Indian Registration:
Unrecognized and Unstated Paternity

by

Michelle M. Mann

The research and publication of this study were funded by Status of Women Canada's Policy Research Fund. This document expresses the views of the author and does not necessarily represent the official policy of Status of Women Canada or the Government of Canada.

June 2005

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Status of Women Canada thanks those who contribute to this peer-review process.

Library and Archives Canada Cataloguing in Publication

Mann, Michelle M.
Indian registration [electronic resource]: unrecognized and unstated paternity / by Michelle M. Mann.

Issued also in French under title: Inscription des Indiennes et des Indiens : la question de la paternité non reconnue ou non déclarée.
Mode of access: World Wide Web.
Issued also in printed form.
Includes bibliographical references.

ISBN 0-662-40842-X (PDF) ISBN 0-662-40843-8 (HTML)
Cat. no. SW21-120/2005E-PDF Cat. no. SW21-120/2005E-HTML

1. Indians of North America – Canada – Band membership.
2. Indians of North America – Legal status, laws, etc. – Canada.
3. Indians of North America – Civil rights – Canada.
4. Canada. Indian and Northern Affairs Canada.
5. Indians of North America – Canada – Government relations.
6. Acknowledgment of children – Canada.
7. Canada. Indian Act.
8. Indian women – Government policy – Canada.
9. Civil rights – Canada.
10. Discrimination – Canada.

I. Canada. Status of Women Canada
II. Title.

E92.M36 2005 342.7108'72 C2005-980172-7

Project Manager: Beck Dysart and Jo Anne de Lepper, Status of Women Canada
Publishing and Translation Co-ordinator: Cathy Hallessey, Status of Women Canada
Editing and Layout: PMF Editorial Services Inc. / PMF Services de rédaction inc.
Translation: Lexi-Tech International

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“The success that we as a society have in enabling Aboriginal single mothers to improve their circumstances will have a major impact on Aboriginal children and on the future of Canada.” (Hull 2001: xiii).

ABSTRACT

This report proposes and discusses policy options for the Registrar of Indian and Northern Affairs Canada concerning Indian registration and unstated or unacknowledged paternity. The policy intent is to provide recommendations that address the causes and impacts of unstated paternity and uphold the principles of non-discrimination as reflected in the *Canadian Charter of Rights and Freedoms* and international human rights covenants Canada has ratified. The report begins with a brief overview of the relevant *Indian Act* provisions, the Registrar's current unstated paternity policy and the critical causes and impacts of unstated paternity. It moves on to canvass relevant domestic and international human rights law and concludes with a critical appraisal of a variety of policy options and ensuing recommendations.

TABLE OF CONTENTS

ACRONYMS

AFN	Assembly of First Nations
INAC	Indian and Northern Affairs Canada
NWAC	Native Women's Association of Canada
QNWA	Quebec Native Women's Association
SCO	Southern Chiefs Organization
SWC	Status of Women Canada

PREFACE

Good public policy depends on good policy research. In recognition of this, Status of Women Canada instituted the Policy Research Fund in 1996. It supports independent policy research on issues linked to the public policy agenda and in need of gender-based analysis. Our objective is to enhance public debate on gender equality issues to enable individuals, organizations, policy makers and policy analysts to participate more effectively in the development of policy.

The focus of the research may be on long-term, emerging policy issues or short-term, urgent policy issues that require an analysis of their gender implications. Funding is awarded through an open, competitive call for proposals. A non-governmental, external committee plays a key role in identifying policy research priorities, selecting research proposals for funding and evaluating the final reports.

This policy research paper was proposed and developed under a call for proposals in September 2003, entitled Bill C- 31 – Membership and Status - Unrecognized and Unstated Paternity.

Indian status and band membership affect First Nations people throughout their lives. Both are usually necessary for First Nations people, referred to as Indians under the *Indian Act*, to access social services, economic and health-related benefits for First Nations people, and to share in the duties and benefits of citizenship.

