



FEMMES AUTOCHTONES DU QUÉBEC INC.
QUEBEC NATIVE WOMEN INC.

Position Paper:

*BILL C-3: AN ACT TO PROMOTE GENDER EQUITY IN INDIAN REGISTRATION BY
RESPONDING TO THE COURT OF APPEAL FOR BRITISH COLUMBIA DECISION IN
MCIVOR V. CANADA (REGISTRAR OF INDIAN AND NORTHERN AFFAIRS)*

Presented to:
House of Commons Standing Committee on Aboriginal Affairs and Northern Development

Kahnawake, April 20th, 2010

About our organization

Quebec Native Women Inc/Femmes Autochtones du Québec

Quebec Native Women is a bilingual, non-profit organization that began as a grass-root community initiative in 1974. Our membership includes women from the 10 of the 11 nations of Quebec such as the Abenakis, Algonquins, Attikameks, Crees, Huron-Wendats, Innus, Maliseets, Mi'kmaq, Mohawks and Naskapis, as well as a diversity of Aboriginal groups from across Canada living in urban areas within the region.

QNW's mission is to advocate on behalf of the human rights of Aboriginal women and their families, both collectively and individually, and to lobby the needs and priorities of its members to all levels of government, civil society and decision-makers in all our areas of activity, in regards to Aboriginal peoples' rights.

At the political level, QNW works on behalf of Indigenous women throughout the country as well as internationally to obtain recognition of their right to equality, in both legislative and constitutional terms. QNW also supports Indigenous peoples' right to self-determination and encourages the full participation of Aboriginal women in the process leading to the achievement of that goal.

At the socio-economic level, QNW promotes and creates new training initiatives that will help its members to improve their living conditions thereby creating opportunities for them to become an integral part of the entrepreneurship and decision-making processes in their communities.

QNW provides support and encourages community initiatives that seek to improve the living conditions of Aboriginal women and their families. In this context, QNW is actively involved in cultural sensitization, in education and awareness and in research.

Quebec Native Women has enjoyed unprecedented growth in recent years, as reflected in the ever-increasing quantity and quality of its work producing results that are making a real difference. Backed by a solid organizational structure and strong experience acquired over its 35 year history, QNW is well known today for its proactive involvement in all areas affecting Aboriginal peoples lives.

Introduction

Given Quebec Native Women's (QNW) mission to work on behalf of Indigenous women and their family to obtain recognition of their right to equality, in both legislative and constitutional terms¹, QNW is therefore compelled to present its profound concerns regarding the Canadian Government's legislative proposal, Bill C-3, to amend the Indian status provisions in section 6 of the *Indian Act*² in its response to *McIvor v. Canada*.

While QNW appreciates this unique opportunity to address the historical discrimination faced not only by Aboriginal women but also by their male and female descendants under the *Indian Act*, an injustice which was not corrected with the passing of Bill C-31 in 1985, QNW deplores the restrictive vision proposed by the Federal Government that will not truly end this discrimination and the lack of any effective and meaningful consultation with Aboriginal peoples.

Background

The Sharon McIvor Case

Following the judgment of the Court of Appeal for British Columbia (CABC) of April 6th, 2009, in the *Sharon McIvor* case, the Canadian Government has decided to move forward with amendments to the Indian status registration provisions (section 6) of the *Indian Act*. The Court of Appeal in *McIvor v. Canada* declared sections 6(1)(a) and 6(1)(c) of the *Indian Act* to be unconstitutional, as they violate the equality provision (section 15) of the Canadian *Charter of Rights and Freedoms*, an infringement which was not justified by section 1 of the *Charter*³. However, the Court suspended its declaration of invalidity for 12 months to give Parliament time to amend the Act⁴.

The CABC thus ruled in favor of Sharon McIvor and her son Jacob Grismer concluding that the registration regime (section 6) of the *Indian Act* was still discriminatory towards Aboriginal women and their male and female descendants by precluding them from passing on status but on much narrower grounds than the Supreme Court of British Columbia (SCBC) in 2007. The SCBC had ordered a broader remedy granting equal registration status, including the ability to transmit status to their descendants, to all women registered under s. 6(1)(c) and Aboriginal descendants (born prior to April 17,

¹ See QNW, <http://www.faq-qnw.org/about.html>.

² *Indian Act*, R.S.C., 1985, c. I-5, s. 6.

³ *Canadian Charter of Rights and Freedoms*, s.1, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K), 1982, c. 11.

⁴ *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 [*McIvor*, BCCA 2009]. The appeal Court left it to Parliament to decide how to remedy the discrimination faced by Aboriginal women and their descendants under the registration regime (section 6) of the *Indian Act*, stating it was not appropriate for a Court to impose a solution by opening up Indian status to a wider group of people.

