SHARON MCIVOR AND JACOB GRISMER v. CANADA

PETITIONER SUBMISSION REGARDING IMPLEMENTATION BY CANADA OF THE 11 JANUARY 2019 DECISION OF THE COMMITTEE CONCERNING THE PETITION OF SHARON MCIVOR AND JACOB GRISMER (CCPR/C/124/D/2020/2010)

Before:

The United Nations Human Rights Committee
Office of the High Commissioner for Human Rights
United Nations Office at Geneva

1211 Geneva 10, Switzerland
Fax + 41 22 9179022

By:

Sharon McIvor and Jacob Grismer
Merritt, British Columbia
Canada

Represented by:

Gwen Brodsky
Barrister and Solicitor
307 West 18th Avenue
Vancouver, British Columbia
Canada V5Y 2A8
brodsky@brodskylaw.ca

Tel 604 874 9211

June 15, 2021

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Introduction

The subject matter of the Petition, which was initiated on November 24, 2010, is sex discrimination with regard to Indian status registration.

In *McIvor* (CCPR/C/124/D/2020/2010) (hereinafter referred to as "the *McIvor* Decision"), the Committee determined, in its Views adopted November 1, 2018, that the denial of full s. 6(1)(a) Indian status to Indigenous women and their descendants solely as a result of preferential treatment accorded to Indian men over Indian women born prior to April 17, 1985, and to patrilineal descendants over matrilineal descendants born prior to April 17, 1985, discriminates based on sex.

In particular, the Committee determined that s. 6 of the *Indian Act*, introduced by the 1985 *Act*, and continued by amendments of 2011 and 2017, violates the right to equal protection of the law without discrimination based on sex, and violates the equal right of Indigenous women to the enjoyment of their Indigenous culture, guaranteed by the CCPR (articles 3 and 26, read in conjunction with article 27 of the Covenant).

Article 26 establishes the right of all persons to equality before the law and to the equal protection of the law without discrimination based on sex. Article 3 guarantees the equal right of men and women to the enjoyment of Covenant rights, including the Article 27 right to enjoyment of Indigenous culture. In the *McIvor* Decision, the Committee recalled its General Comment No. 23 (1994), and noted that article 27 of the Covenant establishes a right which is conferred on individuals belonging to Indigenous groups, which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant.

The Committee also recalled that the prohibition against discrimination in the Covenant applies not only to discrimination in law, but also to discrimination in fact.

The Committee delineated Canada's obligations to provide an effective remedy. The Committee stated: "This requires the State party to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State Party is obligated, *inter alia*, (a) to ensure that section 6(1)(a) of the 1985 *Indian Act*, or of that *Act* as amended, is interpreted to allow registration by all persons including the authors who previously were not entitled to be registered under section 6(1)(a) solely as a result of preferential treatment accorded to Indian men over Indian women born prior to 17 April 1985 and to patrilineal descendants over matrilineal descendants, born prior to 17 April 1985; and (b) to take steps to address residual discrimination within First Nations

communities arising from the legal discrimination based on sex in the *Indian Act*. Additionally, the State party is under the obligation to take steps to avoid similar violations in the future." (para.. 9)

The Committee also requested that Canada publish the *McIvor* Decision and disseminate it broadly in Canada's official languages. (para. 10)

The Petitioners' June 15, 2021 submission in the Follow-up Process consists of the Petitioners' comments, and letters to the Committee from four organizations (Union of BC Indian Chiefs; Ontario Native Women's Association; Quebec Native Women's Association; the Canadian Feminist Alliance for International Action) and two individual experts, Dr. Pamela Palmater and Mary Eberts, with whom the Petitioner, Sharon McIvor, and the Petitioners' representative, Gwen Brodsky, have been engaged in collaborative advocacy efforts intended to make the promise of the Petitioners' successful Petition a reality, not a pyrrhic victory.

The information provided in the included letters substantiates the concerns that the Petitioners seek to draw to the attention of the Committee, and add context for the concerns. Additionally, the letters, in particular the letter from FAFIA, document the extensiveness of the efforts that the Petitioner Sharon McIvor, with others, has made to persuade Canada to implement the *McIvor* Decision.

This submission follows on the Petitioners' previous submissions of June 27, 2019; March 30, 2020, and September 18, 2020.

Summary of the Petitioners' Position Regarding Canada's Implementation of the McIvor Decision

The Petitioners submit that Canada has both failed to implement the Committee's Decision, and that it has rejected the Decision. This is evidenced by the extent and persistence of its non-implementation of the *McIvor* Decision, and by its express, ongoing disagreement with the Committee, which it has made a matter of public record.

For decades Indigenous women in Canada have sought justice in the courts and remedial action by legislators to bring an end to longstanding sex discrimination in the *Indian Act*. This Petition launched in 2010, and the *McIvor* Decision rendered in 2018, follow the similar case of Sandra Lovelace concerning s. 12(1)(b) of the *Indian Act.* In 1981 the Committee ruled in favour of Sandra Lovelace's favour (CCPR/C/13/D/24/1977).

Nevertheless, sex discrimination in status registration under the *Indian Act* continues to affect Indigenous women and their descendants.

Following *Lovelace* and a stream of litigation in Canada's domestic courts, Canada has made legislative amendments, removing bits of the discrimination a sliver at a time, but has never fully eliminated it. It is an unfortunate fact that Canada has been resistant to living up to its human rights obligations to Indigenous women, and continues to be so.

The Committee and the Petitioners were led to believe by Canada that through the Bill S-3 amendment to the *Indian Act* that was brought into force on August 15, 2019 the sex discrimination would be brought to an end. (See *McIvor* Decision, paras. 7.6 and 7.11; State party's Submission, January 16, 2020 para. 5) It is now apparent that this is not the case. Notwithstanding the coming into force of the Bill S-3 amendment, known as '6(1)(a) all the way', sex discrimination persists because of barriers to registration that are in the sole control of the State party; the failure of the State party to provide, discuss, or even assume responsibility for making full reparation; and the continuation and repetition of sex discrimination with regard to involuntarily enfranchised women, as well as the two parent rule and the second-generation cut-off.

Other outstanding issues of sex discrimination concern residual sex discrimination with regard to band membership, benefits and services related to status and band membership, restoration of treaty rights and the legislative bar to obtaining compensation in the courts. These outstanding issues are of a profoundly serious nature, reflecting both non-implementation and rejection of the *McIvor* Decision. In addition, the State party's continuing express rejection of the *McIvor* Decision is inconsistent with Canada's obligations as a signatory to the Covenant and the Optional Protocol.

Canada has long been aware of the Petitioners' concerns which have been raised repeatedly by the Petitioner and her representative, and by the Indian Act Sex Discrimination Working Group. (See: FAFIA June 15, 2021 letter.)

Barriers to Registration

As a result of the Bill S-3 2019 amendment, the Petitioners had their status upgraded. However, as we advised the Committee in the Petitioners' submissions of March 30, 2020 and September 18, 2020, there are thousands of newly entitled women and their descendants who have not been registered because Canada has failed to take necessary steps to ensure that people are aware of their rights, and because there are no adequate supports for applicants and there are unconscionable delays in the registration process. It is the plain wording and intention of the *McIvor* Decision that "all persons" previously excluded from full s. 6(1)(a) registration status based on sex be allowed to register under s. 6(1)(a), not just the Petitioners individually.

In 2017, the Parliamentary Budget Officer, based on estimates from independent demographers, calculated that there are 670,450 First Nations women and their descendants who are newly entitled to status as a result of the Bill S-3 '6(1)(a) all the way' amendment that came into force on August 15, 2019.[1] The Parliamentary Budget Officer predicted that about 268,00 of these would actually apply for status. In documents produced since that time, Indigenous Services Canada cites the number of newly eligible

[1] Office of the Parliamentary Budget Officer, *Bill S-3: Report on Sex-Based Inequities in Indian Registration*, 5 December 2017, online at: https://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf.

at 270,000 to 450,000.[2] Yet, as of March 25, 2021 Canada had completed only 17,500 new registrations since 2017, and the Petitioners are informed that the Government of Canada cannot tell us how many of these are from applicants who are newly entitled by the 2019 amendment. This information was provided by the Honourable Carolyn Bennett Minister of Crown-Indigenous Relations in a March 29, 2021 videoconference meeting attended by the Petitioner Sharon McIvor. (Confirmed by FAFIA June 15, 2021 letter to the Committee)

The Petitioners reiterate and emphasize that the Covenant violations addressed by Bill S-3 did not cease with the coming into force of the amendment on August 15, 2019. They will only cease with the registration and consequent granting of status and benefits to all those who are now eligible. For those newly eligible for status, ensuring their Covenant rights to equal registration status depends on there being: 1) a pro-active and effective information campaign that reaches First Nations communities, on and off reserve, to advise First Nations women and their descendants of their new eligibility and the process for applying for status; 2) a timely and effective registration process in place so that they can secure the status they have been discriminatorily denied; and 3) information and other assistance for the newly eligible, to assist them in making their applications for status registration in a system that is notoriously opaque and complex.

There is still no proactive collaborative communications campaign to inform those who are newly eligible that they are entitled to status, despite our repeated requests to Canada, and our submissions to the Committee in this Follow-up Process.

For those who do apply, delays in the registration process are unconscionably long, with applicants being told that wait times are six months to two years, and information from Canada showing that even this standard is not being met in the majority of cases. (The Committee is referred to the Petitioners' March 30, 2020 Submission p. 5; see: also ONWA May 28, 2021 letter to the Committee referencing evidence of three year wait times; FAFIA June 15, 2021 letter to the Committee referencing most current information provided by Minister of Crown-Indigenous Relations)

Canada has posted some information on its website regarding eligibility for status in light of the August 15, 2019 Bill S-3 amendment. However, the Petitioners reiterate, this is a passive means of providing essential information, only accessible to those who are internet-connected. There is no organized, pro-active and effective campaign, being conducted by Canada, in collaboration with regional and local First Nations organizations, and, specifically, with First Nations women's organizations, to ensure that First Nations women and their descendants who are newly eligible are fully informed of their rights to registration and benefits, and that they have access to timely and adequate

[2] Indigenous Services Canada in *The Final Report to Parliament on the Review of S-3*, December 2020, cites the figure 270,000 to 450,000 at 3, online at: https://www.sac-isc.gc.ca/eng/1608831631597/1608832913476. See also Crown-Indigenous Relations and Northern Affairs Canada, "Removal of all sex-based inequities in the Indian Act",15 August 2019, online at: https://www.newswire.ca/news-releases/removal-of-all-sex-based-inequities-in-the-indian-act-890690227.html

assistance to complete the registration process. (See: UBCIC June 1, 2021 letter to the Committee, and QNW May 31, 2021 letter to the Committee)

Transparency with regard to the number of people affected is also deficient. The Petitioners reiterate there must be transparency and accessibility of information, regularly updated, regarding the number of applications from First Nations women and their descendants who are newly eligible: received, denied, accepted and pending. This is necessary for public accountability and so that there can be ongoing monitoring of Canada's performance. As the Quebec Native Women's Association, a front line Indigenous women's organization, has confirmed, "...the accessibility of information concerning the new registration process of Bill S-3 is significantly lacking." (QNW May 31, 2021 letter to the Committee p. 2)

In the absence of an effective information campaign, people who are not aware of their rights cannot be expected to exercise them. Canada should be actively reaching out to the newly entitled. As one example, the State party says that between 2018 and 2020 it automatically upgraded the entitlement categories for 125,000 previously registered individuals, and over 57,000 individuals are now able to pass status to their descendants because of the 2019 Bill S-3 amendment. (State party's Submission, February 4, 2021 para. 12) However, an official in Indigenous Services Canada also informed the Petitioners that it has not notified these individuals who are newly entitled to transmit status because it does not have contact information for them. (FAFIA June 15, 2021 letter to the Committee). That the State party has no means of contacting these people is not credible. This change in status is of no value unless it is known, and people are informed that it can be transmitted to descendants. Canada should be required to provide information to the Committee about its plan and timelines for implementing effective measures to reach out to people who are victims of longstanding *Indian Act* sex discrimination.

The Petitioners stand by the analysis and the concrete requests set out in our submissions of March 30, 2020 and September 18, 2020. Having regard to COVID, the Petitioners emphasize our previous request that the Committee ask Canada to recognize that the processing of applications is an <u>essential service</u> that must be carried out in a timely manner. The State party acknowledges that it allowed registration to be slowed because of COVID. (State party's Submission, February 4, 2021 para. 14) That slowing of registration services was preventable and should never have been allowed to happen. Indigenous people's access to crucial COVID-related benefits including health care is often tied to status. Registration should be, and should have been from the beginning of the pandemic, designated as an essential service, and the files of newly eligible S-3 applicants expedited. The Petitioners reiterate that many of the newly eligible S-3 applicants are ill and elderly; and they need their applications processed expeditiously.

Furthermore, a return to pre-COVID delays is not an adequate response. (State party's Submission, February 4, 2021 para. 14) Even prior to the pandemic wait times were unconscionably long, at two years or more. (The Committee is referred to the Petitioners' submission of March 30, 2020 at p. 5)

The State party states that Indigenous Services Canada is working to address delays and raise consciousness among the newly entitled, and to simplify the application process. However, details are lacking. The State party has not provided the Committee with any details of what changes are being made, or when these changes will be implemented. Nor has Canada provided the Committee with a plan for how and when it will reduce wait times, and become effective in providing information, and assistance to the newly entitled with regard to the application process. Letters filed in this Follow-up Process from leading organizations that the Petitioner Sharon McIvor works with confirm the continuing existence of the unacceptable and unnecessary barriers in the registration process. (QNW May 31, 2021 letter to the Committee; UBCIC June 1, 2021 letter to the Committee; ONWA May 28, 2021 letter to the Committee; FAFIA June 15, 2021 letter to the Committee)

Residual Discrimination

There is extensive residual discrimination arising from *Indian Act* sex discrimination that the State party must address. (The Petitioners refer the Committee to Dr. Palmater June 14, 2021 letter to the Committee.)

Without status registration, women and their descendants cannot be registered as band members on the lists that are controlled by the State party. This accounts for a majority of 634 First Nations.

