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

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INTRODUCTION

The Indigenous Bar Association in Canada (the "IBA") is a non-profit organization representing Indigenous peoples involved in the legal profession across Canada, including judges, lawyers, academics, and students-at-law. The IBA relies on the voluntary contributions of its members and its goals and objectives include the following: (a) establishing a nation-wide community of Indigenous lawyers; (b) providing ongoing education to its members with respect to principles rooted in Indigenous law; (c) providing a forum for the exchange of information and experiences of Indigenous lawyers, academics, and students; and (d) advancing legal and social justice for Indigenous peoples across Canada by engaging in law and policy reform. The IBA continues to promote the recognition and respect for Indigenous laws, customs and traditions in carrying out all of its objectives.

INDIAN STATUS

The IBA acknowledges that the Standing Senate Committee is meeting as a result of the decision of the Quebec Superior Court in *Descheneaux c Canada (Procureur general)* and that Bill S-3 represents Parliament's response to the decision of the Court in that case, namely, to eliminate sex inequality under the *Indian Act*; however, the IBA is of the view that Parliament should not limit its analysis to sex inequality within the *Indian Act*. The IBA submits that Canada needs to focus on legislative reform that empowers Indigenous peoples to meaningfully exercise control over their citizenship systems within Canada's nation-state. Although the IBA has included in our submission suggestions for further improving Bill S-3 from a sex equality standpoint, the primary purpose of our submission is to advocate for the implementation of a new system which respects the autonomy and self-determination of Indigenous peoples in Canada.

While the IBA believes that Bill S-3 is a step towards sex equality within the *Indian Act*, the proposed amendments represent a patchwork solution to the fundamentally flawed provisions in the *Indian Act* and do not address questions pertaining to citizenship, Indigenous jurisdiction and the long-term viability of the status system as a whole. Parliament has an opportunity to recognize and implement systems of citizenship based on Indigenous legal traditions. By disregarding the opportunity to address these broader issues, the Crown is creating an obstacle for Indigenous nations who wish to exercise their aboriginal, treaty, and international rights to govern their own citizens.

COLONIAL FOUNDATION OF INDIAN STATUS

The historic relationship between Indigenous peoples as the original inhabitants of Canada and the people who subsequently settled in this country is tainted by the ambitions of foreign colonial regimes. The colonial agenda perceived the presence of Indigenous peoples in Canada as an obstruction to the ultimate goal of imperial dominance, their customs as barbaric and their purpose as fleeting. The Final Report of the Truth and Reconciliation Commission describes the colonizer's intentions in Canada through the accounts of one of its proponents:

> Herman Merivale, a future British permanent undersecretary of the Colonial Office, noted in his 1840 *Lectures on Colonization and Colonies* that there were four basic approaches an imperial power could take in its relations with Indigenous people. It could exterminate them, enslave them, separate them from colonial society, or assimilate them into colonial society.[1]

The excerpt above explains how colonial authorities envisioned their relationship with Canada's Indigenous peoples. This colonial sentiment ultimately informed the Canadian government's policies toward Indigenous peoples and their traditional territories. Interestingly,

[1] The Final Report of the Truth and Reconciliation Commission of Canada, Canada's Residential Schools: The History, Part 1 Origins to 1939, at p. 14.

the era in which *Lectures on Colonization and Colonies* was authored coincides with one of the first attempts by the colonial government in Canada to define who is and who is not an "Indian". For instance, Article V in *An Act for the better protection of the Lands and Property of the Indians in Lower Canada, August 10, 1850*, provided as follows:

> That the following classes of persons are and shall be considered as Indians belonging to the Tribe or Body of Indians interested in such lands:
> *First*. – All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants.
> *Secondly*. – All persons intermarried with any such Indian and residing amongst them, and the descendants of all such persons.
> *Thirdly*. – All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such: And
> *Fourthly*. – All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants.

The attempts by colonial authorities to delineate the scope of Indians and Tribes was, from their inception, principally aimed at identifying persons who were to be either isolated or assimilated. The terms "Tribe" or "Indian" were not instruments to recognize autonomous Indigenous nations and their respective members. Rather, the terms were used to denote peoples who the colonizer viewed as primitive and who were deprived of basic civic rights afforded to other citizens in Canada. The government's reason for defining Indigenous peoples later became apparent when the government legislated a mechanism under which a person could cease to be an Indian or "enfranchise". Namely, an "Indian of the male sex, and not under twenty-one years of age, is able to speak, read and write either sufficiently advanced in the elementary branches of education and is of good moral character and free from debt…". In essence, a person could discard his or her Indian status if they fit the colonial criteria.

