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

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1. INTRODUCTION

> We are stripped naked of any legal protection and raped by those who would take advantage of the inequities afforded by the *Indian Act*. We are raped because we cannot be buried beside the mothers who bore us and the fathers who begot us... because we are subject to eviction from the domiciles of our families and expulsion from the tribal roles; because we must forfeit any inheritance or ownership of property; because we are divested of the right to vote; because we are unable to pass our Indianness and the Indian culture that is engendered by a woman in her children: because we live in a country acclaimed to be one of the greatest cradles for democracy on earth, offering asylum to refugees while, within its borders, its native sisters are experiencing the same suppression that has caused these people to seek refuge by the great mother known as Canada.
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> *(Standing Committee, September 13, 1982, testimony of Mary Two-Axe Earley, President, Quebec Equal Rights for Indian Women, at p. 4:46.)*

Depriving Indigenous women of the right of citizenship to their Nations drills at the core of humanity; our sense of belonging. As a child ripped from their mother's arms at birth, so too has the *Indian Act* been an instrument of assault on Indigenous Nationhood and an instance of violence against women. The registration provisions of the *Indian Act* have denied Indigenous Peoples their collective Aboriginal right to citizenship and is an unjustifiable infringement.

The Indigenous Bar Association ("**IBA**") has a painful discomfort in participating in *yet* another round of hearings on unsystematic partial measures that have occurred over 35 years. Our Peoples' message has remained the same and the changes have been piecemeal. We want our Nations made whole.

Since the beginning of this legal reform process, there have been three simple requirements: (1) equality for Indigenous women; (2) elimination of all discrimination based in the *Indian Act*; and (3) enabling our Nations' right to self-determine our citizenship. Failure to achieve these requirements means that Canada is knowingly breaching the *Charter*, unjustifiably infringing Indigenous Peoples' Aboriginal and Treaty rights protected by s.35 of the *Constitution Act* and failing to adhere to the principles espoused in Article 33 of the *United Nations Declaration on the Rights of Indigenous Peoples.* Any lesser measure and Canada will be violating its own constitutional law. Bill S-3 falls short of achieving these simple requirements.

The Minister speaks of how Bill S-3 primarily deals with "known" and "simple" discrimination and that "more complex" discrimination will be dealt with in Phase Two of *Indian Act* reform. We can only trust that there is true good faith commitment in the Minister and, for now, offer guidance on progressive steps to achieving legal compliance.

The following traces the path of legal reform that brings us to consider Bill S-3. We will examine the legal challenges brought by Ms. McIvor and Mr. Descheneaux and the Parliamentary response to those cases. We also track the consistent messaging of Indigenous Women's organizations and Indigenous Peoples organizations in each rounds of hearings. It is

a path of continued resistance to discrimination as set out below.

2. BILL C-31 REGISTRATION PROVISIONS

The registration provisions in the *Indian Act* have been a source of discontent for Indigenous peoples since their inception. Indigenous peoples have been aggressively challenging these provisions of the *Indian Act* on the basis of sex discrimination for nearly five decades. In response to the legal challenge brought before the Supreme Court of Canada by Jeanette Corbiere Lavell in *Lavell v. Canada (Attorney General)*[1], pressure from the Human Rights Committee of the United Nations relating the complaints submitted by Sandra Lovelace, and the enactment of the *Canadian Charter of Rights and Freedoms*, the Liberal Government identified as one of its priorities the amendment of the *Indian Act* registration provisions to eliminate discrimination and strengthen self-government in 1980. To execute its mandate, the Standing Committee on Indian Affairs and Northern Development created the "Sub-Committee on Indian Women and the *Indian Act*" which implemented a consultation process in 1982 allowing 27 various groups to propose their views on amending the discrimination found within the *Indian Act*.

Some groups advocated for First Nation jurisdiction over the reinstatement of women to band membership while others such as the Native Women's Association of Canada argued that all women should be reinstated prior to devolving membership control to bands.[2] These views mark a distinction between the equality before self government and self government alone.

The tension between these two views was a central theme of the Sub-Committee's final Report which was presented to the House of Commons. The Sub-Committee's Report also proposed specific amendments to the *Indian Act* to address the discrimination at issue:

> amendments to the *Indian Act* that would permit Indian women and their first generation children who lost status under s. 12(1)(b) to regain their status immediately upon application and would require bands to re-admit such women and children to band membership after a period of 12 months from the date of application. Regardless of whether the mother is still living, these children will be placed on the band list of the mother's band.[3]

The Liberal government's recommended amendments to address both *Indian Act* discrimination and enhanced self-government were captured in *Bill C-47, An Act to amend the Indian Act* and *Bill C-52*, both of which died on the order paper due to the election in 1984. With the election of a Conservative government, amendments to the *Indian Act* were taken up through Bill C-31[4] whose principles were outlined as follows:

> The first principle is that discrimination based on sex should be removed from

[1] [1973] S.C.J. No. 128.
[2] *Minutes of Proceedings and Evidence of the Sub-Committee on Indian Women and the Indian Act*, 32nd Parl, 1st Sess (8-14th September 1982).
[3] *Sixth Report of the Sub-Committee on Indian Women and the Indian Act*, (1 September 1982) at 36.
[4] *An Act to Amend the Indian Act*, S.C. 1985, c.27 (Bill C-31).

> the *Indian Act*.
>
> The second principle is that status under the *Indian Act* and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the *Indian Act*.
>
> The third principle is that no one should gain or lose their status as a result of marriage.
>
> The fourth principle is that persons who have acquired rights should not lose those rights.
>
> The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership.[5]

In the subsequent presentation to the Senate Standing Committee on Legal and Constitutional Affairs, the goals of the federal government through Bill C-31 were set out:

> In the future, status will be determined by the federal government on a totally non-discriminatory basis. Sex and marital status will not affect an individual's entitlement to be registered. No one will gain or lose status as a result of marriage, and in general the only criterion for status will be that at least one parent is registered.

The specific amendments undertaken by Bill C-31 to the registration provisions now found in s. 6 of the *Indian Act* are as follows:

1. Persons entitled to registration prior to 1985, retained full status (paragraph 6(1)(a)).

2. Women who had lost their status by virtue of marrying a non-Indian or were enfranchised, regained status under a new sub-category (paragraph 6(1)(c)).

3. Persons who had lost their status at age 21 due to the 'double mother rule'[6] would regain status for life under the new sub-category (paragraph 6(1)(c)).

4. Persons with one parent entitled to register under s. 6(1), would be entitled to register under s. 6(2).

5. Persons with one parent registered under s. 6(2) were not entitled to register if that person's other parent was not entitled to register.

The various categories of status now in effect through the operation of Bill C-31 created a 'second-generation cut-off', with a loss of status following two generations of mixed parentage.

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[5] *House of Commons Debates on Second Reading of Bill C-31*, (1 March 1985) at 2644.

[6] If both a person's mother and grandmother had gained status through marriage to an Indian man, prior to 1985, that person would only have the benefit of status till the age of 21. This formula has been colloquially referred to as the "Double Mother rule".

As a result, women who regained their status under Bill C-31 would only be able to pass on the entitlement to her child. For men however, their previous entitlement under 1985 meant that both their children and grandchildren would be entitled to register under the *Indian Act*, regardless of mixed parentage. This residual discrimination, at least in part, was the subject of Sharon McIvor's court challenge as discussed in greater detail below.

Bill C-31 also served to separate status and band membership, allowing bands to exercise jurisdiction of their membership and develop their own membership codes if they followed the provisions determined by Canada and set out in the *Indian Act*. About a third of bands opted to create their own membership rules pursuant to section 10 of the *Indian Act*.

3. *MCIVOR* DECISIONS

McIvor v. The Registrar, Indian and Northern Affairs Canada

The residual sex discrimination existing within the *Indian Act* and was first challenged by Sharon McIvor and her son, Jacob Grismer in *McIvor v. The Registrar, Indian and Northern Affairs Canada*[7] in 2007. Ms. McIvor was born in 1948 and, although she would have been entitled to registration under the *Indian Act*, she did not apply for status until after 1985. Had Ms. McIvor been registered as an Indian, the Registrar determined that she would have lost her status upon marrying a non-status person in 1970. Accordingly, Ms. McIvor would have regained her status under s. 6(1)(c) of the 1985 *Indian Act*. The 1985 *Indian Act* also entitled her son, Mr. Grismer, to acquire status but only under s. 6(2) preventing his children from status entitlement. In contrast, a male in Ms. McIvor's circumstances would have acquired status under s. 6(1)(a) and his children born before 1985 would also have s. 6(1) status allowing the passage of status to the following third generation. Ms. McIvor and her son challenged that the 1985 *Indian Act* maintained a discriminatory effect between the descendants of Indian men and Indian women.

The BC Supreme Court agreed and found that the 1985 *Indian Act* discriminated on the basis of both sex and marital status and confirmed the significant role which Indian status now plays within cultural identity. The Court concluded that registration status under the *Indian Act* and the ability to pass status to one's children is a benefit of the law subject to s. 15 of the *Charter*. The registration provisions at issue were held to continue a preference for descendants tracing their entitlement through the paternal line over descendants tracing their entitlement through the maternal line and declared the provisions a "blow to the dignity of the plaintiffs".[8] The discrimination identified in this instance could not be justified under s. 1 of the *Charter*.

