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Women's Legal Education and Action Fund | Fonds d'action et d'éducation juridiques pour les femmes

LEAF Submission
to the Senate Standing Committee on Aboriginal Peoples
on

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

November 29, 2016

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Introduction

The Women's Legal Education and Action Fund (LEAF) urges the Standing Committee on Aboriginal Peoples ("the Committee") to propose amendments to Bill S-3 which fully and finally eliminate sex discrimination from the status provisions of the *Indian Act*. Alternatively, LEAF submits that the Committee should recommend that the government withdraw the Bill and redraft it to remove all sex discrimination from the status provisions of the *Indian Act*. The equality rights of Indigenous women in Canada pursuant to ss.15 and 28 of the *Charter of Rights and Freedoms* must be fully respected and promoted. Bill S-3, as currently drafted, fails to meet the Government of Canada's constitutional obligations to Indigenous women.

Background and Expertise of LEAF

LEAF is a national organization dedicated to promoting substantive equality for women through litigation, law reform and public education. Since it was founded in 1985, LEAF has intervened in numerous cases addressing substantive equality and is a leading expert in the inequality and discrimination experienced by women in Canada. Central to LEAF's commitment to substantive equality is addressing the inequalities suffered by women who experience discrimination on multiple and intersecting grounds, such as on the basis of Indigenous identity, poverty, disability, race, sexual orientation and religion.

Sex discrimination under the *Indian Act*

For over 145 years, the status provisions of the *Indian Act* have discriminated in favour of men and those whose Indian status is traced from male ancestors.

Until 1985, this discrimination was apparent on the face of the legislation. Under the *Indian Act,* S.C. 1951, c. 29, for example, an Indian woman who married a man without Indian status lost her status and band membership, and any children she had would not have status. An Indian woman who married a man with Indian status and membership in a different band would lose her membership in her own band, and become a member of his band. By contrast, a man with Indian

status who married a woman without status would not just keep his status, but would confer that status onto his wife and onto any children he had.[1]

In 1985, the government amended the *Indian Act* to end the practice of gaining or losing status through marriage. The *Indian Act,* RSC 1985, c I-5 created two categories of status. The first category included, among others, individuals who had status already immediately before the new act came into force (s. 6(1)(a)), individuals who had lost their status through "marrying out or other enfranchisement provisions (s. 6(1)(c), (d) or (e)), and individuals with two parents entitled to be registered (s. 6(1)(f)). The second category includes children who have only one parent who falls into the first category (s. 6(2)). Persons registered under s. 6(2) are unable to transmit their Indian status to their children unless those children have another parent with Indian status. This is known as the "second-generation cut-off".

This two-tiered approach to status has the effect of carrying forward the discrimination into the contemporary status regime and reproducing the discrimination against women embedded in the pre-1985 legislation.

Sharon McIvor's challenge of the 1985 Act

The first successful challenge to this residual discrimination was brought by Sharon McIvor and her son, Jacob Grismer. Ms. McIvor married a man without status, and so would have lost her status under the 1951 Act. Under the 1985 Act, she gained status pursuant to s. 6(1)(c). Her son, Mr. Grismer, would have had no status under the 1951 Act, but was entitled under the 1985 Act to register under s. 6(2). If Ms. McIvor had a brother, he would have been entitled to register under s. 6(1)(a), as would any child born to that brother prior to 1985. As a result, that child would have s. 6(1) status, rather than the s. 6(2) status held by Mr. Grismer. This child, accordingly, would have had the significant cultural and material benefit of passing on his status to his children, which Mr. Grismer did not, purely because he traced his Indian status through the female line. The British Columbia Supreme Court and Court of Appeal both concluded that the Act was discriminatory.

Further to this decision, like a number of legal experts, Indigenous governments and Chiefs, the Assembly of First Nations, and Indigenous women's groups, LEAF argued for a broad amendment that would address *all* the sex discrimination that remained embedded in the Act.[2] In spite of this, the government at the time amended the Act only so far as it applied to people in the identical situation of Ms. McIvor and her son. The broader discrimination embedded in the *Indian Act* remained untouched.

[1] *Indian Act,* SC1951, c 29, s 10-11; see also, *Indian Act,* 1876, c 18 (39 Vict), s 3.
[2] Women's Legal Education and Action Fund (LEAF). Submission to the Standing Committee on Aboriginal Affairs and Northern Development on Bill C-3: *Gender Equity in the Indian Registration Act* (April 26, 2010).

