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Bill C-3 – *Gender Equity in Indian Registration Act*

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Aboriginal Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Aboriginal Law Section of the Canadian Bar Association.

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Bill C-3 – *Gender Equity in Indian Registration Act*

I. INTRODUCTION

The Canadian Bar Association’s National Aboriginal Law Section (CBA Section) appreciates the opportunity to comment on Bill C-3, the *Gender Equity in Indian Registration Act*, which was given first reading on March 11, 2010. Bill C-3 responds to the British Columbia Court of Appeal decision in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*.¹ The Bill represents the first time in twenty-five years that Parliament has considered the registration provisions of the *Indian Act*.² The CBA Section asks whether Bill C-3 would actually promote gender equality in Indian registration. Our answer is sort of, but not quite.

II. BILL C-31 AND SHARON McIVOR

In 1985, Bill C-31³ amended the *Indian Act* to provide equal treatment of male and female Indians prospectively for entitlement to registration as a status Indian. Bill C-31 was directed at removing discrimination against women in the *Indian Act* registration provisions. Since then, all registered Indians have been subject to the “second generation cut-off rule” which occurs as a result of two successive generations of parenting with non-Indians of either sex. However, the Act’s gender discrimination was not fully remedied by Bill C-31.

Sharon McIvor was born in 1948, and was not a registered Indian. She married a non-Indian, Charles Grismer, in 1970. Ms. McIvor believed she was not entitled to status under the earlier legislation, because she understood that neither of her parents was entitled to status: both were children of non-Indian fathers. Ms. McIvor would, in any event, have lost her right to status under the former section 12(1)(b) when she married a non-Indian.

¹ 2009 BCCA 153.

² R.S.C. 1985 c.I-5 (*Indian Act*).

³ *An Act to Amend the Indian Act*, S.C. 1985, c.27 (Bill C-31).

Bill C-31, sections 6(1) and 6(2) came into force in 1985. That September, Ms. McIvor applied under the amended legislation for Indian status on behalf of herself and her children. The application took years to resolve. Eventually, she obtained status under section 6(1)(c) and her son, Jacob Grismer, born before 1985, obtained Indian status under section 6(2). However, because Jacob Grismer's wife was not a status Indian, he was unable to pass his status to his children.

Ms. McIvor and Mr. Grismer confronted the "second generation cut-off" rule before male Indians who married and had children with non-Indians prior to 1985. They challenged the 1985 amendments to the *Indian Act*, specifically section 6, on the basis that the status provisions contained residual discrimination on the basis of sex.

III. TRIAL DECISION

At trial,⁴ the judge held that section 6 of the *Indian Act* violated the equality rights of Sharon McIvor and Jacob Grismer under equality guarantees in section 15 of the *Charter*. The equal benefit of law at issue is the right to transmit Indian status and cultural identity to future generations. Individuals like Ms. McIvor and Mr. Grismer face the "second generation cut-off" rule one generation sooner than male Indians who married and had children with non-Indians prior to 1985.

The trial judge ruled the relevant sections of the *Indian Act* unconstitutional, and made an order granting the right to Indian status to anyone with a female ancestor who had lost her status upon marriage to a non-Indian. The judge refused to grant a stay to allow Parliament time to figure out what to do, and instead fashioned a broad complex remedy to alleviate the *Act's* sex discrimination.

IV. APPEAL DECISION

The Government of Canada appealed the trial decision, and the appeal was allowed in part. The BC Court of Appeal found that the trial judge erred in granting a remedy founded on discrimination on the basis of matrilineal descent. The Court found that the proper ground of

⁴ McIvor v. Canada (Registrar, Indian and Northern Affairs), 2007 BCSC 827.

discrimination was sex because the 1985 amendments granted some descendants of men ongoing advantages over similarly placed descendants of women.

However, the BC Court of Appeal also found discrimination on a much narrower basis than did the trial judge. Under section 12(1)(a)(iv) of the former legislation, a grandchild of the hypothetical brother of Ms. McIvor would have lost Indian status at age 21 (the “Double Mother Rule”). Under the 1985 legislation, the hypothetical brother’s grandchildren would have Indian status under section 6(1)(c) or 6(2) and be able to transmit status to any children that they have with persons with status.