The term "Indian" has been amended on numerous occasions since it was articulated in *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, and the historic concept of enfranchisement was abolished under the *Indian Act*, RSC 1985, c I-5. However, the archaic attempts by the Crown to prescribe a concrete, homogenous formula for determining who qualifies as an Indigenous are still alive and well today. The absurdity of defining who is and who is not an Indian within a colonial statutory framework is underscored by the Crown's failed attempts to implement a fair and equitable system after over a century of statutory reform. Today, the immediate issue the Parliament is considering is sex equality, but tomorrow the issue will be the "second generation cut-off" rule.

INDIGENOUS JURISDICTION OVER CITIZENSHIP

The IBA submits that Indigenous people comprise sovereign nations that possess the inherent jurisdiction to exercise exclusive control over membership. This view is consistent with Canada's commitment to reconciliation with Indigenous peoples and the formal adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") and is a crucial basis upon which to achieve reconciliation between Indigenous nations and Canada.

On May 10, 2016, the Honourable Minister of Indigenous Affairs and Northern Development, Carolyn Bennett, addressed the Permanent Forum on Indigenous Issues at the United Nations (the "UN"), and stated that Canada will formally adopt UNDRIP and remove its objector status. Honourable Minister Bennett said that, "[w]e intend nothing less than to adopt and implement the Declaration in accordance with the Canadian Constitution". The IBA welcomes Canada's adoption of UNDRIP, in particular as it pertains Indigenous nations' ability to maintain exclusive control over membership. Article 33.1 of UNDRIP provides that

"Indigenous Peoples have the right to determine their own identity or membership in accordance with their customs and traditions." The IBA submits that the adoption and implementation of Article 33.1 of UNDRIP mandates that Canada recognize Indigenous peoples' right to govern their own membership.

The Report of the Royal Commission on Aboriginal Peoples (the "RCAP Report") is a seminal report which analyzed the relationship between Indigenous peoples and Canada. The RCAP Report highlighted the importance of Indigenous nations assuming jurisdiction over citizenship. The Commission concluded that:

> Under section 35 of the Constitution Act, 1982, an Aboriginal nation has the right to determine which individuals belong to the nation as members and citizens. However, this right is subject to two basic limitations. First, it cannot be exercised in a manner that discriminates between men and women. Second, it cannot specify a minimum blood quantum as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race as such.[2]

The IBA supports the position of the Commission that Indigenous nations have a right to determine their own rules for citizenship that is constitutionally entrenched in section 35 of the *Constitution Act, 1982*. Indigenous nations cannot meaningfully exercise their collective rights within a constitutional democracy without having the authority to define who falls within that collective. The IBA argues that the "status system" under the *Indian Act* unjustifiably infringes the inherent right of Indigenous peoples to self-determine their own citizenship. The right to determine citizenship is an integral component of "pre-existing sovereignty" which was historically exercised by Indigenous nations and continues to be done through traditional Indigenous legal systems. Note, however, that the Commission identified two fundamental limits

[2] Royal Commission on Aboriginal Peoples, Summary of Recommendations. Volume 5, Appendix A, page 12.

on Indigenous nations' jurisdiction over citizenship: sex discrimination; and the utilization of blood quantum as a basis for determining citizenship. The IBA agrees with the limitations espoused by the Commission.

Moreover, as stated in *Haida Nation v BC (Minister of Forests)*, the Crown must act honourably in "all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties". The honour of the Crown "is always at stake in its dealings with Aboriginal peoples." In the case of section 6 of the *Indian Act*, the IBA submits 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. Maintaining societal relationships in accordance with traditional principles, laws, customs and practices, including the right to determine their own members, is a fundamental right that must be exercised exclusively by Indigenous nations.

The amendments proposed by Bill S-3 fail to take these important factors into consideration. Narrow, reactive amendments to the *Indian Act*, such as those contained within Bill S-3, will only precipitate the injustice faced by Indigenous nations in Canada.

CHALLENGES IN OVERCOMING THE INDIAN ACT

The first obstacle that the IBA anticipates with its submission is that the scope of the proposed changes to the *Indian Act* may be perceived by legislators as a drastic, impractical change. The Honourable Minister of Justice, Jody Wilson-Raybould, addressed the Assembly of First Nations Annual General Assembly on July 12, 2016, by stating that:

> [She] would tomorrow like to cast into the fire of history the *Indian Act* so that the Nations can be reborn in its ashes - this is not a practical option - which is why simplistic approaches, such as adopting the UNDRIP as being Canadian law are unworkable and, respectfully, a political distraction to undertaking the hard work required to actually implement it.