Bill S-3

Parliament finds itself in the same position once again. In *Descheneaux v Canada (Attorney General),* the Quebec Superior Court concluded that the *Indian Act* status provisions continue to discriminate against individuals who trace their Indian status through the female line. The specific fact situation of the individuals affected is different than in *McIvor,*[3] but the basic problem is the same: the two-tiered status provisions advantage individuals who trace their status through the male line.

Unfortunately, in Bill S-3, "*An Act to Amend the Indian Act (elimination of sex-based inequities in registration*)," Parliament has once again chosen to take a piecemeal approach to reform that fails to achieve full equality between Aboriginal men and women in eligibility for and transmission of Indian status.

The proposed Bill S-3 leaves intact significant areas of sex discrimination. For example, under Bill S-3:

- Individuals who were born before September 4, 1951, trace their status through the maternal line, and have grandmothers who married out are still disadvantaged relative to male line descendants.
- Female children born outside of marriage to status men prior to September 4, 1951 are disadvantaged under these status provisions, as are their descendants. Male children born outside of marriage of status men and their descendants are eligible for full s. 6(1)(a) status even if they were born prior to 1951.
- Indigenous and Northern Affairs (INAC)'s discriminatory policies governing unstated and unknown paternity remain intact. In cases where women are unable to establish the paternity of their child, for instance because the child was born out of rape or a relationship characterized by violence, INAC treats the child as if it has only one status parent. This systematically disadvantages women who are lone parents and their descendants, and is discriminatory under the meaning of s. 15(1) of the *Charter*. This issue will be addressed by the Ontario Court of Appeal in *Gehl v. Attorney General (Canada)*, to be heard this December.

This list is not exhaustive.

[3] Stéphane Descheneaux's grandmother lost her status through "marrying out." He was born in 1968, long before the 1985 Act came into force. His grandmother regained status in 1985 under s. 6(1)(c), and his mother obtained status under s. 6(2). He still had no status. In 2010, his mother obtained status under s. 6(1)(c.1) pursuant to the amendments that came out of *McIvor*, and he obtained status under s. 6(2). If his First Nations ancestor had been a grandfather, that grandfather would have passed on full status to his children. While the grandchild may have been subject to the Double-Mother rule prior to 1985, after 1985 they would be entitled to full registration under s. 6(1). This gives them the ability to pass on status to their children. Susan Yantha was born to an Indian man and a non-Indian woman in 1954. They were not married. She did not have Indian status at birth, but received it pursuant to s. 6(2) after 1985. If she had been a male child of an Indian man born to unmarried parents in the same period, she would have had status at birth, and retained s 6(1) status after 1985. Her daughter, Tammy Yantha, would in that circumstance have status under s 6(2).

LEAF understands that Bill S-3 is intended to be the first of two stages of *Indian Act* reform. Other issues – including undisclosed or unknown paternity, the second-generation cutoff, federal authority to determine status, and Indigenous jurisdiction over citizenship – may be addressed in the second stage as part of a broad, Nation-to-Nation conversation. This broader reform is essential: the second-generation cut-off is designed to – and will – result in the eradication of status Indians in Canada within 100 years. LEAF supports the call of Indigenous governments and organizations for this Nation-to-Nation conversation.

Nonetheless, LEAF urges this Committee to ensure Bill S-3 removes *all* vestiges of sex discrimination from the status provisions now. This is an essential first step towards meeting Canada's obligations towards Indigenous women under international law,[4] and would set a strong foundation for a broader Nation-to-Nation conversation about moving beyond the racist and colonial *Indian Act.* As Sharon McIvor told the UN Human Rights Committee:

> The [Murdered and Missing Indigenous Women] national inquiry and any consultations on a new nation-to-nation relationship can only start on a credible footing if the Government of Canada begins by publicly undertaking to eliminate the sex discrimination in the *Indian Act* immediately. Without this, Indigenous women do not begin these processes as equals.

The Importance of Registration and the Ongoing Discriminatory Impacts of Exclusion from Registration

Entitlement to Indian status is not merely a matter of access to certain federal government benefits. While the importance of non-discriminatory access to health, education and other benefits and supports for status Indians should not be understated, the implications of the discriminatory exclusion of those who trace their ancestry through the matrilineal line are far-reaching and profound. They include exclusion from the social, cultural and political life of the community, harms to psychological well-being, and denial of dignity and self-worth.

