

Unknown and Unstated Paternity and *The Indian Act*

Enough is Enough!

Nothing is more important than advocating for the rights of Indigenous mothers and their children. While many are aware of the ongoing struggle to eliminate the sex discrimination in The Indian Act, regarding Indian status registration provisions, many are unaware that Aboriginal Affairs and Northern Development Canada is currently discriminating against Indigenous children through an unstated paternity policy. Through this policy as many as 25,000 children have been denied Indian status registration and consequently their treaty rights. Through personal story telling to describe this legal complexity, this paper illustrates this more recent form of sex discrimination. I also offer a discussion of my advocacy efforts regarding this matter.

Introduction

A man may beget a child in passion or by rape, and then disappear;
he need never see or consider child or mother again. (Rich 12)

I was happy when I learned the editorial board of the Motherhood Initiative for Research and Community Involvement (MIRCI) intended to dedicate an entire volume to motherhood activism, advocacy, and agency. Although I am not a biological mother, I truly believe there is nothing more important than mothers and the work that they do. It stands to reason then that by extension I also think there is little more important than advocating for the rights of Indigenous mothers and their children. Here on Turtle Island, prior to European contact, Indigenous mothers and their children were situated at the centre of community politics and wellness. While this was the case historically, due to

the sex discrimination in *The Indian Act* which continues to exist today,¹ many children who have an unknown or unstated² paternity in their lineage—father or grandfather—are excluded from gaining Indian status registration and consequently their treaty rights. This is my lived reality. I do not know who my paternal grandfather is. When I think about the denial of who I am, and by extension my treaty rights, I realize further that while I was born into a wealthy nation, it was Canada that took this away from me. Alternatively stated, it was Canada that legislated my ancestors into an impoverished existence and who continue to deny me my rights as an Indigenous person due to an unknown paternal grandfather.

In writing this paper it is important that I stress that while some people may perceive my effort as more closely representing a resistance effort, and as such see this paper as a “narrative of resistance,” I perceive my effort foremost as a desire to belong to my ancestral community, and after this as an advocacy effort that seeks to protect young Indian mothers, as defined by *The Indian Act*, and their children. That said, my primary goal in telling my story,³ and the advocacy work that I have taken on, is to create greater awareness of Aboriginal Affairs and Northern Development Canada’s⁴ (AANDC) unstated paternity policy. I firmly believe that the more that people know about this continued sex discrimination, the better we are able to protect Indigenous mothers and their children’s right to Indian status registration and, as I have been stressing, their treaty rights.⁵

This paper is structured in three parts: In part one, I offer a brief discussion of the history of the government of Canada’s process of defining “Indians” through what has become *The Indian Act*, its relationship to treaty rights, and the long-time sex discrimination imposed. I also offer a discussion of the efforts that Indigenous women have taken to eliminate the sex discrimination. This discussion is important as it sets the stage for the matter at hand: unknown and unstated paternity. In part two, I discuss AANDC’s unstated paternity policy as it affects status Indian mothers as defined by *The Indian Act* and their children, offering a model to assure reader clarity as the matter is somewhat complex to understand. To illustrate AANDC’s unstated paternity policy on these mothers, in part three I offer my story as an example of the continued sex discrimination. In part three, I also offer a discussion of my ongoing advocacy efforts in challenging this sex discrimination as well as a discussion of some facts and statistics.

Part One: History of the Sex Discrimination and Women’s Efforts at its Elimination

It was through the process of Indian status registration that Indigenous peo-

ple became, and for that matter continue to be, entitled to their treaty rights: annuity payments, hunting and fishing rights, and education and health care.⁶ These treaty rights were negotiated in exchange for Indigenous people allowing settlers to reside in and benefit from our landscapes and the many gifts mother earth provides. Interestingly, the initial criteria of Indian-ness followed an Indigenous model, meaning it was broad and included all people who resided with the Indians.⁷

Despite this inclusive beginning, eventually the government of Canada began limiting the number of people entitled to Indian status registration through a process called enfranchisement.⁸ Through this enfranchisement process, the government of Canada also eliminated their treaty responsibilities (Miller). This process of narrowly defining and controlling Indians is commonly referred to as getting rid of the Indian problem (Francis).

When it was determined that the process of enfranchising Indians was proceeding at too slow a pace, Indian women and their children became the targets of a racist and sexist regime. Through a series of legislative acts dating back to the 1857 *Gradual Civilization Act*, Indian women and their children were enfranchised when their husband or father was enfranchised. It was through the 1869 *Gradual Enfranchisement Act* where Indian women, along with their children, who married non-Indian men were enfranchised⁹ (Gilbert). Again, with this loss of Indian recognition, treaty rights were lost. In addition, the right to live in one's community, the right to inherit property, and for that matter the right to be buried in the community cemetery was also lost. The process of eliminating registered status Indians through sex discrimination was last codified in section 12(1)(b) of the 1951 *Indian Act* (Gilbert).

