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Indian Rights for Indian Babies: Canada's "Unstated Paternity" Policy

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Abstract

Relying on an Indigenous methodology and the methods of a literature analysis, personal experience, and critical introspection this article addresses Aboriginal Affairs and Northern Development Canada's 1985 unstated paternity policy in regard to the Indian status provisions of the Indian Act. Through Canada's unstated paternity policy, with its inherent assumption where the Registrar of Aboriginal Affairs interprets all applicants' birth certificates that lack a father's signature as being a non-Indian man, many Indigenous women and their children continue to be denied the right to live free from sex discrimination. Disturbingly, this unstated paternity policy applies in situations of sexual violence such as incest, rape, gang rape, sexual slavery, and prostitution where young mothers of Indigenous Nations are particularly vulnerable. Thus, despite Canada's Charter of Rights and Freedoms and the two remedial legislations that took place in 1985 and 2011 purportedly to eliminate the sex discrimination in the Indian Act, in Canada's continued need to eliminate treaty responsibilities to Indigenous nations, the nation state is directly targeting Indigenous babies. While policy remedies are discussed, the author also argues that despite the decades of advocacy and litigation work by Indigenous women, Canada has manipulated the remedial legislative process as an opportunity to create new forms of sex discrimination rather than eliminate it. In this way Canada acts in bad faith and in a way that is counter to the Charter.

If the opposition parties support Bill C-3, Aboriginal women will be forced to spend the next 20 years litigating, once again to prove that the Indian Act violates the *Charter* (Day & Green, 2010, p. 7).

Through Aboriginal Affairs and Northern Development Canada's (A.A.N.D.C.) unstated paternity policy many Indigenous people and children are denied Indian status registration due to the lack of a father's signature on their birth certificates. This article is about A.A.N.D.C.'s unstated paternity policy and my process of being denied Indian status because I do not know who my father's father, my grandfather, was or is. I write this article for Indigenous community members, Indigenous women's organizations, and people caring for Indigenous women and their children to learn and draw from. It is in this way that I remain within the mandate of the First People Child and Family Review Journal's mandate.

In writing this article my methodology emerges from an Indigenous paradigm where in line with Anishinaabeg² knowledge philosophy, I draw from my personal experience and my introspection as a plaintiff – rather than from the position of a lawyer offering a legal analysis and thus citing case law³ – who is currently litigating the continued sex discrimination in the *Indian Act* on the matter of unknown paternity. While it may not be the situation with western scholarship, for the Anishinaabeg of Turtle Island, knowledge gained from personal experience and introspection, and given back through first person storytelling, are legitimate forms of knowledge production and sharing. Truth for the Anishinaabeg is in-situ, meaning it is personal, subjective, and emerges from within. This philosophical idea of truth also echoes in other Indigenous Nations. As the late Haudenosaunee scholar Patricia Monture-Angus (1999) has noted, for Indigenous people “truth is internal to the self” and is gained “through personal examination” (p. 217).⁴ Despite centuries of colonization and subjugation, this process of truthing has survived and is making a wave of resurgence in our communities and thus in the academia. It is from within these Indigenous parameters of truth that this article should be read and evaluated. To do otherwise would be to perpetuate the colonial process and the subjugation of Indigenous knowledge. Lastly, regarding my methodology I also need to point out that I feel it is my moral obligation to offer an analysis of what I know on this topic.⁵

This article on unknown and unstated paternity⁶ and the *Indian Act* is structured in six main sections. First, I begin with a literature analysis on the history of the sex discrimination and the *Indian Act*. Second, again drawing from the literature I offer a discussion of the efforts that Indigenous women have taken on in challenging this long-time sex discrimination. This literature analysis of the history of the sex discrimination is intended to provide a foundation to the main purpose of this article. Third, and making up the bulk of this article with its five subsections, I move into an analysis, both literature based and a personal discussion, on the matter of unknown and unstated paternity and the *Indian Act*. Fourth, I offer an update of my court challenge first discussed in “*The Queen and I*” offering a discussion of my 28 year advocacy effort challenging the continued sex discrimination in the *Indian Act* (Gehl, 2006, 2013). Fifth, I offer a discussion on the international conventions and declarations that Canada violates with its unstated paternity policy. The sixth and last section of this article is my summary and conclusion.