1985) who trace their Indian ancestry through the maternal line, as the *Indian Act* (amended by Bill C-31 in 1985) accords to male Indians and their descendants eligible for registration under s. 6(1)(a)⁵. In contrast, the CABC concluded that the only unjustified form of gender discrimination with regard to Indian status arose from the manner in which Bill C-31 dealt with the transition from the past registration rules (1951: first introduction of the double mother rule⁶) to the present non-discriminatory regime (1985: Bill C-31)⁷. Indeed, the CACB found that the trial Judge of the SCBC had gone too far in describing the discrimination as being based on "matrilineal as opposed to patrilineal descent"⁸. According to the CACB, the unconstitutionality is not in relation to the descendants of all women who lost status when "marrying-out" any time since 1876. Instead, the Court of Appeal ruled that the *Charter* violation was limited to the beneficial treatment of persons in the male line previously subject to the transitional provisions relating to the double mother rule, which was introduced in 1951.

Sharon McIvor's application for leave to appeal the CABC's decision to the Supreme Court of Canada was recently dismissed⁹. The CABC's decision is thus still standing leaving the Government of Canada with a one year deadline to amend the registration

⁵ See *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, Justice Ross; *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 1732 at par. 9 [*McIvor*, BCSC 2007] were the SCBC declared that: "(b) Section 6 of the *1985 Act* is of no force and effect in so far, and only in so far, as it provides for the preferential treatment of Indian men over Indian women born prior to April 17, 1985, and the preferential treatment of patrilineal descendents over matrilineal descendents born prior to April 17, 1985, in the right to be registered as an Indian; (c) Section 6(1)(a) of the *1985 Act* shall be interpreted so as to entitle persons to be registered under s. 6(1)(a), who were previously not entitled to be registered under s.6(1)(a) solely as a result of the preferential treatment accorded to Indian men over Indian women born prior to April 17, 1985, and to patrilineal descendants over matrilineal descendents, born prior to April 17, 1985".

⁶ Section 12(1)(a)(iv) of the 1951 *Indian Act* known as the "double mother" clause, provided that a person whose parents married on or after 4 September 1951 and whose mother and paternal grandmother had not been recognized as Indians before their marriages, could be registered at birth, but would lose status and band membership on his or her 21st birthday. The *Indian Act* as amended by Bill C-31 in 1985 granted s. 6(1)(c) status to these individuals who lost status pursuant to the double mother rule.

⁷ *McIvor*, BCCA 2009, *supra* note 4 at s. 118. The CACB held that the continuation of discrimination with regard to Indian status is justified, with one exception: the improvement in status entitlement that the *Indian Act*, as amended by Bill C-31 in 1985, accords to children of status fathers who were affected by the pre-1985 double mother rule. As noted above, Bill C-31 granted full s.6(1) status to these patrilineal descendants even though they would have lost status at age 21, pursuant to the double mother rule. The CABD found that this, and only this aspect of the discrimination, was unjustified because it did not simply preserve existing rights acquired under the former discriminatory regime, but went further and enhanced them. According to the CACB, if Parliament had preserved the double mother rule when Bill C-31 was brought in, the legislative scheme would have passed the section 1 test and there would be no *Charter* violation.

⁸ NCFNG, *Memorandum: Summary of the McIvor Decisions*, Ratcliff & Company, June 2009, at p. 5. According to the CACB, the gender discrimination only applied to individuals caught in the transition between the 1951 and 1985 registration regime.

⁹ *Sharon Donna McIvor et al. v. Registrar, Indian and Northern Affairs Canada et al.* (B.C.) (Civil) leave to appeal to S.C.C refused, 33201, (November 5th 2009).

regime (section 6) of the *Indian Act*. On that issue, Sharon McIvor has presented on October 6th to Indian and Northern Affairs Canada (INAC) her response to the proposal to amend the *Indian Act*. According to her, the proposed amendments are flawed showing that the Court of Appeal decision does not provide a sound basis for legislative reform, and if implemented, would not eliminate the sexual discrimination from the registration provisions of the *Indian Act*¹⁰.

On April 1, 2010, the CABRC granted a 3 month extension [for the April 6th deadline] to the Government of Canada to amend the registration provisions (Section 6) of the *Indian Act* which the BC court deemed to be discriminatory. Canada now has until July 5th, 2010 to pass legislation for its court ordered amendments to the *Indian Act*¹¹.

Bill C-3: The Government of Canada's Proposal to Amend the Indian Act

On March 11, 2010, the Government of Canada introduced Bill C-3, Gender Equity in Indian Registration Act, to address the requirements of the British Columbia Court of Appeal by amending the *Indian Act* but **only** to remedy the specific problem of discrimination brought to light in the case of Sharon McIvor and her family. Indeed, the Government believes that the best course of action for the time being is to limit legislative changes to the registration rules to those that are directly in line with the recent court decision. Specifically:

the Government proposes to amend the *Indian Act* to accomplish the goal of providing Indian registration under s. 6(2) of the *Indian Act* to the grandchild of a woman: a) who lost status due to marrying a non-Indian; and b) whose child born of that marriage parented the grandchild with a non-Indian after September 4, 1951 (when the "double mother" rule was first included in the *Indian Act*); as well as any sibling of that grandchild born before September 4, 1951. To accomplish this goal a new paragraph 6(1)(c.1) will be added to the *Indian Act* granting entitlement to registration to any individual: 1) whose mother lost Indian status upon marrying a non-Indian man; 2) whose father is a non-Indian; 3) who was born after the mother lost Indian status but before April 17, 1985, unless the individual's parents married each other prior to that date; 4) and who had a child with a non-Indian on or after September 4, 1951¹².