It would be an understatement to say that Indigenous women have worked tirelessly to eliminate section 12(1)(b) and its intergenerational effects. In 1966, Mary Two-Axe Early began to speak out publicly on the issue; and in 1971, Jeannette Corbiere-Lavell took the matter of section 12(1)(b) to court arguing it violated the Canadian Bill of Rights (Jamieson). Yvonne Bedard joined Corbiere-Lavell's effort, where in 1973 both cases were heard together at the Supreme Court of Canada (SCC). Unfortunately, relying on a racist and sexist line of reasoning, the SCC compared Indian women to Canadian women, ruling they had equality with them, and as such there was no sex discrimination (McIvor 2004). Regardless of this set-back, in 1981 Sandra Lovelace appealed to the United Nations Human Rights Committee (UNHRC). Because her marriage and loss of status registration occurred prior to the International Covenant on Civil and Political Rights, they declined to rule on the matter. The UNHRC, though, did rule that *The Indian Act* violated section 27 of the International Covenant, which protected culture, religion, and language. Through this ruling, it became evident that Indigenous women

had rights that international forums recognized and were willing to protect (Silman; Stevenson).

When Canada's constitution was patriated in 1982, it included the Charter of Rights and Freedoms. Section 15 of the Charter guarantees the right to live free from sex discrimination.¹⁰ In 1985, *The Indian Act* was amended through Bill C-31, purportedly to bring it in line with the Charter. Through this amendment, many Indigenous women, once involuntarily enfranchised for marrying non-Indian men, were *re-instated* as status Indians, whereas their children were *registered* for the first time.¹¹ With registration, they also became entitled to their treaty rights.

Nonetheless, through the creation of what is commonly referred to as the second-generation cut-off rule, the grandchildren of the Indian women once enfranchised for marrying out continued to be denied status registration and consequently their treaty rights. The second-generation cut-off rule references the fact that after two generations of having children with non-status partners, status registration is no longer passed on. Sharon McIvor's situation is illustrative of the government of Canada's continued unwillingness to resolve all the sex discrimination (Eberts; Day and Green). Because McIvor's status entitlement moved through her mother line rather than her father line, she was prevented from passing on status registration to her son. Unfortunately, as was the case in 1985 with Bill C-31, the legal remedy encoded in Bill C-3 and brought forward through McIvor's effort also failed to resolve all the remaining sex discrimination.¹² In sum, despite the efforts of Two-Axe Early, Corbiere-Lavell, Bedard, Lovelace, and more recently McIvor—the 155-year (as of 2012) history of blatant sex discrimination in *The Indian Act* continues.

Part Two: Unknown and Unstated Paternity

An additional form of sex discrimination that pertains to the children of Indian women, where a father or a grandfather is of unstated, unreported, unnamed, unknown, unacknowledged, unestablished, or unrecognized paternity, exists.¹³ Disturbingly, and regardless of the Charter of Rights and Freedoms, this form of sex discrimination was introduced through the 1985 amendment to *The Indian Act*. While previously there were provisions in *The Indian Act* where a child born out-of-wedlock, and a child of unknown and unstated paternity, was registered along with their status Indian mother, the current *Indian Act* is now silent on this very issue. In short, the government of Canada removed the provisions that once protected these children. To address this intentional and carefully crafted legislative silence, INAC (now AANDC) developed an unstated paternity policy, and it is this very policy¹⁴ that the Registrar relies on when

determining Indian status entitlement in situations where a father’s signature does not appear on a child’s birth certificate.

Through this unstated paternity policy, the Registrar is directed to interpret all situations of unstated, unreported, unnamed, unknown, unacknowledged, unestablished, or unrecognized paternity as a non-Indian man. Today, when a child is born to a status Indian mother and a status Indian father, and for some reason the father’s signature is not on the child’s birth certificate, AAN-DC assumes the father is non-Indian.¹⁵ Alternatively stated, all situations of non-identified paternity are assumed to be non-Indian. This practice is also referred to as a negative assumption of Indian paternity.

