Law Office of Mary Eberts

June 14, 2021

Ibrahim Salama,
Chief,
Human Rights Treaty Branch,
And CCPR Follow-Up Team

Re: **Implementation by Canada of the 11 January 2019 Decision of the Committee concerning the Petition of Sharon McIvor and Jacob Grismer**
CCPR/C/124/D/2020/2010

Dear Mr. Salama and Members of the CCPR Follow-Up Team,

I am writing to provide information to the Committee with regard to the Follow-Up Process in the matter of *McIvor v. Canada,* CCPR/C/124/D/2020/2010.

I am a Canadian lawyer who began working with Indigenous women on the issue of sex discrimination in the *Indian Act* by representing Indian Rights for Indian Women in the 1980s. In addition to representing the Native Women's Association of Canada when it intervened in Sharon McIvor's appeal to the Court of Appeal in British Columbia [*McIvor v. Canada (Minister of Indian and Northern Affairs)*, 2009 BCCA 153], I have appeared as counsel in the following reported cases dealing with sex discrimination under the *Act*: *Perron v. Canada (Attorney General*) [2003] OJ No. 1348; *Sawridge Indian Band v. Canada* (2004) 316 NR 332 (FCS); *Descheneaux v. Canada (Procurateur-General*) 2015 QCSC 3555; *Gehl v Canada (Attorney* General), 2017 ONCA 319 and *Canada (Human Rights Commission) v. Canada (Attorney General),* [2018] 2 SCR 230, as well as a number of unreported cases. I have also written articles in this area, and presented to legislative committees, and I have taught on this subject at the Osgoode Hall Law School certificate program in Aboriginal Law. In addition, I was actively involved in securing the guarantees of equality in section 15 of the *Canadian Charter of Rights and Freedoms*, and have been counsel in several foundational cases in the Supreme Court of Canada dealing with that section and the *Charter* generally.

I am deeply troubled by Canada's public position on the issue of sex discrimination in the *Indian Act*, as represented most recently in its statements to the *Canadian Parliament in Report to Parliament: Review of S-3*, December 2020. Its position does not accurately reflect the law of equality in this country.

Canada's Position on Sex Inequality and the Indian Act

Canada states at page 10 of its *Report* that as a result of its amending legislation, particularly *Bill S-3*, "all sex-based inequities previously in section 6 of the *Indian Act* have been eliminated."

In the law relating to section 15 of the *Charter*, under which most if not all of the challenges have been brought to the *Indian Act*, "inequity" has no meaning. The correct term to describe something which violates the guarantees of section 15 is "inequality". It is readily apparent that the amendments cited by Canada do not, in fact, remove sex "inequality".

In its presentation to Parliament, Canada takes into account only those instances where the *Act*, on its face, makes a distinction between men and women, and in so doing uses the terms "men" and "women". Those cases where the language of the *Act* is apparently neutral on its face, but generates discrimination through its application, are left out of Canada's analysis. However, these situations clearly constitute inequality on the basis of sex. In a country like Canada, where legislative change is usually only prompted by a Court finding of inequality, it is important that this terminology be clear. It is a finding of inequality on the basis of sex, whether on the face of the *Act* or in its impact, that will force needed change. Canada underestimates the true extent of the inequality permeating the *Indian Act* by counting only those cases where the different treatment of men and women is clear on its face.

The Two-Parent Rule: Impact Discrimination in the Indian Act

In 1985, *Bill C-31* enacted a new requirement that a child needs to have two parents with status in order to be eligible for Indian status. Up to that time, a child could receive status from one parent, who was in almost all cases the child's father. Where a single woman with status gave birth to a child, she could, with a few exceptions, pass her status on to her child. The 1985 amendments removed that single opportunity from women with status.

Canada introduced the two-parent rule in 1985 instead of simply making it possible for a child to derive status from either the mother or the father. This rule is apparently neutral on its face, making no one parent superior to the other in the matter of conferring status. However, the privilege of the male parent was transferred from the old *Act* to the new one by means of this two-parent requirement. That privilege was apparent right from the day the legislation came into effect. Couples where the wife derived status from her husband before 1985 were immediately ready to comply with the two-parent rule. That was because *Bill C-31* gave to the woman who had got status from her husband under the old Act the right to pass her status on to her child, which she had not had under the previous law. This woman with the new right to confer status and the husband who already had status were thus able to give full status to their children right away. Couples where the wife lost status upon marriage to a non-status male, and then regained it under *Bill C-31*, were not similarly able to comply with the two-parent rule. This was because the man did not get status through that marriage, either before or after 1985. The wife with newly re-acquired status and her non-status husband could not comply with the two-parent rule. Thus their children were granted status under section 6(2) of the *Act,* known colloquially as "the second generation cut-off".

The Two-Parent Rule, Second Generation Cut-Off, and a New Generation of Lost Children

A person with two status parents receives status that not only lasts through their lifetime, but may also be passed down to the next generation. Even if that person has a child with someone who does not have status, the child will still have status, although it is the lesser form of status available under section 6(2). A person who has one status parent, and thus status under section 6(2) cannot pass that status down to the next generation, unless the child's other parent also has status. This inability of the person with 6(2) status to confer it on a child is why this is called "the second generation cut-off" In extensive consultations across the country conducted by Minister's Special Representative Claudette Dumont-Smith, it became apparent that the inequality of the greatest concern to First Nations was this second-generation cut-off*: Final Report of the Minister's Special Representative on the Collaborative Process on Indian Registration, band membership and First Nation citizenship (*May 2019), page 9.