The Supreme Court held that it is the role of the courts to safeguard the Constitution while it is Parliament's role to enact legislation which protects the rights guaranteed under the Constitution. However, the trial judge did not agree a further delay of two years for Ms. McIvor and Mr. Grismer could be justified. The Court instead declared s. 6 of the 1985 *Indian Act* to be of no force and effect to the extent it allows the differential treatment of Indian male and females or their descendants born prior to April 17, 1985.

[7] 2007 BCSC 827.
[8] 2007 BCSC 827 at para. 287.

In effect, this meant that Indian women born before April 17, 1985 and previously registered under s. 6(1)(c) could now register under s. 6(1)(a) and the descendants of these women born before April 17, 1985 could also register under s. 6(1)(a).

McIvor v. Canada (Registrar, Indian and Northern Affairs)

At the Court of Appeal, the scope of the decision was limited to the particular claims of Ms. McIvor and Mr. Grismer. This excluded any analysis by the Court of other potential discriminatory effects of the *Indian Act* upon future generations or the broader allegations of discrimination on a matrilineal basis. The discrimination found in this case was held to be a result of the sex discrimination against Ms. McIvor, which followed the loss of her status upon marrying a non-status person. In contrast to the trial judge, the discrimination found by the Court of Appeal is far narrower:

> The 1985 legislation violates the *Charter* by according Indian status to children:
>
> > (i) who have only one parent who is Indian (other than by reason of having married an Indian).
> >
> > (ii) where that parent was born prior to April 17, 1985, and
> >
> > (iii) where that parent in turn only had one parent who was Indian (other than by reason of having married an Indian).
>
> If their Indian grand-parent is a man, but not if their Indian grandparent is a woman.[9]

In their application of whether the identified discrimination is saved by s. 1 of the *Charter*, the Court found that the discrimination could be justified as it served to preserve the rights of those subject to the Double Mother rule, which were vested prior to the 1985 *Indian Act.* The Court goes on, however, to rule that the infringement does not minimally impair the equality rights of Ms. McIvor and Mr. Grismer as the 1985 *Indian Act* improves the status of an already advantaged group in providing rights beyond greater than they possessed prior to 1985.

The Court declared s. 6(1)(a) and 6(1)(c) to be of no force and effect due to their inconsistency with s. 15 of the *Charter* but suspended their declaration for one year to allow Parliament to remedy the *Indian Act.*

4. BILL C-3 AMENDMENTS: *2011 GENDER EQUITY IN INDIAN REGISTRATION ACT*

As a result of the direction issued by the Court of Appeal, Parliament passed Bill C-3: *Gender Equity in Indian Registration Act*, which came into force on January 31, 2011. The new amendments added s. 6(1)(c.1) to the *Indian Act*, which permits eligible children and

[9] 2009 BCCA 153 at para. 154.

grandchildren of women who lost status as a result of marrying a non-Indian man to apply for Indian status.

With the 2011 amendments to the *Indian Act*, s. 6(1)(c.1) effectively "upgrades" the status of children of women who had married non-Indigenous persons and regained their status in 1985, from s. 6(2) status to s. 6(1) status. Therefore, the grandchild of a woman who had lost her status upon marrying out and then regained the status in 1985, now enjoys s. 6(2) status (unless their other parent is a status Indian, in which case they are registered under s. 6(1)).

Specifically, s. 6(1)(c.1) grants entitlement to registration to any person:

a) whose mother lost status as a result of marriage under provisions related to marrying out dating from the 1951 *Indian Act* through 1985, or under former provisions of the *Indian Act* related to the same subject matter;

b) whose father is or was, if deceased, not entitled to be registered under the *Indian Act* in effect since the creation of the Indian Registry in the 1951 Act, or was not an Indian as defined in the pre-1951 *Indian Act*;

c) who was born on or after the date the mother lost Indian status but before April 17, 1985 – individuals born after that date are entitled to registration only if their parents married prior to it (note: individuals born to common law parents after April 17, 1985 will be entitled to register under s. 6(2)) ; and

d) who had or adopted a child on or after September 4, 1951 with a person who was not entitled to be registered on the day the child was born or adopted.

Pursuant to s. 6(2) of the *Indian Act*, a child of an individual that holds status under s. 6(1), which now includes s. 6(1)(c.1), whether born on or after September 4, 1951, is entitled to registration. The new generation eligible to status as a result of s. 6(1)(c.1) includes individuals that meet all of the following criteria:

a) the applicant's grandmother lost Indian status as a result of marrying a non-Indian;

b) the applicant has one parent currently registered, or entitled to be registered, under s. 6(2) of the *Indian Act*; and

c) the applicant, or one of his/her siblings of the same entitled to be registered parent, was born on or after September 4, 1951.

S. 6(3)(c) of the *Indian Act* was also amended in 2011, to allow an individual described in s. 6(1)(c.1) of the *Indian Act*, who is no longer living on the day the new provision came into force, to be deemed entitled to be registered under that paragraph. This section addresses situations where a deceased parent, who was registered under s. 6(2) prior to their death, but would have now been entitled to register under s. 6(1)(c.1), will be deemed to have been entitled under s. 6(1)(c.1) prior to their death. Therefore, that individual's child will be able to

register under s. 6(2).

5. CONCERNS REGARDING BILL C-3

The most resounding critique raised with Bill C-3 was its narrow focus upon the findings of the BC Court of Appeal. Then Minister of Indian Affairs, explicitly stated that Parliament's objective has been restricted to respond to the issues raised by the Court of Appeal while admitting that "there are many other issues out there" which lack consensus and could not be addressed in this lifetime.[10] Clearly, this is false. It would be contrary to the rule of law for Parliament to be restricted in its capacity to amend any federal statute.

Bill C-3 only addressed the issues of inequity arising from the implementation of the 'Double Mother' rule, disregarding any discrimination outside those confines. Understandably, organizations took issue with the maintenance of both the second generation cut-off and the hierarchy of inferior and superior categories of status, both serving to ultimately eradicate all registered Indians.

More specifically, Bill C-3 only addressed discrimination for individuals in the precise circumstances of the plaintiffs in the *McIvor* decision and still allowed a grandchild of a male descendant, born before 1985, to pass on status for one generation further than a grandchild of a female descendant.[11] This was denounced as violating essential principles of human rights law, including the Covenant on Civil and Political Rights.[12] Broader amendments that were supported by many of the Indigenous groups, including the Assembly of First Nations, were introduced at the Senate Committee but were ultimately ruled beyond the scope of the Bill and rejected. These amendments proposed to entitle individuals born pre-1985 to 6(1)(a) status. Ms. McIvor further pointed out that individuals born pre-1951 were not addressed by Bill S-3 nor are the illegitimate daughters of Indian men.[13]

Another core critique of Bill C-3 focused upon the requirement that a person would have to either have or adopt a child to upgrade their status from s. 6(2) to s. 6(1). As rightfully pointed out by the Canadian Bar Association, status registration should be based upon ancestry rather than reproduction.[14] The Government's rationale for including this precondition can only be thought to further the object of eliminating status Indians.

The contrast between Bill C-31 and Bill C-3 regarding the reinstatement of band membership was another source of criticism as the children of Indigenous women who married out would have been equally entitled to band membership but for the inequity in the *Indian Act*. It was argued that protections provided under Bill C-31 should similarly be developed for Bill C-3

[10] AANO *Hansard,* 1 April 2010 at 4.
[11] Canadian Bar Association, National Aboriginal Law Section, *Bill C-3 – Gender Equity in the Indian Registration Act,* (April 2010) at 8.
[12] *Proceedings of the Standing Senate Committee on Human Rights,* 40th Parl, 3rd Sess (6 December 2010) at 8:30 (Gwen Brodsky).
[13] *Ibid* at 8:29 (Sharon McIvor).
[14] *Supra* note 11 at 5.

individuals.[15]

The process of engagement undertaken by Canada was also considered problematic, as Canada failed to solicit any input or proposals from Aboriginal organizations concerning its 'amendment concept' with Bill C-3 and merely embarked on an information provision approach.[16] Proposals were put forward for a variety of Aboriginal engagement strategies and the striking of a committee to undertake a study to remove gender discrimination and develop solutions.[17] Issue was also taken with subjecting the equality and human rights of Indigenous women to a broader Nation consultation process. As Ms. McIvor poses to the Senate, "[w]here else in Canada do you have to consult to see if it is okay for a specific group to exercise their full equality and human rights?"[18]

Concerns of justice were raised with s. 9 of Bill C-3 which shields Canada from any liability, particularly given that Canada would have been aware of the fact that Bill C-31 did not comply with the *Charter* as a result of over twenty years of litigation which focused squarely on that issue.[19]

Finally, the IBA and the Assembly of First Nations voiced their concern with Bill C-3's failure to deal with issues of Canada's assumed jurisdiction and the inherent right of Indigenous peoples to determine their own citizenship. The IBA advocated that the application of Indigenous legal orders to Nationhood determinations should be favored over the race-based formula intrinsic to the *Indian Act* and subsequent amendments.[20] The recognition and implementation of Indigenous jurisdiction over citizenship was argued as the only fundamental solution to eradicate ongoing discrimination.[21]

