

**Mandates of the Special Rapporteur on violence against women and girls, its causes and consequences; the Special Rapporteur on the rights of Indigenous Peoples; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence**

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(Please use this reference in your reply)

27 October 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on violence against women and girls, its causes and consequences; Special Rapporteur on the rights of Indigenous Peoples; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, pursuant to Human Rights Council resolutions 50/7, 51/16, 52/36 and 45/10.

In this connection we would like to bring to your attention information we have received concerning **gender-based discrimination of Indigenous women and their descendants under the Indian Act and failure to provide an effective remedy to victims of such discrimination.**

In providing our comments, we are guided by the international human rights standards that govern the prevention and response to violence against women and girls, most notably the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, which have been ratified by Canada, along with other relevant international treaties and customary law principles.

According to the information received:

The Indian Act (*R.S.C., 1985, c. I-5*)<sup>1</sup> is a Canadian federal law that governs matters pertaining to the status of Indigenous peoples in the country. Under the Act, the federal Government maintains a status list of persons identified as a “status Indian.”<sup>2</sup> Some rights and benefits are based directly on this registered status.<sup>3</sup> Perhaps most significantly, such recognition confers the ability to transmit the status to children, as well as “a sense of acceptance within indigenous communities.”<sup>4</sup>

Prior to 1985, the Indian Act contained provisions that were explicitly discriminatory against indigenous women, including removing their status upon marriage to non-status men and making the transmission of status to descendants dependent on the male line. A woman would lose her status, and with it, she would lose the right to her cultural identity, as well as access to health-care services, financial support for education, the right to reside on

<sup>1</sup> Government of Canada, Justice e-Laws, *Indian Act*, RSC, 1985, c. I-5. Available at: <https://laws-lois.justice.gc.ca/eng/acts/I-5/>.

<sup>2</sup> CEDAW/C/81/D/68/2014.

<sup>3</sup> Anna-Karin Holmlund, Amnesty International Letter to CEDAW (2014).

<sup>4</sup> CEDAW/C/81/D/68/2014.

indigenous territories and the rights to hunt and fish on indigenous traditional lands, the right to inherit her family property, and the right to be buried on the reserve with her ancestors. However, if an Indigenous man married a non-status woman, he would maintain all his rights.

Since 1985, a number of amendments have been made to the Act. In 2017, *An Act to amend the Indian Act*, in response to the Superior Court of Quebec decision in *Descheneaux c. Canada (Procureur général) (S-3) (S.C. 2017, c. 25)*, partially came into force and addressed some outstanding sex-based inequities in the registration provisions of the *Indian Act*.<sup>5</sup> The Quebec Superior Court found that the *Indian Act* unjustifiably violates equality rights under the Canadian Charter of Rights and Freedoms. Following the insistence of the Senate of Canada that the Government of Canada go beyond the requirements of *Descheneaux* and remove the core discrimination embedded in sex-based hierarchy between full status (6(1)(a)) and partial status (6(1)(c)), the Government of Canada included provisions in *Bill S-3*, such as removing the 1951 cut-off date from the registration provisions in August 2019, and addressing the unknown or unstated parent issue, amongst others. The full coming into force of *S-3* responds to long-standing concerns raised by First Nations peoples and organizations, the UN Human Rights Committee, the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) and other key stakeholders.

*Examination by the Committee on the Elimination of Discrimination against Women (CEDAW)*

On 14 February 2022, the Committee on the Elimination of Discrimination against Women (CEDAW) determined that Canada violated articles 1, 2, and 3 of the Convention on the Elimination of All Forms of Discrimination against Women, as the *Indian Act* established and maintains a two-tier registration system for status that adversely impacted descendants of enfranchised Indigenous women.<sup>6</sup> The Committee found that Canada unilaterally imposed cut-off rules to registration that applied only to descendants of Indigenous women, who had previously lost their status and their right to determine their own identity. The cut-off rules for registration caused differentiation in status for descendants of Indigenous women, compared to the descendants of Indigenous men. This resulted in unequal criteria for descendants of enfranchised Indigenous women to pass on status to their children, contrary to the fundamental right of self-identification and in violation of the Convention. The Committee further provided that the registration system runs contrary to the right of Indigenous persons to belong to an Indigenous community or nation, and the right not to be subjected to forced assimilation or destruction of their culture. Specifically, the Committee found that the *Indian Act* continues to perpetuate differential treatment of the descendants of enfranchised Indigenous women.

The aforementioned views of the Committee were presented in its findings related to the communication concerning Mr. Jeremy Eugene Matson, a matrilineal indigenous descendant from a long line of leaders of the Capilano

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<sup>5</sup> CEDAW/C/CAN/10.

