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

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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 INDIAN REGISTRATION ACT*

April 26, 2010

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Submission to the Standing Committee on Aboriginal Affairs and Northern Development on Bill C-3: *Gender Equity in Indian Registration Act*

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Introduction

The Women's Legal Education and Action Fund (LEAF) urges the Standing Committee on Aboriginal Affairs and Northern Development ("the Committee") to propose amendments to Bill C-3 which fully and finally eliminate sex discrimination from the status provisions of the *Indian Act*. The equality rights of Aboriginal women in Canada pursuant to ss.15 and 28 of the *Charter of Rights and Freedoms* must be fully respected and promoted. Bill C-3, as currently drafted, fails to meet the Government of Canada's constitutional obligations to Aboriginal women.

Background and Expertise of LEAF

LEAF is a national organization dedicated to promoting substantive equality for women through legal action, research and public education. LEAF has intervened in over 150 cases on substantive equality since it was founded in 1985 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 Aboriginal identity, poverty, disability, race, sexual orientation and religion.

Bill C-3

Bill C-3 is entitled "Gender Equity" in the *Indian Act*. The *Act*, however, fails to achieve full equality between Aboriginal men and women in eligibility for and transmission of Indian status.

For over 140 years, the *Indian Act* has discriminated in favour of males and those whose Indian status is traced from male ancestors. It took Jeanette Corbiere Lavell to pursue a Supreme Court of Canada challenge, Sandra Lovelace to take the issue to the United Nations, and now Sharon McIvor to spend over 20 years in litigation, for the discriminatory provisions to be only partially remedied.

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

- Aboriginal women and their descendants who regain status under Bill C-3, are not entitled to *equal* status;
- Descendants of women born before 1951 will not be entitled to status, whereas descendents of men born before 1951 are entitled to status;
- Descendants of women in common law or other non-marital unions with non-status men are not entitled to status.[1]

In addition, Bill C-3 does not address existing INAC policy pursuant to which all cases of unconfirmed paternity are presumed to be non-status.

In response to Bill C-3, individual Aboriginal women, Aboriginal women's organizations, Aboriginal governments and Chiefs, including the Assembly of First Nations, and legal experts, have demanded the eradication of all sex discrimination under the *Indian Act*.

LEAF supports this demand to remove all vestiges of sex discrimination from the status provisions, and submits that the elimination of residual sex discrimination under the *Indian Act* best meets the federal government's constitutional obligations to achieve substantive equality for Aboriginal women and Canada's obligations under international law.[2]

Bill C-3 falls far short of achieving its stated goal of "gender equity" in the *Indian Act*.

The British Columbia Supreme Court and Court of Appeal Recognized 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.

Many witnesses have testified before this Committee about the consequences of the remaining sex discrimination perpetuated by Bill C-3. These consequences undermine the very foundation

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[1] Various parties have already expertly described to the Committee the ways in which Bill C-3 fails to eliminate sex discrimination from the status provisions of the *Indian Act*. LEAF refers to and adopts the submission of Sharon McIvor in this regard and does not propose to repeat the explanations here. See also the explanation provided by Dr. Pam Palmater.

[2] *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) G.A. 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) G.A. Res. 34/180; *Convention on the Rights of the Child*, Articles 8 and 30 (adopted November 20, 1989, entry into force September 2, 1990) G.A. res. 44/25); and *Universal Declaration of Human Rights*, Articles 2, 15, 16, 22, and 25 (adopted and proclaimed December 10, 1948) G.A. Res. 217A (III).

of equality itself: inclusion, participation in social and political life, psychological well-being, dignity and self-worth.

Dr. Palmater, in her expert submission to this Committee, stated that the continued discrimination under Bill C-3 will "perpetuate the very negative stereotypes against Indian women that *McIvor* (and others) fought against – that they are less worthy, less Aboriginal and less able to transmit their Aboriginality to their children simply by virtue of being Aboriginal women."

Sharon McIvor and others have explained to this Committee the practical and tangible harms of sex discrimination in the determination of Indian status. Exclusion from Indian status often means physical exclusion from the community's culture and resources.

Denial of status and the corresponding lack of acceptance in one's community and degraded sense of identity and self-worth, is an independent harm. It is also legislatively connected to the denial of band membership. Under the *Indian Act* band membership rules (which two-thirds of First Nations fall under), and under the majority of membership codes of First Nations who have assumed control over membership, lack of status results in exclusion from band membership and from having the right to reside in one's home community/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 aboriginal culture and language 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.[3] *Lovelace* and the coming into force of Section 15 of the *Charter*, were the impetus for Canada's first attempt to address the discriminatory status provisions under the *Indian Act.*

Thirty years later, in its hearings on Bill C-3, this Committee has heard that Aboriginal women and their descendents continue to face these discriminatory barriers.

The decisions of the British Columbia courts in the *McIvor* case in 2007 and 2009 recognized the harms of exclusion suffered by Aboriginal women.

Relying on the evidence of Sharon McIvor and other witnesses at trial, as well the Report of the Royal Commission on Aboriginal Peoples ("RCAP"), the British Columbia Supreme Court in the *McIvor* case[4] recognized the complex relationship between Indian status, cultural identity, community acceptance and self-worth.

At paragraph 143, the Court noted that:

> The intangible consequences of registration also continue. Ms. McIvor described her personal experience of the intangible benefits of being registered. Sharon McIvor was

[3] *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No.40 (A/36/40)
[4] *McIvor v. Canada*, 2007 BCSC 827 (CanLII)

> encouraged by the passing of *Bill C-31* because she thought that at last the exclusion, loss of cultural connection, and erosion of her identity and sense of self-worth that she had felt as a non-status Indian would come to an end. Gaining formal recognition of her status has been important to her. It is affirming, and there is no doubt, that she is more accepted in her community than she was previously. She is able to attend ceremonies and other events in her community and feels as though she belongs. It was her testimony that being registered made a big difference in her acceptance in Aboriginal communities.

