Sharon McIvor's Response

to

The August 2009 Proposal of Indian and Northern Affairs Canada to Amend the 1985 Indian Act

October 6, 2009

Background

In August 2009, Indian and Northern Affairs Canada issued a discussion paper, proposing changes to the 1985 *Indian Act*, to which it invited responses.[1] This is the official response of Sharon McIvor to the federal government's proposed amendments.

The McIvor Case

Sharon McIvor and Sharon's son Jacob Grismer have challenged the sex based registration scheme in the 1985 *Indian Act.*

The *McIvor* case arises in the context of longstanding sex discrimination in the criteria for determining registration status under the *Indian Act*. Since the late 1880s, federal law has defined who can be a status Indian based on a patriarchal definition: a male Indian, the child of a male Indian, or the wife of a male Indian. Under successive versions of the *Indian Act* from 1906 onwards, status exclusively followed the paternal line, transmitted by male Indians as fathers and husbands, not by female Indians as mothers and wives.

Indian women were permitted to have status but for the most part could not transmit their status. There was a one-parent rule for transmitting status to children and under that rule, the transmitting parent was male.

This patriarchal scheme extended to identity upon marriage. When an Indian woman married a non-status man her status was revoked, and her children were not entitled to status. This was known as the "marrying out" rule. By contrast, when an Indian man married a non-status woman, both his wife and his children were entitled to status.

The bias in favour of male descent was also manifest in the preferential treatment of the male descendents of male Indians. Under the law in force immediately prior to April 17, 1985, the illegitimate sons of male Indians would always be Indian, whereas the illegitimate children of female Indians were subject to disqualification on the grounds of non-Indian paternity.

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[1] "Discussion Paper, Changes to the *Indian Act* affecting Indian Registration and Band Membership: *McIvor* v. *Canada*," (Indian and Northern Affairs Canada, 2009).

Parliament's express purpose in enacting the 1985 *Indian Act,* also known as Bill C-31, was to eliminate sex discrimination from the criteria for determining registration status in order to comply with the new constitutional right to equality in s. 15 of the *Charter*. In the *McIvor* case, the following aspects of the 1985 amendment scheme are relevant:

(i) it preserves entitlements to full status that existed prior to April 17, 1985 for those who were registered or entitled to be registered under the prior scheme;

(ii) it grants lesser status to women who were previously disqualified from status because of the marrying out rule;[2] and

(iii) it establishes a new second generation cut-off rule through the operation of s. 6(2).

The *1985 Act* creates three categories of status. First, s. 6(1)(a) accords full status to those who were entitled to status under the previous patriarchal regime, including to men who married non-status women and their children. Second, s. 6(1)(c) accords lesser status to women who were denied status under the former marrying out rule ("Bill C-31 women") and as compared to those registered under s. 6(1)(a), as explained below.

Finally, s. 6(2) accords partial status to persons who have only one parent registered under s. 6(1). This effectively creates a "two-parent rule" in that a child who has only one parent with s. 6(2) status is not entitled to any Indian status at all. This feature of the new scheme is known as the "second generation cut-off", as the second generation of children with only one status parent lose all entitlement to status.

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[2] **The Double Mother Rule**

The *1985 Act* also grants s. 6(1)(c) status to a small number of individuals who lost status pursuant to the "double mother" rule. Under the double mother rule, a legitimate child of a status Indian father, whose mother and grandmother only had status because of their marriages to status men would lose status at the age of 21. The double mother rule is exceptional in *Indian Act* history. It was the first and only occasion when a male Indian claiming Indian ancestry could lose status. As the trial judge in the *McIvor* case noted, only 2,000 individuals were affected by the double mother rule.

The way in which Bill C-31 women have lesser status than individuals registered under s. 6(1)(a), which is also the reason the courts below concluded that the *1985 Act* discriminated based on sex, lies in the different treatment of persons born prior to April 17, 1985, depending on whether their status Indian parent is registered under s. 6(1)(a) or s. 6(1)(c). The children of Bill C-31 women will generally gain status under s. 6(2) rather than s. 6(1) whether or not they were born before April 17, 1985, since the reason their mothers lost status in the first place was that their fathers did not have status when their parents married. If such children have married non-status persons, their children (the grandchildren of women registered under s. 6(1)(c)) will have no status. In contrast, the children, born before April 17, 1985, of Indian men who married non-status women were entitled to status under the old discriminatory law and have that right preserved under the *1985 Act*. They are registered under s. 6(1)(a) and even if they marry non-status persons, the children of the marriage will have status. The second generation cut-off is therefore post-poned for this group until at least the following generation.

