

An Exploration of the Colonial Impacts of the *Indian Act* on Indigenous Women in Canada

by

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Abstract

This dissertation explores the impacts of the *Indian Act* on Indigenous women in Canada. Indigenous women saw their identities as leaders and matriarchs mediated through colonial legislation that deemed them “less Indian” than their male counterparts. Paternalistic policies against Indigenous women were internalized by Indigenous communities, resulting in high rates of abuse and inequality today. Indigenous women are reclaiming their rights through Court cases that challenge gender-discriminatory Indian Act provisions, including the Descheneaux case, which challenged Canada to address the discrimination and sexism disproportionately affecting Indigenous women. However, Canada continues to define Indian Status based on historic colonial legislation such as the *Gradual Enfranchisement Act* of 1869. Individuals with ancestors that lost status before 1869 are not recognized as Indians in Canada. Indigenous peoples continue to be imprisoned by colonial policies regarding their identity, disproportionately affecting Indigenous women as they have never had equal status provisions under the *Indian Act*.

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Notes on Terminology

This dissertation recognizes that different Indigenous groups have their own terms to identify their nations, communities and peoples, and where possible, these have been respectfully included.

Indigenous/ Indian: While the words differ greatly, for the purpose of this dissertation they are used interchangeably in respect to the historical or contemporary period that is being addressed. These words are also used interchangeably depending on context: i.e., the social, political or legal nature of the reference and in order to best represent the tone of the dissertation and convey the appropriate meaning.

Indigenous/Aboriginal: Under section 35 of the *Constitution Act*, 1982, “Aboriginal peoples of Canada” includes the Indian, Inuit and Métis Peoples of Canada.¹ Typically, the term Indigenous was used in an international context, yet over the last several years the term Indigenous in Canada has become interchangeable with Aboriginal. This shift in domestic usage relates in part to the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*, (2007); Canada adopted the declaration in 2016.²

First Nation: First Nation refers to both Status and Non-Status Indians; “First Nation and First Nation community are also frequently used in place of the term band provided in the *Indian Act*, with many communities altering their names to reflect this preference.”³ However, there remains no legal definition for First Nation in Canada.

Status Indian: Status Indian refers to a federally registered member of a band or First Nation; these members are defined in accordance with provisions under the *Indian Act*.

Non-Status Indians/ Métis: Non-status Indians, on the other hand, “can refer to Indians who no longer have status under the Indian Act, or to members of mixed communities who have never been recognized as Indians by the federal government. Some closely identify with their Indian heritage, while others feel that the term Métis is more reflective of their mixed origins.”⁴ However, there is no universally accepted definition of Métis. Some describe the Métis people as descendants of the historic Métis Nation, including those persons whose ancestors inhabited western and northern Canada and received land

¹ *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

² Canada, Parliament, Senate, *How Did We Get Here? A Concise, Unvarnished Account of the History of the Relationship Between Indigenous Peoples and Canada* (2019) Interim Report of the Standing Senate Committee on Aboriginal Peoples at 4.

³ Tonina Simeone, “Indigenous Peoples: Terminology and Identity” (14 December 2015), online: *Library of Parliament* <<https://hillnotes.ca/2015/12/14/indigenous-peoples-terminology-and-identity/>>

⁴ *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 at 18.

grants and/or scrip.⁵ However, a broader definition of Métis includes all persons of mixed Aboriginal and non-Aboriginal ancestry who identify themselves as a Métis person and have ancestral connections.

Inuit: The Inuit people are typically referred to as a, “Circumpolar people who live primarily in four regions of Canada: the Nunavut territory, Nunavik, Nunatsiavut and the Inuvialuit Settlement Region, collectively known as Inuit Nunangat.”⁶

⁵ Canada, *supra note 2*, at 4.

⁶ Tonina Simeone, *supra note 3*.

Introduction

Settler-Indigenous relations have been the backdrop upon which Canadian history was founded. Over the last century and a half, the relationship between Indigenous people and the Canadian state has changed monumentally. A relationship that began with mutual dependency, trade and negotiations, led to many violent clashes over land throughout time and place; some of which the Indigenous people were allies of the settlers, and some of which they were not. When British arms took control over what is now referred to as Canada, power relations began to form and the relationship quickly changed. The implementation of legislation, aimed directly at controlling and assimilating Indigenous populations, coupled with the creation of the Indian Department set the stage for a new policy agenda that continued over the next 150 years. The inception of Indian Department created a body that was specifically aimed at “managing Indian Affairs” from birth to death. However, the Department was not the only force aspiring to enfranchise Indigenous people; in 1869 the *Gradual Enfranchisement Act* was legislated, and for the first time in history “Indianness” was not only defined but legally created.

These early forms of assimilation and European control gave birth to what many have referred to as the longest standing barrier to Indigenous self-government, independence and control over their own communities, the *Indian Act*.⁷ The *Indian Act* spans far beyond giving definition to the term “Indian.” It legislates who can and cannot

⁷ Linda Clarkson, Vern Morrisette & Gabriel Régallet, *Our Responsibility to the Seventh Generation: Indigenous Peoples and Sustainable Development* (1992) Winnipeg: International Institute for Sustainable Development at 12.

register for Indian status, who can transmit status onto their descendants and in early legislative provisions, even afforded status to the non-Indian wives of status-Indian men. For Indigenous women, provisions within the *Act* have never afforded them the same rights as their male counterparts. Historically, several provisions of the *Indian Act* worked to exclude women from various rights by terminating their status, or enfranchising them.⁸ These provisions which stripped Indigenous women of their status, had rippling effects on a multiplicity of generations below them. As a result of the discriminatory provisions of the Act, Indigenous descendants of matrilineal lines have never had equal entitlement to Indian status and have been deprived of their Indian identities.

This dissertation strives to articulate that the *Indian Act* is riddled with inequality and colonial ideologies that have removed Indigenous women from traditional leadership roles and as active community members and have painted them as inferior, and property of their husbands. Centuries of colonization have devalued the traditional roles of Indigenous women, creating a power imbalance based on gender identity, that limits the ability of men, women, and their communities in achieving self-actualization and equality. In turn, these colonial notions of have been internalized by Indigenous communities and have contributed to the gross violations against Indigenous women in Canada. Indigenous women suffer the highest rates of violence against them, violence

⁸ Elysa Darling & Drew Lafond, *UN Human Rights Committee Rules Indian Act is Discriminatory in McIvor Case* (January 2019), online: University of Calgary, Faculty of Law <<https://ablawg.ca/2019/01/29/un-human-rights-committee-rules-indian-act-is-discriminatory-in-mcivor-case/>>

that continues today.⁹ The abuse against Indigenous women is a product of years of exposure to racism, sexism and discrimination within the confines of the *Indian Act*.

This dissertation looks at the history of colonial impacts that have disproportionately affected Indigenous women and their descendants since the creation of “Indianness” by investigating the response of Indigenous peoples in the fight against gender-based discrimination which we find at the core of the *Indian Act*. Indigenous people -- especially women, deprived of any recognition of their Indigenous identity -- have not been idle in the fight for justice. Indeed, many Indigenous women have fought tirelessly and extensively to maintain their Indian identity and to bring back equality within their communities. Since the 1970s, Indigenous women have led a series of political movements and have spearheaded numerous litigation attempts to bring provisions within the *Indian Act* in line with gender equality.¹⁰ This political activism, coupled with numerous lawsuits, has led to *Indian Act* amendments in 1985, 2010 and most recently in 2017 following the Descheneaux decision.

This dissertation has been organized into four chapters, which will unpack the historical legacy of resistance, culminating with a critical analysis of the latest Descheneaux decision and the response from Canada. More precisely, I will examine how Canada has dealt with the nullification of *Indian Act* provisions pertaining to Indian identity that have been condemned as discriminatory and in contravention of section 15¹¹

⁹ Jorge Barrera, *MMIWG Cases Continued at Same Rate Even After National Inquiry Began, Data Shows* (June 2019), online: <<https://www.cbc.ca/news/indigenous/mmiwg-inquiry-new-cases-statistics-databases-1.5162482>>

¹⁰ Attorney General of Canada v. Lavell, [1974] S.C.R. 1349

¹¹ Section 15 of the Charter is concerned with equality before and under the law, equal protection and benefit of from the law; “15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” *Charter of Rights and Freedoms, supra note 1*.

of the *Canadian Charter of Rights and Freedoms*. These identified discriminations have reopened conversations and debates about the existence of the *Indian Act* itself. Chapter one will begin by providing a brief historical recount of Settler-Indigenous relations in Canada. This chapter highlights the nature of a shifting relationship between Indigenous peoples and European settlers, starting from clear alliances between independent nations, to the gradual capture of Indigenous peoples -- indigenous women in particular -- under the control of a colonial system of governance within which laws with civilizational aims will now determine who can be a so-called “Indian” from a legal standpoint.¹² This chapter delves into the politics of identity that led to the creation of “Indianness” and ultimately to the *Indian Act*, 1876; designed specifically for the purpose of assimilating Indigenous peoples into Euro-Canadian society with “white control” at the forefront.¹³ More specifically, this chapter focuses on how government created systems of oppression such as banning traditional practices, the creation of Indian residential schools and legally entrenched gender-based discrimination within the *Indian Act* have resulted in a loss of culture, community and ties to traditional land.

Chapter two will highlight the resurgence of Indigenous women, in the fight to combat gender discrimination within *Indian Act* provisions. The larger history of colonialism becomes apparent throughout this chapter as Indigenous women are met with opposition from community leaders (mainly Indigenous men) and organizations such as the Union of British Columbia Indian Chiefs and the Manitoba Indian Brotherhood Inc.,

¹² Martin J. Cannon, “Race Matters: Sexism, Indigenous Sovereignty, and McIvor” (2014) 26:1 *Canadian Journal of Women and the Law* at 35.

¹³ Ted Binema, “Protecting Indian Lands by Defining Indian: 1850-76” (2014) 48:2 *Journal of Canadian Studies/ Revue d'études Canadiennes* at 7.

only to name a few.¹⁴ After years of male dominance and notions of male superiority having been foisted upon Indigenous communities by patriarchal and colonial systems of oppression, many Indigenous men and leaders internalized these views and fought back against Indigenous women trying to reclaim Indian status and equality within their communities. This chapter will introduce the struggles of Jeannette Corbiere Lavell, Yvonne Bédard, Sandra Lovelace Nicolas, and Sharon McIvor, in their court challenges against gender-based discrimination within multiple *Indian Act* provisions. These challenges led to *Indian Act* amendments such as Bill C-31: *An Act to Amend the Indian Act* in 1985 and Bill C-3: *Gender Equity in Indian Registration Act* in 2010, as well as provided many foundational stepping stones for the case of *Descheneaux v. Canada*, 2015 QCCS 3555 to base itself upon in 2017.

Chapter three will provide a legislative overview of the *Descheneaux* case and will articulate the importance of the resulting *Indian Act* amendment, Bill S-3: *An Act to Amend the Indian Act (Elimination of Sex-Based Inequities in Registration)*. The *Descheneaux* case was a monumental step for Indigenous women's rights in Canada, as it targeted a much larger scope of the *Indian Act* than had previously been done, challenging the government to repeal section 6 (Indian Registration provisions) in its entirety. Furthermore, *Descheneaux* exposed the discriminatory elements remaining within *Indian Act* provisions and challenged the federal government to look beyond the scope of the Act, to rid of discrimination that exists in a much larger form.

Finally, chapter four presents a “post-Descheneaux” analysis of Bill S-3, articulating that gender-discrimination exists deep within colonial structures and

¹⁴ Attorney General of Canada v. Lavell, *supra* note 10, at 1378.

ideologies, and is an issue much larger than provisions within the *Indian Act*. While the Court cases have allowed hundreds of thousands of women to reclaim their Indian status, Bill S-3 is not a solution to the larger underlying problem; that colonialism has entrenched gender and race based discrimination throughout policy, legislation and even within Indigenous societies which has allow for the continued discrimination against Indigenous women in Canada. This final chapter is aimed at making the reader think; where do we go from here? Do Indigenous communities want the *Indian Act* in its entirety to be abolished or does the Act bring about a distinctiveness of their people? What does honest reconciliation look like for Indigenous women and how is it achieved? Without offering a solution to the *Indian Act*, this dissertation proposes that there are a multiplicity of opinions surrounding the future of Indian registration, identity and politics in Canada. What is perhaps most important is that Indigenous people will now be at the forefront of decision making, especially when the decisions impact their communities and their peoples.

Chapter 1

1.1: Historical Notes on the Indian Question in Canada

For the Indigenous peoples of Canada, the emergence of the Canadian state and the relationship between them and the settlers is not the starting point of their respective histories, but one bead with many previous histories in a much longer wampum.¹⁵ The Indigenous peoples of North America include numerous organized societies and nations that have indeed existed “since time immemorial;” long before the arrival of any Europeans on their land. Not only did the Indigenous societies precede the European newcomers by many thousands of years, but the diversity exhibited by their societies and cultures at the very least matched that of the first European settlers at the time of so-called contact. Such long history and cultural diversity are certainly true for the country we now call Canada, built on multiple and complex diplomatic relationships with a vast array of different Indigenous cultures, linguistic groups and political organizations ever

¹⁵ Wampum belts consisted of shell wampum beads strung together on rawhide strips; the patterns typically symbolized peace, a steadfast friendship and commitment to one another’s wellbeing. Over time, both Indigenous peoples and the settlers presented each other with a number of wampum belts (with a variety of coloured beads and design patterns to represent the significance of what was taking place); the belts signified trust, brotherhood and a sense of unity among the different cultures. As well, wampum belts were introduced as part of an elaborate set of political proceedings, which regulated protocol between the First Nations peoples and the Europeans and guarantee the safety of both parties. The wampum was used as a visual promise to recall political agreements and guaranteeing the authenticity and sincerity of these promises. These belts were upheld and adhered too long before written policies, treaty implementation and political mandates were written, long before the *Indian Act* became law. Kathryn V. Muller, “The Two “Mystery” Belts of Grand River: A Biography of the Two Row Wampum and the Friendship Belt” (2007) 31:1 *The American Indian Quarterly* at 137 and Russell Thornton, *Fighting Tuscarora: The Autobiography of Chief Clinton Rickard*, 2nd ed (Syracuse University Press, 1984) at 130-134.

since its emergence in 1876. Thus, there is no shortcut across diversity and complexity when dealing with the subject of Indigenous history, culture and politics in Canada.

The goal of this chapter is to unpack some elements around what constitutes the history of the relationships between Indigenous peoples and the country that came to be known as Canada. More precisely, its aim is to provide a brief summary of key moments in history to better ground our investigation of the role played by diverse colonial politics and legislative measures which have historically targeted Indigenous women and their identities. This is not to say that all groups of Indigenous peoples experienced the same historical upbringing; however, it is a fair assumption to presume that all Indigenous peoples have been in some way affected by similar colonial policies, methods of oppression and bouts of discrimination at the hands of the Canadian state with an immeasurable impact on Indigenous women in particular.¹⁶ This chapter will articulate how tumultuous encounters, coupled with bouts of war and economical ventures, brought about a different dynamic to a relationship that was once founded upon mutual exchange and allegiance, to one of colonial control and domination. More precisely, we shall explore how “Indianness” came to be defined, and was taken away from many Indigenous people, specifically women that did not fit the legal parameters of the *Indian Act*.

1.1.2: Tumultuous Encounters: Colonial Wars and the Fur Trade

At the time of first European contact, evidence suggests that the Great Lakes region consisted of at least 34 First Nation groups, representing a kaleidoscope of

¹⁶ Keith D. Smith, *Strange Visitors: Documents in Indigenous-Settler Relations in Canada from 1876*, (University of Toronto Press, 2014) at xxiii.

cultures, ranging from hunter-gatherer societies to agriculturalists and variations in between.¹⁷ For example, many of the early Indigenous populations resided on the Northwest Coast (today's Southern Ontario) where there was an abundance of easily accessible resources, which facilitated the emergence of a sedentary lifestyle.¹⁸ These populations included numerous groups of Iroquoian peoples which practiced mainly farming, and were constituents of much larger communities.¹⁹ The Iroquoian peoples are believed to have totaled approximately 60,000 people of all First Nations inhabiting the land at that time, if not more.²⁰ Also inhabiting the land were numerous groups of Algonquian peoples; viewed as one of the most widespread Indigenous groups at the time --by geographic region-- the Algonquin people were diversified from the Rocky Mountains to the Atlantic and along the coast from the Arctic to Cape Fear.²¹ Early details of encounters between people from Europe and Scandinavia were recorded on the East coast, and involved the Mi'kmaq people.²² Given the vast distance of Indigenous inhabitancy and geographic location, first contact between Europeans and Indigenous peoples occurred over a long period of time. These intermittent points of contact explain the variation in recorded dates of first contact between the settlers and the Indigenous communities and speak to the more widely accepted view, of many first encounters.

¹⁷ Victor P. Lytwyn, "Waterworld: The Aquatic Territory of the Great Lakes First Nations, in Gin Gas Winan: Documenting Aboriginal History in Ontario" (1996) The Champlain Society at 14.

¹⁸ Canada, Crown Indigenous Relations and Northern Affairs, First Nations in Canada, (May 2017), online: Government of Canada <<https://www.rcaanc-cirnac.gc.ca/eng/1307460755710/1536862806124>>

¹⁹ Robert T. Boyd, Demographic History, 1774-1874, in Wayne Suttles, ed., Northwest Coast, vol. 7, Handbook of North American Indians (Washington D.C.: Smithsonian Institution Press, 1990) at 135.

²⁰ *Ibid* at 135.

²¹ Olive Patricia Dickason & David T. McNab, Canada's First Nations: A History of Founding Peoples from the Earliest Times, 4th ed (Oxford University Press, 2008) at 42.

²² Margaret Robinson, "Animal Personhood in Mi'kmaq Perspective," (2014) 4:1 Societies Journal at 673.

For the Europeans who came to what is now called North America, the historical dates are much more recent; among them included the French who played a determinant role in the colonization of today's Québec and Canada.²³ Indigenous relations with the French settlers, started as relations of trade and mutual beneficence. For example, during their first encounter in 1534,²⁴ the Mi'kmaq people were very eager to trade furs and metal goods with Jacques Cartier and his men; this visit represents the first recorded exchange of furs between the Indigenous peoples and the Europeans.²⁵ Further along the voyage to North America, Cartier and his men preceded north to the Bay of Gaspé, where they encountered a group of Iroquoian peoples who had come from the interior to fish and hunt seal.²⁶ Cartier's testimony of accounts with the Iroquoian people suggests that the first meeting was one of mutual curiosity and respect. In support, H. P. Biggar suggests that Iroquoian men actually showed great pleasure at meeting the French explorers at the beginning of their relationship.²⁷ The curiosity and outright friendliness displayed on both sides followed the general pattern of first encounters between the Indigenous peoples and the Europeans, however many of these encounters quickly turned, and as a result many ended in tragedy.

After a series of conflicts alternated with periods of peace between the different Indigenous and colonial powers (such as the French, the British and the Dutch), it was quickly realized by the Europeans that it was nearly impossible to wage war without the

²³ Roger Riendeau, *A Brief History of Canada*, 1st ed (Fitzhenry & Whiteside, 2000) at 26.

²⁴ In April, 1534, Jacques Cartier set sail from Saint-Malo France, "with the intent of finding a sea route through the continental land mass to Asia," and in the process, became the first European to penetrate inland and leave a detailed surviving account of his expeditions. Roger Riendeau, *supra note 23*, at 26.

²⁵ Roger Riendeau, *supra note 23*, at 26.