6. *DESCHENEAUX C. CANADA (PROCUREUR GÉNÉRAL)*

The sex discrimination in the registration provisions of the *Indian Act* therefore continued and was again revisited 5 years later. In *Descheneaux c. Canada (Procureur Général)*[22] the Plaintiffs, Stéphane Descheneaux and Susan and Tammy Yantha, claimed that s. 6 of the *Indian Act* violates the equality guaranteed in 15(1) of the *Canadian Charter of Rights and Freedoms* by creating discriminatory and differential treatment in regards to who is or is not a status Indian. These claims of discrimination arose from two factually specific contexts:

Stéphane Descheneaux

Stéphane Descheneaux maintained that he is deprived of 6(1) status because of sex

[15] Pam Palmater, *Presentation to the Standing Committee on Aboriginal Affairs and Northern Development (AANO) Re: Bill C-3 – Gender Equity in Indian Registration Act,* (20 April 2010) at 9.
[16] Mary Eberts, "McIvor: Justice Delayed-Again", (2010) 9 Indigenous Law Journal 15 at 40.
[17] *Supra* note 12 at 8:16 (Conrad Saulis, National Association of Friendship Centres).
[18] *Supra* note 12 at 8:40.
[19] *Supra* note 11 at 6.
[20] Indigenous Bar Association, *Position Paper on Bill C-3 – Gender Equity in Indian Registration Act,* (6 December 2010) at 7-9.
[21] *Supra* note 12 at 8:11 (Jody Wilson-Raybould, Regional Chief, British Columbia, Assembly of First Nations).
[22] 2015 QCCS 3555.

discrimination. His grandmother lost her status in 1935 after marrying a non-status Indian. Under that version of the *Indian Act*, her child, Mr. Descheneaux's mother, had no status at birth. Mr. Descheneaux's mother also married a non-Indian and then gave birth to Mr. Descheneaux, who was thus deprived of status due to his grandmother and mother's marriages. The amendments to the *Indian Act* passed in 1985 and 2010 allowed both his grandmother and mother to regain status. However, as the child of a status Indian and non-status Indian, Mr. Descheneaux's mother held 6(2) status and by marrying a non-status Indian she could not pass her status onto her child Mr. Descheneaux.

If Mr. Descheneaux's grandfather had married a non-status Indian on the other hand, both of Mr. Deschaneux's mother's parents would have held status, and Mr. Deschaneux's mother would have been a 6(1) Indian from birth, meaning that she would have passed status onto Mr. Descheneaux.

He alleged that the distinction based on the sex of an Indian grandparent is discriminatory in that it:

> …perpetuates a stereotype whereby the Indian identity of women and their descendants are less worthy of consideration or have less value than that of Indian men and their descendants, and by having the effect that Stéphane Descheneaux's children cannot have Indian status passed down to them or enjoy certain attendant benefits…[23]

Susan & Tammy Yantha

The version of the *Indian Act* in force in 1954 held that illegitimate daughters of status Indian men and non-status Indian women would not have status, while illegitimate sons would have 6(1) status.

Susan Yantha was born in 1954 as the illegitimate daughter of an Indian man and a non-Indian woman. In 1972, she had a child, Tammy Yantha, with a non-Indian man. After the 1985 amendments, Susan obtained 6(2) status since only one of her parents had status. Tammy is prevented from obtaining status due to her mother's 6(2) classification and her father not holding status.

Susan was denied status at birth based purely on her sex. If she had been a male, she would have held 6(1) Indian from birth and her daughter Tammy would have 6(2) status. Susan and Tammy argued that the distinctions in terms of registration based on Susan's sex are discriminatory because they:

> ...perpetuate a stereotype whereby the Indian identity of women and their descendants does not have the same value or importance as that of Indian men and their descendants.[24]

[23] *Supra* note 22 at para 59.
[24] *Supra* note 22 at para 65.

Matrilineal Discrimination

It should be noted that the Plaintiffs did not take up the general argument raised at trial and dismissed in appeal in *McIvor* whereby they are victims of more general matrilineal discrimination to which a systemic remedy must be applied by reinterpreting history. Although they referred to such discrimination in their motion to institute proceedings, they based their arguments instead on the facts affecting them directly but that nevertheless concern more than one generation, which the BCCA accepted in *McIvor*.

Differential Treatment

The Plaintiffs argued that they suffered unlawful discrimination and that Bill C-3 had not gone far enough to address gender-based inequality. They brought to the Court's attention the ways in which the *Indian Act* continues to perpetuate differential treatment between:

(a) First cousins, depending on the sex of their Indian grandparent, where the grandparent was married to a non-Indian before 1985; and

(b) Siblings, where a male and female child were born out of wedlock between the 1951 and 1985 amendments to the *Indian Act*.

The differential treatment resulted in unequal ability to pass on Indian status, depending on whether a person was descended from a male or female Indian grandparent, or parent, depending on the situation.

Findings by the Court

In each of these cases, the Quebec Superior Court determined that the plaintiffs received differential treatment because of ongoing gender-based discrimination in the Indian status registration system.

For Descheneaux, the Court held that paragraphs 6(1)(a), (c), and (f) and ss. 6(2) of the *Indian Act* infringe on Descheneaux's right to equality enshrined in s. 15 of the Canadian *Charter* by granting full 6(1) status or 6(1) status beyond the age of 21 to certain persons:

i) who have only one Indian parent (other than a non-Indian woman who acquired status through marriage), and

ii) this Indian parent had only one Indian parent (other than a non-Indian woman who acquired status through marriage),

if their Indian grandparent is a man, but not if the Indian grandparent is an Indian woman who lost her status through marriage.

For the Yantha Plaintiffs, the Court held that paragraphs 6(1)(a), (c), and (f) and ss. 6(2) of the *Indian Act* infringe on the right to equality enshrined in s. 15 of the Canadian *Charter*:

1. of Susan Yantha, by making it possible for:

(i) some male illegitimate children of an Indian man and a non-Indian woman to pass on 6(1) status to their children with a non-Indian woman (who acquired status through marriage),

(ii) beyond the children's age of 21 or, in other words, for life,

when she is not permitted to do so because she is a illegitimate female child born between September 4, 1951, and April 16, 1985, inclusively;

2. of Tammy Yantha, by granting status equivalent to that in ss. 6(1) to some persons:

i) who have only one Indian parent (other than a non-Indian woman who acquired status through marriage), and

ii) this Indian parent was born out of wedlock of an Indian father and a non-Indian mother between September 4, 1951, and April 16, 1985, inclusively,

if their Indian parent born out of wedlock is a man but not if this Indian parent born out of wedlock is a woman born between September 4, 1951, and April 16, 1985, inclusively.

Deviation from McIvor Section 1 Analysis

Notably, the Court held that these violations are not justified under s. 1 of the *Charter*, and the sections were declared inoperative. The Court respectfully but strongly disagreed with the BCCA's analysis in *McIvor* of the existence of a pressing and substantial objective stating that:

> ... the concerns of some regarding the dilution of the cultural identity of First Nations could be considered in the context of the justification of an infringement of the right to equality only at the risk of giving weight to stereotypes.
>
> ... the concerns for resources that were expressed are problematic... budgetary restrictions alone do not justify an infringement... When an advantage is refused on the basis of a prohibited ground, equality often involves additional costs for society. The argument that there are suddenly insufficient resources for everyone once it is necessary to satisfy the requirements of the right to equality may in fact constitute another affront to this right.[25]
>
> (emphasis added)

The Court suspended the effect of the judgment for eighteen months, providing a deadline of February 3, 2017 for Parliament to remedy the provisions.

7. BILL S-3, AN ACT TO AMEND THE *INDIAN ACT* (ELIMINATION OF SEX-BASED INEQUITIES IN REGISTRATION)

[25] *Supra* note 22 at paras 184 and 186.

In 2015-16, Prime Minister Trudeau described his Government's approach to reconciliation as one that would revitalize the Nation to Nation relationship; mark true legal reform; and bring honour to the Crown. Bill S-3 is the first government legislation to directly affect Indigenous Peoples and this legislative attempt to address issues with the registration provisions in the *Indian Act* is inconsistent with the Government's political commitments.

In *obiter*, the Court instructed Parliament to go beyond the facts in *Descheneaux* in their drafting of legislation to consider all sex discrimination arising out of the *Indian Act*:

> ...because of the technical nature of the *Indian Act*, its evolution over time, and its multi-generational effects, the task of ensuring that it has no unjustifiable discriminatory effects is a significant challenge. These are not, however, reasons that justify not taking on that challenge once again.
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> Parliament should not interpret this judgment as strictly as it did the BCCA's judgment in McIvor. If it wishes to fully play its role instead of giving free reign to legal disputes, it must act differently this time, while also quickly making sufficiently significant corrections to remedy the discrimination identified in this case. One approach does not exclude the other.[26]

This summary places Bill S-3 in that lens. Canada's approach to Bill S-3 has ignored this important guidance from the Court.

