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Discussion Paper

Bill S-3 and Inequities under the *Indian Act*

This paper discusses the gender-based issues in the *Indian Act*'s registration provisions and the effectiveness of Bill S-3 to change things. Throughout this document, the Native Women's Association of Canada (NWAC) poses questions designed to recognize how Indigenous women continue to be affected by discriminatory provisions within the *Indian Act* and how legislative processes historically – have not served their interests well.

There are a myriad of reports, studies, and literature describing the horrific colonial policies enacted upon Indigenous Peoples through the *Indian Act*. By taking a deeper dive into Bill S-3 and the processes that have led here, NWAC hopes to provide traditionally-informed recommendations moving forward .

Through round table discussions, one-on-one interviews and surveys, NWAC is working to:

- Understand and receive information on the *effectiveness* of Bill S-3 by hearing from Indigenous people affected by past discriminatory legislation ; and
- Raise awareness of the new provisions brought in under Bill S-3 and the processes for applying for status under the *Indian Act*.

Brief History of the *Indian* Act

Gender inequity begins with the definition of 'Indian' within the *Indian Act* in 1851. The first definition provided a way for colonizers to distinguish between who was and was not permitted on reserve lands. This responded to complaints of people laying claim to Indian land "with no connection to communities, and where the uncertain status of people with contested connection to communities resulted in internal strife." [1]

The 1851 definition was broad in scope: Anyone who married a person of 'Indian' blood was considered *Indian* in terms of related entitlements. There were no consultations with First Nations people before passing this legal definition of "Indian". Almost immediately, there was dissent. Since resources for First Nations people were already being limited, some expressed fears about white men inheriting entitlements reserved for Indigenous Peoples. Rather than

[1] Ted Binnema, "Protecting Indian Lands," 10.

address resource deficiency, the 1851 legislation narrowed who qualified as 'Indian', penalizing Indian women who married non-Indian men.

The 1851 *Indian Act* was officially passed by the newly-Confederated Canada in 1876. It adopted ideas of assimilation, enfranchisement, and the definition of Indian. As in 1851, the 1876 *Indian Act* stipulated any Indian woman who married "any other than an Indian or non-treaty Indian"[2] would cease to be Indian under the *Act.*

Almost exactly a century after law-makers first defined 'Indian,' the 1951 *Indian Act* established the Indian Register. This government agent held registration control of who could qualify for Indian status. If any Indigenous man's name was removed or omitted from the Indian Register, then so too were the names of his wife and children.[3] The 1951 *Indian Act* gave individuals the right to protest decisions made in the granting or removal of Indian status and/or band membership. Ultimately, the Act granted control of band membership to the federal government.

In 1985, Canada passed Bill C-31, hoping to remove sex-based discrimination from the Indian Act registration rules. This change responded to discrimination prohibitions under section 15 of the newly-enacted Canadian Charter of Rights and Freedoms.

Bill C-31 meant women no longer lost membership with their band, nor were they forced to join their husband's band, upon marriage. Further, women who lost status because of marrying non-Indian men were entitled to re-register.[30]

The changes, however, did not fix all the gender-based discrimination under the Act and, in fact, Bill C-31 created new bases of discrimination.

Bill C-31's ostensibly gender-neutral second-generation cut-off rule meant two consecutive generations of non-Indian status parents would render applicants ineligible to register for status.[31] In other words, a person is not entitled to status if only one of their parents was or is entitled to status, and only one parent of that status parent was or is entitled to status.

Also, individuals who registered for status before 1985, like non-Indian women who married Indian men, could maintain their status,[32] but could no longer confer it through marriage.

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[2] *Indian Act*, 1876, c.18, at s3(c)

[3] *Indian Act*, 1951, c.23, at s10

When Canada passed Bill C-31, it treated the descendants of women who had lost or been denied status differently, based on their sex, creating new discrimination under the registration rules.

This triggered a series of court rulings and legislative amendments that ultimately led to Bill S-3.

What follows are summaries of some of the discriminatory issues created by the Indian Act and how Bill S-3 was meant to address these issues, followed by questions for consideration.

