PETITIONER OBSERVATIONS IN RESPONSE TO CANADA'S REQUEST FOR SUSPENSION OF THE COMMITTEE'S CONSIDERATION OF THE PETITION OF SHARON MCIVOR AND JACOB GRISMER, Communication No. 2020/2010

A. Canada's Request for Suspension of Consideration of the McIvor Petition Should Not Be Granted

1. The petition in this matter was submitted on November 24, 2010.

2. On August 23, 2011 Canada filed a petition opposing the petition on grounds of admissibility and on the merits, arguing that the challenged *Indian Act* criteria for determining eligibility for status do not violate the *International Covenant on Civil and Political Rights*.

3. In its submission of May 9, 2016 Canada requests suspension of the consideration of Sharon McIvor's petition on the grounds that:

- Canada has been directed by the Superior Court in a ruling on *Descheneaux v. Canada*[1] to amend the *Indian Act* because it discriminates against Stéphane Deschenaux and Susan Yantha on the basis of sex. The Court suspended its declaration of constitutional invalidity until February 3, 2017 to give Canada time to make curative amendments.

- Canada is now exploring various approaches for "engagement with First Nations and other Indigenous groups on necessary legislative changes in response to the *Deschenaux* decision".

- "[T]hese efforts will be embedded in a larger ongoing process" regarding "a renewed, nation-to-nation relationship with Indigenous peoples."

4. Canada does not acknowledge that the *Indian Act* criteria for determining status continue to be inconsistent with the rights of Aboriginal women to equality which are guaranteed by the *Covenant*. Nor has Canada made a commitment to eliminate all sex discrimination from the criteria for status. Canada has not even agreed to accord full s. 6(1)(a) status to Sharon McIvor and her descendants to place her on an equal footing with her brother and his descendants.

5. Given this context, as well as Canada's failure to take effective remedial action over an excessively prolonged period of time, the

petitioners object in the strongest terms to the State Party's request that the Committee's consideration of their petition be further delayed.

6. Having made no concrete undertaking, in effect, Canada is requesting the Committee to "just trust us" and to place the rights of the petitioners in a legal limbo. This is neither a valid nor a respectful approach to the enforcement of ICCPR rights. Canada has failed to recognize that the role of the Human Rights Committee is not merely to passively receive information from State Parties, but to adjudicate claims filed against them.

7. The petitioners urge the Committee to conclude its consideration of the petition and to issue a decision on the McIvor/Grismer petition without delay, making it clear to the State Party that it is obligated to remove all remaining sex discrimination from the status provisions of the *Indian Act*.

B. Delay is Extreme and Harmful

8. Canada has failed over an extremely long period of time to take effective remedial action to eliminate the sex discrimination from the *Indian Act*. Highlights of this history are:

- In 1971, Jeannette Corbiere Lavell and Yvonne Bedard brought suit under the sex equality provision of the *Canadian Bill of Rights*.[2] In a landmark ruling, four out of nine judges of the Supreme Court of Canada agreed with Lavell and Bedard.[3]

- In 1978, the Government of Canada issued a report prepared for the Department of Indian Affairs and Northern Development, entitled *Indian Act Discrimination Against Sex*, acknowledging the sex discrimination in the "marrying out" rule and other provisions of the *Indian Act*.

- In the late 1970s, Sandra Lovelace and the women of Tobique took a petition to the UN Human Rights Committee. In its 1981 decision, *Lovelace v Canada*,[4] the Committee found that the loss of Indian women's status pursuant to section 12(1)(b) of the 1951 *Indian Act* violated the right to the enjoyment of cultural life under the *International Covenant on Civil and Political Rights*.[5]

- In 1985, the federal government enacted Bill C-31,[6] both in response to *Lovelace* and because of the introduction of Canada's new constitutional equality rights guarantee, section 15 of the

Canadian Charter of Rights and Freedoms.[7] The promise was to eliminate all of the sex discrimination.[8] Instead, Bill C-31 removed some of the sex discrimination and carried forward the rest.

