

BRIEF

**Subject: Changes proposed to the Indian Act and the
administration of the Indian Act**

Presented to

DEPARTMENT OF INDIAN AFFAIRS
AND NORTHERN CANADA

by

QUEBEC NATIVE WOMEN INC.



September 29th, 2000

FOREWORD

Our message to the federal government is hardly new. The Canadian Government must assume its responsibilities in regard to the protection of equality rights for aboriginal women. The struggle for the recognition of fundamental rights for aboriginal women, their children and their grandchildren, punctuated by court action, promises and disappointments, seems to be a struggle without end in this country.

Since 1974, the Quebec Native Women's Association has actively denounced the injustices caused by the *Indian Act*. In particular, since 1984, we have presented a number of briefs and position papers to various entities including: the brief presented to the Standing Committee on Indian Affairs and Northern Development on Bill C-47 in June 1984; the brief to the Parliamentary Sub-Committee on Equality Rights in 1985; the brief presented to the Standing Committee on Indian Affairs and Northern Development in March 1986; the report on the implementation of Bill C-31 presented to the Standing Committee on Aboriginal Affairs and Northern Development in February 1988; the Brief presented to the First Nations' Circle on the Constitution in 1992; the brief filed with the Royal Commission on Aboriginal Peoples in 1993, to name but a few.

Unfortunately, all of our efforts to make the voices of aboriginal women of Quebec heard seem to have been in vain. Although the *Indian Act* was amended in 1985 to re-establish rights for aboriginal women, many of them are still confronted with numerous problems caused by the way in which the *Indian Act* is administered by DIAND and by Band Councils. The changes made to the *Indian Act* in 1985 were supported by the Quebec Native Women's Association because, for us, the injustices caused by this law had to be corrected within the same law.

This being said, we must state that the *Indian Act* is still, today, not only discriminatory, but out of date. Aboriginal women are aware that their rights are still not respected by the Government of Canada, this same government which thought it important to enact a *Charter of Rights and Freedoms* and which is signatory to a number of international covenants. We demand a number of major changes to the attitude of the federal government and that of the Department of Indian Affairs in regard to the administration of the *Indian Act*.

It is disgraceful that the Minister of Indian Affairs has organized a consultation of a few months with a minimal budget on a problem this complex while the agreement concluded between the Department of Indian Affairs and the Assembly of First Nations on the Joint Policy Initiative covers several years and has a budget of millions of dollars.

In this file, we see that we continue to be treated with little respect and that the Minister continues to act as though he has little concern for the rights of the aboriginal women of Canada. Nonetheless, we will persist and we wish to propose our

ideas for solutions. These come from our reflections on the issues and the positions we have taken for the past 25 years to improve the situation of our families, our children and our nations.

INTRODUCTION

In 1985, when the amendments to the *Indian Act* were introduced, it was evident that these amendments did not go far enough to truly eradicate the effects of the century-old discrimination against Indian women.

In fact, Bill C-31, as introduced by the Conservative government of the day, represented a net retreat from Bill C-47 which had been introduced by the previous Liberal government, passed by the House of Commons but not passed by the Senate as Parliament had been prorogued and the unanimous consent of all the Senators to the Bill could not be obtained.

Over the past 15 years, the problems created by Bill C-31 have been exacerbated to the point that many Indian families wonder whether the whole effort has been for nought. The imperfections of Bill C-31 have been multiplied and magnified as a result of governmental administrative policies which continue to discriminate against Indian women and their children, as well as by a lack of will on the part of the Government of Canada to ensure that even Bill C-31, as inadequate as it was, was implemented and enforced.

Among the many concerns raised by women are the discriminatory provisions of the *Indian Act* such as the restrictions on Indian status entitlement; the discriminatory policy of the Indian Registrar which requires identification of a child's father; the difficulty in transferring to another band such as the birth band because of the requirement of consent of the other band; the denial of band membership by some band councils even though the right to membership is protected under the *Indian Act*; by-laws preventing non-members from residing on the reserve which affect non-aboriginal spouses and, as a consequence, the children of such marriages; land allotments subject to the Band Council's will; the silence of the *Indian Act* with respect to division of property upon divorce when historically, lands and houses are registered in the male spouse's name; difficulties in obtaining orders for the temporary use of the matrimonial house in situations of family violence, or to have the order enforced on reserve; and the application of the Charter to Aboriginal Governments so as to attain balance between Aboriginal community interests and individual rights.