Issue: "Unknown" or "Unstated" Parentage

Historically, the Indian Registrar's Proof of Paternity Policy made it the applicant's responsibility to provide very specific types of evidence to qualify for status. Finding this evidence was often challenging or impossible to do. The issue of 'unknown' or 'unstated' parentage refers to when, for any number of circumstances, information about a person's parents or parental lineage is unknown or unstated on official birth documents.[4]

In the 2017 *Gehl v Canada (Attorney General)* case, the Ontario Court of Appeal was tasked with determining whether the Registrar had unreasonably and inadequately denied Dr. Gehl from registering for status, under the paternity policy.[5] She provided documents with information about her biological father but was unable to provide the name of her paternal grandfather. Through an administrative law analysis, the Court decided Dr. Gehl's evidence demonstrated her ancestor was entitled to status, the Registrar's decision was unreasonable, and Dr. Gehl should receive status. The Court found the paternity policy ran the risk of preventing applicants from obtaining status and accessing constitutionally-guaranteed entitlements.

In the Gehl decision, Justice Sharpe wrote the Registrar, as an administrative decision maker, was required to guard against making decisions that would result in substantive inequalities and that *Charter* values should have guided the decision-making process. Justice Sharpe noted that

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[4] Government of Canada, *Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship* (2019) at pg 24 <https://www.mlib.ca/uploads/Collaborative%20Process%20Fact%20Sheets%20On%20Indian%20Registration%2C%20Band%20membership%20and%20First%20Nation%20Citizenship.pdf>.

[5] *Gehl v. Canada (Attorney General*) [2017] ONCA 319.

while the paternity policy appeared gender neutral, it denied Dr. Gehl her right to equal treatment and perpetuated historical disadvantages suffered by Indigenous women.[6]

Proving a father's identity is more difficult for a mother. In most situations, the biological mother of a child will be proven simply by giving birth to the child. However, the mother may not know the biological father's identity.[7] That child will have difficulty proving parentage.[8]

There are many reasons a woman may be unwilling or unable to prove the identity of her child's father. For example, the mother may be fearful and unable or unwilling to provide the identity of the father; her pregnancy may be the result of a relationship with a relative, or the spouse or partner of someone else; the pregnancy may be the result of abuse or sexual assault; or the mother may have had several sexual partners.[9]

How did Bill S-3 address this issue?

Bill S-3 sought to address the *Gehl* decision by easing the burden of proof applicants must meet in situations of unknown or unstated parents or ancestors. Specifically, subsection 5(6) of the *Indian Act* now states when determining whether the unknown or unstated parent or ancestor of an applicant was or would have been entitled to status, the Registrar "shall draw from [the evidence] every reasonable inference in favour" of a determination that the unknown/unstated parent or ancestor was entitled to status.

What does it mean to consider the evidence "on a balance of probabilities"?

Canada has taken the position that, when the Registrar is considering evidence respecting an applicant's parent, grandparent, or other ancestor, they must do so on a "balance of probabilities". In other words, the Registrar must ask "is it more probable than not that the parent, grandparent or other ancestor is entitled to be registered?"

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[6] *Ibid.*

[7] *Gehl v. Attorney-General of Canada* [2015] ONSC 3481 at para 44.

[8] *Supra* note 3.

[9] *Ibid.*

The Registrar must make every reasonable conclusion that would support granting the applicant status.[10] Moreover, section 5(7) of the *Indian Act* now says the Registrar cannot presume the unstated or unknown parent, grandparent or other ancestor is not, or was not, entitled to be registered as a status Indian.[11]

Why is "unknown" or "unstated" parentage still a problem after Bill S-3 came into force?

While Bill S-3 eliminated the very specific types of evidence an applicant needs to provide, the current law still requires a person applying for status to be able to find and give relevant and credible evidence to prove they are entitled to status based on their ancestry. This change did very little to fix the problems the Ontario Court of Appeal outlined in Gehl. Finding "relevant evidence" may be impossible or may re-traumatize the applicant.[12]

Discussion Questions relating to Unknown or Unstated Parentage:

1. What type of evidence should be permitted to prove parentage?
2. What are some challenges or burdens Indigenous women or gender diverse people specifically face when trying to find information about their parentage and ancestry?
3. What are some reasons Indigenous women may be unwilling or unable to provide information about parentage or ancestry?