²⁶ Roger Riendeau, *supra note 23*, at 27.

²⁷ H.P. Biggar, *Voyages of Jacques Cartier*, 1st ed. (Ottawa: F.A. Acland, 1924) at 61-62.

support of the local Indigenous people, and that healthy relations with the Indigenous peoples meant better fur trade ventures, access to weapons and other metallurgic goods.²⁸ At this point in history, we can observe that the basis of the relationship between Indigenous peoples and the European settlers does not revolve around attempts to control or define Indigenous (or Indian) identities.

However, as the fur trade continued and the drive for economic success led furs from the north part of the American continent to become one of the most highly sought-after commodities, the number of European vessels making the trip to Canada grew exponentially until finally the fur trade monopolized. In 1670, the Hudson's Bay Company (HBC) was created and quickly became one of the most powerful entities within the fur trade.²⁹ Local Indigenous communities, living near the trading posts worked as trappers or were hired as hunters to help feed men within the operation.³⁰ Other Indigenous people were hired as middlemen between the HBC and the First Nations that lived further away from the trading post, as a tactic to enhance communication efforts; regardless, the relationships between the two proved to operate efficiently in the beginning.³¹ As a result of this twofold relationship, scholars have argued that the fur trade became the basis for friendship treaties as well as political and military pacts, "[...]because if there was no peace without trade, there could be no alliance without economic relations."³²

²⁸ *Ibid* at 63.

²⁹ Irene Ternier Gordon, *People of the Fur Trade: From Native Trappers to Chief Factor*, (Heritage House Publishing Company, 2011) at 11.

³⁰ Derek Honeyman, "Indian Trappers and the Hudson's Bay Company: Early Means of Negotiation in the Canadian Fur Trade" (2003) 15:1 *University of Arizona in Arizona Anthropologist* at 34.

³¹ Irene Ternier Gordon, *supra note 29*, at 12.

³² Gilles Havard, *The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century*, translated by Phyllis Aronoff and Howard Scott, (McGill-Queen's University Press, 2001) at 16.

At this point in history, the Indigenous people and the French continued to hold somewhat steady relations; yet, the same cannot be said for the imperial rivals of North America. New France (the French colonies that existed in North America and a large portion of present-day eastern Canada) and the 13 British colonies had been engaged in colonial conflict over land and trade ventures since 1608.³³ These tensions coupled with many other events sparked hostilities between the British and New France and amidst pressures of the fur trade, the undeniable tension led to the outbreak of the Seven Year War.³⁴

The Seven Year War lasted from 1756-1763 and implicated the struggle for supremacy that both Britain and France were going through during the fur trade era in North America.³⁵ During the war, Indigenous allies aided the French and enabled them to defeat several British attacks and capture a number of British forts.³⁶ At the height of the war, Louis-Antoine de Bougainville (a French admiral and explorer) went so far as to claim that, “without Aboriginal support France could not persist in North America and that this support was the counterweight tipping the balance in favor of the French.”³⁷ This clearly articulates the importance of France's relationship with their Indigenous allies in the beginning of the trade era and in the early onset of war.

When the British began to recognize the importance of forming allegiances with the Indigenous people they created the official British Indian Department in 1755,

³³ Daniel Marston, *The Seven Years' War: Essential Histories*, 1st ed, volume 6 (Osprey Publishing, 2001) at 11.

³⁴ *Ibid* at 11.

³⁵ *Ibid* at 11.

³⁶ *Ibid* at 11.

³⁷ Frans de Bruyn & Shaun Regan, *The Culture of the Seven Years' War: Empire, Identity and the Arts in the Eighteenth-Century Atlantic World*, 1st ed (University of Toronto Press: Scholarly Publishing Division, 2014) at 96.

divided into two superintendencies: one for the nations north of the Ohio River, and the other for the nations located in the south.³⁸ The Indian Department as a way for British authorities to centralize their negotiations with the Indigenous people in order to ensure neutrality, if not obtain their support.³⁹ As a result, many Indigenous nations had withdrawn from the conflict and had signed treaties agreeing not to intervene in the final British military operations against the French;

“In exchange, the British promised that the Aboriginals would suffer no reprisals, since they would henceforth be under the protection of the King; that they would keep their land (the limits of which, however, were not formally defined); and that they would continue to enjoy the same rights and privileges they had enjoyed under the French administration (which rights were also not clearly specified).”⁴⁰

As a result of these newfound neutralities and negotiations between the Indigenous nations and the British, the British captured Louisbourg in 1758, Quebec City in 1759 and Montreal in 1760.⁴¹ Finally, in 1763, France formally ceded Canada to the British and the Seven Year War was over.

1.1.3 The Royal Proclamation and the Treaty of Niagara

Once the French army had been defeated in North America, the British government faced the ultimate question: how would they conduct relations with the Indigenous peoples that still dominated most of Canada? Indigenous scholar John Borrows argues that the answer is twofold and hinges on the Royal Proclamation 1763 and the Treaty of Niagara 1764; both part of a larger treaty between First Nations and the

³⁸ *Ibid* at 96.

³⁹ *Ibid* at 96.

⁴⁰ *Ibid* at 97.

⁴¹ William John Eccles, *Seven Years War* (February 2006) edited by Tabitha Marshall (2014), online: The Canadian Encyclopedia <<https://www.thecanadianencyclopedia.ca/en/article/seven-years-war>>

Crown which stood for healthy relations, collaborative efforts and a guarantee of First Nation Self-Government.⁴² Both Proclamation and Treaty of Niagara rights continued throughout the early colonization of Canada and, “these Aboriginal rights survived to form and sustain the foundations of the First Nations/ Crown relationship, and to inform Canada’s subsequent treaty making history.”⁴³

While many narratives paint Indigenous people as uninvolved and passive during times of the Royal Proclamation and Niagara Treaty, it becomes apparent that,

“First Nations were not passive objects, but active participants, in the formulation and ratification of the Royal Proclamation. In the colonial struggle for northern North America and in the foundational development of principles to guide the relationship between First Nations and the British Crown, First Nations were not dependent victims of a greater power.”⁴⁴

Both the Proclamation and the Treaty of Niagara were a result of the interactions between the Indigenous populations that had long inhabited North America, and the British. These interactions led to the formulation of agreements which regulated the allocation of land and resources and established jurisdictions between the Indigenous people and the British.⁴⁵ The nature of the Proclamation established a set of principles, “developed through practised experience, war, and negotiation and, as such, we the product of both societies’ precepts.”⁴⁶

However, through the Proclamation power dynamics began to form. In order to amalgamate the Crown’s position in North America, words were strategically placed

⁴² John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*. Michael Asch, ed. (Vancouver: UBC Press, 1997) at 169.

⁴³ *Ibid* at 170.

⁴⁴ John Borrows, *supra note 42*, at 169.

⁴⁵ John Borrows, *supra note 42*, at 170.

⁴⁶ John Borrows, *supra note 42*, at 170.

within the Proclamation which did not align with Indigenous perspectives on governance, partnership or how to use the land. The Crown explicitly claimed “dominion” and “sovereignty” over Indigenous territories and as a result, only the Crown could make treaties with the Indigenous people, limiting Indigenous control over their own negotiations and lands.⁴⁷ Although a stable relationship with the Indigenous people was important to the British, “they were at the same time trying to increase political and economic power relative to First Nations and other European powers.”⁴⁸ In order to alleviate First Nations distrust in certain provisions, the Crown had to ensure that Indigenous people believed that their jurisdictions and territories were protected. However, for the British to secure their position in North America, “the colonial enterprise required an expansion of the Crown's sovereignty and dominion over the ‘Indian’ lands. Thus, while the Proclamation seemingly reinforced First Nation preferences that First Nation territories would remain free from European imposition, it also opened the door to the erosion of these same preferences.”⁴⁹ Arguably, it is the different objectives of the First Nations and the Crown, and the way that these objectives were strategically placed within the Proclamation that present two different visions within its text and as a result,

“These competing policies between and within the parties’ objectives were not resolved in the wording of the Proclamation because the Crown privileged its understanding of how land would be allocated. The effect of this privileging was to limit First Nations' ability to freely determine their land use, despite Aboriginal non-agreement with such a result, as evidenced by the Treaty of Niagara.”⁵⁰

⁴⁷ Terry Fenge & Jim Aldridge, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada*, 1st ed, volume 78 (McGill-Queen's University Press: 2015) at xvii.

⁴⁸ John Borrows, *supra note 42*, at 170.

⁴⁹ John Borrows, *supra note 42*, at 170.

⁵⁰ John Borrows, *supra note 42*, at 172.

The Niagara gathering resulted in a renewed and extended nation-to-nation relationship between Indigenous peoples and the settlers, recognizing that agreed upon principles had been hindering rather than helping the Indigenous populations in many instances. During the Niagara Treaty, “the Covenant Chain of Friendship, a multi-nation alliance in which no member gave up their sovereignty was affirmed” which reaffirmed protections under the guise of the Proclamation.⁵¹ The Treaty of Niagara acknowledged that around the time of Proclamation, Indigenous people and their British allies made promises through methods other than written principles; oral statements and belts of wampum were also agreed upon, many of which were not upheld by the British Crown following 1763.⁵² Thus, in 1764, a treaty was entered into to negotiate and formalize the principles upon which First Nation/settler relationships would be based upon and to reaffirm protections for Indigenous communities.

1.1.4 Gradual Domination and Colonial Forms of Control

Following the Treaty of Niagara, aspects of the Proclamation continued to protect Indigenous people from the American colonists looking to expand at the time of the Revolution, while also protecting the Crown from encroachment by other colonies during the Revolution and around the time of the War of 1812.⁵³ During these periods of war, the British Indian Department was still largely controlled by the military, in charge of governing their Indigenous allies, and ensuring their commitment in times of war and as a result,⁵⁴

⁵¹ John Borrows, *supra* note 42, at 173.

⁵² John Borrows, *supra* note 42, at 173.

⁵³ Catharine MacMillan & Charlotte Smith, *Challenges to Authority and the Recognition of Rights: From Magna Carta to Modernity*, 1st ed (Cambridge University Press, 2018) at 166.

⁵⁴ Phillip M. White, *American Indian Chronology: Chronologies of the American Mosaic*, 1st ed (London: Greenwood Press, 2006) at 42.

“[...]Especially in the post-1774 years against the common enemy – the Americans – an enduring and symbiotic relationship evolved between the Native people and the British Crown in North America which was rooted in the mutual need and desire for protection and survival. British Indian policy from 1774 to 1815 was thus geared primarily to ensuring the preservation and defense of Canada through the military use and assistance of His Majesty’s Indian allies.”⁵⁵

Scholar Ethan A. Schmidt argues that many Indigenous allies were longing for a British victory that would, “[c]ontinue to restrain the land-hungry colonial settlers from moving west beyond the Appalachian Mountains,” and yet the Americans’ Revolution created a pretense for justifying the rapid, and often brutal expansion into the western territories.⁵⁶ The Indigenous peoples would continue to be displaced and pushed further west (west to the Mississippi and then North, to Canada) throughout most of the nineteenth century.⁵⁷ When the Revolution ended in 1783 and the American colonies won independence from Great Britain -- becoming the United States of America -- relationships with the Indigenous people began to change drastically.⁵⁸

1.2: Defining “Indianness:” The Birth of the *Indian Act*, 1876

New anxieties surrounding the question of who is an “Indian” gradually emerged post-fur trade. Capturing Indian identity as something that could be legally defined became a more pressing question after the war between the British and the American colonists had ended and British allegiances with Indigenous peoples were no longer

⁵⁵ Robert S. Allen, *His Majesty's Indian Allies: British Indian Policy in the Defence of Canada 1774-1815* (Toronto & Oxford: Dundurn Press, 1992) at 3.

⁵⁶ Ethan A. Schmidt, *Native Americans in the American Revolution: How the War Divided, Devastated and Transformed the Early American Indian World*, 1st ed (Oxford & England: Praeger, 2014) at 8.

⁵⁷ *Ibid* at 8.

⁵⁸ Alan Taylor, *American Revolutions: A Continental History, 1750-1804*, 1st ed (W. W. Norton & Company, 2016) at 137.

pertinent for success. Post-war, Indigenous communities were no longer relied upon for military support, and their involvement in the fur trade which around the time of the Revolution was predominantly English led was becoming much less frequent.⁵⁹ Therefore, the Indigenous people were becoming more of a problem than a counterpart and defining “Indianness” to better control of the countries populations, became the political agenda for the next several years.

For example, due to previous allegiances and agreements, considerable quantities of land had been set aside in Upper and Lower Canada for the First Nations people; as a result, the Department suggested that, “First Nation lands remain under the protection of the British Crown, not under provincial control, and that measures be taken to protect these lands from trespass and theft.”⁶⁰ From 1830 onwards, numerous statutes were enacted in a government proclaimed attempt to protect First Nations lands; however, as settlement intensified, the reserves were becoming the target for encroachment and attempts to “protect” Indian lands were met with limited success.⁶¹

In 1850, the Department created (what they proclaimed was an attempt to protect Indian lands) the *Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*.⁶² This legislation vested all Indian land and property in a Commissioner of Indian lands, which had full control over leasing and rent collection, regardless of

⁵⁹ James Dempsey, Library and Archives Canada, *Aboriginal Soldiers in the First World War* (4 April 2017), online: <<https://www.collectionscanada.gc.ca/aboriginal-heritage/020016-4009-e.html>>

⁶⁰ Michael Coyle, “Addressing Aboriginal Land and Treaty Tights in Ontario: An Analysis of Past Policies and Options for the Future” (2005), online: Attorney General of Canada, at 13 <https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Coyle.pdf>

⁶¹ *Ibid* at 13.

⁶² Canada, *False Assumptions and a Failed Relationship*, volume 1, part 2 (1996), online: Report of the Royal Commission on Aboriginal People at 298 <<http://caid.ca/RRCAP1.9.pdf>>

whether or not the band consented.⁶³ In other words, this legislation created a colonially imposed body of people to govern, control and restrict Indigenous affairs.

This Act was also one of the first recorded attempts to define who was legally considered an Indian; “they were defined as people of Indian blood who were reputed to belong to a particular body or group of Indians who were interested in certain lands. The definition included those who intermarried and resided amongst them and those who were adopted in infancy. Individuals could trace their Indian ancestry through either parent.”⁶⁴ Arguably, this early legislation and the initial attempt at defining Indian status, was the most inclusive definition, “[...] of all the future legislative attempts at identifying and defining Indians.”⁶⁵

Only one year after this Act was implemented, the legislation was amended to exclude non-Indian males that married Indian women.⁶⁶ However, non-Indian women that married Indian men, kept their acquired Indian status under this Act.⁶⁷ This exclusionary definition is the first of many which, “ostensibly legislated to protect Indian lands from being taken over by designing white men, however, their long-term effect was mostly to separate Indian women and children from their reserve communities.”⁶⁸ As a result, this Act became the first piece of legislation to include within its provisions a patrilineal model of identity transmission, later recognized as generating sex-based discrimination. It can be suggested that Acts such as the *Act for the Better Protection of*

⁶³ Joan Holmes, “The Original Intentions of the Indian Act,” (2002) For a conference held in Ottawa, Ontario hosted by Pacific Business and Law Institute at 17.

⁶⁴ *Ibid* at 18.

⁶⁵ *Ibid* at 18.

⁶⁶ *Ibid* at 18.

⁶⁷ *Ibid* at 18.

⁶⁸ *Ibid* at 18.

the Lands and Property of the Indians in Lower Canada, were designed to define and limit who could be classified as an “Indian” person, without consulting with the Indigenous nations about who should be considered.

In 1857, the *Gradual Civilization Act* was implemented through what Joan Holmes refers to as, “a more overt method [...] to fulfill the assimilation agenda,”⁶⁹ and became a clear indicator that the Canadian state was on the verge of federation.⁷⁰ Brian Titley argues that as a result of this shifting dynamic, the Canadian state passed legislation which articulated that the responsibility for dealing with Indigenous communities was transferring from the British Crown to colonial control.⁷¹ Upon this transition, Indian administration became one of the main foci of the government and land became the main source of interest.

By 1876 and the creation of the new Dominion (or the formation of Canada as we know it), the Indigenous populations became solely federal responsibility.⁷² As a result, the federal government created a public service branch for dealing with the Indigenous peoples,⁷³ and moved to strengthen the assimilative and discriminatory provisions of previous legislation such as the *Act for the Better Protection of the Lands and Property of the Indians in Lower Canada* and the *Gradual Civilization Act*.

In 1869, the federal government implemented the *Gradual Enfranchisement Act* to further limit and control the Indigenous populations; provisions were included from

⁶⁹ *Ibid* at 19.

⁷⁰ Amanda Robinson, *Gradual Civilization Act* (March 2016), online: The Canadian Encyclopedia <<https://www.thecanadianencyclopedia.ca/en/article/gradual-civilization-act>>

⁷¹ Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*, reprint edition (University of British Columbia Press, 1986) at 4.

⁷² Brian Titley, *supra note 71*, at 5.

⁷³ Brian Titley, *supra note 71*, at 5.

within previous Acts which systematically discriminated against Indigenous people based on gender. The *Gradual Enfranchisement Act* continued to allow non-Indian women that married Indian men to acquire status and continued to deny non-Indian men that married Indian women of status. However, this Act took discrimination to new heights as Indian women who married non-Indian men (or “married out”), lost their right to Indian status and band membership.⁷⁴ Children of these intermarriages were also affected, and were no longer eligible for Indian status under the Act.⁷⁵ This Act was designed to disenfranchise Indian women -- and any children conceived with non-Indian men -- through a termination Indian status.⁷⁶ The *Gradual Enfranchisement Act* was undeniably the driving force for encouraging enfranchisement and gender discrimination which, “[...] had been bubbling beneath the surface of Indian policy and was now apparent and would become an element of the *Indian Act* when it was passed a few years later.”⁷⁷

The *Indian Act*, 1876 remains one of the most complex pieces of legislation in Canadian history. Since its creation the *Indian Act* has shaped, controlled, and constrained the lives and opportunities of Indigenous people. Intentions behind the creation of the Act have long been disputed. However, one thing that remains for certain is that the Act was a consolidation of previous regulations pertaining to Indigenous people, which gave greater authority to the federal Department of Indian Affairs.⁷⁸ Since the *Indian Act* was implemented, the Department has used the Act as a mechanism of intervention; the Department has interfered in Indigenous communities internal band

⁷⁴ Canada, *supra note 62*, at 254.

⁷⁵ Canada, *supra note 62*, at 254.

⁷⁶ Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Purich Publishing, 2011) at 105.

⁷⁷ Canada, *supra note 62*, at 254.

⁷⁸ Canada, *supra note 18*.

workings and has even made sweeping policy decisions that define and limit who is legally considered to be an Indian under the Act.⁷⁹ As such, “Indianness” became a characteristic that could be applied to some individuals, and taken away from others. Provisions within the Act could systematically legislate some Indigenous people outside of their communities (disproportionately affecting Indigenous women) and have been used to exclude those who did not meet the colonially imposed legal requirements of “Indian” identity.

Scholars and activists such as Bonita Lawrence argue that the *Indian Act*, “is much more than a body of laws that for over a century have controlled every aspect of Indian life. As a regulatory regime, the *Indian Act*... [is an] organizing... conceptual framework that has shaped contemporary Native life in ways that are now so familiar as to almost seem natural.”⁸⁰ As we shall explore, this natural impression that “Indians” needed to be tightly governed, operated through the lens of a civilization agenda assuming the supremacy of settler societies.