What is both discouraging and infuriating to those of us who have been involved for so long in the struggle for our basic human rights, is that the Government of Canada has consistently and deliberately ignored not only our own pleas for fairness and equity, but also the recommendations of such entities as the Standing Committee on Aboriginal Affairs and Northern Development, the Aboriginal Justice Inquiry of Manitoba, the Auditor General of Canada and the United Nation's Human Rights Committee.

Canada is a party to several international treaties which guarantee equality between men and women and forbid all forms of discrimination. It is also party to a Convention which specifically protects the rights of children. Furthermore, it is subject to the jurisdiction of several international institutions¹ established to ensure that States which, like Canada, **freely and voluntarily** become parties to international legal instruments, respect their obligations. Discrimination against the children and grand-children of Aboriginal women who regained their status under section 6(2) of the *Indian Act*, the assumption that the father of a child is not Indian if the mother does not reveal his identity, the unequal patrimonial rights of spouses and the adverse consequences of this situation in a divorce, as well as the lack of guarantee of residence within the community for non-aboriginal husbands are all situations which are incompatible with Canada's international obligations.

The Government of Canada has been repeatedly told for more than a decade that it is violating both the Constitution of Canada and its obligations under international law, yet it has refused to act to end the discrimination.

This refusal to act is often on the pretext that it does not wish to interfere in the internal workings of First Nations. However, the Government of Canada is bound by its own Constitution and by its obligations under international law. It cannot, **on any pretext**, create enclaves within its borders in which it permits the routine violation of basic human rights. Rather, it has a clear **duty to act** to protect the basic human rights of all those within its borders.

Given limited time and resources, we will address only a few of the many types of discrimination faced by aboriginal women in Canada and will concentrate on providing clear solutions to at least some of these problems.

CONTINUING DISCRIMINATION IN THE *INDIAN ACT*

You have heard, and are aware of, the continuing discrimination against re-instated women and their children under the amended *Indian Act*. The *Indian Act* cuts off entitlement to Indian status after two generations if one parent does not have Indian status. Among other adverse consequences, this leads to situations where members of the same family may not all be entitled to the same rights.

The Standing Committee on Aboriginal Affairs and Northern Development held six months of hearings on the implementation of Bill C-31 and published its report in 1988. In its report, at pages 30-36, the Standing Committee noted

¹ *Inter alia*: Human Rights Committee; Inter-American Commission on Human Rights; Committee for the Elimination of all Forms of Discrimination against Women

that there were a number of examples of residual sex discrimination in the amended *Indian Act*. It concluded:

“Most Indian groups, whether status, non-status, including native women’s groups, agreed that the 1985 amendments do not go far enough in recognizing Indian status for persons of mixed Indian and non-Indian heritage. While most also appear not to favour any arbitrary cut-off point, a uniform Quarter Descent Rule would at least place reinstated women on an equal footing with their brothers and would help to allay the fears of an ever-decreasing population of status Indians as a result of s. 6(2) and current rates of status/non-status intermarriage.”

The Standing Committee then recommended (Recommendation #11) that s. 6(2) of *An Act to Amend the Indian Act, 1985* be amended **before the end of the current session of Parliament** in order to eliminate discrimination between brothers and sisters. This was in 1988! Twelve years later, nothing has been done.

The *Act to amend the Indian Act, 1985* (Bill C-31) required the Minister to table a report on the implementation of the Act no later than two years following assent. The Minister did so, but concluded that it was too soon to determine the impacts of the amendments. He thus undertook to carry out a full review of the implementation of the Act and to report by 1990. This was done, and in the Minister’s “Report on the Impacts of the 1985 Amendments to the *Indian Act*”, the following was noted (at p. 8):

“Not all sexual discrimination has been eliminated by Bill C-31. There remains unequal treatment of some male and female siblings. Women who lost status through marriage prior to 1985 cannot pass status along through successive generations; their brothers who married non-Indian women prior to 1985 can do so. The brothers, their non-Indian spouses and their children, are automatically considered band members, while their sisters’ children can only acquire status. In the case of bands that have assumed control of membership prior to June 28th, 1987, the children of the female line have only conditional entitlement to band membership.”