<sup>6</sup> CEDAW/C/81/D/68/2014.

Community.<sup>7</sup> His grandmother was an indigenous woman, a member of the indigenous Squamish Nation in British Columbia, who was forcibly taken away from her community and placed in a residential school. The school aimed at assimilating indigenous children into Euro-Western culture by making them learn English and practice Christianity. She married a non-indigenous man and ceased to be considered indigenous under the *Indian Act*. The Committee recommended that Canada provide appropriate reparation to Mr. Matson and his children, including recognizing them as indigenous people with full legal capacity, and allowing them to freely transmit their indigenous status and identity to their descendants.

In its tenth periodic report submitted under article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of Canada acknowledged that the residual effects of the previous sex-based laws continue to perpetuate discrimination against Indigenous women and their descendants. However, the Government of Canada also claimed that “all known sex-based inequities in registration” were fully eliminated in the 2019 amendments of the Indian Act. Furthermore, the Government of Canada indicated that the restrictions for passing on status to children do not apply exclusively to the descendants of enfranchised Indigenous women.<sup>8</sup>

The Government of Canada acknowledged the Committee’s recommendation that the Government of Canada ensure Mr. Matson and his children can transmit status to their children and that the Government of Canada amend its legislation to eliminate cut off dates, but reiterated its argument that the current legislative scheme does not discriminate on the basis of sex. In effect, the Government of Canada appears to have imposed its own interpretation of its treaty obligations under the Convention and asserted it would not implement the Committee’s views. To date, Mr. Matson has reportedly not been provided with reparations.

*Bill C-38: An Act to amend the Indian Act*

On 24 December 2022, *Bill C-38 An Act to amend the Indian Act (new registration entitlements)*, was introduced by the Minister for Indigenous Issues of Canada. The enactment amends the Indian Act to provide, among other things, new entitlements to registration in the Indian Register in response to the challenge of certain provisions of the Act under the Canadian Charter of Rights and Freedoms in *Nicholas v. Canada (Attorney General)* and that the persons who have become so entitled also have the right to have their names entered in a Band List maintained in the Department of Indigenous Services. Bill C-38 is part of a long history of attempts to amend the Indian Act aimed at addressing discrimination in registration.

The introduction of these legislative amendments to the *Indian Act* through Bill C-38 seek to address four specific areas, including enfranchisement, individual deregistration, natal band reaffiliation and membership, as well as outdated and offensive language related to dependent persons.

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<sup>7</sup> Ibid.

<sup>8</sup> Government of Canada, Response to the Views Of The Committee On The Elimination Of Discrimination Against Women Regarding The Communication Of Jeremy Matson Communication No. 68/2014, 1 September 2022, paras 8–9. See also, CEDAW/C/81/D/68/2014, para. 20(b)(i).

*a. Enfranchisement*

Enfranchisement is the process that results in a person losing their Indian status. Previous amendments to the Indian Act allowed individuals who were voluntarily or involuntarily enfranchised to apply to have their registration reinstated; however, their grandchildren remained ineligible for registration. Bill C-38 would allow these descendants to obtain Indian status.

It is estimated that approximately 3,500 individuals may be eligible for registration over the next five years under this amendment.

Clause 4(1) of Bill C-38 would amend paragraph 6(1)(a.1) of the Act to add paragraph (i) to include entitlement to register for individuals who lost or were denied status because they were enfranchised. By removing s. 109(2) order qualifier, this provision would encompass both s. 109(1) and (2) enfranchisement orders into 6(1)(a.1), thereby extending entitlement to the direct descendants of such persons pursuant to s. 6(1)(a.3). The proposed amendments would effectively address the issue of status entitlement rights for individuals adversely affected by the coerced enfranchisement provisions.

*b. Individual deregistration*

Currently, individuals who have Indian status cannot request to be removed from the Indian Register. Bill C-38 would allow individuals to apply to have their names removed from the Indian Register but give them the right to reapply in the future. They will also retain the ability to pass their Indian status to their descendants. Once a person is de-registered, they no longer have access to services or benefits associated with Indian status.

A person may want to de-register if they wish to enrol with an American Indian Tribe, if they want to identify and/or register as a Métis person, if they no longer wish to be recognized on the federal Indian Register or if their parents registered them as children and they are withdrawing their consent for registration.

*c. Right to membership in natal band*

Bill C-38 recognizes the rights of all First Nations persons to membership with their natal Band. This amendment mainly affects women who were automatically moved to their husbands' band list upon marriage, along with their descendants. The Bill will allow people who grew up as members of one First Nation but lost their membership to apply to be members of that First Nation again.