1.2.1: The Civilization Agenda

This naturalization of control is easily depicted when analyzing the history of Indigenous people in Canada. Under the *Indian Act*, the federal government managed Indian lands, resources, and money, controlled access to intoxicants, and promoted ‘civilization’ among a population they perceived as uncivilized.⁸¹ The *Indian Act* was designed specifically for the purpose of integrating Indigenous people into Euro-

⁷⁹ Alberta, *Aboriginal Peoples of Alberta: Yesterday, Today and Tomorrow* (November 2013), online: Alberta Aboriginal Relations at 12 <<http://indigenous.alberta.ca/documents/AboriginalPeoples.pdf>>

⁸⁰ *Ibid* at 6.

⁸¹ Ted Binema, *supra note* 13, at 7.

Canadian society with a form of white control at the forefront.⁸² As a result, *Indian Act* amendments between 1876 and 1927 were largely concerned with civilizing First Nations peoples, and assimilating them into Euro-Canadian culture.

With each amendment, *Indian Act* legislation became increasingly restrictive, imposing ever-greater controls on the lives of Indigenous people. For example, the Act continued to push for the whole-scale abandonment of traditional ways of life, introducing outright bans on spiritual and religious ceremonies such as the Potlatch and Sundance in 1884.⁸³ For Indigenous people -- especially women -- such measures had terrible consequences. The forced abandonment of the Potlatch ceremony disconnected communities from spiritual traditions, efforts of healing and celebrations of life; it also abandoned the role of Indian women as community leaders and knowledge keepers.⁸⁴

Sylvia McAdam, co-founder of the Idle No More movement argues that,

“The Potlatch ban and similar provisions of the *Indian Act* have contributed to the exclusion of women in Indigenous ceremonies. She notes that, prior to treaty, Indigenous women held ceremonies and were doctors and healers within their communities. Specifically, the medicine lodges, law lodges, and clan mother’s Sundance lodges were spaces in which women held considerable power.”⁸⁵

Since the Potlatch ban the ongoing oppression of Indigenous women has continued. McAdam’s has even suggested that the ban contributed to the patriarchal culture and internalized gender-discrimination that remains within many Indigenous

⁸² Ted Binema, *supra note 13*, at 7.

⁸³ Al Garman & Kirstin Doull, “Embracing the Healing Journey” (2009) 5:1 *Journal of Aboriginal Health* at 7.

⁸⁴ Barry Pritzker, *A Native American Encyclopedia: History, Culture, and Peoples*, 1st ed (Oxford University Press, 2000) at 199.

⁸⁵ Tansi Nîîtôtemtik, *Colonialism and the Potlatch Ban* (2018), online: University of Alberta Law <<https://ualbertalaw.typepad.com/faculty/2018/11/colonialism-and-the-potlatch-ban.html>>

societies today.⁸⁶ In support of McAdam's claim, Philip Brass, a traditional knowledge keeper from Peepeekisis First Nation in Saskatchewan also articulates that,

“A patriarchal culture exists around ceremonies today because men would tell the agents that they were going ‘hunting,’ when in reality, they were practising ceremonies in the bush. The men, back at that time during the ban, would go out into the bush under the excuse that they’ve gone hunting, and women would have to stay home. This led to ceremonies being practiced with only men in attendance. After doing that for 70 years, the ceremonies became very male-centric.”⁸⁷

It was not until 1951, that the Potlatch ban was lifted,⁸⁸ and the ramifications are still greatly affecting Indigenous women in their communities. Present day, many Indigenous women remain on the sidelines during the ceremony, excluded and deprived of participation in ceremonies that would typically be led by women.⁸⁹ Therefore, the colonial imposition of the Potlatch ban, has had long-lasting effects for Indigenous communities -- specifically Indigenous women -- in their transmission of culture and Indian identity.

However, the Potlatch ban was not the only attempt by the government of Canada to assimilate Indigenous people into the larger society. The prejudicial belief that Indigenous people were inferior, uncivilised, and doomed to vanish, all contributed to the belief that it was in the government's best interest to encourage assimilation and enfranchise the Indigenous populations.⁹⁰ As full citizens, Indigenous peoples would no

⁸⁶ *Ibid.*

⁸⁷ Lenard Monkman, *Historical Ban on Potlatch Ceremony Has Lingering Effects For Indigenous Women, Author Says*, (March 2017), online: CBC News <<https://www.cbc.ca/news/indigenous/historical-ban-spirituality-felt-indigenous-women-today-1.4036528>>

⁸⁸ René R. Gadacz, *Potlach* (February 2006), online: The Canadian Encyclopedia <<https://www.thecanadianencyclopedia.ca/en/article/potlatch>>

⁸⁹ Lenard Monkman, *supra note 87*.

⁹⁰ Lenard Monkman, *supra note 87*.

longer be considered “wards” of the State, and the government would consequently be relieved of the costs associated with this fiduciary relationship.

Residential schools became the means through which this intergenerational assimilation was to be achieved. Residential schools were government sponsored religious institutions that were designed in response to the so-called “Indian problem.”⁹¹ As was stated by Duncan Campbell Scott, the former deputy superintendent of Indian Affairs; “Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this.”⁹² As a result, Indigenous children were forcibly removed from their households at a very young age, made to live in residential school institutions and banned from practicing their cultural traditions. The federal government was responsible for funding and setting general policy guidelines within the residential school system; while the church organizations, for the most part, oversaw the day-to-day operations of the institutions.⁹³ Regardless, neither the government nor the churches, according to Jennifer J. Llewellyn, had Indigenous culture, interest or well-being as priorities.⁹⁴

Indigenous children had limited to no contact with their families, and suffered from the colonially imposed conditions of disconnection and diminishment of Indian identity. Jennifer J. Llewellyn even states that, “The nature of these institutions permitted and even encouraged the abuse that commonly marked children's experiences. Sexual

⁹¹ Jennifer J. Llewellyn, “Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice” (2002) 52:3 University of Toronto Law Journal at 253.

⁹² Brian Titley, *supra note 71*, at 97.

⁹³ Jennifer J. Llewellyn, *supra note 91*, at 278.

⁹⁴ Jennifer J. Llewellyn, *supra note 91*, at 278.

abuse by caregivers and administrators was rampant in the schools. So, too, were other forms of physical abuse, sometimes rising to life-threatening levels.”⁹⁵ For example, the most severe form of punishment was often administered when students spoke their Native tongue.⁹⁶ Given that Indigenous children were punished for speaking the language of their people, many have suffered a loss of dialect and cultural familiarity at the hands of the Canadian state. With an estimated 150,000 First Nation, Inuit and Métis children that attended residential schools, testimonies that spoke positively of the experience are far overshadowed by tragic accounts of emotional, physical and sexual abuse.⁹⁷

The legacy of residential schools has contributed largely to the social problems and traumas that continue to exist in many Indigenous communities today, and while the examples presented above are only some recounts of Indigenous oppression under the discriminatory political regime of the Canadian government, they depict the intention of Indian legislation and residential school systems; “The objective – I quote from Sir John A. Macdonald, our revered forefather – was to 'take the Indian out of the child,' and thus solve what was referred to as the Indian problem.”⁹⁸ The reality is that the assimilatory nature of the civilization agenda remained one of the central tenets of Indian policy and legislation for the next 150 years.⁹⁹

⁹⁵ Jennifer J. Llewellyn, *supra* note 91, at 279.

⁹⁶ Agnes Grant, *No End of Grief: Indian Residential Schools in Canada*, 1st ed (Winnipeg: Pemmican Publications, 1996) at 92.

⁹⁷ Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada*, 1st ed (Vancouver, Toronto: University of British Columbia Press, 2010) at 12.

⁹⁸ Sean Fine, Chief Justice Says Canada Attempted “Cultural Genocide” on Aboriginals (May 2015), online: The Globe and Mail <<https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>>

⁹⁹ Ted Binema, *supra* note 13, at 9.

1.2.2: Who is an Indian? Gender as a Means of Oppression

Ramifications of assimilation and acculturation that remain deeply immersed within Canadian policy frameworks, continue to affect Indigenous communities present day. The *Indian Act* imposed upon the Indigenous nations, a title and personhood which granted them protections and fiduciary accountability by the state, yet has also allowed every aspect of their livelihoods from birth to death to be governed and controlled.¹⁰⁰ This control is especially problematic in regard to questions around Indian identity and who is legally an Indian? The 1996 report of the Royal Commission on Aboriginal Peoples articulated that, being recognized as an “Indian” in Canadian law often had very little to do with whether or not a person had Indian ancestry.¹⁰¹ This becomes apparent under section 112 of the *Indian Act*, 1876 -- the so-called Compulsory Enfranchisement section -- which provided that Indians could lose status if they graduated university, became a Christian minister, or achieved professional designation as a doctor or lawyer.¹⁰² The possibility of status removal clearly articulates the disadvantage and limited positions of power that Indigenous people were able to hold as a result of discriminatory Act provisions.

However, *Indian Act* legislation also disproportionately affected Indigenous women in the sense that policies and amendments broadened in scope to impose foreign citizenship boundaries on Indigenous nations, and then legislated Indigenous people (specifically women) outside of their respective culture because of gender and

¹⁰⁰ Martin J. Cannon, *supra note 12*, at 28.

¹⁰¹ Canada, Parliament, House of Commons Debates, *The Indian Act* (30 November 2017) at 1.

¹⁰² Indigenous Foundations, *Indian Status* (July 2009), online: First Nations and Indigenous Studies, University of British Columbia <<https://indigenousfoundations.arts.ubc.ca/indianstatus/>>

intermarriage.¹⁰³ For example, in early legislation -- such as the *Gradual Enfranchisement Act* and the *Indian Act*, 1876 and 1951 -- Indigenous people were denied rights to status simply because they were women. Women that married off reserve, had different status entitlement than that of their male counterpart in an identical situation.¹⁰⁴ For women, Indian status was conditional upon their husband's status;

“If she married an Indian man from another Indian band, she would cease to be a member of her own band and become a member of her husband's band. Legally, her status would become conditional on her husband's status. Whether marrying an Indian man or non-Indian man, an Indian woman may be separated from her own family and community, as well as her connections to her heritage.”¹⁰⁵

The inherent discrimination that was written within the confines of Indian legislation, subjected Indigenous women to unequal status provisions and colonially imposed limits on Indian identity. In 1951 -- in response to the United Nations' Universal Declaration of Human Rights -- the *Indian Act* was amended to remove what the federal government considered to be the “more oppressive sections” of the Act.¹⁰⁶ Under the 1951 Act amendments, it was no longer illegal for Indigenous communities to practice their cultural traditions such as the Potlatch, and Indigenous women were granted the right to vote in band council elections.¹⁰⁷ However, the 1951 *Indian Act* remained riddled with gender-based discrimination which continued to oppress Indigenous women. For example, section 12(1)(b) continued to remove status from Indigenous women that married non-Indian men, including American Indians and non-status Aboriginal men in

¹⁰³ Martin J. Cannon, *supra note 12*, at 28.

¹⁰⁴ Martin J. Cannon, *supra note 12*, at 28.

¹⁰⁵ Indigenous Foundations, *Bill C-31* (July 2009), online: First Nations and Indigenous Studies, University of British Columbia <https://indigenousfoundations.web.arts.ubc.ca/bill_c-31/>

¹⁰⁶ Indigenous Foundations, *The Indian Act* (January 2009), online: First Nations and Indigenous Studies, University of British Columbia <https://indigenousfoundations.arts.ubc.ca/the_indian_act/>

¹⁰⁷ *Ibid.*

Canada, such as Métis.¹⁰⁸ Section 12(1)(b) of the *Indian Act*, placed Indigenous women in positions of disadvantage and attempted to enfranchise Indigenous families in response to the Canadian government's assimilation agenda.

For Indigenous women, the discrimination which threatened their Indian identity also threatened their well-being and community/ familial relations. The reality is, for many Indigenous women, marrying off reserve or marrying a non-Indian man meant the literal expulsion from their communities. Testimonies have been recorded of Indigenous women that have suffered as a result of the above-mentioned provisions; in a 2010 study at the University of New Brunswick an Indigenous woman -- referred to only as Millie -- spoke about the tremendous impact it had on her life when the Registrar revoked her Indian status as a result of marrying a non-Indian man.¹⁰⁹ Millie spoke about her experience and stated that,

“My mom and dad [...] said I lost my status, that's my own fault and stuff like that. So therefore they wouldn't comfort me. The community was rejecting me. I couldn't get comfort there. I was so lost. I was so angry! There was nobody to turn to at all. I could of handled it on the outside, putting up with all this bullshit, knowin' that I could come back to the comfort - even if they didn't say a word to me. That's fine. That itself I could have accepted. Just ignore me. It's just those hateful things that people used to say to me. Especially, it seemed like when I was down the lowest that was when it turned up, no matter whether I was in town or anywhere. No matter where I saw them, even people I would have least expected - bang! They knocked me down again.”¹¹⁰

It should be rearticulated that under the 1951 *Indian Act* provisions, Indian men that married non-Indian women did not lose their status; creating a double standard within Indigenous communities. Janet Silman states that, “over the years more and more

¹⁰⁸ *Ibid.*

¹⁰⁹ Fern Marie Paul, “Bill C-31: The Experiences of ‘Indian’ Women Who ‘Married Out,’” (2010) University of New Brunswick, A Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Masters in Arts in the Graduate Academic Unit of Sociology at 81.

¹¹⁰ *Ibid* at 83.

women were being thrown out of their homes by husbands. While the men then moved their girlfriends—often [non-status]—into the family home, the Indian women and children had to move into condemned houses or in with relatives who already were overcrowded.”¹¹¹ The unequal treatment of Indian women therefore clearly articulates why hostilities and anger remain within many Indigenous communities. In these cases, *Indian Act* provisions and changing attitudes within Indian band mentality, led many Indigenous women to impoverished conditions and proliferated vulnerabilities. As the gender roles of Indigenous women’s were being maligned and devalued by colonial policies of enfranchisement, men’s were not; at least not within the confines of the bands or on the reserves.¹¹² Although there was certainly much violence and discrimination directed at Indian men in Canada, it has been suggested that “the social roles and responsibilities of heterosexual Indian men within bands and on the reserves was systematically elevated over that of women and non-heterosexuals by the institutions of Christianity, capitalism, sexism, and homophobia.”¹¹³ Thus, it becomes apparent that the discrimination lies deep within policy narratives and colonial ideologies that have been internalized by Indigenous communities and have allowed for a continued marginalization of Indigenous women in Canada.

As a direct consequence, Indigenous women face the highest poverty and violence rates in all of Canada;¹¹⁴ “in 1991, eight out of ten Aboriginal women reported victimization by physical, sexual, psychological, or ritual abuse; this rate is twice as high

¹¹¹ Janet Silman, *Enough is Enough: Aboriginal Women Speak Out*, 1st ed (Women’s Press, 1992) at 11.

¹¹² Joanne Barker, “Gender, Sovereignty, Rights: Native Women’s Activism Against Social Inequality and Violence in Canada,” (2008) 60:2 *American Quarterly* at 263.

¹¹³ *Ibid* at 263.

¹¹⁴ Carrie Bourassa, Kim McKay-McNabb & Mary Hampton, “Racism, Sexism, and Colonialism: The Impact on the Health of Aboriginal Women in Canada” (2004) 24:1 *Canadian Women Studies* at 23.

as that reported by non-Aboriginal women in Canada.”¹¹⁵ Sherene H. Razack argues that much of the violence against Indigenous women that is occurring present day, is a direct result of years of discrimination and the normalization of violence against women for the last 150 years.¹¹⁶ Until gender-discriminatory provisions and ideologies have been addressed at their core, Indigenous women will continue to suffer.

¹¹⁵ *Ibid* at 23.

¹¹⁶ Sherene H. Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George” (2000) 15:2 Cambridge University Press at 91.

Chapter 2

2.1: Women, Activism and Legal Response to the *Indian Act*

In Canada, not all Indigenous women have had the same shared experiences, and do not identify with a single culture. However, Indigenous women have shared a similar colonial history in which the imposition of patrilineal codification of Indian identity, has transformed Indigenous societies by diminishing Indigenous women's power, status, and material circumstances.¹¹⁷ Centuries of colonization have devalued the traditional roles of Indigenous women, creating a power imbalance based on gender identity, that both limits the ability of men, women, and their communities in achieving self-actualization and equality.

Indigenous narratives suggest that contrary to the present-day colonial structure of First Nations communities, many were in fact derived from matriarchal societies.¹¹⁸

Former president of the Native Women's Association of Canada and Mohawk Activist, Beverley Jacobs argues that,

“Women were respected for their spiritual and mental strength and men were respected for their spiritual and physical strength. Women were given the responsibility in bearing children and were given the strength and power to carry that responsibility through. Men had always respected that spiritual and mental strength and women respected the men's physical strength.”¹¹⁹

¹¹⁷ Cheryl Suzack, Shari M. Huhndorf, Jeanne Perreault & Jean Barman, *Indigenous Women and Feminism: Politics, Activism, Culture*, eds (Vancouver: UBC Press, 2010) at 3.

¹¹⁸ *Ibid* at 3.

¹¹⁹ Indigenous Foundations, *Marginalization of Aboriginal Women: A Brief History of the Marginalization of Aboriginal Women in Canada* (March 2009), online: First Nations and Indigenous Studies, University of British Columbia <https://indigenousfoundations.arts.ubc.ca/marginalization_of_aboriginal_women/>

However, as European colonists began to enact legislation that encompassed a patriarchal narrative, Indigenous women were no longer respected as political actors, or leaders within their communities.¹²⁰ Indigenous women in positions of community leadership became scarce. Colonial policies began to restructure Indigenous bands in a way that was male centric, and created a gender based hierarchy in community practice and policy.¹²¹ The federal government went as far as legislating how Indigenous community leadership was to be elected and actively interfered with the decision-making process in Indigenous communities.¹²² For example, the federal government legislated Indigenous women outside of the election process; the election process was restricted to males over the age of 21.¹²³ As a direct result, Indigenous men became the primary decision makers within most communities and, “the respected and honoured role of community leader was lost to Indigenous women for centuries to come.”¹²⁴

In an attempt to control and limit Indigenous women, it becomes apparent that “colonization has involved their removal from positions of power, the replacement of traditional gender roles with Western patriarchal practices, the exertion of colonial control over Indigenous communities through the management of women’s bodies, and sexual violence.”¹²⁵ The sad reality is that, discrimination based on gender has become so ingrained in many Indigenous communities, that it is now seen as a traditional trait¹²⁶ and

¹²⁰ Luca Rollè, Shulamit Ramon & Piera Brustia, “Editorial: New Perspectives on Domestic Violence: From Research to Intervention Frontiers” (2019) 10:641 *Frontiers in Psychology* at 120.

¹²¹ Carol McDonald, Elizabeth Thomlinson and Marjorie McIntyre, “Realities of Canadian Nursing: Professional, Practice, and Power Issues” (2006) 102:2 *The Canadian Nurse* at 117.

¹²² *Ibid* at 117.

¹²³ *Ibid* at 117.

¹²⁴ Luca Rollè et al, *supra* note 120, at 120.

¹²⁵ Cheryl Suzack, *supra* note 117, at 1.

¹²⁶ Cheryl Suzack, *supra* note 117, at 3.

present day, Indigenous men have actually criticized women who assume elected leadership within their communities of “acting like men.”¹²⁷

2.2: Legal Challenges

Indigenous women have been challenged extensively to prove their lineage, cultural heritage and most shockingly, their existence as Indigenous people. These roadblocks have led Indigenous activists to challenge the colonial notions of masculinity and paternalism, in a fight for Indigenous women’s rights and recognition within society. It is the uniqueness of Indigenous communities, and the similarities surrounding the situation of Indigenous women, that has united women across Canada; in a fight for equality, respect and a recognition of their “Indian” identity.

