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Feminist Alliance for
International Action

L'Alliance Féministe pour
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Backgrounder for Press Conference on UN Ruling on Indian Act Sex Discrimination, January 17, 2019

What Does the UN Decision Say?

- The sex-based hierarchy between s. 6(1)(a) and s. 6(1)(c), introduced by the 1985 *Indian Act*, and continued by the amendments of 2011 and 2017, violates the right to the equal protection of the law without discrimination based on sex, and violates the equal right of men and women to the enjoyment of Indigenous culture, guaranteed by the *International Covenant on Civil and Political Rights*.
- First Nations women and their descendants are entitled to status, and to full 6(1)(a) status, on the same footing as First Nations men and their descendants.
- Distinctions between the maternal line and the paternal line, including the "1951 cut-off", which bars some maternal line descendants born before 1951 from eligibility for status, are discriminatory and not permissible.
- All those excluded because of sex discrimination, and those denied 6(1)(a) status because of sex discrimination, must be included and granted full status.

The decision can be found here:

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CAN/CCPR_C_124_D_2020_2010_28073_E.pdf

History of Indian Act Sex Discrimination in Canada

Since its inception, the *Indian Act* has accorded privileged forms of Indian status to Indian men and their descendants compared to Indian women and their descendants, treating the latter as second-class Indians. In earlier versions of the *Indian Act*, an Indian was defined as 'a male Indian, the wife of a male Indian, or the child of a male Indian.' For the most part from 1876 to 1985, Indian women had no ability, or limited ability, to transmit status to their descendants. There was a one-parent rule for transmitting status and that parent was male. As well, Indian women lost status when they married a non-Indian. On the other hand,

Indian men who married non-Indians kept their Indian status and endowed status on their non-Indian wives.¹

The Government of Canada has amended the *Indian Act* three times, in 1985, 2011 and 2017, ostensibly to remove the sex discrimination from the status registration provisions, each time doing it only partially.

In 1985, the Government of Canada enacted Bill C-31,² in response to the 1981 UN decision in *Lovelace v. Canada*³ and to the introduction of Canada's new constitutional equality rights guarantee, section 15 of the *Charter*. The promise made by the Government of Canada was to eliminate all of the sex discrimination.⁴

Instead, Bill C-31 entrenched inequality by creating the category of 6(1)(a) for all those (mostly male) Indians and their descendants who already had full status prior to April 17, 1985, and the lesser category of 6(1)(c) for women whose status had been denied, or whose status had been removed because of marriage to a non-Indian. The women were considered "re-instatees", and they were re-instated to a lesser category of status. Their ability to transmit Indian status to their children was restricted by their 6(1)(c) status.

For the first time, Bill C-31 introduced a second generation cut-off, but delayed its application to those born prior to April 17, 1985 who had 6(1)(a) status; the second generation cut-off applied immediately to 6(1)(c) women. In other words, the "re-instated" women could pass status to their children, but not to the next generations, while their male counterparts could pass status to all their descendants born prior to April 17, 1985. The children of 6(1)(c) women were consigned to inferior 6(2) status, which is non-transmissible.

The 1985 consignment of First Nations women to 6(1)(c) status treated them as lesser parents, and denied them the legitimacy and social standing associated with full s. 6(1)(a) status. Throughout the years, the so-called "Bill C-31 women" have been treated as though they are not truly Indian, or 'not Indian enough,' less entitled to enjoy Indigenous rights, requiring them to fight continually for recognition by male Indigenous leadership, their families, communities, and

broader society. As a result, many women have faced painful forms of discrimination as they are branded as 'traitors' for having married out – a burden their male counterparts do not carry. In many communities, registration under section 6(1)(c) is like a 'scarlet letter' – a declaration to other community members that they are outcasts, lesser Indians. Similarly, the 6(2) status which was given to the children of "Bill C-31 women" is a lesser form of Indian status, and it tells the community that these are the children of Indian women who married out, or who had children out of wedlock. The profound hurt that has been caused and the injustice that has been suffered by the women who are often referred to pejoratively as "6(1)(c) women" or "Bill C-31 women" has been neither recognized nor remedied.

