

Equality Delayed is Equality Denied for Indigenous Women

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Ce texte se veut une courte histoire du sexisme présent dans la législation canadienne qui touche le peuple autochtone dans la Loi des Indiens. Depuis son élection en 1876, en dépit des nombreux amendements qui ont suivi, les femmes autochtones n'ont jamais été reconnues comme telles. Elles furent traitées comme citoyennes de seconde classe, moins que des parents, encore moins comme Indiennes. Les auteures sont d'avis que cette loi discriminatoire a grandement contribué au sérieux problème des femmes autochtones perdues et assassinées au Canada. Cet article demande au Gouvernement de cesser ses sursis et de finalement agir vers un changement.

Entitlement to equal status for women in the *Indian Act* is delayed, once again, after the House of Commons voted in favour of an amended form of the Senate's Bill S-3 on December 4, 2017.

The legislation is supposed to eliminate the long-standing discrimination against Indigenous women embedded in the *Act*, and to go beyond what is narrowly required by the Quebec Superior Court's 2015 ruling in *Descheneaux v. Canada*. But the provisions designed to do this don't come into force with the Bill's passage, and there is no fixed date for their implementation. That means that, for Indigenous women and their descendants, full equality is put off again to some unknown future date.

This is dismaying, given that Prime Minister Trudeau tells us repeatedly that he is committed to women's equality, to a new nation-to-nation relationship with Indigenous peoples, and to ending the crisis of murdered and missing Indigenous women.¹ Canada will fail on all fronts until it removes the sex discrimination from the *Indian Act*.

Discrimination against Indigenous women is as old as

Canada. It is a marker—a definer of Canada as a colonial, patriarchal nation-state. Since 1876, the *Indian Act* has treated Indigenous women and their descendants as non-persons and, in more recent times, as second-class “Indians,” the legal term used in the legislation.² In early versions of the *Indian Act*, an Indian was “a male Indian, the wife of a male Indian, or the child of a male Indian.”³ For the most part, from 1876 to 1985, Indian women could not transmit their status to their descendants. There was a one-parent rule for transmitting status and that parent was male.⁴ Indian women lost their status when they married a non-Indian, while Indian men who married non-Indians kept their status and endowed status on their non-Indian wives.⁵

In anticipation of the coming-into-force of Canada's new constitutional equality rights guarantee in 1985, the federal government introduced Bill C-31. It removed some of the sex discrimination, but it did not remove the male-female hierarchy. Instead, Bill C-31 entrenched it by creating the category of 6(1)(a) for all those (mostly male) Indians and their descendants who already had full status prior to April 17, 1985, and the lesser category of 6(1)(c) for women whose status had been denied, or whose status had been removed because of marriage to a non-Indian. The women were considered “re-instatees,” and were assigned a lesser category of status, which restricted their ability to transmit status to their children.⁶

From this flows all the current discrimination problems. Since 1985, there has been a string of court cases—*McIvor*, *Matson*, *Gehl*, *Descheneaux*—trying to unwind the impact of this entrenched sex discrimination. The Government of Canada has responded to these cases by removing the

sliver of discrimination identified by each litigant, while leaving the sex-based hierarchy between 6(1)(a) and 6(1)(c) status in place. To make the discrimination more complicated, the Harper government introduced a new twist in 2010 by barring the descendants of women born before 1951 from eligibility for status.⁷

The Senate of Canada made a valiant attempt to remove the discrimination entirely by passing its “6(1)(a) all the way” amendment to Bill S-3 in June 2017.⁸ The Senate’s amendment was dubbed “6(1)(a) all the way” because it would have entitled Indian women and their descendants to “6(1)(a) status on the same footing as their male counterparts.

But, the federal government resoundingly rejected it. The government’s compromise with the Senate has been to add its own “6(1)(a) all the way” provisions to Bill S-3, but to delay their coming-into-force until an unspecified date in the future.⁹ The bottom line is that, one more time, Indigenous women and their descendants are told to wait for equality. They will get it, maybe, at some point, but not now.

Most people agree that the *Indian Act* is a colonial instrument for controlling and assimilating Indigenous peoples and it should be discarded. But as long as it exists, it must not discriminate against women. As long as it exists, its treatment of Indigenous women as second-class persons, lesser parents, and lesser Indians, is profoundly damaging to them, their children, and their communities.

