants at the same time.

(3) Legal Consultations

Phase II must, at a minimum, include fully-funded legal consultations with ALL interested First Nations in the manner in which they choose to be consulted (individual First Nations, regional groupings, Nation-based, treaty-based or otherwise), Indigenous women's organizations and subject matter Indigenous experts. The consultation process and agenda should be jointly constructed with adequate timelines to ensure it is done right.

(4) Address Chronic Underfunding

Funding must be identified to address the current and future populations of First Nations for all on and off-reserve programs and services which are already chronically underfunded. Adequate funding must be allocated on an emergency basis to address the many multiple over-lapping crises in housing, water, sewer, education, health, mental health, infrastructure, child welfare, and women's safety. These funds should be increased to accommodate new registrants and to ease the financial burden on First Nations.

If we don't address gender equality now, it will never be addressed. Canada's plans to shove "complex" gender issues to Phase II under the impossible standard of "consensus" means we'll never see full gender equality. I thought the whole intent of reconciliation was to do better by Indigenous peoples. If this is the case, then we have no real choice but to remedy all gender discrimination in *Bill S-3.*

APPENDIX A

EMPLOYMENT:

2009 -	Associate Professor & Chair in Indigenous Governance, Ryerson Univ
2009 -	Nationhood Consulting (First Nation governance)
1998 - 2008	Legal Counsel, Justice Canada
	Director of Lands & Trusts, INAC (Indian registration)
	Director Government Relations (treaties, claims, self-gov) INAC

EDUCATION:

JSD (DAL)	Doctoral thesis on constitutional law, Aboriginal and treaty rights and legislation in relation to Indian status, membership & citizenship
LLM (DAL)	Master's thesis on Aboriginal and treaty rights, international law and constitutional law re Aboriginal border crossing rights
LLB (UNB)	Specialized in Aboriginal, natural resources & environmental law
BA (STU)	Double Major in Native Studies & History
TIK	Traditional Indigenous knowledge = Mi'kmaw laws & traditions

PROFESSIONAL:

Law Society of NB (1998), MB Law Society, Cdn Bar Assoc., Indigenous Bar Assoc.

AWARDS:

Margaret Mead Award in Social Justice – 2016 - Int'l Community Corrections Assoc

J.S. Woodsworth Woman of Excellence Award in Human Rights & Equity – 2016

University of New Brunswick - **UNB Alumni Award of Distinction** – 2015

A Bold Vision - **Canada's Top Visionary Women Leaders**: Top 23 – 2014

Building a Better World Designation – Dalhousie University – **"Nation-Builder"** - 2014

Canadian Lawyer Magazine's **Top 25 Most Influential Lawyer** - Top 5 Most Influential Lawyer in Human Rights – 2013

Dalhousie Law School - **Bertha Wilson Honour Society** - 2012 (Inaugural Inductee)

Women's Courage Award in Social Justice – 2012

YWCA - **Woman of Distinction Award** in Social Justice – 2012

SELECTED PUBLICATIONS:

Books:

P. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2011).

P. Palmater, *Indigenous Nationhood: Empowering Grassroots Citizens* (Winnipeg: Fernwood Publishing, 2015).

Book Chapters:

P. Palmater, "My Tribe, My Heirs and Their Heirs Forever: Living Mi'kmaw Treaty" in *Living Treaties: Narrating Mi'kmaw Treaty Relations*, Marie Battiste and Jaime Battiste, eds., (Cape Breton: Cape Breton University Press, 2016) 24-41.

P. Palmater, "All About Strong Alliances: First Nations Engagement in the Federal Election" in A. Marland, T. Giasson, eds., *Canadian Election Anaylsis: Communication, Strategy, and Democracy* (Vancouver: UBC Press & Samara Canada, 2015) at 60.

P. Palmater, "Canada: As Long as the Grass Grows and Rivers Flow" in *A Bold Vision: Women Leaders Imagining Canada's Future* (Charlottetown, PEI: Women's Network Inc., 2014) 251.

P. Palmater, "Feathers vs. Guns" in *Rabble's Best of Rabble 2013* (Toronto: Rabble, 2014).

P. Palmater, "Why Are We Idle No More?", in the Kino-nda-niimi Collective ed., *The Winter We Danced: Voices from the Past, the Future and the Idle No More Movement* (Winnipeg, Arbeiter Ring Publishing, 2014) 37.

P. Palmater, "Harper's Indigenous Manifesto: Erasing Canada's Indigenous Communities" in *Rabble's Best of Rabble 2012* (Toronto: Rabble, 2013).

