Second Generation Cut-Off

Canada's Legal Extinction Plan

Prepared by Mary Eberts, OC

for the

Indian Act Sex Discrimination Working Group

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The Indian Act Sex Discrimination Working Group

The Indian Act Sex Discrimination Working Group (the Working Group) is composed of the leading plaintiffs in the court and UN petitions that have challenged *Indian Act* sex discrimination, Canada's top legal experts on this sex discrimination, leaders from two of Canada's largest Indigenous women's organizations - the Ontario Native Women's Association and the Quebec Native Women's Association – and from the Union of B.C. Indian Chiefs, Justice for Girls and the Feminist Alliance for International Action. The Working Group advocates for an end to the sex discrimination in the *Indian Act*, and for repair of all its harms.

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The second generation cut-off was introduced in 1985 by *Bill C-31*, which was Canada's attempt to make the *Indian Act* comply with the equality guarantees of the *Charter of Rights.*

This paper examines the operation of the second generation cut-off, the threat that it poses to the continuity of First Nations as distinct legal entities, and assesses its vulnerability to *Charter* challenge. It recommends that the second generation cut-off, the two parent rule and the 1985 cut-off be repealed and replaced with a one parent rule, which treats men and women equally.

What is the Second Generation Cut-Off?

Bill C-31 introduced the requirement that a person must have two parents with Indian status in order to be eligible for status under 6(1)(a) of the *Indian Act.*

This was the first time in the history of the *Indian Act* that a two parent rule was imposed. Before Confederation, legislation provided that a person would be recognized as Indian if one parent, either the mother or the father, was recognized. This acceptance of either parent as capable of transmitting status continued until 1869 when the *Indian Act* began to specify that a child could get status only from the father.

Section 6(2) of the *Indian Act*, also introduced for the first time in *Bill C-31,* provides that a person is entitled to be registered if he or she is a person one of whose parents is or, if no longer living, was at the time of death, entitled to be registered under subsection (1). But the child of one status parent receives only 6(2) status, sometimes referred to as half status, and cannot, alone, pass on that status to a child.

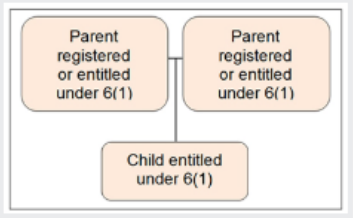
What this means is that a person with two status parents will get Indian status under 6(1)(a). A person with one status parent gets status under 6(2). Having status under either 6(1) or 6(2) will permit that person to be counted as one of the two parents required under 6(1)(f).

The operation of the two-parent rule in the Act when there are two status parents is set out in the first four of these diagrams below, drawn from Canada's paper, *Background to Indian Registration*.[1]

[1] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, *Background to Indian Registration*, at pp. 14-17, https://www.rcaanc-cirnac.gc.ca/eng/1540405608208/1568898474141

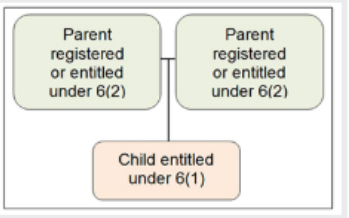
Diagram: How does entitlement to Indian registration work post-1985?

Figure 1a: Two parents registered under section 6(1)



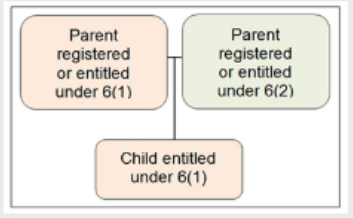
▶ Description of Figure 1a: Two parents registered under section 6(1)

Figure 1b: Two parents registered under section 6(2)



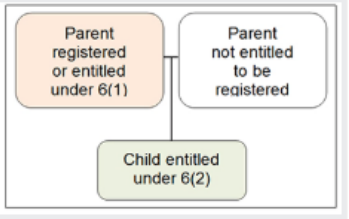
▶ Description of Figure 1b: Two parents registered under section 6(2)

Figure 1c: One parent registered under section 6(1) and one parent registered under section 6(2)



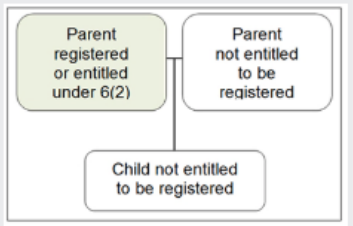
▶ Description of Figure 1c: One parent registered under section 6(1) and one parent registered under section 6(2)

Figure 1d: One parent registered under section 6(1) and one parent not entitled to be registered)



▶ Description of Figure 1d: One parent registered under section 6(1) and one parent not entitled to be registered

Figure 1e: One parent registered under section 6(2) and one parent not entitled to be registered (second-generation cut-off)



▶ Description of Figure 1e: One parent registered under section 6(2) and one parent not entitled to be registered

The final figure, 1e, above shows the operation of the second-generation cut-off. Although one parent with status under 6(1) can confer status on a child, that status is under s.6(2), and a person with 6(2) status will not be able to pass on status where he or she is the only parent with status. A person with 6(2) status must parent with another registered Indian for the child to have status.

An Issue of Great Concern

As early as 1996, the second generation cut-off was identified as "the most important target of criticism in the 1985 Act."[2] These early concerns did not subside. From November 2018 to May 2019 Minister of Crown-Indigenous Relations' Special Representative Claudette Dumont-Smith conducted a collaborative process dealing with several unresolved equity issues in the *Indian Act*. She reported that "unquestionably" the inequity of greatest concern raised by participants in the collaborative process was the second generation cut-off.[3]

Dumont-Smith observed that the second generation cut-off affects every First Nations individual regardless of gender, ancestry, place of residence, family or marital status.[4] It will lead to a significant number of children born to a parent with Indian status who nonetheless remain themselves ineligible for status. The impact of this dichotomy on individuals and families is severe.

Under the government-led *Exploratory Process on Indian Registration, Band Membership and Citizenship* in 2011-2013[5], some First Nations said that "some members were unfairly affected by the cut-off… [because they] were cut off even though the member and their family had always been connected to the band and community."

The BC Assembly of First Nations and the Union of BC Indian Chiefs[6] identify loss of identity and cultural connection for individuals and families as one of the consequences of the second generation cut-off, with another being divisions within communities, where some members are granted status and some are not. Experience has shown that the second generation cut-off, in

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[2] Megan Furi and Jill Wherrett. "Indian Status and Band Membership Issues", February 1996, revised February 2003, included as para. 190 in an extract of the judgment of Madam Justice Ross in *McIvor*, quoted by Madam Justice Masse in *Descheneaux*, para. 103. See online, https://publications.gc.ca/Collection-R/LoPBdP/BP/bp410-e.htm

[3] Ibid, page 14

[4] Ibid.

[5] AFN*, Second Generation Cut-off Rule*, https://www.afn.ca/wp-content/uploads/2020/01/06-19-02-06-AFN-Fact-Sheet-Second-Generation-cut-off-final-revised.pdf referencing the Government of Canada *Exploratory Process on Indian Registration, Band Membership and Citizenship: Highlights and Findings* archived online at https://www.sac-isc.gc.ca/eng/1358354906496/1565361390714

[6] Union of B.C. Indian Chiefs*, Indian Act Second-Generation Cut-Off*, joint initiative of BCAFN and UBCIC, https://www.ubcic.bc.ca/indian_act_second_generation_cut_off

combination with the 1985 cut-off, means that even within families some siblings are eligible for status and some are not.[7]

In addition to this impact on individuals and families, Dumont-Smith states in her report that the cut-off "will see the gradual elimination of persons eligible to be registered as an Indian with some communities feeling this impact in the next generation while most First Nation communities, regardless of location, will feel this impact within the next 4 generations".[8] Union of BC Indian Chiefs and BCAFN projections indicate that 27% of BC First Nation peoples are registered as s.6(2), and thus subject to the second generation cut-off. Echoing Dumont-Smith, they warn that within one generation, one in every four children born on reserve is expected to lack registration entitlement and eligibility because of the second generation cut-off.[9]

Indigenous Services Canada (ISC) reports that: "Across Canada, 322,173 individuals (or 29% of the total registered population) are registered under section 6(2)."[10] ISC also states that if these thousands of First Nations individuals do not parent with another registered Indian, their descendants will no longer be recognized as First Nations under the *Indian Act*, and they will have no access to the rights, benefits and services that Canada provides for registered individuals.

We can see, then, that the second generation cut-off is of concern to both individuals and the collective. Both experience a threat to their continued or future existence as Indigenous, the individual because he or she and their children will be exiled from family and nation if the cut-off denies status, and the nation because its very existence is at risk if the cut-off diminishes the number of status Indians in the collective.[11]

Of course, First Nations have a collective interest in being able to bear the expenses of increased membership that arise from the removal of discriminatory provisions of the *Indian Act*, but this is not a conflict with individual interests. Both the Nations and the individuals have an interest in Canada agreeing, finally, to provide the necessary resources to First Nations that will allow them to support their members with services and opportunities to live and work on reserve. Canada can serve the interests of both by adopting more realistic finance policies for

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[7] Jeremy Matson *Submission to the Standing Committee on Indigenous and Northern Affairs re Bill S-3* November 30, 2016, https://www.ourcommons.ca/Content/Committee/421/INAN/Evidence/EV8663087/INANEV38-E.PDF]; *Make It Stop! Ending the remaining discrimination in Indian registration*, 2022, online https://sencanada.ca/en/info-page/parl-44-1/appa-make-it-stop-ending-the-remaining-discrimination-in-indian-registration/ at 27

[8] Claudette Dumont-Smith, *Minister's Special Representative final report on the collaborative process on Indian registration, band membership and First Nation citizenship*, May 2019 https://www.rcaanc-cirnac.gc.ca/eng/1561561140999/1568902073183, at page 14.

[9] Union of B.C. Indian Chiefs*, Indian Act Second-Generation Cut-Off*, joint initiative of BCAFN and UBCIC, https://www.ubcic.bc.ca/indian_act_second_generation_cut_off

[10] Indigenous Services Canada, Second Generation Cut-Off issue sheet: https://www.sac-isc.gc.ca/eng/1710424351084/1710424389393#sec3

[11] It is important to note that reserves are parcels of land held by the Crown for the benefit of particular Bands. If there are no status members of a particular Band, the reserve land will revert to the Crown.