Exclusion from status has also affected the ability of First Nations women and their children to access federal programs and services intended for registered Indians, such as post-secondary education, and uninsured health benefits. Exclusion from status, or being assigned to a lesser category of status, has also resulted in the denial of Band membership and related benefits, including ability to live on reserve with their families and communities, access to K-12 education on reserve, housing, training and cultural programs.⁵ It further denies their political voice as they can neither run, nor vote, for leadership positions. Most of all it denies their Indigenous identity, divides families and creates a significant barrier to accessing elders, language speakers and community ceremonies.

Since the 1970s, First Nations women and their descendants have launched legal challenges and petitions to UN treaty bodies⁶ in order to unwind this discriminatory, sex-based hierarchy and its effects. However, in response, the Government of Canada has made only piecemeal reforms and never completely eliminating the discrimination.

In 2011, in response to the B.C. Court of Appeal *Mclvor v. Canada* decision, the Government of Canada passed Bill C-3, *Gender Equity in Indian Registration Act*,⁷ and in December 2017, the Government of Canada passed another amendment, *Bill S-3 An Act to amend the Indian Act in response to the Superior*

*Court of Quebec decision in Descheneaux c. Canada (Procureur général).*⁸ In both cases, the amendments removed the specific form of sex discrimination in the status registration provisions that was identified by the courts but left the core of it in place. An obvious example of the discrimination that remains, notwithstanding Bill C-3 and Bill S-3, is the continuing exclusion of female line descendants born prior to 1951; male line descendants born prior to 1951 are not excluded from status. This exclusion is known as "the 1951 cutoff".

Bill C-3 was expected to entitle about 45,000 new registrants,⁹ and Bill S-3 is expected to entitle between 28,000 and 35,000 new registrants.¹⁰ However, the Parliamentary Budget Officer estimates that there are approximately 270,000 First Nations women and their descendants who are still excluded and could register for Indian status if the sex discrimination is completely eliminated.¹¹

The effect of maintaining the 6(1)(a) - 6(1)(c) hierarchy is that, to this day, Indian women and their descendants are still being denied equal status with Indian men and their descendants because the scheme treats the female line as inferior and affords their descendants lesser or no status. Under the current law, Indian women like Sharon McIvor can never have full 6(1)(a) Indian status like their male counterparts.

6(1)(a) All the Way

In June 2017, when Bill S-3 was in Parliament, the Senate of Canada amended it in a way that would have eliminated the sex discrimination, fully and finally, from the *Indian Act*. That amendment was dubbed the '6(1)(a) all the way' amendment because it would have entitled Indian women and their descendants born prior to 1985 to full 6(1)(a) status on the same footing as Indian men and their descendants.

However, the Government of Canada refused to support this amendment. However, since Senate approval was still required, in October 2017, the Government of Canada agreed to include provisions that will have the same effect as the Senate's '6(1)(a) all the way' amendment (ss. 2.1, 3.1 and 3.2). Since these provisions **do not come into force until an unspecified date** when

the Government may decide, by Order-in-Council, to enact them.¹² The bottom line is that the bulk of the sex discrimination remains and ***there is no fixed date for its removal.***

The Government of Canada's purported justification for this failure to eliminate the sex discrimination from the *Indian Act* is that it must consult with Indigenous communities and leaders before doing so. Canada has consulted about the removal of sex discrimination from the *Indian Act* repeatedly over the last forty years, including before and after passing Bill C-31 in 1985, and before and after passing Bill C-3 in 2010. The duty to consult is perverted when it is used as an excuse to delay the elimination of the Government's own more-than-a-century-old sex discrimination against First Nations women and their descendants.