As a result of this negative assumption of Indian paternity, a child *potentially* loses their right to Indian status registration and thus their treaty rights.¹⁶ Some might ask, “Why do you add the word potentially?” This is a good question and this is where the issue becomes somewhat complex. Since 1985, status Indians are registered either under section 6(1) status or under section 6(2) status. Section 6(1) status is best viewed as a stronger form of status, meaning a mother can pass on status in her own right regardless of their child’s paternity. Section 6(2) status, though, is a weaker form of status in that a mother cannot pass on status to her child in her own right.¹⁷ In this latter situation, where the mother is registered under section 6(2) and the father’s signature is not on

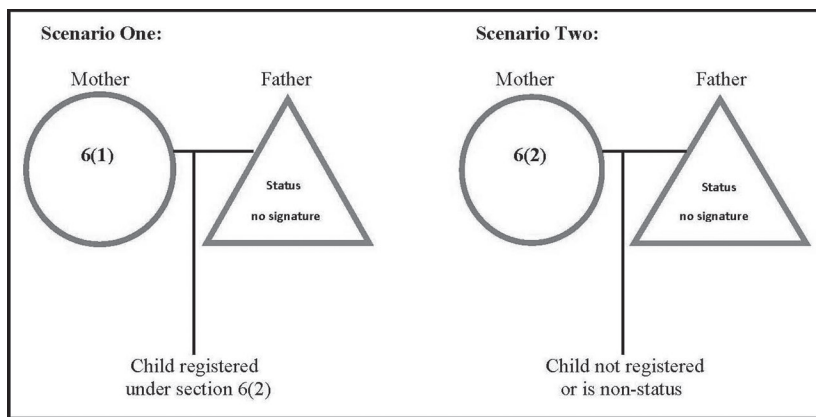


Figure 1: The Effects of Aboriginal Affairs and Northern Development Canada’s Unstated Paternity Policy

the child’s birth registration form, the child is hit with the second-generation cut-off rule, discussed above, and denied status registration.

In sum, there are two scenarios that result from AANDC applying a negative assumption of Indian paternity. In scenario one, a child born to a section 6(1)

mother and a status Indian father who does not sign the child's birth certificate is registered under section 6(2). In scenario two, a child born to a section 6(2) mother and a status Indian father who does not sign the child's birth certificate is a non-status person due to the second-generation cut-off rule. To help convey this complexity see figure 1 above.

Part Three: How it Affects Me and My Advocacy Efforts

Certainly I was focused on the events that led up to the 1985 amendment to *The Indian Act*. I was curious if I would be entitled to Indian status registration through this amendment. I was unsure, though, how my unknown paternal grandfather would be factored into the equation of entitlement. As I have discussed previously in *The Queen and I*, I began the process of learning about my ancestry from my *kokomis* (grandmother), followed by conducting the necessary archival research. In this oral and archival research I needed to establish a clear link to an ancestor that was recognized as an Indian through the use of vital statistic records such as birth, marriage, and death certificates. After many years of archival research, I was successful in having my *kokomis* registered under section 6(1) of *The Indian Act*, the stronger form of status.¹⁸ This meant my father was entitled as well. Said another way, as a 6(1) Indian my *kokomis* could, in her own right, pass status on to him.

Although prior to 1985 there were provisions in *The Indian Act* that protected children born out-of-wedlock and of unknown paternity, through my process of applying for Indian status I discovered that in situations of new applications, AANDC's unstated paternity policy is also applied to births that predate 1985 (see Gilbert). This includes me and my father's situation. I was born in 1962 and my father, Rodney Peter Gagnon, was born in 1935 with an unknown paternity. Through AANDC's unstated paternity policy it is assumed my unknown paternal grandfather was, or is, a non-Indian person. Thus, as a child of unknown paternity it was determined that my father was only entitled to registration under section 6(2) of *The Indian Act*, the weaker form of status, meaning he could not pass status on to me in his own right.¹⁹ Essentially, due to AANDC's policy assumption, I was hit with the second-generation cut-off rule that was codified in the 1985 *Indian Act*. With this denial of Indian status registration I am also denied my treaty rights such as the health care and education rights that registered status Indians are entitled to. Further, I am also denied band membership and citizenship in the larger Anishinabek Nation (Gehl 2012a). Succinctly, because I do not know who my grandfather was, or is, I am denied my treaty rights and I live in exile because the government of Canada assumes my unknown paternal grandfather is a non-Indian man.

I have taken many steps to become registered as a status Indian. In May 2001, my legal representative, Kimberly Murray of Aboriginal Legal Services of Toronto (ALST), filed a section 15 Charter challenge on my behalf and even though Murray has since moved on, ALST has retained carriage of my file. This statement of claim was struck,²⁰ appealed, and subsequently re-filed in October 2002. The discovery, affidavit, and cross-examination process is now complete. Further, the expert reports are in. The next step in my Charter challenge is filing the summary judgement motion that I am more than eager to move on with.