The Minister of Indian Affairs and Northern Development thus acknowledged ten years ago that the *Indian Act* continued to discriminate against Indian women and their children. However, he made no attempt to introduce legislation to remedy this continued violation of our rights.

The *Report of the Aboriginal Justice Inquiry of Manitoba, 1991*, (at p. 203-204) pointed to the fact that “Despite the amendments intended to remove discrimination, the *Indian Act* today still contains clear forms of sexual discrimination - as well as the seeds of eventual termination of Indian status altogether.” It recommended that the *Indian Act* be amended to eliminate all continuing forms of discrimination regarding the children of Indian women who regain their status under Bill C-31.

CONTINUING VIOLATION OF CANADA’S INTERNATIONAL OBLIGATIONS

We have argued before that the various forms of differential treatment in the *Indian Act* were incompatible with Canada's international obligations, as reported in 1988 by the Standing Committee on Aboriginal Affairs:

Accordingly the Quebec Native Women's Association says the right of 12(1)(b) women with non-Indian spouses and non-member children to live on reserve with their families is not guaranteed. They argue that the various forms of differential treatment described above violate a variety of domestic and international human rights standards. The restricted ability of Indian women to pass on Indian status and band membership to their children and grand-children is said to be discrimination on the basis of sex and descent and therefore a violation of :

- -s. 15 of the Canadian Charter of Rights
- -ss. 2 and 7 of the Universal Declaration of Human Rights
- -ss. 1, 2(1), 3 and 26 of the International Covenant on Civil and Political Rights
- -s. 1(1) of the International Covenant on the Elimination of all Forms of Discrimination. In addition, the more limited ability of Indian women to reside on reserve with their families is alleged to be a violation of s. 17(1) of the International Covenant on Civil and Political Rights.²

The developments in international law since we last invoked it lead to the clear and inescapable conclusion that the Government of Canada continues to violate its international obligations by discriminating against Indian women and their children.

The Human Rights Committee has underlined the fundamental character of non discrimination:

Non discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.³

The importance of this principle is clearly reflected by the fact that it tolerates no derogation whatsoever, even in times of public emergency.

However, the regime which flowed from Bill C-31 has created significant inequalities among Aboriginal children and as such, it is incompatible with Canada's international obligations. A child born of a marriage contracted before 1985 whose father is non-Indian and whose mother regained her status under section 6(1) of the *Indian Act* may be deprived of the possibility to pass his or her Indian status on to his or her children, contrary to a child, also born of a marriage contracted before 1985 whose father is Indian and whose mother is non Indian. In addition, children of Indian women

² *Fifth Report of the Standing Committee on Aboriginal Affairs and Northern Development on consideration of the implementation of the Act to amend the Indian Act as passed by the House of Commons on June 12, 1985, August 1988, pp. 33-34.*

³ *Non-discrimination: 10/11/89, CCPR General Comment 18 (General Comments)*

who regained their status under section 6(2) of the *Indian Act* can be denied band membership.

This regime has also created significant inequalities among Aboriginal women because they are not all able to pass their status on to their children, an inability which carries grave consequences.

The Aboriginal child deprived of his or her status, or of band membership, is thus deprived of the right to take part in the life of his community, contrary to the provisions of Article 27 of the *International Covenant on Civil and Political Rights*, to the almost identical provisions of Article XIII of the *American Declaration of the Rights and Duties of Man*, which binds Canada since it became a member of the Organization of American States, in January of 1990, and of article 30 of the *Convention on the Rights of the Child*.

The Aboriginal child who is deprived of status or denied band membership is thereby deprived of the best means of preserving his identity, a right guaranteed under article 8 of the *Convention on the Rights of the Child*:

1. States Parties undertake to respect the right of a child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

Under the terms of Article 4 of the Convention, Canada has also undertaken to adopt the necessary legislative, administrative and other measures to implement the rights protected under the Convention. Upon ratifying the Convention, it made the following declaration:

It is the understanding of the Government of Canada that, in matters relating to aboriginal peoples of Canada, the fulfilment of its responsibilities under article 4 of the Convention must take into account the provisions of article 30. In particular, in assessing what measures are appropriate to implement the rights recognized in the Convention for aboriginal children, due regard must be paid to not denying their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.