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[10] *Indian Act,* RSC, 1985, c I-5, at s 5(6).

[11] *Indian Act,* RSC, 1985, c I-5, at s 5(7).

[12] Native Women's Association of Canada, *Bill S-3: An Act to Amend the Indian Act in Response to the Superior Court of Quebec Decision in Descheneaux v. Canada* (2018) <https://www.nwac.ca/wp-content/uploads/2018/04/Bill-S-3-pdf-1.pdf>.

4. Do you think Indigenous women or gender diverse people are disproportionately affected by requirements to prove parentage? Why or why not?

Issue: The 'Double Mother Rule' and Second-Generation Cut-Off Provisions of Bill C-31 (1985)

The 1951 *Indian Act* introduced the controversial 'double mother rule', which held anyone born after September 4th, 1951, and whose mother and grandmother (on their father's side) acquired status through marriage, lost Indian status when they reached 21 years of age.[13]

In 1985, Bill C-31 addressed this gender discrimination.[14] The 'double mother rule' was officially abolished, opening and restoring status to affected women (and their children). From 1985 forward, an Indigenous woman would no longer become entitled to status or lose status as a result of who they married. The Second-Generation Cut-Off:
While Bill C-31 may have sought to redress gender inequality within the *Indian Act,* it raised other barriers for descendants. With more people now eligible for status First Nations representatives raised concerns about a growing status base with limited resources. [15]attempt to balance individual and collective rights was why the second-generation cut-off was introduced in the first place.[16]

Rather than address resource scarcity, Bill C-31 created a two-tier registration system under *Indian Act* sections 6(1) and 6(2). Under these rules, people would lose Indian status after two consecutive generations of mixed Indian and non-Indian parentage.[17]

This posed a relative disadvantage for children born before April 17th, 1985, to status-holding women who married non-Indian men and regained status under section 6(1). These children

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[13] *Indian Act*, 1951, c.23, at s12(a)(4)

[14] Ibid.

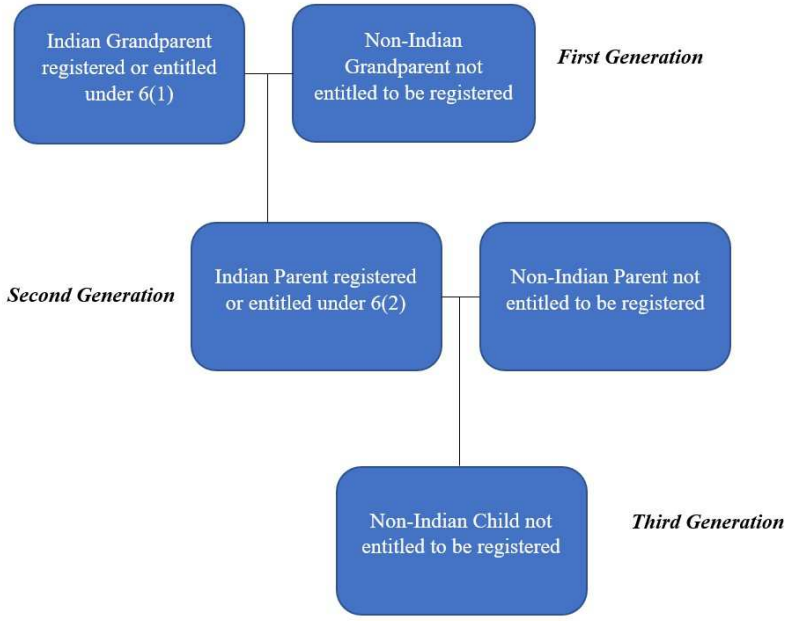
[16] Assembly of First Nations. (2020 Jan 16). "What is Bill C-31 and Bill C-3?", 2. < https://www.afn.ca/wp-content/uploads/2020/01/16-19-02-06-AFN-Fact-Sheet-Bill-C-31-Bill-C-3-final-revised.pdf>

[17] Ibid.

were registered under section 6(2), rendering them ineligible to transfer status to their children, if they married non-Indians.[18] In other words, the women's grandchildren did not gain status.