Given that this article relies on personal knowledge, readers may be interested to know my motivation in gaining Indian status registration as well as my motivation for the subsequent litigation. My motivation was, and remains, for the purpose of identity affirmation,⁷ to be registered as a status Indian and become a First Nation band member, as in my situation the two are conflated, meaning I am denied membership because I do not have Indian status (see Gehl, 2006, 2013). My motivation is also for the purpose of

² The Anishinaabeg, also spelled Anishinabek, are a series of culturally and linguistically related Indigenous Nations whose territories surround the Great Lakes region.

³ I suggest people interested in reading recent legal analysis that cites case law on Indian status provisions of the *Indian Act* should read Palmater, 2011. I also suggest Eberts, 2010 and McIvor, 2004, 1995.

⁴ See also Castellano, 2000; Battiste and Henderson, 2000; Gehl, 2012; Simpson, 2003.

⁵ See Blackstock's (2011) discussion about moral courage.

⁶ Unknown and unstated paternity does not capture the complexity of this issue. This article will flesh out this very matter.

⁷ Through the abuse of colonial power Indian status registration has taken on real meaning as a signifier of Indigenous identity and as such it is now a significant element for some people (Gehl with Ross, 2013).

gaining my treaty rights such as health care. In light of the amount of time that has passed – 28 years – there is now an additional motivation: citizenship in the broader Anishinabek citizenship endeavour. Again, because I am denied Indian status I am also denied Anishinabek citizenship. While First Nation citizenship, and its ties to Indian status, are significant and require more research, it is outside the scope of this article on unknown and unstated paternity and the *Indian Act*. Suffice it to say here the unstated paternity policy⁸ A.A.N.D.C. relies on to deny me Indian status registration also denies me First Nation band membership, access to my treaty rights, as well as citizenship in the larger Anishinabek citizenship endeavour.

Before I begin this article it is also important for me to explain the relationship between Indian status registration and Indigenous treaty rights. Canada was born out of an alliance between several Nations. The *Royal Proclamation of 1763* and the *Treaty at Niagara of 1764* established a constitutional agreement of peace, friendship, trade, and sharing amongst several Nations of competing interests: British, French, and Indigenous (Borrows, 2002; Gehl, 2011). After this foundational constitutional framework was established, the British proceeded to enter into treaties with individual Indigenous Nations such as the Ojibway and Cree. Through these latter treaty agreements several generations of settler Canadians have gained access to Indigenous land and resources and all the benefits. In addition, through these agreements, hunting and fishing rights, education, health care, and annual annuity payments for the Indigenous Nations were affirmed, established, and protected. These Indigenous treaty rights are now enshrined in section 35 of Canada's *Constitution*. Respecting Indigenous treaty rights is Canada's responsibility. It is in this way, that just as settler Canadians are beneficiaries of the treaty agreements so are Indigenous Nations. "We are all treaty people" is a common axiom and as Commissioner Morris stated, these treaties were and are to last "as long as the sun shall shine, the grass shall grow, and the rivers flow" (Office of the Treaty Commission, 2011).

History of the Sex Discrimination in the *Indian Act*

The bill [read Bill C-3] that you have before you that you are considering ... is a piece of garbage, to be frank. It does not do anything near what it should do (McIvor, 2010).

Eventually, through the imposition of colonial policy and laws, it was through the process of Indian status registration whereby Indigenous people became, and continue to be, entitled to their treaty rights. It is because of this relationship between Indian status registration and treaty rights that many people conflate "treaty" and "status" as in a "treaty status" Indian. Initially the legislative process of defining who an Indian was followed an Indigenous model, meaning being an Indian was more about community relationships and affiliation and thus broad and inclusive. Despite this inclusive beginning, through the application of an increasingly narrow definition of Indian status, the government of Canada began limiting the number of people entitled to Indian status, and through this process began eliminating the federal government's treaty responsibilities established in 1764 during the *Treaty at Niagara* (Miller, 2004). This process of narrowly defining and controlling who an Indian was, and is, is commonly referred to as eliminating the "Indian problem" (Scott qtd. in Troniak, 2011). One example of this process is that at one time an Indian person who gained an education or who became a professional was

⁸ In using the term policy I am referring to standard practice.

involuntarily enfranchised into Canadian society. Consequently, they were also denied their treaty rights.