Unfortunately, the Canadian Government has yet to put its words into action! International bodies came to the same conclusion as Canadian courts in holding that the principle of non-discrimination does not mean that all persons have to be treated in an identical fashion. Differences in treatment which are based on reasonable and objective criteria will not necessarily be incompatible with a State's international obligations. In fact, some situations may call for a different treatment. However, in all cases the measures will only be justifiable if they aim at correcting discrimination:

..as long as such action is needed to correct discrimination in fact, it is a case of

legitimate differentiation under the Covenant.⁴

The conditions have been spelled out by the Human Rights Committee:

Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such discrimination are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁵

One might be tempted to argue that the criteria of a non-aboriginal father and grandfather are objective. However, this measure is not intended to “correct discrimination in fact”. Its aim is to restrict the number of status Indians within the meaning of the Indian Act and its effect is to create a new situation of discrimination in fact. Consequently, it does not achieve a purpose which is legitimate under the Covenant. In fact, that is what the Human Rights Committee told Canada in April of 1999:

Concerned about ongoing discrimination against aboriginal women. Following the adoption of the Committee’s Views in the *Lovelace* case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstated, this amendment affects only the woman and her children, not subsequent generations, which may still be denied membership in the community. The Committee recommends that these issues be addressed by the State party.⁶

The Canadian Government has yet to show any sign of its intention to comply with the recommendations of the Committee.

The amendments to the *Indian Act* originally proposed by the Liberal government in 1984, just before Parliament was prorogued (Bill C-47), and which were assented to by the House of Commons, allowed for the reinstatement of women who had lost their status through marriage, their children and, in most cases, their grandchildren. The reinstatement was to both Indian status and to band membership.

After the 1984 election, it was the newly elected Conservative government which moved to narrow the eligibility for reinstatement, and to create the distinction between registration as an Indian and registration as a band member. It should not be difficult for the present day Liberal government to return to the principles of equality it espoused in 1984 and amend the *Indian Act* to do away with the sex discrimination which remains in the Act in order to allow for the registration of the grandchildren of reinstated women. Not to do so would be a continuing violation of Canada’s

⁴ *Id.*, para. 10.

⁵ *Id.*, para. 13

⁶ *Concluding Observations of the Human Rights Committee: Canada.*, 07/09/99. CCPR/C/79/Add. 105 (Concluding Observations/Comments), 7 April 1999, para. 19

obligations both under its own Constitution and under international law.

In summary, it is clear that, both on a national and on an international level, the entities which have looked at this problem have all concluded that the residual sex discrimination in the *Indian Act* is in violation of Canada's own constitution and its international obligations. It is also clear that the federal government is fully aware that this is the case. The only question is whether or not the Government of Canada is sufficiently concerned with the protection of human rights to take the action required to eliminate this legislated discrimination. The fact that there may be opposition from some of the entrenched aboriginal leadership whose self-interest leads them to resist any change to the *status quo*, cannot serve as an excuse. Canada does not have the power to allow the creation of areas within its borders in which there are no guarantees of basic human rights.

REGISTRATION OF A CHILD WHOSE FATHER IS UNKNOWN

In administering the *Indian Act*, government officials have decided that, in the case of the registration of children of unmarried women, the father must be named. If the mother is unwilling or unable to name the father and/or if the father is unwilling to sign a certificate of paternity or similar document, the child will be presumed to have had a non-Indian father. This affects the child's capacity to pass on Indian status to his or her own children. There is no such requirement in the *Indian Act* and this requirement is a matter of administrative policy which can, and should, be changed immediately.

The Standing Committee on Aboriginal Affairs and Northern Development, in its six months of hearings on the implementation of Bill C-31, heard a great deal about this form of discrimination, and dealt with it in its report.

As a result of testimony heard by the Committee, it noted that in cases in which the child is the result of rape or incest, if the father is married to someone else or if the relationship ended with bitter feelings by the man, it is not possible to obtain the father's signature on a certificate of paternity or other similar document. The Committee recommended (Recommendation #8):

"We recommend that as there is no legal requirement in the Act for unmarried Indian women to name the father of their children in order to establish their entitlement to registration and band membership, the practice be discontinued immediately. An affidavit or statutory declaration simply swearing or declaring the status of the father without naming him should be sufficient to satisfy the requirements of the application for reinstatement."