¹⁰ See Sharon McIvor, *Sharon McIvor's Response to The August 2009 Proposal of Indian and Northern Affairs Canada to Amend the 1985 Indian Act*, October 6, 2009, at pp. 8-10. McIvor provided in this document example of ways in which the proposed amendments are premised on the continuance of discrimination: "1. The proposed amendments are restricted to grandchildren of women *who lost status due to marrying a non-Indian* [...]; 2. Under the proposed amendments, the grandchild must have been born after September 4, 1951 [...]; 3. The proposed amendments contain another problematic cut-off, a generational one. It only applies to grandchildren [...]; 4. The proposed amendments will only grant s.6(2) status, and never s.6(1) status to the proposed new registrants".

¹¹ INAC, *Canada Given 3-Month Extension to Implement McIvor decision – will continue to pursue early adoption of C-3*, Press Release Ref. #2-3333, April 1th 2010, <http://www.ainc-inac.gc.ca/ai/mr/nr/j-a2010/23333-eng.asp>.

¹² INAC, *Explanatory Paper: Proposed Amendments to the Indian Act Affecting Indian Registration McIvor v. Canada*, Ottawa 2010, at pp. 2-3.

With either type of amendment, entitlement to band membership would flow to those gaining the right to registration under the *Indian Act* for those bands whose membership is determined according to section 11 of the *Act*. For First Nations that control their own membership codes under section 10 of the *Act* or otherwise under self-government arrangements, eligibility for band membership would follow the First Nation's rules and criteria¹³.

Estimated Impacts on Registered Indian Population and Band Membership

Overall, INAC believes that the total number of individuals newly entitled to registration under the *Indian Act* resulting from the proposed amendment would number in the range of 45,000 causing an increase of about 6% of the existing status population¹⁴. This estimate is larger than the range of 20,000 to 40,000 originally identified in the "Discussion Paper" released by INAC in August, 2009. It should also be noted that in 1985 with Bill C-31, INAC had seriously underestimated the number of persons likely to seek reinstatement¹⁵. Thus further research was undertaken and finally completed in the Fall of 2009 by Stewart Clatworthy¹⁶, on which new estimates should be based upon in order to calculate more precisely the increased number of the Status Indian population which will directly impact the already strained funding of Aboriginal communities who provide community members services

In that regard, INAC has already stated that the issue of additional funding to be provided to Aboriginal peoples for the provision of programs and services for the additional Status Indians will not be discussed at this stage, a decision that will certainly have a direct impact on Aboriginal communities' limited funding¹⁷. As was the case with Bill C-31, the Federal Government believes that the great majority of individuals newly entitled to registration likely live off reserve which will result in limited demand for on-reserve housing and services. However, the Government should be more conscious that many Bill C-31 registrants who continued to live off-reserve have not done so by choice but are in fact limited to obtaining reserve residency rights due to several factors: lack of

¹³ *Ibid.*, p. 4.

¹⁴ *Ibid.*, pp. 4-5.

¹⁵ See *Report of the Royal Commission on Aboriginal Peoples*, Vol.4 chap. 2 s. 3.1, Ottawa Communication Group — Publishing, 1996 [RCAP].

¹⁶ INAC, *Estimates of Demographic Implications from Indian Registration Amendment McIvor v. Canada*, Ottawa, March 2010.

¹⁷ INAC, *Frequently Asked Questions: Engagement Process Amendments to the registration provisions of the Indian Act As per the Court of Appeal for British Columbia's decision in the Sharon McIvor litigation*, Ottawa, 2009, at p. 3.

funding, insufficient land base, and discriminatory band created membership codes under the direction of INAC¹⁸.

As for band membership, impacts on communities will create new social problems as more than 230 bands control and determine their own membership codes, which are quite varied. Indeed, some bands have open policies, while others, reluctant to accept new members, have enacted restrictive codes¹⁹. For Aboriginal communities that do not control their own membership, new registrants will be added to the appropriate band list by the Indian Registrar.

In spite of the Federal Government's acknowledgement that there are a number of broader issues related to registration and membership that extend far beyond the specifics of the McIvor decision, the proposed amendments to the *Indian Act* will not address these broader issues. Nor will they address other discriminative governmental administrative policies such as unstated paternity policy and on-reserve matrimonial real property, or shortages of housing and resources on reserve.

Instead the Canadian government is relying on a separate parallel process whereby the Minister of INAC will work in partnership **with national Aboriginal organizations** to establish an exploratory process that will invite the participation of First Nations and other Aboriginal groups and organizations to discuss the broader issues surrounding Indian registration, band membership and First Nations citizenship.