Ms. McIvor’s grandchildren, on the other hand, have no entitlement to Indian status. Thus, the BC Court of Appeal found that sections 6(1)(a) and 6(1)(c) of the *Indian Act* violate the *Charter* only to the extent that they grant individuals to whom the Double Mother Rule applied greater rights than they would have had under section 12(1)(a)(iv) of the former legislation. In essence, the court held that Bill C-31 effectively went beyond preserving rights by enhancing the right to transmit status to those who formerly lost status under the Double Mother Rule.

The BC Court of Appeal also held that the trial judge erred in defining the extent of the *Charter* violation, as the effect of the trial decision would be to apply section 15 of the *Charter* retrospectively. According to Justice Groberman, the trial judge had considered it necessary to redress all discrimination that occurred prior to 1985 and would have granted Indian status to all individuals who could show that somewhere in their ancestry there was a person who had lost Indian status by virtue of being a woman married to a non-Indian.

The BC Court of Appeal narrowed the scope of a section 15 infringement, but also held that the infringement was not justified by section 1 of the *Charter*. While the Court recognized the need to preserve vested rights of those who have status as a pressing and substantial governmental objective justifying the legislation, it held that Bill C-31 did not minimally impair the equality rights of the plaintiffs. Accordingly, it was not saved by section 1.

As a result of this *Charter* violation, the BC Court of Appeal declared on April 9, 2009 that sections 6(1)(a) and 6(1)(c) of the *Indian Act* are of no force and effect. Significantly, the BC Court of Appeal refused to “read in” provisions to overcome the discrimination as the trial judge had done in the decision below. By doing so, the court eliminated not only section

6(1)(c), by which many Aboriginal women regained their status as Indians (specifically, those who had married non-Indians before 1985) but also section 6(1)(a), under which many Aboriginal men, women and children had their pre-1985 Indian status recognized and continued post-1985. The only Indians who appear to keep their status under the judgment are:

- members of new Indian bands since 1985 (section 6(1)(b)),
- Indian men, their wives and children, who were enfranchised by Minister's order before 1985 (section 6(1)(d)),
- the rare cases of those who lost status pre-1985 for becoming professionals or leaving the country (section 6(1)(e)) and
- the children of one or two such individuals (section 6(1)(f), section 6(2)).

However, the BC Court of Appeal suspended the effect of its judgment for 12 months to allow Parliament to respond to the declaration with a legislative remedy.

V. SUPREME COURT OF CANADA

On June 2, 2009, the federal government announced that it would not seek leave to appeal to the Supreme Court of Canada. Instead, it proceeded with legislative amendments and indicated a willingness to work with First Nations' organizations to "facilitate the necessary bill".

On June 4, 2009, Sharon McIvor filed an application seeking leave to appeal to the Supreme Court of Canada. On November 5, 2009, the Supreme Court denied leave to appeal.

VI. GOVERNMENT RESPONSE

The federal government scheduled several sessions with national and regional Aboriginal organizations and accepted written comments prior to Parliament's introduction of Bill C-3, *Gender Equity in Indian Registration Act*. The federal government also brought a motion before the BC Court of Appeal to extend the April 2010 deadline for re-enacting provisions to July 5, 2010 or whenever the bill comes into force, whichever is sooner. On April 1, 2010, the court granted the motion, extending the suspension to July 5, 2010.⁵

⁵ *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2010 BCCA 168, paragraphs 11 and 19. Interestingly, the court did not grant immediate registration to Mr. Grismer's two children as a condition of the extension, as requested by the respondents. The court held that this was not a case which demanded "a special personalized order": paragraph 18.

The main amendment proposed in Bill C-3 is the addition of section 6(1)(c.1) to the *Indian Act*, that would provide status to any individual:

- whose mother lost Indian status upon marrying a non-Indian man,
- whose father is a non-Indian,
- who was born after the mother lost Indian status but before April 17, 1985, unless the individual's parents married each other prior to that date, and
- who had a child with a non-Indian on or after September 4, 1951.