In ignoring these recommendations, the Canadian government violates its international obligations. As pointed out by the Human Rights Committee:

The Covenant requires that children should be protected against discrimination on any grounds such as race, colour, sex, language, religion, national or social origin, property or birth.⁷

These provisions are similar to those found in Article 2 of the *Convention on the Rights of the Child*. Consequently, the administrative policy requiring that unmarried women name the father of their child, failing which, the father is presumed to be non-Indian is incompatible with Canada's international obligations. This policy forces the mother to reveal the identity of the aboriginal father to avoid gravely penalizing her child. It constitutes arbitrary interference with her privacy, contrary to the provisions of Article 17 of the *International Covenant on Civil and Political Rights*.

Interference based on administrative policy and not on legislation has been deemed illegal within the meaning of Article 17 by the Human Rights Committee:

The term "unlawful" means that no interference can take place except in cases envisaged by the law.⁸

It is true that the protection of privacy, which includes the right not to reveal the identity of a child's father without suffering adverse consequences, is not an absolute. In the words of the Human Rights Committee:

As persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant.⁹

However, the knowledge of the identity of an Aboriginal child's father is not "essential in the interests of society". Such was in fact the opinion of the Standing Committee in 1998, when it proposes an alternative which was compatible with Canada's international obligations.

We re-iterate that the Report of the Standing Committee was tabled in 1988. Nothing has changed and the future of our children continues to be determined by administrative policy rather than by law. There is no excuse for refusing to discontinue this administrative practice. As stated by the Standing Committee, an affidavit or statutory declaration

⁷ *Rights of the Child (Art. 24)*, 07/04/89, CCPR, General Comment 17, Human Rights Committee (1989).

⁸ *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, 08/04/88. CCPR General Comment 16, para. 3, Human Rights Committee (1988).

⁹ *Id.*, para. 7

declaring the status of the father without naming him or requiring his signature, should be sufficient.

RESIDENCY

Women who have been reinstated faced many problems in returning to their reserves. In many cases, there is simply not enough housing and land to provide homes for them. At the time of the introduction of Bill C-31, the Minister of Indian Affairs promised extra funding for housing and, where required, that extra land would be provided in order to assure that the already desperate situation faced by many bands would not get any worse.

As early as 1988, the Standing Committee on Aboriginal Affairs and Northern Development had recommended (Recommendations #21 and #26) that the total costs of housing needed for C-31 registrants be supported and that an adequate land base be provided to First Nations for returning members. This was never done.

As the Auditor General of Canada noted 6 years after the passage of Bill C-31:

- 14.40 Despite the government's assertion that no band would suffer as a result of Bill C-31, DIAND did not, at the time of our audit, have a financial plan to identify how and when the existing and future housing shortfall would be met. Furthermore, although DIAND was aware that some reserves could not physically accommodate the requirements for more housing, it did not put forward any possible solutions to this problem.¹⁰

In some cases, despite more than adequate resources, band councils have attempted to block C-31 registrants in every way possible, even when they are returning to live, for example, in their parents' homes. A number of band councils have simply defied the 1985 amendments to the *Indian Act*. As the Auditor General of Canada reported:

- 14.41 Some C-31 registrants have gained status but have not been accepted by a band. Two Indian organizations estimate that 9 out of 10 C-31 registrants in Alberta have no band membership. Some bands have introduced restrictive membership codes that effectively block C-31 people from joining the band. One example is a code that requires a period of on-reserve residency, yet allows only band members to live there. This usually occurs with wealthy bands that fear dilution of the band wealth and disruption of the existing band power structures.¹¹

This situation does not only exist in the west, it exists as well here in Quebec where several bands have consistently acted in defiance of the *Indian Act* amendments and have not only refused to allow C-31 registrants to return, but have also harassed, intimidated and attempted to forcibly remove women who have married non-Indians, even when those women have lived all their lives on reserve.