While QNW is pleased to have the opportunity to discuss these broader issues, we deplore the exclusive manner in which the Government of Canada intends on conducting discussions. The fact that it will be done in a separate more informal process restricted primarily to the National Aboriginal Organizations (NAO's) is cause for concern as it evacuates the notion of democracy within these discussion and ignores Canada's constitutional obligation to conduct proper consultations on matters affecting the rights of Aboriginal peoples. It is important to note that while it is more convenient and efficient for the Government to consult with the NAO's, it must be emphasized that they do not adequately represent all the constituents reflected in their mission statements. They are also considered to be "special interest groups" by the federal government and therefore

¹⁸ RCAP, *supra* note 15, s.3.1

¹⁹ A review of the 236 codes adopted by First Nations from June 1985 to May 1992 identified four main types: 1) one-parent descent rules, whereby a person is eligible for membership based on the membership or eligibility of one parent; 2) two-parent descent rules, which declare that to become eligible, both of a person's parents must be members or eligible for membership; 3) blood quantum rules, which base eligibility on the amount of Indian blood a person possesses (typically 50%); and 4) *Indian Act* rules, that base membership on sections 6(1) and 6(2) of the *Indian Act*. See Stewart Clatworthy and Anthony H. Smith, *Population Implications of the 1985 Amendments to the Indian Act*, research study prepared for the Assembly of First Nations, Ottawa, 1992.

need to be accompanied by regional and/or community groups composed entirely of Aboriginal peoples.

The intended parallel “discussions” also excludes Aboriginal peoples’ right to self-determination from the ongoing legislative process by dictating once again who has the right to determine "Indian status" which has an important link to Aboriginal identity, membership and citizenship. Thus Bill C-3 remains a restrictive and colonized vision adopted by the Government of Canada which focuses solely on a legislative "patchwork" remedy in the interest of averting a legislative void in British Columbia as well as, the least amount of cost to the Government of Canada. Consequently, this approach raises several serious issues of concern that will impact upon the collective and individual rights of Aboriginal peoples.

Issues of concern

Crown’s Duty to Consult and Accommodate Aboriginal Peoples

Firstly, QNW does not accept the present lack of consultation with Indigenous peoples – which would ensure Indigenous “input” consistent with the constitutional duties of the Federal Government. In the *McIvor* case, Madame Justice Ross had indicated in trial Court that: "A suspension would enable the registration process to continue and afford Parliament time to seek *input* from Aboriginal groups in *its development and implementation of a scheme consistent with the court’s ruling*"²⁰. The Canadian Government’s undertaking of "engagement" sessions to inform Aboriginal peoples about the proposed changes to the Indian status registration provisions (section 6) of the *Indian Act* should not be mistaken as effective consultation sessions.

A collaborative process is absolutely necessary in order to comply with the 2009 CABC decision in the *Sharon McIvor* case. The CACB indicated: "We have neither an evidentiary foundation nor reasoned argument as to the extent to which Indian status should be seen as an Aboriginal right rather than a matter for statutory enactment. This case, in short, has not been presented in such a manner as to properly raise issues under s. 35 of the *Constitution Act, 1982*"²¹. However, even if the *McIvor* case does not provide evidence or argument on whether “Indian status should be seen as an Aboriginal right”, we believe that the Canadian Government must still seek the “input” of Aboriginal peoples through consultations since Aboriginal or treaty rights may still be affected by the “development and implementation of a scheme” to address the present discrimination arising from section 6 of the *Indian Act*.

²⁰ *McIvor*, BCSC 2007, *supra* note 5 at par. 345.

²¹ *McIvor*, BCCA 2009, *supra* note 4 at par. 66.

By possibly denying "Indian status" under any proposed amendments to the *Indian Act*, an Aboriginal individual would possibly be denied such rights as those relating to land and harvesting. As decided by the Supreme Court in *Taku River Tlingit First Nation v. British Columbia*:

The duty to consult arises when a Crown actor has knowledge, real or constructive, of the *potential existence* of Aboriginal rights or title and *contemplates conduct that might adversely affect* them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation²².

As highlighted by the Supreme Court, the Government of Canada has a duty to consult with Aboriginal peoples and accommodate their concerns prior to making decisions that might adversely affect their rights. As stated in *Haida Nation v. British Columbia*:

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples [...]. The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required [...]²³.

QNW therefore condemns the "engagement process" conducted by INAC from August to November 2009 which was not intended to consult but inform Aboriginal communities of the legislative process set forth by the Canadian Government. Consultation and accommodation are an essential corollary to the honourable process of reconciliation that section 35 of the *Constitution Act, 1982* demands.

In order to promote the process of reconciliation mandated by section 35 of the *Constitution Act, 1982*, QNW therefore requests that real and effective consultations begin immediately as part of a process of fair dealing and reconciliation.