Since the 1970s, Indigenous women have been organizing in the fight against both colonial and Indigenous politics which encompass issues of personhood, nation and culture. The driving force behind these battles remains the systemically entrenched discrimination which resides within Indian policy. By challenging the sex-based provisions of the *Indian Act* and highlighting the blatant forms of sexism that remain, Indigenous women have set the stage for a more equal Canada, and a more inclusive place for women. These female Indigenous leaders have become the change makers necessary to advance the legal system and have paved way for Indigenous people to continue to fight against colonial systems of oppression and gender-based discrimination.

¹²⁷ Canada, Status of Women, *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports*, Policy Research by Judith F. Sayers, Kelly A. MacDonald, Jo-Anne Fiske, Melonie Newell, Evelyn George & Wendy Cornet (November 2001) at 58.

This chapter will highlight four cases, and four resilient Indigenous women that brought forth legal challenges on behalf of themselves and their descendants -- as well as other Indigenous women and children -- which challenged the discriminatory provisions of the *Indian Act*.

2.2.1: Attorney General of Canada v. Lavell, [1974] S.C.R. 1349

Indigenous women have been vocal about the deprivation of rights which they suffer as a result of *Indian Act* provisions. At the height of the resistance movement in Canada, Indigenous women brought their challenges to light through the Canadian judicial system, and legal mechanisms which were already in place. Throughout time, Indigenous women also began to take to social media platforms and advocate through other means of resistance to attract media attention and a rising political voice.¹²⁸ As a result, these acts of resiliency began to generate public interest and Indigenous women acquired support from a much larger audience.¹²⁹

One of the first Indigenous women to bring forth a Court challenge was Jeannette Corbiere Lavell. The Lavell case was an appeal from two judgments. The first concerned Jeannette Lavell, an Anishinaabe woman born on the Wikwemikong Reserve, Manitoulin Island in Ontario.¹³⁰ Lavell was a “status Indian” (an Indian within the legal sphere of the *Indian Act*) until 1970 when she married a non-Indian man.¹³¹ Following their union,

¹²⁸ Alex Wilson, Bronwyn Carlson & Acushla Sciascia, “Reterritorializing Social Media: Indigenous People Rise Up” (2017) 21:1 Australasian Journal of Information Systems at 1.

¹²⁹ Peter W. Hogg, “The Canadian Bill of Rights: Equality Before the Law in A.-G. Can. v. Lavell” (1974) 52:2 Canadian Bar Review at 263.

¹³⁰ Keith D. Smith, *supra note* 16, at 452.

¹³¹ Peter W. Hogg, *supra note* 129, at 263.

Lavell received a notice from the Department of Indian Affairs and Northern Development stating that her name was recently deleted from the Indian Registry and that legally, she was no longer considered an Indian under section 12(1)(b) of the *Indian Act*.¹³²

Lavell appealed the Departments decision to remove her name from the Indian Registry to the York County Court as per section 9(3) of the *Indian Act*, but the judge upheld the decision of the Registrar.¹³³ Unsatisfied with the outcome, Lavell then took her challenge to the Federal Court of Appeal, “which reversed the County Court judge on the grounds that section 12(1)(b) was inoperative by reason of conflict with the right to “equality before the law” in section 1(b) of the *Canadian Bill of Rights*.”¹³⁴ This decision was upheld until Lavell joined another Indigenous activist, Yvonne Bédard at the Supreme Court of Canada. Together, the women challenged the patriarchal and discriminatory nature of constitutional law in Canada.¹³⁵

2.2.2: R. v. Bédard, 2017 SCC 4, [2017] 1 S.C.R. 89

Yvonne Bédard, was a member of the Iroquois Nation, born to the Six Nations Indian Reserve in Brantford, Ontario.¹³⁶ Bédard was also a “status Indian” under the *Indian Act*, until she married a non-Indian man in 1964.¹³⁷ The marriage dissolved and in

¹³² Peter W. Hogg, *supra note* 129, at 263.

¹³³ Peter W. Hogg, *supra note* 129, at 263.

¹³⁴ Peter W. Hogg, *supra note* 129, at 263.

¹³⁵ Amanda Robinson, Lavell Case (February 2006) Edited April 2017, online: The Canadian Encyclopedia <<https://www.thecanadianencyclopedia.ca/en/article/lavell-case>>

¹³⁶ Attorney General of Canada v. Lavell, *supra note* 10, at 1355.

¹³⁷ Peter W. Hogg, *supra note* 129, at 264.

1970 and Bédard returned to the reserve to live in a house which had been left to her by her mother's will, "[h]er mother had held a Certificate of Possession under section 20 of the *Indian Act* and which had been bequeathed to her under her mother's will which had been approved by the Council of the Six Nations and on behalf of the Minister of Indian Affairs as required by the *Indian Act*, [section 45(3)] on August 7, 1969."¹³⁸

Upon her return to the community, Bédard was informed by band leadership that she and her children were no longer entitled to live on the Reserve, as they were no longer "status Indians" and could not inherit Reserve land. However, in "good faith" the band council passed a series of resolutions giving Bédard, "permission to reside on the Reserve for a period of six months during which she was to dispose of the property, and extending this permission for a further eight months, after which any further requests for her continued residence would be denied."¹³⁹ Bédard disposed of the property to her brother -- a legally recognized "status Indian"-- and he allowed her and her children to continue living in the house.

On September 7, 1971, the band council requested the District Supervisor to serve a notice to Bédard and force her to quit the reserve; which ultimately meant leaving her "brothers house" and the reserve altogether.¹⁴⁰ In response, Bédard brought her case to the Supreme Court of Ontario where it was heard by Mr. Justice Osler. Justice Osler determined that, "the Council's request to the District Supervisor and any action taken by

¹³⁸ Attorney General of Canada v. Lavell, *supra* note 10, at 1355.

¹³⁹ Attorney General of Canada v. Lavell, *supra* note 10, at 1356.

¹⁴⁰ Peter W. Hogg, *supra* note 129, at 264.

the Supervisor pursuant to such request, and the removal of her name from the Band list simply because of her marriage to a non-Indian, are actions that discriminate against her by reason of her race and sex and deny her “equality before the law.”¹⁴¹ By adhering to recent arguments in the Lavell case, and the decision of the Federal Court of Appeal, Osler determined that sex-based discrimination continued to exist under section 12 (1)(b) of the *Indian Act*, 1876.¹⁴² Osler also determined that Act provision denied individuals of their right to enjoyment of property, proving inconsistent with the *Canadian Bill of Rights*, section 1(a).¹⁴³ Osler stated that, “the loss of status as an Indian and the loss of the right to be registered and to occupy property upon a reserve is discrimination which is adverse to the interest of Indian women and is in contravention of the *Canadian Bill of Rights*.”¹⁴⁴

2.2.3: An Appeal to the Supreme Court of Canada: Lavell and Bédard in Synchronicity

The Lavell and Bédard case were similar in scope, merit and time frame and as a result, they became known together.¹⁴⁵ Both cases were met with opposition by community leaders, and many Indigenous men from: The Indian Association of Alberta, The Union of British Columbia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest

¹⁴¹ Attorney General of Canada v. Lavell, *supra note 10*, at 1356.

¹⁴² Peter W. Hogg, *supra note 129*, at 264.

¹⁴³ Peter W. Hogg, *supra note 129*, at 264.

¹⁴⁴ Attorney General of Canada v. Lavell, *supra note 10*, at 1378.

¹⁴⁵ Attorney General of Canada v. Lavell, *supra note 10*, at 1378.

Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, The Indian Association of Quebec, The Yukon Native Brotherhood and The National Indian Brotherhood, by counsel appearing on behalf of the Six Nations Band and by counsel appearing on behalf of the Treaty Voice of Alberta Association.¹⁴⁶ These groups held that sex-based discrimination did not exist within the *Indian Act* and that the representations by the Lavell and Bédard were without merit, justification and validity.¹⁴⁷

On August 27, 1973, after facing tremendous pressure from the federal government and Indian associations, the Supreme Court of Canada reversed the decisions of the Federal Court of Appeal and of Osler J., and held that section 12(1)(b) was not in conflict with the right to “equality before the law” and did not violate the *Canadian Bill of Rights*.¹⁴⁸ The Supreme Court’s decision allowed section 12(1)(b) of the *Indian Act* to continue in operation; the “marrying-out” rule continued to discriminate against Indigenous women and further entrenched this notion of lesser importance over the female population. As a result, both Lavell and Bédard lost their rights to Indian status.

2.2.4: Sandra Lovelace v. Canada, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977 and a Return to Bill C-31

The early struggles of Lavell and Bédard paved the way for other Indigenous women to fight against discriminatory provisions of the *Indian Act*, and in 1977 a new challenge entered the Canadian court system. Sandra Lovelace, a registered “status

¹⁴⁶ Attorney General of Canada v. Lavell, *supra note 10*, at 1379.

¹⁴⁷ Amanda Robinson, *supra note 135*.

¹⁴⁸ Peter W. Hogg, *supra note 129*, at 264.

Indian” and Maliseet woman from Tobique New Brunswick, challenged section 12(1)(b) of *Indian Act* after she lost her Indian status from marrying a non-Indian man and moving off Reserve.¹⁴⁹ When the marriage ended some years later, Lovelace and her children returned to the Reserve to live with her parents. Upon their arrival, Lovelace was informed that she was no longer entitled to purchase a home on Reserve land because Band Council orders prioritize housing for members only and she was no longer legally an Indian.¹⁵⁰ Lovelace and her children also lost access to Federal programs for Indian education, housing, social assistance and their rights, “[...] to borrow funds from the Band Council for housing; to traditional hunting and fishing rights; and cultural benefits that come with living among family and friends on the reserve.”¹⁵¹

Lovelace submitted an application to the United Nations Human Rights Committee, articulating that the loss of rights in which she suffered, was disproportionately affecting Indigenous women and violated Articles 2(1), 3, 4, 23(1), 26 and 27 of the *International Covenant on Civil and Political Rights* (ICCPR).¹⁵² Lovelace argued that the *Indian Act* unjustifiably stripped Indian women who married non-Indian men of their status, yet allowed Indian men that married non-Indian women to maintain their status and even went as far as to allow their non-Indian wives to access the benefits of the Reserve.¹⁵³ Lovelace claimed that this grave articulation of sex-based

¹⁴⁹ Anne F. Bayefsky, “The Human Rights Committee and the Case of Sandra Lovelace” (1983) 20:1 Cambridge University Press at 244.

¹⁵⁰ Sandra Lovelace v. Canada, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977

¹⁵¹ *Ibid* at 12.

¹⁵² *Ibid* at 12.

¹⁵³ *Ibid* at 14.

discrimination violated international covenants concerned with equality and justice, putting Indigenous women and children more at harm of losing their rights, land, and culture than Indigenous men in the same circumstances.¹⁵⁴

The Human Rights Committee found that although not all of the provisions that Lovelace challenged were violated, the effects of losing cultural benefits from living on the reserve violated Article 27 of the ICCPR, which establishes that states cannot deny minority groups the right to enjoy culture.¹⁵⁵ The Committee determined that, “People who are born and raised on a reserve, have maintained ties and want to further maintain ties to that community, are considered part of that minority group within the meaning of Article 27.”¹⁵⁶ Lovelace grew up on the Reserve and was raised within her culture, she only left for a few years around the time of her marriage.¹⁵⁷ Therefore, in relation to the Lovelace case, section 12 (1)(b) of the *Indian Act* unjustifiably stripped her of her rights to Indian status.

The Committee also argued that Lovelace was denied the right to “enjoy her culture” because there were no communities outside of the Reserve that shared the same language and culture as the Maliseet Indians.¹⁵⁸ Indigenous communities have distinct cultural traditions, practices and dialects than that of the larger Western society and therefore, Lovelace would be removed from her space of cultural familiarity. In conclusion, the Human Rights Committee determined that,

¹⁵⁴ *Ibid* at 14.

¹⁵⁵ *Ibid* at 12.

¹⁵⁶ *Ibid* at 17.

¹⁵⁷ *Ibid* at 21.

¹⁵⁸ *Ibid* at 12.

“It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe.”¹⁵⁹

In 1981, the Committee ruled that removing Sandra Lovelace’s Indian status infringed her rights under Article 27 and was an unjustified violation of the ICCPR¹⁶⁰ and as a result, the Government of Canada was forced to amend the *Indian Act*.¹⁶¹ However, it was not until 1985 that the amendments to the *Indian Act* came into force; all said and done, it took 10 years for Sandra Lovelace to regain her status.¹⁶²

2.2.5: 1985 *Indian Act* Amendments and the Creation of Bill C-31

The Lovelace decision arguably made unprecedented history in Canadian courts. In 1985, the government of Canada was ordered to amend the discriminatory sections of the *Indian Act* through the implementation of Bill C-31. Bill C-31: *A Bill to Amend the Indian Act* was aimed at eliminating gender discrimination -- specifically in regard to Indian status -- and a re-expression of matrilineal/matrilocal importance among Indigenous communities in Canada.¹⁶³ Bill C-31 was passed in an attempt to end enfranchisement provisions within the *Indian Act* and restore status to those who had

¹⁵⁹ *Ibid* at 21.

¹⁶⁰ *Ibid* at 33.

¹⁶¹ Anne McClintock, Aamir Mufti & Ella Shohat, *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives*, (University of California *et al.*, 1997) at 10.

¹⁶² Canada, Parliament, House of Commons Debates, *The Indian Act* (16 January 1984) at 466.

¹⁶³ Anne McClintock *et al.*, *supra note* 161, at 11.

previously lost it.¹⁶⁴ Bill C-31 amendments abolished section 12(1)(b), the “marrying-out” rule, and 12 (1)(a)(iv), the “double mother” rule.¹⁶⁵

Bill C-31 also brought forth an amendment to section 6 of the *Indian Act*, “Persons Entitled to be Registered,” creating a divide among Indigenous people, and two classes of status.¹⁶⁶ The two classes of status are referred to as section 6(1) and section 6(2) Indian status; however, these categories do not imply that either are half or full status Indians, as many have tried to argue, but rather they determine whether the children of a status Indian, will acquire status or not under Bill C-31.¹⁶⁷ For example, a section 6(1) Indian who marries a 6(1) or a 6(2) Indian will have children that acquire 6(1) status.¹⁶⁸ If two section 6(2) Indians marry, they will also have children that acquire 6(1) status.¹⁶⁹ If a section 6(1) Indian marries anyone without status (whether that person is Aboriginal or not) their children will acquire only section 6(2) status.¹⁷⁰ Finally, if a section 6(2) Indian marries anyone without status (whether that person is Aboriginal or not) their children will have no legal Indian status.¹⁷¹ Under Bill C-31 amendments it only takes two generations of out-marriages to no longer be considered a status-Indian.

The consequences of falling within section 6(1) or 6(2) are perhaps most adversely felt by the children and grandchildren of Indigenous women as “for these descendants, the way their parents and grandparents acquired status will be important

¹⁶⁴ Martin J. Cannon, “Bill C-31 - An Act to Amend the Indian Act: Notes Toward A Qualitative Analysis of Legislated Injustice,” (2005) 1:1 *The Canadian Journal of Native Studies* XXV, at 374.

¹⁶⁵ Keith D. Smith, *supra note* 16, at 326.

¹⁶⁶ Keith D. Smith, *supra note* 16, at 322.

¹⁶⁷ Keith D. Smith, *supra note* 16, at 323.

¹⁶⁸ Keith D. Smith, *supra note* 16, at 324.

¹⁶⁹ Keith D. Smith, *supra note* 16, at 324.

¹⁷⁰ Gail Guthrie Valaskakis, Eric Guimond & Madeleine Dion Stout, *Restoring the Balance: First Nations Women, Community and Culture*, 1st ed (University of Manitoba Press, 2009) at 116.

¹⁷¹ Keith D. Smith, *supra note* 16, at 326.

determinants of whether they will have Indian status and, if they do, whether and to what extent they will be able to pass it on to their children.”¹⁷² As a result, one of the most criticized aspects of Bill C-31 is that it did not actually reverse the sexism inherent in denying women status if they married a non-Indian man.¹⁷³ Women that had their Indian status reinstated under Bill C-31 had 6(1) status, but their children only acquired 6(2) status and as a result, could not pass on their status to the third generation unless they too married a status Indian. Under Bill C-31, Indian men who married non-Indian women and transmitted Indian status to their non-Indigenous wives, were also able to transmit section 6(1) status onto their children.¹⁷⁴ This highlights the discriminatory aspects of Bill C-31, and how the Bill merely reinforced gender discrimination as Indigenous women that married non-Indian men were not given equal opportunity to pass Indian status onto their children.

For example, if only one parent (the male) was an Indian, the children of this union would be considered for section 6(1) status. If only one parent (the female) was an Indian, the children were only born with section 6(2) status. As per section 6(2) limitations, these individuals cannot pass on Indian status to their descendants (unless marrying another status Indian), creating what is referred to as the “second-generation cut-off” and discriminating against 6(2) Indians in which acquired status from their mother.¹⁷⁵ The second-generation cut-off rule articulated that, “the grandchildren of women whose status was reinstated under the bill were prevented from inheriting status

¹⁷² Keith D. Smith, *supra* note 16, at 326.

¹⁷³ Keith D. Smith, *supra* note 16, at 326.

¹⁷⁴ Keith D. Smith, *supra* note 16, at 326.

¹⁷⁵ Keith D. Smith, *supra* note 16, at 327.

unless the grandchildren's parents were both Status Indians."¹⁷⁶ In other words, after two generations of marrying out, the descendants are not entitled to register as Indians.¹⁷⁷

However, Indigenous men that married out before 1985, could pass on status to their children for at least one more generation.¹⁷⁸ All other factors being equal, this rule creates a situation in which the descendants of a women who married out before 1985 will have fewer Indian rights than those of her brother (a male) who married out at the same time, despite the fact that their degree of Indian ancestry is identical.

An example taken from the 1985, Report of the Aboriginal Justice Inquiry of Manitoba in a recommendation to the Canadian government to cease all forms of gender-discrimination within the *Indian Act*, helps to illustrate the human reality of this form of gender-discrimination:

“John and Joan, a brother and sister, were both registered status Indians. Joan married a Metis man before 1985 so she lost her Indian status under section 12(1)(b) of the former Act. John married a white woman before 1985 and she automatically became a status Indian. Both John and Joan have had children over the years. Joan is now eligible to regain her status under section 6(1)(c) and her children will qualify under section 6(2). They are treated as having only one eligible parent, their mother, although both parents are Aboriginal. John's children gained status at birth as both parents were Indians legally, even though only one was an aboriginal person.

Joan's children can pass on status to their offspring only if they also marry registered Indians. If they marry unregistered Aboriginal people or non-Aboriginal people, then no status will pass to their children. All John's grandchildren will be status Indians, regardless of who their children marry. Thus, entitlement to registration for the second generation has nothing to do with racial or cultural characteristics. The Act has eliminated the discrimination faced by those who lost status but has passed it onto the next generation.”¹⁷⁹

¹⁷⁶ Heather Conn, Sandra Lovelace Nicholas (January 2018), online: The Canadian Encyclopedia <<https://www.thecanadianencyclopedia.ca/en/article/sandra-lovelace-nicholas>>

¹⁷⁷ Pamela D. Palmater, *supra note 76*, at 19.

¹⁷⁸ Canada, Library and Archives Canada, *Report of the Royal Commission on Aboriginal Peoples*, Volume 4 (1996), online: Reproduced With the Permission of the Minister of Public Works and Government Services (2007) at 37.

