THE CANADIAN BAR ASSOCIATION
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Bill S-3 – *Indian Act* amendments *(elimination of sex-based inequities in registration)*

CANADIAN BAR ASSOCIATION
ABORIGINAL LAW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 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 CBA Aboriginal Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Aboriginal Law Section.

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I. INTRODUCTION

The Canadian Bar Association's Aboriginal Law Section (CBA Section) appreciates the opportunity to comment on gender equity in Indian registration in Bill S-3, *An Act to amend the Indian Act (elimination of sex-based inequities in registration).*

In April 2010, the CBA Section proposed several recommendations to ensure that what was then Bill C-3, *Gender Equity in Indian Registration Act,* would achieve its objective of promoting gender equity in Indian registration. Not all of those recommendations were adopted before the Bill was passed.

The CBA Section is pleased that some of our recommendations for Bill C-3 are now in Bill S-3, responding to the Quebec Superior Court's decision in *Descheneaux c. Canada (Procureur général)*,[1] notably removing section 6(1)(c.1)(iv) of the *Indian Act*,[2] and adding section 6(1) to more effectively eradicate gender inequity in Indian registration.

We believe that Bill S-3 is on the right track to effectively promote gender equity in Indian registration. That said, the CBA Section makes several recommendations aimed at avoiding further litigation on gender equity in Indian registration.

II. INDIAN REGISTRATION SYSTEM: THEN AND NOW

In 1985, Bill C-31[3] amended the *Indian Act*, with the intent of eliminating discrimination against women in the Indian Status registration system. However, gender discrimination was not fully remedied by the bill as it only provided status to the third-generation descendants of male Indians who lost their status at age 21 under the pre-1985 'double mother rule'. The descendants of women who had lost status before 1985 because of marriages to non-Indian

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1 2015 QCCS 3555.

2 RSC 1985 c.I-5.

3 *An Act to Amend the Indian Act*, SC 1985, c.27.

men and who regained status under section 6(1)(c) of the *Indian Act* after 1985 faced the 'second generation cut-off' rule' (which results in the loss of Indian Status after two successive generations of mixed-status parenting), one generation sooner than the descendants of status Indian men who married non-status Indian women before 1985. As a result, third-generation descendants of female status Indians had lost Indian Status due to the second generation cut-off rule, while the third-generation descendants of male status Indians would at least have Indian Status under section 6(2) of the *Indian Act*.

The British Columbia Court of Appeal addressed this issue in *McIvor v. Canada (Registrar, Indian and Northern Affairs)*,[4] holding that sections 6(1)(a) and 6(1)(c) of the *Indian Act* violated section 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*), but only because those sections granted status to the third-generation descendants of male Indians who would have lost their Indian Status at age 21 under the pre-1985 double mother rule. The Court of Appeal did not consider other possible discriminatory effects of the *Indian Act* for further generations. It declared sections 6(1)(a) and 6(1)(c) to be of no force and effect due to their inconsistency with section 15 of the *Charter*, suspending the declaration for one year to allow Parliament to remedy the situation. In response, the federal government tabled Bill C-3 in 2010.

Bill C-3 was narrow in scope, addressing only the precise sex-based discrimination issues deemed problematic by the Court of Appeal in *McIvor*. It did not address all possible discriminatory effects of the *Indian Act* for further generations. As a result, Bill C-3 eliminated gender-based discrimination only for some individuals. For example, while third-generation descendants of both male and female status Indians now have status under Bill C-3, only those descendants born of a marriage entered into before April 17, 1985 ***where the status Indian grandparent was male*** hold that status by virtue of section 6(1) of the *Indian Act* (delaying the application of the second generation cut-off rule for at least one generation). Those born of a marriage entered into before April 17, 1985 ***where the Indian grandparent was female*** hold Indian Status by virtue of section 6(2) of the *Indian Act*. The second generation cut-off rule provides that those individuals may pass Indian Status to their child only if the child's other parent holds Indian Status by virtue of section 6(1) of the *Indian Act*.

4 2009 BCCA 153.

Bill C-3 also created additional problems. For example, section 6(1)(c.1)(iv)discriminated against those not wishing to have a child in that it required people have a child to be eligible to hold Indian Status under section 6(1)(c.1) of the *Indian Ac*t (as opposed to section 6(2)).

III. *DESCHENEAUX V. CANADA*

Bill C-3's failure to address more comprehensively the discriminatory effects of the *Indian Act* status provisions led to a *Charter* challenge before the Superior Court of Quebec. *Descheneaux v Canada* involved three plaintiffs, Stéphane Descheneaux, as well as Susan and Tammy Yantha.

Stéphane Descheneaux is the third-generation descendant of a female status Indian. He was born of a marriage that occurred before April 17, 1985, but because of the unaddressed discriminatory effects of the second generation cut-off rule, he received section 6(2) status after Bill C-3 passed. Mr. Deschenaux was ineligible to pass any Indian Status to his children, as the mother of his children did not have Indian Status. Had Mr. Deschenaux been the third-generation descendant of a male status Indian rather than a female status Indian, he would have received Indian Status via section 6(1) of the *Indian Act* after Bill C-3 was passed, and could have at least passed section 6(2) status to his children.