Historical Nature of the Discrimination against Aboriginal Women and their Descendants

QNW is also concerned by the lack of recognition for the historical and institutionalized nature of the discrimination against Aboriginal women and their male and female descendants that was permitted under the *Indian Act* since its imposition in 1876. Indeed, the proposed amendments under Bill C-3, which rely on the CABRC limited decision, are restricted to *grandchildren of women who lost status due to marrying a non-Indian born*

²² *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, at par. 25.

²³ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at par. 16-17.

after September 4, 1951. QNW considers this proposal as flawed, being premised on the continuance of discrimination.

Firstly, the proposed cut-off based on a post-September 4, 1951 birth date, which assumes that it is only the issue of sexual discrimination that should be addressed in the registration scheme in regard to the double mother rule dating back to 1951, is erroneous. The Canadian Government must acknowledge the fact that for more than a hundred years the *Indian Act* rooted in Victorian ideas of race and patriarchy has privileged Aboriginal descent through the male line. The **sexual discrimination faced by Aboriginal women effectively goes back to 1876 (and not 1951)** where a woman's identity as an Indian, through rules of registration imposed under the *Indian Act* to Aboriginal peoples, came to depend on the status of her husband (ex: a non-Indian woman married to an Indian man gained Indian status whereas an Indian women who married non-Indian men, lost their status as an Indian according to the "marrying out rule")²⁴.

In that regard, a recent survey conducted on QNW members revealed that more than 70% of respondents are in favor of going as far back as 1876 on the issue of status²⁵. Some have also commented that this issue should have never occurred in the first place and that a date should not determine their sense of belonging to an Aboriginal community. Reflecting members' opinion, QNW recommends that the Canadian Government should not impose an artificial September 4, 1951 cut-off on status entitlement. Using a 1951 cut-off for descendants of Aboriginal women and not for descendants of Aboriginal men, will create new inequalities based on a date of birth. Given the fact that grandchildren who trace their Aboriginal descent through the maternal line will continue to be denied status if they were born prior to September 4, 1951 unless they have at least one sibling born after that date²⁶.

Moreover the proposed amendments under Bill C-3 will only apply to grandchildren and not to other matrilineal descendants. This is yet another way in which the proposed amendments do not place matrilineal-Indian descendants on the same footing as patrilineal-Indian descendants. Pursuant to s. 6(1)(a) of the *Indian Act*, which can be transmitted by one Indian parent, **descendants of male Indians are not restricted to looking only as far back as a grandfather** (for s. 6(1)(a) registrants the impact of the

²⁴ RCAP, *supra* note 15, s.3.1. Section 12(1)(b) of the *Indian Act* before 1985 provided that a woman who married a non-Indian was not entitled to be registered. In contrast, section 11(1)(f) stated that the wife or widow of any registered Indian man was entitled to status. Pursuant to section 109(1), if a male status Indian was enfranchised, his wife and children would also be enfranchised.

²⁵ QNW Survey, *Indian Status and the McIvor Case*, October 2009. This survey was conducted during the 36th Annual Gathering (17th and 18th of October 2009) on 37 of members being delegated to represent their Aboriginal women's Council.

²⁶ INAC, *Estimates of Demographic Implications*, *supra* note 16 p. 3.

2nd generation cut-off rule is post-poned)²⁷. In contrast, a person with s. 6(2) status cannot transmit status unless they parent with another Status Indian (for this group the second generation cut-off takes immediate effect)²⁸.

Although all children born after April 17, 1985 are subject to the second generation cut-off, the proposed amendment maintains a sex-based hierarchy of status for persons born prior to April 17, 1985 whereby descendants on the male line born prior to April 17, 1985 are accorded s. 6(1) status whereas descendants on the female Aboriginal line, born prior to April 17, 1985 will not necessarily be accorded s. 6(1) status. This means that the second generation cut-off will continue to take effect a generation early for some matrilineal-Indian descendants²⁹.

Thus the proposed amendments focusing exclusively on *grandchildren of women who lost status due to marrying a non-Indian born after September 4, 1951* will not remedy the full extent of the ongoing sexual discrimination based on being an Indian woman or a matrilineal descendant.

Finally, other governmental administrative policies (ex: unstated paternity policy³⁰; on-reserve matrimonial real property) continues to discriminate broadly against Aboriginal women as progenitors, and against descendants who trace their Indian ancestry through their female forebears, or in other words, descendants who are unable to establish Indian paternity.

On this matter, 85% of respondents believe that discriminatory administrative practices such as the issue of unstated paternity (the assumption that the father of a child is not Indian if the mother does not reveal his identity) should be addressed by the proposed amendments³¹. Reflecting members' opinion, QNW urges the Canadian Government to end all forms of discrimination against women and their descendants by removing the element of categorization of Indian Status i.e. 6(1), 6(2). Moreover, the administrative

²⁷ *Ibid.* at p. 10. A child who has only one parent with s. 6(2) status is not entitled to any Indian status at all. This feature introduced under Bill C-31 is known as the "second generation cut-off", as the second generation of children with only one status parent lose all entitlement to status.