¹⁰ *Report of the Auditor General of Canada to the House of Commons*, 1991, p. 335

¹¹ *Report of the Auditor General of Canada to the House of Commons*, 1991, p. 335

The 1985 amendments included a provision allowing band councils to make by-laws to regulate residency on reserve. DIAND takes the position that this power can be used to prohibit non-Indian spouses from living with their Indian wives on reserve, thus forcing women to wish to return to their home communities to either divorce their husbands, or remain in exile. Furthermore, the *Indian Act* only guarantees a right of residence for minor children of reinstated women, so that a child, who has grown up most of his life on reserve, can be forced to leave at the age of eighteen.

DIAND's interpretation of the residency by-law power is wrong. Under general administrative law principles, a power to regulate an activity does not include the power to completely prohibit it, unless there is specific provision made to that effect in the enabling legislation. In any event, forcing a woman to choose between losing her husband and her children who are 18 years old, or being able to live in her community, is contrary to all basic notions of human decency and DIAND should not be encouraging the use of the residency by-law power in order to illegally circumvent the law.

Nor should DIAND be turning a blind eye to those band councils who simply choose to defy the amended *Indian Act*. Rather than using their leadership position, not to mention their financial power, to encourage band councils to respect the Act, DIAND has been a knowing accomplice in the defiance of the Act, often devolving more and more power, and larger and larger budgets, to band councils who openly refuse to respect the law.

Under Bill C-47, the Liberal government's attempt to amend the *Indian Act*, the residency rights of non-Indians married to Indians and all their children would have been guaranteed. This is certainly appropriate in a country which purports to care about the rights of women and children, and which supports the family as a basic cornerstone of society. It is also consistent with Canada's international obligations.

The fact that non-aboriginal persons do not have a guaranteed right to reside with their Indian spouses on reserve, and are placed in a situation where they risk expulsion, is incompatible with the provisions of article 8 of the *Convention on the Rights of the Child* to the extent that family relations are not adequately protected.

In addition, this lack of guarantee is incompatible with the provisions of Article 23 of the *International Covenant on Civil and Political Rights* which affirms, in terms identical to those of Article 16 of the *Universal Declaration of Human Rights* that:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The *Indian Act* should be amended so as to guarantee the right of a non-Indian spouse to live with his wife in her community and to have all their children live there as well.

DIVORCE

There is one further issue we would like to discuss. It does not arise out of the 1985 amendments to the *Indian Act* but, rather is a long-standing and urgent problem. The Supreme Court of Canada has decided that provincial laws relating to division of property upon divorce cannot apply to property on Indian reserves. The *Indian Act* is simply silent on this issue. Historically, lands and houses were always registered by DIAND in the male spouse's name. This all too often leaves women with no economic power and, in the case of divorce, a woman and her children find themselves homeless.

As the Aboriginal Justice Inquiry of Manitoba pointed out, quite aside from questions of legality, the lack of protection and fair treatment for aboriginal women encourages and leads to other forms of discrimination against them by both DIAND and by band councils.

“There is no equal division of property upon marriage breakdown recognized under the *Indian Act*. This has to be rectified. While we recognize that amending the *Indian Act* is not a high priority for either the federal government or the Aboriginal leadership of Canada, we do believe that this matter warrants immediate attention. The Act's failure to deal fairly and equitably with Aboriginal women is not only quite probably unconstitutional, but also appears to encourage administrative discrimination in the provision of housing and other services to Aboriginal women by the Department of Indian Affairs and local governments.”¹²

The Aboriginal Justice Inquiry of Manitoba specifically recommended that:

“The *Indian Act* be amended to provide for the equal division of property upon marriage breakdown.”¹³

Canada's failure to take these recommendations into account is contrary to its international obligations. As recalled by the Human Rights Committee in its General Comment 28 on Equality between man and women:

In becoming Parties to the Covenant, States undertake, in accordance with article 3, to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant, and in accordance with article 5, nothing in the Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights provided for in article 3, or at limitations not covered by the Covenant. Moreover, there shall be no restriction upon or derogation from the equal enjoyment by women of all fundamental human rights recognized or existent pursuant to law, conventions, regulations or customs, on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.¹⁴

¹² *Report of the Aboriginal Justice Inquiry of Manitoba*, 1991, p. 485

¹³ *Report of the Aboriginal Justice Inquiry of Manitoba*, 1991, p. 486

¹⁴ *Equality of rights between men and women (article 3)*: 29/03/2000, CCPR/C/21/Rev.1/Add.10, CCPR

No later than last March, the Committee reminded all States Parties to the Covenant that:

To fulfil their obligations under article 23, paragraph 4, States must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to.... the ownership or administration of property, whether common property of property in the sole ownership on either spouse. States should review their legislation to ensure that women have equal rights in regard to the ownership and administration of such property where necessary.
[...]