¹⁷⁹ Manitoba, Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, volume 1 (Winnipeg: Queen's Printer, 1991) at 204.

The case articulates many of the concerns raised by Indigenous peoples; by eliminating some of the major forms of discrimination through the implementation of Bill C-31, new forms have ultimately been created. Bill C-31 has been highly criticized for only deferring the termination of Indian status by a generation, rather than adequately addressing the legal issues surrounding how Indian status is determined and conferred.¹⁸⁰ Arguably, Bill C-31 has become a gateway to a world in which some Indigenous people are more equal than others. The section 6(1)/6(2) distinction creates two classes of so-called Indians that give fewer rights to Indigenous women and their descendants.¹⁸¹

It is also important to note that the process in which Bill C-31 created for Indigenous women to apply for a reinstatement of Indian status, looked good on paper, but it “[...] proved to be extremely difficult for women to actually execute the process.”¹⁸² The extensive documentation that was required to prove eligibility of Indian status under Bill C-31, coupled with the slow pace of the approval process were highly criticized.¹⁸³ In some instances, birth records had not been recorded on paper and as a result, “it became necessary to seek sworn affidavits as evidence of family relationships and declarations from elders as verification of past band affiliation.”¹⁸⁴ This requirement presented an issue for many Indigenous women that had lost their status as a result of marrying non-Indian men, as they were no longer recognized by their communities and in many instances had been forcibly removed from their culture. This is not to say that the

¹⁸⁰ Indigenous Foundations, *supra* note 105.

¹⁸¹ Stewart Clatworthy & Anthony H. Smith, *Population Implications of the 1985 Amendments to the Indian Act: Final Report*, 1st ed (Toronto: Law, 1992) at vii-viii.

¹⁸² Bob Joseph, *21 Things You May Not Know About the Indian Act: Helping Canadians Make Reconciliation with Indigenous Peoples a Reality*, 1st ed (Indigenous Relations Press, 2018) at 84.

¹⁸³ Keith D. Smith, *supra* note 16, at 326.

¹⁸⁴ Keith D. Smith, *supra* note 16, at 322.

efforts of Lavell, Bédard and Lovelace were without success. All three cases paved the way for Indigenous women to continue the fight for equality, and set the stage for legal cases yet to come.

2.2.6: McIvor v. Canada (Registrar of Indian and Northern Affairs), 2009 BCCA 153

As a result of the 1985 amendments to the *Indian Act*, Sharon McIvor and her son Jacob Grismer -- both descendants of members from the Lower Nicola Indian Band -- brought forth a section 15 constitutional challenge against section 6 of the *Indian Act* to the British Columbia Supreme Court, on June 8, 2007.¹⁸⁵ The driving force behind the McIvor challenge was the residual sex-based discrimination within the registration provisions of the Act which allowed Indigenous women and their descendants to continue being treated differently than their Indian counterparts.¹⁸⁶ McIvor argued that, “As a woman, I was not treated equally as a transmitter of status, and, as a result, my own children and grandchildren were ineligible for registration.”¹⁸⁷

Prior to Bill C-31, McIvor was under the impression that she was not eligible for Indian status because she traced her Indian ancestry through her maternal lineage, and her father did not have Indian status.¹⁸⁸ At the British Columbia Supreme Court, evidence from within the Statutory Appeal revealed that both McIvor’s parents were entitled to

¹⁸⁵ Sharon McIvor and Jacob Grismer v. Canada, *Communications Submitted for Consideration Under the First Optional Protocol to the International Covenant on Civil and Political Rights* (2010), online: at 13 <<http://www.socialrightscura.ca/documents/legal/mcivor/McIvorPetition.pdf>>

¹⁸⁶ Keith D. Smith, *supra note 16*, at 334.

¹⁸⁷ Keith D. Smith, *supra note 16*, at 334.

¹⁸⁸ Pamela D. Palmater, *supra note 76*, at 19.

register for Indian status, “because there had never been a declaration by the Registrar that their fathers were non-Indian,” and as a result, McIvor was eligible for status until she married a non-Indian man in 1970.¹⁸⁹ After the 1985 amendments came into force, McIvor applied for a reinstatement of Indian status, on behalf of both herself and her children. However, in 1987, McIvor was advised that she was only entitled to be registered under section 6(2), and that her children were not entitled to Indian status.¹⁹⁰

In an attempt to highlight that discrimination that resulted from the 1985 Act amendments, it should be noted that McIvor’s brother was able to transmit Indian status to his children and grandchildren, who share an identical lineage to Sharon McIvor.¹⁹¹ It thus became apparent that the amendments created different classes of Indians and Indian entitlement for registration.¹⁹² As a result, McIvor came before the British Columbia Supreme Court, “Seeking an order that she be registered under section 6(1)(c) and that Jacob be registered under section 6(2). [...] Sharon also challenged the constitutionality of the Indian Act provisions relating to registration, claiming that they discriminated against women on the basis of sex contrary to the *Charter of Rights and Freedoms* (the “Charter”).”¹⁹³

¹⁸⁹ Brent Lehmann, “Memorandum: Summary of the McIvor Decision” (2009) Prepared for the National Center for First Nations Governance by Ratcliff & Company at 3.

¹⁹⁰ *Ibid* at 3.

¹⁹¹ Sharon McIvor and Jacob Grismer v. Canada, *supra* note 185, at 18.

¹⁹² David Mutimer, *Canadian Annual Review of Politics and Public Affairs*, 17th ed (University of Toronto Press, 2007).

¹⁹³ Brent Lehmann, *supra* note 189, at 3.

At trial, McIvor was successful. The Statutory Appeal confirmed McIvor's entitlement to status under 6(1)(c) and Grismer's entitlement to status under 6(2).¹⁹⁴ However, even with this new-found entitlement Grismer would still be unable to pass status onto his children.¹⁹⁵ The trial Judge recognized the differential treatment of Indian women and their descendants and held that section 6 of the *Indian Act* discriminated against women on the basis of gender, and violated the *Canadian Charter of Rights and Freedoms*.¹⁹⁶ The judge stated that,

“Although the concept of “Indian” is a creation of government, it has developed into a powerful source of cultural identity for the individual and the Aboriginal community. Like citizenship, both parents and children have an interest in this intangible aspect of Indian status. Parents have an interest in the transmission of this source of cultural identity to their children. If all of Jacob's Indian ancestors had been male, but the details were otherwise unchanged, and he was applying for registration now, he and his mother would both be entitled to full registration under section 6(1)(a).”¹⁹⁷

The Court argued that section 6 of the *Indian Act*, 1985, was in violation of section 15(1) of the Charter because it “discriminates between matrilineal and patrilineal descendants born prior to April 17, 1985, of Indian women who married non-Indian men, and the descendants of Indian men who married non-Indian women.”¹⁹⁸ As a result, descendants such as Jacob Grismer did not have equal rights to confer Indian status to their children.

Shortly after the McIvor decision had been released, the Federal government appealed the judgement of the British Columbia Supreme Court. Yet, in 2009, the British

¹⁹⁴ Brent Lehmann, *supra note* 189, at 3.

¹⁹⁵ David Mutimer, *supra note* 192.

¹⁹⁶ Brent Lehmann, *supra note* 189, at 3.

¹⁹⁷ Brent Lehmann, *supra note* 189, at 3.

¹⁹⁸ *McIvor v The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 at para 343.

Columbia Court of Appeal upheld the trial judge's decision, and gave the Federal government one year to amend the *Indian Act*.¹⁹⁹ The government was instructed to address and correct the residual sex-based discrimination which continued to remain within the section 6 provisions of the Act.²⁰⁰

2.2.7: Bill C-3: An Act to Promote Gender Equity in Indian Registration, 2010

In a direct response to the *McIvor* challenge, the Federal government introduced Bill C-3: *An Act to Promote Gender Equity in Indian Registration* in March 2010, and despite pushback from Indigenous women,²⁰¹ the Bill received Royal Assent in December. The former Conservative government proposed that Bill C-3 would allow up to 45,000 descendants of previously ineligible Indigenous women to acquire Indian status; yet, what was not mentioned was that Bill C-3 would continue to discriminate against select groups of Indigenous people by conferring a weaker classification of status onto “reinstates.”²⁰² While Bill C-3 allowed for some Indigenous women to reclaim their Indian status, it did not provide them with status equal to that of their male counterparts; rather, “Descendants of reinstated women still had less ability to transmit their status than the descendants of men. The legislated inability of one Indian parent to transmit status, known as the second-generation cut-off, applied to these women’s

¹⁹⁹ Brent Lehmann, *supra note* 189, at 5.

²⁰⁰ Brent Lehmann, *supra note* 189, at 5.

²⁰¹ Shelagh Day & Joyce Green, *Bill C-3 is Sexist, Racist and Fatally Flawed* (April 2010), online: Canadian Dimension <<https://canadiandimension.com/articles/view/web-exclusive-bill-c-3-is-sexist-racist-and-fatally-flawed>>

²⁰² *Ibid.*

descendants one generation earlier than to male lineage descendants.”²⁰³ Bill C-3 did not adequately address the residual effects of gender-based discrimination within the *Indian Act*, as the status which many of the descendants received, would still not be equal to that of their Indian counterparts from a patrilineal line.²⁰⁴ Therefore, it should come as no surprise that Indigenous women and their descendants pushed back against the Bill in it’s entirety.

Sharon McIvor’s challenge against the discriminatory provisions of the *Indian Act* -- and the preferential treatment of Indian men within the registration provisions -- called for more than a one generation deferral of status. McIvor fought for equality under section 15 of the *Canadian Charter of Rights and Freedoms* in which Bill C-3 has ultimately denied. In fact, Bill C-3 has done little in the way of correcting the inequalities between Indigenous men, women, or their descendants, and as a result McIvor has been very vocal about the issues that remain within this Bill and the disgrace of the band aid solution that the federal government took at fixing a much larger issue of discrimination.²⁰⁵ McIvor stated, “My own struggle has taken twenty years. Before me, Mary Two-Are Early, Jeanette Corbière Lavell, Yvonne Bedard, and Sandra Lovelace all fought to end sex discrimination against Aboriginal women in the status registration provisions in the *Indian Act*. It has been about fifty years now. Surely this is long enough.”²⁰⁶

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Keith D. Smith, *supra note 16*, at 334.

²⁰⁶ Keith D. Smith, *supra note 16*, at 334.

Each of the four cases presented above articulate the failed attempts made by the government of Canada, to “amend the *Indian Act*” and address gender discrimination. Rather than correcting the discrimination against Indigenous women altogether, each amendment deferred the inequality only by a generation. With each amendment, a different (yet limited) group of Indigenous people became eligible for Indian status. However, if the amendments had focused on the larger picture, correcting the inequality between Indigenous women and their male counterparts, descendants from a matrilineal line would receive the same classifications of status that descendants from the patrilineal line did.²⁰⁷

²⁰⁷ Canada, Parliament, House of Commons, *Standing Committee Meeting on Aboriginal Affairs and Northern Development* (13 April 2010) 3rd session, 40th Parliament at 1.

Chapter 3

3.1: Challenging Sex-Based Discrimination in a New Light

The previous chapters have illustrated the adverse affects of discrimination against Indigenous women and how these long-standing issues have further entrenched inequality upon their descendants as well. However, with the rise of mounting political activism -- that included Indigenous women at the forefront from the 1970s onward -- the push to reinstate Indian status to Indigenous women and their descendants has been successful in its attempt to highlight the race-based and sexist colonial nature of Indian legislation. Throughout the previous chapters it has become apparent that, “[h]istorically, men were able to successively “out-parent” for several more generations than women based on their gender and how the *Indian Act* granted status to men;” this at its very core is discrimination.²⁰⁸ As all four of the previous cases have presented, issues within the *Indian Act* remain, and the shallow amendments such as Bill C-31, and Bill C-3, continue to prevent equal access to Indigenous women. As a result, both themselves and their descendants have had less opportunity than their male counterparts at reclaiming their Indian identities.

3.1.1: Descheneaux v. Canada, 2015 QCCS 355

In 2015, the gender-based discrimination which continued to flourish under section 6 of the *Indian Act*, was the catalyst for the *Descheneaux v. Canada (Procureur Général)*, 2015 QCCS 3555 court challenge. The case involved three plaintiffs, Stéphane

²⁰⁸ Canada, Native Women’s Association of Canada, *Descheneaux Information Session: PTMA ToolKit* (February 2017) at 3 <<https://www.faq-qnw.org/wp-content/uploads/2017/03/Descheneaux-Information-Toolkit-final-low-res.pdf>>

Descheneaux, and Susan and Tammy Yantha; each of the plaintiffs are affiliated with Abénakis of Odanak First Nation of Quebec and the case was heard within the confines of the Quebec Superior Court.²⁰⁹ The Descheneaux action “in part carried forward McIvor’s challenge to pass on ‘Indian Status’ to her grandson which were similar circumstances as Descheneaux.”²¹⁰ As a result, the plaintiffs challenged the status provisions of the *Indian Act* alleging that sex-based discrimination continues to exist contrary to section 15 of the *Canadian Charter of Rights and Freedoms*.²¹¹ Bill C-3 had not gone far enough to address the gender-based inequality within section 6 the *Indian Act*.

To recapture the evidence and legal nature presented in the previous chapters, it must be understood that based on the function and operation of the 1927 and 1951 *Indian Act*, Indian women were discriminated against by virtue of being female. For many years, Indigenous women lost their status if they married non-Indian men, yet the same was not true for their male counterparts. Indian men that married non-Indian woman maintained their status and were able to confer status both to their non-Indian wives and children of that union.²¹² The transfer of status from an Indian man to his non-Indian wife became legally referred to as the “Double Mother Rule.”²¹³ If the Indian man and non-Indian woman had a male child, he too would gain status identical to his parents, and if the male child married a non-Indian woman prior to April 16, 1985 she too would obtain Indian status.²¹⁴ This rule also applied to the male child of the next generation, as long as he was

²⁰⁹ Descheneaux c. Canada (Procureur Général), 2015 QCCS 3555

²¹⁰ Canada, *supra note* 208, at 3.

²¹¹ Descheneaux c. Canada, *supra note* 209, at 3.

²¹² Canada, *supra note* 208, at 3.

²¹³ Descheneaux c. Canada, *supra note* 209, at 8.

²¹⁴ Canada, *supra note* 208, at 3.

born before the April 16, 1985 cut-off date. The 1985 Act amendments abolished the “Double Mother Rule” and no longer granted Indian status to non-Indian spouses; children of these unions, born after April 17, 1985 would now only be entitled to section 6(2) status as well.²¹⁵

As was articulated in the McIvor ruling, the 1985 amendments did entitle some Indigenous women and their first-generation descendants to regain Indian status. Yet, as McIvor argues, the grandchildren of Indian women who married out will only ever receive section 6(2) status, and will never see status under section 6(1) because of the discriminatory provisions which exists.²¹⁶ Human rights advocate Lynn Gehl supports McIvor’s claim by articulating that, “it is a process where a family lineage is first, bumped down a level to 6(2) status and second, bumped out to being non-status.”²¹⁷ The 1985 *Indian Act* amendments create a hierarchy; classes of Indian status were created which prioritizes male lineage over that of female ancestral lines. As a result, even those who regained or were afforded Indian status under Bill C-3, have continued to be discriminated against because their Aboriginal ancestor was a woman; thus, affecting Stéphane Descheneaux and his descendants and resulting in the Descheneaux action.²¹⁸

²¹⁵ Canada, *supra note* 208, at 3.

²¹⁶ Keith D. Smith, *supra note* 16, at 334.

²¹⁷ Lynn Gehl, *Understanding 6(1)A: All The Way* (July 2017), online: Black Face Blogging <<https://www.lynngehl.com/black-face-blogging/understanding-61a-all-the-way>>

²¹⁸ Canada, *supra note* 208, at 3.

3.1.2: The Legal Situation of Plaintiff Stéphane Descheneaux

Understanding the challenges that are excluding Indigenous women and their descendants from becoming status Indians, we can now examine the legal situation of Stéphane Descheneaux. Descheneaux is the third-generation descendant of a female status Indian; Descheneaux's grandmother held 6(1) status at birth but lost it upon marrying a non-Indian man as per the 1951 *Indian Act*.²¹⁹ Descheneaux's mother was also ineligible for status under the 1951 Act.²²⁰ To preface, Descheneaux's mother married a non-Indian man and gave birth to Stéphane in 1968, several years before the 1985 amendments came into force.²²¹ When the 1985 *Indian Act* amendments came into force, Descheneaux's grandmother regained her status under section 6 (1)(c), thereby entitling Descheneaux's mother to section 6(2) status.²²² Subject to the "second generation cut-off" Descheneaux still had no entitlement to Indian status and when he married a non-Indian woman and subsequently had two daughters (born between 2002 and 2007) both were ineligible for status as well.²²³

In 2010 when Bill C-3 came into effect, amendments enhanced Descheneaux's mother's status from section 6(2) to section 6(1)(c.1) status and for the first time in his life, Descheneaux received Indian status under section 6(2).²²⁴ However, because Descheneaux had only received section 6(2) status he remained ineligible to confer it onto his daughters. Descheneaux maintains that he is deprived of Indian status under

²¹⁹ Canada, *supra note* 208, at 3.

²²⁰ Canada, *supra note* 208, at 3.

²²¹ Canada, *supra note* 208, at 3.

²²² Descheneaux c. Canada, *supra note* 209, at 18.

²²³ Canada, *supra note* 208, at 20.

²²⁴ Descheneaux c. Canada, *supra note* 209, at 18.

section 6(1) of the Act because of gender-based discrimination; “an Indian man in the same circumstances as his grandmother would have been entitled to 6(1) status and that Indian man’s great grandchild would be entitled to 6(2).”²²⁵ This argument is referred to as the “cousins issue” and deals with how Indian status is acquired and transmitted among cousins of the same family, depending on the sex of their Indian grandparent.²²⁶ Had Descheneaux been the third-generation descendant of a male status Indian, he would have been entitled to section 6(1) status.²²⁷ As a result, his marriage to a non-Indian woman would still have allowed him to pass section 6(2) status onto their children.²²⁸ It becomes apparent that because Descheneaux’s status was conferred through a matrilineal line (his grandmother), Descheneaux and his daughters are treated unequally to that of a descendant which conferred their status through a patrilineal line (their grandfather).

Although Bill C-3 removed some of the inequalities that directly affected grandchildren of Indian women who had married non-Indian men, “it did not address a further inequality that directly affected the great-grandchildren of such women.”²²⁹ Therefore, it did not bring matrilineal entitlement to Indian registration in line with patrilineal entitlement in ultimately similar circumstances.

²²⁵ Descheneaux c. Canada, *supra* note 209, at 20.

²²⁶ Canada, Crown Indigenous Relations and Northern Affairs Canada, The Government of Canada’s Response to Descheneaux (January 2018), online: Government of Canada <<https://www.aadnc-aandc.gc.ca/eng/1467227680166/1467227697623>>

²²⁷ Canada, Crown Indigenous Relations and Northern Affairs Canada, Background on Indian Registration (November 2018), online: Government of Canada <<https://www.aadnc-aandc.gc.ca/eng/1540405608208/1540405629669>>

²²⁸ *Ibid.*

²²⁹ Canada, *supra* note 208, at 19.