The lesser status accorded to women registered under s. 6(1)(c) as compared to those registered under s. 6(1)(a) therefore imposes a legislated disadvantage on their ability to transmit status to their descendents, based on their sex.

The discriminatory operation of the *1985 Act* is vividly illustrated by the different treatment it accords to Sharon McIvor, her child, Jacob Grismer (who was born before April 17, 1985), and grandchild, as compared to her brother, Ernie McIvor, his child (who was also born before April 17, 1985), and grandchild. Although their lineages are identical, the *1985 Act* treats Sharon McIvor and Ernie McIvor differently based on their sex. Sharon was ineligible for status under the former law as a female Indian who married a non-status man. The *1985 Act* grants Sharon McIvor a registration status that is not equal to that of her brother in that she is only able to transmit partial status to her child, Jacob. Since Jacob married a non-status person, Sharon's grandchild is not entitled to any status at all because of the second-generation cut-off. However, the *1985 Act* treats Sharon's brother Ernie, who married a non-status person and whose child also married a non-status person, differently. Ernie's grandchild is not affected by the second generation cut-off because the *1985 Act* accords full status to both Ernie and his child. This means Ernie's grandchild is entitled to status. Thus, Sharon cannot transmit any Indian status to her grandchild whereas Ernie can transmit status to his grandchild.

The sex discriminatory operation of the *1985 Act* is also evidenced by the disadvantageous treatment it accords to descendants of status Indian mothers who, like Sharon's mother and grandmother, lived in common law relationships with the non-status fathers of their children, as compared with the preferential treatment it

accords to male descendants of status Indian fathers who lived in common-law relationships with the non-status mothers of their children. The *1985 Act* grants full s. 6(1)(a) status to the male children of a status Indian father who lived in a common law relationship with the non-status mother of his children. In contrast, under the *1985 Act*, children of the status Indian mother who lived in a common-law relationship with the non-status father of her children whom the Registrar previously disqualified from status, are consigned to s. 6(1)(c).

Again, Sharon McIvor's history is illustrative. Sharon McIvor lacked status from birth, because she traced her Indian ancestry through the maternal line, and her father did not have status. Sharon's parents lived in a common law relationship, and were never married. When Sharon applied to become registered in 1985, Sharon was told that she could only be registered under s. 6(2) and not s. 6(1), unless she could establish Indian paternity, which she was unable to do. The fact that Sharon was able to establish Indian maternity was not considered sufficient to entitle Sharon to s. 6(1)(a) status. Sharon's deceased mother was deemed to have been previously excluded from status due to her non-Indian paternity, and, therefore, she was consigned to s. 6(1)(c) under the *1985 Act*. In turn, Sharon's children were ineligible for registration.

Based on a revised interpretation of the legislation, INAC subsequently conceded that Sharon McIvor's mother,[3] Susan Blankinship, should be considered to have been eligible for registration. This culminated in Sharon's status under the *1985 Act* being somewhat improved to s. 6(1)(c) status from s. 6(2) status. However, this concession turned on a technicality, that is, the fact that there had never been any formal declaration by the Registrar regarding paternity. Ross J. explained, "There is a certain irony to the defendants' present position. The defendants' concessions were based upon the fact that the exclusions from registration had never been triggered because there had never been a declaration by the Registrar regarding paternity in the case of either Susan Blankinship or Sharon McIvor. Their concession is consistent with the provisions of the relevant versions of the *Indian Act*. However, I think it is fair to say that the Registrar's initial response to the plaintiffs' applications for registration reflected what the response would have been had an application been made under the previous legislation. This is consistent with the plaintiffs' understanding that they were not entitled to registration. There were no applications made for registration of Susan

[3] Based on genealogical evidence and an analysis supplied by the Registrar, it was conceded at the same time that Sharon's father should be considered to have been eligible for status.

Blankinship or Sharon McIvor prior to the amendments reflected in the *1985 Act*. If they had applied prior to 1985, they almost certainly would have been refused."

In summary, there are various ways in which the continuing preference of the *1985 Act* for matrilineal descent and marriage to a male Indian carries forward discrimination based on the ground of sex. These are illustrated by the *McIvor* case, and must be addressed to eliminate sex discrimination from the status registration scheme. The only effective remedy will be one which places all descendants of status Indian women, that is matrilineal descendants, on the same footing as descendants of status Indian men, that is, patrilineal descendants entitled to register under s. 6(1)(a) of the *1985 Act*.

What is Registration Status?

