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VIA ELECTRONIC TRANSMISSION

Committee on the Elimination of Discrimination against Women Human Rights Treaties Division
Office of the United Nations High Commissioner for Human Rights
Palais Wilson – 52, rue du Pâquis
CH – 1201 Geneva, Switzerland
Email: peitions@ohchr.org and cedaw@ohchr.org

Dear Committee Members:

UPDATE Re: Petition #68/2014: Mr. Jeremy Matson

I am writing to reaffirm West Coast LEAF's support for Petition #68/2014 submitted by Mr. Jeremy Matson through the individual complaint mechanism of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").

In our original letter in support of Mr. Matson's petition, dated September 15, 2016, we set out the ways in which the transmission of status under Canada's *Indian Act* amounted to discrimination on the basis of sex and is thereby in contravention of the CEDAW as well as the *Declaration on the Rights of Indigenous Peoples*[1] ("UNDRIP").

In the time following our original letter, the CEDAW Committee suspended its consideration of Mr. Matson's petition pending proposed amendments to the *Indian Act*. It is our recommendation that the CEDAW Committee proceed with its consideration of Mr. Matson's petition for three reasons:

1. ***The legislative revisions have not fully addressed the discriminatory way in which status is transmitted in the Indian Act and thus continue to adversely affect Mr. Matson and his family.***

The *Indian Act* continues to deny status to children of Indigenous people after two consecutive generations of status parents having children with non-status parents.[2] The implications of this "second generation cut-off rule" are particularly severe for Indigenous women who may have a variety of legitimate concerns with disclosing paternity including fearing for their safety and that of their children. Furthermore, women continue to face barriers to securing status for their

[1] United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly, 2 October 2007, A/RES/61/295, http://www.refworld.org/docid/471355a82.html
[2] R.S.C. 1985, c. I-5, ss 6(2) and 6(2.01).

Indigenous children where they are unable to prove the status of the other parent for a variety of reasons including where the pregnancy is a result of rape or where they have not named the father on the child's birth certificate because of other safety concerns.

The *Indian Act* also continues to arbitrarily discriminate against Indigenous children on the basis of age and their parents' marital status by limiting status to children whose parents were married prior to April 17, 1985.[3]

Because Mr. Matson's marriage occurred after the 1985 cut-off date, his children are only able to receive status under 6(2) and 6(2.01) which, as a result of the "second generation cut-off rule", effectively denies their descendants status. The denial of status does not only mean that Mr. Matson's descendants will not be able to access tangible benefits, such as social services and band election voting rights, it also means that they may effectively be denied their "right to belong to an Indigenous community".[4]

2. *It is unlikely that the Canadian government will make any further revisions to the Indian Act without being compelled to do so.*

The discrimination enshrined in the *Indian Act* is not an isolated incidence of legislative failure. Instead it follows a history of intentional assimilation that continues to plague Indigenous peoples across Canada. Canadian government policies from the administration of the *Indian Act*, to residential schools, to the 60s scoop have had devastating implications for Indigenous communities and are directly responsible for the many social issues facing Indigenous peoples today including the endemic of violence against Indigenous women and girls, the overrepresentation of Indigenous children in the child welfare system, and the shocking rates of Indigenous people in Canadian prisons.

While it is unclear if the Canadian government's failure to fully address the shortcomings of the *Indian Act* are indicative of continued efforts to assimilate Indigenous peoples, what is clear is that it has shown great reluctance in remedying the discrimination enshrined in the legislation. The government has only amended the *Indian Act* when mandated to do so by the courts following expensive and time-consuming litigation by Indigenous peoples and their advocates and, even then, only to provide a remedy to the parties directly affected by the litigation. The government's reluctance to fully address the discriminatory effects of the *Indian Act* was noted by the Supreme Court of Canada in *Descheneaux*:

> From the perspective of Canadian citizens, all of whom are potential litigants, the failure to perform this legislative duty and the abdication of power that may result are obviously not desirable.
>
> First, it would compel them to argue their constitutional rights in the judicial arena in many closely related cases and at great cost, instead of benefiting from the broader effects of a policy decision and counting on those who exercise legislative power to ensure that their rights are respected when statutes concerning them are enacted and revised. What is more, limited judicial resources used on disputes that a well-interpreted

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[3] *Ibid* ss 6(1)
[4] UNDRIP *supra* note 1 article 9.

prior judgment should have settled are squandered instead of being used efficiently, with unfortunate effects for all litigants.[5]

Despite the Court's explicit direction to Parliament to interpret the judgment in *Descheneaux* more broadly than it had done with previous judgments, the amendments that were introduced following *Descheneaux* by way of Bill S-3[6] once again failed to address the discriminatory provisions in the *Indian Act* including those relating to Mr. Matson and his family. Consequently, there is little hope that the government will further amend the *Indian Act* without being directed to do so either through further resource depleting litigation by Indigenous peoples or through international pressure.

3. *Recent precedent coming out of the Supreme Court of Canada has severely limited the avenues available for compelling the government to make further revisions to the Indian Act.*

Approximately ten years ago Mr. Matson filed a human rights complaint before the Canadian Human Rights Tribunal ("Tribunal") under the *Canadian Human Rights Act*. The Supreme Court of Canada rendered its decision in the resulting case in June 2018 finding that the Tribunal did not have jurisdiction to overturn discriminatory legislation.[7] Not only does the Court's ruling mean that Mr. Matson would have to begin re-litigating his matter from scratch, the decision also means that the only legal avenue available to Indigenous peoples for challenging the discriminatory provisions of the *Indian Act* is by way of a court challenge under the *Charter of Rights and Freedoms* ("*Charter*").

A *Charter* challenge can cost anywhere from $50,000 to $1,000,000 and funding for this form of litigation is scarce and competitive.[8] It can also take years and sometimes even decades to receive a final judgment. Thus, the enforcement of rights through a *Charter* challenge remains unattainable for most Canadians.

Mr. Matson and many Indigenous peoples before him have repeatedly exhausted all internal legal avenues available to them to address the persistent discrimination in the *Indian Act.* It is our view that there is no indication that the Canadian government will act on its own to remedy the violations raised in the petition and it is unreasonable to expect individuals to continue this fight through lengthy and expensive litigation. The requirement to exhaust internal remedies before seeking international remedies should be based on realistic consideration of the accessibility of internal remedies to those most impacted by the impugned legal regime. In practical terms, internal remedies have been exhausted in this case.

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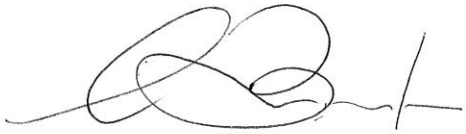
[5] *Descheneaux v. Canada (Procureur Général)*, 2015 QCCS 3555, https://www.canlii.org/en/qc/qccs/doc/2015/2015qccs3555/2015qccs3555.html pp 240 and 241.
[6] Bill S-3, An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c Canada (Procureur général), First Session, Forty-second Parliament, 64-65-66 Elizabeth II, 2015-2016-2017, http://www.parl.ca/DocumentViewer/en/42-1/bill/S-3/royal-assent
[7] *Canada (Canadian Human Rights Commission) v Canada (Attorney General),* 2018 SCC 31 2018 SCC 31.
[8] Young, Alan "The Costs of Charter Litigation", Research and Statistics Division, Department of Justice, May 3, 2016, https://www.justice.gc.ca/eng/rp-pr/jr/ccl-clc/ccl-clc.pdf p 3-4.

Accordingly, we encourage the CEDAW Committee to fully consider Mr. Matson's petition in hopes that this will encourage the Canadian government to finally and wholly remedy the human rights violations in the *Indian Act*.

Sincerely,



Elba Bendo
Director of Law Reform

Cc Jeremy Matson