When it was determined that the process of enfranchising Indians and eliminating Indigenous treaty rights was proceeding at a snail's pace, Indian women and their children became the target of the patriarchal and racist regime. Through a series of legislative acts dating back to the 1857 *Gradual Civilization Act*, Indian women and their children were enfranchised when their husband or father was enfranchised. It was through the 1869 *Gradual Enfranchisement Act* where Indian women, along with their children, who married non-Indian men (a.k.a. marrying out) were enfranchised, denied Indian status registration and thus their treaty rights (Miller, 2004). At this time, as per the European model of the world, women were considered chattel or appendages of their husbands and therefore if, and when, they married a non-Indian man they too became a non-Indian person (Gehl, 2006, 2013). Eventually, the process of eliminating status Indians through sex discrimination was codified in section 12(1)(b) of the 1951 *Indian Act* (Gilbert, 1996). Significant to this discussion is another form of sex discrimination first codified in the 1951 *Indian Act*: the double-mother clause. Essentially, through the double-mother clause a person was enfranchised at the age of 21 years if both their mother and paternal grandmother (two generations of non-Indigenous mothers) were non-Indians prior to their marriage (Eberts, 2010).

With this loss of status, Indian women also lost their treaty rights, their right to live in their communities, their right to inherit property, and their right to be buried in the community cemetery. Further, through this sex discrimination "Aboriginal women have been denied opportunities to hold leadership positions within their communities and organizations and have been excluded from high-level negotiations among Aboriginal and Canadian political leaders" (McIvor, 2004, p. 108).

Having offered this context, the next section of this article is dedicated to a discussion of the efforts Indigenous women have taken to eliminate this long time sex discrimination as well as a discussion of how it continues.

Ogitchidaa Kwewag

As most know, many Indigenous women have worked tirelessly to eliminate section 12(1)(b) of the *Indian Act* and its intergenerational effects. I think it is appropriate to refer to these Indigenous women as Ogitchidaa Kwewag, an Indigenous term that best translates to a brave woman who is dedicated to the safety, security, and service of her family, community, and nation. In addition, activists and scholars⁹ from many disciplinary backgrounds have written about the efforts of these Ogitchidaa Kwewag. On the national and international scale it is Mary Two-Axe Early, a Mohawk woman from Kahnawake, Quebec, who in 1966 began to speak publicly about the matter, where eventually she approached the Royal Commission on the Status of Women (Jamieson, 1978). It was in 1971 when now icon of Indigenous women's rights Jeannette Corbiere-Lavell, an Anishinaabe woman from Manitoulin Island, Ontario, took the matter of section 12(1)(b) to court arguing it violated the *Canadian Bill of Rights*. Yvonne Bedard, from Six Nations, Ontario, was also addressing the sex discrimination, and it was in 1973 when both their cases were heard together at the Supreme Court of Canada (S.C.C.) level. Unfortunately, relying on a

⁹ See also Bear with the Tobique Women's Group, 1991; Cannon, 2008; S. Day, 2011; Day and Green, 2010; Gilbert, 1996; Eberts, 2010; Fiske and George, 2006; Gehl 2013, 2011, 2006; Jamieson, 1978; McIvor, 2010, 2004, 1995; Monture-Angus, 1999; Moss, 1987; Palmater, 2011; Silman, 1987; Stevenson, 1999; Wherrett, 1996.

patriarchal line of reasoning, the S.C.C. ruled that because Indian women who married non-Indian men “had equality of status with all other Canadian married females”, there was no sex discrimination to resolve (McIvor, 2004, p. 113).¹⁰

Although this 1973 S.C.C. decision was a setback, in 1981 Sandra Lovelace, a Maliseet woman from Tobique First Nation, New Brunswick, appealed to the United Nations Human Rights Committee (U.N.H.R.C.) regarding section 12(1)(b). Because her marriage and loss of status registration occurred prior to the *International Covenant on Civil and Political Rights* the U.N.H.R.C. declined to rule on the matter of sex discrimination. Nonetheless, the U.N.H.R.C. did rule that the *Indian Act* violated section 27 of the International Covenant, which protected culture, religion, and language. Through this ruling it became evident that Indigenous women did have rights that international fora were willing to stand behind and protect (McIvor, 2004).¹¹

Largely due to the actions of these Ogitchidaa Kwewag, combined with the patriation of Canada's *Constitution* in 1982 intact with the *Charter of Rights and Freedoms*, in particular section 15 – the sex equality section – in 1985 the *Indian Act* was amended.¹² As a reminder for readers section 15 of the *Charter* reads: “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.” Through this amendment to the *Indian Act* many Indigenous women, involuntarily enfranchised for marrying non-Indian men, were re-instated as status Indians, and many of their children were *newly registered* as status Indians for the first time. Statistics Canada reports that by the end of 2002, more than 114,000 individuals gained Indian status registration through the 1985 amendment (O'Donnell & Wallace, 2012). Through this process, many re-instated women re-gained, whereas their newly registered children gained for the first time, First Nation band membership and entitlement to their treaty rights that were protected through the 1764 *Treaty at Niagara*. Indian status registration entitlement for the grandchildren of these reinstated Indian women, however, is another matter.

