

# Indian Act Sex Discrimination: Enough Inquiry Already, Just Fix It

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*Le présent article fait un lien entre la discrimination sexuelle historique dans la Loi sur les Indiens et les niveaux élevés de violence contre les femmes autochtones. Les dispositions de la loi ont été reconnues comme étant une cause sous-jacente qui contribue à rendre les femmes autochtones vulnérables et plus susceptibles d'être victimes de violence. Il sera impossible de régler le problème de la violence contre les femmes autochtones si on ne se penche pas aussi sur la discrimination sous-jacente de façon exhaustive. De plus, l'auteure soutient qu'on n'a pas besoin d'attendre une enquête pour corriger la Loi sur les Indiens. Les gouvernements fédéraux successifs ont tous été très conscients de la discrimination sexuelle que la Loi contient et de ses effets sur le registre des droits de la personne au Canada. L'auteure conclut en demandant une modification immédiate des dispositions de la Loi sur les Indiens une fois pour toutes.*

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*This article links ongoing historical sex discrimination in the Indian Act to the high levels of violence against Indigenous women. The status provisions have been recognized as an underlying cause contributing to the existing vulnerabilities that make Indigenous women more susceptible to violence. Addressing violence against Indigenous women will be impossible unless and until the underlying discrimination is also comprehensively addressed. The author further contends that fixing the Indian Act does not require waiting for an inquiry. Successive federal governments have been well aware of the ongoing sex discrimination under the Act and its implications for Canada's human rights record. The article concludes by calling for the immediate amendment of the status provisions in the Indian Act once and for all.*

## ***Murders and Disappearances of Indigenous Women and Girls Planning for Change: Towards a National Inquiry and an Effective National Action Plan, 30–31 January 2016, Ottawa***

From the earliest days of the call for a national inquiry into murders and disappearances of Indigenous women, there were naysayers who said we do not need a national inquiry, Canada should act now. Unfortunately, there is a need for a national inquiry because governments in Canada have yet to acknowledge Canada's role in

creating the conditions that foster the violence. They are nowhere close to agreeing on a coordinated national plan for preventing the violence.

However, there are also some things that Canada should act on immediately. About some things, further inquiry would be a needless waste of time and money and an abuse of process. A prime example is the ongoing sex discrimination under the *Indian Act*, with regard to status.<sup>1</sup> Successive federal governments have been well aware of this problem, and its implications for Canada's human rights record, for a very long time. Recall the following facts:

- The federal government began looking at the problem of *Indian Act* sex discrimination in the 1960s.<sup>2</sup>
- In response to protests by organizations such as Equal Rights for Indian Women, there were calls for reform in the 1970 report of the Royal Commission on the Status of Women.<sup>3</sup>
- In 1971, Jeannette Corbiere Lavell and Yvonne Bedard brought suit under the sex equality provision of the *Canadian Bill of Rights*.<sup>4</sup> In a landmark ruling, four out of nine judges of the Supreme Court of Canada agreed with Lavell and Bedard.<sup>5</sup>
- In 1978, the government of Canada issued a report prepared for the Department of Indian Affairs and Northern Development, entitled *Indian Act Discrimination against Sex*, acknowledging the sex discrimination in the "marrying out" rule and other provisions of the *Indian Act*.<sup>6</sup>
- In the late 1970s, Sandra Lovelace and the women of Tobique took a petition to the UN Human Rights Committee. In its 1981 decision, *Lovelace v Canada*,<sup>7</sup> the committee found that the loss of Indian women's status pursuant to section 12(1)(b) of the 1951 *Indian Act* violated the right to the enjoyment of cultural life under the International Covenant on Civil and Political Rights.<sup>8</sup>

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1. *Indian Act*, RSC 1985, c I-5.

2. For a more extensive summary of the *Indian Act* sex discrimination legislative reform process, see the decision of Justice Carol Ross in *McIvor v Canada (Registrar of Indian and Northern Affairs Canada)*, 2007 BCSC 827. On appeal to the British Columbia Court of Appeal, the decision of Judge Ross was reversed in part. However, the appellate court did not disturb Justice Ross's findings concerning the history of legislative reform (see 2009 BCCA 153). In 2009, the Supreme Court of Canada refused leave to appeal (see 2009 CanLII 61383 (SCC)).