Section 6(1)(c.1) would apply to individuals currently registered, or entitled to be registered, under section 6(2) who meet the above criteria.⁶ New registration would be available to the children of individuals covered by section 6(1)(c.1) (whether born before, on, or after September 4, 1951) under section 6(2).

However, it is puzzling that under the proposed section 6(1)(c.1)(iv), one must have a child before being eligible for registration under section 6(1)(c.1).⁷ In our view, a person should have status according to ancestry, rather than whether that person has parented a child. The proposal in Bill C-3 would generate administrative inefficiencies, as a person eligible for registration under section 6(1)(c.1) will have to apply not only for registration of his or her child but also to change his or her own registration from section 6(2) to 6(1)(c.1) so the child may be registered. This is especially true where the section 6(1)(c.1) person has parented a child with a non-Indian.

⁶ There are many people registered under section 6(2) who were registered post-1985 because they were not registered earlier for reasons other than gender discrimination. One of those reasons had to do with adoption. In the 1960s and 70s, numerous First Nation children were adopted out but were not registered as Indians. After 1985, they were registered as Indians but under section 6(2). In many of those cases, their mothers still had status at the time of the children's birth and so after 1985 were reinstated because they were entitled to be registered at their birth but were not. However, they were given the same lesser status – namely section 6(2). Bill C-3 would not provide any benefit to those people who were given section 6(2) status for reasons different from the *McIvor* case. Unless a person meets all of the criteria, they are left out.

⁷ This raises a potential concern for “family status” discrimination, in that some people will only be “bumped up” from section 6(2) to 6(1) status if they parent a child. This may affect people whose band membership code denies membership to Indians registered under section 6(2) and also in communities where there is a certain stigma associated with having section 6(2) status rather than section 6(1).

RECOMMENDATION

The CBA Section recommends that section 2(3) of the Bill be amended to remove the proposed addition of section 6(1)(c.1)(iv) to the *Indian Act*.

New registration under section 6(2) will be available to individuals meeting all of the following criteria:

- whose grandmother lost Indian status as a result of marrying a non-Indian,
- who has one parent currently registered, or entitled to be registered, under sub-section 6(2) of the *Indian Act*, and
- who was born on or after September 4, 1951.

VII. EXISTING REGISTRANTS

The proposed amendments in Bill C-3 would re-enact provisions struck down by the Court of Appeal, specifically sections 6(1)(a) and 6(1)(c).

The Bill would come into force, or be deemed to come into force, on a day on or after April 5, 2010, to be fixed by order of the Governor in Council. This would protect the entitlement to registration of persons registered or entitled to be registered under those sections, so that no one would lose their registration as an Indian as a result of these amendments.

Section 9 is a concern, as it would remove the right of anyone to sue the federal government for not providing them with status as a result of the gender discrimination addressed by the Bill. If the federal government can be presumed to have been aware that Bill C-31 was not consistent with the *Charter* as far back as 1985, and did not act for over twenty years until the *Mclvor* decision reached the BC Court of Appeal, the CBA Section is concerned with the justice of such a “no liability” provision. Further, we caution that including such a provision could make the Bill vulnerable to further *Charter* challenges.

RECOMMENDATION

The CBA Section recommends that section 9 be removed from Bill C-3.

VIII. BAND MEMBERSHIP

For bands where membership is determined by Indian and Northern Affairs Canada under section 11 of the *Indian Act*, applicants would be added to the band list at the time of registration. For bands that have assumed control of their membership under section 10 of the *Indian Act*, the applicant's membership will be determined by rules adopted by the band.

Bill C-3 fails to provide additional resources to First Nations to address an influx of persons with status, particularly section 11 bands. The absence of funding is regrettable, in light of the federal government's estimates that up to 42,850 individuals may be able to change their status from section 6(2) to section 6(1), and up to 39,763 individuals will be newly entitled to registration under section 6(2).⁸ This may invite some First Nations to adopt more restrictive membership codes, as occurred after the passage of Bill C-31 in 1985.