At paragraph 138 of its judgment, the Court referred to the RCAP which "reported that the Department of Indian and Northern Affairs conducted a survey of 2,000 *Bill C-31* registrants, and almost two-thirds of those canvassed reported that they had applied for Indian status for reasons of identity or because of the culture and sense of belonging that it implied."

The British Columbia Court of Appeal accepted the findings of the trial judge with respect to the importance of registration to cultural identity and connection:

> The trial judge also accepted that certain intangible benefits arise from Indian status, in that it results in acceptance within the aboriginal community. While some of the evidence of such acceptance may be overstated, in that it fails to distinguish between Indian status and membership in a band, I am of the view that the trial judge was correct in accepting that intangible benefits do flow from the right to Indian status. (emphasis added).[5]

The Court of Appeal also accepted that "the ability to transmit Indian status to one's offspring can be of significant spiritual and cultural value".[6]

As the Standing Committee on Aboriginal Affairs and Northern Development conducts its review of Bill C-3, therefore, it should be very aware that the British Columbia Court of Appeal accepted the broad harms suffered by Aboriginal women and their descendants because of denial of Indian status. Although the Court of Appeal arrived at a narrower constitutional finding[7], the Court did not dispute the harm experienced by the Aboriginal women and children who are not covered by its imposed remedy. In fact, the Court of Appeal left open the possibility of future equality challenges to the status provisions.[8] This issue, therefore, will continue to be litigated at significant cost to both the government and Aboriginal women, unless and until comprehensive legislative amendments are made. At this time, various challenges to the ongoing sex discrimination in the status provisions are proceeding under the Canadian Human Rights Act. The British Columbia Court of Appeal decision is not determinative of these human rights

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[5] *McIvor v. Canada*, 2009 BCCA 153 (CanLII) at para. 70.

[6] *McIvor v. Canada, supra,* at para.71.

[7] The Court's judgment was based on its interpretation of the facts and legal argument presented and on the Court's application of the comparator group analysis.

[8] For example, at paragraph 87, the Court noted that it would not consider discrimination on the basis of marital status of the child's mother since this issue was not fully presented in evidence or argument. At paragraphs 95-101, the Court noted that the case before the Court was not argued on the basis of the analogous ground of matrilineal descent. And although the Court expressed doubts as to the success of such an argument, these statements are not binding.

challenges or similar challenges to the status provisions which may be brought in other provinces.

The current process of amending the *Indian Act* permits the Committee to amend Bill C-3 to end all residual sex discrimination. It is unacceptable, and inconsistent with the 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.

The Obligations of the Government of Canada

By leaving out the descendants of some Aboriginal women, and by according to Bill C-3 registrants a lesser ability to transmit status to their children and grandchildren, Bill C-3 perpetuates the sex-discrimination it purports to correct.

LEAF supports the call by Aboriginal women and Aboriginal organizations and governments that enough is enough.

The Government of Canada can and should amend the *Indian Act* to fully and finally eliminate sex discrimination from the status provisions.

The Government of Canada is not limited to implementing only the remedy required by the British Columbia Court of Appeal in *McIvor v. Canada*. The Court's ruling in *McIvor* does not create a "rigid constitutional template".[9]

The Supreme Court has affirmed the role of Parliament to "build" on a Court's ruling, particularly where the judicial scheme "can be improved" by the legislature.[10] For example, in its decision in *R. v. O'Connor* in 1995, the Supreme Court of Canada laid down a procedure for the disclosure of confidential records of sexual assault complainants which purported to balance the equality rights of complainants and the rights of accused to full answer and defence. In 1997, Parliament enacted amendments to the *Criminal Code* which differed from the procedure delineated by the Court and which ostensibly went further to protect women's equality rights and protect their confidential records from disclosure to those accused of sexually assaulting them. In upholding the new legislation in *R. v. Mills* in 1999, the Supreme Court of Canada emphasized the importance of Parliament building on the Court's earlier decision in *O'Connor*.

[9] *R. v. Mills*, [1999] 3 S.C.R. 668.
[10] *R. v. Mills, supra* at para.55.

Conclusion

The Government's s.15 *Charter* and international law obligations require a more comprehensive and meaningful amendment to the *Indian Act* than that proposed under Bill C-3.

LEAF takes no position on the specific proposals put forward by various parties, but confirms its support for an amendment that will achieve the goal of eliminating all forms of discrimination against Aboriginal women and their descendants.

LEAF submits that the Committee has the jurisdiction to propose amendments to the Bill to achieve this end. The Bill is broad in scope. It is an act "to promote gender equity in Indian registration" by "responding" to the BCCA decision in *McIvor*. The response by Government can and should be comprehensive and should fully eradicate any vestige of inequality in the determination of Indian status.

In the event, however, that the Committee determines that it is beyond its scope to propose amendments to fully eliminate sex discrimination, LEAF submits that, consistent with the submissions made by Aboriginal women and their organizations, the Bill should be withdrawn and a new Bill which fully redresses the discrimination suffered by Aboriginal women should be introduced.

Finally, LEAF notes that the Government of Canada should ensure that the other errors and failings of Bill C-31 are avoided as it moves to amend the *Indian Act* status provisions in 2010. Specifically, alongside the necessary amendments to the *Indian Act* should be a commitment by the Government of Canada to adequately resource First Nations communities for the new registrants.