3. *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Government of Canada, 1970).

4. *Canadian Bill of Rights*, SC 1960, c 44.

5. *Canada (AG) v Lavell*, [1974] SCR 1349.

6. The report was cited by Justice Carol Ross in *McIvor*, *supra* note 2 at para 53.

7. *Lovelace v Canada*, Communication no R6/24, Supp no 40, UN Doc A/36/40 (1981) at 166.

8. International Covenant on Civil and Political Rights, 1966, 999 UNTS 171.

- In 1985, the federal government enacted Bill C-31,<sup>9</sup> both in response to *Lovelace* and because of section 15 of the *Canadian Charter of Rights and Freedoms*.<sup>10</sup> The promise was to eliminate all of the sex discrimination.<sup>11</sup> Instead, Bill C-31 removed some of the sex discrimination and carried forward the rest. In the same year, Sharon McIvor launched her constitutional sex equality challenge.
- In 1996, the Royal Commission on Indigenous Peoples criticized the 1985 *Indian Act*'s continuation of sex discrimination.<sup>12</sup> Over the next decade, various UN human rights treaty bodies, including the Human Rights Committee,<sup>13</sup> the Committee on Economic, Social and Cultural Rights,<sup>14</sup> and the Committee on the Elimination of Discrimination against Women,<sup>15</sup> criticized Canada for its continuing discrimination against Indigenous women.

After twenty years of constitutional litigation in *McIvor v Canada (Registrar of Indian and Northern Affairs Canada)* and findings of sex discrimination by two levels of court,<sup>16</sup> the government passed Bill C-3 in 2011.<sup>17</sup> On the government's

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9. Bill C-31, *An Act to Amend the Indian Act*, SC 1985, c 27. Bill C-31 was enacted as *Indian Act*, *supra* note 1.
  10. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
  11. *Minutes of Proceedings and Evidence of the Standing Committee on Legal and Constitutional Affairs*, 33rd Parl, 1st Sess (7 March 1985) at 12:7–12:9 (David Crombie, Minister of Indian Affairs and Northern Development).
  12. *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996).
  13. Human Rights Committee, *Concluding Observations of the Human Rights Committee*, CCPROR, 85th Sess, UN Doc C/CAN/CO/5 (2006).
  14. Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UNGAOR, 36th Sess, UN Doc E/C.12/CAN/CO/5 (2006).
  15. Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, CEDAWOR, 42nd Sess, UN Doc C/CAN/CO/7 (2008); CEDAW, *Report of the Committee on the Elimination of Discrimination against Women*, UNGAOR, 58th Sess, Supp no 38, UN Doc A/58/38 (2003).
  16. *McIvor*, *supra* note 2. Both the British Columbia Supreme Court and the British Columbia Court of Appeal found that the scheme discriminated based on sex, although the Court of Appeal found that the scheme discriminated on a much narrower basis and that the discrimination was justified in part.
  17. Bill C-3, *Gender Equity in Indian Registration Act*, 3rd Sess, 40th Parl, 2010 (received royal assent on 15 December 2010); *Gender Equity in Indian Registration Act*, SC 2010, c 18.

count, Bill C-3 restored status entitlement to approximately 45,000 individuals.<sup>18</sup> On the one hand, a shift of this magnitude represents a huge victory for Indigenous feminist activism and for Sharon McIvor as one of its leaders. On the other hand, Canada should be ashamed. The reforms once again were piecemeal. At the same time as removing one more piece of the sex discrimination, the government re-enacted the bulk of it. To this day, people of Indigenous descent are still being denied status because the scheme treats the female line as inferior. This ongoing sex discrimination signals to all concerned that Indigenous women are not equal.