Without status registration, First Nations women are excluded from accessing First Nations-specific social programmes and services such as uninsured health benefits. As Dr. Pamela Palmater explains, "Every day that Canada fails to register these women and children, contributes to their high rates of poverty, ill health and pre-mature death rates." (Dr. Palmater June 14, 2021 letter to the Committee)

A lack of status also effectively means that band membership is not available. Pursuant to s. 10 of the *Indian Act* a band is permitted to assume control of its membership by adopting a membership code. However, bands do not have the resources to provide programmes and services such as on reserve housing to non-status members.

Further, the State party has failed to protect band membership for women and their descendants who become registered under the '6(1)(a) all the way amendment'. In situations where a band has adopted a membership code, the new '6(1)(a) all the way' registrants can be excluded from band membership. The State party must ensure band membership for those entitled to status under the '6(1)(a) all the way amendment'. As Dr. Palmater explains, if Canada does not protect band membership for those newly entitled due to sex discrimination, then it has only remedied half the discrimination. (Dr. Palmater June 14, 2021 letter to the Committee)

Lack of band membership has serious consequences. It means lack of access to on reserve housing and other benefits associated with band membership. Lack of band

membership also means exclusion from participation in community decision-making about matters of fundamental importance such as those pertaining to First Nation land rights. (Dr. Palmater June 14, 2021 letter to the Committee)

Furthermore, federal and provincial governments often rely on registration and band membership to determine who may access Aboriginal and treaty rights. Those without status are also excluded from benefits and other payments associated with treaty rights. Canada must restore treaty rights to those who lost them because of *Indian Act* sex discrimination. For decades, Canadian policy was that only a "status" Indian could benefit from a Treaty which included her family and community. When women lost status because they married a non-status male, they and their descendants also lost Treaty rights and benefits. Although a woman deprived of her status could be given a lump sum equal to ten years' worth of annuity payments, this sum was inadequate to compensate for the loss of being permanently excluded, with her descendants, from Treaty and all the tangible and intangible benefits of Treaty. This harm of *Indian Act* sex discrimination has not been acknowledged or repaired.

To ensure that the newly entitled individuals actually derive the benefits that attend band membership the State party must provide support to the bands. Where there are band resource issues raised by the addition of new members the State party is responsible for addressing them. In anticipation of the coming into force of the Bill S-3 '6(1)(a) all the way' amendment, the Minister's Special Representative Claudette Dumont-Smith made various recommendations to the federal government designed to assist the bands in reintegrating the newly entitled members, including 1.3 - 1.6:

- provide funding to communities to carry out information sessions with community members on this and future legislative reform;

- provide the necessary funds to increase the administrative financial and human resources capacity to correspond to anticipated increases in the numbers of band members;

- change current funding formulas for federally-funding programs, to First Nations to meet the increased need for services to Indian women and their descendants in a timely manner;

- make immediate adjustments to the Additions to Reserve requests and respond in a more efficient and timely manner upon the coming into force of the of the Bill S-3 amendment.

Canada has provided no information to the Committee or the Petitioners regarding implementation of the Dumont-Smith recommendations, which are integrally related to implementation of the *McIvor* Decision. The Petitioners reiterate that Canada should

implement immediately the recommendations in the Dumont-Smith 2019 report.[3]

The State party acknowledges that Indigenous women and leaders have raised concerns about residual discrimination, including with regard to "timely access to rights; services, and benefits, access to retroactive treaty benefits, reparations; and band membership; and the ways that other provisions of the *Indian Act* intersected with historic laws and policies". (State party's Submission, February 4, 2021 para. 11) However, the *McIvor* Decision requires that steps actually be taken to address residual discrimination. Canada has not provided the Committee with any information about concrete measures that it has taken to implement the requirement that residual discrimination be addressed, or any measures that it will take.

Full Reparation, including Compensation, Apology, and Education

Despite our request of January 18, 2019 to Canada, and our submission of March 30, 2020 to the Committee, there has been no discussion between Canada and the Petitioners about full reparation, nor has reparation been mentioned in any public statement. Nor, according to information provided to the Petitioners, does any Minster have authority to discuss or consider reparations (See: FAFIA June 15, 2021 letter to the Committee) Further, Canada's most recent submissions to the Committee omit any discussion of Canada's obligations to ensure full reparation. The Petitioners reiterate, full reparation, in this circumstance, would encompass *inter alia*: compensation to victims for the harms done, including the loss of band membership, treaty rights, and all related benefits and services; a public apology, including acknowledgement of the facts and acceptance of responsibility; and inclusion of an accurate account of the violations that occurred, in Canada's law school training, in judicial training, and in educational material at all levels.

Canada has not made a public apology to the thousands of First Nations women and their descendants who have been discriminated against at law by Canada since the *Indian Act* was first introduced more than 140 years ago.

The State party notes that in 2017 Minister Bennett paid tribute to some Indigenous women who have challenged *Indian Act* sex discrimination, including the Petitioner, Sharon McIvor. (State party's Submission, January 16, 2020 para. 11) This was not an apology to anyone, and certainly not to all the thousands of women and their descendants whose Covenant rights have been, and continue to be, violated by *Indian Act* sex discrimination.

Rather, Canada continues to publicly deny that the Petitioners' Covenant rights were violated and to criticize the Committee for finding otherwise, and continues to resist providing the remedy directed by the Committee. In contrast, public apologies have been made in Canada to Indigenous peoples who have suffered other forms of discrimination

[3] *Report to Parliament on the Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship*: *Minister's Special Representative final report on the collaborative process on Indian registration, band membership and First Nation citizenship* (https://www.rcaancirnac.gc.ca/eng/1561561140999/1568902073183)

and harms at the hands of Canadian governments, for example, residential school survivors, and Inuit and Ahiarmiut who were subjected to forced relocations in the High Arctic and in southwestern Nunavut.

Residential school survivors, and others, have also been granted compensation for the harms done to them. Compensation schemes can be put in place in a variety of ways. However, it is a matter of grave concern that the *Indian Act* now specifically bars those previously excluded from 6(1)(a) status because of sex discrimination from claiming or receiving compensation.

Section 10.1 of the *Indian Act*, as amended by S.C. 2017 c. 25, states:

> **No liability**
>
> 10.1 For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty in right of Canada, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because
>
> (a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this section comes into force; and
>
> (b) that person or one of the person's parents, grandparents or other ancestors is entitled to be registered under paragraph 6(1)(a.1), (a.2) or (a.3) of the *Indian Act*.

The Petitioners reiterate that Canada's refusal to accept liability for harms caused by *Indian Act* sex discrimination and attempt to bar affected individuals from seeking compensation is inconsistent with its Covenant obligation to provide an effective and enforceable remedy, and itself constitutes sex discrimination.

To our knowledge, Canada has no plans to ensure that education materials and training regarding the history and legacy of the sex discrimination practiced against First Nations women and their descendants are included in law school, judicial training or school curricula. Canada has not provided any evidence concerning its concrete measures to address these outstanding matters of reparation, either undertaken or planned.

Continuation and Repetition of Discrimination

Canada has failed to remedy the continuing *Indian Act* sex discrimination against those who involuntarily lost their status upon the enfranchisement of a husband. Indian men were enfranchised involuntarily if they served in the military or gained a university degree. Indian men could also apply to enfranchise, and thereby lose their Indian status. Women married to men who were enfranchised, automatically lost their Indian status. These women, like the women who 'married out', were also treated by the *Indian Act* as

though they, along with their children, were the property of their husbands. Under the 1985 *Indian Act* the women who had lost status because of the enfranchisement of their spouse were reinstated to lesser categories of status, with limited rights to transmit status, in the same way that Sharon McIvor was reinstated to a lesser category of status, with limited rights to transmit status.

However, whereas the '6(1)(a) all the way' amendment accords full status to the women like Sharon McIvor who married a non-status man, the situation of women who lost their status due to involuntarily enfranchisement was not specifically addressed. Further, the Registrar does not interpret s. 6(1)(a) of the *Indian Act* as including these women and their descendants. The women continue to be relegated to lesser categories of status. Also, their descendants continue to be relegated to inferior categories of status, or denied status. This is contrary to the State party's obligation of non-repetition.

The State party inaccurately refers to the issue of enfranchisement as among the "non-sex based inequities that continue to persist in the *Indian Act*." (State party's Submission, February 4, 2021 para. 11) Although Canada says otherwise, clearly this is an issue of sex discrimination. It functions in the same way as the sex discrimination identified in the *McIvor* Decision. Furthermore, this ongoing sex discrimination against the involuntarily enfranchised women is so similar to the sex discrimination against the women who lost status upon marriage to a non-Indian man, at issue in the *McIvor* Decision, that the State Party's obligation of non-repetition requires that it be addressed. (For additional analysis of enfranchisement as sex discrimination the Committee is referred to Mary Eberts June 14, 2021 letter to the Committee.

The State party says that the enfranchisement is among the issues that "will likely require legislative changes." However, the Petitioners do not agree that legislative change is necessary. The Petitioners submit that the situation of the involuntarily enfranchised women is encompassed by the language of the remedy issued by the Committee in the *McIvor* Decision. The remedy in the *McIvor* Decision requires that s. 6(1)(a) be interpreted to allow registration by "all persons who previously were not eligible to be registered" solely as a result of the sex discrimination embedded in the registration scheme. (*McIvor* Decision, para. 9) The enfranchised women and their descendants are among the persons who previously were not eligible to be registered" solely as a result of the sex discrimination embedded in the registration scheme.

A simple and effective way for the State party to remedy this blatant sex discrimination and fulfill its "obligation to avoid similar violations in the future" is for the State party to interpret s. 6(1)(a) as allowing registration by enfranchised women and their descendants, born prior to April 17, 1985.

The Petitioners submit that, based on the *McIvor* Decision and having specific regard to the remedy set out in paragraph 9 of the *McIvor* Decision, the Registrar should be directed to interpret s. 6(1)(a) of the *Indian Act* to include Indian women who were involuntarily enfranchised and their descendants, born prior to April 17, 1985. If Canada maintains that legislative change is required to end the sex discrimination against

enfranchised women and their descendants, it should proceed with that legislative change immediately. It is not adequate or acceptable for Canada to make a vague reference to the need for legislative change to remove discrimination, with no specified time frame, and without committing to make that change.

Another outstanding issue of residual sex discrimination concerns the *Indian Act* provisions known as the two parent rule and the second generation cut-off, which, as explained by Mary Eberts, discriminate based on sex despite being neutral on their face. (See: Mary Eberts June 14, 2021 letter to the Committee) The continuation of this sex discrimination is not consistent with State Party's obligation to avoid future violations.

Canada' Rejection of the Committee's Decision

The Petitioners submit that Canada's failures to satisfy the remedial requirements of the Committee's Decision are so egregious as to be tantamount to a rejection of the Committee's Decision. Moreover, Canada has also expressly criticized and rejected the Committee's Decision. Canada states that it does not agree with the Committee that the Petitioners' Covenant rights were violated, and the Committee should have viewed the Petition as inadmissible or without merit. Canada continues to press its position that the sex discrimination that affected the Petitioners was fully remedied by 2011 amendments to the *Indian Act*.

This is the same argument that Canada advanced in the Petition process, and which was rejected by the Committee (State party's Submission, January 16, 2020 para. 9) Canada also stated in its January 16, 2020 submission that it was making efforts to address the Committee's recommendations, but only because it recognized and regretted the historical discrimination and other inequities to which Indigenous women and their descendants had been subject. Canada accepts no responsibility for the profoundly serious sex discrimination suffered by the Petitioners and other similarly situated Indigenous women and their descendants, who are the intended beneficiaries of the '6(1)(a) all the way' amendment in Bill S-3.

Canada's relentless challenges to the Committee's jurisdiction to decide the McIvor case, and denial of responsibility for any sex discrimination, is the context in which Canada's failure to implement the Committee's remedial recommendations must be understood. Canada’s only commitment is to "make efforts to address" the Committee's recommendations. In contrast, Canada's remedial obligation is to actually provide an effective remedy.

Canada's continuing non-implementation of the *McIvor* Decision and continuing criticism of the Decision is disrespectful of the Committee's role and inconsistent with the State party's undertaking under international human rights law. By becoming a party to the Optional Protocol, Canada recognized the competence of the Committee to determine whether there has been a violation of the Covenant. And, pursuant to article 2 of the Covenant, Canada has undertaken to ensure to all individuals within its territory the rights

recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined by the Committee that a violation has occurred.

Canada's Nation-to-Nation Relationship with Indigenous Peoples

The State party says it is committed to a renewed nation-to-nation relationship with Indigenous peoples, based on recognition of rights, respect and co-operation guided by the principles in UNDRIP, and that it continues to engage with First Nations and Indigenous partners in order to determine how best to address outstanding concerns regarding registration, including among other things access to rights, services, and benefits; entitlement to treaty benefits, reparations, and band membership. (State party's Submission, February 4, 2021 para. 11-18) The State party characterizes these endeavours as part of ensuring that that it is "on the path of 'getting out of the business or Indian registration'." (State party's Submission, February 4, 2021 para.15)

This echoes submissions that the State party made to the Committee in 2017 in which the State party contended that its approach in failing to immediately eliminate sex discrimination was in keeping with the government's renewed nation-to-nation relationship with Indigenous peoples and its endorsement of the UNDRIP. (The Committee is referred to: Petitioner Comments in Response to State party's 2017 and 2018 Supplemental Submissions on the Admissibility and Merits of the Applicants' Petition to the Human Rights Committee, at paras. 85 - 87)

The Petitioners reiterate that the UNDRIP reinforces the claims of Indigenous women to the protection of their domestically and internationally guaranteed equality rights, including their Covenant rights. Article 1 of the UNDRIP provides that Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the *Charter of the United Nations*,[4] the *Universal Declaration of Human Rights*,[5] and international human rights law.

Article 44 of UNDRIP specifically guarantees all the rights and freedoms contained in it equally to male and female Indigenous persons, and Article 22(2) provides that States, in conjunction with Indigenous peoples, will ensure that "indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."