To minimally comply with the *Descheneaux* ruling, the government introduced Bill S-3, which addresses three discreet issues of sexism in the *Indian Act*:

- **Cousins Issue:** Address the differential treatment of first cousins whose grandmother lost status due to marriage with a non-Indian, when that marriage occurred before April 17, 1985;

- **Siblings Issue**: Address the differential treatment of women who were born out of wedlock of Indian fathers between September 4, 1951 and April 17, 1985; and

- **Issue of Omitted Minors:** Address the differential treatment of minor children, compared to their adult or married siblings, who were born of Indian parents or of an Indian mother, but lost entitlement to Indian status because their mother married a non-Indian after their birth September 4, 1951 and April 17, 1985.

Section by Section Summary of Bill S-3

Re-enacts s. 6(1)(a)

1 (1) Paragraph 6(1)(a) of the *Indian Act* is replaced by the following:

(a) that person was registered or entitled to be registered immediately before April 17,

[26] *Supra* note 22 at paras 242-243.

1985;

This amendment simply re-enacts the impugned s. 6(1)(a) of the *Indian Act* which provides that individuals who were registered or entitled to be registered before the coming into force of Bill C-31 on April 17, 1985, continue to be registered or continue to be entitled to be registered after that date.

Re-enacts s. 6(1)(c)

(2) Paragraph 6(1)(c) of the *Indian Act* is replaced by the following:

(c) the name of that person was omitted or deleted from the Indian Register, or from a band list before September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or ss. 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under ss. 109(2), as each provision read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as any of those provisions;

This amendment re-enacts s. 6(1)(c) of the *Indian Act* which provides for the reinstatement of those individuals whose names were omitted or deleted from the Indian Register, or a Band List prior to April 17, 1985. In other words, it provides eligibility for Indian status to:

- women who had previously lost status as a result of marrying non-Indians;
- persons removed from the Register as a result of protests based on non-Indian paternity;
- persons omitted or deleted from the Register under the double-mother rule;
- the illegitimate children of Indian women born prior to August 14, 1956 who were omitted or deleted because of non-Indian paternity.

Differential Treatment of Children to Parents

(c.01) that person meets the following conditions:

(i) the name of one of their parents was, as a result of that parent's mother's marriage, omitted or deleted from the Indian Register on or after September 4, 1951 under subparagraph 12(1)(a)(iii) pursuant to an order made under ss. 109(2), as each provision read immediately before April 17, 1985, or under any former provision of this act relating to the same subject matter as either of those provisions,

(ii) their other parent is not entitled to be registered or, if that other parent is no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred before September 4, 1951, and

(iii) they were born before April 17, 1985, whether or not their parents were married to each other at the time of the birth, or they were born after April 16, 1985 and their parents were married to each other at any time before April 17, 1985;

(c.01) this amendment is intended to address the differential treatment of minor children compared to their adult or married siblings who were born of Indian parents, or of an Indian mother, but lost entitlement to Indian status because their mother married a non-Indian after their birth, and between September 4, 1951 and April 16, 1985.

Differential Treatment of Cousins depending on Sex of Grandparent

(3) ss. 6(1) of the *Indian Act* is amended by adding the following after paragraph (c.1):

(c.2) that person meets the following conditions:

(i) one of their parents is entitled to be registered under paragraph (c.1) or, if that parent is no longer living, was so entitled at the time of death or would have been so entitled on the day on which that paragraph came into force, had he or she not died, and

(ii) they were born before April 17, 1985, whether or not their parents were married to each other at the time of the birth, or they were born after April 16, 1985 and their parents were married to each other at any time before April 17, 1985;

This amendment intends to address the **"cousins" issue** from *Descheneaux* by correcting the differential treatment in the acquisition and transmission of "Indian status" that arises among first cousins of the same family depending on the sex of their Indian grandparent, where the grandparent married a non-Indian prior to April 17, 1985.

Differential Treatment of Siblings, including Transgender

(c.3) that person meets the following conditions:

(i) they were born female during the period beginning on September 4, 1951 and ending on April 16, 1985 and their parents were not married to each other at the time of the birth,

(ii) their father is entitled to be registered or, if he is no longer living, was at the time of death entitled to be registered, and

(iii) their mother was not at the time of that person's birth entitled to be registered;

This amendment is intended to address the **"siblings" issue** from *Descheneaux* by correcting the differential treatment in the ability to transmit "Indian status" between male and female children whose parents were not married to each other at the time of birth. It proposes to provide entitlement under ss. 6(1) to individuals born female and out of wedlock of an Indian father and of a non-Indian mother. Transgendered males who were born female will be assured of their ability to be eligible for registration under ss. 6(1).

Grandchildren/Great Grandchildren

(c.4) that person meets the following conditions:

(i) one of their parents is entitled to be registered under paragraph (c.2) or (c.3) or, if that parent is no longer living, was at the time of death so entitled or would have been so entitled on the day on which that paragraph came into force, had he or she not died,

(ii) their other parent is not entitled to be registered or, if that other parent is no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred before September 4, 1951, and

(iii) they were born before April 17, 1985, whether or not their parents were married to each other at the time of the birth, or they were born after April 16, 1985 and their parents were married to each other at any time before April 17, 1985;

This amendment addresses the provision for registration entitlement under ss. 6(1) for grandchildren and great-grandchildren of individuals affected by either the "cousins" issue or the "siblings" issue.

Re-enacts 6(1)(f)

(4) Paragraph 6(1)(f) of the *Indian Act* is replaced by the following:

(f) both parents of that person are entitled to be registered under this section or, if the parents are no longer living, were so entitled at the time of death.

This simply re-enacts paragraph 6(1)(f) of the *Indian Act* to make eligible for registration an individual whose both parents are entitled to be registered, deemed entitled to be registered or are registered.

Re-enact 6(2)

(5) ss. 6(2) of the *Indian Act* is replaced by the following:

Persons entitled to be registered

(2) Subject to s. 7, a person is entitled to be registered if one of their parents is entitled to be registered under ss. (1) or, if that parent is no longer living, was so entitled at the time of death.

This simply re-enacts ss. 6(2) of the *Indian Act* to make eligible for registration an individual with one parent who is entitled to be registered, deemed entitled to be registered or is registered.

Dual Entitlements

Clarification

(2.1) A person who is entitled to be registered under both paragraph (1)(f) and any other paragraph of ss. (1) is considered to be entitled to be registered under that other paragraph only, and a person who is entitled to be registered under both ss. (2) and any paragraph of ss. (1) is considered to be entitled to be registered under that paragraph

only.

Proposes to provide clarity where there are **dual entitlements** to registration so that those entitled to be registered under 6(1)(c.1) are registered under this paragraph as their descendants could benefit from the new proposed registration provisions 6(1)(c.2) and (c.4) instead of only registering under 6(1)(f) or ss. 6(2).

Entitlement where Ascendant Deceased

(6) Ss. 6(3) of the *Indian Act* is amended by striking out "and" at the end of paragraph (b), by adding "and" at the end of paragraph (c) and by adding the following after paragraph (c):

(d) a person described in paragraph (1)(c.01), (c.2), (c.3) or (c.4) and who was no longer living on the day on which that paragraph came into force is deemed to be entitled to be registered under that paragraph.

If a person is deemed entitled to be registered under paragraphs 6(1)(c.01), (c.2), (c.3) or (c.4) but is no longer living on the date of the coming into force of Bill S-3, that person is deemed entitled to registration. This would ensure that the children of individuals who would have been entitled under the new amendments had they not been deceased are entitled as if their ascendants were living and entitled to be registered under the new amendments.

Children of Deceased Ascendants entitled to be entered on Band List of Deceased Parent

2 (1) Ss. 11(3) of the *Indian Act* is amended by striking out "and" at the end of paragraph (a) and by adding the following after that paragraph:

(a.1) a person who would have been entitled to be registered under any of paragraphs 6(1)(c.01) to (c.4), had they been living on the day on which that paragraph came into force, and who would otherwise have been entitled, on that day, to have their name entered in a Band List, is deemed to be entitled to have their name so entered; and

If a person is deemed entitled to registration under paragraphs 6(1)(c.01), 6(1)(c.1), 6(1)(c.2), 6(1)(c.3) or 6(1)(c.4) but deceased before the coming into force of the Gender Equity in Indian Registration Act (Bill C-3) or before the date of the coming into force of Bill S-3, the person would be deemed to be entitled to have his or her name entered on the Band list maintained in the Department. This would ensure that children of individuals deceased, but newly entitled under these new provisions, also are entitled to have their name entered into the same Band list their parents would have been entitled to.