Throughout the years, the so-called “Bill C-31 women” have been treated as though they are not “truly Indian,” or “not Indian enough,” less entitled to benefits and housing, and obliged to fight continually for recognition by male Indigenous leadership, their families, communities, and broader society. In many communities, having 6(1)(c) status is like a “scarlet letter”—a declaration of lack of worth. The damage that has been caused and the injustice that has been suffered by the women, who are often referred to pejoratively as “6(1)(c) women” or “Bill C-31 women,” has been neither recognized nor remedied.¹⁰

Both the Inter-American Commission on Human Rights and the United Nations Committee on the Elimination of Discrimination against Women found in their investigations that *Indian Act* sex discrimination is a root cause of the crisis of murders and disappearances, precisely because Indigenous women have been cast from their communities and treated like marginal human beings.¹¹

Why do we need further delay? The Government of Canada claims that more consultation is needed before the sex discrimination can be eliminated. However, repeated consultations with Indigenous communities about sex discrimination in the *Indian Act* have been undertaken by successive federal governments over the

last fifty years, always with the promise that consultation would lead to removal of the discrimination. Yet after repeated consultations, the sex discrimination remains. In 2018, consultation is a guise for further delay. Consultation should enhance the implementation of human rights, not block it.

As long as the Government refuses to grant equal status in the *Indian Act*, the message is clear: equality for Indigenous women is too complicated, too costly. But Canada cannot be not a healthy, rights-respecting nation while we continue to deny equality to Indigenous women; nor can Indigenous nations thrive as long as women are not equal partners and participants in their communities. Indigenous women are entitled to equality now. Equality delayed is equality denied.

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Endnotes

¹Justin Trudeau, Prime Minister of Canada, Statement on International Women’s Day, March 8, 2018, online; Justin Trudeau’s Address to the 72th Session of the United Nations General Assembly, September 21, 2017, online.

²*Indian Act*. R.S., c. I-6, s. 2(1) defines Indian as “a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.”

³*Indian Act* 1876, Chapter 18, cited in Royal Commission on Aboriginal Peoples, Final Report, Volume I, Looking Forward, Looking Back, at p.170, online.

⁴This was the consequence of defining Indians as male Indians, the wives of male Indians, and the children of male Indians. Indian status was passed on through the male line only, so Indian women could not independently pass on Indian status to their descendants.

⁵Royal Commission on Aboriginal Peoples, Final Report, Volume I, *Looking Forward, Looking Back*, at p. 167, online.

⁶Royal Commission on Aboriginal Peoples, Final Report, Volume 4, at 36-37, online.

⁷Library of Parliament, Legislative Summary of Bill C-3: Gender Equity in Indian Registration Act, March 18, 2010, at 2.2 (iv), online.

⁸The Senate of Canada, Bill S-3, *An Act to amend the Indian Act (elimination of sex-based inequities in registration)*, s. 7, June 1, 2017, online.

⁹Government of Canada, *Plain Text Description of Bill S-3, An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, s. 15(1), online.

¹⁰Native Women's Association of Canada, *Aboriginal Women's Rights Are Human Rights*, Research Paper for the

Canadian Human Rights Act Review, at p. 14, online.

¹¹Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women and Girls in British Columbia, Canada*, December 21, 2014, at 93, 129, online: UN Committee on the Elimination of Discrimination against Women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/OP.8/CAN/1, 30 March 2015, at 219(e), online.

MARGO SWISS

Stillborn

Awake thou that sleepest
Ephesians 5.14

One dark night
I heard You speak and knew
that voice was none but You.
But so dog-tired and too far gone to rise
I beggared off pledging to write
another night.

Days then passed and only now
do I recall what I forgot that
You so kindly all for-

gave those precious words spilling into
lines a little poem let go come to not or even worse
what might have been in time
a sacred verse mis-
carried now your stillborn art
bleeds away in tears
as my heart cries itself
awake.

Margo Swiss has published three books of poetry, most recently The Hatching of the Heart (Wipf and Stock, Oregon). She has also edited an anthology of Canadian poets, Poetry as Liturgy (St Thomas Poetry Series) and two books on Milton and other Renaissance writers: Heirs of Fame (Bucknell University Press) and Speaking Grief in English Literary Culture: Shakespeare to Milton (Duchesne University Press). She taught Humanities, English, and Creative Writing at York University before her retirement in 2018.