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## Indian Registration: Unrecognized and Unstated Paternity

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### Introduction

Since the enactment of Bill C-31 in 1985, the provisions of the *Indian Act* relating to Indian<sup>1</sup> registration and Band membership have been the source of litigation and policy challenges.

Bill C-31 was intended to address gender discrimination arising from previous provisions of the *Indian Act*,<sup>2</sup> which provided that an Indian woman who married a non-Indian man lost her Indian registration and band membership, as did their children. By contrast, an Indian man who married a non-Indian woman did not lose these entitlements, nor did his children, while his wife could actually gain Indian status and band membership.

While Bill C-31 attempted to deal with this gender-based discrimination, it has not been entirely successful. Allegations of gender-based discrimination remain, now focused on subsections 6(1) and 6(2) of the *Indian Act*.<sup>3</sup> These allegations include issues relating to Indian status, band membership, and the stigmatization and exclusion of Bill C-31 reinstates. Another significant gender concern is that the patrilineal legacy of the *Indian Act* provisions survives in current federal policy relating to the registration of children with “unstated” or “unrecognized” paternity.

The current *Indian Act* now contains two main categories of Indian registration. Children born after 1985 are registered as Status Indians under subsection 6(1) if both parents are or were entitled to registration, and under subsection 6(2) if one parent is or was entitled to registration under subsection 6(1). Thus, section 6 translates into a loss of registration for successive generations where both parents are not Registered Indians or are not recognized as such.

Following the 1985 amendments, Indian and Northern Affairs Canada (INAC) registry policy was changed to require the father’s signature on the birth form and other forms of proof of paternity, in the absence of which the child’s registration would be determined solely on the basis of the mother’s entitlement.

As a result, many children are either registered incorrectly, or not registered at all where paternity is not established in accordance with the Registrar’s policy at INAC. Non-reporting or non-acknowledgment of a Registered Indian father may result in the loss of benefits and entitlements to either the child or his or her subsequent children through the loss of registration.

Ultimately, Indian registration confers tax benefits for those with reserve-based property, membership in bands whose membership is still determined by INAC, and access to national programs such as post-secondary education and the Non-Insured Health Benefits Program. These benefits conferred by registration and Band membership are often of great importance to women as primary caregivers of children.

Given high rates of unstated and unrecognized paternity in the First Nations community, fundamental questions arise concerning the Registrar's policy and the determination of registration and accompanying Band membership for many children born after 1985.

## The Registrar's Policy

Subsequent to the 1985 amendments, INAC registry policy was changed to require proof of paternity, in the absence of which the child's registration would be determined solely on the basis of the mother's entitlement. The INAC policy pertaining to Indian registration is similar across all regions. Currently the Registrar accepts the following birth evidence as it relates to proof of paternity.<sup>4</sup>

5.1.5 Births—All births must be accompanied by:

- (i) a Vital Statistics birth record or extract which identifies the parent(s) by name,\* but:
  - (a) if the named father is claimed to be incorrect, the applicant must contact Vital Statistics to obtain an amended birth registration that either changes the name of the father or is silent on paternity; or,
  - (b) if the birth document is silent on paternity but Indian paternity is claimed, then statutory declarations by the parents (see (c) and (d) below and examples for mother and father at Annex C) confirming paternity will be required to substantiate the claimed father;
  - (c) statutory declarations must always be completed and witnessed in front of a person authorized as a commissioner for the taking of oaths (either by the Province or Territory) such as a lawyer, Notary Public or Justice of the Peace, or by an INAC official authorized under s.108 of the *Indian Act* to witness statements of this kind;
  - (d) if the father (for (b) above) is deceased, the Registrar will require statutory declarations from at least two close relatives of the deceased father (e.g., grandparent, aunt, uncle, sibling, etc.) who are aware of the circumstances of the child's birth and who can identify the father from their own personal knowledge. Each statutory declaration is to describe: how the person making the declaration came about this knowledge; identify what relationship they have to the child; and, provide their full name, date of birth, and band name and number.

- (iii) a completed *Child Application for Registration as an Indian* form with the signed Parental Consent Statements by the parent(s) or legal guardian, whether Indian or non-Indian, requesting the child's registration and indicating in which Registry Group (of which parent) they wish the child to be registered.

Thus, while the two-parent rule is contained in the *Indian Act*, the evidentiary and administrative requirements for proof of paternity are established entirely as a matter of INAC policy. As noted by the Standing Committee on Aboriginal Affairs and Northern Development (1988: 46:15): "There is no provision in the amended *Act* that stipulates particular evidentiary requirements at the initial application stage for entitlement to registration or band membership."