*d. Outdated and offensive language*

Bill C-38 proposes amendments to the definition of dependent persons under the Act. Clause 1 of the Bill proposes replacing the term and definition of "mentally incompetent Indian" under s.2(1) of the Indian Act (RSC, 1985, c I-5) with the term "dependent person". The Bill does not however address other offensive terms and definitions that ought to also be addressed by the

Bill, including “Indian” and “voluntary enfranchisement”.

*Potential impacts*

If passed, the amendments will primarily impact those First Nations whose Band lists are maintained by Canada under section 11 of the Indian Act. The amendments to the Indian Act could result in both decreases and additions to some First Nations’ membership.

The Bill (C-38) would also enable women to regain membership in their band of origin for Departmental Band Lists if they lost membership in that band upon marriage to a member of a different band prior to the Bill C-31 amendments in 1985. The Bill would also provide the same entitlement to their direct descendants. It is expected that approximately 3,500 individuals could be newly eligible for registration as a result of the proposed legislation.

According to information received and building on prior consultation on these issues in 2018-19, Indigenous Services Canada has reportedly held over 50 virtual engagement sessions with First Nations, Indigenous organizations and other interested or impacted individuals between August to December 2022.

While we do not wish to prejudge the accuracy of the above-mentioned allegations, and while we recognize the efforts of the Government of Canada to address some of the shortcomings of the Indian Act by initiating Bill C38, we are concerned that discriminatory provisions remain and should be addressed in order to ensure that women and their descendants who grew up as members of one First Nation but lost their membership, are able to apply to be members of that First Nation again in a timely and effective manner. We further note the consultative process that was undertaken prior to the presentation of Bill C-38, and we encourage the continuation of such consultations with First Nations, Indigenous organizations who represent non-status First Nations, and other interested or impacted individuals. to address the broader suite of remaining issues in the registration and band membership provisions of the Indian Act. The right of indigenous peoples to self-determination is paramount and should be upheld in line with common article 1 of the International Covenants of 1966. Finally, it would be important to ensure that the Bill C38 becoming law is ushered in reasonably quickly to allow women and their dependents to access reparation as soon as possible.

We call upon your Excellency’s Government to take the necessary measures to carefully review the Indian Act to eliminate the remaining discrimination, to support registration by women and their descendants who are newly eligible to seek status, and to create an affordable, reliable, timely, and accessible remedy to compensate those who have suffered the effects of discrimination, in light of the international human rights standards that govern the prevention and respond to violence against women and girls, most notably the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, which have been ratified by Canada along with other relevant international treaties and customary law principles, such as the United Nations Declaration on the Rights of Indigenous Peoples and the Convention on the Elimination of Racial Discrimination.

We further call upon your Excellency's Government to implement, in collaboration, cooperation and consultation with Indigenous Peoples, the recommendations of the Special Rapporteur on the rights of Indigenous Peoples to implement the recommendations of the Standing Senate Committee on Indigenous Peoples to repeal section 6 (2) of the Indian Act (the "second generation cut-off"), which reduces the number of individuals with status; to repeal non-liability clauses in the amendments to the Act, in order to allow First Nations women and their descendants who were denied status to be compensated ; to develop plain language materials in Indigenous languages and the country's official languages to explain the eligibility and the registration process; and support registration by women and their descendants newly eligible for status through a streamlined, easily accessible process; and create an affordable, reliable, timely and accessible remedy to compensate those who have suffered the effects of discrimination. (A/HRC/54/31/Add.2)

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandate provided by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for the observations of your Excellency's Government on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned comments.
2. Please share information on the current status of Bill C-38 and any additional measures that are being undertaken to address the remaining discriminatory provisions in the Indian Act, including, to address the sex and gender discrimination in the registration system for status recognition for indigenous women and girls.
3. Please provide information on on any measures that have been taken to address the reparation claim of Mr. Jeremy Matson in line with the views adopted by the CEDAW Committee under article 7 (3) of the Optional Protocol (concerning communication No. 68/2014)

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

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## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, we would like to refer to your Excellency's Government to its legal obligations under the international treaties it has ratified and to broader international human rights standards.

We refer to the Committee on the Elimination of Discrimination against Women's General Recommendation no. 39 (2022) on the rights of indigenous women and girls emphasizes that "indigenous women and girls have the right to be free from all forms of discrimination on the basis of their sex; gender; Indigenous origin, status or identity." The General Recommendation also notes that discrimination, together with gender-based violence "against Indigenous women and girls threatens and disrupts the spiritual life, connection with Mother Earth, cultural integrity and survival, and social fabric of Indigenous Peoples and communities."