Further, pursuant to UNDRIP, Indigenous individuals have a right to belong to an Indigenous community or nation, and the right not to be subjected to any form of forced population transfer which has the aim or effect of violating or undermining their rights. States are obliged to provide effective mechanisms of redress for any form of forced assimilation. (UNDRIP articles 8, 9). *Indian* Act sex discrimination is a tool of forced assimilation that runs afoul of UNDRIP as well the Covenant. It has been an effective tool of assimilation, defining thousands of women and their descendants out of the pool of 'Indians' who have inherent and treaty rights recognized by Canada. (For further details on this point, the Committee is directed to: UBCIC June 1, 2021 letter to the

[4] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No. 7.
[5] GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

Committee)

The Petitioners submit that at this time the urgency accorded by the State party to "getting out of the business of Indian registration," through alleged nation-to-nation engagement, far from being a positive step towards dismantling Canada's colonial history, may, in effect, simply shift the damage of sex discrimination, and the burden of repair, to First Nations. The fact is that because of *Indian Act* sex discrimination thousands of Indigenous women and their descendants have been, and continue to be, excluded from their nations. The State party's first priority, and an obligatory step prior to "getting out of the business of Indian registration", must be to undo the egregious damage it has done, and restore status to the women and the matrilineal descendants so that Indigenous nations can be made whole again. (See: Dr. Palmater June 14, 2021 letter to the Committee; ONWA May 28, 2021 letter to the Committee; and FAFIA June 15, 2021 letter to the Committee)

The State party's continuation of *Indian Act* sex discrimination through its continuing failure to address the outstanding issues of sex discrimination, of which the State party is well aware, does not reflect a commitment to the Covenant rights of Indigenous women. Nor does it reflect a commitment to the principles of UNDRIP.

The Petitioners also recall the Committee to the fact that the long-standing discrimination in the *Indian Act* has been found by the United Nations Committee on the Elimination of Discrimination against Women, the Inter-American Human Rights Commission, and Canada's National Inquiry on Missing and Murdered Indigenous Women and Girls to be a root cause of the high numbers of murders and disappearances, which are recognized as a human rights crisis in Canada. Ensuring the rights of First Nations women and their descendants to equal protection of the law and to equal enjoyment of their culture is key to ending the violence.

The Petitioners' Efforts to Secure the State Party's Compliance with the Decision

Since the issuance of the Committee's decision in this Communication, the Petitioner, Sharon McIvor, with the support of her legal counsel and in collaboration with leading Indigenous and human rights organizations, including, among others, the Union of B.C. Indian Chiefs, the Quebec Native Women's Association, the Ontario Native Women's Association, the Canadian Feminist Alliance for International Action, and leading experts including Dr. Pamela Palmater and Mary Eberts, letters from whom are included as part of this submission by the Petitioners, has tried repeatedly to persuade Canada's top officials of the urgency of implementing the Committee's Decision. The history of these collaborative efforts and their disappointing results are documented in the FAFIA June 15, 2021 letter and three appendices, to which the Committee is referred. The Petitioners' efforts to communicate with Canada about implementation of the systemic aspects of the Decision began on January 18, 2019 with a letter sent by their representative to the Minister of Indigenous Affairs. (See: Petitioners' Submissions, June 27, 2019 and March 30, 2020)

We made detailed requests for concrete steps to be taken by Canada in the Petitioners' March 30, 2020 Submission. We raised the matter of Canada's continuing non-compliance again in the Petitioners' submission of September 18, 2020. Now, despite our efforts, supported by the efforts of others, and despite the passage of a long period of time since the Decision was rendered, Canada still does not consider *Indian Act* registration, or any other aspect of implementation of the Committee's decision, a priority. We are making no progress in trying to persuade Canada that it needs a plan with clear timelines for addressing all the remedial components of the Committee's decision.

Conclusion

The Petitioners have demonstrated that Canada has failed to implement the Committee's Decision; and that it has rejected the Decision, both implicitly and expressly.

The State party has made a facial change to s. 6 of the *Indian Act* and granted 6(1)(a) status to Sharon McIvor and Jacob Grismer; it has done little more. Canada's efforts to provide an effective remedy and full reparation are deficient, as described in this submission.

Notwithstanding the coming into force of the Bill S-3 amendment, known as '6(1)(a) all the way', sex discrimination persists because of barriers to registration, that are in the sole control of the State Party, and the failure of the State party to provide, discuss, or even assume responsibility for making full reparation. Other outstanding issues concern residual sex discrimination with regard to benefits and services related to band membership and restoration of treaty rights; and the continuation and repetition of sex discrimination with regard to the denial of s. 6(1)(a) status to involuntarily enfranchised women; the legislative bar to obtaining compensation in the courts; and the discrimination inherent in the two-parent rule and the second generation cut-off.

A record of concerted, but unsuccessful, efforts by the Sharon McIvor, in collaboration with others, to secure Canada's compliance underscores the importance and urgency of further actions by the Committee in relation to Canada. In light of Canada's continuing non-compliance with the Covenant and failure to implement the Decision clear direction from the Committee to Canada is necessary and appropriate.

Petitioners' Requests

Based on the *McIvor* Decision, and because this is a matter of such fundamental importance, the Petitioners urgently request that the Committee ask Canada to:

Transparency

- Provide up to date information regarding:

- The number of applications for status or improved status pursuant to the 6(1)(a) amendment and the *McIvor* Decision that have been a) received b) granted and c) denied;
- The wait times for the processing of applications;
- The details of steps taken to provide information regarding new entitlements under the '6(1)(a) all the way' amendment and the *McIvor* Decision, including the content of the information that was provided, to whom, when, and the format or method of communicating the information.

Registration

- Develop an effective information campaign to ensure that information regarding new eligibility for status, and the potential eligibility for upgraded status, is widely available and accessible, in urban, rural and on reserve communities, with a timeline for carrying out these measures;
- Provide access to the government's genealogical information on First Nations people for the use of applicants;
- Provide legal and paralegal assistance and supports in the application process to First Nations applicants who may be affected by the '6(1)(a) all the way' amendment and the *McIvor* Decision;
- Notify those whose status has been automatically upgraded that their descendants may be newly eligible for status, or upgraded status.

Reduce Wait Times

- Provide adequate resources, including adequate numbers of registration clerks for processing of applications from First Nations women and their descendants who may be affected by the '6(1)(a) all the way' amendment and the *McIvor* Decision;
- Provide information regarding these resources, including where, when, and how they are deployed, and how the State Party will assess the adequacy of these resources to ensure that First Nations women and their descendants will receive an effective remedy as set out in the *McIvor* Decision;
- Expedite applications for registration filed by those who may be newly eligible under the '6(1)(a) all the way' amendment and the *McIvor* Decision, particularly for those who have disabilities or are ill or elderly;
- Reduce wait times very significantly and institute improved standards for processing;
- Recognize and designate processing of applications for status registration as an essential service that must be carried out in a timely manner at all times, including during a pandemic.

Residual Discrimination

Address residual discrimination within First Nations communities, by taking steps that will:

- Ensure band membership to all women and their descendants, who receive status registration pursuant to the '6(1)(a) all the way' amendment and the *McIvor* Decision;
- Ensure that the women who were involuntarily transferred to their husband's bands because of discriminatory application of the *Indian Act* have the opportunity to be restored to their birth bands;
- Ensure that First Nations women and their descendants are accorded equal access to band membership, reserve housing and services, treaty entitlements, participation in the political decision–making of their communities, and any other incidents of band membership;
- Provide adequate resources to extend statutory benefits and services to registrants who are newly eligible;

- Implement recommendations 1.3 – 1.6 of the Minister's Special Representative, Claudette Dumont-Smith in her final report on Indian registration, band membership, and First Nations citizenship;[6]
- Restore treaty rights and related benefits and payments.

Full Reparation

Design a process and identify appropriate measures that will "make full reparation" including:

- Compensation, apology and inclusion of a full and accurate account of the history of discrimination against First Nations women and their descendants in education material at all levels of schooling in Canada, and in particular in Canada's law school training, and in judicial training;
- Provide a mandate to the appropriate Ministers to implement the *McIvor* Decision, that includes providing an effective and enforceable remedy to the First Nations women and their descendants whose rights have been violated;
- Eliminate barriers to obtaining an effective and enforceable remedy from Canada for harms caused to individuals by the violation of their Covenant rights, including s. 10. 1 of the *Indian Act*, as amended by S.C. 2017 c. 25, which bars them from claiming or receiving compensation;
- Implement measures to promote broad public understanding that the *Indian Act* has discriminated against First Nations women and their descendants for decades, that this discrimination violates international human rights law, and that an effective remedy is now required of Canada.

[6] Minister's Special Representative final report on the collaborative process on Indian registration, band membership and First Nation citizenship, June 2019, online at: https://www.rcaanc-cirnac.gc.ca/eng/1561561140999/1568902073183

Obligation of Non-Repetition

- Ensure that 6(1)(a) of the *Indian Act* is interpreted to include Indian women who were involuntarily enfranchised, and their descendants, born prior to April 17, 1985, or make immediate legislative changes if deemed necessary to achieve this result;
- Address the sex discrimination inherent in other provisions of the *Indian Act*, and eschew interpretations that perpetuate preferential treatment of male Indians over female Indians and matrilineal over patrilineal descendants.

Report to Committee

- Report back to the Committee regarding the above measures, in a fulsome manner, within a period of time specified by the Committee.

All of which is respectfully submitted,

Gwen Brodsky
Counsel to Sharon McIvor and Jacob Grismer

OUR LAND IS OUR FUTURE

UNION OF BRITISH COLUMBIA INDIAN CHIEFS

FOUNDING HEAD OFFICE
209 - 345 Chief Alex Thomas Way
Kamloops, B.C. V2H 1H1
Tel: 250-828-9746
Fax: 250-828-0319

VANCOUVER OFFICE
401 - 312 Main Street
Vancouver, B.C. V6A 2T2
Tel: 604-684-0231
Fax: 604-684-5726
1-800-793-9701
Email: ubcic@ubcic.bc.ca
Web: www.ubcic.bc.ca

June 1, 2021

ATTN: Ibrahim Salama
Chief, Human Rights Treaties Branch
and Members of the CCPR Follow-up Team
C/O Gwen Brodsky, Via email only: brodsky@brodskylaw.ca

Re: Implementation by Canada of the 11 January 2019 Decision of the Committee concerning the Petition of Sharon McIvor and Jacob Grismer, CCPR/C/124/D/2020/2010

Dear Mr. Salama and Members of the CCPR Follow-up Team,

The Union of BC Indian Chiefs (UBCIC) writes to support the Petitioners' requests for immediate and effective implementation of the UN Human Rights Committee decision and remedy in *McIvor* v *Canada*, CCPR/C/124/D/2020/2010, in which the Committee found Canada to be in violation of the Petitioners rights under Articles 3 and 26, read in conjunction with Article 27, of the International Covenant on Civil and Political Rights ("the Covenant") and outlined Canada's legal obligations to ensure an effective remedy, including: full reparations through amendments to s 6(1)(a) of the *Indian Act*, to take steps to address issues of residual discrimination, and to take steps to avoid similar violations in the future.

The Union of BC Indian Chiefs is a representative body of approximately 140 First Nations within British Columbia and has a mandate from the member Nations of British Columbia to work towards the implementation, exercise and recognition of our inherent Title and Rights as Indigenous peoples. We have been specifically mandated via resolution to advocate for the full removal of all sex-based discrimination in the *Indian Act.*[1]

As the UBCIC, we recognize Indigenous women as central to our communities, our cultures, and our governments, and as essential to the continued survival of our peoples. Systemic and legal discrimination has been perpetuated against Indigenous women and their descendants as a tool of forced assimilation. These colonial policies were, and continue to be, used to destabilize our communities through the inevitable reduction of our membership rolls and violent family separation, undermining our ability to

[1] UBCIC Resolution 2010-08 "Bill C-3"; 2012-18 "Endorsement of UBCIC Citizenship Paper"; UBCIC Resolution 2019-11 "Immediate Implementation of Bill S3 and the Removal of Sex-Based Discrimination from the *Indian Act*"; UBCIC Resolution 2021-19 "Support for Removal of Ongoing Discrimination in the *Indian Act*".

maintain and protect the legal status and existence of our present and future citizens, and threatening our connection to our land base, our Title and Rights, our cultures, languages, knowledge and our resources.

UBCIC has long been involved in advocacy efforts to eliminate sex-based discrimination in the *Indian Act*, and to provide redress and reparations to Indigenous women and their descendants who have been impacted by the historical, ongoing and residual impacts created by this discrimination. As a member of the First Nations Leadership Council coalition[2] UBCIC intervened in the constitutional case of *McIvor v Canada*,[3] before the British Columbia Court of Appeal. The purpose of our intervention was to support the decision of the British Columbia Supreme Court mandating the elimination of sex discrimination from the *Indian Act*.[4] The position of the UBCIC was, and continues to be, that Indian women and their (matrilineal) descendants must be placed on the same legal footing as Indian men and their (patrilineal) descendants. We have also intervened before this Committee to support the Petition of Sharon McIvor and Jacob Grismer, including in 2011: https://povertyandhumanrights.org/wp-content/uploads/2011/08/Grand-Chief-Stewart-Philip-Affidavit.pdf and in 2016: https://povertyandhumanrights.org/wp-content/uploads/2016/06/McIvorUBCIC-affidavit-2-in-support-of-S-McIvor.doc0001.pdf.