First Nations that will allow them to support the members who return once the discrimination has been removed from the *Indian Act.* In the *McIvor* and *Descheneaux* cases, Canada failed in its attempt to justify on the basis of financial concerns the denial of equality by the two parent rule and second generation cut-off. In both cases, it was emphasized that achieving equality requires a financial commitment.

The second generation cut-off in *Bill C-31* is not the first time a second generation cut-off was included in the *Indian Act*. The first was the "double mother rule", introduced in the 1951 Act. The rule provided that a child whose mother and grandmother had 'married in' and obtained status by marrying a status man would only have status until the age of 21.

The double mother rule, in effect from 1951 to 1985, was at no time in its existence a substantial threat to First Nations. One reason is because many exemptions to the double mother rule were granted, and its enforcement generally was quite lax. Justice Groberman states in his reasons for judgment in *McIvor* that by July 1982, 285 bands had requested exemptions from the rule; by July 1984 the number of bands requesting exemptions had risen to 311, 64% of the bands in Canada[12]. He points out that "significant doubt had been expressed as to the validity of the exemptions."[13] Madam Justice Masse observed in the *Descheneaux* case that the rule was not uniformly applied in practice, and that children who should have been removed from the Register at 21 years of age sometimes remained on it for their whole lives.[14] Because the double mother rule was in existence for such a short time, and so many exemptions were granted to it, "male Indian members could have children with non-Indian women over several generations without any consequences on the status of their descendants."[15]

Moreover, the double mother rule, even when it was applied, was not as harsh as the second generation cut-off. Justice Groberman based his decision in *McIvor* on a comparison between the second generation cut-off in 6(2) and the double mother rule. He found that the treatment of Jacob Grismer under s.6(2) was less favourable than the treatment he would have received under the double mother rule and that 6(2) violated the rights of both Mr. Grismer and his mother, Sharon McIvor.[16]

Charter Challenges after 1985

The distinction between the ability of a person with 6(1) status to confer status as the sole parent, and the inability of a person with 6(2) status to do so, means that status under 6(2) is a second class kind of status. Second class status is a familiar feature of the *Indian Act*. For most

[12] At para.30, 138
[13] At para. 38. See also *Descheneaux* at para. 27 where Justice Masse makes the same point.
[14] *Descheneaux* at para. 27
[15] Loc. Cit, note 12.
[16] *McIvor*, Court of Appeal, at para. 161

of the time between Confederation and 1985, Indian women with status could not pass it to their children.

Canada has stated, in a tone of some surprise, that although there is no difference in access to government services and benefits available to registered Indians whether an individual is registered under 6(1)(a) or (c) on the one hand or s.6(2) on the other, "there exists a perception that being registered under 6(1)(a) is better or the most desired category."[17] It argues that "the only difference" between the two is in their ability to pass on entitlement to registration to their children depending on who they parent with.

This is a very big difference. *Charter* challenges brought since 1985 have made that clear.

Principles of Equality Analysis

Section 15 of the *Charter* provides that every individual is equal before and under the law and has the right to the equal protection and benefit of the law, without discrimination on a number of named grounds, including race and sex. In a claim under section 15, a person must prove that the law creates a distinction based on a ground named in the section, or one analogous to it. The distinction may be visible on the face of the law, or because of its differential impact. It must also be proven that the law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage.

This formula, referring as it does to both the face of the law and also its impact, reflects the fact that in applying section 15, a Court is assessing both *substantive equality* and *formal equality*. Formal equality involves treating people the same way. Such identical or seemingly neutral treatment may frequently produce serious inequality, if the people given the same treatment are actually differently situated. The concept of substantive equality adopted by the Supreme Court requires a much more complex approach to determining whether inequality results from the law.

The substantive equality approach considers the circumstances of those claiming that their rights under section 15 have been violated. If those circumstances show vulnerability, a history of discrimination or oppression, or similar features, then it may well be a violation of their right to substantive equality for the law to treat them in the same way as it treats a group which does not have a history of disadvantage or differential treatment, or possess a particular vulnerability. The equality analysis must consider not only what is on the face of the law, but also the situation of those groups subject to it, and whether the impact of the law creates inequality, even if it seems to be giving everyone the same treatment. The Court considers the substance and the impact of the law, rather than just its appearance.

If a claimant is able to establish that section 15 rights have been violated, then section 1 of the *Charter* provides that the government must justify the infringement. Section 1 provides that the

[17] *Op.cit*. note 1, at 19

Charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The government must establish that the law pursues an objective that is important enough to justify limiting a *Charter* right; that the law is rationally connected to that objective; that the law impairs the right no more than is reasonably necessary to accomplish the objective and that it does not have a disproportionately severe impact on those to whom it applies.[18]

In the cases discussed below, both Courts and the United Nations Committee on the Elimination of Discrimination against Women have found that the two parent rule and second generation cut-off have denied equality to women and their descendants. The cases, dealing with three separate Acts amending the *Indian Act*, illustrate the enormously complex problems caused by Canada's attempt to cure the sex discrimination in the *Indian Act* while still preserving the privileges of men. They deal with the impact of the second generation cut-off on the child (*McIvor*), grandchild (*Descheneaux*) and great-grandchild (*Matson*) of a woman who lost her status because she married a non-status man. The first level of Court in *McIvor* identified the problem as discrimination against the maternal line of descent, but Canada's legislative response to each of the cases dealt with that problem in a piecemeal fashion, leaving the issue to be litigated generation by generation. The cases are discussed at some length for two reasons: 1) to clarify the complicated facts about the history of each family, and 2) to highlight the very critical language judges used to describe Canada's approach.

McIvor and *Bill C-3*

The first *Charter* challenge to the second generation cut-off was brought by Sharon McIvor and her son Jacob Grismer. Jacob Grismer's father was non-status, and Ms. McIvor had had her status restored by *Bill C-31* to 6(1)(c). Mr. Grismer thus had status under 6(2), which prohibited him from passing status on to the child he had fathered with a non-status woman.

Canada argued in *McIvor* that "there is no right to transmit Indian status, which is purely a matter of statute."[19] Both levels of Court that heard the *McIvor* case disagreed with Canada's position.

Madam Justice Ross of the BC Supreme Court stated in *McIvor* that "…the eligibility of the child for registration as an Indian based upon the circumstances of the parent is a benefit of the law in which both the parent and the child have a legitimate interest."[20] Justice Groberman of the BC Court of Appeal agreed. He concluded that the ability to transmit Indian status to his children is a benefit to Mr. Grismer, and not solely a benefit to his children. He added that the ability to transmit Indian status to her grandchildren through Mr. Grismer is a benefit to Ms.

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[18] *R. v. Oakes*, [1986] 1 SCR 103 para 53 quoted by Ross J. at para. 290, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/117/index.do

[19] Madam Justice Ross, at para. 179

[20] At paras.192 and 196

McIvor. [21] As a benefit of the law, this ability to transmit status down the generations attracts the protection of section 15 of the *Charter*.

Justice Ross agreed that the government's stated objectives for the legislation as a whole were pressing and substantial.[22] These objectives were: 1) to remove from the *Indian Act* of discrimination based on sex; 2) to restore status and band membership to those who had lost it because of discrimination in the *Indian Act*; 3) to ensure that no one should gain or lose status as a result of marriage; 4) to ensure that those persons who have acquired rights should not lose them; and 5) to permit the First Nations that desire to do so to determine their own membership.

However, she states that these objectives are not related to the discriminatory scheme that was adopted.[23] "…The government could have chosen to treat men and women and their respective descendants equally under the new regime, which was intended to eliminate discrimination on the basis of sex in the system of registration."[24] It did not. It preserved the pre-1985 privilege of the status male and the non-status woman who married him, and thus established a "continuing preference for descendants who trace their lineage along the male line"[25] and "…different treatment of descendants of mixed ancestry who trace their lineage along the maternal rather than the paternal line."[26]

Justice Ross concluded that "the preferential treatment afforded to the paternal lineage contained in the impugned provisions cannot be said to be rationally connected to the objectives of the legislation."[27]

With respect to the minimal impairment analysis, Justice Ross rejected the idea that the government was striking a balance between the interests of competing groups.[28] She continues, "No group has been identified that would be disadvantaged by removing discrimination from the s.6 criteria" and "the government has not demonstrated that any group has an interest in perpetuating the discrimination." She states[29] that purely financial considerations are not sufficient to justify the infringement of *Charter* rights. She notes Minister Crombie's admission that "the costs of redressing past discrimination may be substantial. Given our objective of restoring fairness in the *Indian Act*, however, they are unavoidable." She observes that there

[21] At paras. 91-93 of his reasons, quoted by Justice Masse in para. 185 of *Descheneaux*
[22] At para. 323
[23] At para. 305
[24] At para. 321
[25] At para. 237
[26] At para.249
[27] At para. 328
[28] At paras. 329-330
[29] At para. 331 citing at para. 333 Memorandum to Cabinet January 24, 1985, and Memorandum to the Minister of Indian Affairs, January 11, 1985

was no evidence from Canada that the costs associated with the relief sought could not be absorbed by the government and no evidence of financial emergency or severe financial crisis.[30]

Madam Justice Ross found that section 6 of the *Indian Act* violates section 15 and 28 of the *Charter* "in that it discriminates on the ground of sex and marital status, against matrilineal descendants, born prior to April 17, 1985, who married non-Indian men, in the entitlement to be registered as Indians and is not saved by s.1 of the *Charter*."[31]

Justice Groberman did not analyse the issues on the basis of lineage. Rather he compared the treatment given under the double mother rule and the treatment of Jacob Grismer under s.6(2)[32] and found that Mr. Grismer was treated more harshly.[33] Although he found some justification for this differential treatment because the provisions protected rights acquired before 1985, overall he held that Canada had failed to satisfy the test under section 1 of the *Charter.* He declared sections 6(1)(a) and 6(1)(c) to be invalid and suspended the declaration for a year to allow Parliament to amend the legislation to make it constitutional[34].

Bill C-3 was enacted to put the ruling in *McIvor* into legislative form. It provides that the child of a women restored to status under s.6(1)(c) (who would have status under 6(2) because she is his only status parent), can pass on status to a child without parenting with another status Indian.[35]

Descheneaux

Whereas Jacob Grismer sued because of disadvantage arising from his mother's status, Stephane Descheneaux was disadvantaged because the *Indian Act* treated his grandmother less well than it treated a man.

The analysis in *Descheneaux* was complicated by the fact that *Bill C-3* contained "measures that applied only to persons who were in situations strictly identical" to those of Jacob Grismer.[36] The facts of M. Descheneaux's claim required the court to move beyond that narrow set of facts, and explore the preferences that were given to the grandchildren of status Indian men who would have been affected by the "double mother " rule prior to 1985.