Newly Entitled to be Entered on Band List

(2) Ss. 11(3.1) of the *Indian Act* is replaced by the following:

Additional membership rule — paragraphs 6(1)(c.01) to (c.4)

(3.1) A person is entitled to have their name entered in a Band List that is maintained in

the Department for a band if

(a) they are entitled to be registered under paragraph 6(1)(c.01) and one of their parents ceased to be a member of that band by reason of the circumstances set out in subparagraph 6(1)(c.01)(i);

(b) they are entitled to be registered under paragraph 6(1)(c.1) and their mother ceased to be a member of that band by reason of the circumstances set out in subparagraph 6(1)(c.1)(i);

(c) they are entitled to be registered under paragraph 6(1)(c.2) and one of their parents is entitled to be registered under paragraph 6(1)(c.1) and to have his or her name entered in the Band List or, if that parent is no longer living, was so entitled at the time of death or would have been so entitled on the day on which paragraph 6(1)(c.1) came into force, had he or she not died;

(d) they are entitled to be registered under paragraph 6(1)(c.3) and their father is entitled to have his name entered in the Band List or, if their father is no longer living, was so entitled at the time of death;

(e) they are entitled to be registered under paragraph 6(1)(c.4) and one of their parents is entitled to be registered under paragraph 6(1)(c.2) and to have his or her name entered in the Band List or, if that parent is no longer living, was so entitled at the time of death or would have been so entitled on the day on which paragraph 6(1)(c.2) came into force, had he or she not died; or

(f) they are entitled to be registered under paragraph 6(1)(c.4) and their mother is entitled to be registered under paragraph 6(1)(c.3) and to have her name entered in the Band List, or, if the mother is no longer living, was so entitled at the time of death or would have been so entitled on the day on which paragraph 6(1)(c.3) came into force, had she not died.

This amendment gives the additional effect for individuals newly entitled to registration under 6(1)(c.01), 6(1)(c.2), 6(1)(c.3) or 6(1)(c.4), to have their names entered on the Band List maintained by the Department if they meet the requirements of the amended ss. 6 (3.1).

No liability for Crown or Council actions prior to Enactment of S-3

8 For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty in right of Canada, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because

(a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this Act comes into force; and

> (b) one of the person's parents is entitled to be registered under paragraph 6(1)(c.01), (c.2), (c.3) or (c.4) of the *Indian Act*.

This amendment controversially stipulates that no claim for compensation lies against the Crown, her employees or band councils for anything done in the performance of their duties because a person whose parent is entitled to registration under new paragraphs 6(1)(c.01), (c.2), (c.3) or (c.4) was not registered or included on a band list before the coming into force. That is, no person newly entitled to registration as of the coming into force of the legislation would be able to claim damages because they were not registered immediately prior to that date.

Retroactive Legislation Deeming Provision

> 9 This Act comes into force, or is deemed to have come into force, on a day to be fixed by order of the Governor in Council, but that day must be the day on which the suspension of the declaration expires.

Since Bill S-3 will not be enacted by the expiration of the Superior Court of Quebec's suspended declaration of invalidity on February 3, 2017. This clause allows the Governor in Council to bring the legislation into force retroactively, effective February 2, 2017.

8. CONCERNS RAISED REGARDING BILL S-3

All witnesses that appeared before the Standing Committee supported the intent of eliminating sex discrimination and *Charter* violations in the *Indian Act*. There was also unanimous rejection of the initial draft of Bill S-3 as the appropriate legal mechanism given the legal requirement for s. 35 of the *Constitution Act* and *Charter* compliance. Parliament should not knowingly advance legislation that it has notice will infringe upon Aboriginal and Treaty rights and will further exacerbate discrimination on the most vulnerable in Indigenous societies, Indigenous women and girls.

The following summarizes the themes of concerns raised:

Procedural Aspect of Section 35 of the *Constitution Act*: Breach of the Duty to Consult

The factual record demonstrates that substantive consultations did not occur with First Nations directly, only "engagement" sessions had been held with various national and regional Indigenous organizations. As a result, many submissions argued that to advance legislation while consultations had not been completed breached the procedural duty to consult related to the substantive Aboriginal and Treaty right to control First Nation citizenship. It is also settled law that any consultation that does not allow for accommodations (i.e., amendments to the Bill S-3), is not consultation at all. It was submitted that the Chair of the Senate Committee substantively narrows the scope of the Bill thereby prohibiting amendments, it is certainly not justifiable consultation.

Residual *Charter* Violations in *Indian Act*

The core of this concern is that Parliament is knowingly advancing legislation to eliminate

discrimination in the *Indian Act* with substantive notice that Bill S-3 leaves intact significant areas of sex discrimination. The Bill does not live up to its title and may not be *Charter* compliant.

LEAF noted passionately and practically that "[i]t's unacceptable and inconsistent with the *Charter*'s substantive equality guarantee to force indigenous women to endure the financial and emotional hardship of years of protracted litigation to remove the remaining areas of sex discrimination in the status provision. We already know they're there."[27]

There are a number of examples provided in witness submissions of situations where discrimination will continue. We will also take up the issue under suggested amendments to Bill S-3.

Fundamental Flaw: Band-aid Approach to a Terminal Patient

As stated in Committee hearings by the IBA, many witnesses expressed their frustration with "participating in a dialogue that is ultimately premised on tinkering with a formula that is used to determine who is and who is not an Indian under the *Indian Act*".[28] Nationhood entitlement within the confines of a statute intended to assimilate and eliminate Indigenous peoples is flawed. Furthering Indigenous citizenship through a legislative vehicle that only exacerbates discrimination will not work. In the case of s. 6 of the *Indian Act*, the IBA submitted that a status system that undermines the legitimacy of Indigenous governments to control citizenship cannot be characterized as one that promotes the honour of the Crown. Narrow, reactive amendments to the *Indian Act*, such as those contained within Bill S-3, will only prolong the injustice faced by Indigenous Nations in Canada.[29]

Noted Discriminations Left Intact in *Indian Act*

Many witnesses urged the committee to ensure that Parliament's legislative response to *Descheneaux* comprehensively remove all the vestiges of sex discrimination by either amending Bill S-3 or through withdrawing it and replacing it with a comprehensive amendment drawn from substantive consultations with First Nations and Indigenous women's organizations. No witness was capable of providing an exhaustive list and it may be perhaps an impossible task to produce such a list given the fact driven analysis required to identify all direct and indirect discrimination caused by the hierarchy created by s. 6 of the *Indian Act*.

Listed discriminations that remain in the *Indian Act* include:

- **Section 6(2) Second Generation Cut-Off**. The second-generation cut-off rule and hierarchy of status are not addressed by Bill S-3. By eliminating the total number of

[27] Women's Legal and Education Action Fund, *LEAF Submission to the Senate Standing Committee on Aboriginal Peoples on Bill S-3: An Act to amend the Indian Act (elimination of sex-based inequities in registration)*, (29 November 2016) at 7.
[28] *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 42nd Parl, 1st Sess (23 November 2016) at 13:72 (Drew Lafond, MacPherson, Leslie Tyerman, LLP, Indigenous Bar Association).
[29] Indigenous Bar Association, *Position Paper on Bill S-3 An Act to amend the Indian act (elimination of sex-based inequities in registration)*, (23 November 2016) at 6.

registered Indians through the second-generation cut-off rule, Canada is progressively able to minimize the total number of status Indians. Bill S-3, accepts new and restrictive rules of registration and does not deviate from the logic of elimination;

- **Illegitimate Children.** Prior to September 4, 1951, female children born outside of marriage to status men are disadvantaged under these status provisions, as are their descendants. Prior to 1951, male children born outside of marriage of status men and their descendants are eligible for full s. 6(1)(a) status registration;[30]

- **Grandchildren.** If born prior to 1951, any grandchild that traces their descent through Indian women who married out will be denied status;[31]

- **Enfranchisement by Father.** Prior to 1985, a woman could lose her status by her husband or father's decision to enfranchise his wife and minor children. This voluntary election was only provided to Indian men. Bill C-3 dealt with operational enfranchisement of women by marriage and Bill S-3 is silent on the patriarchal right provided to Father's to enfranchise;[32]

- **Same Parents, Different status.** Vested rights of Non-Indian women remain in the operation of the *Indian Act* and create inequitable treatment for siblings of parents born of Father-Indian or Mother-Non-Indian but "married in" to status determined on whether they were born before or after 1985. If children born pre-1985, they have s. 6(1) status as both parents are considered status Indians, if born post 1985, they are s. 6(2) because Mother treated as non-status;[33]

- **Undeclared paternity**: In the absence of proof before 1985, the father was presumed to be Indian. After 1985, that presumption was reversed, undeclared paternity now presumes the Father is non-Indian. Given that many women chose not to get married in order to not lose status for their children prior to 1985, there is an inequity created within siblings. This creates a situation where pre-1985 children of the same non-Indian father are declared s. 6(1) and post-1985 are s. 6(2);[34]

- **Adoption of Non-Indian Children.** Pre-1985, legal adoption by Indian parents didn't count if they didn't adopt an Indian baby;[35]

- **Retroactive to 1860.** To ensure that there are no unforeseen sex discrimination applications of the *Indian Act*, it is suggested that Bill S-3 apply retroactively to 1860

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[30] *Supra* note 27 at 3.
[31] Dr. Pamela Palmater, *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)*, (15 December 2016) at 5.
[32] *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 42nd Parl, 1st Sess (22 November 2016) at 13:35-13:36 (David Schulze, Counsel for the plaintiffs and for the intervenors).
[33] *Ibid* at 13:36 (David Schulze, Counsel for the plaintiffs and for the intervenors).
[34] *Supra* note 32 at 13:36 (David Schulze, Counsel for the plaintiffs and for the intervenors).
[35] *Supra* note 32 at 13:36 (David Schulze, Counsel for the plaintiffs and for the intervenors).