3.1.3: The Legal Situation of Plaintiffs Susan and Tammy Yantha

For Susan Yantha and her daughter Tammy, the situation is different from that of Descheneaux. The grievance brought forth by the Yantha women has been formulated as follows: “Embedded in the differences between how a male is treated versus a female when either is an illegitimate child of an Indian man who held 6(1) Indian status prior to April 16, 1985 and who did not marry a non-Indian woman.”²³⁰ Susan Yantha is the daughter of a status Indian man and a non-status Indian woman, born out of wedlock and without Indian status, in 1954.²³¹ Yantha was born without status because *Indian Act* provisions that were operating at the time of her birth, held that “illegitimate daughters of Status Indian men and non-Status Indian women would not have Status, while illegitimate sons would have 6(1) Status.”²³² These *Indian Act* provisions were discriminatory in nature.

Susan was unaware that her biological father was a status Indian.²³³ Later in life, Susan learned more about her father and made several attempts to contact him (to no avail).²³⁴ In 1972, Susan Yantha and her non-Indian husband gave birth to their daughter Tammy.²³⁵ In 1976 Susan’s marriage dissolved, and after several attempts Susan was finally able to reconnect with her biological father.²³⁶ Susan’s biological father adopted her, and when Bill C-31 came into effect, Susan obtained Indian status only under section

²³⁰ Canada, *supra note* 208, at 20.

²³¹ Canada, *supra note* 208, at 20.

²³² Elysa Hogg, Bill S-3: A Rushed Response to Descheneaux (December 2016), online: Alberta Law Blog <<https://ablawg.ca/2016/12/01/bill-s-3-a-rushed-response-to-descheneaux/>>

²³³ Descheneaux c. Canada, *supra note* 209, at 19.

²³⁴ Descheneaux c. Canada, *supra note* 209, at 19.

²³⁵ Descheneaux c. Canada, *supra note* 209, at 19.

²³⁶ Descheneaux c. Canada, *supra note* 209, at 19.

6(2) of the Act because she was a female child with only one Indian parent (her father).²³⁷ Had Susan been a male child born during the same time period, “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.”²³⁸ As a result, Yantha argues that section 6 of the *Indian Act* violates the equality guarantees set out in section 15(1) of the Charter.²³⁹ Yantha argues that the discrepancies between female and male children born out of wedlock to the union of an Indian man and non-Indian woman, during the same period, have completely different rights in regard to their ability to be entered in the Indian Register and a different capacity to pass on status to their children and grandchildren.²⁴⁰ As a result,

“Susan and Tammy argue that the distinctions in terms of registration based on Susan’s sex are discriminatory because they: perpetuate a stereotype whereby the Indian identity of women and their descendants does not have the same value or importance as that of Indian men and their descendants.”²⁴¹

Throughout the case, Susan articulates that some of the most challenging things that she experiences as an Indigenous woman are the feelings of injustice and humiliation which surround her, because she is unable to pass on full Indian status to her children and grandchildren.²⁴² These feelings of injustice are proliferated because the persons to whom Susan compares herself (her male counterparts) are able to confer status to their children

²³⁷ Descheneaux c. Canada, *supra note* 209, at 19.

²³⁸ Canada, The Canadian Bar Association, Bill S-3 – Indian Act Amendments (Elimination of Sex-Based Inequities in Registration) (November 2016), online: Aboriginal Law Section at 3 <https://sencanada.ca/content/sen/committee/421/APPA/Briefs/CBABriefS-3_e.pdf>

²³⁹ Descheneaux c. Canada, *supra note* 209, at 19.

²⁴⁰ Descheneaux c. Canada, *supra note* 209, at 19.

²⁴¹ Descheneaux c. Canada, *supra note* 209, at 65.

²⁴² Descheneaux c. Canada, *supra note* 209, at 20.

and grandchildren.²⁴³ This argument also applies to any Indigenous women in a situation comparable to Susan's.

3.1.4: Why the Descheneaux Action?

All the plaintiffs in the Descheneaux action suffer from similar bouts of discrimination under the *Indian Act*. The Descheneaux action was brought forth with the purpose of reinstating Indian status to Indigenous women and their descendants that have been unjustifiably discriminated against on the basis of gender, and stripped of their Indian identity. More specifically, the plaintiffs have faced similar discrimination -- on the basis of maternal lineage and the unequal treatment of Indigenous women -- and have had little remedy even after the 1985 and 2010 *Indian Act* amendments. The discrimination in which Descheneaux, and Susan and Tammy Yantha have faced, “[...]perpetuates a stereotype whereby the Indian identity of women and their descendants are less worthy of consideration or have less value than that of Indian men and their descendants,” and has proliferated discrimination against Indigenous women and their descendants both within the larger society and within their own communities.²⁴⁴

3.1.5: Intervenors

Within the Descheneaux challenge, the plaintiffs are seeking to have section 6 of the *Indian Act* declared constitutionally invalid as many of the provisions discriminate

²⁴³ Descheneaux c. Canada, *supra* note 209, at 20.

²⁴⁴ Descheneaux c. Canada, *supra* note 209, at 59.

against Indigenous women and violate Charter provisions relating to equality in Canada.²⁴⁵ Descheanax, Susan and Tammy Yantha have also asked that the Court,

“Broaden the application of section 6(1) of the Act so that it applies to them, in particular so that they, like those to whom they compare themselves, may see their children benefit from Indian status, which they do not now. In their motion, they suggest the precise wording of the new legislative provisions. The three plaintiffs also ask for a conclusion declaring that they are entitled to be registered with the status they seek and request that the Court render any other order it deems just.”²⁴⁶

Finding “just reasoning” in the plaintiff’s logic, the Intervenors support the plaintiffs on all accounts.²⁴⁷ The interveners in this case are: Chief Rick O’Bomsawin, Nicole O’Bomsawin, Clément Sadoques, Alain O’Bomsawin and Jacques Thériault Watso on their own behalf, but also as the elected council representing the Abenaki of Odanak.²⁴⁸ Another group of interveners present throughout this case consisted of: Chief Raymond Bernard, Christian Trottier, Kevin Bernard, Lucien Millette and Nayan Bernard, on their own behalf and as the elected council representing the Abenaki of Wôlinak, and they too supported the plaintiffs recommendation and call for further action.²⁴⁹ Descheneaux, Susan and Tammy Yantha also requested separate conclusions, stating that each of them are entitled to be registered with the appropriate status to the same degree that their Indian counterparts have previously been awarded.²⁵⁰ The interveners, raised no objections to any of these demands, rather fully supported the plaintiffs in their decisions.

²⁴⁵ Descheneaux c. Canada, *supra note* 209, at 21.

²⁴⁶ Descheneaux c. Canada, *supra note* 209, at 21.

²⁴⁷ Descheneaux c. Canada, *supra note* 209, at 21.

²⁴⁸ Descheneaux c. Canada, *supra note* 209, at 21.

²⁴⁹ Descheneaux c. Canada, *supra note* 209, at 1.

²⁵⁰ Descheneaux c. Canada, *supra note* 209, at 70.

3.1.6: Judicial Reasoning

The Descheneaux case was heard by Justice Chantal Masse. Masse’s reasoning was predicated around one main question throughout this case; was the Court bound by the judgment of the British Columbia Court of Appeal in the “McIvor” ruling or were their grounds to set the McIvor decision aside in whole or in part?²⁵¹ The Court ruled that the nature of the discrimination that Stéphane Descheneaux suffered was similar to the discrimination that was identified in the McIvor case in 2006.²⁵² In both McIvor and Descheneaux, descendants of a newly reclaimed status Indian are discriminated against, solely because of the sex of that Indian parent or grandparent. In McIvor, Jacob Grismer suffered discrimination in relation to his mother’s loss of status; whereas, the discrimination that Descheneaux suffered stemmed from his grandmother’s loss of status.²⁵³ However, after hearing all the facts of the Descheneaux case, the Court decided that,

“On issues relating to discrimination with multigenerational aspects before and after the coming into force of the Canadian Charter, the Court is most certainly bound by McIvor. The fact situation in Descheneaux’s case, however, sheds new light on the scope of the preferential treatment given certain persons to whom the Double Mother Rule applied, since his mother – unlike Grismer’s – got married before 1985. On this issue, which was raised because of the different factual background in evidence in this case, on which McIvor did not rule, the Court is not bound by that earlier judgment.”²⁵⁴

In the case of Susan Yantha, although the fact situation is different, the nature of the discrimination is also very similar. In the words of the Court;

²⁵¹ Descheneaux c. Canada, *supra* note 209, at 2.

²⁵² Descheneaux c. Canada, *supra* note 209, at 89.

²⁵³ Canadian Human Rights Tribunal, *Written Submissions of the Assembly of First Nations Regarding the Definition of “First Nations Child” Under Jordan’s Principle* (2019) Tribunal File No. T1340/7008 at 9.

²⁵⁴ Descheneaux c. Canada, *supra* note 209, at 91.

“The discrimination flows from the historically lower value placed by Parliament on a woman’s Indian identity. The current discriminatory treatment of Susan and Tammy Yantha with regard to their registration, which occurs under the 1985 Act, also results – as it did in *McIvor* – from rights recognized in 6(1)(a) and benefits conferred on victims of the Double Mother Rule beyond the preservation of vested rights.”²⁵⁵

Had Indigenous women been historically equal to that of their male counterparts, and had they been given the same status rights under the Act, Susan Yantha would have been born with section 6(1)(a) status preserved under section 11(c) of 1985 *Indian Act*. Had Yantha been born with section 6(1)(a) status, she would have been able to confer Indian status onto her daughter. Yet, because Indigenous women had unequal status provisions to that of their male counterparts, this was not the case for Susan or Tammy.

Throughout the case, the rationale becomes pretty clear: Descheneaux would have been entitled to section 6(1) status today, and could therefore have passed on Indian status to his children, if his Indian grandmother had been his Indian grandfather.²⁵⁶ In order to further exemplify the discrimination at hand, Descheneaux compared his situation to the situation of a grandchild of a hypothetical Indian man -- within the same generation as his grandmother – and to whom the Double Mother Rule would have applied,

“When this hypothetical Indian man got married, he preserved his status and conferred it on his non-Indian wife. His son, born in the same era as Stéphane Descheneaux’s mother, would therefore have had Indian status at birth. When the hypothetical son in turn married a non-Indian woman, she would obtain status. If they had children before April 17, 1985, the date the 1985 Act came into force, these children would, upon their birth, have status but in principle would lose it at the age of 21 under the Double Mother Rule because their father had married a woman who was non-Indian (before her marriage) and because they were the grandchildren of an Indian man and a woman who was non-Indian (before her marriage).”²⁵⁷

²⁵⁵ *Descheneaux c. Canada*, *supra note 209*, at 93.

²⁵⁶ *Descheneaux c. Canada*, *supra note 209*, at 49.

²⁵⁷ *Descheneaux c. Canada*, *supra note 209*, at 49.

Throughout this example it becomes apparent that gender-discrimination within the *Indian Act* gave Indigenous women and their descendants a lesser chance for reinstatement of status. The Court ruled that Descheneaux did not receive the same treatment as those who preserved their status because of rights vested under a former version of the Act pursuant to 6(1)(a), and that Descheneaux suffered discriminatory treatment because of the sex of his Indian grandparent.²⁵⁸ The historical and stereotypical nature of the discrimination at issue, (the lesser value assigned to the Indian identity of women and their descendants) impacted Descheneaux and his families ability to confer Indian status, and reap the benefits of their culture. In conclusion, Descheneaux was unable to pass on Indian status in the same way that those in a comparator could, if their Indian grandmother, was their Indian grandfather.²⁵⁹ We can further deduce that *Indian Act* amendments could have addressed this undeniable discrimination had they given status equivalent to section 6(1) to all individuals with a parent whose mother is an Indian woman, and who lost her status by marrying a non-Indian man.²⁶⁰

For plaintiffs Susan and Tammy Yantha however, the analysis focused on the discrimination that arose from special treatment given to persons to whom the Double Mother Rule (Indigenous men and their illegitimate sons) applied before 1985.²⁶¹ For example, Susan Yantha compares her situation to that of,

“The hypothetical illegitimate son of an Indian man born in the same period as her, while Tammy’s situation is compared to that of children of a marriage of such an Indian man with a non-Indian mother. The hypothetical illegitimate son was born of an Indian father and a non-Indian mother, like Susan, but has Indian status from birth under paragraph 11(c) of the 1951 Act – which became 11(1)(c) with the 1956 amendments – as interpreted by the Supreme

²⁵⁸ Descheneaux c. Canada, *supra* note 209, at 51.

²⁵⁹ Descheneaux c. Canada, *supra* note 209, at 58.

²⁶⁰ Descheneaux c. Canada, *supra* note 209, at 57.

²⁶¹ Descheneaux c. Canada, *supra* note 209, at 58.

Court in *Martin v. Chapman*. He preserved his status upon marrying a non-Indian before 1985 and his wife obtained status under the provisions applicable at the time. Their children, however, while they had Indian status at birth, stood to lose it at the age of 21 because of the Double Mother Rule, as described above. The 1985 Act granted children of the comparator group status under 6(1), but because Susan had only 6(2) status after the coming into force of this statute since she had only one Indian parent and did not marry an Indian, she could not pass that status on to Tammy Yantha, who remains without status.”²⁶²

Throughout this example it becomes apparent that Susan Yantha was discriminated against because of her sex; given that Susan was the illegitimate daughter (and not son) of an Indian man, her rights were not vested under section 11(c) of the *Indian Act* and she did not have Indian status at birth.²⁶³ The discrimination faced by both Susan and Tammy is deeply rooted in stereotypes that have historically deemed Indigenous women inferior to that of their male counterparts and have placed an emphasized importance on the identity of male Indians. In a circumstance where the only thing that differs is the sex of the illegitimate child, female children have less rights and protections under the Act than male children. As a result, Indigenous women continue to be discriminated against because of *Indian Act* amendments that do not consider a larger scope of discrimination in which Indigenous women have been faced with since the creation of the Act. Solutions aimed at fixing only some parts of a bigger problem will continue to allow discrimination against Indigenous women and their descendants to occur.

²⁶² Descheneaux c. Canada, *supra* note 209, at 58.

²⁶³ Descheneaux c. Canada, *supra* note 209, at 58.

3.1.7: The Decision

On August 3, 2015, Justice Masse delivered her judgement which stated that as a result of the findings and the inherent sex-based discrimination in which Stéphane Descheneaux, Susan Yantha and Tammy Yantha adequately presented throughout this case, the Quebec Superior Court agreed that Indian women have long been treated unequally to that of their male counterparts.²⁶⁴ This discrimination has allowed not only Indigenous women to be valued less than Indigenous males, but has also impacted their descendants. It is for such a reason, and those mentioned above that the Court ruled paragraphs 6(1)(a), (c), and (f) and subsection 6(2)²⁶⁵ of the *Indian Act* to be declared

²⁶⁴ Descheneaux c. Canada, *supra note* 209, at 289.

²⁶⁵ This footnote provides reference to the section 6 provisions which the Quebec Court of Appeal rendered to be violating section 15 of the *Charter*; “The legislative provision at the heart of this debate is section 6 of the Act, including the 2010 amendment, which added paragraph 6(1)(c.1). It reads as follows: 6. (1) Subject to section 7, a person is entitled to be registered if (a) that person was registered or entitled to be registered immediately prior to April 17, 1985; (c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions; (c.1) that person (i) is a person whose mother’s name was, as a result of the mother’s marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(b) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions, (ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951, (ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951, (iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person’s parents married each other prior to April 17, 1985, was born prior to that date, and (iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted; (d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions; (e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, (i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or (ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that

inoperative and in violation of section 15 of the *Canadian Charter of Rights and Freedoms*.²⁶⁶ By way of these conclusions, Justice Masse instructed Parliament to address, “[...] (1) the sex-based discrimination brought forth within the case, as well as (2) correct any other sex-based discriminatory provisions that can be identified, and (3) any other forms of discrimination based on other enumerated grounds.”²⁶⁷

Per the extensive scope of the decision, Justice Masse suspended her declaration for a period of 18 months in order to give Parliament enough time to make the necessary amendments.²⁶⁸ A suspension of declaration means that the court’s decision will not take effect until the time allotted has expired. In this instance, the paragraphs mentioned directly above, will become inoperative after 18 months (February 13, 2017). Given the technical nature of the *Indian Act* and the multiplicity of multi-generational effects it has had on Indigenous communities, the task of amending the Act to ensure that no discrimination remains within its provisions poses a significant challenge for the federal Government.²⁶⁹ However, the Court directly stated that Parliament must take the appropriate measures to, “identify and settle all other discriminatory situations that may arise from the issue identified, whether they are based on sex or another prohibited ground, in accordance with its constitutional obligation to ensure that the laws respect the rights enshrined in the Canadian Charter,” and while the Courts recognized the scope of this challenge, the government of Canada has a responsibility to address all issues

section; or (f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section. (2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).” *Descheneaux c. Canada, supra note 209*, at 4.

²⁶⁶ *Descheneaux c. Canada, supra note 209*, at 74.

²⁶⁷ *Descheneaux c. Canada, supra note 209*, at 76.

²⁶⁸ *Descheneaux c. Canada, supra note 209*, at 76.

²⁶⁹ *Descheneaux c. Canada, supra note 209*, at 77.

disproportionately affecting Indigenous women and discriminating against their people.²⁷⁰

To conclude, the Descheneaux case differed from that of Lavell, Bédard and Lovelace; and while it was similar in nature to that of *McIvor*, it highlighted a much larger scope of preferential treatment given male Indians and their descendants under the *Indian Act*. Rather than challenging certain discriminatory provisions of the *Act*, the Descheneaux case challenged the constitutional validity of section 6 in its entirety. This broader challenge allowed the court to see the significant number of Indigenous women and their descendants that have unequal access to Indian status, under the registration provisions of the *Act*, simply because their lineage is traced through a female line. The Descheneaux case articulated that not only were these women and their descendants given restrictions on their rights to Indian identity, but their descendants continue to face inequality under *Indian Act* provisions, grossly violating section 15 of the Charter. Given that previous amendments had only allowed for certain groups of Indigenous people to reclaim their status (mainly those with patrilineal descent), an overhaul of the *Act* is needed to rid the *Indian Act* of provisions that discriminate based on gender. Therefore, the abolishment of section 6 was necessary in the fight to restore equality between Indigenous men and women and to repair some of the damage that gender discrimination has caused to many Indigenous communities and families over the last 150 years.

²⁷⁰ Descheneaux c. Canada, *supra* note 209, at 235.

Chapter 4

4.1: Indigenous Resurgence and Recognition of Equality: The Government's Response Post Descheneaux

After the Descheneaux decision was released (September 2, 2015), the former Conservative Government -- the “Harper Government” -- tabled an appeal of Masse’s judgement, in an attempt to keep section 6 of the *Indian Act* in operation.²⁷¹ However, with an election period fast approaching, the appeal was placed on hold until a government had been announced. On October 19, 2015, a new Liberal majority was adopted in Canada.²⁷² In the Liberal Government’s Speech from the Throne, the new “Trudeau Government” declared that it would “undertake to renew, nation-to-nation, the relationship between Canada and Indigenous peoples” and as a result, the appeal was withdrawn on February 22, 2016 and the government proceeded with Masse’s orders.²⁷³

On August 11, 2016, Canada announced its official response to the Descheneaux case; a two-phased approach which would address Justice Masse’s orders. Phase I was aimed at abolishing sex-based discrimination within the *Indian Act*, specifically the cousin issue and the sibling issue as articulated in the Descheneaux case.²⁷⁴ However, the Government was also instructed to include other identified forms of sex-based discrimination within the same amending Bill, namely the “omitted minor child” issue.²⁷⁵ Phase II would provide for a collaborative process with First Nations groups and other

²⁷¹ Canada, *supra note* 208, at 21.