States must also ensure equality in regard to the dissolution of marriage.¹⁵

Discrimination against women has been defined in article 1 of the *Convention for the Elimination of all Forms of Discrimination Against Women* as follows:

the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Under the *International Covenant on Civil and Political Rights*, the rights which must be protected against discrimination are not limited to those listed. Any legislation adopted by Canada must be non-discriminatory:

In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It’s prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.¹⁶

Therefore, Canada can be held internationally liable for not amending the discriminatory provisions of the *Indian Act*, including those which deprive Indian woman of the same patrimonial rights as their spouses.

Traditionally, aboriginal women played an important economic role in their societies whether through their efforts at farming, their skill in gathering of food, preparation of clothing and preparation of furs for market, to name but a few. A

General Comment 28, para. 9.

¹⁵ *Id.*, para. 25-26

¹⁶ *Non discrimination: 10/11/89*, General Comment 18 para.12

family unit could not survive without the economic input of both men and women. The imposition of European values in which men controlled access to goods and services, including land and housing, was a major disruption to the foundation of the aboriginal family. This balance must be redressed.

The *Indian Act* should be amended to provide either for a regime in which spouses are common as to property or a regime of community of acquests in which property acquired during the marriage becomes the common property of both spouses. This would have to be done retroactively in the same way as the marriage regime was retroactively changed in Quebec for all Quebecers. Failing this, the *Indian Act* must be amended to provide for an equal division of property upon the dissolution of the marriage.

In conclusion, we have come to reiterate concerns which we have expressed on numerous occasions before today and to offer solutions which have already been suggested to Canada in the past. Our patience is not limitless. Our rights and the rights of many of our children are being violated. We expect the Government of Canada to take the initiative to amend the *Indian Act* so as to eliminate all discriminatory provisions and to put an end to discriminatory policies within the Department of Indian Affairs. We also expect the Government of Canada to live up to its constitutional obligation to ensure that powers exercised by Band councils are exercised in a manner compatible with the Canadian Charter of Rights and the international human rights covenants and conventions to which Canada is a party.

We re-iterate:

- 1) the Standing Committee found that the *Indian Act* continued to discriminate against women in 1988;
- 2) the Minister of Indian Affairs admitted that there was continuing discrimination against women in 1990;
- 3) the Aboriginal Justice Inquiry of Manitoba, led by the Associate Chief Justice of that province, found in 1991 that the *Indian Act* continued to discriminate against women;
- 4) the United Nations' Human Rights Committee also came to the conclusion, in 1999, that the *Indian Act* continued to discriminate against women.

We are confident that a Canadian Court would come to the same conclusion. The Government of Canada has two choices - it can either amend its legislation now in order to conform to its national and international obligations, or it can wait until a court declares the registration scheme under the *Indian Act* to be invalid and deal with the fallout and confusion which will inevitably result.

RECOMMENDATIONS

The Quebec Native Women's Association therefore recommends the following:

1. That the *Indian Act* be amended so as to eliminate all forms of discrimination against women. This would require the reinstatement to both Indian status and band membership of not only the women who lost their status as a result of the historical discrimination against them, but also of their children and grandchildren;
2. That the *Indian Act* be amended so as to ensure that non-Indian persons who are married to Indians have a right to reside on reserve with their spouses and that the children born of these marriages be ensured of their right to reside on reserve;
3. That the *Indian Act* be amended to ensure equality between husband and wife in regard to property and to ensure that there is equality in the division of assets in the case of divorce;
4. That the administrative policy of the Department of Indian Affairs which requires the identification and/or admission of paternity of the father of a child born to an unmarried woman be immediately changed to a requirement that the mother of the child sign an affidavit or statutory declaration as to the status of the father of the child.