Nonetheless, non-reporting or non-acknowledgment of a Registered Indian father may result in the loss of benefits and entitlements to either the child or his or her subsequent children through the loss of registration.

For example, if a First Nations woman entitled to subsection 6(1) registration has a child with unestablished paternity, that child is automatically entitled to subsection 6(2) registration. If the First Nations woman is registered under subsection 6(2) herself, then her child is not entitled to registration as a Status Indian. Similarly, the child of a non-registered woman with an unnamed registered father will not be entitled to registration.

## Critical Impacts

The gravity of the unstated paternity problem is evident in statistics gathered indicating unstated fathers for children born to subsection 6(1) registered women. Clatworthy (2003a:2–3) found that an analysis of the Indian register for children born to women registered under subsection 6(1) between April 17, 1985 and December 31, 1999 indicated roughly 37,300 children with unstated fathers. This number represents about 19% of all children born to subsection 6(1) registered women during that same period.

Further, while direct numbers were not available for children with unstated fathers born to subsection 6(2) registered women, Clatworthy (2003a:3) estimates that as many as 13,000 may have unstated fathers and are therefore ineligible for registration. Clatworthy (2003a:4) has also observed that during the 1985–1999 period, about 30% of all children with unstated fathers were born to mothers under 20 years of age.

More specifically, a study (Clatworthy 2001) prepared for the Manitoba Southern Chiefs Organization (SCO) highlights the impacts of the operation of subsections 6(1) and 6(2) as they interact with high rates of unstated paternity.

More than 29 percent of the Registered Indian population of SCO First Nations is registered under section 6(2). Among children (aged 0–17 years), section 6(2) registrants form more than 48 percent of the population.

The high concentrations of SCO children registered under 6(2) result in part from very high rates of unstated paternity. More than 30 percent of all SCO children born since Bill C-31 was enacted have unstated fathers, a rate nearly twice the national average (iii).

Clatworthy's conclusions (2001:v) for SCO First Nations included a finding that with an ever-increasing number of descendants not entitled to registration, sometime during the fifth generation, no further descendants will be so entitled.

The benefits conferred by registration and membership are of great import to First Nations women, who remain most often the primary caregivers of children. Aboriginal women in Canada experience lower incomes and higher rates of unemployment than Aboriginal men or other women, and in 1996, Registered Indians had by far the highest proportion of single mother families (Hull 2001: x). In 1996, more than 25% of Registered Indian children lived in single mother families, compared to 14% of non-Aboriginal children (Hull 2001:xi). Aboriginal women aged 15–24 years were found to be more than three times as likely to be single mothers than the general population in that age group, with about one in three Aboriginal mothers single (Hull 2001: xi).

There are also additional non-tangible benefits that registration may facilitate such as personal, community, and cultural identification:

I want my children to experience the feeling of belonging because before that, I don't feel that we did, I did, I didn't belong. And my children would like to have status whether there's anything involved in that, except its sort of a recognition kind of a thing. They would like to have it and I think they should have it. There's sort of an unspoken thing for people who have status, its legal. (Huntley and Blaney 1999:40).

While many First Nations women and their children experience the detrimental effects arising from unstated or unrecognized paternity, teenage mothers and their offspring may suffer disproportionately. The negative impact on First Nations women and their children resulting from the two-parent rule and proof of paternity requirements arguably constitutes discrimination based on gender and family status.

Focus group participants in hearings held by the Special Representative on First Nations Women's Issues found the requirement for First Nations women to identify the paternity of their children to be "offensive, degrading, discriminatory, and a potential violation of the rights of Aboriginal women to privacy" (Erickson 2001:27).

In addition, the two-parent rule, and its resulting impacts of reducing the registered population over two generations of successive out-parenting is perceived as further governmental attempts at genocide, assimilation, and gradual elimination of the Registered Indian population (AFN 1999).

## **Critical Causes**

Having established the detrimental impacts experienced by women and their children with unstated or unacknowledged Indian paternity, it is crucial to consider

why this situation is occurring, and what can be done to address it. The causes underlying unstated paternity are too great to cover in the detail they merit in this chapter, but they range from administrative issues to a decision not to name the father by the mother.

Unacknowledged paternity can be said to arise where the mother names the father but not in accordance with the requirements of provincial Vital Statistics or INAC policy, thereby causing paternity to be considered unstated. Frequently, in the literature, the language of “unstated paternity” subsumes both the categories of unacknowledged and unstated paternity. Clatworthy (2003b) estimated that approximately 50% of unstated paternity cases are considered to be unintentional on the part of the mother, while the other 50% are deemed intentional.