Indian women are more adversely affected by non-registration and non-membership than men because they are usually the primary caregivers of children. Without proper registration status and membership for themselves and/or their children, they cannot access schools, post-secondary education, other benefits for the children, adequate housing to accommodate the family, nor can they inherit band property.

Researchers were asked to identify policy alternatives to the present membership and registration requirements of Indians in general, and on unstated paternity issues in particular. The research was required to promote gender equality while recognizing the diversity among First Nations women, and develop policy solutions that take into account the realities of women's lives

Two projects were funded by Status of Women Canada on this theme. The other project examines matrilineal models of First Nations citizenship and community membership policies.

We thank all the researchers for their contribution to the public policy debate.

ABOUT THE AUTHOR

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EXECUTIVE SUMMARY

Arising from legislative changes effected by Bill C-31, the current *Indian Act* contains two categories of Indian registration. Pursuant to subsection 6(1), a child is registered as a Status Indian where both parents of the child are or were entitled to registration, and under subsection 6(2), where one of the child's parents is or was entitled to registration under Section 6(1).

As a simple equation, 6(1) + 6(1) = 6(1), 6(2) + 6(1) = 6(1) and 6(2) + 6(2) = 6(1). However, 6(1) + no registration = 6(2) and 6(2) + no registration = no registration, thereby resulting in a loss of registration over two successive generations of joint registered Indian–non-registered Indian parenting.

Therefore, non-reporting or non-acknowledgment by Indian and Northern Affairs Canada (INAC) of a registered Indian father results in the loss of benefits and entitlements to either the child or the child's subsequent children where there is successive "out-parenting." 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.

Approximately 50 percent of unstated paternity cases are considered to be unintentional, while the other 50 percent are deemed intentional on the part of the mother. Causes of unstated paternity range from those that can be considered more "administrative" in nature to those that are "substantive," such as a decision by the mother not to name the father.

Current INAC registration policy requiring the father's signature and other forms of proof of paternity in order for his registration to factor into the registration entitlement of his child, has resulted in both incorrect and no registration for children.

The gravity of the unstated paternity problem is evident in statistics. Approximately 37,300 children born to women registered under 6(1) between April 17, 1985 and December 31, 1999 were recorded as having unstated fathers. Estimates indicate that as many as 13,000 children of 6(2) registered mothers in that same time period may have unstated fathers and are therefore ineligible for registration.

The benefits conferred by registration and membership are of great import to First Nations women who remain most often the primary caregivers of children. The impact on First Nations women imparted via the two-parent rule and proof of paternity requirements has been alleged to constitute gender-based discrimination against Indian women and birth/family status-related discrimination against their children.

While there has been no definitive court decision on issues relating to registration and unstated paternity to date, both the *Canadian Charter of Rights and Freedoms* and international human rights covenants may be a source of future legal challenges.

This report proposes a variety of options to address the needs of First Nations women and their children of unstated paternity, in relation to Indian registration and in a manner consistent with the legal environment. Options canvassed range from maintaining the status quo to removal of registration from the *Indian Act*.

It is the opinion of the author that the numerous challenges described in this report cannot be resolved without addressing the Registrar's paternity policy in a fairly fundamental way. This is evident in the recommendations that follow.

Recommendation 1: The Registrar's policy regarding evidentiary requirements for proof of paternity should be amended to allow an unmarried First Nations woman (or man) to swear an affidavit or declaration that the other parent of her (or his) child is a registered Indian. The child would then be entitled to registration on the basis of having two registered Indian parents. To address any "floodgates" concerns, INAC could institute a system wherein bands are notified of such a registration by standard form and allowed a year to rebut paternity (or maternity). 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.

Recommendation 2: At the very least, the Registrar's policy should be changed to include a *Trociuk* style amendment, wherein women whose pregnancies are the result of abuse, incest or rape, and who want to "unacknowledge" the father may file an affidavit as to Indian registration paternity without naming the father.