In *Descheneaux*, Justice Masse points out that someone affected by the double mother rule before 1985 would have had only one Indian parent, the father, as the woman he married gained status by marrying in, and, in addition, that one parent would have had only one Indian parent, as his mother would also have gained status by marrying in. This is the same situation as

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[30] At para. 333
[31] At para. 9 Reasons for Judgment, *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 1732 https://www.socialrightscura.ca/documents/legal/mcivor/2007bcsc1732.pdf
[32] At paras. 81 and 82
[33] At para. 161
[34] At para.161
[35] C-3 s. 2(3) enacting 6 (1)(c) and 6(1)(c.1)
[36] Reasons of Justice Masse, para.47

M. Descheneaux except that his one Indian grandparent and one Indian parent were female, instead of male.[37]

The grandmother of M. Descheneaux lost her status in 1935 after marrying a non-Indian. Her daughter thus had no status at birth. She married a non-Indian. With these two non-status parents, M. Descheneaux had no status at his birth in 1968. His grandmother regained status under s.6(1)(c) enacted by *Bill C-31.* His mother received status under s.6(2) of *Bill C-31*. However, as a person with 6(2) status who had parented with a non-Indian, she was not entitled to pass status to her son at the time of his birth. Under *Bill C-3*, his mother did regain status under the new 6(1)(c.1). Accordingly, M. Descheneaux received status under s.6(2). However, as a person with 6(2) status who had parented with a non-status woman, he could not pass status to his children, born between 2002 and 2007.[38]

Justice Masse compared M. Descheneaux's status with that of someone subject to the double mother rule before 1985, who would have had status until the age of 21. If below 21 in 1985, that person would have been entitled to status under s.6(1)(a). So too would any child of that person born before he turned 21. The pre-1985 preference for the male has thus been carried over into *Bill C-31.*[39]

Justice Masse found that paragraphs 6(1)(a)(c) and (f) and ss. 6(2) of the *Indian Act* infringed M. Descheneaux's right to equality in the *Charter*, by granting 6(1) status or 6(1) status beyond the age of 21, to persons who have only one Indian parent (other than a non-Indian woman who acquired status through marriage) and this Indian parent had only one Indian parent (other than a non-Indian woman who had gained status through marriage), if their Indian grandparent is a man, but not if the Indian grandparent is a woman who lost status through marriage.[40]

She then ruled that Canada failed to show that there was a pressing and substantial objective justifying the marked discriminatory treatment of the claimants.

She expressed serious doubts about any attempt to justify this discrimination under section 1 by relying on the desire to avoid dilution of the cultural identity of First Nations. To do so would be to risk giving weight to stereotypes "that assume that the very persons who were alienated from the First Nations because of the discrimination they suffered …are not interested in participating meaningfully in the life of their band or in preserving their cultural identity."[41]

She also rejected concern for resources as a justification for the discrimination: "Even if duly established, budgetary restrictions alone do not justify an infringement …."[42] She declared: "When an advantage is refused on a prohibited ground, equality often involves additional costs

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[37] At para. 142
[38] See paras. 140, 55-57
[39] Para. 142
[40] Para. 152
[41] Para. 185 quoting *Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203* at para.18, https://decision scc-csc.ca/scc-csc/scc-csc/en/item/1704/index.do
[42] Para.186

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."[43]

She expressed "full agreement"[44] with the refusal of the BC Court of Appeal in *McIvor* to accept Canada's argument that there is an important difference between the beneficiaries of the double mother rule and those seeking equality under the *Charte*r: namely "that members of the comparator group have two Indian parents – a father who is of Indian heritage and a mother who became Indian by virtue of marriage." Such a distinction is based on the very sort of discrimination being challenged.[45]

She stated that one of the ways Parliament could have ensured treatment free of sex discrimination against the group M. Descheneaux belongs to would have been to give status equivalent to that in s.6(1) to all persons whose mother is an Indian woman who lost her status by marrying their non-Indian father and whose father is a non-Indian man.[46]

Bill S-3 and *Matson*

There was a strong campaign in the Senate to expand the narrow protections offered by the version of *Bill S-3* which Canada introduced to address the discrimination found in the *Descheneaux* case. Senators and activists alike rallied to the campaign cry of "6(1)(a) all the way", a call first articulated by Dr. Lynn Gehl, a prominent advocate and litigant for sex equality in the *Indian Act,* on a sign she carried at a 2017 protest rally on the steps of Parliament. This goal was, in effect, what Justice Masse, and Justice Ross before her, had said was necessary to remove sex discrimination from the Act. This remedy was also the one recommended by the United Nations Human Rights Committee, which ruled on Sharon McIvor's petition in January 2019. In her petition, Ms. McIvor argued that Bill C-3 was too narrow to correct the discrimination she faced.[47]

The extension of status under s.6(1)(a) to more classes of persons benefitted Jeremy Matson. His paternal grandmother had lost status by marrying a non-Indian. Her son, Mr. Matson's father, did not have status. His father married a non-Indigenous woman. Having two non-status parents like his father before him, Jeremy Matson, born in 1977, did not have status.

Mr. Matson's grandmother recovered status because of s.6(1)(c) of *Bill C-31*. Her son, Jeremy Matson's father, received status under s.6(2). As a result of *Bill C-3*, Jeremy Matson's father became entitled to status under s.6(1) of the Act. Because of this "promotion" and even though

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[43] *Loc.cit*. note 39
[44] Para. 201
[45] Para. 200 citing paras. 141 and 142 of the reasons of Groberman J.A.
[46] Para. 154
[47] Human Rights Committee*, Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 2020/2010*—CCPR/C/124/E/2020/2010 January 2019 (McIvor) https://digitallibrary.un.org/record/3982303/files/CCPR_C_124_D_2020_2010-EN.pdf

his wife was non-status, he was able to confer s.6(2) status on Jeremy. [48] As of 2011, however, Jeremy Matson was not able to pass status on to his children, because he had 6(2) status and parented with a non-status woman.

Another upgrade in the status of Mr. Matson's ancestors was effected by *Bill S-3.* His grandmother became entitled to registration under new paragraph 6(1)(a.1). His father became entitled to registration under new paragraph 6(1)(a.3) instead of the 6(1)(c.1) enacted by *Bill C-3*. Jeremy Matson himself became entitled to registration under 6(1)(a.3).[49]

However, the Matson family faced another obstacle to achieving a status comparable to that available to those descended from a man who had married out. The "1985 cut-off" in 6(1)(c.4) enacted by *Bill S-3* provides that to receive status, a person is required to have been born before April 17, 1985 whether or not their parents were married to each other at the time of the birth, or after April 16, 1985 and with parents who were married to each other at any time before April 17, 1985. Mr. Matson and his wife married after the 1985 cut-off date. This cut-off affected Mr. Matson's children. As the great-grandchildren of a woman who had married a non-status man, they did not have the same rights to pass on status as did the great-grandchildren of a man who had married a non-status woman.

Canada argues that "differential treatment of children born prior to and after the amendments of 1985 was based entirely on the date of the adoption of new legislative scheme governing entitlement to registration. Any differential treatment based on dates does not constitute discrimination".[50] This is an embarrassing attempt by Canada to claim that formal equality is all that matters, and to deny the cascading effect down the generations of discrimination against women and the maternal line. Despite this denial, Canada acknowledges that the 1985 cut-off date will likely require legislative changes.[51]

The CEDAW Committee found that the 1985 cut-off rule in *Bill S-3*, even if not currently based on the gender of the descendants of the woman who lost status for marrying a non-status man, perpetuates in practice the differential treatment of descendants of those women. It gives rise to "current inequities based on the previous, explicit gender-based discrimination."[52] As noted, Canada has acknowledged that the 1985 cut-off will likely require legislative changes[53] but has not made those changes.

The CEDAW Committee held that Canada has breached its obligations under articles 2 and 3 of the *Convention on the Elimination of All Forms of Discrimination Against Women.* Section 2 contains a commitment by States Parties to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. Section 3 requires States Parties to take all

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[48] Views adopted by the CEDAW Committee 11 March 2022, paras. 2.6-2.7
[49] *Views*, at paras. 14.3-14.4
[50] *Views*, para. 14.4
[51] *Views*, para. 16.2, 18.10
[52] *Views,* para. 18.10
[53] *Views*, para. 16.2

appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

The CEDAW Committee recommended that Canada amend the legislation to address fully the adverse effects of the historical gender inequality of the *Indian Act* and take all measures necessary to provide registration to all matrilineal descendants on an equal basis to patrilineal descendants.[54] In a 2025 Report the CEDAW Committee notes that Canada "accepts the Committee's recommendations to take all other measures necessary to provide registration to all matrilineal descendants on an equal basis to patriarchal ones."[55]

However, Canada has not yet taken the steps required to eliminate the old and new sex discrimination in the status provisions of the *Indian Act*.

Another Distinctive Form of Sex Discrimination

Section 6(1)(f) of the *Indian Act* provides that a person has status if both the person's parents are status Indians.

Mothers and fathers are not equal with respect to the obligation to establish that parents have status.