²⁸ *Ibid.* at p. 10.

²⁹ *Ibid.* at p. 10.

³⁰ Michelle M. Mann, *Indian Registration: Unrecognized and Unstated Paternity*, Research Directorate Status of Women, Ottawa, 2005 ("non-reporting or non-acknowledgment by Indian and Northern Affairs Canada (INAC) of a registered Indian father results in the loss of benefits and entitlements to either the child or the child's subsequent children where there is successive "out-parenting." Unacknowledged paternity can be said to arise where the mother names the father but not in accordance with the requirements of provincial vital statistics or INAC policy, thereby causing paternity to be considered unstated. Approximately 50 percent of unstated paternity cases are considered to be unintentional, while the other 50 percent are deemed intentional on the part of the mother. Causes of unstated paternity range from those that can be considered more "administrative" in nature to those that are "substantive," such as a decision by the mother not to name the father").

³¹ QNW Survey, *supra* note 25.

policy 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.

Shortage of Housing and Resources

In regard to redressing the unconstitutional and discriminatory aspects in section 6 of the *Indian Act*, the financial responsibility lies squarely with the Canadian Government. Taking into account the fact that the proposed amendments will likely result in an increase of about 6% of the existing status population and that many Aboriginal communities are facing a shortage of housing, land and resources, a transitional plan must be developed and financially supported, in order to facilitate the arrival of newly reinstated Indigenous peoples³². Indeed, Federal guarantees are required for additional financial and other resources and services in Aboriginal communities arising from any increases in population.

On this issue, 80% of respondents are aware that the proposed amendments will have not only positive but also negative impacts on them and their community, many commenting on the lack of funds regarding education and housing in their community³³. Moreover 78% of respondents (75% of respondents living in their community on reserve or Crown land) believe that their community needs more land and resources to accommodate new members. QNW thus proposes that the costs of housing needed for new registrants be supported by the Canadian Government and that an increase/adequate land base be provided to Aboriginal communities for returning members. Otherwise, any such amendments will only serve to perpetuate the hardships and challenges faced by many Aboriginal communities and more specifically by Aboriginal women that are particularly vulnerable to poverty³⁴. As with Bill C-31, in the absence of guarantees of additional funds for these purposes, many reserve communities will resist the increased membership that will occur as a result.

³² Overcrowding and inadequate housing are of particular concern on-reserve, where there is a current housing shortage of between 20,000 and 35,000 units. The shortfall is growing by an estimated 2,200 units a year. In 2001, nearly 24% of non-reserve First Nations, Métis and Inuit households were in core housing need (households that fall below one or more of the adequacy, suitability or affordability standards), compared with 13.5% of non-Aboriginal households. See INAC, *Aboriginal Housing*, 2006.

³³ QNW Survey, *supra* note 25.

³⁴ Indeed, 18% of Aboriginal women are single mothers, representing 27% of Aboriginal families. Of these families, 72% reside in cities and are in core housing need. CERA, *Women and Housing in Canada: Barriers to Equality* 2002.

Band Membership: Issues Relating to Discriminatory Membership and Custom Election Codes

Whereas Bill C-31 attempted to protect the acquired rights to band membership of new registrants, the proposed amendments under Bill C-3 to the registration regime of the *Indian Act* does not address this important issue. Indeed, for Band Councils that control their own membership under section 10 of the *Indian Act* or otherwise under self-government arrangements, eligibility for band membership and the benefits arising from it (access to subsidized housing on reserves and Band-administered programs and essential services; the right to vote and run in Band Councils elections) would follow the Band Council rules and criteria. Thus under the new amendments, those who will acquire or regain status will not automatically be given band membership and its associated benefits.

In 1985, with Bill C-31, several bands have consistently acted in defiance of the *Indian Act* amendments by refusing to grant membership to C-31 registrants (mostly women) or by illegally enacting discriminatory membership and custom election codes specifically targeting women who regained status in 1985 as well as their descendants³⁵. Bill C-31 amendments in 1985 which were designed to redress the historical sexual discrimination faced by Aboriginal women were not enforced properly by the Federal Government. Thus creating situations that have led to grave violations of the fundamental human rights of Aboriginal women, who regained their status under Bill C-31 and their children since they are unable to live on-reserve, participate in the democratic process of elections and are denied access to Band-administered programs and services usually offered to community members.

On this issue, half of the 21% of respondents living in a community which has enacted its own membership code believe that many membership codes add another level of discrimination against women who have regained their status through Bill C-31³⁶. Moreover, 81% of respondents believe that membership to a community should be automatic when an individual gains status³⁷. Reflecting members' opinion, QNW urges the Federal Government to grant band membership to new registrants and to create an

³⁵ Aboriginal women have had difficulties in exercising their rights as reinstated band members or in receiving services and benefits from their bands in defiance of the *Indian Act* amendments. Several complaints of discrimination have indeed been filed against Band Councils. See *Courtois v. Canada (Minister of Indian Affairs and Northern Development)*, [1991] 1 C.N.L.R. 40 that illustrated some of the problems regarding Bill C-31 registrants and their access to band-provided services. See also *Sawridge Band v. Canada*, [*Sawridge Band v. Canada* (1998), 157 F.T.R. 236 (F.C.T.D.); rev'd by *Sawridge Band v. Canada*, [1997] 3 F.C. 580; (1997), 3 Admin. L.R. (3d) 69; 215 N.R. 133 (C.A.) that considered the rights of reinstated women and the rights of Band Councils to determine membership.