In the Committee's decision CCPR/C/124/D/2020/2010, and in accordance with Article 2(3)(a) of the Covenant on Civil and Political Rights, the Committee outlined Canada's obligations to provide the Petitioners with an effective remedy, including full reparations to those whose Covenant rights have been violated and to take steps to address the residual discrimination within First Nations communities arising from sex-based discrimination within the *Indian Act*.[5] We are aware of Canada's February 2021 submission to the Committee[6] in which Canada states that all remaining sex-based inequities in the *Indian Act* registration provisions have been eliminated by Bill S-3.[7] Canada also expresses a commitment to a Nation-to-Nation relationship with Indigenous peoples which is "*based on a recognition of rights, respect and cooperation, and guided by the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples".*[8]

However, Bill S-3 is meaningless until the women and their descendants who are now entitled to status registration actually become registered. The fact is that very few have been registered by Canada following the Bill S-3 coming into force, which is a direct result of Canada's failure to take the steps necessary to make registration available, as further explained below. Therefore, it is the position of the UBCIC that, notwithstanding the coming into force of Bill S-3, Canada has failed to take steps necessary to meaningfully fulfill its obligations under the Covenant. By failing to make registration available to

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[2] The First Nations Leadership Council comes together to advocate on topics of joint issue and concern, and is a political collaborative relationship comprised of the political executives of the BC Assembly of First Nations, the First Nations Summit, and the Union of BC Indian Chiefs.
[3] *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153.
[4] *McIvor v The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827.
[5] CCPR/C/124/D/2020/2010, at para 10.
[6] Follow-up Submission of the Government of Canada to its response to the views of the Human Rights Committee Concerning the Communication of Sharon McIvor and Jacob Grismer: Communication no: 2020/2010, February 3, 2021, at p 2 para 4.
[7] 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 Session, 42nd Parliament, 64-65-66 Elizabeth II, 2015-2016-2017; online: https://www.parl.ca/DocumentViewer/en/42-1/bill/S-3/royal-assent (Bill S-3).
[8] *Supra* note 6, paras 16-18.

those who are now entitled to it, Canada has failed to implement Bill S-3.[9] Furthermore, Canada has not worked with the UBCIC or First Nations in BC as full partners to address these issues, as is required by the UN Declaration, and as called for by the UBCIC via numerous resolutions.[10]

The *United Nations Declaration on the Rights of Indigenous Peoples*, which the Government of Canada has adopted without qualification and have committed to implement, affirms:

> **Article 8(1):** Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture;
>
> **Article 8(2):** States shall provide effective mechanisms for prevention of and redress for:
> a) 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;
> b) 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;
> c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
> d) Any form of forced assimilation or integration;
>
> **Article 9:** Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

By Resolution 2019-11,[11] the UBCIC called upon the Government of Canada to take immediate action to bring all provisions of Bill S-3 into force and to work with Indigenous peoples, as full partners, to develop necessary mechanisms, reparations and processes by which the rights of Indigenous women and their descendants can be fully realized and recognized. This was followed by Resolution 2021-19,[12] which recognized that while some Indigenous women and their descendants have now become eligible for *Indian Act* status through the passage of Bill S-3, they continue to face unreasonable and unconscionable delays in becoming registered, constituting ongoing discrimination and a denial of their rights. Despite these ongoing calls, Canada has refused to implement the decision of this Committee and blatantly ignored the direct calls of First Nations to bring an end to this discrimination and provide the necessary reparations to Indigenous women and their descendants.

As indicated in the Committee's decision in *McIvor*, Canada has an obligation to provide effective remedies, reparations, and to address the residual discrimination faced by Indigenous women and their descendants. It is the position of the UBCIC that Canada has not taken action necessary to meet its obligations under domestic law, nor international human rights law.

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[9] UBCIC notes with concern that there are also other remaining instances of sex-based discrimination remaining in the *Indian Act* including provisions that discriminate against Indigenous women who lost their status through involuntary enfranchisement, which Canada has yet to address, and which the UBCIC has specified in UBCIC Resolution 2021-19.
[10] *Supra* note 1.
[11] *Ibid*
[12] *Ibid*

According to the Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations, as of March 25, 2021, Canada has registered 17,500 new Indians since 2017.[13] Since the Government of Canada's own estimates of the number of First Nations people newly entitled to status by Bill S-3 is between 270,000 and 450,000, the numbers registered so far do not represent full and effective remedial action.[14] In addition, those who have applied face delays of two years and more to have their applications processed. Canada has also failed to effectively provide information to those who are potentially impacted, to provide the necessary resources to assist in the application process, and to adequately publicize and distribute the decision of the Committee. In addition, there has been no willingness on the part of Canada to discuss reparations for those impacted, nor to take any form of meaningful action on its own.

The COVID-19 Pandemic has exacerbated the pre-existing socioeconomic and health disparities that exist for Indigenous peoples in Canada, increasing risks to the health and well-being of Indigenous peoples, who have reported greater impacts upon their financial and mental well-being than other Canadians because of the pandemic. This is further intensified for Indigenous women, increasing the risks and challenges faced by Indigenous children who are more likely to be growing up in sole-parent households headed by Indigenous women. Indigenous Elders have also been disproportionately impacted in every area of the country. Despite these very public and known realities, Canada chose to pause processing applications for Indian status registration, which they acknowledge – albeit passively – in their own submission to the Committee. Rather than take meaningful and proactive steps to ensure Indigenous women and their descendants have access to the rights and benefits allotted via Indian status amid a public health crisis, Canada intentionally skirted their legal obligations by instead using the pandemic as an excuse to create further delays.

The UBCIC was made aware of these concerns by Indigenous women early in the pandemic and, in addition to the past decade of advocacy on sex-based discrimination in the *Indian Act*, has made several calls upon Canada in the past year to declare Indian registration an essential service, to no avail. Prior to the COVID-19 pandemic the wait times for Indian registration averaged 12-18 months. This has now been extended to two years or more. Until Canada takes significant steps to address these unreasonable delays, the issues of sex-based discrimination will not be addressed. Reiterating the calls by the Petitioners, the UBCIC requests the Committee to call upon Canada to declare *Indian Act* registration an essential service.

In conclusion, the UBCIC fully supports the Petitioners' requests for immediate and effective implementation of the UN Human Rights Committee decision and remedy in *McIvor* v *Canada*, CCPR/C/124/D/2020/2010 and the additional request of the Petitioners, as supported by UBCIC Resolution 2021-19, to declare *Indian Act* registration an essential service.

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[13] This information was provided to Chief Judy Wilson, Secretary-Treasurer of UBCIC, by Minister Bennett in a meeting on March 29, 2021, and confirmed by email.

[14] Crown-Indigenous Relations and Northern Affairs Canada, "Removal of all sex-based inequities in the *Indian Act*", 15 April 2019, online at: https://www.newswire.ca/news-releases/removal-of-all-sex-based-inequities-in-the-indian-act-890690227.html; see also Office of the Parliamentary Budget Officer, *Addressing sex-based inequities in Indian Registration*, 5 December 2017, online at: https://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf

On behalf of the UNION OF BC INDIAN CHIEFS

Grand Chief Stewart Phillip
President

Chief Don Tom
Vice-President

Kukpi7 Judy Wilson
Secretary-Treasurer

CC: Sharon McIvor

Ibrahim Salama,
Chief, Human Rights Treaty Branch

and

CCPR Follow-up Team

May 28, 2021

Re: CCPR Follow-up Process for Ascertaining the Measures Taken by Canada to Implement the 11 January 2019 Decision of the Committee concerning the Petition of Sharon McIvor and Jacob Grismer, CCPR/C/124/D/2020/2010.

Dear Mr. Salama and the Members of the CCPR Follow-up Team,

The Ontario Native Women's Association (ONWA) is writing to support the Petitioners' requests for the immediate and effective implementation of the UN Human Rights Committee decision and remedy in *McIvor* CCPR/C/124/D/2020/2010.

ONWA is the largest and oldest Indigenous women's organization in Canada. We are a not-for-profit organization established to empower and support all Indigenous women and their families in the province of Ontario through research, advocacy, policy development and programs that focus on local, regional and provincial activities. We have a long history of advocating for Indigenous women's rights, based on our experience in communities, our research and policy analysis, and our clear articulation of recommendations, guidance, and advice to decision-makers at all levels of government.

ONWA is deeply concerned with the federal government's persistent failure to provide a full and effective remedy for the egregious violations of Indigenous women's rights under international human rights law, identified by the Committee in Sharon McIvor's petition.

Indigenous women and their children have waited for too many years to see the necessary changes in the *Indian Act.* The *Indian Act* has embedded multiple forms of sex discrimination, as demonstrated in numerous court case victories (*Lovelace, Lavell, McIvor, Matson, Descheneaux* and *Gehl*). *Bill S-3* provided the federal government an opportunity to take full and effective action to restore Indigenous women's inherent rights, and their families and communities. Despite *Bill S-3* receiving Royal Assent on December 12, 2017, the federal government's actions fail to achieve the restoration of Indigenous women's inherent rights and to fully address the human rights violations highlighted by the United Nations Human Rights Committee.

Head Office: P.O. Box15-684 City Road, Fort William First Nation, ON P7J1K3 ·
Toll Free: 1-800-667-0816 · Phone: (807) 623-3442 · Fax: (807) 623-1104

ONWA has called on the federal government to undertake the following four actions:

1. **Put the appropriate investments into the implementation of registration of women and their children under *Bill S-3*.** We understand that Indigenous women, before COVID-19, were told by Indigenous Services Canada that the registration process could take up to three years. This is not only a human rights issue, but the actions of the government undermine the ability for Indigenous women and their children to restore identity and belonging to one's own people. For some Elders, Indigenous women and families, three years may be too long to wait. In our work with the federal government, we have seen some improvements. However, the registration process continues to require a significant initial and ongoing investment.

2. **Complete the remedy of sex discrimination** as was identified in the decision from the United Nations Human Rights Committee about the *McIvor* case, para. 9 starting on p. 17, in particular sub b). Only one part of this remedy has been implemented so far - that is, the change in the law that entitles women and their descendants to 6(1)(a) status on the same footing as their male counterparts. The actual registration of the women is a critical part of this remedy, and it is essential that the federal government also address the residual discrimination in communities. To ensure effective Nation building that is inclusive of First Nations women, there would have to be immediate investments in addressing the residual discrimination in communities that continue to function within a legacy of colonization and embedded patriarchal values, including the limitations that are part of the governance structure imbedded in the *Indian Act.*

3. **Develop a strength based educational campaign for First Nations communities and for women who may want to apply.** We know that this legislation was not well received by all First Nations. The significant challenges that some First Nations face in caring for their current membership, means that the return of new members is seen as an undue hardship. Embedded in some communities is a level of internalized racism that means that women and their children may be registered but have no sense of being welcomed back into their ancestral community. This is not a failing of any individual community but needs to be addressed and supported as part of the decolonization process.

4. **The Government of Canada meaningfully engage with Indigenous women and invest in Indigenous women' s organizations** in the development of any federal policy and funding formulas. In 2016, the federal government established a "Nation-to-Nation" framework and chose as its partners for "Nation" building, three national Indigenous organizations: The Assembly of First Nations (AFN), the Métis National Council, and the Inuit Tapiriit Kanatami. For example, the AFN is a male dominated representative body of Chiefs that is established and recognized through the *Indian Act*. What constitutes the AFN's legitimacy to represent First Nations women and girls in the context of nation building and particularly urban Indigenous women who are not connected to their First Nation community?

The "Nation-to-Nation" framework continues to marginalize and alienate Indigenous women from substantive policy, funding and governance conversations and decisions. Consequently, recent decisions by the federal government have resulted in Indigenous women essentially being left out of legislative frameworks that have been constructed (*Bill C-92, An Act respecting First Nations, Inuit and Métis children, youth and families*); reallocation of responsibilities and funding out of the federal government (Early Childhood Development, Housing, Health and Education) and most recently, the distribution of

funding for addressing COVID- 19. While the model has continued to evolve, it has not recognized Indigenous women as having a right to their own representative bodies, and has not recognized urban Indigenous communities, which is where the large majority of Indigenous women live.

This federal government recognizes that previous policies have been rooted in colonization. Embedded in colonization are patriarchal values. If the federal government is serious in its application of its own Gender Based Analysis +, it is crucial that a critical lens be applied to examining why the government continues to fund and invest in institutions based on patriarchal institutions that perpetuate sex discrimination.

In closing, we seek the immediate and effective implementation of the UN Human Rights Committee decision and remedy in the *McIvor v Canada*, CPR/C/124/D/2020/2010. We also call upon the federal government to significantly enhance its work towards righting historical injustices, through implementing the above actions.

With respect,

Dr. Dawn Lavell-Harvard
ONWA, President

Head Office: P.O. Box15-684 City Road, Fort William First Nation, ON P7J1K3 ·
Toll Free: 1-800-667-0816 · Phone: (807) 623-3442 · Fax: (807) 623-1104

FEMMES AUTOCHTONES DU QUÉBEC INC.
QUEBEC NATIVE WOMEN INC.

May 31, 2021

Ibrahim Salama, Chief
Human Rights Treaties Branch,
and CCPR follow-up Team

Re: CCPR Follow-up Process for Ascertaining the Measures Taken by Canada to Implement the 11 January 2019 Decision of the Committee concerning the Petition of Sharon McIvor and Jacob Grismer, CCPR/C/124/D/2020/2010

Dear Mr. Salama and Members of the CCPR Follow-up team,

Quebec Native Women (hereinafter QNW) writes to support the petitioners' requests for immediate and effective implementation of the decision of the United Nations Human Rights Committee and redress in the case of *McIvor v. Canada*, CCPR/C/124/D/2020/2010.

QNW is a bilingual non-profit organization founded in 1974 that began as a community initiative. As an Indigenous Representative Organization (IRO), we represent women from ten (10) First Nations of Quebec: Abenaki, Anishnabe, Atikamek, Innu, Eeyou, Wendat, Wolastoqiyik (Maliseet), Mig'maq, Mohawk and Naskapi as well as urban women. For over 47 years, our organization has contributed to the restoration of balance between Indigenous men and women by giving a strong voice to the needs and priorities of women. QNW brings the needs of its members to the attention of authorities and decision-makers in all sectors of our activities: health, youth, justice and public safety, women's shelters and the promotion of non-violence, human rights, international law, and employment and training.

In *McIvor*, the United Nations Human Rights Committee ruled that in relation to the Indian Act, Canada is in violation of articles 3 and 26, read in conjunction with article 27 of the *International Covenant on Civil and Political Rights*. Our organization wonders where Canada's respect for human rights fits in, given that the sex discrimination identified by the Committee persists today. Contrary to what the Government of Canada claims, our organization is firm in its position on the existence of discrimination in the Indian Act, despite the *Bill S-3* amendments *(An Act to amend the Indian Act in response to the Quebec Superior Court decision in Descheneaux v. Canada)*. Our Indigenous women and girls still experience racism, sexism, and sex discrimination under these laws, which are still steeped in colonialism.

Canada claims that the amendments made by *Bill S-3* to section 6 of the Indian Act eliminated discrimination against Indigenous women with respect to registration. It maintains, in its January 8, 2021 submission to the Committee, that there are no longer sex-based inequities arising from this legislation. However, we are of the opposite opinion since non-registration persists and since the consequences for women and their families are heavy to bear. QNW can see the impacts of the delay in the registration process for women and their descendants on a daily basis. We therefore ask the Committee to strengthen its direction to Canada to put an end to these inequalities between First Nations men and women by immediately implementing the decision and the right to redress as directed in the *McIvor* decision.