- In 1994 Sharon McIvor launched her constitutional sex equality challenge, which was preceded by nearly a decade of unsuccessful litigation and administrative efforts involving the Registrar of Indian and Northern Affairs.

- In 1996, the Royal Commission on Indigenous Peoples criticized the 1985 *Indian Act*'s continuation of sex discrimination.[9] Over the next decade, various UN human rights treaty bodies, including the Human Rights Committee,[10] the Committee on Economic, Social and Cultural Rights,[11] and the Committee on the Elimination of Discrimination against Women,[12] criticized Canada for its continuing discrimination against Indigenous women.

- After more than twenty years of litigation in *McIvor v Canada (Registrar of Indian and Northern Affairs Canada)*, repeated delays by Canada,[13] and findings of sex discrimination by two levels of court,[14] the government passed Bill C-3 in 2011.[15] On the government's count, Bill C-3 restored status entitlement to approximately 45,000 individuals.[16] On the one hand, this was an important shift. On the other hand, the reforms, once again, were piecemeal. At the same time as removing one more aspect of the sex discrimination, the Government of Canada re-enacted the bulk of it. To this day, people of Indigenous descent are still being denied status because the scheme treats the female line as inferior. Since *McIvor v. Canada* was decided by the British Columbia Court of Appeal in 2009, the Canadian Human Rights Tribunal and other courts have dealt with *Matson v. Canada (Indian Affairs and Northern Development)*,[17] *Lynn Gehl v. Attorney General of Canada*,[18] and *Deschenaux c. Canada (Procureur Genera)*.[19] To date, the effects of the sex discrimination complained of in these cases stands uncorrected. This ongoing sex discrimination signals to all concerned that Indigenous women are not equal.

9. It is because of Canada's piecemeal approach to reform that Sharon McIvor has a petition before this Committee.

10. Since the filing of Sharon McIvor's petition and the passage of Bill C-3 Canada has been repeatedly urged to eliminate the sex discrimination from the *Indian Act* by this Committee,[20] by the UN Committee on the Elimination of Discrimination against Women,[21] and by the Inter-American Commission on Human Rights.[22]

11. In their investigations of the murders and disappearances of Indigenous women and girls in Canada, the CEDAW Committee and the Inter-American Commission have found as a fact that the sex discrimination in the *Indian Act* is a root cause of the violence.

12. The Inter-American Commission on Human Rights, in its report entitled *Missing and Murdered Indigenous Women and Girls in British Columbia*, Canada, found that:

- by addressing only particular subsets of Indigenous women who face discrimination, the *Indian Act* as amended by Bill C-3 "fails to fully address remaining concerns about gender equality"[23] and

- "Indigenous women face multiple challenges with respect to securing status for themselves and their children, and, in some cases, the presence of a second, intermediate status classification can rise to the level of cultural and spiritual violence against Indigenous women, since it creates a perception that certain subsets of Indigenous women are less purely Indigenous than those with 'full' status. This can have severe negative social and psychological effects on the women in question, even aside from the consequences for a woman's descendants."[24]

13. The decision of the Inter-American Commission on Human Rights (IACHR) also links *Indian Act* sex discrimination to the murders and disappearances of Indigenous women, finding that:

- with regard to the causes of high levels of violence against Indigenous women, historical *Indian Act* sex discrimination is a root cause of high levels of violence against Indigenous women and the "existing vulnerabilities that make Indigenous women more susceptible to violence"[25] and

- with regard to the state's international obligations, "[a]ddressing violence against women is not sufficient unless the underlying factors of discrimination that originate and exacerbate the violence are also comprehensively addressed."[26]

14. Furthermore, the 6 March 2015 decision of the UN Committee on the Elimination of Discrimination against Women on the Article 8 inquiry into missing and murdered women in Canada, made the same finding as the IACHR and recommended that:

- Canada "amend the *Indian Act* to eliminate discrimination against women with respect to the transmission of Indian status, and in

particular to ensure that [Indigenous] women enjoy the same rights as men to transmit status to children and grandchildren, regardless of whether their [Indigenous] ancestor is a woman, and remove administrative impediments to ensure effective registration as a Status Indian for [Indigenous] women and their children, regardless of whether or not the father has recognized the child."[27]

