

***Equal Registration Status For Aboriginal Women and Their Descendants:
Sharon McIvor's Comments on 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)***

**Submission to the Standing Committee on Aboriginal Affairs and
Northern Development, following appearance by Sharon McIvor and
Gwen Brodsky, April 13, 2010**

What is this Moment?

This is an historic moment. The Parliament of Canada has an opportunity to remove a decades-long stain on Canada's reputation as a promoter of the human rights of women.

What is Wrong with Bill C-3?

First, Bill C-3 leaves out some Aboriginal women and their descendants who would be entitled to register, if sex discrimination were completely eradicated from the registration scheme. Second, even those Aboriginal women and their descendants that Bill C-3 purports to include, will be denied *equal* registration status.

The government has long acknowledged that discrimination against Aboriginal women is wrong. Bill C-31 which amended the *Indian Act* in 1985 was intended to eliminate sex discrimination from the registration scheme. Instead, the 1985 amendment to the *Indian Act* is failed remedial legislation. Bill C-3, if passed as proposed, will be another piece of failed remedial legislation. In a country that is bound by constitutional and international treaty commitments to the norms of equality and non-discrimination, a 2010 amendment that does not fully eradicate sex discrimination against Aboriginal women and their descendants is not acceptable. The approach to eliminating sex discrimination from the status registration scheme must be 'zero tolerance.' No Aboriginal woman or her descendants should be left out, or consigned to an inferior category of status, because of continuing sex discrimination.

A. Who Will Be Left Out by Bill C-3?

The following are some illustrations of who will be left out if Bill C-3 proceeds in its current form:

- ***The 1951 Cut-off***

Under the terms of Bill C-3, 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. There is no reason that sex discrimination should be permitted to continue just because a descendant is over a certain age, roughly 58 as of 2009. Sex discrimination is sex discrimination regardless of the age of the descendant.

The government's suggestion that there should be a cut-off based on a post-September 4, 1951 birth date is misguided. Bill C-3 assumes that the only sex discrimination in the current registration scheme was caused by the introduction in 1951 of the double mother rule.

This is a false assumption. For more than a hundred years the *Indian Act* has privileged Aboriginal descent through the male line, and that privilege is embedded in the *1985 Act*. Prior to 1951, the double mother rule did not exist. Male lineage descendants who were born prior to 1951 are accorded full s. 6(1)(a) status.

It is simply wrong to impose a September 4, 1951 cut-off on status entitlement for female lineage descendants. This will perpetuate the discriminatory exclusion of Aboriginal seniors, denying them the benefits of status, by reason only of the fact that they trace their Aboriginal lineage through the female line. This means that the children and grandchildren of these seniors will also be precluded from status registration. Using a 1951 cut-off for descendants of Aboriginal women and not for descendants of Aboriginal men, will also create new inequalities between siblings within the same families, based on their date of birth.

Summary: A grandchild born prior to September 4, 1951 who is a descendant of a status woman who married out will be excluded from registration status by Bill C-3.

- *Common Law Situations*

The proposed amendment is restricted to grandchildren of women who *lost status due to marrying a non-Indian*. Focusing exclusively on those who lost status due to marrying a non-Indian will not cure the full extent of the ongoing sex discrimination in the registration regime based on being an Indian woman or a matrilineal descendant. The *1985 Act* discriminates 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. In some instances the issue of non-Indian paternity may arise in the context of a marriage between an Indian woman and a non-status man. In other instances, marriage is not a factor.

Providing a legislative remedy to those who are grandchildren of Aboriginal women who married out but not to other matrilineal descendants (for example, the previously disintitiled grandchildren of Aboriginal grandmothers who co-parented in common law relationships with non-status men) will serve to perpetuate sex discrimination. Such a restricted amendment would continue to exclude from registration some matrilineal descendants based on the sex of their unmarried Aboriginal grandmother.

