SECOND SUPPLEMENTAL SUBMISSION OF THE GOVERNMENT OF CANADA ON THE ADMISSIBILITY AND MERITS OF THE COMMUNICATION TO THE HUMAN RIGHTS COMMITTEE OF SHARON McIVOR AND JACOB GRISMER

COMMUNICATION NO. 2020/2010

A. Introduction

1. By letter dated 23 December 2010, the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) forwarded to Canada the communication of Ms. Sharon McIvor and Mr. Jacob Grismer ("the authors") to the Human Rights Committee ("the Committee"), for consideration under the *Optional Protocol to the International Covenant on Civil and Political Rights* ("the *Optional Protocol*"). The communication was registered as case No. 2020/2010.

2. Canada filed its initial submission on the admissibility and merits of the communication on 23 August 2011, as well as a brief further submission on 28 February 2012.

3. Canada now requests that the Committee suspend its consideration of the communication. As will be explained below, a recent court challenge raised some of the same allegations of discrimination on the basis of sex as have been raised by the authors, and the court concluded that certain legal provisions constitute unjustifiable discrimination contrary to the *Canadian Charter of Rights and Freedoms* (the Charter).[1] Therefore, in responding to the court's decision, the federal government is currently reviewing the matters that are at issue in this communication.

4. These ongoing domestic policy developments materially affect the legal issues that have been raised by the authors. It is Canada's view that the Committee will be best placed to consider the communication if it suspends consideration, until Canada can provide a concrete update on the process taken and the policy approach chosen.

5. No relationship is more important to the Government of Canada than the one with Indigenous peoples. Canada is committed to engaging in a renewed, nation-to-nation relationship, based on recognition of rights, respect, co-operation, and partnership. This includes implementation of the principles of the *United Nations Declaration on the Rights of Indigenous Peoples*. The equality rights of Indigenous women are a priority concern. The developments described below are part of this ongoing process.

B. Background on the communication

[1] *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555, online: http://canlii.ca/t/glzhm.

6. The authors' communication alleges several violations of the *International Covenant on Civil and Political Rights* (ICCPR), arising from the rules for the acquisition and transmission of entitlement to Indian registration under Canada's federal *Indian Act*.[2] These will be referred to below as "the eligibility provisions."

7. The authors argue that over their long history, the eligibility provisions have resulted in various forms of discrimination on the basis of sex. As a result, the authors claim that they have been discriminated against on the basis of sex (contrary to Article 26 of the ICCPR), and that because of this alleged discrimination, they are not able to enjoy their culture on an equal basis (contrary to Article 27 read together with Articles 2(1) and 3). The authors also claim that they have not had access to an effective remedy for these alleged violations, contrary to Article 2(3).

8. Canada has responded to these allegations in its previous submissions, with facts and arguments to the effect that the authors' communication is inadmissible. Canada continues to rely on its previous submissions.

9. However, in light of ongoing developments, it is Canada's respectful view that the Committee's consideration of these issues should be suspended.

C. Ongoing policy development process regarding sex discrimination in the *Indian Act*

10. The authors successfully pursued domestic remedies under the *Charter* before filing the current communication. In April 2009, the Court of Appeal for British Columbia found partially in favour of the authors, concluding that certain aspects of the eligibility provisions were an unjustifiable violation of the authors' *Charter* rights, specifically the right not to be discriminated against on the basis of sex.[3] See Canada's initial submission for more detail.

11. Following the Court of Appeal's decision in *McIvor*, the Government of Canada undertook an engagement process regarding proposed amendments to the relevant provisions. In March 2010, the Government introduced Bill C-3, its legislative response to the *McIvor* decision in order to directly address the issues raised by the authors, and remedy the discriminatory impact identified by the Court in its reasons. Bill C-3 came into force on 31 January 2011.[4]

12. Following the 2011 amendments, another *Charter* challenge was brought to the eligibility provisions, this time in the Superior Court of Quebec. The plaintiffs argued that the eligibility provisions were an unjustifiable violation of the right to equality guaranteed by section 15 of the *Charter*, because they perpetuate differential treatment between Indian women and their descendants as compared to Indian men and their descendants. They also argued that the 2011 amendments did not go far enough in addressing sex-based inequities in Indian registration.

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[2] R.S.C. 1985, c. I-5, online: http://canlii.ca/t/52fln. See section 6 in particular.
[3] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, online: http://canlii.ca/t/230zn.
[4] *Gender Equity in Indian Registration Act*, S.C. 2010, c. 18, online: http://canlii.ca/t/52mg0.