This rule did not affect the children of Indian men the same way. Those children of men who married non-status women received status under section 6(1)[19] allowing them to pass down status for at least another generation.

Figure 1: How the 'Second-Generation Cut-Off Rule' Works



Bill S-3 & the Discriminatory Impacts of Bill C-31 Today

The 1996 Report of the Royal Commission on Aboriginal Peoples found all Indian bands across Canada were affected by Bill C-31, but Indigenous women did not see real, substantial change

[18] Ibid.

[19] *McIvor v Canada (Registrar of Indian and Northern Affairs),* 2009 BCCA 153 (CanLII), at paras 59-61.

to the discrimination they and their descendants faced in the *Indian Act*.[20] Some Indigenous communities reported members were still unfairly denied status reinstatement, even after Bill C-31.[21]

Bill S-3 did address the differential treatment of the descendants of women who lost status due to pre-1985 sexism under the Act. Bill S-3 extended status entitlement to the "direct descendants" of people victimized by those sexist provisions. Nevertheless, Bill S-3 did not remove the "second generation cut-off rule" and the *Indian Act* continues to apply a two-tier status system under sections 6(1) and 6(2).[22]

Suggested Changes and NWAC's Role Moving Forward

Some feel the two-tier status system under sections 6(1) and 6(2) of the *Indian Act* should be eliminated, which would do away with the "second generation cut-off" issue.[23] Others call for the *Indian Act* to be abolished altogether, emphasizing the importance of building a renewed nation-to-nation relationship with Indigenous Peoples, strengthening reconciliation efforts and consultations, prioritizing affected communities.[24]

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[20] Canada. Erasmus, G., & Dussault R. (1996). *Report of the Royal Commission on Aboriginal Peoples.* Vol. 4, pg. 31. *Ottawa: The Commission.*

[21] Indigenous and Northern Affairs Canada. (2018 November 28). *Remaining inequities related to registration and membership.* Government of Canada. https://www.rcaanc-cirnac.gc.ca/eng/1540403281222/1568898803889. 4 May 2021.

[22] *Indian Act*, RSC, 1985, c I-5, at ss 6(1) and (2); Gehl, Lynn, *Unknown and Unstated Paternity and the Indian Act: Enough is Enough!* (2012) 3 Journal of the Motherhood Initiative 1 at pgs 192-193 <https://jarm.journals.yorku.ca/index.php/jarm/article/viewFile/36318/33036>.

[23] Mann, Michelle, *Indian Registration: Unrecognized and Unstated Paternity* (2007) Aboriginal Policy Research Consortium International 93 <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1351&context=aprci>.

[24] AH Nation talk, *NWAC: Delayed Justice, a Bandage Solution and the Gaps in Bill S-3* (27 February 2018) Nation Talk <https://nationtalk.ca/story/nwac-delayed-justice-a-bandage-solution-and-the-gaps-in-bill-s-3>.

NWAC is currently seeking input on how Bill S-3 impacts Indigenous women, girls, and gender diverse people. NWAC is also interested in hearing from Indigenous women, girls, and gender diverse people about what changes they would like to see implemented, if any, with the status registration process and the current *Indian Act* rules.

Discussion Questions

relating to the Second-Generation Cut-Off issue:

1. Should there be a second generation-cut-off? Why or why not?
2. Should there be any generational cut-off? If no, why? If yes, what generation would you propose should be the cut-off (example: third-generation, fourth-generation, fifth generation etc.)?
3. Do you think there should be two types of status under section 6(1) and 6(2)? Why or why not?
4. Should there be only a one-parent requirement? Why or why not?
5. Do you think these types of generational cut-offs disproportionately affect Indigenous women or gender diverse people? Why or why not?
6. If a second generation-cut-off was eliminated, what are some concerns you and your community may have (example: availability of resources)? What would be some ways these concerns could be addressed?
7. Why is the ability to transmit status an important concern specifically to Indigenous women?
8. Do you think there exists discrimination against women and children who have 6(2) status versus 6(1) status? Why or why not?