Recommendation 3: Indian and Northern Affairs Canada should facilitate access to the necessary resources where an affidavit by the birth mother is required, for example a commissioner of oaths or person empowered under the *Indian Act.*

Recommendation 4: Indian and Northern Affairs Canada should undertake educational initiatives to address high rates of unstated paternity, directed equally toward men and women. While a national educational policy could be developed, these initiatives should be regional and community focussed, and implemented at the local level. Education is particularly important if Recommendation 1 is not adopted.

Recommendation 5: Indian and Northern Affairs Canada should engage in provincial/territorial vital statistics act discussions to ascertain where administrative difficulties can be remedied, for example with joint request forms prior to the birth for remote communities. Indian and Northern Affairs should also undertake independent initiatives geared toward addressing administrative challenges in the birth registration process, such as provision of accompaniment moneys and community-based administrative assistance. This could be accomplished through enhancing the role of Indian Registry administrators. Again, administrative measures are particularly important if Recommendation 1 is not adopted.

Recommendation 6: First Nations women's 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.

Recommendation 7: Given the possibilities for imposition of more members on First Nations communities, First Nations representative groups should be consulted throughout the development of any policy or legislative change.

1. INTRODUCTION

Since their enactment in 1985, the ramifications of the Bill C-31 changes to the *Indian Act*[1] have been the source of litigation and policy challenges primarily involving Indian[2] registration and band membership issues.

Bill C-31 was intended to address gender discrimination arising from previous provisions of the *Indian Act*,[3] which provided that an Indian woman who married a non-Indian man, lost her Indian registration, as did their children. By contrast, an Indian man who married a non-Indian woman did not lose registration, nor did his children, while his wife actually gained Indian registration.

While the Bill attempted to deal with the re-instatement of Indian registration and band membership for Indian women who had "married out," it has not been entirely successful in meeting these objectives. Allegations of gender-based discrimination remain surrounding 6(1) and 6(2) registration categories under the *Indian Act*,[4] as well as around band membership and exclusion of Bill C-31 reinstatees.

The patrilineal legacy of the *Indian Act* provisions also survive via issues surrounding unstated and unrecognized paternity.

Subsequent to the 1985 amendments, a child's right to be registered as a Status Indian is based on the registration characteristics of that child's parents. Where a father is unreported by the mother or he is reported but not recognized by Indian and Northern Affairs Canada (INAC), the child's entitlement can only be based on the mother's registration.

The current *Indian Act* now contains two categories of Indian registration, known as 6(1) and 6(2). Children born after 1985 are registered as a Status Indian under 6(1) where both parents of the child are or were entitled to registration, and under subsection 6(2), where one of the child's parents is or was entitled to registration under section 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.

Pursuant to the 1985 amendments, 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 the child's subsequent children through the loss of registration.

For example, if a First Nations woman entitled to 6(1) registration has a child with unestablished paternity, that child is automatically entitled to 6(2) registration. If the First

Nations woman is registered under 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.

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 non-insured health benefits.

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.

2. THE *INDIAN ACT*

The current *Indian Act* now contains two categories of Indian registration, known as 6(1) and 6(2), with births after 1985 falling into one of two categories.

> 6(1) Subject to section 7, a person is entitled to be registered if:
>
> (f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.
>
> (2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

Ultimately, while subsection 6(1) contains some "remedial" categories of registration, registration is now and in the future will be primarily decided under subsections (6)(1)(f) and 6(2). Pursuant to subsection 6(1), a child is now registered as a Status Indian where both parents of the child are or were entitled to registration at the time of their death. Under subsection 6(2), a child is registered where one parent is or was entitled to registration under Section 6(1) at the time of her/his death.

Thus, section 6 translates into a loss of registration after two consecutive generations of out-parenting with non-registered partners.

> C-31 is the gateway to a world in which some Indians are more equal than others. It establishes two "classes" of Indians: *full* Indians registered under Section 6(1) and *half* Indians registered under Section 6(2). These classes have unequal rights: they differ in their ability to pass Indian status to children (Clatworthy 1994: 51).