We further note that in its recommendations in response to communication No. 68/2014 (CEDAW/C/81/D/68/2014), the CEDAW Committee urged the Government of Canada to (i) amend its legislation, after an adequate process of free, prior and informed consultation, to address fully the adverse effects of the historical gender inequality in the Indian Act and to enshrine the fundamental criterion of self-identification, including by eliminating cut-off dates in the registration provisions and taking all other measures necessary to provide registration to all matrilineal descendants on an equal basis to patrilineal descendants; and to (ii) Allocate sufficient resources for the implementation of the amendments of the law (para. 20).

The need to protect indigenous women and girls from discrimination was reiterated by the former Special Rapporteur on the rights of indigenous peoples, who highlighted that article 22 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) specifically provides that States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination (para. 7).

In its decision of 14 January 2019 by United Nations Human Rights Committee in favour of Sharon McIvor, the Committee held that the sex-based hierarchy between s. 6(1)(a) and s. 6(1)(c), introduced by the 1985 Indian Act and continued by the amendments of 2011 and 2017 violates the right to the equal protection of the law without discrimination based on sex, as well as the equal right of men and women to the enjoyment of Indigenous culture guaranteed by the International Covenant on Civil and Political Rights. The Committee also found that Canada is obligated to provide full reparation, and "to take steps to address residual discrimination based on sex by the federal government arising from the Indian Act."

The incompatibility of the current Indian Act with the rights to self-determination of indigenous peoples of Canada was also referenced by the Special Rapporteur on indigenous peoples in his end of visit statement to Canada in March 2023, in which he reiterated his predecessor's recommendation "to remove any existing legal barriers to the effective exercise of indigenous self-government, including those contained in the Indian Act." The Special Rapporteur further noted that the federal government has the authority to decide who has First Nations status,

forcibly shaping the identities of thousands of Indigenous persons. Through sex discrimination in the Indian Act, thousands of Indigenous women and their descendants are denied status and associated benefits, including health care.

In presenting his findings to the Human Rights Council the Special Rapporteur on indigenous peoples recommended that (A/HRC/54/31/Add.2) Canada should: Set up an independent Indigenous-led human rights mechanism in compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles), to monitor and enforce the implementation by Canada of the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Indigenous Peoples Act, (para.89. (b)); implement the recommendations of the Standing Senate Committee on Indigenous Peoples to repeal section 6 (2) of the Indian Act (the “second generation cutoff”), which reduces the number of individuals with status; to repeal non-liability clauses in the amendments to the Act, in order to allow First Nations women and their descendants who were denied status to be compensated; and to develop plain language materials in Indigenous languages and the country’s official languages to explain the eligibility and the registration process; support registration by women and their descendants newly eligible for status through a streamlined, easily accessible process; and create an affordable, reliable, timely and accessible remedy to compensate those who have suffered the effects of discrimination (paras. 93 (a)).

During her visit to Canada in April 2019, the former Special Rapporteur on violence against women and girls stressed the urgency and importance of repealing any provisions in the Indian Act that discriminate against indigenous women and girls. The former Special Rapporteur also emphasized that the Indian Act “discriminates against First Nations women and their descendants with respect to the entitlement and transmission of Indian status, which represents a continuing violation of international and national gender equality provisions.” The treatment of First Nations women as secondary to men perpetrates violence against them. This discrimination and hierarchy among status exacerbates collateral violence within communities, as well as jurisdictional and logistical barriers for First Nations people to access services. The 2011 and 2017 reforms to the Indian Act have fallen short of providing equality to First Nations women and their descendants, which results in further unequal access to benefits and services.

In her report to the Human Rights Council on violence against indigenous women in 2022, the Special Rapporteur on violence against women and girls pointed to the strong intergenerational component of violence against indigenous women and girls, pointing to the endemic nature of the violation of the right of self-determination of indigenous peoples and its detrimental impact on indigenous women and girls. The Special Rapporteur observed that “violations through both colonization and post-colonial power structures and State practices have included assaults on the cultural integrity of indigenous communities, non-recognition of customary laws and governance systems.” In her report, the Special Rapporteur also referenced the observation of the Inter-American Commission on Human Rights that in its report Indigenous women and their human rights in the Americas of 2017, “acts of violence and discrimination against indigenous women not only harm those women individually, but also negatively impact the collective identity of the communities to which they belong”.

The Special Rapporteur's report further noted that, the Committee on the Elimination of Discrimination against Women, in March 2022, having considered claims of long-standing gender-based discrimination in the Indian Act of Canada that continued to affect tens of thousands of descendants of indigenous women, called on Canada to amend its legislation to enshrine the fundamental criterion of self-identification and to provide registration to all matrilineal descendants on an equal basis to patrilineal descendants.'