### ***“Administrative” Difficulties***

On the administrative end, problems have been identified with the registration of birth form, which is completed by the mother in hospital (except in Quebec) and names the father along with other details of the birth. Where the birth occurs outside of a medical facility, the parents have 30 days to file the form. Administrative requirements differ between regions, but in most provinces the registration of birth form must be signed by both parents where they are not married. Where the parents are married, most jurisdictions require only one parent’s signature (Clatworthy 2003a:14).

Where the form is not signed by both as required, Vital Statistics in that province contacts the parent(s) by mail informing them of the requirement. Where the signature is still not collected within approximately 60 days, the father’s name is stricken from the birth registration, if it was present (Clatworthy 2003a:14). The mother may have provided a name but been unwilling or unable to obtain the father’s signature, leading to unacknowledged paternity.

The requirement for the father’s signature on the birth registration form is highly problematic for those parents living in remote communities without medical facilities. Where the mother must travel outside of the community to give birth, the father may not attend and therefore not be present to sign the birth registration.

Vital Statistics staff in all of the regions contacted for this study confirm that they receive many birth registrations which contain the father’s identity, but which have not been signed by the father or accompanied by a joint request form. Subsequent efforts by Vital Statistics to obtain signed documents frequently meet with no response (Clatworthy 2003a:17).

In those remaining areas of the country, Vital Statistics requires only the mother’s signature on the birth registration form, but requires that unmarried parents file a joint request form with both signatures where the father is to be acknowledged. Again, Vital Statistics sends out a reminder and if the joint request form is not received within roughly 30 days, the fathers’ information is stricken from the birth registration form.

The difficulties and expense inherent in amending birth registration information are also identified as a cause of unstated paternity. Clatworthy (2003a:14–15) noted that most regions allow for changes to be made free of charge during the first 60 days after registration. Changes may still be made after this time by filing a joint request form, affidavit, or declaration of paternity document, containing the father's particulars and signed by both parents. However, requirements in most regions for witnessing and notarization along with administrative fees render amendment to birth registration complicated and potentially expensive.

Problems with registering the father with Vital Statistics then lead to problems with obtaining Indian registration given that INAC's requirements include birth registration showing the father's name.

As noted earlier, where the birth document is silent on paternity but Indian paternity is claimed, INAC requires statutory declarations by the parents to substantiate the father. However, statutory declarations remain problematic given that commissioners of oaths are not easily located in remote communities and generally charge a fee for their services. In addition, registration of a birth with INAC requires a completed *Child Application for Registration as an Indian* form accompanied by signed parental consent statements by both parents, where paternity is stated.

Clatworthy (2003a:17) also pointed to "lengthy delays" between birth registration and Indian registration as creating additional barriers to paternal identification as the passage of time may create increased difficulties in amending birth registration. Such difficulties include relationship problems between the mother and father, increased evidentiary requirements, and charges or fees.

### ***"Substantive" Difficulties***

At the opposite end of the spectrum is the situation whereby the mother decides not to state the father, or the father refuses to acknowledge paternity. Underlying causal factors may include the mother and father having an unstable relationship, concerns about confidentiality in a small community, and the mother's concerns about child custody and access, or her own registration and membership (Clatworthy 2003a:18). In addition, the pregnancy may be the result of abuse, incest, or rape, in which case the mother will likely be unwilling or unable to identify the father:

Thus, single mothers concerned with protecting their children's birthright face a difficult choice: either they submit to an invasion of their privacy and the ensuing social repercussions which may arise in the context of a patriarchal society or they forfeit their children's right to status. Although, it may not be in a father's interest to acknowledge his child, if he fears being held financially responsible, for example, or happens to be married to someone else, an affidavit signed by him acknowledging paternity must be produced in order to register a child as "Indian." The mother may also not wish to disclose the identity of the father, in particular, in cases of sexualized violence. Not only dehumanizing, but to put a woman into the position of having to ask her rapist for the confirmation of his deed

is more than absurd. Regardless of the circumstances, women are placed at the mercy of the father's consent (Huntley and Blaney 1999:24).

It has also been noted that single First Nations mothers often feel that the father's background should not be a factor where he is not an active member of the family and that to require his acknowledgement is culturally inappropriate.

If one does not name the father of one's child, it is assumed the child's father is non-Indian. This is racist, sexist and is directly against women's cultural rights. Culture is transmitted largely through women ... and therefore a child with an Indian mother is an Indian regardless of biological paternity. (Holmes 1987:25).

## Charter Compliance

### Section 15

The most relevant section of the Charter is subsection 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.