Unfortunately, the Government of Canada, in its history of consultations on the elimination of sex discrimination from the *Indian Act* has pitted the right of Indigenous communities to self-determination against Indigenous women's right to equality, encouraging and permitting male-led Indigenous organizations and some band councils to oppose equality for Indigenous women on the grounds that self-government should be established first,¹³ or that they do not have adequate resources to incorporate new band members.¹⁴ Resources matter, but cannot be determinative.¹⁵ Canada has an obligation to respect and implement both the right to self-determination and women's rights to equality and non-discrimination,¹⁶ which should be treated as mutually supportive rather than mutually exclusive.

United Nations treaty bodies have repeatedly recommended that Canada eliminate the sex discrimination from the *Indian Act*.¹⁷ The crisis of violence will not stop until Indigenous women and girls are treated as equal human beings. Removing this discrimination from the *Indian Act* is a minimum threshold requirement for ending violence.

In its 2015 report on *Missing and Murdered Indigenous Women in British Columbia, Canada*, the IACHR found that historical *Indian Act* sex discrimination is a root cause of high levels of violence against First Nations women.¹⁸ The

United Nations CEDAW Committee in its inquiry under Article 8 of the Optional Protocol found that the *Indian Act* has mandated and enforced gender-based discrimination and inequality for First Nations women for more than one hundred years.¹⁹ The CEDAW Committee recommended that sex discrimination be eliminated from the *Indian Act* as an essential step in addressing the murders and disappearances.²⁰

¹ Royal Commission on Aboriginal Peoples, *Volume I: Looking Forward, Looking Back* (Ottawa: Communication Group, 1996), at 251-262, online: <https://qspace.library.queensu.ca/bitstream/handle/1974/6874/RRCAP1_combined.pdf?sequence=5&isAllowed=y>; *Volume 4: Perspectives and Realities*, at 20-43, online: <https://qspace.library.queensu.ca/bitstream/handle/1974/6874/RRCAP4_combined.pdf?sequence=2&isAllowed=y>.

² Bill C-31, *An Act to amend the Indian Act*, 1st Sess, 33rd Parl, 1985, c 27. Bill C-31 was enacted as *Indian Act*, RSC 1985, c I-5.

³ HRC, Communication No R.6/24, *Sandra Lovelace v Canada*, 36 UN GAOR Supp (No 40) at 166, UN Doc A/36/40 (1981), online: <<http://hrlibrary.umn.edu/undocs/session36/6-24.htm>> [Lovelace].

⁴ Minutes of Proceedings and Evidence of the Standing Committee on Legal and Constitutional Affairs, 1st Sess, 33rd Parl (7 March 1985), at 12:7–12:9 (David Crombie, Minister of Indian Affairs and Northern Development).

⁵ Pamela Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Vancouver: UBC Press, 2011).

⁶ *Canada (AG) v Lavell*, [1974] SCR 1349; *Lovelace*; *Mclvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153; *Mclvor v Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 827; *Matson v Canada (Indian Affairs and Northern Development)*, [2013] CHRT No 13; *Canada (Canadian Human Rights Commission) v Canada (Indian and Northern Affairs)*, [2015] FCJ No 400; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31; *Lynn Gehl v Attorney General of Canada*, 2015 ONSC 3481 (CanLII); *Descheneaux c Canada (Procureur Général)*, 2015 QCCS 3555. Sharon Mclvor and Jeremy Matson have outstanding petitions filed with the United Nations Human Rights Committee (*Sharon Mclvor and Jacob Grismer v Canada*, online: <<https://povertyandhumanrights.org/2011/08/mcivor-v-canada/>>) and the Committee on the Elimination of Discrimination against Women (*Matson v Canada*, Petition No 68/2014) because of the continuing discrimination.

⁷ Bill C-3, *Gender Equity in Indian Registration Act*, 3rd Sess, 40th Parl, 2010 (received royal assent on 15 December 2010); *Gender Equity in Indian Registration Act*, SC 2010, c 18.

⁸ Government of Canada, “Plain text description of Bill S-3, An Act to amend the Indian Act in response to Superior Court of Quebec decision in *Descheneaux c. Canada (Procureur général)*” (31 January 2018), online: <<https://www.aadnc-aandc.gc.ca/eng/1478177979520/1478178031024>>.