Susan Yantha is the daughter of a status Indian man and a non-status Indian woman, born out of wedlock in 1954. As a female child born out of wedlock, she was born without status. After Bill C-31 was passed in 1985, she gained section 6(2) status. Had she been a man, she would have been born with section 11(c) status, and would have preserved her status under section 6(1) of the *Indian Act* after 1985. Ms. Yantha would at least have been able to pass on section 6(2) status to her children. This situation did not change after Bill C-3 was passed in 2010.

Tammy Yantha is Susan Yantha's daughter. As a result of her mother's gender, Tammy Yantha had no Indian Status. Her daughter, Julia Yantha, also had no Indian Status. Had Susan Yantha been a man, Tammy Yantha would have been born with section 6(1) Indian Status, and Julia Yantha would have been born with at least section 6(2) Indian Status.

In each of these cases, the Quebec Superior Court determined that the plaintiffs received differential treatment because of ongoing gender-based discrimination in the Indian Status registration system. The Court declared that sections 6(1)(a)(c) and (f), as well as section 6(2), of the *Indian Act* violated section 15 of the *Charter*. The violation was not justified under section 1 of the *Charter*, and the sections were declared inoperative. The declaration of

invalidity was suspended for 18 months (until February 3, 2017), to allow Parliament to remedy the discrimination.

IV. GOVERNMENT'S FIDUCIARY OBLIGATIONS

In response to the decision in *Descheneaux*, the government began consultations with several national and regional First Nations associations in September 2016. Consultations are scheduled to continue until at least December 2, 2016.[5]

The government also introduced Bill S-3 on October 25, 2016, leaving less than three and a half months for Parliament to consider the government's response to *Deschenaux*, or the Indigenous community's reaction to that response. During that time, there are less than 40 House of Commons sitting days, and less than 30 Senate sitting days.

This timeline is problematic. In *Haida Nation v. British Columbia (Minister of Forests)*,[6] the Supreme Court of Canada recognized that the Honour of the Crown gives rise to a duty to consult and, where appropriate, accommodate First Nations when Canada considers activities that might impact Aboriginal rights. Consultations must be meaningful and in good faith. Further, Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* provides that, before adopting and implementing legislative measures that may affect Indigenous peoples, States shall consult and cooperate in good faith with them in order to obtain their free, prior and informed consent.

Allowing less than three and a half months for the legislative process for Bill S-3 before the February 3, 2017 deadline, while other consultations are still underway, leaves little time for Parliament to ensure that the consultations are concluded and any required amendments considered, before the *Indian Act* provisions struck down in *Deschenaux* become inoperative.

RECOMMENDATION

1. **The CBA Section recommends that the House of Commons committee not report Bill S-3 to the House of Commons until all currently scheduled**

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5 See *Debates of the* Senate, 42nd Parl, 1st Sess, No 150 (15 November 2016) at 1520 (Hon Serge Joyal): "I hear that there will be consultations November 16 with the File Hills Qu'Appelle Tribal Council; November 26 with the Madawaska Maliseet First Nation; November 23 with Atlantic Native Women's Association of Canada; November 24 with Mi'gmawe'l Tplu'taqnn Incorporated in New Brunswick; the Southern Chiefs of Manitoba on December 1; and Quebec Native Women on December 2."

6 2004 SCC 73.

consultations have ended and the Minister of Indigenous and Northern Affairs confirms that no further amendments are required to the Bill.

V. IDENTIFYING AND REDRESSING DISCRIMINATORY SITUATIONS

In *Descheneaux*, the trial judge noted that "*McIvor* could have enabled Parliament to make more sweeping corrections than what was accomplished by the measures in the 2010 Act."[7] She also pointed out that "Parliament chose to limit the remedy to the parties in *McIvor* and those in situations strictly identical to theirs. It did not attempt to identify the full measure of the advantages given the privileged group identified in that case", which is "obviously not desirable" from the perspective of Canadian citizens.[8]

Much as was the case following *McIvor*, Bill S-3 does not redress the broad question of inequities resulting from the *Indian Act*'s status provisions. For instance, in situations of unstated paternity (where a mother with Indian Status cannot confirm the Indian Status of the father of her child), the father is presumed not to have Indian Status. This presumption imposes a limit on a woman's ability to pass her Indian Status to her children. Further, Bill S-3 also does not address age-based discrimination introduced in 1985 by Bill C-31, which provides individuals entitled to Indian Status born prior to April 17, 1985 with status under section 6(1) regardless of parentage, while individuals born on or after April 17, 1985 only acquire status under section 6(1) if both parents had Indian Status.