As far back as 1988, the Standing Committee on Aboriginal Affairs and Northern Development noted residual sex discrimination in the requirement for unmarried Indian women to name the father of their children to establish their children's entitlement to registration and band membership (Standing Committee 1988:46:35).

The case of *Villeneuve, McGillivray v. Canada* deals directly with the unstated paternity issue: a re-amended statement of claim was filed with the Federal Court in 1998, though the case does not appear to have progressed further. According to the statement of claim, the plaintiffs challenged the entitlement to registration of a child who was born to a Registered Indian mother and father. The mother, however, elected to keep the identity of the plaintiff's father undisclosed. Accordingly, the child was registered under subsection 6(2) of the *Indian Act* as having only one Registered Indian parent. Among other allegations, the plaintiffs claimed that Canada has violated their right to equality under the law by following a departmental policy that discriminates against applicants for Indian registration on the grounds of both sex and family status. One remedy sought was that the policy regarding proof of paternity be declared of no force and effect.

In *Gehl v. Canada (Attorney General)*, the plaintiff Lynn Gehl brought a claim against the government for her denial of registration on the basis that her father had unstated paternity, leaving him registered under subsection 6(2). Partnered with a non-registered person, her father was then unable to pass registration on to his daughter, the plaintiff. In this case, Ms. Gehl argued that she was discriminated against on the basis of her family status, given that a distinction is created between Aboriginal children of wed and unwed parents. A burden is imposed upon children of unwed parents and their offspring in the form of a more onerous

requirement of proof than that imposed on other applicants for registration. She further alleged that the negative presumption of paternity is based on stereotyping of Indians of unwed parents that goes to their human dignity. Finally, she alleged a breach of her section 15 equality rights to be registered as an Indian and a breach of her Aboriginal rights under s. 35 to be an Indian and member of her Aboriginal community. Unfortunately, this case was not decided on the merits by the Ontario Court of Appeal, which found that it had been brought in the wrong form to the wrong court.

Similarly, section 3 of the *Canadian Human Rights Act*, which prohibits discrimination on the grounds of sex, marital, and family status among others, would also apply were it not for section 67 which exempts the *Indian Act*. In 2000, the *Canadian Human Rights Act Review Panel* (p. 135) recommended removal of section 67 from the Human Rights Act, but to date it remains.

### ***The Trociuk Case***

A section 15 Charter equality case that may have implications for federal policy is *Trociuk v. Attorney General of British Columbia*, a 2003 decision of the Supreme Court of Canada. In this case, an estranged non-Aboriginal father and mother of triplets were battling over the mother's legislated right to fill out and submit the statement of live birth on her own, marking the father as "unacknowledged by the mother." She alone chose and registered the children's surname, pursuant to the British Columbia *Vital Statistics Act*, and the father was precluded from having the registration altered to include his particulars.

In what appears to be a first in Canada, section 15 equality rights under the Charter were successfully employed by the father to defend the interests of men. The court found that the statutory absolute discretion conferred on British Columbia mothers to "unacknowledge" a biological father on birth registration and in naming children discriminated on the basis of sex and could not be defended by the saving provisions of section 1 of the Charter. Such a provision violated the human dignity of biological fathers.

However, as the Supreme Court duly noted, there are circumstances where a biological father will be appropriately unacknowledged.

There may be compelling reasons for permitting a mother to unacknowledge a father at birth, to exclude his particulars from the registration, and to permanently preclude his participation in determining the child's surname. Such is the case of a mother who has become pregnant as a result of rape or incest. (para 25)

The court then cited a justice who heard the case at the British Columbia Court of Appeal level.

Newbury J.A. held, and counsel for the respondent, Reni Ernst, argued, that in cases where a mother has good reasons for unacknowledging a father, providing the latter the opportunity to dispute the unacknowledgment would lead to negative effects. Newbury J.A. reasoned that such an opportunity would be "a serious



incursion into the interests of the mother” and would not be in the best interests of the child. (para 26)

Finally, the court concluded:

An application procedure could be designed to control the particular negative effects on mothers that may flow from post-unacknowledgment applications. Such effects include unwanted public disclosure of the identities of fathers who have been justifiably unacknowledged, and confrontation in court between mothers and men who have caused them harm. *Prowse J.A.* has proposed a procedure that would eliminate both these effects. The legislature could provide that a judge in chambers would alone determine whether a father has been justifiably excluded, based solely on affidavit evidence. (para 38)

It is noteworthy that the Supreme Court considered that such a procedure could be said to have ameliorative purposes or effects for two disadvantaged groups pursuant to subsection 15(1) of the Charter: women who have valid reasons to unacknowledge a father, and their children (para 27). Such an ameliorative procedure would not be discriminatory in its treatment of biological fathers.