⁹ Indigenous and Northern Affairs Canada, “Registration Process for Bill C-3 Applicants”, Government of Canada <www.aadnc-aandc.gc.ca>.

¹⁰ Dr. Pamela Palmater, Presentation to the Parliamentary Committee on Indigenous and Northern Affairs Re: Bill S-3. December 5, 2016, online: <<http://www.pampalmater.com/wp->

[content/uploads/2016/12/Presentation-to-Parliamentary-Standing-Committee-on-Indigenous-and-Northern-Affairs-Dec-5-2016.pdf](http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf)>.

¹¹ Parliamentary Budget Officer, “Bill S-3: Addressing Sex-Based Inequities in the Indian Act,” (Ottawa: Office of the Parliamentary Budget Officer, 5 December 2017), online: <http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf>.

¹² Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, 1st Sess, 42nd Parl, 2017, s 15(2) (assented to 12 December 2017).

¹³ Gerard Hartley, “The Search for Consensus: A Legislative History of Bill C-31, 1969–1985” (2007) Aboriginal Policy Research Consortium International (APRCi) 5 at 12, online: <<https://ir.lib.uwo.ca/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1346&context=aprci>>. Hartley describes how AFN’s National Chief David Ahenakew argued that the Indian Act should not be amended before the constitutional entrenchment of the right to self-government: “First we have to secure our right place in Canada, the rights of our First Nations. Then we would deal with the discrimination against women...” Jane Gottfriedson, then President of NWAC, replied “Aboriginal women’s rights must not be kept in abeyance while Indian leaders and federal and provincial governments sort out the meaning of Aboriginal constitutional rights.” Hartley explains: “The NWAC supported Aboriginal self-government, Gottfriedson asserted, but ‘if Indian women suffer under federal discriminatory legislation for another five or twenty years while you hash out the meaning of Indian government, we will not accept this.’” Thirty-six years later little has changed.

¹⁴ Naomi Metallic, at Part III, Volume V, p. 161, line 10 - p. 163, line 6 appears to give credence to the argument that legal equality for Indian women can be delayed while the federal government discusses resources and longer-term plans for eliminating the Indian Act. This position is not consonant with the human rights of Indigenous women.

¹⁵ *Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3 at para 283.

¹⁶ Inter-American Commission on Human Rights, *Indigenous Women and Their Human Rights in the Americas*, OEA/Ser.L/V/II, Doc 44/17, 17 April 2017, at para 59, online: <<https://www.oas.org/en/iachr/reports/pdfs/IndigenousWomen.pdf>> [IACHR Report 2017], citing UNHRC Corpuz Report 2015, para 75.

¹⁷ HRC, Concluding observations 2006, *supra*; HRC, Concluding observations 2015, at paras 17-18; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights*, 36th Sess, adopted 22 May 2006, UN Doc E/C.12/CAN/CO/4-5, online: <<https://undocs.org/E/C.12/CAN/CO/5>> [CESCR, Concluding observations 2006]; CESCR, Concluding observations 2016, at para 22(b); CERD, Concluding observations 2007, *supra* at para 15; Committee on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination of Discrimination against Women*, 28th & 29th Sess, UN Doc A/58/38 (2003), online: <[http://undocs.org/A/58/38\(SUPP\)](http://undocs.org/A/58/38(SUPP))>; CEDAW, Concluding observations 2008, *supra*; CEDAW, Concluding observations 2016, *supra* at para 13.

¹⁸ IACHR Report 2014, at paras 93 & 129.

¹⁹ CEDAW Report 2015, at para 24.

²⁰ CEDAW Report 2015, at para 219(e). The Committee calls upon Canada: “To amend the Indian Act to eliminate discrimination against women with respect to the transmission of Indian status, and in particular to ensure that aboriginal women enjoy the same rights as men to transmit status to children and grandchildren, regardless of whether their aboriginal ancestor is a

woman, and remove administrative impediments to ensure effective registration as a status Indian for aboriginal women and their children, regardless of whether or not the father has recognized the child.”