15. Similarly, the UN Human Rights Committee, following the 2015 periodic review of Canada, urged Canada to "remove all remaining discriminatory effects of the Indian Act that affect indigenous women and their descendants, so that they enjoy all rights on an equal footing with men."[28]

16. Further delay in remedying *Indian Act* sex discrimination is harmful to Sharon McIvor and to many other Indigenous women and their descendants because it perpetuates the perception that Indigenous women are less worthy and less deserving of respect and equal treatment than their male counterparts.

17. In addition, delay means that individuals are denied access to valuable tangible benefits that can never be recovered. It bears emphasizing that the challenged discrimination only applies to individuals of Aboriginal descent born prior to April 17, 1985, and some members of the affected group are elderly. Each year that the discriminatory regime survives, individuals of Aboriginal descent die without having gained status and without having been able to pass it to their descendants.

C. It is Not Legitimate for the New Liberal Government to Claim More Time for Engagement and Policy Development

18. Canada's suggestion to the Committee that it needs more time for engagement and policy development must be rejected in light of the history of Bill C-3. In 2010 when Bill C-3 was being debated, the Liberals were an Opposition Party in Canada's Parliament, rather than forming the government as they do now. The Liberal Party in 2010 spoke strenuously against the piecemeal approach to reform offered by Bill C-3 and called for the complete elimination of the sex discrimination in the *Indian Act*.

19. Moreover, during that legislative reform process the Liberal Party put forward specific language for an amendment to Bill C-3 that would have had the effect of extending equal status to Aboriginal women by making 6(1)(a) status available to Aboriginal women and their

descendants on the same basis that it is available to Aboriginal men and their descendants.[29]

20. In other words, Parliamentary history tells us that the Liberal Party, which now forms the Government of Canada, knows that complete elimination of the sex discrimination from the *Indian Act* is the only right thing to do and it has itself drafted the statutory language necessary to accomplish this. The Liberal Government of Canada's claim that it needs to consult and delay further lacks credibility and respect for the rights of Aboriginal women and their descendants.

D. The Government's Proposed Process Related to the Deschenaux Decision Does Not Justify Suspension of Consideration of the McIvor Petition

21. Comfort cannot be taken from the fact that Canada is required by the Superior Court of Quebec to make amendments by February 2017 that will cure the *Indian Act* sex discrimination experienced by Stéphane Deschenaux and Susan Yantha. Nor can comfort be taken from the fact that Canada has promised to initiate a process of engagement and policy development to respond to the *Deschenaux* ruling. This is so for the following reasons:

- First, there is no end in sight for this yet to be determined engagement and policy process. The February 3, 2017 deadline set by the Court *Deschenaux* is not a fixed date. Governments can and do often return to courts to request extensions of deadlines. In the McIvor case, Canada returned to Court on more than one occasion to obtain extensions of deadlines. If the Commmittee suspends its consideration of the McIvor petition to accommodate Canada's political schedule, the petitioners and the Committee could be waiting for a long time.

- Secondly, *Deschenaux* challenged only a particular and narrow aspect of the sex discrimination in the status provisions of the *Indian Act*. There are many variations in how the sex discrimination in the *Indian Act* affects Aboriginal individuals. A statutory response that seeks only to address the discrimination identified in *Deschenaux* will still leave some discrimination in the status provisions untouched. For example, the Deschenaux judgement does not address the sex-based exclusion of descendants born prior to April 4, 1951, nor the exclusion of grandchildren of unmarried status grandmothers. It does not address the fact that the scheme only grants non-transmissible s. 6(2) status, and never 6(1)(a) status, to the grandchildren born

> prior to April 17, 1985 of Aboriginal women who married out and whose children married out. Further, it does not address the objection of the petitioners that they do not enjoy all the intangible benefits of status on a basis of equality with their peers because the scheme denies them the legitimacy and social standing associated with full 6(1)(a) status.[30]

22. Canada could wait for more court decisions and correct each variation without eliminating the sex discrimination overall. That is precisely what Canada did with Bill C-3, which did not live up to its name - *Gender Equity in the Indian Act* – in response to Sharon McIvor's challenge. In *Deschenaux*, the Court reflected on the government's limited approach to reform following *McIvor*, and expressed concern about the tendency of governments to do the "bare minimum" and to "wait for the courts to rule on a case by case basis." The judge characterized this governmental tendency as a "certain legislative abdication."[31] Taking this piecemeal approach could take more years while blatant sex discrimination, of which Canada is well aware, remains in place.