RECOMMENDATION

The CBA Section recommends that the federal government provide adequate funding to support First Nations whose memberships will increase as a result of Bill C-3.

IX. CONTINUING DISCRIMINATION

Unfortunately, Bill C-3 would not completely eliminate discrimination from the registration provisions of the *Indian Act*. The proposals do not address discriminatory aspects of the "second generation cut-off rule" enacted in 1985, which the parties and the court studiously avoided in the *McIvor* case.

Perhaps more important, Bill C-3 would not sufficiently address the source of discrimination identified by the BC Court of Appeal; sections 6(1)(a) and 6(1)(c) violate the *Charter* to the extent that they grant individuals to whom the "Double Mother Rule" applied greater rights than they would have had under the former legislation. The chart below shows how Double Mother re-instatees would still have "better status" than those in the comparator group, even following the proposed amendments in Bill C-3.

⁸ *Estimates of Demographic Implications from Indian Registration Amendments: McIvor v. Canada* (Indian and Northern Affairs Canada) (Ottawa: Minister of Public Works and Government Services Canada, March 2010).

Bill C-3 would eliminate gender discrimination, but only for some individuals. As the chart demonstrates, others would continue to suffer discrimination by receiving lesser or no status because they had an Indian grandmother, instead of an Indian grandfather. A grandchild born before 1985 descended from an Indian grandfather would be able to transmit status for one generation longer than those descended from an Indian grandmother.

The CBA Section recommends that Parliament take the opportunity provided by the *McIvor* decision to fully eradicate gender inequality in the registration provisions of the *Indian Act*, rather than simply follow the letter of the law outlined in the BC Court of Appeal decision. For example, Bill C-3 would be improved by an amendment so that a grandchild born before 1985 with a female grandparent would receive the same entitlement to status as a grandchild of a male grandparent born in the same period.

RECOMMENDATION

The CBA Section recommends that Parliament take this opportunity to fully eradicate gender inequality in the registration provisions of the *Indian Act*. For example, the Bill would be improved by amending section 2(3) of Bill C-3 to add to section 6(1) to the *Indian Act*:

(c.2) that person is a child born after September 4, 1951 and before April 17, 1985 of a parent entitled to be registered under section 6(1)(c.1).

Indian status inherited from a Female Grandparent (Sharon McIvor)		Indian status inherited from a Male Grandparent (Hypothetical Brother)	
Before 1985			
Sharon McIvor married non-Indian man	lost status	Hypothetical Brother married non-Indian woman	status
Jacob Grismer (son) married non-Indian woman	no status	Son married non-Indian woman	status
Grandchild	no status	Grandchild double mother rule	old s.12(1)(a)(iv) status until 21 yrs
After 1985 (Bill C-31)			
Sharon McIvor married non-Indian man	6(1)(c) reinstated	Hypothetical Brother married non-Indian woman	6(1)(a) maintains status
Jacob Grismer (son) married non-Indian woman	6(2) second-gen. cut-off	Son married non-Indian woman	6(1)(a) maintains status
Grandchild born <i>after</i> 1985	no status	Grandchild born <i>after</i> 1985	6(2) second-gen. cut- off ⁹
Grandchild born <i>before</i> 1985	no status	Grandchild born <i>before</i> 1985	6(1)(c) double mother reinstatee
Parliament's proposed amendments (Bill C-3)			
Sharon McIvor married non-Indian man	6(1)(c) status	Hypothetical Brother married non-Indian woman	6(1)(a) status
Jacob Grismer married non-Indian woman	6(1)(c.1) status	Son married non-Indian woman	6(1)(a) status
Grandchild born <i>after</i> 1985	6(2) status	Grandchild born <i>after</i> 1985	6(2) status
Grandchild born <i>before</i> 1985	6(2) no status continuing discrimination	Grandchild born <i>before</i> 1985	6(1)(c) status

⁹ This was the situation in *McIvor*.