A woman goes through pregnancy and delivery before the child is born. She may be lactating after the birth. These are likely to associate the woman with parenthood of that child in a way that would be difficult to conceal or deny. A man's role in impregnating the mother is more difficult to discern from circumstances likely to be known or knowable. Impregnation is an act, not a condition like pregnancy, and is thus more easily concealed or denied

Section 6(1)(f) has given rise to the problem described by Stewart Clatworthy as "widespread and persistently high levels of unstated paternity among First Nations children."[56] Unstated paternity is highly correlated with the age of mothers at the time of birth; from 1985 to 1999, about 30% of all children with unstated fathers were born to mothers under 20 years of age.[57] Stewart Clatworthy estimated in 2004 that as many as 13,000 children may be born of mothers with 6(2) status and a father with no status. In 2012, Dr. Lynn Gehl estimated that as many as 25,000 children born to mothers registered under s.6(2) of the *Indian Act* have been denied status.[58]

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[54] *Views*. Para. 20
[55] Committee on the Elimination of Discrimination against Women, Follow-up progress report on individual communications, Draft prepared by the Working Group, 4 March 2025 CEDAW/C/90/3 at para.4.6
[56] Stewart Clatworthy, "Unstated Paternity: Estimates and Contributing Factors," (2004) *Aboriginal Policy* Research Consortium International (PRCI**)** 138 at 229, http://thompsonbooks.com/wp-content/uploads/2020/02/APR_Vol_2Ch11.pdf
[57] Clatworthy at 227
[58] Lynn Gehl, "Unknown and Unstated Paternity and *The Indian Act" 3:1* (2012) *Journal of the Motherhood Initiative* 188 at 195 https://jarm.journals.yorku.ca/index.php/jarm/article/view/36318

Jo-Anne Fiske and Evelyn George suggest that reasons of safety are more responsible for young mothers not identifying the father of the child than is simple unawareness of the rules about registration.[59] The name of the father may be unknown because of circumstances surrounding a mother's rape. The mother may be reluctant to disclose the name of the father where the child has been conceived by rape, incest or adultery. A father may refuse to allow his name to be put on the application for registration. [60]

The links made by Fiske and George between inability to name a child's status father and violence or fear of violence are very troubling given the high rate of violence experienced by Indigenous women and girls. The Department of Justice Canada reports that Indigenous women and girls are likely to be at much higher risk than non-Indigenous women and girls of experiencing specific acts of violence like physical assault, sexual assault and spousal violence. The risk of violence perpetrated by an intimate partner or another member of the family is much higher for Indigenous women and girls than for non-Indigenous women and girls, as is violence outside the home and a high incidence of attacks from individuals that they may barely know. The Department points out that even controlling for certain specific risk factors, "it is clear that being Indigenous, in itself, is a risk factor for violent victimization of Indigenous women."[61]

The *Indian Act* does not authorize the taking of a DNA sample in cases of contested or unknown paternity. There may be some help for those who do not know the identity of their child's father in ss.5(8) of the *Indian Act,* enacted by *Bill S-3* after the Ontario Court of Appeal decision in the *Gehl* case. Dr. Gehl did not know the name of her paternal grandfather and was affected in her quest for Indian status by an unstated government policy directing the Registrar "to interpret all situations of unstated, unreported, unnamed, unknown, unacknowledged, unestablished, or unrecognized paternity as a non-Indian man."[62] She was successful in having the Ontario Court of Appeal recognize that her grandfather had been a status Indian by presenting evidence of his many connections to the local Indigenous community, even though she was unable to identify him by name.

Subsection 5(8) of the Act now provides that in cases of unknown or unstated paternity the Registrar "shall rely on any credible evidence that is presented by the applicant in support of the application or that the Registrar otherwise has knowledge of and shall draw from it every reasonable inference in favour of the person in respect of whom the application is made."

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[59] Jo-Anne Fiske and Evelyn George, "Bill C-31: A Study of Cultural Trauma" in Jerry P. White, *Aboriginal policy research: making a difference* (Papers presented at the 2d Aboriginal Research Conference held in Ottawa, Mar. 20-21 2006) 2007, https://core.ac.uk/download/pdf/129542418.pdf

[60] Ibid, at 5.

[61] Government of Canada, Department of Justice, *Women and the Criminal Justice System: Understanding First Nations, Inuit and Metis Women and Girls' Experience with the Criminal Justice System; Understanding Indigenous Women and Girls' Experiences with Victimization and Violence; Violence Against Women and Girls* https:///www.justice.gc.ca/socjs/s-esjp/en/women/femmes/wgv/ff

[62] Gehl, at pp.192-193

Even with such assistance as may be available in a particular case from the provisions of ss. 5(8), it is strikingly apparent that it is more difficult for the woman than the man to meet the requirements of the two-parent rule. That difficulty arises not only from the different ways in which women and men experience conception pregnancy and birth of a child, but also because of Indigenous women's greater vulnerability to the very factors which will discourage or disable them from naming the child's other parent.

It cannot be seriously doubted that because of this huge disparity in the experience of women and men, the two parent rule will be found to be in violation of section 15 of the *Charter*, and unjustifiable under section 1.

Time to Stop Piece-Meal Amendment

The Supreme Court has ruled that Canada cannot justify inadequate legislation on the basis that it is simply one stage in an incremental effort at achieving the necessary overall change. Speaking for the majority of the Court, Justice Iacobucci says in *Vriend v. Alberta*,[63] that "groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the *Charter* will be reduced to little more than empty words."

Canada's approach to the removal of sex discrimination from the registration provisions of the *Indian Act* has not simply been slow and incremental.

As so trenchantly put by Justice Masse in *Descheneaux*,[64] Canada has spent the past forty years avoiding its legislative responsibility to ensure compliance with the *Charter*'s equality guarantees:

> When Parliament chooses not to consider the broader implications of judicial decisions by limiting their scope to the bare minimum, a certain abdication of legislative power in favour of the judiciary will likely take place. In such cases, it appears that the holders of legislative power prefer to wait for the courts to rule on a case-by-case basis before acting, and for their judgments to gradually force statutory amendments to finally bring them in line with the Constitution.
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> From the perspective of Canadian citizens, all of whom are potential litigants, the failure to perform this legislative duty and the abdication of power that may result are obviously not desirable.

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[63] *Vriend v. Alberta* [1908]1 SCR 493 at para. 122, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1607/index.do

[64] *Descheneaux c. Canada (Procureur Général),* 2015 QCCS 3555 (CanLII), https://canlii.ca/t/glzhm. at paras. 239-240

Moreover, there are important signs that an alternative to the two-parent rule is known and achieving acceptance.

The *Anishinabek Nation Citizenship Law*[65] provides that a person is entitled to be an Anishinabek Nation citizen if the person can trace their descendancy through at least one parent to the original people of an Anishinabek First Nation, or has at least one parent who is a member currently registered with an Anishinabek First Nation, or if the person can trace their descendancy through at least one parent to a status Indian who is registered or entitled to be registered with an Anishinabek First Nation.

The *AFN Template Membership/Citizenship Code for First Nations Governments*[66] provides in Part I that a person is entitled to be a citizen of a particular nation if the person can trace their ancestry through at least one parent (a) who is a signatory of the applicable numbered Treaty (b) who is a member or currently registered with the Nation (c) who is registered or entitled to be registered with the Nation; or is a descendant of a person who was entitled to become a citizen but for any reason failed to make application or did make an application but it was "not approved due to flawed legislation".

The Union of BC Indian Chiefs in Assembly passed a resolution in 2023, which calls on the Government of Canada:

> To abolish all remaining sex, race and family-based discrimination as identified by First Nations and advocates, including legacies of sex discrimination and gender discrimination, in the *Indian Act* including 6(2) status and the requirement to have two status parents to transmit status to the next generation, and ensure that all First Nations men and women alike can transmit status as one parent.[67]

Representing over 100 First Nations Bands in BC, this resolution demonstrates the urgency and ongoing concerns stemming from how "First Nations people were dispossessed of their lands and cultures, fragmented, and forcibly relocated to reserves and urban centers, creating conditions which have led to high rates of out-parenting and intermarriage between status Indians and non-status individuals."[68]

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[65] Anishinabek Nation Grand Council Assembly/Aamjiwnaang First Nation, Resolution No. 2009/05 and Draft *Anishinabek Nation Citizenship Law* at 2. https://www.anishinabek.ca/wp-content/uploads/2016/05/DRAFT-Citizenship-Law-Oct-2010-1.pdf

[66] Assembly of First Nations, *Template Membership/Citizenship Code for First Nations Governments*, 2017, https://www.afn.ca/wp-content/uploads/2020/01/2017-06-06-AFN-Template-membership-citizenship-code-for-FNs-final.pdf

[67] Union of BC Indian Chiefs resolution 2023-61, Repeal of Second-Generation Cut-Off and Two-Parent Rule in the Determination of Indian Status (Registration) under the *Indian Act*, 2023 available online: https://assets.nationbuilder.com/ubcic/pages/132/attachments/original/1697473873/2023Oct_AGA_Resolutions_CombinedPackage.pdf?1697473873

[68] Ibid.

Conclusion and Recommendations

There are several reasons why Canada should remove the second generation cut-off and replace the two parent rule with a one parent requirement, which treats the mother and the father equally. These include history: this was the original requirement for recognition as an Indian, even before the *Indian Act.* Throughout its history to 1985 the *Indian Act* has determined status on the basis of a one parent rule, although the rule was flawed by preference for the male parent.

Another reason is the obvious inequality of the two parent rule. The preference for the male parent has survived from before 1985, and instead of being removed by legislation from 1985 on, has been further embedded into the descent of status. Moreover, the difference in circumstances between Indigenous men and women, including both physical differences relating to the procreation of children and also the heightened vulnerability of Indigenous women to the kinds of violent circumstances that prevent them from naming the father on the birth certificate, make the two parent rule a violation of the *Charter.*

Yet another is the threat posed to the survival of persons and families as status Indians, and the survival of Nations themselves, posed by the second generation cut-off. That threat is an integral part of the scheme based on the two parent rule.

A fourth reason is the scheme of the Act itself. It recognizes the right of Bands to determine their own membership codes, which can and do complement the requirements of the legislation and express important local features, values and decision-makers. This architecture of the statute suggests that the rule in the *Indian Act* should be a basic one, to which Bands may add depending on local circumstances, as long as they abide by safeguards set out in the legislation.

Accordingly, it is recommended that Parliament abolish the second generation cut-off by including in *Bill S-2* a one parent rule for descent of status, which treats men and women equally. The legislation should also remove the 1985 cut-off enacted by *Bill S-3,* provide adequate transition measures to repair the continuing harm done by the legislative process since 1985, and contain safeguards for certain rights that may not be overridden or ignored by Bands making their own membership rules.