³⁶ QNW Survey, *supra* note 25.

³⁷ *Ibid.*

appeal mechanism such as a separate and impartial appeal tribunal to review any revised discriminatory membership and custom election codes to ensure fairness and the protection of acquired rights.

The Federal Government will need to ensure that any reform to the *Indian Act* will be fully implemented and enforced in a non-discriminatory manner by Band Councils. The Canadian Government is thus accountable to the rule of law and must also be held accountable for the way in which discriminatory membership and election codes specifically targeting Aboriginal women who regained their status under Bill C-31 were adopted and enforced. The criteria of these codes are created and sanctioned by INAC, linking the Federal Government's culpability in the multi-layered mechanisms which perpetuate the discrimination against Aboriginal women and their descendants. These codes contradict the spirit of Bill C-31 as well as its implementation, thereby creating illegally enforced membership codes adopted by Band Councils, hence establishing rogue Band Councils elected in a fashion that is not reflective of good governance principles³⁸.

Categorization of Aboriginality and Decline in Status Population

Many categories of "Aboriginality" have been created with the *Indian Act*: "full Indian" and "half Indians" under subsection 6(1) and subsection 6(2). These categories have little to do with culture, identity or citizenship but deal strictly with administration, bureaucracy and a continuing federal policy of assimilation that persists to this day. Indeed, with current rates of marrying out, these categories set out under the *Indian Act* will lead to a dramatic decline in registered Indian population if the rules are not changed. "In the long run these rules will lead to the extinction of First Nations"³⁹. This declining trend in status through the *Indian Act* is of great concern for the vitality and longevity of band communities. The full assimilation and integration program of Aboriginal peoples into Canadian society set up by the Government of Canada in 1876 under the *Indian Act* will thus have been fulfilled if this declining trend continues.

Furthermore, the emergence of different classes of citizens within First Nations populations (full Indian vs. half Indians under subsection 6(1) and subsection 6(2) of the *Indian Act*; members vs. non-members), raises a number of important questions and

³⁸ See United Nations, *Global Issues: Governance*, <<http://www.un.org/en/globalissues/governance>> "Good governance promotes equity, participation, pluralism, transparency, accountability and the rule of law, in a manner that is effective, efficient and enduring."

³⁹ Research on the continued demographic impacts of the 1985 amendments conducted by Stewart Clatworthy and Anthony H. Smith suggests that overall, with current rates of marrying out, First Nations populations (on and off-reserve) will undergo significant transformation over the next generations (in roughly fifty years) where large and growing numbers of individuals will lack eligibility for Indian registration and membership and in some communities the registered Indian population will decline dramatically. See Clatworthy and Smith, *supra* note 19 pp. ii, iii.

issues concerning individual and collective rights, citizenship and the individuals' duties to their nation, social equality and cohesion, and jurisdictional, financial and administrative responsibilities for the provision of a wide range of services to various citizen groups.

Thus the proposed amendments in keeping the same categorization in status rules between subsection 6(1) status Indians and subsection 6(2) status Indians, combined with restrictive band membership codes, furthers social division within Aboriginal communities creating family tensions that can be heightened when resources are scarce. Within a couple of generations, Indian band communities will have sizeable populations of non-Indians who, under current federal funding formulae — based on the number of status Indians in a given band — will begin to put strains on federally funded services. It is a known fact that current funding formulae are insufficient in meeting communities' needs⁴⁰. Therefore the Federal Government must create adequate funding formulas to accommodate new members. Otherwise, the current situation whereby an underclass exists within First Nations will continue and will further divide communities and families.

In that regard, 86% of respondents do not agree with this categorization of Indian status under subsection 6(1) and 6(2) created by the *Indian Act*, many commenting on the fact that they are native from birth and should not be given a number for the sake of administrative policies⁴¹. Fifty-one percent of respondents further believe that this categorization should not be kept in the *Indian Act*, many commenting on the fact that status and membership to a community should not be defined exclusively by race or bloodline but also by ties to the community. It should be inclusive of customary values of citizenship, ties to traditional culture and languages and it should be a decision of the community as a whole (not imposed by the government)⁴².