rather than 1951;[36]

- **Age-based Discrimination.** Bill S-3 also does not address age-based discrimination introduced in 1985 by Bill C-31, which provides individuals entitled to Indian status born prior to April 17, 1985 with status under s. 6(1) regardless of parentage, while individuals born on or after April 17, 1985 only acquire status under s. 6(1) if both parents had Indian status;[37]

- **Illegitimate Children of Female Indians Removed Under ss. 11(e) of the 1951 *Indian Act* and ss. 12(2) of the 1970 *Indian Act.*** Although paragraph 6(1)(c) of the *Indian Act* confers Indian status on illegitimate children of status Indian females (i.e. an individual whose name was omitted or deleted from the Indian register under ss. 12(2) of the *Indian Act* as this provision read immediately prior to April 17, 1985) (a "**Section 12(2) Indian**"), the children of Section 12(2) Indians were unable to pass on their full status to their children if they propagate with a non-status Indian and the child was born prior to 1985. These individuals are treated differently than the illegitimate children of status Indian males who had children prior to 1985, particularly illegitimate daughters of status Indian males following the introduction of paragraphs 6(1)(c.3) and 6(1)(c.4) under Bill S-3;

- **Males not Registered as Status Indians Did Not Acquire Indian Status Under the *Indian Act* by Virtue of Their Marriage to Status Indian females.** Non-status male Indians who married status Indian women have been treated differently than their non-status Indian female counterparts who acquired status by marrying a status Indian male. Depending on how one characterizes the benefits derived from being registered as a status Indian, non-status Indian females have derived a benefit that was otherwise denied to non-status male individuals. Although this aspect of sex discrimination has not been addressed under Bill S-3, we strongly caution that any approach which allows non-status males to acquire status by virtue of their marriage to a status Indian female could face strong opposition from Indigenous communities; and

- **Sex-Based Hierarchy Within 6(1).** Indigenous women and their descendants to inferior categories of status. Women restored under Bill C-3 can never have s. 6(1)(a) status, but their brother, with the same parents, can. Consigning women to 6(1)(c) status devalues them, and denies them the legitimacy and social standing. Bill S-3 proposes to add new sub-categories of s. 6(1)(c), (c.2, c. 3, c.4) thereby extending forms of inferior status to more people.[38]

Insufficient Resources

Many witnesses expressed concerns about the implementation of Bill S-3 and the two-pronged

[36] *Supra* note 32 at 13:70 (Robert Bertrand, National Chief, Congress of Aboriginal Peoples).
[37] Canadian Bar Association, Aboriginal Law Section, *Bill S-3 – Indian Act amendments (elimination of sex-based inequities in registration)*, (November 2016) at 5.
[38] Feminist Alliance for International Action, "One More Time: The Government of Canada fails to remove all sex discrimination from the *Indian Act*" (28 November 2016) at 2.

approach calling on the Government of Canada to provide adequate funding in place for:

- increased members within First Nations;
- increased demands on Post-Secondary Funding Program and Non-Insured Health Benefits;
- potential increases in Treaty land entitlements with population-based calculations;
- possible land issue entitlements with returning membership to First Nations; and
- specific capacity funding for organizations, especially Indigenous women's organizations, in Phase II of the Nation-to-Nation approach.

Section 8 – Denial of Liability

Several witnesses raised strong concerns regarding s. 8 of Bill S-3, which precludes those impacted by Bill S-3 from seeking compensation for their past exclusion from Indian status. It prevents anyone previously denied Indian status as a result of the sex discrimination addressed by Bill S-3 from taking legal action against the federal government, its agents or band councils. S. 8 wrongfully acts as a shield for sex discrimination and *Charter* violations.

9. ALTERNATIVES FOR IMPLEMENTING DESCHENEAUX

As we recommended in our prior submissions regarding Bill S-3, the IBA is of the view that the focus of this process should more properly be upon the implementation of *Descheneaux* within a Nation to Nation framework which ceases attempting to further categorize Indians. In support of this work, we repeat our request that Canada establish a Special Parliamentary Committee to act as a Parliamentary Task Force on the issue of self-determination and citizenship under s.s 6-14 of the *Indian Act*.

Subsequent to *Descheneaux*, other Indigenous groups and women's organizations have advocated for alternative approaches to eradicate *Indian Act* discrimination:

1. Stop creating endless categories of Indians. As argued by the Liberals in 2010 at the House of Commons, to eliminate all sex-based discrimination, all Indian men and women born prior to 1985 (whether married or not or of matrilineal or patrilineal descendants) should be restored to full s. 6(1)(a) status.[39]

2. Canada must work in partnership with Indigenous Nations and women's groups to comprehensively remove all forms of sex discrimination from the *Indian Act* as part of Phase one of Canada's reform process through amendments to Bill S-3 or the tabling of a new bill altogether.[40] This first step is a necessary element for the following Nation to

[39] *Supra* note 38 at 3.
[40] *Proceedings of the Standing Senate Committee on Aboriginal Peoples,* 42nd Parl, 1st Sess (29 November 2016) at 14:27 (Krista Nerland, Women's Legal Education and Action Fund).

Nation examination of departing from the *Indian Act*.[41] Failing to do so, will result in the exclusion of the perspectives of Indigenous women and their descendants who are currently prevented from registration or participating in these Nation level discussions.[42] Delaying this equality certainty on the premise of necessary Nation consultation is dishonourable Crown conduct at best as Indigenous women must not be treated as a "commodit[y] to be traded in a process of reconfiguring Nation-to-Nation relations.[43]

3. Remove s. 8 of Bill S-3 regarding Canada's liability in its entirety and develop a negotiation process to resolve outstanding claims, including those for Bill C-31 and Bill C-3 claimants.[44]

4. Sufficient resources, including land, need to be identified by Canada and Indigenous governments to assist Nations with the expected increases in membership resulting from Bill S-3.[45] Similarly, resources and service standards need to be developed for the registration department of Indigenous and Northern Affairs Canada to allow for the timely registration of those previously discriminated against.

5. The amendments proposed in Bill S-3 should provide entitlements to individuals suffering discrimination as a result of events prior to 1951. As was the case with Bill-31, Bill S-3 should address discrimination from 1860 onwards.[46]

10. OUTSTANDING DISCRIMINATION CHALLENGES TO *INDIAN ACT* REGISTRATION PROVISIONS

To survey ongoing discrimination challenges, we researched court cases, Canadian Human Rights Tribunal Cases and queried news releases for announcements relating to discrimination challenges to the registration provisions of the *Indian Act.* We note that ongoing cases that have not yet been decided by a court are not searchable using available databases. For this reason, there may be active cases that do not appear in our results. The following table provides a brief summary of the cases of which we are aware.

Case	Group	Grounds alleged	Conclusion
Matson et al v Indian and Northern Affairs Canada, 2013 CHRT 13, aff'd 2016 FCA	Individual litigants	Discrimination on the grounds of race, national or ethnic origin, sex and family, contrary to s. 5 of the *CHRA,* based on the way in which the	The CHRT (affirmed on appeal) determined that the complaints were direct challenges to provisions in the *Indian Act* and as such did not allege a discriminatory

[41] *Supra* note 27 at 8.
[42] *Supra* note 31 at 9.
[43] Gwen Brodsky, "Indian Act Sex Discrimination: Enough Inquiry Already, Just Fix It*,* 28 Can. J. Women & Law 314 at 320.
[44] *Supra* note 31 at 16.
[45] *Supra* note 40 at 14:29 (David Taylor, Aboriginal Law Section, Canadian Bar Association).
[46] *Supra* note 28 at 13:70 (Robert Bertrand, National Chief, Congress of Aboriginal Peoples).