Resource List

Charter

Canadian Charter of Rights and Freedoms, Part I of *Constitution Act, 1982*, Schedule B to the *Canada Act, 1862*, c. 11 (UK) https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/resources-ressources.html#copy

Andrews v. Law Society of British Columbia, [1989] 1 SCR (Supreme Court Reports) 143 at pp. 163-173 https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/407/index.do

R. v. Kapp, [2008] 2 SCR 83 at paras.14-18 https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/5696/index.do

Quebec (Attorney General) v. A, [2013]1 SCR 61 at paras. 319-333 https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/10536/index.do

Fraser v. Canada (Attorney General), [2020] SCR 113 at paras.26-53 https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18510/index.do

Vriend v. Alberta [1908]1 SCR 493 at para. 122, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1607/index.do

R. v. Oakes, [1986] 1 SCR 103 para 53 quoted by Ross J. at para. 290, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/117/index.do

Legislation

Indian Lands Before Confederation

An Act for the protection of the Indians in Upper Canada from impositions, and the property occupied or enjoyed by them from trespass or injury, S.Prov.C. 1850 (Vict 13 & 14) c.74 https://bnald.lib.unb.ca/legislation/act-protection-indians-upper-canada-imposition-and-property-occupied-or-enjoyed-them

An Act to repeal in part and to amend an Act, intituled, An Act for the better protection of the Lands and property of the Indians in Lower Canada, 1851 (Vict.14&15). C.51 SCUC 1859 (Vict.22), c.59 https://bnald.lib.unb.ca/legislation/act-repeal-part-and-amend-act-intituled-act-better-protection-lands-and-property

An Act to prevent trespasses to Public and Indian Lands, SCUC 1859 (Vict.22), c.81 https://www.canadiana.ca/view/oocihm.9_00930/830 (Toronto : S. Derbishire and G. Desbarats, 1859.; 1241 images with full-text search https://n2t.net/ark:/69429/m0348gf0n168)

An Act respecting Indians and Indian Lands CSLC, 1861 (Vict.24), c.14
https://caid.ca/IndLanAct1860.pdf

Assimilation Before Confederation

An Act to encourage the gradual civilization of the Indian tribes in this province and to amend the laws respecting Indians, 1857 (Vict. 20) c.26 https://caid.ca/GraCivAct1857.pdf

An Act respecting civilization and Enfranchisement of certain Indians, CSC 1859, (Vict. 22) c.9
https://caid.ca/CivEnfAct1859.pdf

After Confederation

An Act providing for the organization of the Department of the Secretary of State of Canada and for the management of Indian and Ordnance Land, SC 1868, c. 42 https://www.sac-isc.gc.ca/eng/1100100010196/1618940565216

An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act, 31st Victoria, c. 42 SC 1869, c.6 https://www.sac-isc.gc.ca/eng/1100100010204/1618939577385

The Indian Act, 1876, Vict.39 c.18 (UK)
https://publications.gc.ca/collections/collection_2017/aanc-inac/R5-158-2-1978-eng.pdf page 24

The Indian Act, 1880, 43 Vict. C.28 (UK)
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The Indian Act, 1906, RSC 1906, c.81
https://publications.gc.ca/collections/collection_2017/aanc-inac/R5-158-2-1978-eng.pdf on page 174

The Indian Act, 1927, S.C 1927, c.98
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The Indian Act, 1951, S.C. 1951, c.29
https://publications.gc.ca/collections/collection_2017/aanc-inac/R5-158-2-1978-eng.pdf on page 315

Amending Legislation, 1985 onwards

Bill C-31, An Act to amend the Indian Act, S.C. 1985, c.27, Subsequently *The Indian Act*, R.S.C. c.I-5.

Bill C-3, An Act to promote gender equity in Indian Registration, S.C.2010, c.18 https://laws-lois.justice.gc.ca/eng/annualstatutes/2010_18/page-1.html

Bill S-3, An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur general) S.C. 2017, c. 25 https://www.parl.ca/DocumentViewer/en/42-1/bill/S-3/royal-assent

The first phase came into effect on December 22, 2017 and the second phase on August 15, 2019. (Indigenous Services Canada, *The Final Report to Parliament on the Review of S-3* (December 2020) p. 13 of 67) https://www.sac-isc.gc.ca/eng/1608831631597/1608832913476

Bill C-38, An Act to Amend the Indian Act (New Registration Entitlements), First reading December 15, 2022; second reading March 22, 2024 (not passed) https://www.parl.ca/legisinfo/en/bill/44-1/c-38

Bill S-2, An Act to Amend the Indian Act (New Registration Entitlements), First reading May 29,2025; second reading June 25, 2025 https://www.parl.ca/DocumentViewer/en/45-1/bill/S-2/first-reading

Canada. Department of Justice. *Charter Statement. Bill S-2.* Tabled in the Senate June 17, 2025. https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/s2_2.html

International Instruments

Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 UN GAOR Supp. (no.46) at 193, UN Doc. A/34/46, entered into force Sept.3, 1981 https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_34_180.pdf

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 54/4, annex, 54 UN GAOR Supp. (No.49) at 5m UN Doc. A/54/49 (Vol.1)(2000), entered into force Dec.22, 2000 https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-elimination-all-forms

Committee on the Elimination of Discrimination against Women, *Concluding observations on the tenth periodic report of Canada,* adopted at Committee's 89th Session, 7-25 October, 2024 https://www.ohchr.org/en/documents/concluding-observations/cedawccanco10-concluding-observations-tenth-periodic-report

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp.(No.16) UN Doc A/23, (1966). 999 UNTS 171, entered into force Mar. 23, 1976 https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

First Optional Protocol to the International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp (No. 16) UNH Doc. A/6316 (1966). 999 UNTS 302, entered into force March 23, 1976 https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-international-covenant-civil-and-political

UN Declaration on the Rights of Indigenous Peoples, Resolution Adopted by the General Assembly 13 September 2007, Official Records of the General Assembly Sixty-First Session, Supplement No. 53 (A/61.53) part one, chap 11, sec. A. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

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Attorney General of Canada v. Lavell; *Isaac et al. v. Bédard* [1974] SCR 1349 https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/5261/index.do

Sandra Lovelace v. Canada, Communication No. 24/77 Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977 https://juris.ohchr.org/casedetails/286/en-US

Martin v. Chapman [1983] 1 SCR 365 https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/5337/index.do

Indian Act – After 1985

Sawridge Indian Band v. Canada, 2004 FCA 16 *https://epe.lac-bac.gc.ca/100/202/301/fed_courts_reports/2004/v03/sawridge/fc/2004/pub/v3/2004fc33902.html?nodisclaimer=1*

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McIvor v. Canada (Registrar of Indian and Northern Affairs) 2009 BCCA153 https://femlaw.queensu.ca/sites/flswww/files/uploaded_files/McIvorBCCA2009.pdf ;

reversing *McIvor v. The Registrar, Indian and Northern Affairs Canada,* 2007 BCSC 827 https://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc827/2007bcsc827.html ;

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Canada (Canadian Human Rights Commission) v. Canada (Attorney General) [2018] 2 SCR 230 (Matson) https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/17134/index.do

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First Nations families and Canada agree to put litigation on hold while working to end the legacy of "enfranchisement" under the *Indian Act*, March 3, 2022, https://www.canada.ca/en/indigenous-services-canada/news/2022/03/first-nations-families-and-canada-agree-to-put-litigation-on-hold-while-working-to-endvthe-legacy-of-enfranchisement-under-the-indian-act.html;

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FOUR

Settler Colonialism in Canada

Making "Indian" Women Disappear

Mary Eberts, Shelagh Day and Sharon McIvor

THIS CHAPTER EXAMINES CANADA'S USE OF discrimination against women under the Indian Act in an effort to reduce, and eventually eliminate, the population of "Indians," whose very existence challenged Canada's assertion of sovereignty over land once occupied and cared for by Indigenous Peoples. This discrimination started at Confederation and was a feature of the settler colonization of what is now Canada. The discrimination continued even after Canada adopted its own rights legislation and adhered to international covenants forbidding sex discrimination. It has not yet fully ended, despite vigorous litigation and law reform efforts over the last fifty years on the part of Indian women and their families. As Canada contemplates how it can bring into effect the United Nations Declaration on the Rights of Indigenous Peoples, the time has come for it to stop resisting the end of sex discrimination in the Indian Act, and to provide redress for women and their families who have lost their communities and cultures because of it.

SETTLER COLONIALISM SHAPES THE INDIAN ACT

Settler colonialism is a process in which settlers (Veracini 2010, 53) establish residency and multi-generation families, and engage in activities like farming, building, and resource development, which assert possession over the land. We see this purpose in the wording of section 91(24) of the Constitution Act (1867), which gives Canada jurisdiction over "Indians and lands reserved for Indians." In *Daniels v. Canada*

(2016, paras. 4–5), the majority of the Supreme Court affirms that the purposes of section 91(24) were "closely related to the expansionist goals of Confederation." It identifies those purposes as "to control Native peoples and communities where necessary, to facilitate the development of the Dominion, to honour the obligations to Natives that the Dominion inherited from Britain" and "eventually to civilize and assimilate Native people" (para. 353).

In order to confirm its sovereignty, title, and jurisdiction, the settler state tolerates no assertion of a right or interest in land by Indigenous Peoples. Indeed, it seeks to eliminate such peoples, either through outright killing, or by various means like assimilation, incarceration and institutionalization, or forceful removal from their traditional land (Veracini 2010, 33, 35, 37, 45). Indigenous Peoples "challenge with their very presence the basic legitimacy of the settler entity" (Veracini 2010, 33), and the settler state strives to establish that the land over which it asserted sovereignty was indeed terra nullius: land occupied by no one (Encyclopedia Virginia 1493; Holy See Press Office 2023; McNeil 2016; Tomchuk 2023).

The relationship between settler colonialism and genocide is inextricable. The Convention on the Prevention and Punishment of the Crime of Genocide (United Nations 1948) defines genocide as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

Rafael Lemkin, originator of the term genocide, explored the "constitutive and inherent" relationship between genocide and settler colonialism (Docker 2004, 3). In his unpublished writings he focussed on the genocide perpetrated by English, French, and post-independence Americans: dispossessing Indigenous Peoples of their land, removal and deportation, removal or stealing of children, disease through overcrowding on reservations with inadequate food and medicine, self-destruction brought about by introduction of liquor, curtailing and deprivation of legal rights, and cultural genocide (Docker 2004, 9–14).

The Indian Act, a feature of Canadian law since Confederation, has been the repository of authority for the actions of the state — described in the Convention on the Prevention and Punishment of the Crime of Genocide and by Lemkin — designed to control, reduce, or eliminate the Indigenous population. The Indian Act is the largest single erasure of Indigenous Peoples in the history of Canada.

When it passed the Indian Act, Canada created a world it could define and tightly control. Canada created rules about who would be recognized as "Indian" (or, in other words, have Indian Status), and only those persons would participate in the world created by the Indian Act. Any benefits provided under the Act, like the right to inhabit reserve land, were available only to "Indians." Through the Indian Act, Canada created a small "official" Indigenous population that could be controlled and gradually eliminated through the rules about who would receive status.

THE INDIAN ACT: PATRIARCHAL AND COLONIAL DOMINANCE

Since Confederation, the Act identified the father as the only parent who could confer status on a child (*An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands* 1868, s. 15). This is one of the two most powerful types of sex discrimination in the Indian Act. That the Indian Act is legislation that embodies and enforces patriarchy has significant implications.