As a simple equation, 6(1) + 6(1) = 6(1), 6(2) + 6(1) = 6(1) and 6(2) + 6(2) = 6(1). However, 6(1) + no registration = 6(2) and 6(2) + no registration = no registration, thereby resulting in a loss of registration over two generations of joint registered Indian–non-registered Indian parenting.

Further skewing this equation is the fact that pre-1985 many non-Aboriginal women obtained Indian registration by virtue of marrying a registered Indian man, adding to the complexity of Bill C-31.

As part of the operation of section 6 and the two-parent rule, Bill C-31 also changed provisions of the previous *Indian Act*[5] that had provided that children of Indian mothers with unreported fathers were allowed to register. That registration could be protested within 12 months by a band on the basis that the band had knowledge that the father was not Indian. If the father was proven to be non-Indian, then the child's registration would change accordingly.

Clearly, the tangible benefits attendant on obtaining Indian registration are desirable: access/entitlement to INAC's programming base, tax benefits for those with reserve-based property and access to national programs, such as post-secondary education and non-insured health benefits. Under sections 9 and 11 of the Act, registration also determines membership in bands whose lists are maintained by INAC which, in turn, often determines access to band resources.

In essence, a First Nations child denied registration will also be denied band membership where the band's membership list is managed by INAC. The child may also be denied band membership where the band has assumed control of membership pursuant to section 10 of the *Indian Act*. This however, is entirely dependent on the membership code of each First Nation, which may or may not recognize non-registered Indians as members.

3. 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.

> 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,[6] 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.

> Notes: If a court has awarded custody of the child to one parent, consent of the other parent is not required. Consult Regional Office for direction, if in doubt. Otherwise, if a proper signed statement is not available [and the names of both parents are on the birth document, or the father has been confirmed by statutory declarations], the Field Officer is faced with one of the following four situations and must:
>
> 1. - be satisfied that the parent not signing the statement is indeed either deceased or cannot be located, before the Field Officer can register the child in accordance with the wishes of the parent who *has* signed;
>
> 2. - contact the parent (known whereabouts) who has not signed, asking that parent to reply within a reasonable time [say, 30 days] to indicate whether the child should be registered, and telling that parent that if there is no reply within the specified time, then the child will be registered in accordance with the wishes of the parent who *has* signed;
>
> 3. - not register the child, so long as the parents disagree on whether the child should be registered at all; and,
>
> 4. - inform the parents (by letter) that registering the child will be delayed until they can agree in which Registry Group the child is to be registered, unless the parents agree to have the child registered on a General List by HQ. No BCR [band council resolution] will later be required to move the child's name from the General List to one parent's Registry Group – but if s.10, they will have to apply to the band for membership (INAC 2003).

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 her or his subsequent children through the loss of registration.

For example, if a First Nations woman entitled to 6(1) registration has a child with unestablished paternity, that child is automatically entitled to 6(2) registration.[7] If the First Nations woman is registered under 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.

4. CRITICAL IMPACTS

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

Further, while direct numbers were not available for children with unstated fathers born to 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) also observed that during the 1985 to 1999 period, about 30 percent of all children with unstated fathers were born to mothers under 20 years of age.

More specifically, a study (Clatworthy 2001: iii) prepared for the Manitoba Southern Chiefs Organization (SCO) highlighted the impacts of the operation of 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.

Clatworthy's conclusions (2001: v) for the 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 his 1996 study of Aboriginal single mothers in Canada, Hull concluded (2001: xii):

> All Canadian single mothers tend to experience economic disadvantages, including problems in the labour market and low family income, but Aboriginal single mothers experience these problems to a greater degree than others. The low incomes of single mother families and high rates of dependency on government transfer payments among Aboriginal single mothers are clearly documented.

Registered Indians have twice as high a proportion of single mother families as other Canadians. In 1996, more than 25 percent of registered Indian children lived in single mother families, compared to 14 percent of non-Aboriginal children (Hull 2001: xi). Aboriginal women aged 15 to 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 additional non-tangible benefits of registration, such as personal, community and cultural identification. The testimony of individual Aboriginal women confirmed this life experience.