13. To provide more detail, the plaintiffs' claims focused on two instances in which historical (pre-1985) distinctions between men and women in the eligibility provisions continue to have a residual impact on descendants in the female line. First, in certain circumstances, the grandchildren of women who had lost entitlement upon marriage to a non-Indian do not have the same entitlement as the grandchildren of men who married a non-Indian. Second, a provision of the pre-1985 *Indian Act* was interpreted to provide that only male children born out of wedlock to an Indian man and non-Indian woman were entitled to registration. While this provision was not included in the 1985 amendments to the *Indian Act*, it continued to have a residual effect, such that women previously affected by this inequality, while entitled to registration under 6(2), were not put on full equal footing with their male counterparts who have a status under 6(1).

14. On 3 August 2015 the Superior Court of Quebec ruled in favour of the plaintiffs, in a decision entitled *Descheneaux c. Canada (Procureur Général)*.[5] The Court held that paragraphs 6(1)(a), (c), and (f) and subsection 6(2) of the *Indian Act* are an unjustifiable infringement of the *Charter* protection against discrimination on the basis of sex.

15. The Government of Canada will not pursue an appeal of the Court's decision.[6] Therefore, the discriminatory provisions have been declared to be of no force or effect in the Province of Quebec. The Court suspended its order for a period of 18 months – until 3 February 2017 – to allow Parliament to make the necessary legislative amendments. While the decision currently has legal force in Quebec only, any potential future changes will be applied nationally.

16. The Government of Canada is now exploring various opportunities and approaches for engagement with First Nations and other Indigenous groups on necessary legislative changes in response to the *Descheneaux* decision. The exact nature of the engagement, including how information will be shared and received from First Nations and Indigenous organizations, will be determined in the coming months. Further details should be available prior to July 2016, and Canada will update the Committee as appropriate.

17. These efforts will be embedded in a larger ongoing process that has broad implications for the matters at issue in this communication. As mentioned above, Canada is committed to engaging in a renewed, nation-to-nation relationship with Indigenous peoples. Canada will develop a new Federal Reconciliation Framework, in full partnership with First Nations, Métis, and Inuit, as well as the provinces and territories. To support reconciliation and to continue the necessary process of truth telling and healing, the Government of Canada is working to implement the "Calls to Action" of the Truth and Reconciliation Commission on the legacy of Canada's Indian Residential Schools system. The new Federal Reconciliation Framework will be informed by the Commission's Calls

[5] *Supra* note 1.

[6] The Government of Canada had initially filed an appeal of the lower court decision, on 2 September 2015. This was filed during a federal election period, to preserve the option of continuing the appeal pending direction from the government after the October 2015 election. The Government withdrew its appeal on February 22, 2016.

to Action. Canada will also review all laws, policies, and operational practices, in full partnership and consultation with Indigenous peoples.

18. The equality rights of Indigenous women are a priority concern. One concrete demonstration of this commitment is that in December 2015, the Government of Canada announced the launch of a national public Inquiry into missing and murdered Indigenous women and girls. The Inquiry will be a critical step in identifying concrete and coordinated actions to respond to violence against Indigenous women and girls, and to prevent future violence. With the pre-Inquiry consultation phase now completed, the Government is developing design options based on the feedback received.

D. Conclusion

19. The process of engagement and policy development that will likely be forthcoming in respect of *Descheneaux* will have a material effect on the issues that have been raised by the authors: specifically, the sex discrimination issues with the eligibility provisions that are the focus of the current communication.

20. According to the timelines provided by the Court in *Descheneaux*, any necessary legislative amendments must be enacted by 3 February 2017. As noted above, further details should be available on the engagement process prior to July 2016. Canada will update the Committee as these details become available.

21. Therefore, Canada respectfully requests that the Committee suspend its consideration of the communication until the forthcoming policy process has been completed. It is Canada's view that the Committee will be best placed to consider the communication, and craft its views, once Canada is able to provide concrete updates on the process taken and the policy approach chosen.

22. However, if the Committee chooses to proceed in considering the admissibility and merits of the communication, then Canada continues to rely on its previous submissions, that the communication is inadmissible. The authors have successfully brought their allegations of sex discrimination before Canadian courts: following a 2009 court decision in their favour, the eligibility provisions in the *Indian Act* were amended in 2011 to directly address the specific situation of the authors. In other words, the authors have received an effective remedy. Furthermore, aspects of the authors' communication are inadmissible either for failure to exhaust domestic remedies, or because the authors themselves are not victims of the alleged violations.

Ottawa
5 May 2016