In a patriarchy, women's sexuality and reproductive capacity are not under their own control (Lerner 1986, 77). Their bodies and sexual services are at the disposal of their kin group, their husbands, and their fathers (80). The imposition of patriarchy thus totally undercut the social structures of those Indigenous Peoples organized on matriarchal principles, while it imposed Victorian patriarchy on all Indigenous Peoples, privileging Indian men, and it imposed patriarchal norms for relations between the powerful state and dispossessed Indigenous people. In settler Canada, white dominance over Indigenous Peoples is symbolized and accompanied by the exposure of Indigenous women to sexual assault from white men.

Sherene Razack (2016, 293) argues that the targeting of Indigenous women for sexualized violence is part of the "deeply embedded and systematized devaluing of Indigenous life in settler societies." In Razack's

analysis, Indigenous women suffer not only the dehumanization and disposability characterizing settler attitudes toward Indigenous people (293). In addition, sexual violence against them sends powerful messages about the hegemony of the white "race," and the ability of white men to assert dominance over Indigenous men and women. The violability of Indigenous women symbolically represents, as well, the vulnerability of lands once occupied by Indigenous Peoples. She states, "The visible signs of sexualized violence make it clear that Indigenous women are collectively sexually violable and that Indigenous lands are occupied" (293).

VOLUNTARY AND INVOLUNTARY ASSIMILATION

Enfranchisement

The first method of assimilation tried by Canada was enfranchisement, introduced before Confederation, and brought forward into post-Confederation Canada in 1869 (*An Act for the gradual enfranchisement of Indians* 1869). The purpose of enfranchisement was "to encourage the progress of Civilization among the Indian tribes of this province and the gradual removal of all legal distinctions between them and Her Majesty's Canadian subjects" (*Gradual Civilization Act* 1857, preamble). An enfranchised person would no longer have Indian Status.

Enfranchisement was primarily intended for men, although for a period voluntary enfranchisement was also available to single women. It was exploited by Indian agents, whose administration of it was declared illegal in the case of *Hele v. Attorney General of Canada* (2020).

A committee would examine a male candidate for enfranchisement to determine his language capacity, education, and moral character. Enfranchisement entitled a man to occupy a portion of reserve land to which he would ultimately receive title (*Gradual Civilization Act* 1857, III, IV). The wife and children of the enfranchised man were also enfranchised, but without their consent, and without the kind of inquiry into their capacity for "civilization" that men experienced (*Gradual Civilization Act* 1857, VIII). In 1951, the Indian Act added a provision that upon her marriage to a non-Indian, a woman could be enfranchised (*Indian Act* 1951b, s.108 (2)). Enfranchisement was unnecessary, given that women lost status upon such a marriage, but Canada imposed it nonetheless.

Kathleen Jamieson (1978) reports that between 1965 and 1975, 5,035 women and children were enfranchised following the woman's marriage to a non-status male. In the same period, there were 228 voluntary enfranchisements. That is, 95 percent of enfranchisements were of women who had no choice. In the period of 1973 to 1976, 99.32 percent of all enfranchisements were of women who had no choice. Following 1975, Jamieson notes, the Governor in Council ceased issuing enfranchisement orders in respect of women who married non-Indian men but continued to deprive them of status without taking the extra step of enfranchising them (65).

The enfranchisement of men had little success in lowering the number of male Indians because of opposition from Indigenous nations (Kirkby 2018, 3, 13–14, 17, 33–34). The failure of male enfranchisement means that Canada's principal statutory means of reducing the number of Status Indians has been discrimination against women and their children. One form of that discrimination has been mentioned already: the right of the male parent, but not the female, to confer Indian Status on a child. The only exception in the Act to the statutory preference for the status male as sole conveyor of status was that a status woman who had a child outside marriage could give the child status, as long as no one came forward to prove to the Registrar that the father was not a Status Indian (*Indian Act* S.C. 1951 c. 29, s.11(e)).

Loss of Indian Status Upon Marriage

The second powerful kind of discrimination against women was introduced by an 1869 statute: an Indian woman marrying anyone other than an Indian as recognized by the Indian Act would cease to be an Indian within the meaning of the Act. No children of that marriage would be considered Indian. Any Indian woman marrying an Indian of any other tribe or body of Indians would cease to be a member of her natal band and would become a member of her husband's band (*An Act for the gradual enfranchisement of Indians* 1869, s.6).

As witnesses before the Penner Committee (House of Commons 1982) proclaimed in 1982, this exile literally erased women's identity. They told MPs: "I am not recognized as an Indian person and I am not recognized as a white person," and "We are literally wiped off the face of the earth" (65).

COLONIZATION IN THE AGE OF RIGHTS

In the 1960s and 1970s, section 12(1)(b) (*Indian Act* S.C. 1951, c. 29) was the version of the statutory provision removing status from a woman who married a non-status male, and providing that the couple's children could not have status.

Mary Two-Axe Earley, a Kanien'kehá:ka woman from Kahnawa:ke (Brown 2017), had lost her status upon marriage to a non-status man. She founded Indian Rights for Indian Women in Quebec and co-founded its national counterpart. Mary Two-Axe Earley, and other women from the Kahnawa:ke reserve, presented a brief urging the repeal of section 12(1)(b) to the Royal Commission on the Status of Women, appointed by Canada in 1967. In its final report, in 1970, the commission recommended the repeal of section 12(1)(b) (Royal Commission on the Status of Women in Canada 1970).

The Canadian Bill of Rights

At around that time, Jeannette Corbiere Lavell, an Anishinaabekwe from Wikwemikong, and Yvonne Bedard, a Haudenosaunee woman from Six Nations, filed separate challenges to section 12(1)(b) of the Indian Act, which were heard together in the Supreme Court of Canada in 1973. Both had lost status because of marriage to non-status men and had been banished from their communities. In their challenges, they relied upon the guarantee of "equality before the law" in section 1(b) of the Canadian Bill of Rights (1960), which had been enacted by the Diefenbaker government to apply to federal statutes. Indian leadership was arrayed against the women. One of the main reasons was that they feared that the women's success might result in removal of the Indian Act, the link between Indians and the treaties that Canada's White Paper (Department of Indian Affairs and Northern Development 1969) had proposed to get rid of a short while before (Cardinal 1977; Weaver 1981).

In 1973, the Supreme Court issued a five-to-four judgment against the women. The majority stated that equality before the law under the Bill of Rights means that as long as the Indian Act discriminates against all Status Indian women, there was no inequality before the law (*Attorney General of Canada v. Lavell; Isaac et al. v Bedard* 1973, 1366–1373). However, Justice Laskin stated on behalf of the four dissenting judges that section 12(1)(b) amounted to "statutory excommunication" of Indian women from their communities (1386).

International Human Rights Covenants

International human rights treaties entered into by Canada beginning in the 1970s, particularly the International Covenant on Civil and Political Rights (ICCPR) (1966) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) have been relied on by those protesting women's loss of status upon marriage. Both have an Optional Protocol (First Optional Protocol to International Covenant on Civil and Political Rights 1976; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women [1999]) allowing individuals to complain directly to the UN Human Rights Treaty Body overseeing that treaty, alleging violation of its terms. In addition, Canada is obligated to submit a periodic report to the Treaty Body for review, a process also allowing civil society organizations and individuals to comment on Canada's compliance with the treaty. The Treaty Body issues concluding observations after the review, with recommendations to ensure compliance with the treaty's provisions. The ICCPR is administered by the UN Human Rights Committee and CEDAW by the Committee on the Elimination of Discrimination Against Women.

Canada ratified the ICCPR (1966) and its First Optional Protocol in 1976. Sandra Lovelace, a Maliseet woman from the Tobique Reserve in New Brunswick, was the first to file a complaint about sex discrimination in the Indian Act under the ICCPR. Ms. Lovelace complained in 1977 that section 12(1)(b) of the Indian Act violated her right to equality on the basis of sex and her right to enjoyment of her culture.

Ms. Lovelace had lost her status at marriage to a non-status man, and upon separating from her husband was unable to return to the Tobique Reserve with her non-status children. The Human Rights Committee ruled in July 1981 that her right to equal enjoyment of her culture under Article 27 of the Convention had been violated: as long as section 12(1)(b) continued in effect, it denied her right to live in her community and share her culture with her family and kin (*Sandra Lovelace v. Canada* 1984).

Around the same time as it was signing on to the ICCPR, Canada deliberately excluded the Indian Act from the application of the Canadian Human Rights Act (Revised Statutes of Canada, c. H-6, c.33) passed in 1977. Canada did not make the Human Rights Act applicable to the Indian Act until 2011. Moreover, during this period Canada began its

practice of ignoring the many recommendations to end sex discrimination in the Indian Act made by UN Treaty Bodies under several human rights covenants (Human Rights Committee 1999, 2006, 2015; CERD 2007, 2012; CEDAW 2003, 2008, 2015, 2016; Committee on Economic Social and Cultural Rights 2006, 2016; Human Rights Council 2013, 2018) and also the decisions of UN committees on individual complaints (CEDAW 2022b; Human Rights Committee 2019; McIvor and Grismer 2010, 2019; *Sandra Lovelace v. Canada* 1984; United Nations Human Rights Committee 2022).

PASSAGE OF BILL C-31

Canada's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1981 and the coming into force of section 15 of the Canadian Charter of Rights and Freedoms in 1985, propelled Canada into revision of the Indian Act. Bill C-31, passed in 1985 (*Indian Act* 1985), no longer included provisions allowing enfranchisement of men or women. Nor did it include provisions removing status from an Indian woman for marrying a non-status male. However, Bill C-31 did not make women fully equal to their male counterparts or address all the inequities in the previous Indian Act. It also introduced new forms of sex discrimination.

It did this by ending the system where there was only one kind of legislated status and introducing a new system with two kinds of status, one superior to the other. Status under s.6(1)(a) of Bill C-31 (full status) was available to all those (mostly male) Indians and their descendants who already had full status prior to April 17, 1985. Status under section 6(1)(c) of Bill C-31 was provided to women whose status had been denied, or whose status had been removed because of marriage to a non-Indian, under the previous legislation. This woman and the non-status father of her child would have offspring with "half status," unable to transmit that status unless he or she parented with another status person.