Exclusion from the Indian status can mean exclusion from band membership. Under the *Indian Act* band membership rules,[5] which apply to the majority of First Nations, lack of Indian status results in exclusion from band membership and from having the right to reside in one's home community or territory. This means that non-status women and children cannot live in their home community. They are treated as "outsiders". They are unable to practice and transmit their culture and language within the community, and their children's Indigenous culture and language

[4] *International Covenant on Civil and Political Rights*, Articles 2(1), 2(2), 3, 23, 24(1), 24(3), 26, and 27; *International Covenant on Economic, Social and Cultural Rights*, Articles 2(2), 3, 11, and 15 (adopted December 16, 1966, entry into force on January 3, 1976) GA Res. 2200A (XXI); *Convention on the Elimination of all forms of Discrimination Against Women*, Articles 2(a), 2(c), 2(d), 2(e), 2(f), 3, 5, 13(a),15(1), 15(2),16(a), and 16(d) (adopted December 18, 1979, entry into force September 3, 1981) GA Res 34/180; *Convention on the Rights of the Child*, Articles 8 and 30 (adopted November 20, 1989, entry into force September 2, 1990) GA Res 44/25); and *Universal Declaration of Human Rights*, Articles 2, 15, 16, 22, and 25 (adopted and proclaimed December 10, 1948) GA Res 217A (III).

[5] See *Indian Act,* RSC 1985 cI-5, s 11.

cannot be nurtured within the community. In the 1980 decision in *Lovelace v. Canada*, this exclusion of Aboriginal women and children was found to be inconsistent with Canada's international human rights obligations by the United Nations Human Rights Committee.[6]

In addition, there is a direct connection between the discrimination that remains embedded in the *Indian Act* and the disproportionate violence suffered by Indigenous women and girls.[7] Women who are disconnected from the support and resources of their community will be more vulnerable to violence. The Committee on the Elimination of Discrimination against Women has listed the discriminatory provisions of the *Indian Act* as one of multiple factors that "cannot be separated from the current violence against aboriginal women and the continued and increased vulnerability of aboriginal women to such violence."[8]

The Inter-American Commission on Human Rights also found that:

> Indigenous women face multiple challenges with respect to securing status for themselves and their children, and, in some cases, the presence of a second intermediate status classification can rise to the level of cultural and spiritual violence against Indigenous women, since it creates the perception that certain subsets of Indigenous women are less purely Indigenous than those with "full" status. This can have negative psychological and social effects on the women in question, even aside from the consequences for a woman's descendants.[9]

The Obligations of the Government of Canada

By leaving out the descendants of some Aboriginal women, and by failing to address the problems of denying status on the basis of unknown or unstated paternity, Bill S-3 perpetuates the sex discrimination it purports to correct.

In *Descheneaux,* Masse J. urged the government not to repeat the mistakes of the past by taking a piecemeal approach to sex discrimination under the *Indian Act*:

> This judgment aims to dispose of the plaintiffs' action.

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[6] *Lovelace v. Canada*, Communication No R6/24, UN Doc Supp No 40 (A/36/40).
[7] See, generally, Gwen Brodsky, "*Indian Act* Sex Discrimination: Enough Inquiry Already, Just Fix It," *Canadian Journal of Women and the Law*, Vol 28, No 2 (2016) at 317.
[8] CEDAW, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (30 March 2015) UN Doc CEDAW/C/OP.8/CAN/1 at para 129. The Committee consequently urged Canada to make amendments to eliminate discrimination under the *Indian Act*. See *Ibid*, para 219(e).
[9] Inter-American Commission on Human Rights, *Missing and Murdered Women in British Columbia,* Canada (OEA)/Ser.L./V/II, Doc 30/14 21 (2014) <http://oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf> at para 68.

It does not, however, exempt Parliament from taking the appropriate measures to identify and settle all other discriminatory situations that may arise from the issue identified, whether they are based on sex or another prohibited ground, in accordance with its constitutional obligation to ensure that the laws respect the rights enshrined in the Canadian Charter.

This task incumbent on Parliament is complex and commensurate with the general impact of the statutes it enacts. It must take into account the effects of a statute in all the situations to which it will likely apply, and do so in light of the reports, studies and factual situations discussed and raised during the enactment process, and in light of the applicable law, including the principles set out in judicial decisions.