The *McIvor* case is about status registration. Status registration is akin to citizenship. Status registration refers to a special relationship between individuals and the federal government, based on Aboriginal ancestry. Status registration is akin to citizenship. Registration status confers intangible and tangible benefits, entitlement to which does not depend on band membership. The intangible aspects of status relate to a sense of cultural identity. Although the concept of Indian status was originally imposed on Aboriginal people by the federal government, it has developed into a powerful source of cultural identity for individuals of Aboriginal descent and Aboriginal communities. It is one of our most basic expectations that we will acquire the cultural identity of our parents; and that as parents we are able transmit our cultural identity to our children. The tangible benefits of registration status include access to non-insured health benefits, financial assistance with post-secondary education, and exemptions from certain taxes.

The McIvor Case Does Not Challenge Provisions of the 1985 Act Dealing with Band Membership

The *McIvor* case does not challenge any of the provisions of the 1985 *Indian Act* involving entitlement to band membership. Band membership is concerned with such things as entitlement to live on reserve and vote in band elections. Prior to 1985, registration status and band membership were closely connected. However, the *1985 Act* severed registration status from band membership. Today, there are individuals who have status and not band membership. There are also individuals who have band membership and not status. Therefore, it is possible to eliminate the sex discrimination from the status registration provisions, without affecting band membership, as was recognised by the British Columbia Supreme Court

which ruled in favour of Sharon McIvor and Jacob Grismer. The British Columbia Court of Appeal did not suggest otherwise. The federal government may choose to embark on a process of considering band membership issues. However, band membership forms no part of the *McIvor* case.

The 2007 Decision of the British Columbia Supreme Court in the *McIvor* Case is Correct

In 2007, following a trial in the *McIvor* case, the British Columbia Supreme Court held that the sex based hierarchy contained in the status registration provisions of the *1985 Act* discriminate against matrilineal descendents, born prior to April 17, 1985, and Indian women born prior to April 17, 1985 who married non-Indian men, with respect to the entitlement to be registered as Indians, contrary to the *Charter*'s equality guarantees. The Court found further that the discrimination is not justified pursuant to s. 1 of the *Charter*. The effect of the British Columbia Supreme Court order in the *McIvor* case was to give women registered under s. 6(1)(c) and Aboriginal descendants who trace their Indian ancestry through the maternal line, equal registration status, including the ability to transmit status to their descendants, as the *1985 Act* accords to male Indians and their descendants eligible for registration under s. 6(1)(a), thereby eliminating the sex discrimination in the treatment of these two groups. The position of Sharon McIvor is that the British Columbia Supreme Court decision is correct. Justice Ross's order expressly does not affect entitlement to band membership or band membership rules enacted by a band.

Why is Sharon McIvor Seeking Leave to Appeal to the Supreme Court of Canada?

The Registar of Indian and Northern Affairs Canada and the Attorney General of Canada appealed the decision of Ross J. to the British Columbia Court of Appeal. In 2008, the Court of Appeal issued a further decision in the *McIvor* case. The Court of Appeal confirmed that the registration provisions of the *1985 Act* discriminate, contrary to s. 15 of the *Charter*. In this sense Sharon McIvor was victorious, once again. However, the Court of Appeal adopted a very different approach to s. 1 of the *Charter*, leading to a much narrower characterization of why the *1985 Act* was not justified. Based on this narrower analysis, it allowed the government's appeal in part, and set aside the trial judge's order. The Court of Appeal held that the continuation of discrimination with regard to Indian status, is justified, with one exception. The one aspect of the sex discrimination in the *1985 Act* which the Court found not to be justified, is the *improvement* in status entitlement that the *1985 Act* accords to children of status fathers who were

affected by the pre-1985 double mother rule. The double mother rule is explained in footnote #2, above. The *1985 Act* granted full s. 6(1)(a) status to these patrilineal descendants even though they would have lost status at age 21, pursuant to the double mother rule. The Court of Appeal found that this, and only this aspect of the discrimination, was unjustified because it did not simply preserve existing rights acquired under the former discriminatory regime, but went further and enhanced them.

The implication of the Court of Appeal decision is that it will be constitutionally valid for Parliament to legislatively correct only what the Court of Appeal considered to be the single unjustified aspect of the *1985 Act* – its conferral of a new advantage for those subject to the former double mother rule – and to continue the previous *1985 Act*'s sex discrimination against people in the position of Sharon McIvor, and Jacob Grismer, who may obtain no remedy despite the violation of their *Charter* rights.

Sharon McIvor does not agree with the Court of Appeal decision. She has sought leave to appeal in the Supreme Court of Canada.