It is important that I stress that I am not alone in my quest for Indian status registration, and as such raising awareness about AANDC's horrific policy is a large part of what I now do. Writing this paper is no exception to this important work. During the 1985-1999 time-period, 37,300 children of so called unstated paternity²¹ were born to mothers registered under section 6(1). During the same time period, 13,000 children of so-called unstated paternity were born to mothers registered under section 6(2) (Clatworthy). These latter 13,000 children lost their right to status registration and their treaty rights. In extrapolating this latter figure forward to 2012 as I have, I calculate that since 1985 as many as 25,000 children have been denied status registration.

The rates of so called unstated paternity for mothers registered under 6(1) are disconcerting where, not surprising, they are higher for younger mothers. For mothers under the age of fifteen years the rate of so called unstated paternity is 45 percent; 15 to 19 years the rate is 30 percent; 20 to 24 years the rate is 19 percent; and for mothers aged 30 to 34 years the rate is 12 percent (Mann 2009). While no figures are offered for mother's registered under 6(2), it is not unreasonable to assume that similar rates apply.

In reviewing these figures, and in thinking about this issue, we must be careful not to assume that mothers are to blame. Raising awareness about this is central to my advocacy efforts. There are many reasons why fathers' signatures are lacking on birth registration forms. For example, some mothers are victims of sexualized violence such as incest. These situations are best known as unstated, unreported, and unnamed paternity as mothers do not record the father's name on the birth registration form, nor gain his signature as a mechanism to prevent him from having access to the child. In some situations the child was conceived through sexual violence such as rape, gang rape, sexual slavery, or prostitution. These situations are best known as unknown paternity as the father is not known to the mother, child, or grandchild. In other situations a father may refuse to acknowledge or establish the paternity of their child. For example, when a mother records the father's name on the child's birth registration form, yet in his desire to avoid child support payments and/or to preserve a previous relationship he refuses to accept responsibility for the child. Another situation is unrecognized paternity where a mother does record the

father's name but because his signature is not obtained government officials blank out his name. One such example of this latter situation is when a father dies prior to the birth of his child (see also Mann 2006).

In an effort to raise awareness about the continued sex discrimination in the AANDC's unstated paternity policy, I have sought out and gained endorsements from three Indigenous women's organizations. In February 2008, September 2009, and November 2009, the Assembly of First Nations Women's Council, the Native Women's Association of Canada (NWAC), and the Ontario Native Women's Association (ONWA) endorsed the importance of my court case. Further to this, although without funding, in September 2010, I ambitiously launched a National Strategy to Raise Awareness on Unknown and Unstated Paternity and *The Indian Act*. It is important that I reach the people most affected by AANDC's policy and as such, as part of my National Strategy, I created a personal website²² dedicating a significant amount of space to articles and posters on this matter. Many of these materials are geared toward reaching community people and consist of several short articles such as *Quick Facts*. I have also written numerous community articles which have been published in *Anishinabek News* and the ONWA newsletter, and I also created a short video titled, *Discrimination and The Indian Act*, which can be accessed at my website. Further, to reach community people across Canada, I also created a Facebook group: "Unknown and Unstated Paternity and *The Indian Act*." As of August 2012, I have over 900 members and it is growing every week.

Conclusion

For years, Indigenous women such as Mary Two-Axe Early, Jeannette Corbiere-Lavell, Yvonne Bedard, Sandra Lovelace, and Sharon McIvor have worked tirelessly to eliminate the sex discrimination in *The Indian Act*. Regardless of their efforts, and despite living in a post Charter era, two attempts at remedial legislation—1985 and 2011—have led to new forms of sex discrimination. Clearly, legislative change intended to eliminate sex discrimination should be more than about the government of Canada taking it as an opportunity to create additional forms of sex discrimination. Indigenous women and their longtime efforts are deserving of more respect than this. To manipulate their agency, as the government of Canada has, is a national disgrace. As discussed in this paper, one such new form of sex discrimination is AANDC's unstated paternity policy. Through this policy, today when a father's signature is not a part of their child's birth certificate, AANDC assumes the father is non-Indian. Due to this policy, I estimate that as many as 25,000 children born to mothers registered under section 6(2) of *The Indian Act* have been denied status registration and consequently their treaty rights. Disturbingly, in the unfortunate

event where Indian women are victims of sexualized violence that prevent them from being able to name fathers and thus gain their signatures, AANDC's policy assumption remains. Mothers must not bear the brunt of this unconscionable policy. Indian women and their babies are deserving of more than being the targets of the government of Canada's desire to eliminate status Indians and the treaty responsibilities that this country is founded on.

