THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

January 31, 2022

Via email: cedaw@ohchr.org; petitions@ohchr.org

Ms. Gladys Acosta Vargas
Chairperson, Committee on the Elimination of Discrimination against Women
Human Rights Treaties Division
Office of the United Nations High Commissioner for Human Rights
Palais Wilson- 52, rue des Pâquis
CH-1201 Geneva, Switzerland

Dear Ms. Acosta Vargas:

Re: Communication 68/2014 of Jeremy Matson

I am writing on behalf of the Aboriginal Law Section of the Canadian Bar Association (CBA Section) to offer a letter of support for Jeremy Matson's Communication 68/2014 to the United Nations Committee on the Elimination of Discrimination against Women (CEDAW).

In short, Mr. Matson's complaint is that the registration provisions of the *Indian Act* discriminate against women and that avenues for redress are inadequate. We encourage CEDAW to assist Mr. Matson and urge Canada to remove all sex-based inequities in the *Indian Act*'s registration provisions.

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section represents lawyers who specialize in Aboriginal law from across the country, and frequently contributes to legislative and national policy initiatives.

We regularly make submissions to Canadian legislators on issues affecting Indigenous people, including registration or "Indian status" under the *Indian Act.*[1] We commented on Bill C-3 and Bill S-3,[2] where both bills improved (but did not eliminate) sex-based discrimination in the *Indian Act.* We also made submissions to a House of Commons Committee[3] on the removal of section 67 from the *Canadian Human Rights Act.*

1 RSC 1985, c I-5.

2 CBA Section Submission on Bill C-3 Gender Equity in Indian Registration Act (April 2010); CBA Section Submission on Bill S-3 Indian Act amendments (elimination of sex-based inequities in registration (November 2016).

3 CBA Section Submission on Bill C-44 Canadian Human Rights Act amendments (application to Indian Act (April 2007).

Remaining Sex-Based Inequities in the *Indian Act*

While Canada has taken steps to remedy discrimination in the registration provisions of the *Indian Act* through Bill S-3, the *Indian Act* still creates sex-based inequities through the second-generation cut-off, which Mr. Matson describes in his submissions.

First, the second-generation cut-off disproportionately affects Indigenous women and their children because it affects the parent who gives birth (who will always be known), as opposed to the non-birthing parent (who may be unknown or unstated in birth records). This is often referred to as the "unstated paternity" issue.

Women registered under s. 6(2) of the *Indian Act* must prove the other parent of their child is registered or entitled to registration to ensure registration is granted. There are many reasons why women may be unable or unwilling to identify the father of a child including sexual assault, sexual abuse or other violence. Even where women are able and willing to identify the father of a child, a father may not be willing to admit paternity. The burden of establishing parentage is not as heavy on men registered under s. 6(2) who apply for registration for their children because birth mothers are always known and stated in birth records.

While Canada has recently legislated that there is no *presumption* that an unknown or unstated parent is not entitled to be registered,[4] there is no presumption that the parent *is* entitled to be registered. This means that a mother registered under s. 6(2) applying on behalf of her child must still demonstrate to the Registrar that the other parent of the child is registered or entitled to registration.

Second, as Mr. Matson notes, sex-based discrimination in the *Indian Act* intersects with discrimination on other grounds prohibited by Canadian and international law including age and marital status.[5] With respect to age, because April 17, 1985 is the date used for the second-generation cut-off, siblings or other relatives with the same ancestral, cultural and other connections to their First Nation communities may have different registration status under the *Indian Act*.

In the case of two siblings with unstated paternity, for example, with a grandmother whose entitlement to registration was restored under Bill S-3, a sibling born before April 17, 1985 will be entitled to registration under s. 6(1) while a sibling born after April 17, 1985 will only be entitled to registration under s. 6(2), which can only be passed on to their children if they partner with another registered Indian. This is age-based discrimination, and disproportionately affects Indigenous women and their children with unstated paternity.