## International Compliance

Over the years, INAC has endeavoured to develop viable policy options that are responsive to both pending domestic litigation challenges and Canada’s international commitments; commitments that many Aboriginal women say are being broken.

The Aboriginal child deprived of his or her status, or of band membership, is thus deprived of the right to take part in the life of his community, contrary to the provisions of Article 27 of the *International Covenant on Civil and Political Rights*, to the almost identical provisions Article XII of the *American Declaration of the Rights and Duties of Man*, which binds Canada since it became a member of the Organization of American states, in January of 1990 and of article 30 of the *Convention on the Rights of the Child* (NWAC and QNWA nd: 9).

Two separate but interconnected groups are impacted by the Registrar’s unstated paternity policy: children of unwed parents, and their mothers. Those international covenants considered most applicable are canvassed below.

The *Universal Declaration of Human Rights* as the first of the modern human rights treaties forms the basis for the more specific conventions that followed. Article 2 of the Declaration provides for freedom from discrimination on the basis of numerous characteristics, including sex and birth, while Article 7 states that all are equal before the law and are entitled without discrimination to equal protection of the law. Article 25 might provide fodder for an international challenge to the unstated paternity policy, given the implications for the mother and child’s standard of living where there is a denial of registration:

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment,

sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

With respect to children who may be denied registration as a result of unstated or unrecognized paternity, the *Convention on the Rights of the Child* may apply. Article 2 of the Convention provides that state parties shall respect and ensure the rights within, without discrimination of any kind, irrespective of the child's or his or her parent's sex, or birth. Article 8 protects a child's right to preserve his or her identity, including nationality, name, and family relations as recognized by law and without unlawful interference. Article 30 provides that children of Indigenous origin "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture."

The *International Covenant on Civil and Political Rights* provides protection from discrimination on the grounds of sex and birth in Article 2, while Article 26 provides the standard equality before and equal protection of the law provisions. Article 17 addresses individual privacy rights:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.

As noted by the Quebec Native Women's Association (2000:12):

Consequently, the administrative policy requiring that unmarried women name the father of their child, failing which, the father is presumed to be non-Indian is incompatible with Canada's international obligations. This policy forces the mother to reveal the identity of the Aboriginal father to avoid gravely penalizing her child. It constitutes arbitrary interference with her privacy, contrary to the provisions of Article 17 of the *International Covenant on Civil and Political Rights*.

Article 27 of the *International Covenant on Civil and Political Rights* guarantees that persons belonging to ethnic minorities may enjoy their culture in community with other members of their group. Article 27 was the basis for the success of *Sandra Lovelace v. Canada* at the United Nations Human Rights Committee in 1981, where Sandra Lovelace challenged the now infamous *Indian Act* provisions wherein a woman lost Indian registration upon "marrying out." In 1985 the government responded to this international criticism with Bill C-31, restoring registration to these women.

In fact, in 1999, the Human Rights Committee was still commenting on Lovelace:

The Committee is concerned about ongoing discrimination against Aboriginal women. Following the adoption of the Committee's views in the Lovelace case in July 1981, amendments were introduced to the *Indian Act* in 1985. Although the Indian status of women who had lost status because of marriage was reinstated, this amendment affects only the woman and her children, not subsequent generations, which may still be

denied membership in the community. The Committee recommends that these issues be addressed by the State party (para 19)

Most recently in 2003, the Committee on the Elimination of Discrimination Against Women expressed “serious concern” “about the persistent systematic discrimination faced by Aboriginal women in all aspects of their lives.” The committee urged Canada to accelerate its efforts to eliminate discrimination against Aboriginal women, particularly with respect to remaining discriminatory legal provisions and the equal enjoyment of their human rights to education, employment and physical and psychological well-being. It urged Canada to combat patriarchal attitudes, practices, and stereotyping of roles relating to Aboriginal women and requested “comprehensive information on the situation of Aboriginal women” in Canada’s next report (paras 361–362).

## **Critical Options**

This paper proposes a variety of options that explore ways to address the needs of First Nations women and their children with unstated paternity, in relation to registration and in a manner consistent with the legal environment.

It is the opinion of the author that the numerous challenges cannot be resolved without addressing INAC policy in a fairly fundamental way.

### ***1. Maintain the Status Quo***

The first option is self-explanatory: maintain the status quo, do nothing, but wait and see where litigation and political pressures take INAC. Advocates of this approach posit that it avoids making premature changes that will run counter to the demands flowing from current, unresolved challenges.