Although it has been 27 years since *The Indian Act* was amended to bring it in line with the equality provision of the Charter of Rights and Freedoms, I have yet to experience the liberation it claims to contain. Moving beyond my personal need, though, it is for young mothers and their children that I do the advocacy work I do. Enough is enough!

¹The 1985 and 2011 amendments to *The Indian Act* did not resolve all the sex discrimination. Further, they created new forms of sex discrimination. See Eberts; Gehl (2006); McIvor (2004, 1995); Palmater.

²Unstated paternity, alternatively know as unreported and unnamed paternity, references situations where a child is conceived through sexual violence or incest, where a mother does not record the father's name on the birth registration form, nor gain his signature because she does not want him to have access to the child. Unknown paternity references situations where a father is not known to the mother, child, and grandchild because the child was conceived through sexual violence such as rape, gang rape, sexual slavery, or prostitution. Other situations include unacknowledged paternity, or alternatively unestablished paternity, where a mother records the father's name on the child's birth registration form, yet he refuses to sign because he needs to protect his standing in the community, and/or a marriage to another woman, and/or to avoid child support payments. Another situation is unrecognized paternity where a mother records the father's name on the birth registration form, but because the father's signature is not obtained, a government official blanks out his name. Alternatively stated, the father's name is removed. It must be appreciated that in many situations the father is not present during the birth of the child, such as when the mother is flown out of her community to give birth. Furthermore, sometimes the father dies prior to the birth of the child.

³As an Indigenous person I prefer the term story rather than narrative.

⁴Formerly Indian and Northern Affairs Canada (INAC).

⁵It is important to link the relationship between Indian status registration and treaty rights. For the most part, a non-status Indian is not entitled to treaty rights. Treaty rights were established during the 1764 Treaty at Niagara (Borrows; Gehl 2011). While many Indigenous Nations in British Columbia and Ontario are currently in the process of negotiating individual land claims

and self-government agreements, registered status Indians are entitled to their treaty rights established in 1764.

⁶The government of Canada is invested in calling these treaty rights “programs.” This is their colonial position.

⁷Many have written about the history of the Indian status registration provisions in *The Indian Act*: Bear, Cannon, Day and Green, Eberts, Gehl (2006), Jamieson, McIvor (2004, 1995), Palmater, Silman, Stevenson, and Wherrett.

⁸Enfranchisement best translates to no longer being an Indian.

⁹Often times this is referred to as “marrying out.”

¹⁰April 17, 2012 marked the thirtieth anniversary of the Charter of Rights and Freedoms. Possibly needless to say, I did not celebrate.

¹¹Statistics Canada reports that by the end of 2002, more than 114,000 individuals gained status registration through the 1985 amendment (O’Donnell and Wallace).

¹²Notwithstanding the remaining discrimination, it has been estimated that through the 2011 amendment as many as 45,000 grandchildren of Indian women once enfranchised for marrying out will gain the right to status registration (Day and Green; O’Donnell and Wallace).

¹³See footnote 2; herein after referred to as unknown and unstated paternity.

¹⁴While AANDC may argue that there is no such policy, but rather that they follow a procedure, the outcome is the same. I use the word “policy” to mean a procedure taken.

¹⁵AANDC’s unstated paternity policy also applies to situations where a non-Indian mother has a child with a status Indian father and the father’s *signature* is not on the child’s birth certificate.

¹⁶Under this policy, the father’s *signature* is required on the child’s birth registration form, regardless of marital status, for it to be factored into the process of determining status registration.

¹⁷These rules about section 6(1) and section 6(2) also apply to status Indian fathers.

¹⁸I have learned that my uncle Stewart likes to be credited as helping me in this endeavour. While Stewart was on his own journey and it was great to have his brief company, it was largely through my archival research that we were able to find the missing link to have my grandmother and father entitled to registration. Stewart was also registered.

¹⁹To recap, my *kokomis* was registered as a 6(1), my father as a 6(2), and I am not entitled.

²⁰The process of striking my claim, in my opinion, was a Department of Justice strategy of delay, rather than my lawyer taking the wrong action as some people who lack critical awareness may think (Gehl 2012b).

²¹As I have stated, many situations are subsumed under this unstated paternity

policy. In this way, the policy title is a misnomer and blames mothers. Again, see footnote 2.

²²Thank you to friend and ally Pegi Eyers for helping me set up my website.

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