The CBA Section underscored these unstated paternity and age issues to the Canadian Senate when it was considering Bill S-3.[6]

Third, another result of Canada's various "fixes" to gender discrimination in the *Indian Act* – through bills C-31, C-3 and S-3 – is that whether a person's parents are married and when they married (before or after April 17, 1985) also affects a person's entitlement to registration.

---

4 *Indian Act,* s. 5(7).

5 Discrimination based on age and marital status are prohibited by s. 15 of the *Canadian Charter of Rights and Freedoms.* Age: *McKinney v. University of Guelph,* [1990] 3 SCR 229. Marital status: *Miron v. Trudel,* [1995] 2 S.C.R. 418; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325; *Quebec (A.G.) v. A*, [2013] 1 S.C.R. 61. Discrimination on the basis of martial status is prohibited by the *Convention on the Elimination of All Forms of Discrimination against Women* (CEAFDW), United Nations General Assembly, GA Res 34/180 of 18 December 1979, UN Doc A/RES/34/180, Article 1.

6 See footnote 1.

For example, if two cousins (A and B) born after April 17, 1985 have a grandmother who has been re-entitled under Bill S-3, and both have one parent registered under s. 6(1) and one unregistered parent, but cousin A's parents married before April 17, 1985 and cousin B's parents are unmarried or married after April 17, 1985, cousin A will be entitled to registration under s. 6(1) and cousin B will only be entitled to registration under s. 6(2). This is discrimination on the basis of marital status, a prohibited ground under s. 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*)[7] and Article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women*.[8] We understand that this is the intersecting discrimination affecting Mr. Matson's children.

Fourth, the second-generation cut-off infringes Indigenous people's freedom to associate, disproportionately impacting Indigenous women. The fundamental freedom of association is guaranteed in s. 2(d) of the *Charter,* and Article 9 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[9]

While the *Indian Act* permits Indian bands to establish their own membership codes, for those bands whose membership list is maintained by the Minister of Indigenous Services, only persons who are registered Indians may be members. In addition, only status Indians are given the rights and benefits under the *Indian Act* including associated programs and services, and band funding for these programs and services is based on the number of status Indians in the community. This creates a disincentive for bands to broaden their membership beyond status Indians and as a result, the vast majority of Indian bands in Canada make registration under the *Indian Act* a criterion for membership. [10] The funds given to bands are generally viewed as inadequate to meet even the current needs of status Indian membership.[11]

First Nations women are disproportionately impacted when they are denied membership and excluded from their communities because of intersecting discrimination and disadvantages. The Final Report of Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG Report) recognized that exclusion of women and girls from their communities resulting from the denial of Indian status compounds the dangers First Nations women face by denying them their home, connection to culture, family, community and related supports. The MMIWG Report notes that some women who are not given Indian status will seek refuge in larger urban centres without the protections family and community can provide. Simply put, the denial of Indian status leaves First Nation women more vulnerable to violence.[12]

Finally, the second-generation cut-off is assimilative, in violation of Article 8 of UNDRIP. Over time, it operates to reduce the number of status Indians for which Canada is responsible under the *Indian Act*. While Bill S-3 has slowed this assimilative process, it has not ended it.

---

7 *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.).

8 CEAFDW, footnote 6.

9 United Nations General Assembly, UN Res 61/295, 2007.

10 The concern of Indian bands regarding the adequacy of funding to provide for new members admitted as a result of the removal of sex-based inequities in the *Indian Act* was noted in the report of Claudette Dumont-Smith, Minister's Special Representative on The collaborative process on Indian registration, band membership and First Nation citizenship (May 2019).