Summary:

The grandchild of a status woman and a non-status man who were unmarried will be excluded from registration status by Bill C-3.

The registration provisions of the *1985 Act* also discriminate against certain female descendants, solely because they are female. In particular, the *Indian Act* has been interpreted to provide full status to the illegitimate male children of male Indians, but not to the illegitimate female children of male Indians. Under Bill C-3, the female child of a status man and a non-status woman who were unmarried will continue to be excluded from status registration solely because the child is female. This is wrong, and should be repaired, as part of eliminating sex discrimination from the status registration scheme.

Summary: The female child of a status man and a non-status woman who were unmarried will be excluded by Bill C-3.

B. Bill C-3 Confers Unequal Registration Status on Descendants of Aboriginal Women

- *The Grandchildren on the Maternal Line Receive an Inferior Category of Status*

The proposed amendment will only grant s. 6(2) status, and never s. 6(1) status to the grandchildren of Aboriginal women who married out. This is yet another way in which the proposed amendment does not place matrilineal-Indian descendants on the same footing as patrilineal-Indian descendants, and has the effect of excluding subsequent generations because of the sex of their Aboriginal ancestor.

Under the current scheme, patrilineal-Indian descendants born prior to April 17, 1985 are entitled to be registered under s. 6(1)(a) of the *Act*. Section 6(1)(a) status is a superior form of status because it can be transmitted by one Indian parent. Further, for s. 6(1)(a) registrants the impact of the 2nd generation cut-off is postponed. 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.

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. Bill C-3 makes descendants on the female line subject to the second generation cut-off a generation early.

In this respect, Bill C-3 does not fully correct the *Charter* violation identified by the B.C. Court of Appeal in *McIvor v. AG Canada*. Under Bill C-3 the grandchildren on the male line who were affected by the double-mother rule under the previous legislation will continue to be registered under s. 6(1), if they were born prior to April 17, 1985. And yet, under Bill C-3 a grandchild on the female line born prior to April 17, 1985, with a grandmother who married out, will be consigned to s. 6(2). This is discriminatory, and not consistent with the British Columbia Court of Appeal decision. The effect of the Court's decision is that it is unconstitutional to grant status to grandchildren on the male line, who were affected by the double-mother rule, while continuing to deny status to a grandchild on the female line, because his or her grandmother married out. Based on the reasoning of the British Columbia Court of Appeal it must also

be unconstitutional to accord a *lesser status* to a grandchild on the female line than an equivalent grandchild on the male line.

The principle of equality requires that descendants on the female line receive nothing less than *equal* registration status.

Summary:

The grandchild of a status grandmother who married out will not be able to pass status to his or her child born prior to April 17, 1985, while the grandchild of a status grandfather who married out can.

What Should Be Done Now?

The continuing sex discrimination in the status registration scheme must be completely and finally eradicated now. Bill C-3 must be amended or replaced to:

- remove the 1951 cut-off and ensure that all direct descendants on the female Aboriginal line, born prior to April 17, 1985, are accorded the same s. 6(1) status, as the descendants on the male line.
- ensure that no one born prior to April 17, 1985 who is entitled to status is consigned to s. 6(2) status.
- ensure that entitlement to status is extended to the female child of the status man and non-status woman who were unmarried.

Is there a Need for Consultation?

Parliament's immediate and clear task is to fully and finally remove all sex discrimination from the status registration provisions. There is no need for consultation about this basic right. Further, it would be wrong to consult about whether continuing sex discrimination in the status registration provisions should be permitted.

Status registration does not involve any competing interests. It is solely concerned with the special relationship between individual persons of Aboriginal ancestry and the federal government.

Band membership is a different and distinct concept from status registration, which involves First Nations community interests in such entitlements as the right to vote in band elections and live on reserves.

Band membership issues are deserving of consultation, but should have no bearing on the timetable or content of amendments to eliminate discrimination from status registration, which can and must be addressed immediately.

Respectfully submitted

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