> 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. It's just like joining a club. It's far more important than that, but it's like that. Where you want to become a part of something, so you go out and you join a club, you put your name down and you're a part of that club. It's the same kind of thing only much more profound, you get your status you become made up. It's kind of a different thing, but it's highly emotional. It's a big feeling of belonging, so being unattached when you're not recognized. When you do get your status you're recognized…it's a thing of belonging (Huntley and Blaney 1999: 40).

While many First Nations women and their children experience the detrimental effects arising from unstated or unrecognized paternity and the accompanying loss of registration, teenage mothers and their offspring may suffer disproportionately. The impact on First Nations women imparted via the two-parent rule and proof of paternity requirements arguably constitutes discrimination against both them and their children. This issue is considered in further detail in the legal component of this report.

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).

5. 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 report, 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 referenced in this report. Clatworthy (2003b) estimated that approximately 50 percent of unstated paternity cases are considered to be unintentional, while the other 50 percent are deemed intentional on the part of the mother.

"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 from region to region, but in most provinces the registration of birth form must be signed by both parents when they are not married. When 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 staff in that province contact 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 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.

At a Bill C-31 conference hosted by the Native Women's Association of Canada (NWAC 1998: 20),

> [a] participant from the NWT questioned when a child is registered under the mother or father's status. Under the law the child from two native parents is registered as a 6(1). A person used to fill out their child's papers at the hospital but now the band does it. Many times the child's father is not there to be added and people will have to pay a fee to change the certificate so the child can be registered properly. She told people to remember to put the baby's father on the birth certificate. If the parent is silent then it is automatically assumed it is a non-native and the process to change this could be a costly one.

Problems with birth 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.

As the Alberta Native Women's Association stated to the Standing Committee (1988: 46:18):

> Paternity certificates are being demanded by Indian Affairs band membership clerks of some of our unmarried mothers when they attempt to register their children. If this child is the result of a rape or incest, if the father is married to someone else or if the relationship ended with bitter feelings by the man, these men will refuse to sign the paternity certificates. This will lead to generations of our people being denied their rightful heritage and rights.

The problems posed by current proof of paternity requirements are reiterated.

> 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 the father's background should not be a factor where he is not an active member of the family, and to require his acknowledgment 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. The single parent rate for native women is very high — in many cases, the father is non-supportive and absent from the lives of both the mother and children. Nowhere in the legislation are Indian men required to name the children they may have fathered (Holmes 1987: 25).

6. LEGAL CONSIDERATIONS

Policy options developed in a vacuum are futile, regardless of how innovative. A fulsome approach to arriving at recommendations that seek to ameliorate unstated and unacknowledged paternity issues requires a consideration of the legal environment. While the potential legal instruments that may apply in the context of the unstated paternity issue are too numerous to be discussed in detail in this paper, those perceived as most relevant are canvassed, including a discussion of cases where applicable.

The *Canadian Charter of Rights and Freedoms*

The starting point for any discussion in the Canadian context is the Charter. The Charter and the protections contained therein apply to government policy as well as legislation.

Section 7

Two sections of the Charter appear most applicable in the unstated and unrecognized paternity context, the first being section 7.

> 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.

In the case of *Canada v. Sinclair*,[8] Sinclair was deleted by the Registrar from the Indian Registry, prior to exhausting the *Indian Act* protest process, resulting in his loss of all registration benefits. It was argued that this violated his section 7 liberty and security rights.

> Sinclair satisfied the first branch of section 7 by demonstrating that his liberty and security rights had been violated. He was deprived of the right to liberty by the decision to delete his name from the federal list and the consequences flowing from that action. The Registrar's decision affected fundamental and important life choices, his personal autonomy to live his own life, and his dignity…
>
> The Registrar's decision also impacted upon his ability to provide the necessaries of life and to receive particular health benefits and therefore violated his right to security of the person (Morse 2002: 394).

