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

1. On July 13, 2016 the Human Rights Committee decided to postpone consideration of this Petition until its session in July 2017. The Committee thereby acceded to Canada's request for delay, over the objections of the Petitioner.

2. The Committee requested that Canada provide additional information by March 1, 2017.

3. On March 3, 2017 the Petitioners received from the Human Rights Committee Canada's submission requesting a further postponement of the Committee's consideration of the Petition until November 2017.

4. The Petitioners object to Canada's request. The Petitioners continue to rely on and respectfully direct the Committee to the Petitioners' submission filed on June 20, 2016. The Petitioners make the following additional observations.

5. The Petitioners submit that Canada's request for a further postponement should be refused because Canada has not given the Committee any reason to have confidence that Canada intends to use additional months of delay to eliminate all the sex discrimination in the status registration regime.

6. As explained in the Petitioners' previous submissions, for decades Canada has insisted on a piecemeal approach to addressing sex discrimination in the *Indian Act*. In 1985 Canada made piecemeal reforms removing some of the sex discrimination and carrying forward the rest, resulting in the *McIvor v. Canada* constitutional litigation. In 2010 Canada made more piecemeal reforms ostensibly to comply with the BC Court of Appeal decision in the *McIvor v. Canada*. The continuing sex discrimination in Bill C-3 left Sharon McIvor with no alternative but to seek the assistance of the Human Rights Committee. Other individuals returned to the courts because both the decision of Court of Appeal in *McIvor* and the government's legislative response to it were manifestly flawed. In 2015 the Quebec Superior Court issued a judgement in *Deschenaux*[1] confirming that the *Indian Act* continued to discriminate based on sex.

7. In 2016 Canada introduced Bill S-3, more piecemeal legislation that fails to fully remove sex discrimination once and for all.

8. Essentially Bill S-3 deals with scenarios that are similar to the particular facts of the plaintiffs that were before the Court in *Deschenaux*. It does not comprehensively eliminate sex discrimination. Canada has indicated that it will consider an amendment to remove another sliver of discrimination, namely differential treatment of grandchildren of women born out of wedlock. Still, this leaves the core of the discrimination in place, in particular the sex-based hierarchy between 6(1)(a) status and s. 6(1)(c). This also leaves unaddressed discrimination against Aboriginal women and their descendants born prior to September 4, 1951, based on the ground of sex.

9. Significantly, Canada's own Senate Committee on Aboriginal Peoples chose not to support Bill S-3. Instead, after hearing from witnesses about the sex discrimination that Bill S-3 would not cure, on December 6, 2016 a motion was introduced in the Senate Committee not to proceed further with study of Bill S-3. On December 13, 2016 the Senate Committee wrote to the Federal Minister of Indigenous and Northern Affairs urging the government to remove all scenarios of sex discrimination.[2] The Senate Committee's decision not to accede to the government's approach of attempting to pass legislation that leaves sex discrimination in place, means that the government must take another approach.

10. However, the Petitioners continue to be concerned that Canada is not engaged in a genuine process of law reform intended to eliminate <u>all</u> sex discrimination in the status registration regime as required by the ICCPR. Notwithstanding the admonitions of the Senate Committee and of the Court in *Deschenaux*, Canada appears to be intent on eliminating the whole status registration regime from the *Indian Act* as soon as possible, but not on removing all the sex discrimination embedded in the flawed regime before doing so.

11. The Petitioners reiterate that Canada's purported goal of developing a new nation-to-nation relationship with Aboriginal peoples is laudable and appropriate. However, it is not a valid reason for postponing the elimination of sex discrimination in the existing status registration regime.

12. The *Deschenaux*-related policy review process in which Canada purports to be engaged will not result in the elimination of all sex discrimination, as long as Canada continues to rely on its "known discrimination" approach. "Known discrimination," a term that Canada has invented is code for Canada's assumption that the withholding of equal status recognition from women and matrilineal descendants is justified by the goal of preserving previously acquired rights. For reasons previously advanced by the Petitioners in this proceeding, this assumption is not consistent with the ICCPR. Moreover, the Petitioners

have challenged the decision of the British Columbia Court of Appeal in *McIvor v. Canada*, in which this rationale for the continuation of sex discrimination was accepted. The issue of whether the preservation of sex discrimination is even a valid objective under the ICCPR lies at the heart of the *McIvor* petition. Unless Canada is willing to revisit its position that preserving discriminatorily acquired rights for Aboriginal men and their descendants justifies the perpetuation of sex discrimination against Aboriginal women and their descendants, the *McIvor* petition cannot be resolved, *Indian Act* sex discrimination will continue, and Canada will be in violation of the ICCPR.

13. To comply with the ICCPR, Canada must completely eliminate the sex discrimination in the *Indian Act.* This could be accomplished if Canada were to grant s. 6(1)(a) registration entitlement to those Indigenous persons who were previously not entitled to be registered under s. 6(1)(1)(a) solely as a result of the preferential treatment accorded to status Indian men over status Indian women born prior to April 17, 1985, and to patrilineal descendants over matrilineal descendants, born prior to April 17, 1985. Measures that fall short of that inevitably will leave sex discrimination in place.

14. Contrary to Canada's submission, the Petitioners have not received an effective remedy. They have requested both systemic and individual remedies.

15. Furthermore, the Petitioners continue to be directly affected by the sex-based hierarchy between 6(1)(a) and s. 6(1)(c). Canada has failed to address or even acknowledge the profound offence to their dignity and ICCPR rights that this differential treatment represents. How can it be consistent with the ICCPR that Sharon McIvor's brother Ernie and his offspring are entitled to full s. 6(1)(a) status whereas Sharon McIvor and her offspring are consigned to a status that is stigmatized and widely regarded as inferior, notwithstanding that she and her brother have the same lineage? There has been no indication from Canada that it intends to correct this fundamental sex-based inequality.

16. In conclusion, the Petitioners ask the Human Rights Committee not to further delay consideration of this petition.

17. The Petitioners request:

(i) that the Committee refuse Canada's request that the Committee further postpone its adjudication of this complaint, especially in light of Canada's failure to demonstrate that the particular amendments that it proposes to make to Bill S-3 will address <u>all the remedies requested by the Petitioners and the full extent of the discrimination identified</u>, in

particular with regard to the sex-based hierarchy between s. 6(1)(a) and s. 6(1)(c) of the *Indian Act*; and

(ii) in any event, that the Committee recommend to Canada that the Petitioners' eligibility for full s. 6(1)(a) status be recognized and given immediate effect. This request is made in light of the State Party's failure to take effective remedial action over an excessively long period of time and in light of the ongoing prejudice of being denied access to full s. 6(1)(a) status based solely on Sharon McIvor's female sex.

All of which is respectfully submitted by:

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Gwen Brodsky, On behalf of Sharon McIvor and Jacob Grismer
Date: March 16, 2017

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[1] See appended: *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555 http://www.canlii.org/en/qc/qccs/doc/2015/2015qccs3555/2015qccs3555.html?autocompleteStr=Descheneaux&autocompletePos=24, and January 20, 2017 decision suspending the order in *Deschenaux* to avoid creating a vacuum in the legislation, and reiterating the Court's concerns about that the kind of narrow approach to law reform taken by the government following the decision of the Court of Appeal in *McIvor v. Canada*, and urging the government not to take a narrow approach to addressing the sex discrimination embedded in the status registration regime of the *Indian Act*.
[2] See December 13, 2016 letter submitted by Canada.