Issue: Enfranchisement

Enfranchisement is the term for laws assimilating those with Indian Status to non-Indigenous Canadian society. It was a central mechanism in Canada's efforts to affect cultural genocide against Indigenous Peoples. It dates back to the 1857 *Gradual Civilization Act and* the 1869 *Enfranchisement Act,* which regulated "the orderly transition of Aboriginal peoples into the

mainstream of Canadian society."[25] These early laws helped shape the *Indian Act because* enfranchisement aimed to "keep the number of legal Indians to a minimum, both to reduce costs and to minimize the need for additional reserve land."[26]

How did Enfranchisement laws affect Indigenous Women?

There were two main paths to enfranchisement: voluntary and compulsory. Voluntarily, a man with Indian status could apply to enfranchise if he was considered "capable of assuming the duties and responsibilities of citizenship… [and] supporting himself and his dependents."[27]

Because an 'Indian,', was defined as "any male person of Indian blood reputed to belong to a particular band"[28] including their children and spouses, enfranchisement policies had a disproportionate effect on Indigenous women. Their status, and their descendants' status, depended on who they married and whether they married at all. Moreover, a man's voluntary enfranchisement automatically enfranchised his spouse and dependent children.[29] When a status women married a non-status man, she and her dependent children would automatically enfranchise.[30]

Status Indians could have also been automatically enfranchised if they earned a degree or became a clergyman, doctor, or lawyer.[31]

In short, enfranchisement created an either-or scenario for Indigenous Peoples: you could be "Indian," or you could be Canadian, and in many cases, Indigenous women had no choice.

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[25] Peter Kulchyski, "Aboriginal Peoples and Hegemony in Canada," *Journal of Canadian Studies* 30, no. 1 (1995): pp. 60-68, https://doi.org/http://dx.doi.org/10.3138/jcs.30.1.60, 2.

[26] Robert A Campbell, "Making Sober Citizens: The Legacy of Indigenous Alcohol Regulation in Canada, 1777-1985," *Journal of Canadian Studies* 42, no. 1 (2008): pp. 105-126,222, https://doi.org/http://dx.doi.org/10.3138/jcs.42.1.105, 117.

[27] *Indian Act*, (1970), p. 168.

[28] *Indian Act*, RSC 1985 (1876), p. 1.

[29] *Indian Act*, RSC 1952, Vol III, Ch 149, at s 108(1).

[30] *Indian Act,* RSC 1952, Vol III, Ch 149, at s 108(2).

[31] *Indian Act*, RS c 43, 1906, 3 Edward VII, Ch 61, Vol II, at s 111.

Bill C-31 enabled women who lost entitlement through marriage to reinstated status. Bill C-31 ended enfranchisement policies and bands were granted further agency over membership rules.

What did Bill S-3 Change?

While Bill S-3 extended entitlement to register for status under the *Indian Act* to direct descendants of individuals that were involuntarily enfranchised,[32] the Act still does not provide status entitlement to descendants of people who voluntarily enfranchised.

Discussion Questions

relating to the issue of Enfranchisement

1. Do you think there still exists membership discrimination, barriers or concerns that are connected to past enfranchisement? Why or why not?
2. Should the direct descendants of individuals that voluntarily enfranchised be entitled to register for status under the *Indian Act?*

Issue: Marital Status Requirements

Marital status, as it relates to the pre-1985 registration provisions, refers to marriage between a man and a woman, because historic versions *Indian Act* versions do not reflect the legal reality of same-sex nor Indigenous customary marriages.

In 1981, the UN Human Rights Committee found the *Indian Act* discriminated against Maliseet woman Sandra Lovelace Nicholas (Tobique First Nation) when it prevented her from holding Indian status and living on her reserve when she married a non-Indian.[33] In 1985, Canada amended the *Indian Act* through Bill C-31 to redress this discrimination.[34]

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[32] *Indian Act,* RSC, 1985, c I-5, at s 6(1)(a.3).

[33] *Sandra Lovelace v Canada*, UNHCR, 1981, Communication No. 24/1977, UN Doc. CCPR/C/13/D/24/1977.

[34] *Indian Act*, RSC, 1985, c. I-5.