P. Palmater, "Unbelievable but Undeniable: Genocide in Canada" in *Rabble's Best of Rabble.ca* 2011 (Toronto: Rabble, 2012).

Journal Articles:

P. Palmater, "Death by Poverty: The Lethal Impacts of Colonialism" in W. Anthony, L. Samuelson, eds. *Power and Resistance* (Winnipeg: Fernwood Publishing, 2017) 6th ed. (forthcoming).

P. Palmater, "Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence Against Indigenous Women and Girls in the National Inquiry" (2016) 28:2 *Canadian Journal of Women and the Law* 253-284.

P. Palmater, "Genocide, Indian Policy and the Legislated Elimination of Indians in Canada" (2014) vol.3, no.3, *Aboriginal Policy Studies Journal* 27.

P. Palmater, "Matnm tel-Mi'kmawi: I'm Fighting for my Mi'kmaw Identity" (2013) XXXIII vol. 1, *Canadian Journal of Native Studies* 147.

P. Palmater, "Stretched Beyond Human Limits: Death by Poverty in First Nations" (2011) 65/66 *Canadian Review of Social Policy* (published in 2012).

P. Palmater, "When Legislators Make Bad Law: *Bill C-3's* Assault on Democracy" (2011) vol.15, no.1 *Aboriginal Law*, Ontario Bar Association, online: http://www.oba.org/en/pdf/sec_news_sept11_c3_palm.pdf.

P. Palmater, "In My Brother's Footsteps: Is *R. v. Powley* the Path to Recognized Aboriginal Identity for Non-Status Indians?" in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation* (Markham: LexisNexis, 2003) 149.

P. Palmater, "An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians" (2000) 23 *Dalhousie Law Journal*, 102.

SELECTED DOMESTIC AND INTERNATIONAL REPORTS/TESTIMONY:

1. P. Palmater, "Reply to Issues 2, 3, 16 & 18: Indigenous Women and Women in Detention: Report to the Committee on the Elimination of Discrimination against Women on the Occasion of the Committee's Eighth and Ninth Periodic Review of Canada" (Toronto: Ryerson Chair in Indigenous Governance, Feminist Alliance for International Action, Canadian Association of Elizabeth Fry Societies, October 2016).

2. P. Palmater, "Presentation to Parliamentary Standing Committee on International Trade re *Trans-Pacific Partnership Agreement (TPP)* and its Impacts on Indigenous Rights in Canada" (testimony entered into evidence 14 June 2016).

3. P. Palmater, "Statement of Pamela Palmater to the 114th Human Rights Committee Session: Formal Briefing on Canada" (6 July 2015, Geneva Switzerland) with an additional submission" and "My Brief for the Human Rights Committee's Concluding Observations of Canada: Clarifications Related to Canada's Testimony" (7 July 2015, Geneva Switzerland).

4. P. Palmater, "Presentation to Senate Standing Committee on National Security and Defence re *Bill C-51 - An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*" (testimony entered into evidence April 27, 2015) [based on previous submission to House Committee].

5. P. Palmater, "Presentation to Standing Committee on Public Safety and National Security re *Bill C-51 - An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*" (testimony entered into evidence March 24, 2015).

6. P. Palmater, "Expert Testimony to the United Nations CEDAW Committee Experts Under Article 8, Optional Protocol Convention on the Elimination of all forms of Discrimination Against Women re: Murdered, Missing and Traded Indigenous Women in Canada" (13 September 2013). (*Submission is subject to confidentiality agreement and cannot be provided).

7. P. Palmater, "Our Children, Our Future, Our Vision: First Nation Jurisdiction Over First Nation Education" (Ottawa: Chiefs of Ontario, 7 February 2012) [major technical report for Chiefs in Ontario re First Nation education].

8. P. Palmater, "Presentation to Standing Senate Committee on Human Rights re: *Bill S-4 An Act respecting family homes situated on First Nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves*" (testimony entered into evidence June 7, 2010).

9. P. Palmater, "Presentation to the Standing Committee on Aboriginal Affairs and Northern Development (AANO) re: *Bill C-3 Gender Equity in Indian Registration Act*" (testimony entered into evidence April 20, 2010).

SOCIAL MEDIA:

E-mail	*ppalmater@politics.ryerson.ca*
Chair website	*www.ryerson.ca/chair-indigenous-governance*
Personal website	*www.pampalmater.com*
Blog	*www.indigenousnationhood.blogspot.com*
Twitter	*Pam_Palmater*
Facebook	*Pam Palmater*
LinkedIn	*Dr. Pam Palmater*
Instagram	*Pam_Palmater*