²⁷² Canada, *supra note* 208, at 21.

²⁷³ Canada, Making Real Change Happen: Speech from the Throne to Open the First Session of the Forty-second Parliament of Canada, (Ottawa: 42nd Parliament, 1st Session, 2015) at 6.

²⁷⁴ *Ibid* at 22.

²⁷⁵ Canada, *supra note* 208, at 22.

Indigenous people to determine the broader issues to Indian Registration and Band Membership that continue to exist, with an end goal of future reform.²⁷⁶ Phase I was scheduled to begin during the summer of 2016 and was expected to last until the fall. However, given the lengthy process of information sharing and the extensive nature of the review, the Government of Canada had little time remaining to live up to their obligations before Justice Masse's judgement would take effect.

4.1.1: Bill S-3: A Rushed Amendment? Implications for Indigenous Peoples

Bill S-3 was hastily drafted and highly criticized.²⁷⁷ Its first reading took place on October 25, 2016, with its second reading spanning two debates, November 1, 2016 and November 17, 2016.²⁷⁸ The Bill was referred to the Standing Senate Committee on Aboriginal Peoples for further research; a total of six meetings occurred in which the Committee heard evidence from various interested Indigenous groups on the goal and purpose of the new Bill. Three overarching changes to the *Indian Act* were proposed in Bill S-3: the “cousin issue,” the “sibling issue” and the “omitted minor child” issue. To recap, the “cousins issue” deals with “the differential treatment of first cousins whose grandmother lost status due to marriage with a non-Indian before April 17, 1985.”²⁷⁹ The “siblings issue” addresses the differential treatment of women that were born out of

²⁷⁶ Canada, *supra note* 208, at 22.

²⁷⁷ Elysa Hogg, *supra note* 232.

²⁷⁸ Canada, *supra note* 208, at 22.

²⁷⁹ Canada, *Eliminating Known Sex-Based Inequalities in Indian Registration, Indian Status Eligibility*, (Gatineau: Crown-Indigenous Relations and Northern Affairs Canada, 2018) <<https://www.sac-isc.gc.ca/eng/1467214955663/1572460311596>>

wedlock to fathers of Indian descent between September 4, 1951 and April 17, 1985.²⁸⁰

Finally, the third change proposed within Bill S-3 was,

“The “omitted minor child” issue which deals with children belonging to an Indian woman who would lose status upon marriage to a non-Indian man. An Indian woman who parented a child with an Indian man but did not marry him would be entitled to 6(1) in her own right and her child would also gain 6(1) status as their Indian parents. When the Indian woman married a non-Indian man, she and her minor child would lose status. However, should the child not be a minor or the child married, only the mother would lose status upon her marriage to a non-Indian man. Bill C-31 corrected this issue and restored the Indians woman’s status to 6(1)(c). The amendments would enhance her and her minor child(ren) status back to 6(1).”²⁸¹

After Descheneaux, it was recognizable that many of the above-mentioned provisions discriminated against Indigenous women. Bill S-3 was to provide some flexibility for the unique experiences of Indigenous people who have been denied their rights to Indian identity because of gender-discrimination entrenched deep within the roots of the *Indian Act*. As part of its commitment to the Indigenous peoples, on July 28, 2016, the Government of Canada launched phase II of the Descheneaux response. Phase II included an engagement session with First Nations and various other Indigenous groups that would address the residual sex-based inequalities in Indian registration carried forward through the 1985 and 2010 *Indian Act* amendments.²⁸² The engagement session included: First Nation Treaties and Nation organizations, “as well as regional and national organizations representing the interests of First Nations, First Nations women, Métis and non-status Indians.”²⁸³ These sessions were designed to hear from Indigenous

²⁸⁰ Canada, *supra note* 279.

²⁸¹ Canada, *supra note* 208, at 22.

²⁸² Canada, Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship, *Consultation Plan*, (Gatineau: Crown-Indigenous Relations and Northern Affairs Canada, 2018) at 1.

²⁸³ *Ibid.*

people about their concerns surrounding the long-standing, residual and unaddressed issues relating to band membership and Indian registration.²⁸⁴

However, Bill S-3 was highly criticized by many of the participating Indigenous groups which argued that leaving less than three and a half months for Parliament to consider the government's response to *Descheneaux* and engage in sufficient consultation with the concerned Indigenous communities across Canada, was inadequate. During that time, there were less than 40 House of Commons sitting days, and less than 30 Senate sitting days.²⁸⁵ The proposed timeline was problematic as it did not allow enough time for sufficient and respectful consultation with Indigenous people to occur. Consultations must be meaningful and pursued in good faith. Given the complexity of these issues, changes to Indian registration could significantly impact Indigenous identities; shifting the parameters of who could legally be considered an "Indian" in Canada and broadening the scope of Indigeneity to Indigenous women and their descendants that had long been denied. Therefore, without careful consideration, rushing the implementation of Bill S-3 or the consultation process could do more harm than good for Indigenous people, especially those who continue to be discriminated against under the *Indian Act*.

On December 13, 2016, the Standing Senate Committee on Aboriginal Peoples articulated Bill S-3 should not proceed further without being granted an extension because the Bill, as it stood, would continue to discriminate on the enumerated grounds of gender as well as the possibility that the Crown may have failed to fulfill its duty to consult under section 35 of the *Constitution Act, 1982*.²⁸⁶ The Crown requested an

²⁸⁴ *Ibid.*

²⁸⁵ Canada, Parliament, Senate, Government Should Salvage Flawed Indian Act Bill, Senate Committee Says (13 December 2016) News Release: The Standing Senate Committee on Aboriginal Peoples.

²⁸⁶ *Ibid.*

extension on Justice Masse's decision. Masse in turn granted an extension of five additional months to complete the Courts orders²⁸⁷ and on December 12, 2017, Bill S-3: *An Act to Amend the Indian Act (elimination of sex-based inequalities in registration)* received Royal Assent.²⁸⁸

The implementation of Bill S-3 does not absolve the Crowns continued commitment to Indigenous communities. The federal Government is required to report back to Parliament on three separate occasions;

“1) on the design of the consultation process within 5 months of Royal Assent (by May 12, 2018); 2) on the results of the consultation one year after the consultations begin (by June 12, 2019); and 3) on the review of Bill S-3 amendments to determine whether all sex-based inequalities have been eliminated with respect to those provisions and on the operation of those provisions within 3 years of Royal Assent (by December 12, 2020).”²⁸⁹

These requirements were designed to ensure Canada's Indigenous populations that the government would remain committed to consulting and engaging with Indigenous communities and working to address the discriminatory roots of the *Indian Act*. These consultations have been pertinent in identifying potential discriminatory Act provisions which remain outside the scope of section 6. While Bill S-3 has thus taken strides toward the advancement of Indigenous equality and will certainly allow some individuals that have “fallen through the cracks of the past reform” acquire Indian status,²⁹⁰ it has also been subjected to harsh criticism by members of Indigenous communities.

²⁸⁷ Canada, The Standing Senate Committee on Aboriginal Peoples, Evidence (December 3, 2015 - September 11, 2019) 42nd Parliament, 1st Session at 22.

²⁸⁸ Mandell Pinder LLP, “Descheneaux v. Canada, 2015 QCCS 3555 – Case Summary,” (British Columbia: *Barristers & Solicitors*, 2016) at 1.

²⁸⁹ Canada, *supra note* 282.

²⁹⁰ Elysa Hogg, *supra note* 232.

In 2016, the Senate Committee on Aboriginal Peoples sought feedback from the Descheneaux Plaintiffs, representatives of Crown Indigenous Relations and Northern Affairs Canada, and various First Nations and First Nations organizations across Canada on Bill S-3, to which some central themes of criticism arose.²⁹¹ Indigenous communities criticized the Minister's decision to continue using the *Indian Act* as the central piece of legislation in which Indian identity is based upon.²⁹² Indigenous people also responded by stating that consultations on Bill S-3 were lacking in execution and that going forward, the government should "look for solutions outside of the *Indian Act* in dealing with band membership and other issues facing Indigenous peoples in Canada."²⁹³ It has become apparent that the *Indian Act* was founded upon colonial ideologies and is inherently racist by virtue of design. What many of the responses to the Senate Committee suggested was a full scale reinvention of the relationship between Indigenous people and the Canadian government because "enactments like Bill S-3 are like fixing cracks in a foundation that badly needs replacing;" reiterating, once again, the general findings of the Royal Commission on Aboriginal Peoples more than two decades ago.²⁹⁴

However, it is important not to discredit the hard work of Descheneaux and to understand that the Descheneaux case brought to light much larger issues of discrimination stemming from the colonial roots of the *Indian Act* and within policies that govern the Indigenous people. It is undeniably gratifying to see the Plaintiffs from the *Descheneaux* case and others like them granted justice when it comes to the discriminatory effects of the Act. Yet, for many other Indigenous people plunged into the

²⁹¹ Elysa Hogg, *supra note 232*.

²⁹² Elysa Hogg, *supra note 232*.

²⁹³ Canada, *supra note 287*.

²⁹⁴ Elysa Hogg, *supra note 232*.

bureaucracy and policy aftermaths of the Canadian government's scramble to address the Court's decision, the legacy of colonialism is still largely felt across the nation. For Indigenous descendants with ancestors that lost their status before 1869, this argument brings to light the issue of a process in which the Indigenous peoples had little chance -- if any -- to decide the parameters of what would have been proper consultations, outcomes and dates of significant importance for reinstatement.

4.1.2: Bill S-3: The Final Provision

On August 15, 2019, the final provisions of Bill S-3 came into effect removing the 1951 cut-off from the *Indian Act* registration provisions.²⁹⁵ Indigenous descendants born prior to April 17, 1985 to women that lost their Indian status or were removed from band lists because of their marriage to a non-Indian man -- as far back as the *Gradual Enfranchisement Act*, 1869 -- are now entitled to register.²⁹⁶ It has been argued that this reclamation of Indian status will bring Indigenous women and their descendants inline with the descendants of their male counterparts whom never lost status.²⁹⁷ The government of Canada's news release stated that, "the removal of the 1951 cut-off could result in between 270,000 and 450,000 individuals being newly entitled to registration under the *Indian Act* over the next decade."²⁹⁸ The implementation of Bill S-3's final

²⁹⁵ Canada, Crown Indigenous Relations and Northern Affairs, *Removal of All Sex-Based Inequalities in the Indian Act* (August 2019), online: Government of Canada <<https://www.newswire.ca/news-releases/removal-of-all-sex-based-inequities-in-the-indian-act-890690227.html>>

²⁹⁶ Jennifer Greens, *Indian Status Could be Extended to Hundreds of Thousands as Bill S-3 Provisions Come Into Force* (August 2019), online: CBC News <<https://www.cbc.ca/news/indigenous/bill-s-3-indian-act-sex-discrimination-1.5249008>>

²⁹⁷ Justin Brake, *First Nations women finally to be treated equally under Indian Act: Bennett* (August 2019), online: APTN National News <<https://aptnnews.ca/2019/08/16/first-nations-women-finally-to-be-treated-equally-under-indian-act-bennett/>>

²⁹⁸ Jennifer Greens, *supra note 296*.

provisions is of huge consequence and a first for Canada in the history of settler-Indigenous relations.

The final additions to Bill S-3 resulted in a repeal of section 6(1)(c) and brought into force a new section 6(1)(a) provision, referred to by advocates as “status all the way.”²⁹⁹ The new provisions provide for some structural changes to the Act as, “All the different categories of people entitled to status have been renumbered as subsections under s. 6(1)(a) of the Act– an effort to address the perception that the women and their children who had been reinstated under s. 6(1)(C) were “less than” those registered under s. 6(1)(a).”³⁰⁰ Nearing the end of the news release, Carolyn Bennett, Minister of Crown-Indigenous Relations extended her support to Indigenous women, children and nations by stating that,

“Gender equality is a fundamental human right and for far too long, First Nations women and their descendants have continued to face the effects of historical gender discrimination in *Indian Act* registration going back to its inception 150 years ago. I stand in solidarity with the Indigenous women who have been working so hard for decades to end sex-based discrimination in the *Indian Act* registration and am proud that today all remaining gender discrimination has been eliminated from *Indian Act* registration provisions.”³⁰¹

While political support is both welcomed and encouraged from government officials, it must be acknowledged that Bill S-3 did not put an end to gender-

²⁹⁹ Jessica Deer, *Delayed Bill S-3 Amendments will be in Force Before Election, Says Minister’s Office* (August 2019), online: CBC News <<https://www.cbc.ca/news/indigenous/bill-s3-indian-act-sex-discrimination-1.5176499>>

³⁰⁰ Olthuis Kleer Townshend, *Significant Changes to Indian Status Rules to Address Discrimination Against Indigenous Women*, L.L.P (September 2019), online: <<https://www.oktlaw.com/significant-changes-to-indian-status-rules-to-address-discrimination-against-indigenous-women/>>

³⁰¹ Canada, Crown Indigenous Relations and Northern Affairs, Government of Canada Implements Remaining Provisions of Bill S-3, Ending Sex-Based Inequities (August 2019), online: News Release - Government of Canada <<https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2019/08/removal-of-all-sex-based-inequities-in-the-indian-act.html>>

discrimination throughout the registration provisions of the *Indian Act*. What has not been as overly articulated is that, “The second-generation cut-off still applies under the new status regime. That means that status is still lost after two generations of mixed (status and non-status) parentage” leaving Indigenous women in a position of further vulnerability and the potential for the *Indian Acts* discriminatory history to repeat itself.³⁰² It must also be acknowledged that gender discrimination stems far beyond the confines of the *Indian Act*. Gender-based discrimination has been internalized and reproduced throughout Indigenous communities, policies and livelihoods for decades. Recognizing that deeply rooted forms of discrimination and structural racism were created within colonial policies, legislation and ideologies has been uncomfortable for much of Canada’s political leadership to internalize.³⁰³ The acknowledgement of gender discrimination within the *Indian Act* has been a long time coming, and we can predict that such change in legislation will have many reverberations throughout future political agendas and within Indigenous communities.

4.2: Reconciliation: A Way Forward

The abolishment of discriminatory *Indian Act* provisions certainly signals a good and meaningful step toward a more inclusive and just Canada, as well as a chance to renew the relationship between the State and the Indigenous people. However, until Indigenous women are accepted as being valuable leaders, assets and members of their communities; until Indigenous women are given positions of power, are accepted in politics, and are given an equal platform to address their concerns, discrimination against

³⁰² Olthuis Kleeer Townshend, *supra note* 300.

³⁰³ Samantha Loppie, Charlotte Reading & Sarah de Leeur, “Social Determinants of Health: Aboriginal Experiences with Racism and its Impacts” (2014) National Collaborating Center for Aboriginal Health at 5.

Indigenous women will continue to exist in Canada.³⁰⁴ Minister Carolyn Bennett openly claims that she is committed to uphold the recommendations by Justice Masse in the Descheneaux case, and is ready to work with Aboriginal Peoples to, “take a broader look at systemic issues regarding registration, membership, citizenship and identity for First Nations, Métis, Inuit and non-status Indians.”³⁰⁵ There is therefore a hopefulness that future political leaders will remain committed to eliminating the systemic barriers that Indigenous women face as an important step in the long journey toward reconciliation and equality.

From June, 2008 to the present day, the Government of Canada has launched a suite of public statements,³⁰⁶ acts,³⁰⁷ policies, strategies, actions, and plans³⁰⁸ which vow to change the relationship between Canada and the Indigenous people and focus on a more inclusive future, founded on equal access and partnership. This foundation of equality and collaboration will pave the way for reconciliation of multiple forms to occur. For example, in 2008, the Truth and Reconciliation Commission of Canada (TRC) was officially launched as part of the Indian Residential Schools Settlement Agreement to address the victims that suffered and/or lost their lives at the hands of state sanctioned institutions.³⁰⁹ The Indian Residential School Settlement Agreement was created in

³⁰⁴ Canada, *The National Inquiry into Missing and Murdered Indigenous Women and Girls: Our Women and Girls are Sacred* (2017) Interim Report at 1.

³⁰⁵ The Canadian Press, *Ottawa to Change Indian Act in Response to Descheneaux Ruling by February* (2016), online: CBC News <<https://www.cbc.ca/news/indigenous/descheneaux-ruling-indian-act-february-1.3701080>>

³⁰⁶ Prime Minister Stephan Harper, *Statement of Apology - to Former Students of Indian Residential Schools*, on behalf of the Government of Canada (June 2008), online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rqpi_apo_pdf_1322167347706_eng.pdf>

³⁰⁷ Acts such as Bill C-3 and Bill S-3.

³⁰⁸ Canada, *supra note 273*.

³⁰⁹ Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada*, 1st ed (UBC Press, 2010) at 8.

response to over 12,000 individual abuse claims and several class action lawsuits filed on behalf of over 70,000 Indian Residential School students, against the federal government and the church entities responsible for the unjustifiable abuse against the Indigenous populations.³¹⁰

Given the breadth of this lawsuit, the TRC was intended to be an entity that would guide Canadians through the treacherous discovery of the facts and the true nature of the Residential School experience and the discriminatory treatment of Indigenous people in Canada. The TRC was also created as a political voice for Indigenous people, a voice that would forward the reconciliation agenda for years to come. Scholars such as Emilie de Haas and Patricia Hayner have articulated that reconciliation cannot occur at a national level until there is an ease of political tension between affected groups; one of the ways to achieve this is by bringing to light the truth of past events.³¹¹ By publicly addressing previously silenced or highly contentious events, “[...] a commission can ease some of the strains that may otherwise be present in national legislative or other political bodies.”³¹² To further articulate Canada’s support of the TRC, in 2017, Prime Minister, Justin Trudeau extended an apology to Canada’s Indigenous nations;

“The government of Canada sincerely apologizes and asks for forgiveness of the aboriginal peoples of this country for failing them so profoundly. [...] At the same time today there is reason for hope. Today we find ourselves on a new path, working together towards a nation-to-nation relationship based on recognition, rights, respect, cooperation and partnership.”³¹³

³¹⁰ *Ibid* at 8.

³¹¹ Patricia Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, (New York : Routledge, 2011) at 183.

³¹² Emilie de Haas, “A Commitment to Reconciliation: Canada’s Next Steps in the Post-TRC Phase” (2017) 5:9 McGill Faculty of Law at 9.

³¹³ Justin Trudeau, Prime Minister of Canada, *PM Trudeau Addresses the Truth and Reconciliation Commission of Canada* (December 2015), online: Government of Canada <<https://pm.gc.ca/en/videos/2015/12/15/pm-trudeau-addresses-truth-and-reconciliation-commission-canada-ottawa>>

Within his apology, Trudeau vowed to implement all 94 of the Commissions “calls to action” to further reconciliation between Indigenous people and Canada. However, the government of Canada must also act beyond the “calls to action,” and beyond the scope of the *Indian Act*, to ensure that colonial forms of discrimination disproportionately affecting Indigenous communities, women and children, are abolished and corrected. Marion Buller -- Chief Commissioner of the National Inquiry into Missing and Murdered Indigenous Women and Girls -- stated that, “There is no doubt that the loss of Indigenous women and girls to all forms of violence is a national tragedy. It has traumatized generations of families, and it will continue to traumatize communities if we do not commit to action and change.”³¹⁴ The devastating impacts of colonialism, racism and gender-discrimination have allowed for the well-being of Indigenous women to be less valued than the well-being of their male counterparts. The Native Women’s Association of Canada (NWAC) is also of the opinion that,

“Gendered outcomes of reconciliation need to be realized within oppressed communities to address the violence, poverty and various forms of imbalance resulting from centuries of oppression, the colonial beliefs and ideas about gender relations and individualism that continue to shape policies, protocols and practices must also be challenged and transformed.”³¹⁵

Therefore, reconciliation at a national, political and social level must span beyond the confines of apparent discriminatory regimes, Acts and policies. It must target systemic and deeply rooted colonial narratives which depict Indigenous people (especially women) as invaluable or inferior and must challenge the internalized community notions of Indigenous women as less deserving of equal access, opportunity

³¹⁴ Canada, *supra note* 304, at 1.