200* *Roger William Andrews and Roger William Andrews on behalf of Michelle Dominique Andrews v Indian Northern Affairs Canada,* 2013 CHRT 21, aff'd 2016 FCA 200* *Consolidated on appeal		Complainants were registered as Indians under the *Indian Act.* The Complainants alleged that, due to their matrilineal Indian Heritage, they continued to be treated differently in their registration under ss. 6(2) when compared to those whose lineage is paternal and are registered under ss. 6(1). Specifically, the Complainants took issue with the fact that registration under ss. 6(2) did not allow the Complainants to pass on their status to their children.	practice under s. 5 of the *CHRA* because the adoption of legislation is not a service "customarily available to the general public" within the meaning of that s.. Such a challenge must be brought under s. 15 of the *Charter.* Appeals of the CHRT decisions in *Matson* and *Andrews* were consolidated at the Federal Court of Appeal and heard together in 2016 FCA 200. Leave to appeal to the SCC was granted on March 30, 2017.
Gehl v Canada (Attorney General) 2015 ONSC 3481* *Appealed to the ONCA	Individual litigant	Sought a declaration that s. 6 of the *Indian Act* is contrary to s. 15 of the *Charter* because: (i) S. 6 discriminates against applicants for registration who were born out of wedlock or whose ancestors were born out of wedlock; (ii) S. 6 discriminates against applicants for registration who do not know their paternity or the paternity of their ancestors; and (iii) S. 6 discriminates against applicants for registration whose ancestors were never registered or recognized as Indians prior to 1985.	Dismissed. The impugned provisions of the *Indian Act* treat all applicants the same. An onus is placed on all applicants to establish entitlement to registration. "Unknowable paternity" is not an analogous ground protected by s. 15. Appeal heard by the ONCA in December 2016. Decision of the ONCA rendered in 2017 ONCA 319, where the Court found in favour of the applicant (appellant) by holding that the Registrar improperly applied the "Proof of Paternity" Policy. The Court held that, in the appellant's circumstances, it was discriminatory to require

			the appellant to provide proof that her paternal grandfather was a status Indian.
Nacey, Rainville, Dennis v Aboriginal Affairs and Northern Development Canada, 2014 CHRT 20	Individual litigants	The Complainants allege AANDC engaged in a discriminatory practice on the basis of age, sex and/or family status, contrary to s. 5 of the *CHRA*. Specifically, two of the Complainants allege that AANDC engaged in a discriminatory practice in its application of ss. 6(1)(c.1) of the *Indian Act* requiring them or a sibling to have been born or adopted on or after September 4, 1951 in order for the Complainants to be eligible for registration under 6(2) of the *Indian Act.* The third Complainant alleges that AANDC engaged in a discriminatory practice by applying legislation that provides better treatment for male children born to Indian fathers outside marriage before April 17, 1985 than it does for female children in otherwise identical circumstances.	Adjourned pending conclusion of *Matson* and *Andrews.*
Beattie et al v Aboriginal Affairs and Northern Development	Individual litigants	The Complainant alleges that, contrary to s. 5 of the *CHRA,* AANDC discriminated against her "…in the provision of a	Contrary to s. 5, *CHRA,* AANDC refused to amend the Claimants category of registration and refused to recognize her entitlement to

Canada, 2014 CHRT 1		service customarily available to the general public and which s. 5(3) so s. 9(3) of the *Indian Act* require [AANDC] to provide to any person." In particular, the Claimant alleged AANDC refused, based entirely on the prohibited ground of family status discrimination, to give proper and adequate consideration to the facts and law presented to establish the Complainant's entitlement to Indian registration and band membership pursuant to ss. 6(1)(c) and 11(1)(c) of the *Indian Act.*	be added to the Band List of her custom adopted parents. Order given that AANDC cease discriminatory practices of: i) refusing to recognize the adopted child of a male Indian as a "child" of the male Indian, as that term was used in the 1927 *Indian Act*; and ii) refusing to consider first-time registrations for adoptees who were adopted before April 17, 1985, under any provisions other than ss. 6(1)(f) or 6(2) of the *Indian Act*; This case was distinguished from *Matson* and *Andrews* on grounds that those cases did not involve complaints about conduct in exercising discretion in applying the relevant legislation.
Renaud, Sutton and Morigeau v Aboriginal Affairs and Northern Development Canada, 2013 CHRT 30	Individual litigants.	The Complainants allege AANDC engaged in a discriminatory practice on the basis of age, sex and/or family status, contrary to s. 5 of the *CHRA.* Specifically, the Complainants challenged AANDC's application of paragraph 6(1)(c.1) of the *Indian Act* in denying their	Adjourned pending conclusion of *Matson* and *Andrews.*

		applications for Indian registration.	

11. OPTIONS FOR AMENDING THE *INDIAN ACT* TO ELIMINATE SEX *DISCRIMINATION*

Over a century and half have passed since the painful words "Kill the Indian in the Child" were uttered by an American military officer and repeated by Duncan Campbell Scott. Now, with the alarming decline of Indian status registrations, it may well be that the current version of this horrific phrase may be "Kill the Indians *by* Woman and Child", as sex discrimination is maintained in the *Indian Act* registration sections. As status Indians have children who possess lesser Indian status or no status, the *Indian Act* actually eliminates status by First Nations having children. The "marrying in/out" of status of yesterday, may be the reality of "birthing in/out" of today and tomorrow.

Resources Reviewed

We have undertaken a comprehensive review of Parliamentary debates, relevant case law, analysis from academic scholars and critical commentary from a variety of legal journals and policy publications. Canada's approach to eliminate sex discrimination and the responding solutions since the first wave of amendments in 1985, narrowly focus on several strategic responses detailed below. Neither politicians, the judiciary or scholars have mapped out a concrete analysis of the discriminations that will endure from the amendments proposed in either Bill C-3 or Bill S-3 and few have attempted to recommend precise technical amendments.

Exhaustive List

Commentators urged the Senate Committee to ensure that Parliament's legislative response to *Descheneaux* comprehensively remove all instances of sex discrimination by either amending Bill S-3 or by withdrawing it and replacing it with a comprehensive amendment drawn from substantive consultations with First Nations and Indigenous women's organizations. No witness was capable of providing an exhaustive list and it may be perhaps an impossible task to produce such a list given the fact driven analysis required to identify all direct and indirect discrimination caused by the hierarchy created by s. 6 of the *Indian Act*.

Two considerations for a focused and fact driven approach may be for Canada to: (1) commit in advance of commencing Phase II of the *Descheneaux* implementation to strike a specific *Indian Act* – Elimination of Discrimination Working Group; and (2) create an appellate body/dispute resolution mechanism under *Indian Act* Registration process to ensure that s. 15 of the *Charter* is applied to each application. First, several organizations noted their concerns that the equality mandate will be lost in the depth of Phase II's mandate. A working group providing special status to Indigenous women's organizations may enhance the process on tangible further amendments of the *Indian Act* and be more constructive in its result. Second, witnesses highlighted the excessive human, cultural and financial costs borne by Indigenous women to bring the fundamental human right of equality to their citizenship and nationhood. An

alternative dispute resolution mechanism may provide a forum for greater access to justice and assist to alleviate unknown discrimination.

Recommendations

The IBA noted our reluctance to tinker with fundamental sovereign issues of equality, citizenship and Nationhood within the confines of the *Indian Act*. Our membership is greatly inspired by the self-determination of our Peoples and preservation of inequities under the *Indian Act* represents a frustration to our purpose. As it is often said, the Master's tools do not dismantle the Master's house.

We preface our recommendations with the assertion that the IBA represents the interests of Indigenous peoples as a whole. Some commentators would suggest that Indigenous peoples are polarized when it comes to the issue of Indigenous membership and that tension lies between the Indigenous governments who wish to exercise control over their membership systems and Indigenous peoples who seek reinstatement, commonly comprised of descendants of enfranchised Indigenous women. In our view, although the interests of Indigenous peoples are different insofar as the issue of Indigenous membership is concerned, they are not mutually exclusive.

It is harmful to describe the Indigenous membership issue solely as one of sex discrimination. It is equally harmful to characterize the issue as one of sex inequality versus Indigenous self-determination, as this creates the perception that any victory for sex inequality means a defeat for Indigenous sovereignty. The issue of Indian status has been consistently characterized as a balancing act between, on the one hand, Indigenous self-determination, and on the other hand, achieving sex equality. Indeed, the Government applauded the enactment of Bill C-31 as an achievement of that "balance".[47] We submit that the current *Indian Act* system has neither eradicated sex inequality or meaningfully advanced Indigenous self-determination and that within the current framework the accomplishment of these dual objectives may, in fact, be impossible.

It is only within the context of Indigenous self-determination that sex inequality must be addressed. In fact, we would argue that sex equality is presumed as part of the exercise of Indigenous jurisdiction over membership. The aboriginal and treaty rights of Indigenous peoples that are recognized and affirmed under section 35 of the *Constitution Act*, *1982* are qualified pursuant to section 35(4), which provides that such rights are "guaranteed equally to male and female persons." Further, as set out in the *United Nations Declaration on the Rights of Indigenous Peoples*, "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions…"; however, this is also qualified by Article 44, which provides that "[a]ll the rights and freedoms recognized herein are equally guaranteed to make and female indigenous individuals." The overarching goal of ending sex discrimination is therefore subsumed within the broader goal of Indigenous self-determination.

[47] See *Sawridge Band v. Canada*, 2003 FCT 347 ar paras 28 to 30.

Against this backdrop, the IBA's objective in this case is to **empower Indigenous governments to allow them to exercise jurisdiction over their membership systems**. The IBA respectfully submits that any proposed amendments to the *Indian Act* introduced at this stage must be comprised of both substantive and procedural elements. The substantive elements are intended to effect the piecemeal changes in response to the decision in *Descheneaux*, whereas the procedural elements are intended to implement a binding commitment on Canada's part to implement a long-term approach which results in the implementation of Indigenous jurisdiction over membership. The substantive and procedural amendments must be read together. In other words, the IBA's acceptance of the substantive amendments are conditional upon the adoption of the procedural ones as well.