The court found that Sinclair's loss of registration benefits upon deletion by the Registrar but prior to exhausting the protest process, was an error of law, but did not rule on the section 7 arguments.

This case was overturned by the Court of Appeal[9] on jurisdictional (rather than legal) grounds but, nonetheless, demonstrates how plaintiffs can attempt to use section 7 rights in the context of Indian status registration.

Section 15

The most relevant section of the Charter for the purposes of this report is subsection 15(1):

> (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.

The test that will be applied in the context of a section 15 challenge is enumerated in *Law v. Canada (Minister of Employment and Immigration)* and consists of the following inquiries.

> A. Does the impugned law
> (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or
> (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> B. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> And
>
> C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[10]

The plaintiff in Aboriginal cases can pick a comparison group that is Aboriginal or non, to establish a pattern of discrimination against a class of persons with similar characteristics (i.e., children of unmarried Indian parents or unwed Indian mothers). The court will then apply a subjective human dignity test, looking at whether the group's human dignity has been impaired, incorporating group members'perspectives.

As far back as 1988, the Standing Committee 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 pending case of *Villeneuve, McGillivary v. Canada*[11] 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 are challenging among other things, 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 claim 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 is that the policy regarding proof of paternity be declared of no force and effect.

In *Gehl v. Canada (Attorney General)*,[12] 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 as a 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 is 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 on 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 against their human dignity. 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. The case is now proceeding by way of statement of claim in the Ontario Superior Court. The plaintiff has alleged a breach of her section 15 equality rights to be registered as an Indian and a breach of her Aboriginal rights under section 35 to be an Indian and member of her Aboriginal community.

While these two section 15 cases are not definitive of the issue, it appears likely that Charter challenges to the *Indian Act* and the Registrar's unstated paternity policy are likely to forge ahead. As noted by Aboriginal law expert Brad Morse (2002: 409):

> The Canadian courts have now invoked section 15 on several occasions to suggest that a number of sections of the Indian Act are vulnerable to Charter challenges….
>
> The ongoing judicial assessment of the Indian Act in light of section 15 raises many questions as to the future of the Act. The litigation suggests that the Indian Act will not be struck down entirely; however, many provisions will be invalidated or eviscerated. Although it is not certain when this will happen, it is safe to assume that these changes will not happen overnight. While the litigation may have the effect of transforming the Indian Act into a form of statutory Swiss cheese, this will likely be a gradual process. The high probability of continued successful attack with the many such lawsuits underway at present, and the potential inability of the Act to remain even remotely viable as a continuing legacy of colonialism, has been used as part of the federal justification for the introduction of the First Nations Governance Act (Bill C-7).

Similarly, section 3 of the *Canadian Human Rights Act*,[13] 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.

Trociuk

Another section 15 case worthy of consideration, though decided in a different context, is *Trociuk v. Attorney General of British Columbia*,[14] 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.[15]

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.[16]

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.[17]

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 children.[18] Such an ameliorative procedure would not be discriminatory in its treatment of biological fathers.

International

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 to be most applicable to the subject of this report are canvassed below, though many international instruments may in fact contain applicable elements.

The *Universal Declaration of Human Rights*[19] 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 their illegitimacy, the *Convention on the Rights of the Child*[20] 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 the parent's sex, or birth. Article 8 protects a child's right to preserve her/his 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*[21] 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 own culture, in community with the other members of their group. Article 27 was the basis for the success of Sandra Lovelace at the United Nations Human Rights Committee in 1981,[22] where she 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 reinstituted, 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.[23]

Most recently in 2003, the Committee on the Elimination of Discrimination Against Women[24] 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.[25]

7. 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 described in this report cannot be resolved without addressing INAC policy in a fairly fundamental way.