However, what does this have to do with the national inquiry, you might ask. There is a direct connection. The recent decision of the Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia*, finds that:

- in addressing only particular subsets of Indigenous women who face discrimination, the *Indian Act*, as amended by Bill C-3, “fails to fully address remaining concerns about gender equality”<sup>19</sup> and
- “Indigenous women face multiple challenges with respect to securing status for themselves and their children, and, in some cases, the presence of a second, intermediate status classification can rise to the level of cultural and spiritual violence against Indigenous women, since it creates a perception that certain subsets of Indigenous women are less purely Indigenous than those with ‘full’ status. This can have severe negative social and psychological effects on the women in question, even aside from the consequences for a woman’s descendants.”<sup>20</sup>

In addition, the decision of the Inter-American Commission on Human Rights (IACHR) links *Indian Act* sex discrimination to the murders and disappearances of Indigenous women, finding that:

- with regard to the causes of high levels of violence against Indigenous women, historical *Indian Act* sex discrimination is a root cause of high levels of violence against Indigenous women and the “existing vulnerabilities that make Indigenous women more susceptible to violence”<sup>21</sup> and
- with regard to the state’s international obligations, “[a]ddressing violence against women is not sufficient unless the underlying factors of discrimination that originate and exacerbate the violence are also comprehensively addressed.”<sup>22</sup>

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18. Indigenous and Northern Affairs Canada, “Registration Process for Bill C-3 Applicants”, Government of Canada <<http://www.aadnc-aandc.gc.ca>>.

19. Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia*, Canada OEA/Ser.L/V/II, Doc 30/14 21 (2014), Organization of American States <<http://www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf>> at para 68.

20. *Ibid* at para 69.

21. *Ibid* at paras 93, 129.

22. *Ibid* at para 306.

Furthermore, the 6 March 2015 decision of the UN Committee on the Elimination of Discrimination against Women on the Article 8 inquiry into missing and murdered women in Canada, made the same finding as the IACHR and recommended that:

- Canada “amend the *Indian Act* to eliminate discrimination against women with respect to the transmission of Indian status, and in particular to ensure that [Indigenous] women enjoy the same rights as men to transmit status to children and grandchildren, regardless of whether their [Indigenous] ancestor is a woman, and remove administrative impediments to ensure effective registration as a Status Indian for [Indigenous] women and their children, regardless whether or not the father has recognized the child.”<sup>23</sup>

Remediating *Indian Act* sex discrimination once and for all would not be difficult. There is a lot of water on the wheel. It is simply a matter of placing status women on the same statutory footing as status men, as Justice Carol Ross of the British Columbia Supreme Court recognized in *McIvor*,<sup>24</sup> as did the Liberal and New Democratic Party (NDP) members of the Parliament Standing committee in 2010 when Bill C-3 was under review.<sup>25</sup> Todd Russell, then Liberal critic for Indigenous affairs, placed the necessary amending language before the committee, with the unanimous support of his Liberal and NDP colleagues.<sup>26</sup> They were blocked by the Speaker of the House and the intransigent Harper government whose attitude was take it or leave it and those who are not happy can litigate.<sup>27</sup>

Many Liberal and NDP members of the House and Senate called for complete eradication of the sex discrimination and deplored the incompleteness of Bill C-3.

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23. CEDAW, *Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Doc CAN/CEDAW/C/O P.8/CAN/1 (2015), <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW\\_C\\_OP-8\\_CAN\\_1\\_7643\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW_C_OP-8_CAN_1_7643_E.pdf)> at para X(C)(e). Similarly, the UN Human Rights Committee, following the 2015 periodic review of Canada under the International Covenant on Civil and Political Rights, *supra* note 8, urged Canada to “remove reported lasting discriminatory effects against indigenous women, in particular regarding the transmission of Indian status, preventing them and their descendants from enjoying all of the benefits related to such status (arts. 2, 3 and 27).” Human Rights Committee, Concluding Observations of the Human Rights Committee, CCPROR, 114th Sess, UN Doc C/CAN/CO/7 (2015).

24. *McIvor*, *supra* note 2.

25. The 2010 parliamentary process is documented in Gwen Brodsky, “*McIvor v Canada*: Legislated Patriarchy Meets Aboriginal Women’s Equality Rights” in Joyce Green, ed, *Indivisible: Indigenous Human Rights* (Halifax: Fernwood Publishing, 2014).