As the trial judge noted, the judgment in *Deschenaux* does not exempt Parliament "from taking the appropriate measures to identify and settle all other discriminatory situations that may arise from the issue identified", and that "Parliament should not interpret this judgment as strictly as it did the BCCA's judgment in McIvor."[9] The trial judge clearly called on Parliament to consider potential inequities under the *Indian Act* in broader terms, regardless of any difficulties the task may present.[10]

RECOMMENDATION

2. The CBA Section recommends that Parliament take concrete measures to ensure that Bill S-3 is appropriately reviewed in a timely manner after it

7 2015 QCCS 3555 at para 223.

8 2015 QCCS 3555 at para 238, 240.

9 2015 QCCS 3555 at para 235, 243.

10 2015 QCCS 3555 at para 242.

comes into force to ensure it has effectively eradicated inequities in the *Indian Act's* Indian registration system, to minimise future court challenges. Bill S-3 should be amended to add (after section 8):

> **Review by committee**
>
> **8.1 (1) At the start of the eighteenth month after the day on which this Act receives Royal Assent, the provisions enacted by this Act are to be referred to the committee of the Senate, of the House of Commons or of both Houses of Parliament that may be designated or established for the purpose of reviewing the provisions.**
>
> **Report**
>
> **(2) The committee to which the provisions enacted by this Act are referred is to review them and the state of remaining inequities in Indian registration in Canada and submit a report to the House or Houses of Parliament of which it is a committee, including a statement setting out any changes to the provisions that the committee recommends.**

VI. EXISTING REGISTRANTS

In *Descheneaux*, the trial judge declared sections 6(1)(a), (c) and (f), as well as section 6(2) of the *Indian Act* inoperative, suspending the declaration of invalidity until February 3, 2017. These set out the basis for Indian registration entitlement, and are key to the *Indian Act*'s Indian Status regime.

The proposed amendments in Bill S-3 would re-enact these key provisions, and implement amendments to ensure that they are consistent with the *Charter*. No one would lose Indian Status as a result of the amendments in Bill S-3.

The Bill would come into force, or be deemed to come into force, on a day to be fixed by Order in Council, which must correspond to the day when the suspension of the declaration of invalidity expires. This would ensure no interruption in the entitlements conferred by the invalidated provisions. As with a similar coming into force provision in Bill C-3, this is intended to protect the rights of people entitled to register or who were registered under the invalidated sections.

While aspects of Bill S-3 are promising, the presence of section 8 would prevent anyone previously denied Indian Status as a result of the gender discrimination addressed by Bill S-3 from taking legal action against the federal government. This is particularly problematic. As we said in the CBA Section's April 2010 submission on Bill C-3, gender inequity in registration was

not fully eradicated by Bill C-3's provisions and further amendments were needed to achieve this objective. The federal government should have been aware that Bill C-3 did not ensure that the *Indian Act* was fully consistent with the *Charter*, but no steps were taken to achieve consistency. In these circumstances, section 8 of Bill S-3 should not immunize the federal government from failing to act until ordered to do so by the Quebec Superior Court.

RECOMMENDATION

3. The CBA Section recommends that section 8 be removed from Bill S-3.

VII. BAND MEMBERSHIP

As we said in 2010 on Bill C-3, the level of funding to support First Nations must be reconsidered in light of new gender equity provisions. This must occur before Bill S-3 comes into force, as band membership will likely increase after passage of the bill. This would result because people may be assigned to a band membership list as soon as they are registered with Indian Status (for any band whose membership is determined by Indigenous and Northern Affairs Canada under section 11 of the *Indian Act)* or for bands that have adopted a membership code that relies at least in part on the *Indian Act*'s status provisions.

As already recognized during debate on Bill S-3, as many as 28,000 to 35,000 individuals could become entitled to be registered and placed on band lists as a result of Bill S-3.[11] At present, Bill S-3 fails to give additional resources for First Nations to provide sufficient capacity to manage the addition of individuals who would gain status under Bill S-3. The increase in people with Indian Status, coupled with a lack of funding could lead some First Nations to adopt more restrictive membership codes, as occurred after Bill C-31 in 1985, which could in turn lead to altogether different equity problems in the future.

The number of individuals who could become entitled to be registered and placed on band lists as a result of Bill S-3 would also require increased resources for Indian and Northern Affairs Canada units responsible for registering those individuals. The time these individuals have been excluded from Indian Status should not be increased due to a lack of capacity on the part of the federal public service.

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11 *Debates of the* Senate, 42nd Parl, 1st Sess, No 150 (1 November 2016) at 1620 (Hon Frances Lankin).

RECOMMENDATIONS

4. **The CBA Section recommends that the federal government provide adequate funding to support First Nations whose memberships will increase as a result of Bill S-3.**
5. **The CBA Section recommends that the federal government provide adequate resources to support the timely registration of individuals who will gain Indian Status as a result of Bill S-3.**

VIII. CONCLUSION

The CBA Section appreciates the opportunity to share our views on achieving gender equity in the Indian Status registration system in Canada. We urge that care be taken and resources dedicated to ensure that Canada finally finds a comprehensive solution to address long years of inequities in that system.