Judges hear only one specific dispute and are privy only to what is adduced and argued before them. They are not in the best position to grasp all of the implications of the laws and their potentially discriminatory effects.

In the 2010 Act, Parliament chose to limit the remedy to the parties in *McIvor* and those in situations strictly identical to theirs. It did not attempt to identify the full measure of the advantages given the privileged group identified in that case.

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.

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.

First, it would compel them to argue their constitutional rights in the judicial arena in many closely related cases and at great cost, instead of benefiting from the broader effects of a policy decision and counting on those who exercise legislative power to ensure that their rights are respected when statutes concerning them are enacted and revised. What is more, limited judicial resources used on disputes that a well-interpreted prior judgment should have settled are squandered instead of being used efficiently, with unfortunate effects for all litigants.

[…]

Parliament should not interpret this judgment as strictly as it did the BCCA's judgment in *McIvor*. If it wishes to fully play its role instead of giving free reign to legal disputes, it must act differently this time, while also quickly making sufficiently significant

> corrections to remedy the discrimination identified in this case. One approach does not exclude the other.[10]

It is unacceptable, and inconsistent with the *Charter's* substantive equality guarantee and the interests of justice, to force Aboriginal women, who are among the most disadvantaged in Canada, to endure the financial and emotional hardship of years and years of additional protracted litigation to remove the remaining areas of sex discrimination in the status provisions. It is also inconsistent with Canada's obligations under international law.[11] The Government of Canada can and should withdraw this bill and put forth a bill that would amend the *Indian Act* to fully and finally eliminate sex discrimination from the status provisions.

The time pressure imposed by the Quebec Superior Court ruling should not be relied upon to address the issue of sex discrimination under the *Indian Act* in a narrow and incomplete manner. The Attorney General could seek an extension of the delay on the declaration of invalidity beyond the current date of February 3, 2017. Where such an extension aims to ensure that *all* sex discrimination is removed from the bill, the Court is likely to agree.

In addition, LEAF notes with concern the process by which Bill S-3 was drafted and tabled. Last week, this committee heard testimony from the Native Women's Association of Canada and the Assembly of First Nations Women's Council, among others, about the lack of substantive consultation on Bill S-3. An extended deadline would enable Indigenous and Northern Affairs Canada to work with Indigenous women's organizations and governments to put in place a more comprehensive reform to address sex discrimination in the *Indian Act,* and set a strong foundation for the broader Nation-to-Nation conversation that must follow. To this end, LEAF reminds the Committee that the United Nations Declaration on Indigenous Peoples requires Canada to consult in good faith with Indigenous peoples before adopting and implementing legislative measures that may affect them.[12]

Finally, LEAF urges the government to ensure that First Nations communities have the resources and land they need to support new registrants. The government's own estimates suggest up to 35,000 new registrants could arise even out of this narrow bill. A bill that fully addresses sex discrimination under the *Indian Act* would expand registration even more. Program dollars are already inadequate. What is required to support new registrants should not be determined unilaterally in Ottawa, but in partnership with First Nations governments and organizations.

Conclusion

The Government's obligations under s. 15 of the *Charter* and international law require a more comprehensive and meaningful amendment to the *Indian Act* than has been proposed under Bill S-3. LEAF confirms its support for an amendment that will achieve the goal of eliminating all

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[10] *Descheneaux c. Canada (Procureur Général),* 2015 QCCS 3555 at paras 234-240.
[11] See footnote 4.
[12] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 GAOR, 61st Sess, Annex, UN Doc A/RES/61/295 (2007) at Art 19.

forms of discrimination against Indigenous women and their descendants, and urges the government to work in partnership with Indigenous governments and Indigenous women's groups towards this goal. The response by Government can and should be comprehensive and should fully eradicate any vestige of inequality in the determination of Indian status. This will be an important foundation for the broader, Nation-to-Nation conversation about moving beyond the *Indian Act* that must follow.

Passing the bill in its current form would only push the burden of addressing the discrimination onto the people who endure it – Indigenous women, and people who trace their Indian status through the female line.

Finally, the Government of Canada should ensure it does not repeat the failings of Bill C-31 and C-3 as it moves to amend the *Indian Act* status provisions in 2016. Specifically, alongside the necessary amendments to the *Indian Act* must be a commitment by the Government of Canada to ensure First Nations communities have adequate land and resources to support the new registrants.