26. *Ibid.*

27. *Ibid.*

On 8 December 2010, during the Senate debates, Liberal Senator Sandra Lovelace Nicolas—the petitioner in *Lovelace* (1981)—stated:

It is 25 years since Bill C-31 was passed, and we have another “take it or leave it” bill from the government with no amendments. Bill C-3 does not address all aspects of gender discrimination. It is unjust and irresponsible, and it is a bandage solution to an old existing problem for Aboriginal women in Canada ... if Bill C-3 is passed, then Sharon McIvor will be forced to walk down the same long and lonely path that I once travelled ... where is the equality and justice for Canada’s First People, Aboriginal women? ... I apologize to my people and their descendants that the Government of Canada will let Bill C-3 pass without amendments. As far as I can remember ... all Aboriginal women and their issues are always at the bottom of the totem pole.<sup>28</sup>

It is because of the attitude of the Harper government and the failure of the Liberal and NDP joint strategy that Sharon McIvor has a petition pending before the UN Human Rights Committee.<sup>29</sup> For the same reason, additional post-*McIvor Charter* cases have been winding their way through the courts and the statutory human rights system. For the government to even be fighting these cases is wrong.

Now the composition of the government has changed. The Liberals have a majority government and are in a position to accomplish the *Indian Act* reforms that they sought in 2010 and spoke so passionately about in the House of Commons and the Senate.<sup>30</sup> The newly elected Liberal majority government has a fresh opportunity to do the right thing now: immediately amend the status provisions to remedy sex discrimination in the *Indian Act* once and for all. What we do not need is a national inquiry on missing and murdered women that serves as an excuse for further delay in correcting blatant, long-standing legislated sex discrimination, which international treaty bodies have already identified as one of the root causes of violence against Indigenous women.

28. *Debates of the Senate*, 3rd Sess, 40th Parl, No 147 (8 December 2010) at 1450.

29. Sharon McIvor & Jacob Grismer, “*Sharon McIvor and Jacob Grismer v Canada*: Communication Submitted for Consideration under the First Optional Protocol to the International Covenant on Civil and Political Rights” (24 November 2010), Poverty and Human Rights Centre <[povertyandhumanrights.org/wp-content/uploads/2011/08/McIvorApplicantsPetition1.pdf](http://povertyandhumanrights.org/wp-content/uploads/2011/08/McIvorApplicantsPetition1.pdf)>; “*Sharon McIvor and Jacob Grismer v Canada*: Petitioner Comments in Response to State Party’s Submission on the Admissibility and Merits of the Applicants’ Petition to the Human Rights Committee” (5 December 2011), Poverty and Human Rights Centre <[povertyandhumanrights.org/wp-content/uploads/2011/08/McIvor-v.-Canada-Petitioner-Comments-December-5-2011.pdf](http://povertyandhumanrights.org/wp-content/uploads/2011/08/McIvor-v.-Canada-Petitioner-Comments-December-5-2011.pdf)>.

For further information about the *McIvor and Grismer* petition, see Brodsky, *supra* note 25.

30. Brodsky, *supra* note 25.

Unfortunately, early signs indicate that the Liberals are floundering and that, like their predecessors, they are content to postpone full equality for Indigenous women. In February 2016, the new government of Canada announced that it would not appeal the decision of the Quebec Superior Court in *Descheneaux v Canada*, the latest decision to find that the *Indian Act* continues to discriminate on the basis of sex.<sup>31</sup> This seemed like excellent news. However, on 9 May 2016, the government of Canada requested the UN Human Rights Committee to suspend its consideration of Sharon McIvor's petition on the grounds that it would fold the issue of sex discrimination in the *Indian Act* into broader consultations with Indigenous peoples on a new Nation-to-Nation relationship. Canada asked the committee to recognize its commitment to the equality of Indigenous women because of its promise to hold a national inquiry on murders and disappearances of Indigenous women and girls and suspend its consideration of whether Canada is still discriminating against them under the *Indian Act*.

To be sure, there are many issues about which the government should consult with Aboriginal peoples. However, further consultation on whether to eliminate sex discrimination from the criteria for determining entitlement to status is not such an issue. Status, as it has been defined in the *Indian Act*, is exclusively concerned with the special relationship between individuals of Aboriginal descent and the Canadian state. It is not a Nation-to-Nation issue. The equality rights of Indigenous women are not commodities to be traded in a process of reconfiguring Nation-to-Nation relations. The better view is that ending the sex discrimination in the *Indian Act*, once and for all, is a necessary and urgent precondition for moving forward with meaningful Nation-to-Nation reconciliation and a precondition for a national inquiry to begin on a footing of demonstrated respect for the equality of Indigenous women.

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31. *Descheneaux v Canada*, 2015 QCCS 3555.