The directions given by the Committee in *McIvor* were unequivocal and clear. However, concrete actions to implement the decision have not been forthcoming: many women and their descendants are still waiting to obtain their status because the registration process is very slow. Furthermore, the accessibility of information concerning the new registration procedures of *Bill S-3* is significantly lacking. QNW deplores the fact that there has been no proactive and collaborative information campaign to inform Indigenous women of their possibility of registration and the steps to take to obtain it. Our organization also deplores the legislative obstacle of section 10 of *Bill S-3* which prevents victims of sex discrimination from obtaining compensation before the courts. If our women are deprived of administrative and, above all, cultural privileges due to their non-registration, they are entitled to obtain compensation. QNW considers that this obstacle inserted by the government in the Act is tangible proof of its unwillingness to achieve a real reconciliation with the Indigenous peoples. Lastly, we ask the government to be required to be transparent about the registration process since no up-to-date information is available on the number of registrations fully completed and the number of people waiting to be registered.

The Government of Canada is attempting to justify delay in the registration process by pointing to the Covid-19 pandemic. Our organization maintains that this delay is unjustified because the situation in which Indigenous women and their descendants are left violates their human rights to non-discrimination and equality. The

pandemic is not a valid excuse for the government's inaction in implementing *McIvor*. In these uncertain times, the denial of registration to those entitled to registration status under section 6(1)(a) of the *Indian Act* prevents them from receiving health benefits and specific government assistance for the pandemic.

QNW is dedicated to Indigenous women and the promotion of their rights. The lie that the Government of Canada is trying to make us believe about the elimination of discrimination in the Indian Act must stop. Our organization joins its voice, in calling for the effective and immediate implementation of the decision in *McIvor*. We hope that as a result of the Follow-up Process of the United Nations Human Rights Committee, concrete actions will be taken to ensure that the right to equality for our Indigenous women and girls is respected, protected and fulfilled.

Viviane Michel
President of QNW

Merci, Thank you, Nia:wen, Migwetc, Tshinashkumitin, Wela'lin, Wli Wni, Tiawenhk

Business Complex, River Road, C.P. 1989, Kahnawake (Québec) J0L 1B0
T: 450-632-0088 F: 450-632-9280 C: info@faq-qnw.org Web Site: www.faq-qnw.org

FEMMES AUTOCHTONES DU QUÉBEC INC.
QUEBEC NATIVE WOMEN INC.

31 mai 2021

Ibrahim Salama, Chef
Direction des traités relatifs aux droits de l'homme
et l'Équipe de suivi du CCPR

Re : Processus de suivi du CCPR pour vérifier les mesures prises par le Canada pour mettre en œuvre la décision du 11 janvier 2019 du Comité concernant la pétition de Sharon McIvor et Jacob Grismer, CCPR/C/124/D/2020/2010.

Cher Monsieur Salama et Membres de l'équipe de suivi du CCPR,

Femmes Autochtones du Québec (ci-après FAQ) écrit pour soutenir les demandes des pétitionnaires pour une mise en œuvre immédiate et effective de la décision du Comité des droits de l'Homme des Nations Unies et de la réparation dans l'affaire *McIvor c. Canada*, CCPR/C/124/D/2020/2010.

FAQ est une organisation bilingue sans but lucratif fondée en 1974 qui a débuté comme initiative communautaire. Étant une organisation autochtone représentative (OAR), nous représentons des femmes issues de dix (10) Premières Nations du Québec : les Abénakis, les Anishnabes, les Atikameks, les Innus, les Eeyous, les Wendates, les Wolastoqiyik (Malécites), les Mig'maqs, les Mohawks et les Naskapis ainsi que les femmes vivant en milieu urbain. Depuis plus de 47 ans, notre organisation a contribué au rétablissement de l'équilibre entre les hommes et les femmes autochtones en donnant une forte voix aux besoins et priorités des femmes. FAQ fait connaître les besoins de ses membres aux autorités et aux décideurs, et ce, dans tous les secteurs de nos activités : la santé, la jeunesse, la justice et la sécurité publique, les maisons d'hébergement pour femmes et la promotion de la non-violence, les droits de la personne, le droit international ainsi que l'emploi et la formation.

Dans l'affaire *McIvor*, le Comité des droits de l'Homme des Nations Unies a statué qu'en ce qui concerne la *Loi sur les Indiens*, le Canada violait les articles 3 et 26, lus conjointement avec l'article 27 du *Pacte international relatif aux droits civils et politiques*. Notre organisation se demande quelle place occupe le respect des droits humains pour le Canada considérant que la discrimination basée sur le sexe persiste encore aujourd'hui. Contrairement à ce que le gouvernement du Canada prétend, notre organisation est ferme quant à sa position sur l'existence de la discrimination dans la *Loi sur les Indiens*, malgré les amendements du *Projet de Loi S-3 (Loi modifiant la Loi sur les Indiens pour donner suite à la décision de la Cour supérieure du Québec dans Descheneaux c. Canada)*. Nos femmes et nos filles autochtones sont toujours victimes de racisme, de sexisme et de la discrimination basée sur le genre en vertu de ces lois, toujours empreintes de colonialisme.

Le Canada prétend que les modifications apportées par le *Projet de Loi S-3* à l'article 6 de la *Loi sur les Indiens* ont éliminé la discrimination à l'égard des femmes autochtones en matière d'inscription. Il soutient, dans son mémoire au Comité du 8 janvier 2021, qu'il n'y a plus d'iniquités fondées sur le sexe découlant de cette loi. Toutefois, nous sommes d'avis contraire puisque la non-inscription persiste et les conséquences pour les femmes et leurs familles sont lourdes à porter. FAQ peut voir quotidiennement les impacts du retard dans le processus d'inscription des femmes et de leur descendant.e.s. Nous demandons donc au Comité de renforcer sa directive au Canada de mettre fin à ces inégalités entre les hommes et les femmes issus des Premières Nations en appliquant immédiatement la décision et le droit à la réparation tel qu'indiqué dans la décision *McIvor*.

Les directions empruntées par le Comité dans l'affaire *McIvor* étaient claires et sans équivoque. Pourtant, les actions concrètes pour mettre en œuvre la décision ne sont pas au rendez-vous : de nombreuses femmes et leurs descendant.e.s attendent toujours d'obtenir leur statut puisque le processus d'inscription est très lent. De plus, l'accessibilité à l'information concernant les nouvelles procédures d'inscription du *Projet de Loi S-3* fait preuve d'une absence importante. FAQ déplore le fait qu'il n'y ait pas eu de campagne d'informations proactive et collaborative pour informer les femmes autochtones de leur possibilité d'inscription et des démarches à entreprendre pour l'obtenir. Notre organisation déplore également l'obstacle législatif que constitue l'article 10 du *Projet de Loi S-3* qui empêche les victimes de discrimination basée sur le genre d'obtenir une compensation devant les tribunaux. Si nos femmes sont privées de privilèges administratifs, et surtout culturels, dû à leur non-inscription, elles ont droit d'obtenir des compensations. FAQ considère que ces obstacles insérés par le gouvernement dans la *Loi* est une preuve tangible de son manque de volonté de parvenir à une véritable réconciliation avec les peuples autochtones. Enfin, nous demandons au gouvernement d'être transparent quant au processus d'inscription puisqu'aucune information à jour n'est disponible concernant le nombre d'inscriptions réalisées et le nombre de personnes en attente d'enregistrement.

Le gouvernement du Canada tente de justifier ce retard dans le processus d'inscription en invoquant la pandémie de la Covid-19. Notre organisation soutient que ce retard est injustifié car la situation dans laquelle se trouvent les femmes autochtones et leurs descendant.e.s viole leurs droits humains à la non-discrimination et l'égalité. La pandémie n'est pas une excuse valable pour l'inaction du gouvernement dans la mise en œuvre de l'affaire *McIvor*. En cette période incertaine, le refus d'inscription de ceux et celles ayant droit au statut d'inscription en vertu de l'article 6(1)(a) de la *Loi sur les Indiens* les empêche de bénéficier des prestations de santé et d'une aide spécifique du gouvernement pour la pandémie.

FAQ se consacre aux femmes autochtones et à la promotion de leurs droits. Le mensonge que tente de nous faire croire le gouvernement du Canada quant à l'élimination de la discrimination dans la *Loi sur les Indiens* doit de cesser. Notre organisation joint sa voix à celle des autres pour demander la mise en œuvre effective et immédiate de l'affaire *McIvor*. Nous espérons qu'à la suite du processus de suivi du Comité des droits de l'Homme des Nations Unies, des actions concrètes seront prises pour que le droit à l'égalité de nos femmes et filles autochtones soit respecté, protégé et réalisé.

Viviane Michel
Présidente de FAQ

Merci, Thank you, Nia:wen, Migwetc, Tshinashkumitin, Wela'lin, Wli Wni, Tiawenhk

Business Complex, River Road, C.P. 1989, Kahnawake (Québec) J0L 1B0
T: 450-632-0088 F: 450-632-9280 C: info@faq-qnw.org Site web: www.faq-qnw.org

FAFIA-AFAI

Feminist Alliance for International Action

l'Alliance Féministe pour l'Action Internationale

CANADA

Ibrahim Salama, Chief, and CCPR Follow-Up Team
Human Rights Treaty Branch
United Nations, Geneva

June 15, 2021

Re: Implementation by Canada of the 11 January 2019 Decision of the Committee concerning the Petition of Sharon McIvor and Jacob Grismer (CCPR/C/124/D/2020/2010)

Dear Mr. Salama,

The Canadian Feminist Alliance for International Action (FAFIA) wishes to provide information to the UN Human Rights Committee for consideration in the Follow-Up Process to its decision in *McIvor v. Canada*.

FAFIA is an alliance of over sixty women's organizations. Our mission is to defend the human rights of women in Canada, and to advance women's equality through working to secure the domestic implementation of Canada's international and regional human rights commitments.

Since 2016, FAFIA has worked with a group of First Nations women leaders and organizations to defend the rights of First Nations women and their descendants who, for over 140 years, have been discriminated against by the status provisions of the *Indian Act*. This group first worked to secure the '6(1)(a) all the way amendment' to Bill S-3, which amended the *Indian Act* in 2017. This amendment, first proposed and adopted by the Senate of Canada, was dubbed the '6(1)(a) all the way' amendment because its purpose was to entitle First Nations women to full 6(1)(a) status on the same footing as men.

The group then worked to persuade the government to bring that amendment into force because it was not promulgated in December 2017 when other provisions of Bill S-3 were. It was finally promulgated on August 15, 2019. Since that time the group has been working to secure the registration of the 270,000 to 450,000 First Nations women and their descendants who, according to Government of Canada estimates, are newly entitled to status.[1], [2]

This group, who, for ease of reference we will call the Indian Act Sex Discrimination Working Group, or just the Working Group, includes Sharon McIvor, who is a member of FAFIA, other First Nations women who have been the plaintiffs in leading cases challenging *Indian Act* sex discrimination over a fifty year period, Canada's leading experts on *Indian Act* sex discrimination, two of Canada's largest First Nations women's organizations – the Ontario Native Women's Association and the Quebec Native Women's Association – and the Union of B.C. Indian Chiefs. More detailed description of the members of the Working Group is provided in Appendix A to this letter.

Since November 2019, the Working Group has met with the Honourable Marc Miller, Minister of Indigenous Services Canada, and the Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations, and their officials, on seven

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[1] Based on the work of independent demographers, relied on by the Government of Canada, the Parliamentary Budget Officer estimated that 670,450 First Nations women and their descendants are newly entitled to status by the Bill S-3 amendment which came into force on August 15, 2019, and 268,000 of those are likely to apply for status registration. See: Office of the Parliamentary Budget Officer, *Bill S-3: Report on Sex-Based Inequities in Indian Registration*, 5 December 2017, online at: https://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf. Based on the same demographic studies, the Government of Canada cites the number of the newly eligible as 270,000 to 450,000. See, for example, Indigenous Services Canada, *The Final Report to Parliament on the Review of S-3*, December 2020, at 3, online at: https://www.sac-isc.gc.ca/eng/1608831631597/1608832913476

[2] When the Government of Canada brought the '6(1)(a) all the way amendment into force on August 15, 2019, it stated that the amendment "is in line with the United Nations Human Rights Committee decision on the claim brought forward by Sharon McIvor and Jacob Grismer" and "could result in between 270,000 and 450,000 individuals being newly entitled to registration under the Indian Act…" See Crown-Indigenous Relations and Northern Affairs Canada, "Removal of all sex-based inequities in the Indian Act",15 August 2019, online at: https://www.newswire.ca/news-releases/removal-of-all-sex-based-inequities-in-the-indian-act-890690227.html. See also Appendix C to this letter.

different occasions.[3] Discussions were specifically focused on the implementation of Bill S-3 and the urgent need to register the newly entitled First Nations women and their descendants in a timely way, and, in particular, to ensure that First Nations women and their descendants are effectively informed of their new entitlement, have adequate assistance in the registration process, and do not have to deal with unconscionably slow, complex, and erratic procedures.

Members of the Working Group pointed out to Ministers and their officials that until the First Nations women and their descendants are actually registered, the discrimination continues. Until they are actually registered, the women and their descendants continue to be denied status and the benefits that go with it, and therefore continue to be denied equality in law and equal enjoyment of their culture.

According to figures provided to the Working Group by the Honourable Carolyn Bennett, as of March 25, 2021, only 17,500 new Indians have been registered since 2017, when the first provisions of Bill S-3 came into effect.[4] Earlier we had asked for information regarding how many applicants applied or were registered under the August 15, 2019 amendment, which relates to the UN Human Rights Committee's *McIvor* Decision. We were told that the Registrar does "not track whether an applicant is registered under the 2019 amendments vs. the 2017 amendments. They are all tracked as one S-3 workload or inventory."[5]

This means that the number of registrations related to the *McIvor* Decision (the 2019 amendment) is less than 17,500, perhaps much less, since some of the 17,500 will be related to 2017 amendments (resulting from the *Descheneaux* decision in the Quebec Superior Court). In short, the overwhelming majority of First Nations women and their descendants who are newly entitled to status have not been registered to date, nor have, despite our repeated requests, any

[3] Meetings with Minister Miller (Indigenous Services Canada - ISC) were held by videoconference on July 23, 2020, September 24, 2020, and April 29, 2021. Meetings with Minister Bennett (Crown Indigenous Relations and Northern Affairs – CIRNA) were held by videoconference on March 29, 2021 and April 7, 2021. Meetings with ISC officials were held by videoconference November 27, 2020 and January 15, 2021.