23. Unlike *Deschenaux*, the McIvor petition does not just focus on one or two situational variations; it impugns the fundamental sexism of the status provisions of the *Indian Act*, namely the sex based hierarchy between s. 6(1)(a) and s. 6(1)(c) pursuant to which certain status women and their descendants are categorically ineligible for full 6(1)(a) status.

24. *Deschenaux* deals with two ways in which the discrimination manifests, but not with the heart of the problem. The only effective remedy to respond to the discrimination challenged by the Petitioners is one which places Indigenous women and their descendants on the same footing as their male counterparts who have full s. 6(1)(a) status. For the Human Rights Committee the issue is not whether the legislative scheme may in the future comply with *Deschenaux*, but whether it complies with the *International Covenant on Civil and Political Rights*.

E. Canada's Commitment to a New Nation-to-Nation Relationship Does Not Justify Suspension of the Consideration of the McIvor Petition

25. Canada says that its *Deschenaux*-related engagement process will be embedded in a larger ongoing process of consultation regarding a new nation-to-nation relationship with Indigenous peoples in Canada.

26. Canada's commitment to a new nation-to-nation relationship is laudable and appropriate. However, it is not a justification for postponing recognition at law of the equality rights of Indigenous women.

27. To be sure, there are many issues about which the Government of Canada should consult with Aboriginal peoples. However, in 2016 further consultation about whether to eliminate sex discrimination from the criteria for determining entitlement to status is not such an issue.

28. Status, as it has been defined in the *Indian Act*, is exclusively concerned with the special relationship between individuals of Aboriginal descent and the Canadian state. It is not a nation-to-nation issue.

29. Meaningful consultation is predicated on the possibility of negotation. However, the enjoyment of rights guaranteed by the ICCPR is not negotiable. The equality rights of Indigenous women are not commodities to be traded in a process of reconfiguring nation-to-nation relations. Nor can credible nation-to-nation consultation on any subject matter proceed until those who have been previously excluded based on discriminatory criteria, or assigned lesser status, are included and able to participate as equals.

30. To be consistent with international human rights norms, Canada should eliminate the sex discrimination in the *Indian Act*, once and for all, as a necessary and urgent precondition for beginning meaningful nation-to-nation consultations, and as a necessary and urgent precondition for a national inquiry into murders and disappearances of Indigenous women and girls, so that the consultations and the inquiry can begin on a footing of demonstrated respect by government for the equality of Indigenous women.

F. Conclusion

31. The Petitioners request the committee not to accede Canada's request to delay consideration of this petition. The Petitioners respectfully reiterate their request that the committee:

> (a) *direct Canada to take timely measures to ensure that s. 6(1)(a) of the status registration regime, introduced by the 1985 Indian Act, and re-enacted by Bill C-3, is interpreted or amended so as to entitle to registration under s. 6(1)(a) those persons 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 descendants, born prior to April 17, 1985, and

(b) *find that Sharon McIvor is entitled to be registered under either s. 6(1)(a) of the 1985 Indian Act or s. 6(1)(a) of the 1985 Indian Act as amended and that the applicant Jacob Grismer is entitled to be registered as an Indian under s. 6(1)(a) of the 1985 Indian Act or s. 6(1)(a) of the 1985 Indian Act as amended.*

32. The Petitioners wish to re-emphasize that the State Party has failed to take effective remedial action over an excessively prolonged period of time. In light of the State Party's history of intransigence in correcting the sex discrimination of which it has long been aware, the Petitioners stress the desirability of specific guidance from this Committee regarding the nature of the remedy to be provided by the State Party.