The least proactive of all options, it does not address what is likely to be increasing litigation on the issue and the possibility of a high court decision rendering the policy inoperable. It also does not address the political environment, in which many First Nations’ men and women increasingly challenge the legitimacy of the federal government’s defining “Indianness.” Nor does it address the children who suffer for the actions or oversights of their biological parents under a policy that is not in their best interests.

### ***2. Departmental Prioritization***

Departmental prioritization of the unstated paternity issue could include more targeted research and exploration of policy options, including the involvement of focus groups and vetting by stakeholders, most particularly within the First Nations community and by First Nations women.

Although some modest research as well as educational and administrative initiatives regarding unstated paternity have been undertaken, the issue requires greater commitment from the Department. While recognizing that unstated

paternity issues have regional and First Nation-specific characteristics, INAC could develop and implement a national initiative with stakeholder input.

The Report of the Special Representative recommends that the government conduct a Bill C-31 impact study and that the terms of reference for this study be developed with Aboriginal people at the grassroots (Erickson 2001:33). The Special Representative also calls for more involvement of and funding for Aboriginal women's groups so that they can make submissions to government and participate in consultation processes (Erickson 2001:50). The Aboriginal Women's Action Network (AWAN) has also called for related national conferences, qualitative research projects, and evaluation of INAC's implementation of C-31 (Huntley and Blaney 1999:75).

While departmental prioritization is an improvement on the status quo, the unstated paternity issue was flagged as discriminatory by the parliamentary Standing Committee as far back as 1988 (p.46:35), allowing sufficient time in the intervening years to address this failing. Departmental prioritization does not address the volume of youth being inappropriately registered or denied registration altogether every year and the resulting impacts on their quality of life and well-being. Nor does it take into account pending and anticipated litigation on the issue.

### ***3. Educational Initiatives***

Any education initiatives pertaining to paternity and Indian registration must be targeted to both men and women. Men must receive an equal educational focus, since they are the fathers whose signatures may be missing or withheld. As noted by a participant at an Aboriginal Women's Roundtable on Gender Equality:

Our biggest problem is our men who are our leaders. They have never lost status, so they need to be educated about this. However, the challenge is how are we going to educate them? This fight has to have the Chief's support. Our job is to protect the next seven generations and we can start the education process right in our own homes (SWC 2000:6).

Clatworthy (2003a:20–22) noted an absence of printed informational material concerning birth, Indian registration, and unstated paternity for distribution to expectant parents, as well as a need for community-based group workshops, information sessions, and other educational initiatives. It is suggested that initiatives specifically focused on teens and pre-teens might begin to address their disproportionate representation in cases of unstated paternity.

Women participating in the Special Representative focus groups commented on the need to educate Aboriginal women on the implications of marriage and paternity for their children. Here, the suggestion was that Canada make funding available to Aboriginal women's organizations to develop these educational materials, and that the government ensure they are widely distributed across Canada (Erickson 2001:22–23 and 31). These women also felt they did not receive adequate information pertaining to government policy changes and consultation

processes and recommended that information be more thoroughly disseminated to the grassroots level (Erickson 2001:48).

INAC could also enhance the role of Indian Registry Administrators (IRAs) who discover and obtain the appropriate supporting documents and signatures for “field events”<sup>6</sup> in their community then report these events to the regional office or enter the events directly in the Indian Register. IRAs are based in First Nations communities and are therefore well positioned to undertake local education initiatives.

While education is generally a valuable initiative, it will not address the current litigation environment, nor will it likely impact upon the ongoing loss of, or incorrect, registration in the near future. Most importantly, while educational initiatives will address some situations in which paternity is unstated, others will remain, such as situations in which the mother will not or cannot identify the father.

#### **4. Remedy “Administrative” Issues**

Administration of the provincial *Vital Statistics Act* contributes to unstated and unacknowledged paternity, given that INAC heavily relies on birth registration for proof of parentage. Addressing some of the following more administrative concerns, (noted by Clatworthy and others), would likely result in a reduction in unstated or unacknowledged paternity:

- Provide accompaniment monies to the father through INAC or band councils when the mother is giving birth outside of the community; he can then be present to sign the birth registration form
- Allow joint request forms for birth registration to be signed in the community prior to the mother leaving to give birth
- Provide more administrative support and interpretation services in communities with respect to preparation of documents, and communications with outside agencies; the government could establish independent local and regional “advocacy” offices or could enhance the role of Indian Registry administrators
- INAC could liaise with provincial/territorial Vital Statistics agencies to discuss where changes might be made to some of the more administrative problems faced, including signing the birth registration form, and subsequent amendments
- Use alternatives to notarization for amendments to the birth registration or occasionally provide a commissioner of oaths to the community, or an INAC official authorized under s. 108 of the *Indian Act*

Administrative measures may assist in reducing the numbers of First Nations children with unstated or unacknowledged paternity, but will not address what is arguably the most grievous of situations, where the mother has reason for not disclosing paternity or the father refuses acknowledgment. It also does

not address the litigation environment and any discrimination existent via the Registrar's policy.