Bill C-31 introduced the requirement that a child needs to have two status parents in order to acquire status under the Act. Canada held this out as being gender neutral, because it ended the requirement to have a male status parent to be eligible for status, and it applied to women and men equally. However, the requirement has differential effects because of the previous history of discrimination. The woman who had had

her status restored by section 6(1)(c) of Bill C-31 had a spouse with no status. Through her reinstatement, her children became children with one Status Indian parent. Prior to this legislation, a wife who acquired status through marriage had been unable to pass status on to the couple's children, because of the general rule that status could pass only from a male parent. But since the non-Indian wife of a male Indian already had full status under section 6(1)(a), Bill C-31 ensured that she was considered an Indian parent and could pass on status. Consequently, the couple comprised of a status male and the wife who had acquired status through marriage could, as two status parents, pass status to their children. The woman restored to status and her husband with no status would not so qualify.

The corollary of the two-parent rule is the provision in section 6(2) of Bill C-31 that a person with only one status parent has status for her or his lifetime, but they cannot pass status on to a child unless the other parent of that child also has status. This rule has become known as "the second-generation cut-off." The cut-off results from the lesser kind of status possessed by the child of a woman restored to status under section 6(1)(c).

One further consequence of the two-parent rule is that the ability of the woman to pass status to a child she had had out of wedlock was no longer included in the Act. This was the only benefit she had had under the former legislation.

Under the two-parent rule the father is still in a controlling position with respect to conferring status. Although it is relatively easy to determine who is the natural mother of a child, establishing the identity of the father is more difficult. By withholding consent to being identified as the father, a man could prevent the child from being registered with two status parents. The two-parent rule also prejudices the child of a woman who feels constrained not to reveal the identity of the father, as in cases of incest or rape, or is unable to do so, as in cases of gang rape.

Bill C-31 brought about an immediate increase in the population of Status Indians, which exceeded predictions. By December 31, 2000, 114,512 people had gained Indian Status based on Bill C-31 (Furi and Wherrett 1996/2003, 5). In the five years after 1985, the Status Indian population rose by 19 percent as a result of the amendments, with women representing the majority of those who had gained or regained

status (5). In 2000, registrants under Bill C-31 made up 17 percent of the Indian Register (5).

Actual experience and long-term projections, however, indicate that the result of Bill C-31 will be a decline in the number of Status Indians. From 1985 to 1999, thirteen thousand children were born to mothers with only 6(2) status and no other Indian parent. These children did not have the right to be registered as Status Indians (Gehl 2013). Government projections done before another amendment to the Indian Act made in 2010 show that by 2029 there will be 93,800 persons born on reserve who will be ineligible for registration, in contrast to about 4,300 in 2004. Persons born off reserve not entitled to registration will rise in 2029 to 144,800 from about 61,500 in 2004. Those disentitled to registration are expected to begin to outnumber those entitled to registration in about three generations and around the end of the fifth generation, no further children will be born with entitlement to registration (Hurley and Simeone 2010, 5).

BANGING ON A CLOSED DOOR: LITIGATION AFTER 1985

A tide of litigation challenged the inadequacies and inequities of Bill C-31. Madam Justice Masse of the Quebec Superior Court said that Canada preferred "to wait for the courts to rule on a case-by-case basis before acting and for their judgments to gradually force amendments so that statutes are finally consistent with the Constitution" (*Descheneaux v. Canada* 2015, 239).

The first court challenge to Bill C-31 was brought by Sharon McIvor of the Lower Nicola Band in British Columbia and her son Jacob Grismer. In 1985, McIvor applied unsuccessfully for s.6(1)(a) (i.e., "full") status under the revised Indian Act. Sharon and her brother, Ernie McIvor, had each married a non-status person and had a child, and each child married a non-status person and parented children with that person. Application of s.6(1)(a) of the Indian Act to Ernie and his wife ensured that both had status and could confer "full" status on their son. Because McIvor had lost her status upon marriage to a non-status man and regained it under s.6(1)(c), her son was the child of only one Status Indian and had the lesser kind of status conferred by s.6(2). Grismer could not pass status to the child he had with his non-status wife, whereas his cousin, Ernie's child, was able to do so.

In 1986, McIvor and Grismer began an action in the Supreme Court of BC to challenge the refusal of 6(1)(a) status to women who had married non-status men and their direct descendants who claimed entitlement through the female line of descent. This challenge was successful. Justice Carol Ross concluded that the registration provisions in the 1985 Act continue to prefer descendants who trace their Indian ancestry along the paternal line over those who trace their ancestry through the maternal line. The provisions thus continue the very discrimination that the amendments were intended to eliminate. She found that the amendments concerning transmission of status violate section 15 of the Charter as well as section 28, which guarantees the equality of men and women (*McIvor v. The Registrar, Indian and Northern Affairs Canada* 2007).

When ruling on Canada's appeal of this decision, the Court of Appeal of British Columbia acknowledged that there had been a violation of section 15 of the Charter but confined it very narrowly. The Court of Appeal did not compare descent through the female line with descent through the male line, as Justice Ross had done. Rather, it compared the treatment of Grismer under the Act with that of a child whose mother and grandmother had both received status by marrying a status male — the "double mother rule," which had only been a feature of the Indian Act for a short time. A child affected by the double mother rule under the previous Act would receive status only until the age of twenty-one, but under Bill C-31 they would receive status under s.6(1)(a) and keep it for life. That child could thus confer status on a child even if the child did not have another status parent. Grismer had status under s.6(2) of the Indian Act, and no status wife, and thus could not confer status at all. The Supreme Court of Canada denied McIvor and Grismer leave to appeal that same year (*McIvor v. Canada* 2009/2010).

In response to the Court of Appeal decision, Canada introduced Bill C-3 (*Gender Equity in Indian Registration Act* 2010). This bill kept the 6(1)(a) and 6(1)(c) hierarchy, but it gave children of women restored to status under s.6(1)(c) the ability to pass status on to a child even as the only status parent. Canada reported that 37,000 newly entitled individuals were registered from 2011 to 2017 through the implementation of Bill C-3 (Government of Canada 2018).

Bill C-3 was based on the Court of Appeal's narrow view about the basic problem. McIvor and Grismer decided to pursue at the UN Human Rights Committee a remedy for the core sex discrimination against the

maternal line of descent still entrenched in the 6(1)(a)–6(1)(c) hierarchy. They filed their petition in 2010 (McIvor and Grismer 2009/2010), arguing that Bill C-31 violated their right to Indigenous identity and the right to enjoy their culture contrary to Article 27 of the ICCPR, and also the right to be free from sex discrimination contrary to Article 26.

In January 2019, the Committee held that despite revisions to the Indian Act, it still incorporated a distinction based on sex that was not founded on objective and reasonable grounds. This continuing distinction affected the right of McIvor and Grismer to enjoy their own culture together with other members of their group, free from sex discrimination (Human Rights Committee 2019).

Loss of the right to enjoy one's culture together with other members of their group was the basis of the Human Rights Committee decision in *Lovelace* in July 1981. That same human rights violation was found by the Human Rights Committee in *McIvor* in 2019. Despite adherence to international human rights instruments, and the entrenchment of its own Charter of Rights, Canada was still legislating and vigorously defending the deprivation of culture — a hallmark of the settler state and also of genocide.

In August 2015, Justice Masse of the Quebec Superior Court rendered a decision in a case brought by several plaintiffs who experienced sex discrimination that had not been remedied by Bill C-31 (*Descheneaux v. Canada* 2015). One of the plaintiffs, Stephane Descheneaux, had been denied status because his Indian lineage came through his Indian grandmother, who had lost her status when she married a non-status male. Had his grandparent been male, he would have had status and been able to confer it on his wife, children, and grandchildren. Justice Masse ruled in his favour and did not take the very narrow approach to the problem that Justice Groberman had done in the McIvor case.

Another plaintiff, Susan Yantha, was born out of wedlock to a Status Indian father. Under the pre-1985 Act, the father of a child born out of wedlock could confer status on his son, but not his daughter. Because of this sex discrimination, neither Yantha nor her daughter Tammy had status. Although this difference in treatment between male and female children was well known before passage of Bill C-31 (*Martin v. Chapman* 1983), the bill had not addressed it. Justice Masse found that this differentiation between the male and female children born out of wedlock to a status male father was contrary to the Charter.

The 1994 application for status of Dr. Lynn Gehl, an Algonquin Anishinaabekwe, was denied because the identity of her paternal grandfather had never been confirmed. Since only his mother had status, her father had status under section 6(2) of the Act and could not transmit it to Gehl because her mother was non-status. The Ontario Court of Appeal ruled in 2017 that the evidence presented by Gehl was sufficient to establish the Indian Status of her paternal grandfather (and thus the full status of her own father), although she had not been able to provide her grandfather's name. The Court decided that the Indian Act did not require Gehl to provide the name, and the Registrar had been incorrect in requiring her to do so (*Gehl v. Canada* 2017).

After the *Descheneaux* and *Gehl* cases, Canada introduced Bill S-3 (*An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada* 2017). Bill S-3, as initially drafted by Canada, left in place the 6(1)(a)–6(1)(c) hierarchy, and still did not put Indian women on the same footing as their male counterparts with respect to eligibility for status and transmission of status.

An amendment to the bill introduced in the Senate was referred to colloquially as the "6(1)(a) all the way" amendment, because it gave full status under s.6(1)(a) to women and their descendants born before C-31 came into effect in 1985. The "6(1)(a) all the way" amendment was accepted by the Senate Committee, chaired by Senator Lillian Dyck, who herself had been affected by sex discrimination in the Act: her father was not a Status Indian and she had to claim her status after 1985. The bill as amended was then adopted by the full Senate.

When the bill with this amendment was sent to the House of Commons, it was voted down by the governing Liberals. However, the proceedings then returned to the Senate, and the Senate refused to back down on its amendment. The government accepted the amendment as long as it did not come into force at the same time as the other provisions of S-3, and only at a time to be decided by Cabinet. The bill's original provisions, responding to the *Gehl* and *Descheneaux* decisions, came into force in December 2017, and the "6(1)(a) all the way"' amendment came into effect in August 2019, after a public campaign by First Nations women and their allies.

The 6(1)(a) all the way amendment provides to women and their descendants the same right to status and transmission of status as their male counterparts, with respect to the period 1876 to 1985. Bill S-3 does

not cure the discrimination identified by the UN CEDAW Committee in its 2022 decision on the petition of Jeremy Matson. The committee held that Bill S-3 carries forward the old sex discrimination by denying status, or full status, to matrilineal descendants born or married after 1985 (CEDAW 2022b).