Under Bill C-31, Sharon McIvor regained her Indian status as a Lower Nicola Band member, but she could not pass her status to her children and grandchildren the same way as an Indian man. Her 2009 court challenge prompted Canada to update the *Indian Act* again, reducing discrimination in cases like Ms. McIvor's. These 2009 updates did not resolve all gender and marital status discrimination in the *Indian Act*, however.[35]

In 2015, Stéphane Descheneaux (Abénakis of Odanak First Nation) raised some of these continuing discrimination issues. The Superior Court of Québec agreed with him, ruling Indigenous parents do not need to be legally married in order to pass status down to their children. This prompted Canada to again revise the *Indian Act* in 2017 with Bill S-3.

Did Bill S-3 change the marital status requirements?

Bill S-3 amended the registration provisions to provide the same status entitlement to the decedents of persons whose status entitlements were affected by marriage to non-status spouses, regardless of sex. A person's entitlement to status, however, may still be affected by their parents' marital status.

A person who is a "direct descendant" of someone who lost or was denied status under the pre-1985 *Indian Act* on the basis of certain sexist provisions, may be entitled to status. This entitlement, however, will be affected by the applicant's date of birth and the marital status of their parents. Specifically, in these circumstances, if the applicant was born after April 16th, 1985, they will only be entitled to status if their parents married each other before April 17th, 1987.[36]

How might the marital status rules impact Indigenous women today?

The *Indian Act* continues to create different rules for those seeking to register for status, based on whether their parents were married and whether they were born after a certain date.

Those requirements under the registration provisions that relate to the marital status of applicant's parents may not reflect the ways Indigenous relationships, including parenting and marriages, might differ from non-Indigenous cultures and societies.

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[35] *Descheneaux c Canada (Procureur Général),* 2015 QCCS 355 at para 47.

[36] *Indian Act*, RSC, 1985, c I-5, at s 6(1)(a.3).

Discussion Questions

relating to the issue of Marital Status and Age

1. Are the marital status requirements under s. 6(1)(a.3) of the *Indian Act (*that an applicant's parents must have been married to each other at any time prior to April 17th, 1985) a justified restriction on an individual's entitlement to register for status? Why/Why not?

2. Are the age requirements under s. 6(1)(a.3) of the *Indian Act (*that an applicant must have been born prior to April 17th, 1985) a justified restriction on an individual's entitlement to register for status? Why/Why not?

Discussion Questions about Your Views and Experiences regarding Status Entitlement under the *Indian Act*

1. In what ways are Indigenous women and gender diverse people disproportionately affected by lengthy wait times for status registration?

2. Did you find that the application process was easy to understand? Why or why not?

3. While the cost of the application itself is free, are there related costs to obtain other documents that are required for status applications?

4. Did you face any challenges with being able to access, read, print, or fill out any parts of the application? Why or why not?

5. Did you have any challenges obtaining a guarantor for your application? Why or why not?

6. Did the Government contact or try to contact your guarantor? If so, what was this experience like for yourself and your guarantor?

7. Did you apply for status with an unknown or unstated parent before and/or after the legislative amendments? If yes, please share your experience if you are comfortable. If you applied both before and after the amendments, please share what was or was not different about the application processes.

8. What improvements would you suggest that would make the application process more accessible?

9. Would it be helpful to have a physical location that offers services to assist with applying for status? Why or why not? If yes, what would you like those services to look like (for example,

who would run the program, where would the programs be located, what type of assistance would be required etc.)?

10. What types of evidence do you think should be allowed to prove Indigenous ancestry?
11. Are there particular rules or evidence that your community specifically considers when determining membership?
12. Do you think there exists different registration-related challenges for individuals who live off-reserve compared to those who live on reserve?
13. What do you think makes Indigenous women and gender-diverse people's perspectives unique when discussing registration provisions in the *Indian Act*?
14. How do you think the Government of Canada should conduct consultations with Indigenous women and gender diverse people about membership related issues? For example, how should consultations be advertised, who should be the target audience, where should consultation take place?
15. Do you think gender-discrimination still exists in the *Indian Act*? Why or why not?
16. Do you think the membership sections of the *Indian Act* still need to be amended? Why or why not?
17. Besides access to the legal "bundle of rights", what are some other significant social, cultural, traditional, or other reasons that make obtaining status important for Indigenous women, girls, and gender diverse people?
18. Do you have any other comments, concerns, or suggestions?