[4] See Appendix B to FAFIA Letter: Information provided to the Working Group, March 30, 2021, by Chloe Van Bussel, Operations Manager, Office of Minister Bennett, Minister of Crown Indigenous Relations.

[5] See Appendix C to FAFIA Letter: Information provided to the Working Group, October 8, 2020, by Jordano Nudo, Policy Advisor to Minister Miller, Indigenous Service Canada.

adequate plans been put in place by Canada to ensure that they will be registered in a timely way.

Nonetheless, the Government of Canada reported to Parliament on December 11, 2020,[6] and claims, in its Final Report on Review of Bill S-3, that the "sex-based inequities"[7] in the *Indian Act* have been eliminated. FAFIA considers this claim inaccurate for a number of reasons. Below are the highlights of concerns that have been shared with Ministers in meetings and correspondence.

Registration

Until the First Nations women and their descendants are actually registered, the sex discrimination continues. Facial changes to the legislation, without the necessary changes in procedures, protocols, practices and resource allocations that will make registration a reality for the First Nations women and their descendants who have been banished from their communities by sex discrimination, extend only an empty promise of equality.

a) Pro-Active Information Campaign

A pro-active, broad information campaign is necessary to reach First Nations women and their descendants in order to ensure that they know that they may be newly entitled to status. Information provided by Indigenous Services Canada, and what we learn through networks on the ground, indicates that efforts at reaching those who are newly entitled are, so far, minimalist and ineffective. Indigenous Services Canada has provided information about new entitlement to Bands, some national Indigenous organizations, and posted it on the Indigenous Services Canada website. However, these are not effective ways to reach the First Nations women and their descendants who are newly entitled, since they are not likely to be connected to Bands or national organizations, and are more likely to be living off reserve. They are most likely to be reachable through grass roots Indigenous women's organizations, community centres, women's shelters, and urban Indigenous support groups. A pro-active information campaign needs to be easy to understand, and popular; to be effective it should be collaborative and

[6] *The Final Report to Parliament on the Review of S-3*, December 2020, online at: https://www.sac-isc.gc.ca/eng/1608831631597/1608832913476

[7] We reject this terminology, since in Canadian and international law there is no such thing as an "inequity." There are guarantees of equality and non-discrimination, and there are violations of them.

involve the grass roots organizations that represent and work with First Nations women.[8]

b) Supports for those Seeking Registration

The registration process is cumbersome and complicated. Many First Nations women and their descendants do not have access to internet and communication with Indigenous Services Canada is not easy. Gathering the necessary documentation is difficult and costly, and the bureaucratic process is hard to deal with. To make registration accessible, support services, including paralegal assistance, are needed in communities to give applicants advice and help.

c) Delay

For those who apply there is unacceptable delay. Information provided by Minister Bennett on March 29, 2021 (see Appendix B) shows that the standard time frame for processing a registration application is from 6 months to 2 years. This processing time is neither reasonable nor acceptable.

By contrast, in Canada, a person can get a new passport in 10 to 20 working days. Obtaining a new passport requires verification of identity, birth, citizenship – similar requirements to those for status registration.[9]

Further, this unacceptably poor standard is not being met in most cases.[10]

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[8] FAFIA is concerned that the Government of Canada may attempt to justify the low numbers of women and their descendants registered under the 2019 amendment as an expression of their choice. We reject this. Unless every woman and every matrilineal descendant who is newly entitled *knows* that they are entitled, they cannot be said to have chosen. In our view, it is the Government of Canada's responsibility to ensure that it mounts an information campaign that effectively reaches the women and their descendants who are newly entitled, and that takes every possible step to reverse the decades of discrimination and exclusion.

[9] In the case of status registration, the process may require identification of relatives going back one, or several, generations. However, this does not justify the extreme difference between 20 working days for a passport and 6 months to 2 years, or more, for status registration.

[10] See Appendix B. Of the more than 10,000 applications reported on, most faced delays greater than the standard, that is, more than two years. Members of the Working Group regularly receive complaints from women and matrilineal descendants who have waited more than two years, even up to five, to obtain their registration.

d) COVID-19 Emergency

The pandemic has caused additional delays in the registration process. It has also exacerbated the vulnerability of the First Nations women and their descendants who are not registered. The delays during the pandemic compound the vulnerability of those with disabilities.[11]

The Working Group has repeatedly requested that *Indian Act* registration be declared an essential service during the COVID-19 pandemic, to ensure that the First Nations women and their descendants who are entitled to status can be registered and enjoy the health benefits they are owed, as well as the special COVID-19 services and supports that are being provided to Indigenous people. These urgent requests have not been answered.

f) Resource Allocation

Information provided to the Working Group (See Appendix B and Appendix C) indicates that there are 53 staff working on Bill S-3 registration in the Winnipeg office[12], and that an additional 15 million dollars has been allocated to hire more staff over three years.[13] Very rough calculations[14] indicate that this means that Indigenous Services Canada might be able to process 10,000 new registrations

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[11] As rates of disability and poor health are high among First Nations peoples because of Canada's history of impoverishment, poor water, poor housing, and racism in services, Indigenous people, on and off reserve, are especially susceptible to COVID-19 and especially in need of protection. During this crisis, First Nations women and their descendants desperately need the benefits of status that they are entitled to, including extended health benefits, and COVID-19 services. First Nations women and their descendants who have disabilities are in particular need of these benefits and services. Delays in registration, caused by under-resourcing and lack of effective communication, deepen the harms that *Indian Act* discrimination has caused. The Government of Canada has offered specific assistance to Indigenous communities during the pandemic, including accelerated vaccination. However, this assistance is only available through Bands or to those who have status.

[12] See Appendix C.

[13] See Appendix B.

[14] Calculations are based on estimating how many registrations per year each clerk handles in light of known figures; how many additional clerks can be hired for 5 million each year for 3 years, and, in light of number of clerks and number of registrations per year per clerk, how many additional registrations per year ISC could process over the coming three years.

per year for three years.[15] In light of the Government's estimates of 270,000 to 450,000 who are newly entitled, this does not appear to be an adequate response, nor does it indicate willingness to fully implement the Bill S-3 amendment and the *McIvor* remedy.

Residual Discrimination

The Working Group has also repeatedly expressed its concerns to Ministers and their officials about the related discriminatory effects of loss of status and exile from Bands and communities that *Indian Act* sex discrimination has caused. The women lost services and facilities extended to status Indians and Band members, including the ability to hold land on reserve, to be buried on reserve, to access housing provided or supported by the Band, to have children attend reserve schools, to access support for higher education for oneself or one's children, to access health care provided on or through the reserve/Band.

The children of the women also suffer from this consequential discrimination affecting their mothers, for they too are, and have been, denied Band membership, services and benefits.

Because for decades Canadian policy was that only a status Indian could benefit from a Treaty which included her family and community, women and their descendants also lost Treaty rights and benefits.

The Working Group has expressed its concerns about how the exile of the women will affect the women, and First Nations as a whole, in future. Canada states that it wishes to "get out of the business of Indian registration." In practice, however, for the purposes of resource allocation and self-government agreements, Canada only recognizes, and counts, persons with status as members of a nation. Consequently, if Canada exits from Indian registration before it restores First Nations women and their descendants to their rightful place, it will be establishing self-government for nations that have been stripped of thousands of women and their descendants, whose return will then not be affordable, and perhaps not desirable for the nation. Canada cannot get out of the business of Indian registration until it restores the women to their nations, and undoes the enormous damage of its discriminatory regime.

[15] Since Canada is in the best position to make an accurate calculation, the State party should provide its prediction of how many new Bill S-3 registrations it can process with current resources.

Outstanding Sex Discrimination Issues

a) Section 10 Block to Compensation

The *Indian Act* specifically bars women and their descendants who were previously excluded from 6(1)(a) status because of sex discrimination from claiming or receiving compensation.[16] Contrary to Canada's claim that "sex-based inequities" have been eliminated from the *Indian Act*, this bar to compensation constitutes explicit discrimination based on sex.

The Working Group has repeatedly brought this bar to compensation to the attention of Ministers and officials, and requested that it be removed.[17]

b) Involuntary Enfranchisement

We have also brought to the attention of Ministers and officials the continuing sex discrimination inherent in the loss of status by wives and descendants of Indian men who were enfranchised. Whether the men were enfranchised voluntarily or involuntarily, the women and children automatically lost their status and were treated as the property of the men. The sex-based hierarchy in s. 6 of the *Indian Act* perpetuates sex discrimination against these women and their descendants.

c) Unknown and Unstated Paternity

In addition, there is ongoing sex discrimination inherent in the requirement that a woman provide proof that the father of her child is a status Indian in order to register the child, when the father refuses to acknowledge the child, or the

[16] Section 10.1 of the *Indian Act,* as amended by S.C. 2017 c. 25.

[17] Residential school survivors, and Sixties Scoop survivors, among others, have been granted compensation for the harms done to them. *Indian Act* sex discrimination has done terrible harm to First Nations women and their children over decades. Women have been expelled from their communities, from their homes, languages, and cultures, and families have been torn apart. Women have been deemed to be lesser parents, unable to pass on status in the way men can, and branded as traitors for 'marrying out'. They have been denied belonging, identity, services, and voice in decision-making for their communities. But the women and their descendants who have suffered this discrimination, and all its complex effects, are explicitly barred from seeking any compensation.

woman, for understandable reasons, such as rape, cannot or will not identify the father. The difficulties of obtaining and providing evidence of paternity fall on the mother, making evident one of the discriminatory effects of the two-parent rule, which is that it bestows privilege on the male Indian who can always identify the mother of his child.

Reparations

The Working Group has asked Ministers about reparations in light of the *McIvor* Decision. We have been told (see Appendix C) that: "We do not currently have a mandate to negotiate on this matter. Discussions regarding reparations for those affected by sex-based discrimination in the registration provisions of the *Indian Act* would require support from Cabinet." Repeated questions elicit the same response.

Mandate

The Working Group also asked repeatedly: who has the mandate to fully implement Bill S-3 and to implement the *McIvor* remedy? The Prime Minister writes mandate letters for his Cabinet Ministers which are public documents. Neither the mandate letter of Minister Bennett, nor of Minister Miller includes a mandate to fully implement Bill S-3 and to implement the remedy in *McIvor v. Canada*.

Conclusion

The Working Group has made extensive attempts to persuade the Ministers responsible to implement Bill S-3 and the *McIvor* remedy. It is evident from our interactions that the Government of Canada has no plan to ensure First Nations women and their descendants who are newly entitled to status, as required by the *McIvor* Decision, will be actually registered, and in a timely way. The Government of Canada also has no plans to address the residual sex discrimination, or the remaining sex discrimination in the *Indian Act*. Expressions of intention to engage with First Nations and to consult with Indigenous organizations at some unspecified time, and in some unspecified way, do not discharge the obligation to provide an effective remedy, including non-repetition.

First Nations women fought hard through marches, lobbying, and repeated litigation and petitions to the United Nations Human Rights Committee for over fifty years before Canada finally, in August 2019, removed the core of the pre-

1985 sex discrimination from the *Indian Act*. Now Canada is failing to implement its own legislation and to perform the *McIvor* remedy in good faith.

We ask the Committee to support the requests of the Petitioners.

Sincerely,

Shelagh Day, C.M.
Chair, Human Rights Committee

Appendix A
Indian Act Sex Discrimination Working Group

Sharon McIvor is a Thompson Indian and a member of the Lower Nicola Band. Ms. McIvor, is a practising lawyer and a Professor of Indigenous Studies at the Nicola Valley Institute of Technology. She is a member of the Steering Committee of FAFIA.

Dr. Gwen Brodsky is lawyer and a leading expert on constitutional equality rights in Canada with many years of experience arguing equality rights cases before tribunals and courts.

Jeannette Corbiere Lavell, C.M. is a member of Wikwemikong First Nation on Manitoulin Island. She challenged the sex discrimination in the *Indian Act* under the *Canadian Bill of Rights* in 1971. She is a former President of the Native Women's Association of Canada, former president of the Ontario Native Women's Association, and a member of the Order of Canada.

Dr. Lynn Gehl is an Algonquin Anishinaabe-kwe from the Ottawa River Valley. She successfully challenged the *Indian Act* policy regarding unknown and unstated paternity. She is the author of numerous articles and of a recently published book, *Gehl v. Canada*: *Challenging Sex Discrimination in the Indian Act*.

Mary Eberts, O.C. Mary Eberts is one of Canada's leading constitutional equality rights litigators. She has been counsel in many challenges to *Indian Act* sex discrimination, and in ground-breaking *Charter* equality rights cases. She is an Officer of the Order of Canada.

Kukpi7 Chief Judy Wilson is the **Secretary-Treasurer of the Union of B.C. Indian Chiefs (UBCIC).** She is the Chief of the Neskonlith Indian Band and a member of the First Nations Leadership Council, and the Assembly of First Nations Comprehensive Claims Policy Committee.

Viviane Michel is from Maliotenam, and she is the **President of Quebec Native Women (QNW)**. Bilingual, French and Innu, Viviane Michel has years of frontline experience working on violence against women with the Missinak Indigenous women's shelter in Quebec..

Mary Jane Hannaburg is a member of the Mohawk Nation and of the Bear Clan. She is **Vice-President of Quebec Native Women (QNW).** She is a Certified

Addictions Specialist and Trauma Responder, and a Mental Health Worker at the Kanesatake Health Center.

Dr. Dawn Lavell-Harvard, Ph.D. is a member of the Wikwemikong First Nation, and Canada's first Aboriginal Trudeau Scholar. She is the **President of Ontario Native Women's Association (ONWA),** former President of the Native Women's Association of Canada, and Director of the First Peoples House of Learning at Trent University.