³¹⁵ Canada, Native Women’s Association of Canada, *Culturally Relevant Gender Based Models of Reconciliation* (March 2010) at 15 <<https://www.nwac.ca/wp-content/uploads/2015/05/2010-NWAC-Culturally-Relevant-Gender-Based-Models-of-Reconciliation.pdf>>

and Indian identity. For years, governing structures within Indigenous communities have not recognized women's participation and contributions to the same extent as that of men and it is time for this discriminatory logic to change.³¹⁶ Indigenous women have little or no representation in government or other formal decision-making bodies, both in Canada and in Indigenous communities, therefore, opportunities to voice their concerns are lacking.³¹⁷ Without female representation and a true understanding of the years of discrimination burdening Indigenous women, "neither the outcomes of truth and reconciliation processes nor the methodologies used to elicit them are able to do justice to the range of women's experiences of harm or address the changes required to end prejudicial attitudes and practices of dispossession that gave rise to the harm."³¹⁸

As recounts of trauma and experience continue to emerge, it becomes apparent that for many Indigenous people, their respective histories are multifaceted. Even today, Indigenous women from all over Canada experience discrimination in different forms, and therefore reconciliation throughout Indigenous communities is vastly different. For example, Jackie Ottmann -- from the Fishing Lake First Nation in Saskatchewan -- participated in a Reconciliation Summit in Alberta in 2016, where the participants were asked to explain what reconciliation meant to them personally. To Ottmann, "[...] reconciliation begins with self. There is reconciling at different levels of our being, and it's not only until we connect with ourselves at those levels—whether it's emotionally, spiritually, physically or intellectually—that we can also move into other spaces of

³¹⁶ Adam Bond & Leah Quinlan, "Indigenous Gender-based Analysis for Informing the Canadian Minerals and Metals Plan" (2018) Native Women's Association of Canada at 22.

³¹⁷ Canada, *supra note* 315, at 15.

³¹⁸ Canada, *supra note* 315, at 15.

reconciliation.”³¹⁹ Different individual experiences, traumas and discriminations have impacted Indigenous communities for centuries -- especially women and their descendants -- and thus, reconciling these experiences takes effort on a national, political, spiritual and emotional level.³²⁰

4.3: A Looser Grip: Moving Away from the *Indian Act*

For many Indigenous people, the *Indian Act* remains the embodiment of colonialism, racism and paternalism in Canada. The Act exhibits the intrusive nature of the Canadian state into the lives of the Indigenous people, and, as Ken Coates suggests: “is generally held to be responsible for the serious social and cultural disruptions experienced by Indigenous peoples over the past century and a half.”³²¹ For example, in many Indigenous communities, women traditionally held positions of leadership.³²² When the *Indian Act* was created, the Government of Canada was afforded sweeping powers over Indigenous nations and imposed both political and colonial legal structures that conflicted with Indigenous governance systems and values, and legislated Indigenous women outside of positions of power.³²³

By understanding the restrictive and oppressive nature of the *Indian Act* and acknowledging the push from Indigenous communities to be self-sustaining under this renewed relationship with the Canadian state, the question becomes: Why, then, do some

³¹⁹ Banff Center for Arts and Creativity, *Truth and Reconciliation Summit: Words of Wisdom* (2016), online: Alberta Government <<https://www.banffcentre.ca/articles/truth-and-reconciliation-summit-quotes>>

³²⁰ Emilie de Haas, *supra note* 312, at 9.

³²¹ Ken Coates, “The Indian Act and the Future of Aboriginal Governance in Canada” (2008) Prepared for the National Centre for First Nations Governance at 8.

³²² Dr. Tracy Bear & Dr. Paul L. Gareau, *Indigenous Concepts of Gender* (2019), online course: Coursera <<https://www.coursera.org/lecture/indigenous-canada/indigenous-concepts-of-gender-ckZ0u>>

³²³ Ken Coates, *supra note* 321, at 8.

Aboriginal leaders argue that the Indian Act should be maintained?³²⁴ Attempting to answer such a question is not easy. Martin J. Cannon argues that the split perspectives between Indigenous groups on whether or not to have the *Indian Act* repealed started around 1969 when the Government of Canada introduced the *White Paper* policy.³²⁵ The *White Paper* proposed the complete elimination of Indian status, which ultimately meant the elimination of all special provisions and rights for status Indians.³²⁶ In other words, “the government connected a desirable end – eliminating the Indian Act – with an undesirable outcome – stripping status Indians of significant legal and political rights and government obligations.”³²⁷ With the *Indian Act* in place, it has been argued that, at the very least, it outlines the government’s legal and fiduciary responsibility to Indigenous people, and re-enforces the historical commitments that have been made.³²⁸ Harold Cardinal³²⁹ provides a telling explanation of why many Indigenous people argue for the Acts continued existence,

“We do not want the *Indian Act* retained because it is a good piece of legislation. It isn’t. It is discriminatory from start to finish. But it is a level in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretensions to being just a long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable

³²⁴ Ken Coates, *supra note* 321, at 8.

³²⁵ Martin J. Cannon, “Revisiting Histories of Gender-Based Exclusion and the New Politics of Indian Identity” (2008) Prepared for the National Centre for First Nations Governance at 3.

³²⁶ Martin J. Cannon, *supra note* 325, at 3.

³²⁷ Martin J. Cannon, *supra note* 325, at 30.

³²⁸ Martin J. Cannon, *supra note* 325, at 8.

³²⁹ Harold Cardinal, raised on the Sucker Creek Reserve, was a First Nations leader, lawyer, and scholar. Cardinal rose to national prominence as President of the Indian Association of Alberta. Cardinal was elected at the young age of 23 and during nine terms in office, worked to develop and preserve Indian culture. Cardinal played a huge role in the creation of the National Indian Brotherhood, the precursor of the Assembly of First Nations (AFN), and took part in many negotiations with the federal government of Canada over its Indian policy. Wesley Pue, *Harold Cardinal: An Inspirational Warrior* (May 2006), online: University of British Columbia <<https://news.ubc.ca/2006/05/04/archive-ubcreports-2006-06may04-cardinal/>>

Indian Act than surrender our sacred rights.”³³⁰

While Cardinal’s testimony was during *White Paper* discussions in 1969, opinions such as his remain in the legal and political realm of Crown-Indigenous relations to date. Pamela Palmater, a Mi’kmaq lawyer, professor and activist, also states that while the complexities of the *Indian Act* stem far beyond the guise of racism, it does serve as a legislative tool which holds the federal government accountable to Indigenous people in Canada.³³¹ For example, the Act offers a multiplicity of legal protections, “like tax exemptions for property on reserves and the protection of reserve lands from seizure.”³³² First Nations have retained a very low percentage of their traditional lands -- less than 0.2 per cent -- and therefore, “preserving the integrity of those collective lands has been identified as a priority by many First Nations” and has often been used as an argument to keep the *Indian Act* in place.³³³

David Newhouse, director of the Chanie Wenjack School for Indigenous studies at Trent University, went as far as to claim that the *Indian Act* supplies “the legal scaffolding” that continues to support hundreds of First Nations communities across Canada.³³⁴ The Act provides the structure for community governance and Indigenous community life and “reforming the Act in one fell swoop, or repealing it, would be enormously disruptive to First Nations.”³³⁵ As well, Indigenous communities controlling their own membership and citizenship could propose issues for certain members,

³³⁰ Martin J. Cannon, *supra* note 325, at 9.

³³¹ Pam Palmater, *Abolishing the Indian Act Means Eliminating First Nations’ Rights* (October 2019), online: McLeans <<https://www.macleans.ca/opinion/abolishing-the-indian-act-means-eliminating-first-nations-rights/>>

³³² Pam Palmater, *supra* note 331.

³³³ Pam Palmater, *supra* note 331.

³³⁴ Doug Beazley, *Decolonizing the Indian Act* (December 2017), online: The National Bar Association <<https://www.nationalmagazine.ca/en-ca/articles/law/opinion/2017/decolonizing-the-indian-act>>

³³⁵ Doug Beazley, *supra* note 334.

specifically women in communities where equality and revitalization has not yet been achieved. As this dissertation has articulated, Indigenous women still face high rates of violence, neglect and abuse from within their communities. A.C. Hamilton and Murray Sinclair support these notions by stating that,

“The unwillingness of chiefs and councils to address the plight of women and children suffering abuse at the hands of husbands and fathers is quite alarming. We are concerned enough about it to state that we believe that the failure of Aboriginal government leaders to deal at all with the problem of domestic abuse is unconscionable. We believe that there is a heavy responsibility on Aboriginal leaders to recognize the significance of the problem within their own communities. They must begin to recognize, as well, how much their silence and failure to act actually contributes to the problem.”³³⁶

Both Indigenous communities and the Canadian state have a responsibility to recognize the unjust discrimination that Indigenous women continue to face today and must support Indigenous women in their fight for equality. In order to advance Indigenous self-governance and self-determination -- in the undeniable goal of less *Indian Act* dependency and weakening government control over community resources and membership -- women must be included in positions of power, welcomed as equals and encouraged to participate.

However, it is more than just an improved relationship between Indigenous women and their male counterparts that is needed for self-governance to operate effectively. Ramifications of colonialism such as underfunding and a lack of education have hindered the ability of many Indigenous communities to efficiently establish and operate their own systems of governance.³³⁷ Many Indigenous communities are still

³³⁶ A.C.Hamilton and Murray Sinclair , *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1 (Winnipeg: Queen’s Printer, 1991) at 487.

³³⁷ Malinda Smith, “Transforming the Academy: Essays on Indigenous Education, Knowledges and Relations” (2013): University of Alberta at 10.

grappling with the effects of colonialism such as an inadequate water supply,³³⁸ minimal access to health care³³⁹ and high rates of violence against Indigenous women; creating environments of fear and anger and making it difficult for governance systems within the community to flourish. Ultimately, without healthy communities, it becomes difficult to achieve healthy systems of governance. However, the achievement of self-government is also difficult at an operational level. Operating outside the *Indian Act* is dramatically different from the challenges associated with negotiating agreements with the federal and territorial/provincial governments.³⁴⁰ As articulated by Ken Coates, the advancement of self-governance has led many First Nations to,

“[...]Underestimate the legal, political and administrative work associated with converting land claims agreements and self-government accords into practical, appropriate and sustainable First Nations legislation and political structures. For many years, First Nations leaders negotiated for the right of communities to determine their future. Having gained that right, these same leaders now faced the very difficult challenges of drafting legislation, securing community support (particularly for tradition and culture-based governance systems and laws), developing administrative systems, and recruiting suitable personnel.”³⁴¹

While self-determination and self-government are the long-term goal for most Indigenous communities, it takes resources, education and equal access to participation for systems of governance to operate effectively. It can even be argued that a secured commitment and funding stream from the federal government may still be necessary in circumstances of self-government. John Borrows suggests that, “instead of conceiving of

³³⁸ Lori Bradford, Lalita A. Bharadwaj, Udoka Okpalauwaekwe, & Cheryl L. Waldner, “Drinking Water Quality in Indigenous Communities in Canada and Health Outcomes: A Scoping Review” (2016) 75:1 *International Journal of Circumpolar Health*.

³³⁹ Jasjit Goraya, *Access to Health Care on Aboriginal Reserves* (2016), online: <<https://ppgreview.ca/2016/04/06/access-to-health-care-on-aboriginal-reserves-2/>>

³⁴⁰ Ken Coates, *supra note* 321, at 25.

³⁴¹ Ken Coates, *supra note* 321, at 25.

indigenous people as frozen in time (holding contemporary indigenous people to time-of-contact standards) and seeking to end all obligations to them once and for all (think poorly worded treaties), in a democratic society, there must be an ongoing commitment to the relationships between indigenous peoples and the Canadian government and people going forward.”³⁴²

The intent of this dissertation is not to propose an alternative to the *Indian Act*, nor to state indefinitely if the Act will be abolished in its entirety. What can be inferred from this thesis, however, is that current policies, state sanctioned systems of governance and Indian legislation are continuing to fail Indigenous communities across Canada. This dissertation has provided that “on balance, most Aboriginal people in Canada would be pleased to see the Indian Act disappear – but only after an appropriate Aboriginally-controlled system, with firm and ongoing financial and legal commitments by the federal government, is in place.”³⁴³ There is no a “one size fits all” solution to the issues associated with the *Indian Act*; however, what is important is that self-government will further aid Indigenous communities in their decision on whether the *Indian Act*, or at least select provisions of the Act, should continue to exist.

³⁴² Patricia Sekaquaptewa, “Review: Freedom & Indigenous Constitutionalism” by John Borrows, in *Pacific Historical Review* 87:1 at 216-217.

³⁴³ Ken Coates, *supra note* 321, at 27.

Conclusion

This dissertation provided a brief historical analysis of how Settler-Indigenous relations transformed overtime; it encapsulated the impact that this relationship has had on Indigenous freedoms, access and participation, as well as attitudes toward women. It has shown the evolution of Indigenous women as community leaders and matriarchs; to being legislated outside communities by discriminatory provisions created by a state sanctioned *Indian Act*. This dissertation also provides an analysis of the evolution of *Indian Act* policy, and how it further created categories of Indigenous men and women - specifically women - that were deemed “less Indian” than others. However, throughout this dissertation the strength and resilience of Indigenous women that have continued to fight for over 50 years to reinstate status for themselves and their descendants disproportionately affected by gender-based discrimination within registration provisions of the present-day *Indian Act* have also been articulated. A legislative analysis of the Lavell, Bédard, Lovelace and McIvor cases were also presented to preface how the Descheneaux case came to be; these previous cases gave the Descheneaux case solid ground to argue outside of the parameters of what had previously been done. The Descheneaux case challenged the government of Canada to look outside of the confines of the *Indian Act* and to address the deeper, colonial roots of discrimination and sexism which continue to oppress Indigenous women and their descendants. Finally, this dissertation examined the effects of change post-Descheneaux, analyzing arguments put forth for abandoning the *Indian Act* altogether, or keeping some provisions of the Act in operation until communities are healthy enough to achieve systems of self-governance

and restore the well-being of community relations with Indigenous women and their descendants.

One lesson is clear when we review and analyze the struggles of Indigenous women embroiled with legal challenges seeking remedies for past injustices: the government of Canada must continue to work collaboratively with Indigenous peoples to develop measures that address remaining inequalities both within the confines of the *Indian Act*, and within the larger breadth of society. Of course, several challenges remain for Indigenous communities and women, as gender-informed inequalities still greatly exist. Until these inequalities are addressed at their roots, it will be harder to reconcile the harms done to Indigenous people. Thus, for genuine and effective reconciliation to occur, I suggest that change needs to be met on a two-dimensional level: within federal consciousness and within community borders. The dividedness which continues to exist between Indigenous men and women is destructive and makes for unhealthy Indigenous communities. Equality and the encouragement of women and their participation (to the same extent as that of traditional Indigenous societies) are crucial in the fight to restore balance back into many hurting communities.

The efforts of Descheneaux were perhaps the first steps in achieving more inclusive communities. However, the government of Canada cannot claim that Bill S-3 (the response to Descheneaux) eliminates all gender-based discrimination within the registration provisions of the *Indian Act*. Arguments like such are very premature; for instance, the Bill does not address the cumulative and often more subtle effects of gender-based discrimination, caused by years of state sanctioned oppression against Indigenous women. Statements like these allow for the frustrating argument that

Government-Indigenous relations have ultimately come full circle to be expressed. At early points of contact, the State introduced colonial systems of governance onto Indigenous communities, and with Bill S-3 we see this relationship repeating itself. Through an analysis of the Bill, we can observe such repetition come to life by imposing a new cut-off date for Indigenous people to prove Indian status from, once again, a top-down approach. Deemed as a progressive option, Bill S-3 will indeed allow any Indigenous person that can *prove* their lineage, all the way back to 1869 (the *Gradual Enfranchisement Act*) to reclaim their Indian status, granting them one of the most official forms of recognition by the state, as well as an array of services and rights reserved for Status Indians.

For individuals with ancestors that lost their status prior to 1869, there is no recognition and no space for them to be recognized as Indians in Canada. Most importantly, the 1869 cut-off date was not decided by Indigenous nations, it was decided at the hands of the federal government, in which they inferred such a date from the first time *they* imposed colonial definitions of Indianness, and the qualifications required to be so, in legislation. This is problematic because, while decisions like this continue to be made at the hands of the state, no decision-making power has been given back to Indigenous people themselves. It follows that Indigenous peoples are, once again, imprisoned by colonial policies regarding the determination of *their* identity and membership, citing cut-off dates which have no significant importance to Indigenous people, their worldview, laws or their culture. The 1869 cut-off date created by the government is just another arbitrary date decided upon the history of colonial law taking effect, with the consequence of still restricting the rights of Indigenous people to reclaim

their full identity under Canadian laws. This becomes proof that Canada is incapable of getting out of its own colonial imagination, as it continues to refer to its legislation and its standpoint, rather than giving this power to the Indigenous people to decide. Under Bill S-3, the “second generation cut-off” also continues to apply, thus repeating a discrimination that will continue to affect Indigenous women and their descendants.

It thus becomes difficult to look at concepts such as reconciliation when it is understood that the oppression of Indigenous people is still being forwarded into Canadian policies, legislation and ways forward. As a result, for many Indigenous people the concept of genuine and effective reconciliation remains vague, undefined at best. This is especially true for many Indigenous women that lost their Indian status because they married a non-Indian man. These women were forcibly removed from their cultures, resulting in a loss of traditional practices, language and knowledge. For some of these women, the removal of Indian status meant that they lost the right to generational possessions such as land and willed housing.³⁴⁴ These Indigenous women suffered the shame of not being able to pass on Indian status to their descendants, and watched as their male counterparts could. Therefore, we can certainly ask: how do we reconcile with a distinct group of people that for the last 150 years have been told, “you’re not Indian enough,” along with the operation of a department that created the very parameters of Indianness and bestowed it upon Indigenous communities?

In conclusion, many Indigenous people are still feeling the ramifications of paternalistic and colonial policy initiatives, psychologically, socially and economically. Present day, the outstanding levels of low income and violence against Indigenous

³⁴⁴ Sandra Lovelace v. Canada, *supra note* 150.

women tell a story much deeper than the narratives of select *Indian Act* provisions; they tell a story of years of oppression, deeply rooted systemic inequality and communities that are still struggling to rebuild.³⁴⁵ While further progress undeniably needs to be made towards steps of self-actualization and revitalization for Indigenous communities, a path has been marked by the Descheneaux decision for the Canadian state and Indigenous people toward the possibility of reconciliation and Indigenous self-government.

³⁴⁵ Poverty rates among Indigenous people in Canada are at an all time high. The sad reality remains that, “Indigenous people in Canada experience the highest levels of poverty: A shocking 1 in 4 Indigenous peoples (Aboriginal, Métis and Inuit) or 25% are living in poverty and 4 in 10 or 40% of Canada’s Indigenous children live in poverty.” Canadian Poverty Institute, *Poverty in Canada* (2016), online: <<https://www.povertyinstitute.ca/poverty-canada>>

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