It is unacceptable that sex discrimination in the registration provisions of the *Indian Act* continue. For more than one hundred years Aboriginal women and their descendants have been discriminated against in the determination of who can obtain and transmit Indian status. Canada has been widely criticized, at home and internationally, because of this discrimination. It is important that the sex discrimination in the *Indian Act* be fully eradicated now and that all those affected by it be granted an appropriate remedy. A decision is needed from the Supreme Court of Canada to clarify what steps Parliament must take in order to do this.

Sharon McIvor seeks leave to appeal in the Supreme Court of Canada on the grounds that: 1) thousands of Aboriginal women and their descendents are affected by this decision; 2) it is a long-standing issue of discrimination in Canada and correcting it appropriately is a matter of national importance; 3) the reasoning of the British Columbia Court of Appeal will have a negative impact on other equality cases; and 4) the remedial analysis of the British Columbia Court of Appeal is inconsistent with established precedent and incapable of leading to a proper remedy.

The federal government opposes Sharon McIvor's application for leave to appeal to the Supreme Court of Canada.

The Federal Government's August 2009 Proposal to Amend the Indian Act is Flawed

The federal government's August 2009 proposal to amend the registration provisions of the 1985 *Indian Act* is:

> "Specifically, the amendment concept under consideration would provide Indian registration under s. 6(2) of the *Indian Act* to any grandchild of a woman:
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> (a) who lost status due to marrying a non-Indian; and
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> (b) whose children born of that marriage had the grandchild with a non-Indian after September 4, 1951 (when the "double mother" rule was first included in the *Indian Act*).
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> To accomplish this, section 6(1) of the *Indian Act* would be amended to include any person in the situation of the "child" mentioned in (b) above.

The government's proposal, which relies on the British Columbia Court of Appeal decision is flawed, and shows that the Court of Appeal decision does not provide a sound basis for legislative reform. The proposed amendment, if implemented, would not eliminate the sex discrimination from the registration provisions of the 1985 *Indian Act*. It would perpetuate sex discrimination. Following are some examples of ways in which the proposed amendment is premised on the continuance of discrimination:

1. The proposed amendment is restricted to grandchildren of women who *lost status due to marrying a non-Indian*. Focusing exclusively on those who lost status due to marrying a non-Indian will not cure the full extent of the ongoing sex discrimination in the registration regime based on being an Indian woman or a matrilineal descendant. As explained above, the *1985 Act* discriminates broadly against Aboriginal women as progenitors, and against descendants who trace their Indian ancestry through their female forebears, or in other words, descendants who are unable to establish non-Indian paternity. In some instances the issue of non-Indian paternity may arise in the context of a marriage between an Indian woman and a non-status man. In other instances marriage is not a factor.

Providing a legislative remedy to those who are grandchildren of Aboriginal women who married out but not to other matrilineal descendants (for example, the previously disentitled grandchildren of Aboriginal grandmothers who co-parented in common law relationships with non-status men) will serve to perpetuate sex discrimination. Such a restricted amendment would continue to exclude from registration some matrilineal descendants based on the sex of their unmarried Aboriginal grandmother.

The history of Sharon McIvor's case, outlined above, illustrates the problem of providing a remedy only to grandchildren of women who lost status due to marrying a non-Indian, and not to those who are excluded from status (or relegated to an inferior category of status) because they trace their Indian descent through female Aboriginal forebears who partnered with but did not marry non-status men.

2. Under the proposed amendment, the grandchild must have been born after September 4, 1951. Grandchildren who trace their Aboriginal descent through the maternal line will continue to be denied status if they were born prior to September 4, 1951. There is no reason that sex discrimination should be permitted to continue just because an applicant is over a certain age, roughly 58 as of 2009. Sex discrimination is sex discrimination regardless of the age of the applicant.

The government's suggestion that there should be a cut-off based on a post-September 4, 1951 birth date is misguided. The government's proposal assumes that the only sex discrimination in the registration scheme is with regard to the double mother rule, which was first introduced into the registration scheme in 1951. This is a faulty assumption. For more than a hundred years the *Indian Act* has privileged Aboriginal descent through the male line. That privilege is embedded in the *1985 Act*. The legislative reversal of the so-called double mother rule under the *1985 Act* is but one manifestation of the continued privileging of descent through the male Aboriginal line, under the *1985 Act*. Significantly, entitlement to s. 6(1)(a) status is not subject to a 1951 age-based cut-off. Further, it would be absurd to suggest that a 1951 cut-off is warranted by the fact that there is a such cut-off for victims of the double mother rule. Such a suggestion would be absurd because for children of Indian men, born prior 1951 the double mother rule simply did not exist. Male lineage descendants who were born prior to 1951 are accorded s. 6(1)(a) status.