### **5. Registrar's Policy Change**

While the two-parent rule is contained in section 6 of the *Indian Act* the evidentiary requirements for proof of paternity are contained in the Registrar's policy. Policy is changed far more easily than legislation. The 1970 incarnation of the *Indian Act* provided that the child of a registered mother was entitled to registration unless the child's father was proven non-registered. Nothing in the literature reviewed indicates that this approach opened the "floodgates" to registration for children not so entitled.

As far back as 1988, three years after the Bill C-31 amendments, the Standing Committee (1988:46:20) recommended:

We recommend that as there is no legal requirement in the *Act* for unmarried Indian women to name the father of their children in order to establish their entitlement to registration and band membership, the practice be discontinued immediately. An affidavit or statutory declaration simply swearing or declaring the status of the father without naming him should be sufficient to satisfy the requirements of the application for reinstatement.

The Quebec Native Women's Association (2000:13) agrees. "There is no excuse for refusing to discontinue this administrative practice. As stated by the Standing Committee, an affidavit or statutory declaration declaring the status of the father without naming him or requiring his signature, should be sufficient."

The Report of the Special Representative also recommends that the federal government abandon its presumption that the father of a First Nations child is not First Nations absent the requisite evidence (Erickson 2001:28). A policy wherein the child of a Registered Indian woman who swears that the father is also registered, is entitled to registration on the basis of both parent's heritage would address the concerns cited by the Standing Committee and by First Nations women's groups. It would remedy any discrimination arising from the current policy and address unstated paternity litigation, while staunching the flow of loss of and incorrect registration pursuant to the policy.

If INAC and various First Nations have concerns about opening the "floodgates" to incorrect registration, then a policy similar to that contained in the 1970 Act could be instituted, notifying Bands of registration by standard form, and allowing them one year to rebut Registered Indian paternity.

At the very least, INAC policy should be changed to include a *Trociuk*-style amendment, wherein women whose pregnancies are the result of abuse, incest, and rape and who want to "unacknowledge" the father, may file an affidavit as to Registered Indian paternity. This would be an ameliorative approach for those women disadvantaged on the basis of sex, and for those children who are disadvantaged based on the conditions of their birth. The requirement of an affidavit from women who have been victimized would necessitate the availability of

culturally appropriate trained counsellors in order to minimize the potential for re-victimization. Further input into the development of such a process should be obtained from First Nations women's organizations and such counsellors.

### **6. Amend the Indian Act**

INAC could undertake to open up the *Indian Act* and amend the two parent rule contained in section 6, replacing it with one type of registration that could be determined any number of ways including by descent from one Indian parent. This would address the immediate issues concerning Indian women and unstated paternity, as it would no longer be a determining factor for registration of the children of one Indian parent. This would also effectively abolish the second generation cut-off rule.

The Aboriginal Women's Action Network reported that:

To categorise is to separate, divide and exclude. With Bill C-31's new class of "Indians" registered under 6(2), in the future, even more people will be excluded and stripped of their rights...

Because of the second generation cut-off rule contained in the amendment, Bill C-31 has been called the Abocide Bill. In fact, since more and more people fall under the 6(2) category, some bands may only preserve their numbers if their members choose to marry (or have children with) Status Indians. Generation genocide is another term which has been used to describe the long-term effects of the legislation (Huntley and Blaney 1999: 54).

It would also accord with the feelings of some First Nations' women that registration should be determined by the mother. "Women at this focus group feel that if the mother is a Status Indian, then her child should be registered as a Status Indian. One woman stated 'it isn't the government's business who the child's father is.' Another woman stated that 'it should be the women's right to decide the status of their children.'" (Erickson 2001:29)

The women also commented on the divisive nature of categories of registration such as subsection 6(1) and 6(2) created by Bill C-31, with the recommendation that "the categorization of Status Indians should be eliminated." They recommended that subsections 6(1) and 6(2) be repealed and replaced with a provision that states that all persons of Indian ancestry are entitled to be Indian under the *Act* (Erickson 2001:86).