The Special Representative observes in her report that First Nations are aware that the second generation cut-off will gradually eliminate persons eligible to be registered as an Indian. She says, "The end result, in the not so distant future, is that some communities will no longer have any registered Indians…." (p.9) The choice of the two-parent rule for acquiring status, instead of just making the one-parent approach available to both women and men, contributes to what has always been the long term goal of the registration system under the *Indian Act*: the reduction of the number of Indians.

Unknown and Unstated Paternity

The second generation cut-off creates a precarious situation for female parents. As observed by Justice Sharpe of the Ontario Court of Appeal in the *Gehl* case, It is relatively easy to determine who is the mother of the child. Determining who is the father, and thus ascertaining his status, is more difficult. The *Act* leaves it up to the man to consent to being identified as the father, or not consent, giving him enormous power. If he chooses to withhold his name from the registration application in order to conceal an infidelity, the *Indian Act* permits him to do that.

Paternity is particularly difficult to ascertain in cases like rape, gang rape, or incest. In such cases, paternity may be known but unstated, or simply unknown. Where the father does not identify himself, or cannot be identified, the mother with 6(2) status cannot provide full status to her child. If the child has no status, the mother has a very difficult choice to make. As a status person, she is eligible to live on reserve, or to visit friends and relatives there. As a non-status person, her child has no such right. This rule, then, sets the stage for women and their children to be exiled from their home communities in the same way that the earlier rule about losing status upon marriage to a non-status male did. Women and children off reserve, or without family and community support, become very vulnerable to violence and exploitation, as has been reported many times.

Canada's 2020 *Report* to Parliament states that *Bill S-3* has provided a remedy for the problems caused by unknown or unstated paternity (p.9). A new section 5(6) of the *Act* is designed to circumvent the former policy of the Department that the father's name must be provided in order that his status be determined. The section provides that the Registrar need not establish the identity of the father, but is to rely on "any credible evidence" that is presented by the applicant, and to "draw from it every reasonable inference in favour of the person in favour of whom the application is made."

Unfortunately, this relaxation of the rules of proof will not be effective in every case. If it desired to keep yet another generation of women and children from going into exile, Canada could have continued the right of the single woman to give status to her child, present in the law before 1985.

Enfranchisement

In addition to these new inequalities created by the 1985 legislation, there are a number of cases where no remedial legislation has addressed an historic inequality and it thus remains in force. One of these historic inequalities, under increasing pressure from litigation, is enfranchisement.

Enfranchisement was introduced before Confederation, in *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, 20 Vict. (1857) c.26. That it was intended as a tool to encourage assimilation, and eventual absorption of the Indigenous population, has been clear from the outset. The basic scheme was that a male Indian who proved his educational or other accomplishments to the satisfaction of the Crown would be allowed to shed Indian

status and receive land that, in due course, he could leave to his descendants. For various periods from its origin until its abolition in 1985, enfranchisement was made involuntary for men. Even if the enfranchisement was "voluntary", the reasons for it reveal that it was in many cases a measure of desperation: men would enfranchise to keep their children away from residential school, or to be able to hunt or fish in areas where the First Nation right to do so had been overridden. Whether the man's enfranchisement was voluntary or involuntary, the law provided that his wife and minor children were to be enfranchised with him. They had no choice. For a certain period before 1920, single women were eligible to apply for enfranchisement. However, it came to light in the case of *Hele v. Canada (AG),* 2020 QCCS 2406 that zealous officials would enfranchise single women even after the legal justification for it had lapsed.

Bill C-31 did not address all the many situations in which women were involuntarily enfranchised. Nor did *Bill S-3.* The Minister's Special Representative found that this issue was of great concern to First Nations. In June 2021, it was announced that a class action on behalf of several families in the West had been commenced, targeted at the harm done by enfranchisement. It is noteworthy that the first enfranchisement law, in 1857, was also the first legislation to enforce the loss of women's status as a result of her husband's loss or lack of status. While male enfranchisement proved to be very unpopular over the decades, attracting comparatively few applicants, the strategy of removing status from women as a result of their husband's status proved to be an enduringly successful tool of assimilation. It was widely used. Counsel in the new class action, Ryan Beaton, sums it up this way: "Parliament's stated intention for enfranchisement was to gradually reduce the number of status "Indians", while imposing a discriminatory view of women as subservient to their husbands, as recognized by the country's highest court." (https:// powerlaw.ca)

Summary

The overview above is necessarily a brief summary of a complicated subject which is laden with legislative amendments stretching from before Confederation.

Indigenous women still do not have full equality under the law, and the equal benefit of the law, as required by section 15 of the *Canadian Charter of Rights and Freedoms*. The language of section 15 was deliberately sought by women's advocates in order to ensure that narrow language or a narrow iinterpretation of rights, would not prevent justice for Indigenous women.

Canada's policy of moving glacially to reform the *Indian Act,* legislating only when forced to by a Court decision finding sex discrimination, ensures that the *Indian Act* will continue to act as an effective engine for assimilation, for loss of culture and language, family destruction and violence against women.

Yours truly,

Mary Eberts
Mary Eberts, O.C.

95 Howland Avenue, Toronto, Ontario M5R3B4