Dr. Pamela Palmater is a Mi'kmaw citizen and member of the Eel River Bar First Nation in northern New Brunswick. She has been a practicing lawyer for 20 years and is currently a Full Professor and the Chair in Indigenous Governance at Ryerson University.

Shelagh Day is the **Chair of the Human Rights Committee of the Canadian Feminist Alliance for International Action (FAFIA)**. She is a human rights expert, with many years of experience working with governments, human rights commissions and non-governmental organizations. She is a Member of the Order of Canada.

Appendix B

Sent by email March 30, 2021 by:

Chloé van Bussel
Operations manager- Gestionnaire des opérations,
Office of the Minister of Crown-Indigenous Relations/ Cabinet de la ministre des Relations Couronne-Autochtones,
Tel: (873)-353-9135 | chloe.vanbussel@canada.ca

Registration Information Provided by Minister Bennett during meeting with Working Group, March 29, 2021

Applications

- Expected 67,000
- Applications Received since December 2017 31,500 (47.0%)
- Applications Processed as of March 25, 2021 17,500 (54.1%)
- Applications to be Processed as of March 25, 2021 11,379 (36.7%)
- Applications Partially Processed as of March 25, 2021 2,837 (9.2%)

Automatic Indian Status Amendments

- Registrations Completed 125,000
- Individuals newly able to pass on entitlement due to Registration Category Amendments 57,000

Service Standard Analytics

- Number of Applications within service standards (between 6 mos. and 2 years) 3,878
- Number of Applications outside service standards 10,338

Funding to Date

- An initial investment of $19 million was provided in 2018

- An additional investment of $21.2 million over three years starting in 2020-21 was approved in December 2020.
- Of the $21.2 million, $15.4 million will allow for an increase in resources to process registration claims, and $5.8 million will be used for engagement and monitoring activities.
- Total Funding – $40.2 million as of December 2017

Appendix C

Sent by email by Jordano Nudo, October 8, 2020
Conseiller politique | Policy Advisor
Cabinet du ministre des Services aux Autochtones | Office of the Minister of Indigenous Services
873-455-1127
Jordano.nudo@canada.ca

Responses to the Canadian Feminist Alliance for International Action September 24, 2020

1. **What estimate of the number of First Nations women and their descendants who are eligible to be registered because of the August 15, 2019 amendments is ISC using as its base for allocating staff and resources? How many new staff are being hired, and what is the amount of funds that are allocated for implementation of S-3?**

- According to independent demographic estimates, the removal of the 1951 cut-off could result in between 270,000 and 450,000 individuals being newly entitled to registration under the *Indian Act* over the next decade.
- The actual increase in the registered population will depend on the number of individuals who choose to apply and whose applications support their registration.
- Since 2017, the Winnipeg Processing Unit, a dedicated S-3 processing unit, has steadily increased from approximately 20 to 53 employees in 2020. There are plans onboard additional staff.
- Registration support is also provided by 22 subject matter experts, entitlement officers and genealogical researchers in Headquarters.
- To support the processing of files in French and English at the same rate, ISC has created a processing unit in Quebec. Hiring and training of staff to support this unit is ongoing.
- For the implementation of S-3, ISC was allotted $19 million in 2018 following the coming into force of Bill S-3 in December 2017.
- Additional funds were supplied to enhance individual programs (for example Non insured health benefits) on an as needed basis to account for the increase in those newly entitled to access them.
- This month, an additional $21M has been secured for the implementation of the 2019 S-3 amendments (the 1951 cut-off) to further increase staff for processing of applications, to modernize operations, and for stakeholder engagement and impact monitoring.

2. **How many applications the Registrar has received that are based on entitlement newly provided by the August 15, 2019 amendments?**

    - Since August 15, 2019, the Winnipeg Processing Unit has received 6200 applications. Some people may have already been included in our inventory if they applied before August 15, 2019.
    - Unfortunately, we don't know how many applications we have received that are from applicants affected specifically by the 1951 cut-off and this is because an application must be processed in its entirety before it is known that it is impacted by the 1951 cut-off.
    - There is no way to know, upon intake, whether the applicant falls under the 2017 or 2019 amendments.
    - We do not track whether an applicant is registered under the 2019 amendments vs. the 2017 amendments. They are all tracked as one S-3 workload or inventory. This feature of the legislation is intentional to prevent further discrimination based on sex.

3. **Are affidavits considered circumstantial evidence for the purposes of satisfying the unknown and unstated paternity provisions? What does the Registrar do in situations of an unknown paternity due to rape?**

    - All registration decisions are based on the balance of probabilities. This means that the evidence must show that it is more likely than not that the parent, grandparent, or ancestor is, was, or would have been entitled to be registered even if they are unknown.
    - As outlined in section 5(6) of the *Indian Act,* the Registrar shall rely on any credible evidence that is presented by the applicant or that the Registrar otherwise has knowledge of and draw every reasonable inference in favour of the applicant.
    - In situations where the applicant is unable to provide any circumstantial evidence, the applicant, and/or a person with knowledge of the applicant's ancestry or affiliation to a First Nation, are encouraged to provide any information that could help establish the person's entitlement to registration.
    - Applicants are welcomed to submit affidavits or signed statements as circumstantial evidence to support their application for registration; however, it should be noted that applicants are not limited to affidavits and other types of circumstantial evidence are also accepted for review.
    - In cases where an applicant is experiencing evidentiary difficulties, a discretionary decision may be rendered by the Registrar.
    - Where a discretionary decision is required, cases are brought to an interdisciplinary case committee for review after which the case is presented to the Registrar for decision.

- Only the Registrar has the authority to render a discretionary decision.

4. **How do applicants know that there is a priority processing policy for women and descendants who are elderly, have medical problems, or disabilities? How does an applicant trigger priority processing?**

    - Applicants that express an urgent need or request faster processing for registration or a Secure Certificate of Indian Status (SCIS), whether verbally or in writing, will have their applications assessed for priority processing on a case-by-case basis. Further documentation to support priority processing may be requested in some circumstances.
    - Based on the July 23, 2020 meeting with the CFAIA, ISC is priority processing files of those aged 75 and over already in the queue (approximately 200 applications).
    - If the Department receives pertinent information pertaining to a specific application(s), those may be processed on a priority basis for reasons including:
        - medical emergencies, including travel for medical reasons for the cardholder or the cardholder's spouse (with a health professional's note);
        - age of applicant;
        - employment;
        - education funding requirements (with a post-secondary letter of acceptance); and
        - per capita one-time payment to the band to which the applicant could be a member.
    - This policy is not currently public. The Department is considering publicizing the policy in future external communications materials.
    - Generally, and in support of equitable consideration, applications are processed in order of receipt.

5. **Will ISC undertake to review ongoing and residual sex discrimination and address and remedy it?**

    - The Department is taking steps to address the residual discrimination as a result of sex-based inequities in the *Indian Act*.
    - The onboarding of additional staff, system enhancements, workload management strategies, and additional funding are being pursued to further increase processing capacity and improve client service.
    - These complementary measures will provide support to ensure that women and their descendants previously impacted by the sex-based inequities in the registration provisions are registered and have access to the associated rights, benefits and services in a timely manner.
    - The Department is committed to monitoring the impacts of the implementation of S-3 in partnership with First Nations and other stakeholders which will further support the Department's understanding of any residual discrimination.

- ISC is partnering with the Assembly of First Nations (AFN) and waiting on a proposal from the Native Women's Association of Canada (NWAC) to continue outreach on S-3, to assist in the monitoring of impacts, and to identifying possible solutions for other persisting inequities in the registration provisions.
- ISC will further engage the Canadian Feminist Alliance for International Action to help reach impacted individuals.
- Engagement with First Nations and partners is ongoing and the Department is developing proactive communications strategies to reach individuals who are impacted by the changes under S-3.

6. **Will ISC negotiate reparations for First Nations women and their descendants who have been the victims of sex discrimination in the Indian Act?**

    - We acknowledge your interest in this issue. We do not currently have a mandate to negotiate on this matter.
    - Discussions regarding reparations for those affected by sex-based discrimination in the registration provisions of the *Indian Act* would require support from Cabinet.

7. **Will ISC consult with us about its interpretation of S-3 amendments?**

    - The Department welcomes collaboration with CFAIA on S-3 and is open to hearing CFAIA's interpretation of the S-3 amendments.
    - Lori Doran, Director General responsible for S-3 implementation will reach out.

8. **Will ISC reinstate women, and the descendants of women, who lost status because of involuntary enfranchisement, or coerced enfranchisement, without further litigation?**

    - The Department acknowledges the challenges that have been caused by enfranchisement. This issue was raised in the *Exploratory Process* and the *Collaborative Process*.
    - The Department is committed to engaging and addressing other known inequities including issues of enfranchisement.

RYERSON UNIVERSITY
Department of Politics and Public Administration
Faculty of Arts

June 14, 2021

Ibrahim Salama, Chief
Human Rights Treaty Branch
CCPR Follow-up Team

Dear Mr. Salama and Members of the CCPR Follow-up Team;

Re: CCPR Follow-up Process for Ascertaining the Measures Taken by Canada to Implement the 11 January 2019 Decision of the Committee concerning the Petition of Sharon McIvor and Jacob Grismer, CCPR/C/124/D/2020/2010

I am writing to support the Petitioner's request for immediate and effective implementation of the UN Human Rights Committee decision and remedy in McIvor v Canada, CCPR/C/124/D/2020/2010. I am gravely concerned about the health, safety and well-being of First Nations women and their descendants by Canada's failures to fully implement the above-noted decision and its failures to address multiple, overlapping forms of residual sex discrimination related to Indian registration.

By way of background, I am an Indigenous woman from the Mi'kmaw Nation and registered Indian under the *Indian Act, 1985* and registered member of Ugpi-ganjig (Eel River Bar First Nation). I have 4 university degrees, including a doctorate in law which focused exclusively on sex and race discrimination in the *Indian Act's* registration provisions and the corresponding impacts of band membership (membership in a First Nation). I also published a book on this subject-matter entitled: *Beyond Blood: Rethinking Indigenous Identity* (Purich Publishing [now UBC Press], 2011).

I have been a lawyer in good standing with the Law Society of New Brunswick for 23 years and worked with the Government of Canada for 10 years as legal counsel at Justice Canada providing legal advisory services to Indian Affairs on issues related to the *Indian Act*, including Indian registration. I was also a senior Director at Indian Affairs who oversaw Indian registration in the Atlantic region. Following my work at Justice Canada, I was a human rights investigator at the Nova Scotia Human Rights Commission before I came to be Full Professor and the Chair in Indigenous Governance at Ryerson University. At Ryerson, my research and community-based work has focused on ongoing sex and race-based discrimination in Indian registration and band membership in First Nations.

This work has included providing expert testimony and submissions to Parliamentary and Senate committees studying legislation impacting Indian registration (*Bills C-3* and *S-3*) as well as submissions to various United Nations human rights treaty bodies and the Inter-American Commission on Human Rights in relation to sex and race-based discrimination and Indian registration under the *Indian Act*, and it's connection to forced assimilation, legislative extinction, impoverishment of First Nations women and children and its direct links to the higher

rates of violence and murdered and missing Indigenous women and girls. I am considered a subject-matter expert on the issues raised in the above Petition.

The following represents clear examples of how Canada has not fully implemented to decision of the Committee concerning the Petition of Sharon McIvor and Jacob Grismer and has in fact, created new problems.

Indian Registration (status):

While Canada has amended the *Indian Act's* registration provisions to address certain elements of sex discrimination in Indian registration, it has failed to take proactive steps to ensure that all First Nation women and their descendants have been registered. The federal government estimates that between 270,000 and 450,000 First Nations women and their descendants may be entitled to Indian registration under the *Bill S-3* amendments to the *Indian Act.* However, the Parliamentary Budget Officer found that the number could be as high as 670,000, and predicted that about 268,00 of these would actually apply. However, as of March 2021, only 17,500 people have been registered in the 3.5 years since the amendments were made.

At the current average rate of 5,833/year, it would take over 100 years for Canada to register all those entitled. Yet, Canada processes over 5 million passports every year. There is no other program or service offered in Canada that has such an exceptionally long wait-time, which is another example of discriminatory treatment of First Nations women. Similarly, the approvals of Indian registration for First Nations women under *Bills C-3* and *S-3* amendments are subject to a 10-year expiry date on their registration cards. There is no expiry date for First Nations men and their descendants who had previously been registered.

Federal Benefits:

Without Indian registration, First Nations women and their descendants are excluded from accessing First Nations-specific social programs and services like uninsured health benefits to pay for critical health services like prescriptions, long term healthcare supports, dental care, eye care, and mental health services. It also means that they cannot access funding for post-secondary education in universities, colleges and training institutions in order to ensure employment opportunities. Nor will they have access to the legislative income and property tax exemptions to help pay for food, clothing, transportation and housing supplies. Every day that Canada fails to register these women and children, contributes to their high rates of poverty, ill health and pre-mature deaths rates.

Band (First Nation) Membership:

A lack of Indian status also means that for the majority of the 634 First Nations whose membership lists are controlled by Canada, First Nations women and children cannot be registered as band members (members of their First Nation communities). As a result, they cannot access any community-based programs and services like social housing, health clinics, healing centres, on-reserve day-cares and schools, or the cultural supports located on-reserve

including Indigenous language instruction. Non-band members are also frequently screened out of employment opportunities in their First Nations which are reserved for band members only. In the federal, provincial and public context, unregistered First Nations women also lack the ability to apply for jobs that are set aside for First Nations, especially in education, healthcare and government.

Political Voice:

The lack of Indian status and band membership also precludes First Nations women and their descendants from participating in the governance of their home communities. They cannot vote in government elections, nor can they let their names stand to be elected as Chief or Councillor in their communities. This effectively prevents these women from having any say in local governance or matters pertaining to their inherent, Aboriginal, treaty and land rights. Lack of membership at the local band (First Nation) level also means that they cannot participate in larger regional, provincial or national political organizations and thus cannot advocate for their interests at a higher political level.

Land Rights:

A lack of Indian status and band membership means these women are further prevented from voting in referenda in their local First Nation on important issues like land claim settlements, resource agreements or local laws. They would be excluded from any per capita payments, compensation or land distribution. They would also be prevented from living on reserve or acquiring possession of lands on reserve. Thus, their ability to participate in economic development on their reserve lands or traditional lands is also effectively prohibited. It should be noted that Canada is engaged in negotiations with hundreds of First Nations on a wide range of agreements which do not include the participation or input of all these non-registered First Nations women and their descendants.