Maintain the Status Quo

The first option is to maintain the status quo; in other words, do nothing, but wait and see where litigation and political pressures take INAC. Self-explanatory, and the least proactive of all the 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 defining "Indianness." Nor does it address the children; those who suffer for the actions or oversights of their biological parents under a policy that is not in their best interests.

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, 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 grass roots (Erickson 2001: 33). The Special Representative also calls for more involvement of and funding for Aboriginal women's groups so they can make submissions to government and participate in consultation processes (Erickson 2001: 50). The Aboriginal Women's Action Network 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.

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 focussed 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 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 governmental policy changes and consultation processes and recommended that information be more thoroughly disseminated to the grass-roots level (Erickson 2001: 48).

Educational options championed by the Aboriginal Women's Action Network include the following.

- Support advocacy and educational services to be designed and provided by Aboriginal women.
- Revisit information packages under the direction of Aboriginal women.
- Reinstate the 1-800 number for the Registrar's office.
- Provide financial assistance to Native women's organizations for capacity building and undertaking communications (Huntley and Blaney 1999).

Indian and Northern Affairs Canada could also enhance the role of Indian Registry administrators who discover and obtain the appropriate supporting documents and signatures

for "field events"[26] in their community then report these events to the regional office or enter the events directly in the Indian Register. Registry administrators 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 impact on the ongoing loss of, or incorrect registration in the near future. Most important, while educational initiatives will address some situations in which paternity in unstated, others will remain, such as situations in which the mother will not/cannot identify the father.

Remedy "Administrative" Issues

Administration of provincial vital statistics acts 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/unacknowledged paternity.

- Have INAC or band councils provide accompaniment moneys for the father where the mother is giving birth outside of the community; he will then be present to sign the birth registration form.

- Alternatively, joint request forms for birth registration could 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.

- Indian and Northern Affairs could liaise with provincial/territorial vital statistics agencies to discuss where changes might be made to some administrative problems including signing the birth registration form, and subsequent amendments.

- Use alternatives to notarization for amendments to the birth registration or the occasional provision of a commissioner of oaths to the community, or an INAC official authorized under section 108 of the *Indian Act*.

Administrative measures may assist in reducing the number 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.

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 previous 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 for this report 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 (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 has concerns about opening the floodgates to incorrect registration, than 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.

Amend the *Indian Act*

Indian and Northern Affairs 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 cutoff 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 6(1) and 6(2) created by Bill C-31, with the recommendation that "the categorization of status Indians should be eliminated" (Erickson 2001: 36). They recommended that 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 report 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 challenges. 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.

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 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. As stated by Nathan McGillivary, the grandfather of the child plaintiff in *Villeneuve, McGillivary v. the Queen*, (discussed above) remedying the existing Act and accompanying deficiencies is no longer enough.

> And we've been, we filed a claim in court, federal court of Canada in '91 with the assistance of our Chief and Council that she be reinstated as with her full treaty status meaning that we wanted her in section 6-1. At that point generally that's what we wanted. But as we dealt with this issue it became more apparent that we need to develop our own membership citizens, citizenship codes in our communities where they will be recognized by the government.
>
> And I think this is where we need to go. We need to replace section 6-2 with our own legislation, with our own by-laws. Certainly we talk about the governance and that's part of it. You know we need to develop that. We need to ensure that our First Nations citizens are protected in our own constitution (AFN 2001).

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.[27] 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.

RECOMMENDATIONS

Recommendation 1: The Registrar's policy regarding evidentiary requirements for proof of paternity should be amended to allow an unmarried First Nations woman (or man) to swear an affidavit or declaration that the other parent of her (or his) child is a registered Indian. The child would then be entitled to registration on the basis of having two registered Indian parents. To address any "floodgates" concerns, INAC could institute a system wherein bands are notified of such a registration by standard form and allowed a year to rebut paternity (or maternity). 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.

Recommendation 2: At the very least, the Registrar's policy should be changed to include a *Trociuk* style amendment, wherein women whose pregnancies are the result of abuse, incest or rape, and who want to "unacknowledge" the father may file an affidavit as to Indian registration paternity without naming the father.