The IBA is of the view that the implementation of a system for empowering Indigenous peoples to reassume exclusive control over their citizenship systems does not amount to a wholesale adoption of UNDRIP and it is certainly not "unworkable". This merely reflects a trend that Indigenous nations are already exploring across Canada. For instance, Sébastien Grammond, a University of Ottawa law professor, wrote about the beneficiary provisions of the James Bay Northern Quebec Agreement (the "JBNQA") and how they serve as an example of an Indigenous community exercising autonomy over citizenship. Professor Grammond suggests that sections 3A.3.1 of the JBNQA recognize the Inuit legal order as part of the composition of Canada's legal institution. Grammond goes on to state that the criteria adopted for the purposes of determining who is and who is not Inuk:

> … effectively emphasize the individual's connection with the community, most notably when it is based on ancestry, residence in Nunavik, concern for the welfare of other beneficiaries (to be clear, sharing), and family and social connections. The criteria also encompass those factors which are traditionally seen by Western eyes as being "typical Inuit", such as respect for the land and animals, and knowledge of Inuktitut. *Furthermore, these criteria are to be applied by local communities entirely composed of Inuit, who are certainly better positioned than a bureaucrat, to determine if a person is a member of their community.*[Emphasis added]

The James Bay Inuk determine citizenship based on communal ties and participation. The use of traditional laws and customs as a basis for determining citizenship is an approach that the IBA believes should be utilized by each of the Indigenous nations in Canada as an alternative to Indian status. In addition, the Self-Governing Yukon First Nations (the "SGYFN") are another example of Indigenous nations taking exclusive control of their citizenship systems. In the case of the SGYFN, these nations have the authority to enact citizenship codes though their own constitutions and charters. Although this framework was implemented through comprehensive

self-government agreements entered into by each of the SGYFN, there is no reasons why the same cannot be introduced through legislation.

The next challenge is to transform the existing legal regime without affecting the rights acquired to date under the band membership and Indian status provisions of the *Indian Act*. Many Indigenous nations and Indigenous peoples have attributed tangible and intangible benefits with being a status Indian. The value of these benefits, particular those that are intangible in nature, have in some cases been internalized and have become extremely influential. As set out by the British Columbia Court of Appeal in *McIvor v Canada* (*Registrar of Indian and Northern Affairs*):

> I am of the view that the trial judge was correct in accepting that intangible benefits do flow from the right to Indian status.
>
> > The plaintiffs assert that the right to transmit Indian status to one's child should also be recognized as a benefit. I agree with that proposition. Parents are responsible for their children's upbringing, and financial benefits that an Indian child receives will, accordingly, alleviate burdens that would otherwise fall on the parent. Quite apart from such benefits, though, it seems to me that the ability to transmit Indian status to one's offspring can be of significant spiritual and cultural value. I accept that the ability to pass on Indian status to a child can be a matter of comfort and pride for a parent, even leaving aside the financial benefits that accrue to the family.[3]

The problem with the current status system is that the "spiritual and cultural" values associated with being a status Indian are based on arbitrary and archaic distinctions which are rooted in colonial aspirations. Indigenous legal systems are wholly inconsistent with the race-based formula that was introduced and that is currently being maintained under the *Indian Act*. John Borrows argues that:

> We should not deny people citizenship if they are willing to abide by First Nations citizenship laws and be fully participating members in our

[3] *McIvor v Canada* (*Registrar of Indian and Northern Affairs*), 2009 BCCA 153 at paras 70 and 71.

> communities… Indigenous laws should flow from the political character of our societies; they should not apply because of society's racialization of Indigenous peoples.

The continued reference to Indian status as a substitute for Indigenous identity will have a corrosive effect on Indigenous legal traditions, particularly in light of the "second generation cut-off" rule which will inevitably result in the disappearance of status Indians altogether. Abolishing the status system will give Indigenous nations the ability to strengthen communal ties by being able to meaningfully incorporate into their nations individuals who constitute Indigenous citizens based on their legal traditions.

RECOMMENDATIONS

1. **The IBA recommends that the federal government of Canada move away from defining "Indians", to supporting an approach that recognizes First Nations' jurisdiction to determine citizenship.**

2. **The IBA recommends that Canada establish a Special Parliamentary Committee to act as a Parliamentary Task Force on the issue of self-determination and citizenship under sections 6-14 of the *Indian Act*.**

3. **In the interim, and to clarify our oral submissions before the Senate on November 23, 2016, the IBA submits that it has not had an adequate opportunity to comprehensively review Bill S-3 to determine whether the Bill addresses all of the instances of sex discrimination, particularly sex discrimination that can be traced to the early versions of the *Indian Act*. Subject to a more comprehensive review by the IBA, at this time we are able to identify the following instances of sex inequality in the *Indian Act* that have not been addressed in Bill S-3:**

    (a) **Illegitimate children of female Indians removed under subsection 11(e) of the *Indian Act*, 1951, c. 29 and subsection 12(2) of the *Indian Act*, 1970 R.S., c. 149.** 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 subsection 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.

(b) **Male individuals who are 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.

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