All of which is respectfully submitted by:

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Gwen Brodsky, On behalf of Sharon McIvor and Jacob Grismer

Date: June 20, 2016

[1] *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555.
[2] *Canadian Bill of Rights*, SC 1960, c 44
[3] *Canada (AG) v Lavell*, [1974] SCR 1349.

[4] *Lovelace v Canada*, Communication no R6/24, Supp no 40, UN Doc A/36/40 (1981) at 166.
[5] *International Covenant on Civil and Political Rights* (ICCPR) 1966, 999 UNTS 171.
[6] Bill C-31, *An Act to Amend the Indian Act*, SC 1985, c 27. Bill C-31 was enacted as *Indian Act*, RSC 1985, c I-5.
[7] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
[8] *Minutes of Proceedings and Evidence of the Standing Committee on Legal and Constitutional Affairs*, 33rd Parl, 1st Sess (7 March1985) at 12:7–12:9 (David Crombie, Minister of Indian Affairs and Northern Development).
[9] *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996).
[10] Human Rights Committee, *Concluding Observations of the Human Rights Committee*, CCPROR, 85th Sess, UN Doc C/CAN/CO/5 (2006).
[11] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UNGAOR, 36th Sess, UN Doc E/C.12/CAN/CO/5 (2006).
[12] Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, CEDAWOR, 42nd Sess, UN Doc C/CAN/CO/7 (2008); CEDAW, *Report of the Committee on the Elimination of Discrimination against Women*, UNGAOR, 58th Sess, Supp no 38, UN Doc A/58/38 (2003).
[13] The delays are documented in para. 93 of the McIvor Petition and in the British Columbia Supreme Court decision in *McIvor v. Canada*.
[14] *McIvor*, *supra* note 2. Both the British Columbia Supreme Court and the British Columbia Court of Appeal found that the scheme discriminated based on sex, although the Court of Appeal found that the scheme discriminated on a much narrower basis and that the discrimination was justified in part.
[15] Bill C-3, *Gender Equity in Indian Registration Act*, 3rd Sess, 40th Parl, 2010 (received royal assent on 15 December 2010); *Gender Equity in Indian Registration Act*, SC 2010, c 18.
[16] Indigenous and Northern Affairs Canada, "Registration Process for Bill C-3 Applicants", *Government of Canada* <www.aadnc-aandc.gc.ca>
[17] *Matson v. Canada (Indian Affairs and Northern Development)* 2013] . 2013] C.H.R.T. No. 13; *Canada (Canadian Human Rights Commission) v. Canada (Indian and Northern Affairs)* [2015] F.C.J. No. 400..
[18] *Lynn Gehl v. Attorney General of Canada*, 2015 ONSC 3481 (CanLII).
[19] *Deschenaux c. Canada*, supra note 1.
[20] July 2016 Concluding Observations of the Human Rights Committee.
[21] CEDAW Inquiry report.
[22] IACHR report on murders and disappearances.

[23] Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia*, Canada OEA/Ser.L/V/II, Doc 30/14 21 (2014), Organization of American States <www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf> at para 68.
[24] *Ibid* at para 69.
[25] *Ibid* at paras 93, 129.
[26] *Ibid* at para 306.
[27] CEDAW, *Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women Committee on the Elimination of Discrimination against Women*, Doc CAN/CEDAW/C/O P.8/CAN/1 (2015),
[28] United Nations Human Rights Committee, Concluding Observations of the Human Rights Committee, CCPROR, 114th Sess, UNDOC C/CAN/CO/7 (2015).
[29] This legislative history is summarized in Gwen Brodsky, "McIvor v. Canada: Legislated Patriarchy Meets Aboriginal Women's Equality Rights," *Indivisible: Indigenous Human Rights*, Joyce Green, ed, (Fernwood Publishing, 2014).
[30] See paragraphs 2 – 15 of the Petitioners" Comments, December 5, 2011.
[31] See *Deschenaux v. Canada*, paras. 234 – 241.