11 Assembly of First Nations, *An Act Respecting Membership, Discussion Paper,* 19 February 2019, at p. 18

12 National Inquiry into Missing and Murdered Indigenous Women and Girls. *Reclaiming power and place. The final report of the national inquiry into missing and murdered indigenous women and girls,* 2019, Vol 1a, pp. 249-250, 370-378 (see especially p. 372). See also the Commission's findings regarding Indigenous women's Right to Culture in Vol 1a, pp. 408-409 that speak to the impacts of the *Indian Act* registration regime.

Access to Justice for Applicants for Registration under the Indian Act

As Mr. Matson highlights in his submissions to the CEDAW, Indigenous people have been forced to litigate discriminatory aspects of the *Indian Act* piece-by-piece.[13] The *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* (*Matson*) case confirmed that the *Canadian Human Rights Act*[14] cannot be used to challenge legislation, eliminating the Canadian Human Rights Tribunal as an avenue for bringing challenges to the *Indian Act*.[15]

The Canadian Human Rights Tribunal is generally a more accessible avenue for seeking justice than the court system. It is now even more important that Canada remove any remaining discrimination from the *Indian Act*, as domestic options for individuals like Mr. Matson to seek these changes are not accessible.

Given Canada's standard time for processing registration applications is six months to two years,[16] the complexity and length of *Charter* litigation (it can often be appealed to the Supreme Court of Canada), and the months or years to develop new legislation, it could take many years or decades for a person denied registration seeking remedy through *Charter* litigation to obtain redress.

For example, Sharon McIvor applied for registration in 1985. In 1994, she filed her claim alleging the *Indian Act* registration scheme discriminated on the basis of sex in violation of s. 15 of the *Charter*. Her claim was not decided, at the first level of court until 2007,[17] the appeal court decision was issued in 2009,[18] and the Supreme Court of Canada denied leave to appeal that same year.[19] For Ms. McIvor and her son, using the *Charter* to seek remedy for the discrimination in the *Indian Act* was a 24-year odyssey.

Charter-based challenges to legislation are expensive (can range from hundreds of thousands to millions of dollars) and beyond the means of most Canadians – including, as he has made clear, Mr. Matson. While the Canadian government has reinstituted the Court Challenges Program (CCP), which *may* provide *some* funding for *Charter* challenges, it is an application-based program. There is no guarantee funding will be granted and the maximum funding is $200,000.[20] This is not enough to take a *Charter* challenge from trial through all potential appeal levels.

The complexity and length of *Charter* challenges can make it difficult to find lawyers willing to take these matters on a *pro bono* basis. While lawyers should, and do, undertake *pro bono* work, *Charter* challenges to legislation are difficult burdens to shoulder. A domestic remedy that may take decades to result in real change and that depends on an individual's wealth or ability to find a lawyer willing to work on a multi-year or even decades long case without compensation is not adequate.

---

13 See *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (CanLII), followed by *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555 (CanLII).

14 RSC 1985, c H-6.

15 2018 SCC 31.

16 Canada, *Ninth Supplemental Submission of the Government of Canada to the Committee on the Elimination of Discrimination Against Women Regarding the Communication of Jeremy Matson*, 4 February 2021, at footnote 9.

17 *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 (CanLII).

18 *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (CanLII).

19 *Sharon Donna McIvor and Charles Jacob Grismer v. Registrar, Indian and Northern Affairs Canada and Attorney General of Canada*, 2009 CanLII 61383 (SCC).

20 Court Challenges Program, *Eligibility Criteria Litigation*, accessed on January 23, 2022.

Canada should be encouraged to reform the *Indian Act*'s registration provisions to comply with its domestic and international human rights obligations. This should be done with First Nations communities and individuals, in a way that reflects the rights of Indigenous peoples to self-government and the continuation of their culture and laws.

We urge CEDAW to give full and fair consideration to the merits of Mr. Matson's Communication 68/2014 and submissions.

Yours truly,

(*original letter signed by Julie Terrien for* Claire Truesdale*)*

Claire Truesdale
Chair, CBA Aboriginal Law Section

cc: Jeremy Matson matinoia@hotmail.com