QNW thus urges the Canadian Government to eliminate the categorization of status by **recognizing the inherent right of Aboriginal peoples to define who can be a citizen of their nation** and what obligations and rights are entailed within their definition. However, this must be done in accordance with international human rights

⁴⁰ See Office of the Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons*, Ottawa, May 2006, chap. 5 ("even though the Federal Government spends billions of dollars a year -just over \$8 billion in 2004-05- on 360 programs and services targeted to Aboriginal peoples that address issues such as housing, health care, education, and economic development, the conditions in many First Nations communities and of many Aboriginal peoples remain significantly below the national average" at p. 145).

⁴¹ QNW Survey, *supra* note 25.

⁴² *Ibid.*

law⁴³. Indigenous peoples have the right to govern themselves, to reinforce their own forms of government and citizenship - not as a grant from the Government of Canada, but as an inherent right as peoples who have occupied these lands from time immemorial.

Conclusion

QNW appreciates this unique opportunity to address the historical discrimination faced not only by Aboriginal women but also by their male and female descendants, an injustice which was not corrected with the passing of Bill C-31 in 1985.

While QNW recognizes the need to amend the archaic nature of the *Indian Act* which is of itself discriminatory, QNW, as stated earlier, deplores the restrictive vision of the Federal Government focusing solely on a "patchwork" remedy to the specific problem of discrimination brought to light in the *McIvor* case as analyzed by the CABC on limited grounds and the lack of any effective consultation of Aboriginal peoples.

This is a missed opportunity for the Government of Canada to finally eradicate the historical and institutionalized forms of discrimination that Aboriginal women and their descendants have been subjected to under the *Indian Act* since 1876. The Government's proposal to amend the *Indian Act* will indeed cause further destructive divisions within communities. Canada must therefore put an end to the patriarchal regime of Indigenous guardianship that the *Indian Act* constitutes by following a decolonization process whereby Indigenous peoples values, self-determination, culture and language institutions and nationhood will be respected and reinforced.

The *Indian Act* was conceived and implemented in part as an overt attack on Aboriginal women, nationhood and individual identity, "a conscious and sustained attempt by non-Aboriginal missionaries, politicians and bureaucrats — albeit at times well intentioned — to impose rules to determine who is and is not 'Indian'"⁴⁴. A woman's view of herself as Aboriginal and the views of Aboriginal nations about the identity of their citizens were not factors in the equation.

In these and many other ways, the *Indian Act* undermined Aboriginal rights, Aboriginal identity and Aboriginal culture. It created divisions within peoples, communities and **families** that fester to this day. In that regard, we believe that this issue of "Indian status"

⁴³ See *United Nations Declaration of the Rights of Indigenous Peoples*, sect. 3-33 ; *International Covenant on civil and political rights* and *International Covenant on Economic and Social and Cultural Rights*, sect 1.1; *Universal Declaration of Human Rights* sect 15.

⁴⁴ RCAP, *supra* note 15, Vol. 4, chap. 2 s. 3.

is of national importance and should be taken up as a one of society's most pressing problems. Aboriginal women and men deserve equality in access to their inherent rights.

Recommendations

1. That the Government of Canada **immediately conducts meaningful and effective consultations sessions** (and not engagement sessions) in order to obtain the full and effective participation of Aboriginal peoples in which their input will consequently be included thereby accommodating their concerns on the proposed legislative reform of the *Indian Act*.
2. That the Government of Canada's intention to conduct parallel discussions incites instead, meaningful consultation sessions inclusive of any Aboriginal community and Aboriginal organization who desire to participate
3. That a 2 day Constitutional Conference be conducted with Aboriginal peoples and their representatives, to address the federal, provincial and territorial understandings and agreement as to the respective jurisdictional implications and obligations in regards to this issue.
4. That Bill C-3 eradicates all forms of discrimination against Aboriginal women and their descendants **by removing the element of categorization of Indian Status i.e. 6(1), 6(2)**.
5. That Bill C-3 include a new clause regarding unstated paternity to ensure that the administrative policy which requires the identification and/or admission of paternity of the father of a child born to an unmarried Aboriginal 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**.
6. That the Canadian Government **recognizes the historical and institutional nature of the discrimination against Aboriginal women and their descendants by removing the cut-off date based upon a post-September 4, 1951 birth date** in Bill C-3 thus granting equal registration status to all women registered under s. 6(1)(c) and Aboriginal descendants **born prior to April 17, 1985** who trace their Indian ancestry through the maternal line, as the *Indian Act* accords to male Indians and their descendants eligible for registration under s. 6(1)(a).

7. That Bill C-3 **includes provisions to provide automatic band membership to new registrants.**
8. That Bill C-3 **includes a financial plan and provisions for additional land and resources to accommodate for the increased *Indian Status* population of First Nations communities.**
9. That the Government of Canada **recognize the inherent right of Aboriginal peoples to define who can be a citizen of their nation** and what obligations and rights are entailed within their definition. However, this must be done in accordance with international human rights law.
10. That rights associated with “Indian Status” be transportable outside federally recognized reserve and Crown land areas, in order **to remove the apartheid-like restrictive rights and the associated long-term historical injustices imbedded within the *Indian Act*** that have limited Indigenous peoples from exercising their inherent rights.