The Aboriginal Justice Inquiry (1991:c. 5) suggested:

Any person designated as a full member of a recognized First Nation in Canada be accepted by the federal government as qualifying as a Registered Indian for the purposes of federal legislation, funding formula and programs.

The category of so-called "Non-Status" or "unregistered" Indians should disappear. It is thoroughly inappropriate for the federal government to possess the authority or to legislate in such a way as to divide a people into those it will regard legally as being members of the group and those it will not, on grounds that violate the cultural, linguistic, spiritual, political and racial identity of these people.

The *Indian Act* should be amended to entitle any person to be registered who is descended from an Indian band member.

It is beyond the scope of this chapter to propose a new registration scheme for the *Indian Act*, though it appears likely that in years to come the *Act* will be subject to increasing challenge. Changes to the *Act* could circumvent some if not all registration-related litigation; however, passing legislation in this area not only takes years but is also not guaranteed to succeed. Legislative amendment may be on the horizon, but is not sufficiently timely to offer the best solution for the unstated paternity issue in the here and now.

### **7. Remove Registration from the Indian Act**

Distaste for the entire registration system emerged in focus groups held by the Special Representative, wherein Aboriginal women voiced the alien nature of the *Indian Act* to Aboriginal culture. These participants felt that the registration and membership provisions of the *Act* should either be amended to respect traditional ways (such as matrilineal heritage) or the *Act* should be abolished altogether in favour of traditional laws (Erickson 2001:23). It has been suggested that the *Indian Act* provisions be replaced with First Nations governance and citizenship codes.

Removal of registration from the *Indian Act* could accord with the trend in jurisprudence pertaining to treaty rights, indicating that entitlement will be determined on whether an individual claimant has a “substantial connection” to the Indian band signatories and descent from one of the original signatory Indians.<sup>7</sup> Courts across Canada have indicated that non-registration under the *Indian Act* is not to be equated with treaty non-entitlement, indicating that there are other more important determinants. A similar rationale could be applied in determining entitlement to INAC’s programming base for Registered Indians.

The *Indian Act*’s determination of Indian registration is likely to be subjected to increasing legal and political challenge in the years to come. However, even more so than amendments to the *Indian Act*, the removal of registration from the *Act* and the subsequent development of alternative First Nations approaches is likely to be a gradual and painstaking process, rendering it a less tenable option for addressing unstated and unacknowledged paternity.

## **Conclusion**

The Registrar’s policy regarding evidentiary requirements for proof of paternity should be amended to allow an unmarried First Nations woman to swear an affidavit or declaration that the other parent of their child is a Registered Indian. At the very least, the Registrar’s policy should be changed to include a *Trociuk*-style amendment.

Further policy and legal analysis should be conducted to ascertain whether this policy change should also apply to non-registered parents (Aboriginal and non-)



who claim a Registered Indian parent of their child, and to determine ways to curb possible abuse.

Further input into the development of such a process should be obtained from First Nations women's organizations and culturally appropriate trained counsellors in order to minimize the potential for re-victimization. First Nations women's and other representative groups are key stakeholders and should be consulted throughout the development of any policy and legislative change, educational initiatives, or administrative approaches. Where necessary, they should receive funding to facilitate their involvement.

Systemic racism and sexism erect barriers to the lives of Aboriginal women and their children, creating and perpetuating their inequality in Canadian society. The many challenging issues faced by Aboriginal women and their children, including poverty, violence, and poor health, do not stand alone, but are rather inextricably interconnected and indivisible from the systemic and pervasive nature of Aboriginal women's inequality in Canadian society.

The roots of First Nations women's systemic inequality are both broad and deep. While Bill C-31 was intended to weed the *Indian Act* of existing gender-based discrimination, its replacement with discriminatory federal policy pertaining to the registration of the children of First Nations women with unstated and unrecognized paternity remains an ongoing cause of oppression of both First Nations women and their children.

## Endnotes

- 1 First Nations and “Indian” are both used to indicate peoples with Indian status pursuant to the *Indian Act*.
- 2 R.S.C. 1970, c. I-6, as am.
- 3 Commonly referred to as the “cousins” and “siblings” impacts.
- 4 Indian and Northern Affairs Canada. 2003. *Policies on Indian Registration*. Ottawa: Indian and Northern Affairs Canada.
- \* (note from source document) Vital Statistics ultimately requires a paternal signature where parents are unmarried, see section on causes.
- 5 Section 7, which provides that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice,” may also be applicable.
- 6 An event occurring on or after April 17, 1985 and delegated by the Registrar to field officers to enter into the Indian Register.
- 7 See for example, *Simon v. The Queen*, [1985] 2 S.C.R. 387.

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