The Parliamentary Budget Officer estimated that 670,000 persons had become newly entitled to status as a result of Bill S-3. He believed that 270,000 of these would actually register, and that they would probably not move back to reserves (Office of the Parliamentary Budget Officer 2017). Indigenous Services Canada estimated the number of women and their descendants benefitting from this amendment at between 270,000 and 450,000 (Government of Canada 2020).

As of January 2023, only about 40,000 people now entitled to status pursuant to Bill S-3 have actually been registered (Indian Act Discrimination Working Group 2023). The Indian Registrar has advised that an additional 57,000 persons who were already registered at the time Bill S-3 was passed have had their status "upgraded," an improvement that might well entitle more of their family members to registration. However, the Registrar has not advised these people of their status upgrades. Unless someone accidentally discovers the status upgrade, having such an improvement is unlikely to be of benefit to that person and their descendants (*Indian Act Discrimination Working Group 2022a).*

The inadequacies of the registration process are notorious and well documented (Indigenous Services Canada 2022a; Standing Senate Committee on Aboriginal Peoples 2022; Indian Act Discrimination Working Group 2022b). It takes from six months to two years, or more, to be registered as a Status Indian, much more time than getting a passport, which requires similar confirmations of identity. The registration process is cumbersome and demanding, and there are many complaints about lost documents, misdirection, and failure to communicate. Canada decides upon the resources allocated to registration and could have ensured that the Indian Registry would have what it needed to handle large numbers of new applications under Bill S-3, but it did not. By retaining a cumbersome and slow registration process, Canada can impede the growth in numbers of Status Indians, despite the changes to legislation that have removed legal barriers to registration.

In December 2022, Canada introduced Bill C-38 (*An Act to amend the Indian Act [New Registration Amendments]* 2022), to amend the Indian

Act in response to a Charter challenge filed on behalf of members of the Haida Nation whose ancestors had involuntarily lost status because of the enfranchisement of their husband or father (Stefanovich 2021). Bill C-38 also addresses the transfer of women from their natal band to that of their husbands when they married a man from another band. These legislative corrections are both long overdue.

Bill C-38 does not remove the bar to compensation that has been included in Bill C-31, Bill C-3, and Bill S-3 (*An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada* 2017, ss. 10-10.1). Canada has explicitly barred any recovery of damages by women and their children who experienced the statutory excommunication of the Indian Act. Canada has provided financial settlements with respect to forced attendance at residential school and day schools, the child seizures during the "Sixties Scoop" by child wel-fare authorities, underfunded child welfare services (Choi 2022; Crown–Indigenous Relations and Northern Affairs Canada 2020, 2021a, 2021b, 2023a; Canadian Press 2023), and impure water supplies to reserves (Indigenous Services Canada 2022b). Yet Canada refuses to contemplate compensation for the intergenerational life-altering deprivations of status it has inflicted on women, ignoring the fact that it is a party to treaties that require it to provide effective remedies for discrimination, including compensation. José Francisco Calí Tzay, the UN Special Rapporteur on the Rights of Indigenous Peoples, in his March 2023 end of mission statement called on Canada to "create an affordable, reliable, timely, and accessible remedy to compensate those that have suffered the effects of discrimination" (McLeod 2023; Calí Tzay 2023).

Bill C-38 also leaves in place the second-generation cut-off and the two-parent rule, which extend the sex discrimination beyond 1985 and create a final extinction plan. Special Representative Claudette Dumont-Smith noted that the second-generation cut-off was the issue of paramount concern in her consultations among First Nations regarding Bill S-3 (Dumont-Smith 2019). The second-generation cut-off and the two-parent rule, she wrote, will see the gradual elimination of persons eligible to be registered as an Indian, with some communities feeling this impact in the next generation while most First Nations communities, regardless of location, will feel this impact within the next four generations. The end result, in the not-so-distant future, is that

some communities will no longer have any registered Indians, or the number of registered Indians will have declined significantly. Since the government's funding allocations for services and programs are based on numbers of Status Indians, the viability, and the existence, of First Nations communities is threatened. So, too, is their ability to continue residing on reserve land.

THE WAY FORWARD

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) was adopted by the General Assembly on September 13, 2007, after decades of developmental work in which Indigenous leaders from Canada were deeply involved. In May 2016, Canada announced that it was accepting the Declaration unreservedly, reversing its earlier position (Fontaine 2016). In 2021, Canada passed the United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA), the preamble of which states that "the rights and principles affirmed in the Declaration constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world, and must be implemented in Canada."

Article 8 of the Declaration (2007) provides that "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." It requires that states provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of depriving them of their integrity as distinct peoples or of their cultural values or ethnic identities; any action which has the aim or effect of dispossessing them of their lands, territories or resources; any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; and any form of forced assimilation or integration.

In its draft Action Plan for the implementation of UNDRIP (Government of Canada 2023), required by the UNDA, Canada does not acknowledge its imposition of forced assimilation or the need to provide redress for the harms it has caused. In the draft plan, Canada recognizes that "the Indian Act is a colonial-era law designed to exert control over the affairs of First Nations, and as such, the Act will never be fully aligned with" UNDA. It states that for Canada's laws to fulfil the UNDA, the Indian Act must be repealed. The plan announces that "the government is seeking to make the Act's registration and band membership

provisions more consistent with UNDA, until a clear consensus on a way forward on comprehensive change or the Act's repeal is possible." It plans to "co-develop a collaborative consultation process on a suite of broader reform, relating to registration and band membership issues, prior to any transition away from the Indian Act" (22).

This is an exceedingly mild and self-forgiving description of the Indian Act and of Canada's settler colonialism. It may also be signalling that Canada is now prepared to give up using the Indian Act as a way of limiting the Indigenous population so that it will not, by its very existence, cast doubt on the validity of Canada's claims to sovereignty.

Indeed, it could be said that Canada has achieved about as much validation of its sovereignty claim as it can. In *Tsilhqot'in Nation v. British Columbia* (2014, para. 69), the Supreme Court of Canada said that the doctrine of terra nullius has never applied in Canada. It describes Aboriginal title to land as coming from the fact of Aboriginal occupancy of land at the time of European sovereignty. In *Haida Nation v. British Columbia (Minister of Forests)* (2004), Chief Justice McLachlin says,

> The process of reconciliation flows from the Crown's duty of honourable dealing towards Aboriginal peoples, which arises in turn from the Crown's *assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people.* (para. 32, emphasis added)

The italicized phrase represents a description of what has actually taken place in Canada: *assertion* of sovereignty and *de facto* control of land and resources.

Since the 1973 Supreme Court decision in *Calder* (*Calder et al. v. Attorney General of British Columbia* 1973) recognizing Aboriginal title, Canada has been negotiating comprehensive claim or self-government agreements, largely with Indigenous nations whose land had not been previously covered by a treaty. Canada reports that its first twenty-nine comprehensive claim or self-government agreements cover over 40 percent of Canada's land mass of 9,984,670 square kilometres. These instruments, by and large, are constructed so as to allow Canada to substantially fulfil its goals of furthering development and access to resources (Crown–Indigenous Relations and Northern Affairs Canada 2023b, 1–2).

As it contemplates leaving the Indian Act behind, however, Canada gives no sign of willingness to assume the burden of repairing the damage done by its use of the Indian Act as an instrument of colonization. This burden should not be left unattended to and should not be left to others. Not only has Canada's use of the Indian Act deprived generations of Indian women and their descendants of their identity culture and community, Canada's way of changing the Indian Act to remove sex discrimination has emphasized a dichotomy between the individual rights of the woman and the group rights of the nation.

Canada's argument before the Court of Appeal in *McIvor* was repeated by Justice Groberman as a reason why very limited restoration of women and their children to status was "pressing and substantial" under section 1 of the Charter: "There were widespread concerns that the influx [of reinstated persons] might overwhelm the resources available to bands and that it might serve to dilute the cultural integrity of existing First Nation groups" (*McIvor v. Canada* 2009/2010, 129).

This position turns the truth on its head, ignoring Canada's long history of despoiling the culture of Indigenous Peoples through residential schools, sex discrimination, criminal prohibitions on cultural practices, and many other means, and its persistent underfunding of First Nations' basic needs.

Moreover, the position implies that the right to self-determination, collective rights, and cultural integrity are in competition with the individual rights of First Nations women. By contrast, the UN Human Rights Committee considering the cases of Sandra Lovelace, Sharon McIvor and Jacob Grismer recognized their right under the ICCPR to be included in the collectivity, and to practise and enjoy their culture in common with others and on an equal basis.

In its new General Comment, the Committee on the Elimination of Discrimination Against Women (CEDAW 2022a, para.19) has stated:

> Collective rights are indispensable for the existence, well-being and integral development of Indigenous Peoples, including Indigenous women and girls. The individual rights of Indigenous women and girls should never be neglected or violated in the pursuit of collective or group interests, as respect for both dimensions of their human rights is essential.

Many women and First Nations share the goal of establishing self-government. They recognize the harm that sex discrimination has done by reducing the numbers of Status Indians, to the point where the existence of First Nations is threatened in the not-so-distant future. And as Dr. Pam Palmater (2011, 54) states, "There can be no rebuilding of our Nations without loyal citizens to carry forward our identity, culture, practices, traditions, beliefs, laws, and customs for future generations."

There already exists a way of upholding both the interests of women seeking restoration to status and those of First Nations. That is to restore status to the women and their families, ensuring that the Indian Act or any successor scheme will not use sex discrimination as a means of limiting the recognized Indigenous population. First Nations will need adequate resources to deal with the increase in numbers and associated dislocations such as the need for more housing, cultural integration, education, and other services. Importantly, women and their families must receive redress for the long exile from their communities, with all of the practical and spiritual consequences such exile entails. The Native Women's Association of Canada has described the costs to women as "immeasurable" in psychological, economic, social, cultural, and political terms, not to mention the denial of hundreds of millions of dollars in lost federal programs and services, loss of their share in band assets, and loss of homes and property interests on reserves (House of Commons 1982, 58, 17).

This proposed approach recognizes that Canada has created these problems and should not leave women or First Nations to deal with them without support (Government of Canada 2023, 10[ii]). The women thus restored would, as contemplated by Indian Rights for Indian Women, be present and able to participate in the development of self-government and its institutions, the protection of the land, and the restoration of culture. Women will not be excommunicated from their communities and First Nations will not be driven out of existence by statutory rules enacted to serve the discredited process of colonization.

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