Substantive Revisions to Bill S-3

- **Section 12(2) Indian.**

  Although paragraph 6(1)(c) of the *Indian Act* confers Indian status on illegitimate children of status Indian females (i.e. an individual whose name was omitted or deleted from the Indian register under ss. 12(2) of the *Indian Act* as this provision read immediately prior to April 17, 1985), the children of s. 12(2) Indians were unable to pass on their full status to their children if they propagate with a non-status Indian and the child was born prior to 1985. These individuals are treated differently than the illegitimate children of status Indian males who had children prior to 1985, particularly illegitimate daughters of status Indian males following the introduction of paragraphs 6(1)(c.3) and 6(1)(c.4) under Bill S-3.

  To address this situation, the IBA proposes the following new s.6(1)(c.00):

  (c.00) that person meets the following conditions:

  (i) the name of one of their parents was omitted or deleted from the Indian Register on or after September 4, 1951 under ss. 12(2), as it read immediately before April 17, 1968, or under any former provision of this Act relating to the same subject matter as that ss.,

  (ii) their other parent is not entitled to be registered or, if that other parent is no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred before September 4, 1951, and

  (iii) they were born before April 17, 1985, whether or not their parents were married to each other at the time of the birth, or they were born after April 16, 1985 and their parents were married to each other at any time before April 17, 1985.

- **Section 6(1)(c.4) Indians.**

  Section 6(1)(c.4) in Bill S-3 confers Indian status on a person whose parent is entitled to be registered under section 6(1)(c.2). Section 6(1)(c.2) confers status on a person whose

parent is entitled to be registered under section 6(1)(c.1). Section 6(1)(c.1) confers status on a person whose mother was enfranchised by reason of marrying a non-Indian and who was reinstated under section 6(1)(c). Put simply, a woman who married a non-Indian prior to 1985 was entitled to reinstatement under section 6(1)(c). However, Bill S-3 entitles the great grandchildren of the reinstated woman to 6(1) status, even if the child and grandchild of the reinstated woman both had children with non-Indians. This creates inequality between men whose great grandchild was born prior to 1985 and women whose great grandchild was born prior to 1985. According to the double mother rule, the man's grandchild would be reinstated under 6(1)(c), but the great grandchild would only be registered under section 6(2).

- **Unnamed Paternity**.

  Canada's current policy regarding unnamed paternity and the subsequent implementation of s. 6 results in a distinction based upon sex and marital status. The disadvantage experienced through this policy will inevitably be experienced Indigenous women due to the reality of child-bearing and the fact that it is almost always the case that it is men who are left unstated on birth certificates. This particular form of discrimination often arises within a context of poverty and violence suffered by Indigenous women as mothers may choose to not name the father in cases of sexual violence, social conflicts and denial of paternity by the father. The operation of the policy serves to 'widen the gap' between Indigenous women and the remainder of society, denying women the ability to transmit status to either their children or grandchildren. The details of this discrimination were recently explained very eloquently in *Gehl v. Canada (Attorney General)*, 2017 ONCA 319.

  The IBA takes the position that Canada must comprehensively review Bill S-3 to ensure that all discrimination arising from unnamed paternity remedy this concern. It is settled law that any statutory interpretation ambiguity must be liberally interpreted in favour of the Indigenous party and, accordingly, it is the IBA's further position that the presumption that the unnamed parent is a s.6(1) status Indian be restored at law and policy.

- **Denial of Compensation.**

  The denial of liability or compensation for Canada's known infringements upon equality as proposed under S. 8 of Bill S-3 is reprehensible. As other witnesses before the Senate Committee raised, this shield from sexual discrimination and *Charter* violations, allows Canada to continue to delay the removal of all forms of discrimination from the *Indian Act*.

  The IBA takes the position that Bill S-3 be amended to remove s. 8 of the Transitional Provisions in its entirety.

- **1951 Cut-Off.**

Bill C-3 was limited to reinstating status for those who had lost it after September 4, 1951, the date at which the Double Mother rule was added to the *Indian Act*. The err in this approach is that the indirect result has created a hierarchy, range of lesser status and exacerbated further discrimination with Indigenous communities.

The IBA takes the position that Bill S-3 be amended to require that all "persons" be restored to s. 6(1)(a) status if he/she is (1) born before the 1951 *Indian Act*, and (2) is the descendent of a person registered or entitled to be registered under the changes in the 1951 *Indian Act* to simplify the 1951 cut-off dilemma.

- **Alternative Approach - Restore Pre-1985 to s. 6(1)(a) Status.**

  As mentioned above, there has been no consensus on a formula for eliminating all residual sex discrimination, and for that matter other grounds of discrimination under the *Indian Act*. If it is determined that a more comprehensive approach is needed to eliminate all discrimination (as recommended by the Court in *Descheneaux*), including sex discrimination and discrimination on the basis of marital status, we submit that paragraph 6(1)(a) be amended by adding the following:

  (a.1) that person was born prior to April 17, 1985 and is a direct descendant of the person referred to in paragraph (a) or of a person referred to in paragraph 11(1)(a), (b), (c), (d), (e) or (f) as they read immediately prior to April 17, 1985;

  The Liberal opposition advocated for the foregoing provision at the 2010 Committee hearings for Bill C-3. The Liberals argued for a broader amendment to address the concerns of multiple witnesses testifying to the residual discrimination within the *Indian Act* despite the proposed amendments. Their efforts also focused upon rendering s. 6(1)(a) void of any discrimination and serving to reflect the wider findings within the BC Supreme Court ruling.

  While the proposed amendment was ruled inadmissible by both the Committee and the House of Commons due to a perceived inconsistency with the intent of Bill C-3 to respond solely to the BC Court of Appeal decision, we think that the consultations undertaken with witnesses and the overall stated objective of the Liberals warrants some further consideration of the following the proposed amendment.

  It should not remain the case that Indigenous women and their descendants are relegated to what are clearly perceived as inferior categories of status. Countless critics have advocated to eliminate the sex-based hierarchy within s. 6(1). Sustaining the circumstance whereby Indigenous women restored under Bill S-3 can never attain s. 6(1)(a) status, while their brother with identical parents can, defies reason and logic. Extending further sub-categories of inferior status to larger groups of descendants will not likely serve to advance equity.

Procedural Revisions to Bill S-3

- **Indigenous Membership Panel.**

  The IBA submits that there must be sufficient structure to the process for Phase Two of the *Indian Act* reform. A panel and process similar that struck to legally reform the *Canadian Environmental Assessment Act* and the *National Energy Board Act* may be instructive. That is, we recommend that an independent panel be struck to perform Nation-to-Nation engagement across Canada and provide enhanced priority to facilitate submissions from Indigenous Women's organizations at the local, regional and national level. Community outreach to ensure that the voices of Indigenous women, status and non-status, are given their adequate priority should be a substantial part of this process. Finally, a report with recommendations for further reform could form the basis of the Nation-to-Nation consultation. The report could act as a tangible, focused and constructive bridge between Phase One and Two of the reform process.

  The IBA submits that Bill S-3 be amended to contemplate the formation of an independent panel with the mandate to research, consult and report on the next steps for implementing Indigenous jurisdiction over membership, including a mandate to make recommendations for the elimination of Indian status system in favour of an approach which advances Indigenous sovereignty and is consistent with the federal government's responsibilities for Indians under section 91(24).

- **Indigenous Membership Dispute Resolution Body.**

  As explained above, Bill S-3 should include the formation of a dispute resolution body that is equipped to hear and decide on disputes relating to Indian status.

Closing Comments

> ... Indian women... have been denied their birthright. They have been denied the right to call themselves Indian. They have been denied their nationality. By birth and by blood, Indian women are a part of the First Nations of Canada. It is not so important how or in what manner they have been denied their nationality; what is important is that they have been denied this right. It so happens that Indian women have been systematically discriminated against on the basis of their sex in federal *Indian Acts* since 1869.
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> *Ms. Jane Gottfriedson, the President of the Native Women's Association of Canada, given before the Standing Committee, September 9, 1982. (Standing Committee, September 9, 1982; pp. 2:37-2:38.)*

Thirty-five years after this statement and fifteen years after Ms. Gottfriedson's passing in 2002, it remains the fact that the Indian Act denies Indigenous women their birthright, nationality and their dignity. NWAC honours Indigenous female leaders with the Jane Gottfriedson award to those that lead in protecting the political and social rights of Indigenous women. The award is

her legacy, as it symbolizes there remains much work to be done for Indigenous women to achieve equality. The *Indian Act* also has a legacy as an instrument of sexist assumption, gender inequality and violence against Indigenous women.

Our report comprehensively reviewed all commentary, submissions and analysis for now three Bills to amend the *Indian Act* and it is still clear there is much work to be done to honour Indigenous women as rightful citizens of our Nations.

This next chapter of work may be captured by Phase Two of the *Indian Act* reform if there is a mindful effort to empower the silent and excluded. We need to develop participatory mechanisms that brings the fact-driven discrimination to light. We need to hear from non-status Indigenous women and provide them with the capacity to full participate in this next round of discussions with Canada.

Bill S-3 in its present form will not eliminate sex discrimination in the *Indian Act*. It will, at best, achieve limited equality for what sex discrimination is evidenced and can be identified by the few Indigenous Peoples that were granted opportunity to appear in Senate Committee. Neither the IBA, Government of Canada nor other witnesses are capable of being fully informed to do justice to the cause of equality. The Bill fails to meet its noble title.