Using a 1951 cut-off for descendants of Aboriginal women and not for descendants of Aboriginal men, will also create new inequalities between siblings within the same families, based on their date of birth. It is artificial to impose a September 4, 1951 cut off on status entitlement. This will perpetuate the discriminatory

exclusion of Aboriginal seniors, denying them the benefits of status, by reason only of the fact that they trace their Aboriginal lineage through the female line. This means that the children and grandchildren of these seniors will also be precluded from status registration.

3. The proposed amendment contains another problematic cut-off, a generational one. It only applies to grandchildren. It permits continuing sex discrimination against great grandchildren, and great great grandchildren, who trace their Indian lineage through the maternal line. Pursuant to s. 6(1)(a) of the *1985 Act*, descendants of male Indians are not restricted to looking only as far back as a grandfather. The *1985 Act* allows them to claim status based on male Indian ancestry no matter how far back that ancestry may be.

4. The proposed amendment will only grant s. 6(2) status, and never s. 6(1) status to the proposed new registrants. This is yet another way in which the proposed amendment does not place matrilineal-Indian descendants on the same footing as patrilineal-Indian descendants. Under the current scheme, patrilineal-Indian descendants born prior to April 17, 1985 are entitled to be registered under s. 6(1)(a) of the *Act*. As explained above, s. 6(1)(a) status is a superior form of status because it can be transmitted by one Indian parent. Further, for s. 6(1)(a) registrants the impact of the 2nd generation cut-off is post-poned. In contrast, a person with s. 6(2) status cannot transmit status unless they parent with another status Indian. For this group the second generation cut-off takes immediate effect. Although all children born after April 17, 1985 are subject to the second generation cut-off, the proposed amendment maintains a sex-based hierarchy of status for persons born prior to April 17, 1985 whereby descendants on the male line born prior to April 17, 1985 are accorded s. 6(1) status whereas descendants on the female Aboriginal line, born prior to April 17, 1985 will not necessarily be accorded s. 6(1) status. This means that the second generation cut-off will continue to take effect a generation early for some matrilineal-Indian descendants.

The Problem Restated

It is a certainty that the proposed amendment will not extend registration entitlement to everyone who would be entitled if status were "determined by the federal government on a totally non-discriminatory basis", as promised by Minister Crombie in 1985.

The only way to be sure that sex discrimination is totally and finally eliminated from the status registration scheme is to place descendants of status Indian women, that is matrilineal descendants, on the same footing as descendants of status Indian

men, that is, patrilineal descendants entitled to register under s. 6(1)(a) of the *1985 Act*.

It may be noted that the federal government's August 2009 discussion paper provides an estimate of how many people might gain status as a result of the proposed amendment. None if any weight can be placed on the estimate because its premises are dubious. It must be remembered that to become registered people must apply for registration, produce all the relevant documents, meet the criteria for registration, and have their application accepted by the Registrar. Therefore, not everyone who might be entitled to register will in fact apply and be granted registration status.

It is Possible to Repair the Status Registration Provisions so as to Eliminate Sex Discrimination

It is not difficult to conceive of ways to amend the registration provisions of the *1985 Act*.

A simple legislative amendment that would eliminate the sex discrimination from the status registration scheme, set out in the plaintiffs' statement of claim in the *McIvor* case is this: add to s. 6(1)(a) of the *1985 Act*, "or was born prior to April 17, 1985, and was a direct descendant of such a person."

Thus, s. 6(1)(a) would provide that, a person is entitled to be registered if that person was registered or entitled to be registered immediately prior to April 17, 1985 or was born prior to April 17, 1985, and was a direct descendant of such a person.

Conclusion

The history of legislated discrimination against Aboriginal women is a stain on Canada's reputation nationally and internationally as a promoter of human rights. The *McIvor* case was commenced almost twenty years ago. Two levels of court have confirmed that the *1985 Act* continues to discriminate based on the ground of sex. In these circumstances, it is crucial that the Supreme Court of Canada grant leave to consider whether the direction given to Parliament by the Court of Appeal will cure the unconstitutionality of the status registration provisions of the *1985 Act* and afford the plaintiffs a just and appropriate remedy.

The government's 2009 proposal to amend the *1985 Act*, if adopted, will have the effect of perpetuating discrimination in the status registration provisions. This fact

makes the government's proposal unacceptable. The fact that the government's proposal is manifestly deficient, and yet purports to give effect to the Court of Appeal decision in the *McIvor* case also reinforces the appropriateness of the *McIvor* case being heard by the Supreme Court of Canada to clarify what steps Parliament must take.

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