Aboriginal and Treaty Rights:

Both federal and provincial governments often rely on Indian registration and band membership in specific First Nation communities to determine who may access constitutionally-protected Aboriginal and treaty rights; like the rights to hunt, fish or gather within traditional or ancestral territories. Non-registered (non-status) First Nations women and their descendants are frequently harassed, charged or effectively prevented from providing traditional foods for their families. Further, they are often confronted with confiscation of their vehicles and equipment and/or burdened with expensive legal fees associated with defending their rights in court, which can take many years to resolve. They are also excluded from annual treaty payments from historic treaties or other benefits and payments associated with modern treaties.

Pandemic Supports:

A lack of Indian status prevents First Nations women and their descendants from accessing critical pandemic related supports like PPE, priority vaccinations and other supports set aside by

federal and provincial governments. It also means that their voices are excluded from tri-partite emergency planning related to the pandemic. At the local level, the lack of Indian status and band membership means that they cannot access pandemic supports at the band or First Nation level; which include PPE, vaccination clinics, food baskets and other related supports. It also means that they are not included in critical data collection related to the pandemic, like infection, hospitalization, disability and death rates – statistical information for Indigenous pandemic planning now and into the future.

Reparations:

There is currently no plan to make reparations to First Nations women and their descendants who were victims of sex-based discrimination under Canadian and international laws. The *Bill C-3* and *S-3* amendments to Indian registration served to eliminate some of the sex discrimination against First Nations women and their descendants, but specifically prevents them from being compensated for generations of sex discrimination, exclusion and lost benefits. This is despite the fact that under Canadian law, anyone who suffers a breach of their equality rights is entitled to compensation. This is itself a new form of sex discrimination which is a direct result of legislative amendments that were intended to alleviate sex discrimination in Indian registration but in trying to limit the scope of the remedy, created new forms. This certainly does not comply with the Committee's requirement for Canada to make full reparation and to take steps to prevent similar violations in the future.

Diminishing Equality Rights for First Nations Women:

Though Canada has consistently lost court challenges to its discriminatory Indian registration rules, it has not fully remedied the discriminatory treatment experienced by First Nations women and their descendants. It has also failed to compensate them for both historic or ongoing discrimination due to the delayed registration process and the associated or residual impacts of lack of registration. When it does make legislative amendments, Canada has done so in the most restrictive manner possible – in a form of diminishing equality. For example, in the *Bill C-31* amendments to the *Indian Act's* registration provisions, not only were First Nations women restored to Indian status, but their band membership was also protected. This is because pre-1985, Indian status and band membership went hand in hand.

Yet, when Canada amended the Indian registration provisions with *Bill C-3* and *Bill S-3*, not only did they specifically prohibit compensation for these women; but they did not protect their band membership. Therefore, thousands of First Nations women and descendants who may be registered in the future, can be excluded from band membership – even if they were born pre-1985. This occurs when a First Nation has assumed control of its own membership code under section 10 of the *Indian Act* – a power bestowed on First Nations in 1985 in response to having to reinstate First Nations women under *Bill C-31*. If Canada does not protect band membership for all those newly entitled due to sex discrimination, then they have only remedied half the discrimination. Canada cannot in good faith transition to First Nation-controlled membership without first restoring the band membership of First Nations women and their descendants that they would have had, but for the sex discrimination in Indian registration.

Thank you for taking this letter into account in your deliberations. I would be pleased to help answer any questions you may have or provide additional information and clarifications.

Sincerely;

Dr. Pamela D. Palmater
Professor & Chair in Indigenous Governance
Department of Politics and Public Administration
Faculty of Arts, Ryerson University
ppalmater@ryerson.ca
(905) 903-5563 (cell)

Law Office of Mary Eberts

June 14, 2021

Ibrahim Salama,
Chief,
Human Rights Treaty Branch,
And CCPR Follow-Up Team

Re: **Implementation by Canada of the 11 January 2019 Decision of the Committee concerning the Petition of Sharon McIvor and Jacob Grismer**
CCPR/C/124/D/2020/2010

Dear Mr. Salama and Members of the CCPR Follow-Up Team,

I am writing to provide information to the Committee with regard to the Follow-Up Process in the matter of *McIvor v. Canada,* CCPR/C/124/D/2020/2010.

I am a Canadian lawyer who began working with Indigenous women on the issue of sex discrimination in the *Indian Act* by representing Indian Rights for Indian Women in the 1980s. In addition to representing the Native Women's Association of Canada when it intervened in Sharon McIvor's appeal to the Court of Appeal in British Columbia [*McIvor v. Canada (Minister of Indian and Northern Affairs)*, 2009 BCCA 153], I have appeared as counsel in the following reported cases dealing with sex discrimination under the *Act*: *Perron v. Canada (Attorney General*) [2003] OJ No. 1348; *Sawridge Indian Band v. Canada* (2004) 316 NR 332 (FCS); *Descheneaux v. Canada (Procurateur-General*) 2015 QCSC 3555; *Gehl v Canada (Attorney* General), 2017 ONCA 319 and *Canada (Human Rights Commission) v. Canada (Attorney General),* [2018] 2 SCR 230, as well as a number of unreported cases. I have also written articles in this area, and presented to legislative committees, and I have taught on this subject at the Osgoode Hall Law School certificate program in Aboriginal Law. In addition, I was actively involved in securing the guarantees of equality in section 15 of the *Canadian Charter of Rights and Freedoms*, and have been counsel in several foundational cases in the Supreme Court of Canada dealing with that section and the *Charter* generally.

I am deeply troubled by Canada's public position on the issue of sex discrimination in the *Indian Act*, as represented most recently in its statements to the *Canadian Parliament in Report to Parliament: Review of S-3*, December 2020. Its position does not accurately reflect the law of equality in this country.

Canada's Position on Sex Inequality and the Indian Act

Canada states at page 10 of its *Report* that as a result of its amending legislation, particularly *Bill S-3*, "all sex-based inequities previously in section 6 of the *Indian Act* have been eliminated."

In the law relating to section 15 of the *Charter*, under which most if not all of the challenges have been brought to the *Indian Act*, "inequity" has no meaning. The correct term to describe something which violates the guarantees of section 15 is "inequality". It is readily apparent that the amendments cited by Canada do not, in fact, remove sex "inequality".

In its presentation to Parliament, Canada takes into account only those instances where the *Act*, on its face, makes a distinction between men and women, and in so doing uses the terms "men" and "women". Those cases where the language of the *Act* is apparently neutral on its face, but generates discrimination through its application, are left out of Canada's analysis. However, these situations clearly constitute inequality on the basis of sex. In a country like Canada, where legislative change is usually only prompted by a Court finding of inequality, it is important that this terminology be clear. It is a finding of inequality on the basis of sex, whether on the face of the *Act* or in its impact, that will force needed change. Canada underestimates the true extent of the inequality permeating the *Indian Act* by counting only those cases where the different treatment of men and women is clear on its face.

The Two-Parent Rule: Impact Discrimination in the Indian Act

In 1985, *Bill C-31* enacted a new requirement that a child needs to have two parents with status in order to be eligible for Indian status. Up to that time, a child could receive status from one parent, who was in almost all cases the child's father. Where a single woman with status gave birth to a child, she could, with a few exceptions, pass her status on to her child. The 1985 amendments removed that single opportunity from women with status.

Canada introduced the two-parent rule in 1985 instead of simply making it possible for a child to derive status from either the mother or the father. This rule is apparently neutral on its face, making no one parent superior to the other in the matter of conferring status. However, the privilege of the male parent was transferred from the old *Act* to the new one by means of this two-parent requirement. That privilege was apparent right from the day the legislation came into effect. Couples where the wife derived status from her husband before 1985 were immediately ready to comply with the two-parent rule. That was because *Bill C-31* gave to the woman who had got status from her husband under the old Act the right to pass her status on to her child, which she had not had under the previous law. This woman with the new right to confer status and the husband who already had status were thus able to give full status to their children right away. Couples where the wife lost status upon marriage to a non-status male, and then regained it under *Bill C-31*, were not similarly able to comply with the two-parent rule. This was because the man did not get status through that marriage, either before or after 1985. The wife with newly re-acquired status and her non-status husband could not comply with the two-parent rule. Thus their children were granted status under section 6(2) of the *Act,* known colloquially as "the second generation cut-off".

The Two-Parent Rule, Second Generation Cut-Off, and a New Generation of Lost Children

A person with two status parents receives status that not only lasts through their lifetime, but may also be passed down to the next generation. Even if that person has a child with someone who does not have status, the child will still have status, although it is the lesser form of status available under section 6(2). A person who has one status parent, and thus status under section 6(2) cannot pass that status down to the next generation, unless the child's other parent also has status. This inability of the person with 6(2) status to confer it on a child is why this is called "the second generation cut-off" In extensive consultations across the country conducted by Minister's Special Representative Claudette Dumont-Smith, it became apparent that the inequality of the greatest concern to First Nations was this second-generation cut-off*: Final Report of the Minister's Special Representative on the Collaborative Process on Indian Registration, band membership and First Nation citizenship (*May 2019), page 9.

The Special Representative observes in her report that First Nations are aware that the second generation cut-off will gradually eliminate persons eligible to be registered as an Indian. She says, "The end result, in the not so distant future, is that some communities will no longer have any registered Indians…." (p.9) The choice of the two-parent rule for acquiring status, instead of just making the one-parent approach available to both women and men, contributes to what has always been the long term goal of the registration system under the *Indian Act*: the reduction of the number of Indians.

Unknown and Unstated Paternity

The second generation cut-off creates a precarious situation for female parents. As observed by Justice Sharpe of the Ontario Court of Appeal in the *Gehl* case, It is relatively easy to determine who is the mother of the child. Determining who is the father, and thus ascertaining his status, is more difficult. The *Act* leaves it up to the man to consent to being identified as the father, or not consent, giving him enormous power. If he chooses to withhold his name from the registration application in order to conceal an infidelity, the *Indian Act* permits him to do that.

Paternity is particularly difficult to ascertain in cases like rape, gang rape, or incest. In such cases, paternity may be known but unstated, or simply unknown. Where the father does not identify himself, or cannot be identified, the mother with 6(2) status cannot provide full status to her child. If the child has no status, the mother has a very difficult choice to make. As a status person, she is eligible to live on reserve, or to visit friends and relatives there. As a non-status person, her child has no such right. This rule, then, sets the stage for women and their children to be exiled from their home communities in the same way that the earlier rule about losing status upon marriage to a non-status male did. Women and children off reserve, or without family and community support, become very vulnerable to violence and exploitation, as has been reported many times.

Canada's 2020 *Report* to Parliament states that *Bill S-3* has provided a remedy for the problems caused by unknown or unstated paternity (p.9). A new section 5(6) of the *Act* is designed to circumvent the former policy of the Department that the father's name must be provided in order that his status be determined. The section provides that the Registrar need not establish the identity of the father, but is to rely on "any credible evidence" that is presented by the applicant, and to "draw from it every reasonable inference in favour of the person in favour of whom the application is made."

Unfortunately, this relaxation of the rules of proof will not be effective in every case. If it desired to keep yet another generation of women and children from going into exile, Canada could have continued the right of the single woman to give status to her child, present in the law before 1985.

Enfranchisement

In addition to these new inequalities created by the 1985 legislation, there are a number of cases where no remedial legislation has addressed an historic inequality and it thus remains in force. One of these historic inequalities, under increasing pressure from litigation, is enfranchisement.

Enfranchisement was introduced before Confederation, in *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, 20 Vict. (1857) c.26. That it was intended as a tool to encourage assimilation, and eventual absorption of the Indigenous population, has been clear from the outset. The basic scheme was that a male Indian who proved his educational or other accomplishments to the satisfaction of the Crown would be allowed to shed Indian

status and receive land that, in due course, he could leave to his descendants. For various periods from its origin until its abolition in 1985, enfranchisement was made involuntary for men. Even if the enfranchisement was "voluntary", the reasons for it reveal that it was in many cases a measure of desperation: men would enfranchise to keep their children away from residential school, or to be able to hunt or fish in areas where the First Nation right to do so had been overridden. Whether the man's enfranchisement was voluntary or involuntary, the law provided that his wife and minor children were to be enfranchised with him. They had no choice. For a certain period before 1920, single women were eligible to apply for enfranchisement. However, it came to light in the case of *Hele v. Canada (AG),* 2020 QCCS 2406 that zealous officials would enfranchise single women even after the legal justification for it had lapsed.

Bill C-31 did not address all the many situations in which women were involuntarily enfranchised. Nor did *Bill S-3.* The Minister's Special Representative found that this issue was of great concern to First Nations. In June 2021, it was announced that a class action on behalf of several families in the West had been commenced, targeted at the harm done by enfranchisement. It is noteworthy that the first enfranchisement law, in 1857, was also the first legislation to enforce the loss of women's status as a result of her husband's loss or lack of status. While male enfranchisement proved to be very unpopular over the decades, attracting comparatively few applicants, the strategy of removing status from women as a result of their husband's status proved to be an enduringly successful tool of assimilation. It was widely used. Counsel in the new class action, Ryan Beaton, sums it up this way: "Parliament's stated intention for enfranchisement was to gradually reduce the number of status "Indians", while imposing a discriminatory view of women as subservient to their husbands, as recognized by the country's highest court." (https:// powerlaw.ca)

Summary

The overview above is necessarily a brief summary of a complicated subject which is laden with legislative amendments stretching from before Confederation.

Indigenous women still do not have full equality under the law, and the equal benefit of the law, as required by section 15 of the *Canadian Charter of Rights and Freedoms*. The language of section 15 was deliberately sought by women's advocates in order to ensure that narrow language or a narrow iinterpretation of rights, would not prevent justice for Indigenous women.

Canada's policy of moving glacially to reform the *Indian Act,* legislating only when forced to by a Court decision finding sex discrimination, ensures that the *Indian Act* will continue to act as an effective engine for assimilation, for loss of culture and language, family destruction and violence against women.

Yours truly,

Mary Eberts
Mary Eberts, O.C.

95 Howland Avenue, Toronto, Ontario M5R3B4