Recommendation 3: Indian and Northern Affairs Canada should facilitate access to the necessary resources where an affidavit by the birth mother is required, for example a commissioner of oaths or person empowered under the *Indian Act.*

Recommendation 4: Indian and Northern Affairs Canada should undertake educational initiatives to address high rates of unstated paternity, directed equally toward men and women. While a national educational policy could be developed, these initiatives should be regional and community focussed, and implemented at the local level. Education is particularly important if Recommendation 1 is not adopted.

Recommendation 5: Indian and Northern Affairs Canada should engage in provincial/territorial vital statistics act discussions to ascertain where administrative difficulties can be remedied, for example with joint request forms prior to the birth for remote communities. Indian and Northern Affairs should also undertake independent initiatives geared toward addressing administrative challenges in the birth registration process, such as provision of accompaniment moneys and community-based administrative assistance. This could be accomplished through enhancing the role of Indian Registry administrators. Again, administrative measures are particularly important if Recommendation 1 is not adopted.

Recommendation 6: First Nations women's 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.

Recommendation 7: Given the possibilities for imposition of more members on First Nations communities, First Nations representative groups should be consulted throughout the development of any policy or legislative change.

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ENDNOTES

[1] R.S.C. 1985, c. 32(1st Supp.); R.S.C. 1985, c. 43 (4th Supp.).

[2] First Nations and Indian are both used to indicate peoples with Indian status pursuant to the *Indian Act*.

[3] R.S.C. 1970, c. I-6, as am.

[4] Commonly referred to as the "cousins" and "siblings" impacts.

[5] 1970, s. 11(1)(e) and 12(2).

[6] Vital statistics ultimately requires a paternal signature where parents are unmarried; see Chapter 5.

[7] Where a woman previously lost registration due to out-marriage and has been reinstated under 6(1) pursuant to Bill C-31, she and her children remain disadvantaged. Her child with unstated or unrecognized paternity will be registered under 6(2), while the child of her brother, married to a non-Aboriginal woman who was registered prior to 1985, will be registered pursuant to 6(1). This is commonly referred to as the "cousins" issue.

[8] *Canada (Registrar of Indian Register) v. Sinclair*, [2002] 3 F.C. 292.

[9] *Canada (Indian and Northern Affairs) v. Sinclair*, [2003] FCA 265.

[10] [1999] 1 S.C.R. 497, para 3.

[11] *Villeneuve, McGillivary v. Canada*, Re- Amended Statement of Claim, August 20, 1998.

[12] [2002] O.J. No. 3393.

[13] R.S. 1985, c. H-6.

[14] [2003] 1 S.C.R. 835.

[15] Ibid., para 25.

[16] Ibid., para 26.

[17] Ibid., para 38.

[18] Ibid., para 27.

[19] Adopted by the General Assembly, United Nations, Resolution 217 A (III), December 10, 1948.

[20] Adopted by the General Assembly, United Nations, Resolution 44/25, November 20, 1989, entry into force September 2, 1990.

[21] Adopted by the General Assembly, United Nations, Resolution 2200A (XXI), December 16, 1966, entry into force March 23, 1976.

[22] *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

[23] Concluding Observations of the Human Rights Committee: Canada, 07/04/99, CCPR/C/79/Add.105 (Concluding Observations/Comments), para 19.

[24] The Committee oversees the *Convention on the Elimination of all Forms of Discrimination Against Women,* adopted by the General Assembly, United Nations, Resolution 34/180, December 18, 1979, entry into force September 3, 1981.

[25] Concluding Observations of the Committee on the Elimination of Discrimination against Women: Canada, 13-31/01/2003, A/58/38 (Concluding Observations), paras 361-362.

[26] An event occurring on or after April 17, 1985 and delegated by the Registrar to field officers to enter into the Indian Register.

[27] See for example, *Simon v. The Queen,* [1985] 2 S.C.R. 387.

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* Some of these papers are still in progress and not all titles are finalized.