Although many think the 1985 amendment to the *Indian Act* was for the purpose of establishing equality between men and women, and foremost to achieve compliance with the equality provisions of the *Charter of Rights and Freedoms*, it in fact failed. Through the creation of the second-generation cut-off rule, the grandchildren of women once enfranchised for marrying out continued to be denied Indian status registration and consequently all that went with it such as band membership and their treaty rights. Succinctly, the second-generation cut-off rule is a process whereby after two successive generations of parenting with a non-Indian parent, either mother or father, the loss of status registration occurs.¹³ While the second-generation cut-off rule applies to all births after 1985 – the descendants of Indian men included – it was applied immediately in a retroactive way to the descendants of the re-instated Indian

¹⁰ See also Monture Angus, 1999; S. Day, 2011.

¹¹ See also Monture-Angus, 1999; Silman, 1987; Stevenson, 1999.

¹² April 17, 2012 marked the thirtieth anniversary of the Charter of Rights and Freedoms. Possibly needless to say, I did not celebrate.

¹³ While many may argue that it was in 1985 when the enfranchisement process was removed from the Indian Act, I disagree. It is my contention that enfranchisement has a new form: the second-generation cut-off rule.

women one generation sooner. Through this discriminatory process, Corbiere-Lavell has stated, "Three of my five grandchildren do not have legal rights to be members of my community" (as cited in Keung, 2009, n.p.).

To understand this legislative complexity is not a simple task. First, it is important to understand that because of the 1985 amendment, Indian status registration is now stratified into two main subsections: 6(1) and 6(2). While subsection 6(1) status, and its many paragraphs (sub-subsections) – (a) (b) (c) (d) (e) and (f)¹⁴ – allows a parent to pass on Indian status to his or her children in his or her own right, subsection 6(2) status does not. This means a 6(2) parent must parent with another status Indian in order to pass on Indian status registration to his or her children. For this very reason many people refer to 6(1) as a stronger form of status, and 6(2) as a weaker form. Certainly, this distinction is useful at conveying some of the legal complexity created in 1985.

Within the stronger form of Indian status registration, paragraph 6(1)(a) is the best form of status. When the *Indian Act* was amended, Indian men and all their descendants born prior to April 1985, the date of amendment, were all registered under paragraph 6(1)(a), whereas the Indian women who married out were only registered under paragraph 6(1)(c) and their children were only registered under the weaker form of status registration subsection 6(2). As a result of this difference in Indian status registration, and as suggested above, the grandchildren of Indian women became immediate targets of the second-generation cut-off rule. This of course means that the sex discrimination was not eliminated. Rather, through Bill C-31 the sex discrimination was passed on to the children and grandchildren of Indian women once enfranchised for marrying out (Eberts, 2010).¹⁵ It is precisely in this way that the 1985 amendment to the *Indian Act* through Bill C-31 was "failed remedial legislation" (Eberts, 2010, p.28).

As most know by now Sharon McIvor and her son Jacob Grismer's situation is illustrative of the government of Canada's continued reluctance to resolve the sex discrimination. Through the 1985 amendment McIvor was designated as a 6(2) Indian, the weaker form of status registration which thus prevented her from passing on status to her children in her own right because the Indian status granted descends from her Indian women forbearers versus her Indian men forbearers (McIvor, 2004).¹⁶ For 25 years, McIvor continued the important work of eliminating the sex discrimination that the children and grandchildren of Indian women once enfranchised continue to face (S. Day, 2011).¹⁷

An ally to Indigenous women, Mary Eberts, relying on her critical legal perspective, offers her comments and analysis on the McIvor decision. Eberts explains that Madam Justice Ross of the British Columbia Supreme Court agreed with McIvor's legal team that the comparator group for McIvor and her son Grismer was the Indian men who married non-Indian women and their children who on April 17, 1985, were registered as status Indians under 6(1)(a) of the *Indian Act*. Through applying this comparator group Ross J. ruled that the "preference for descent of status through the male line is discrimination on

¹⁴ Outside of my discussion of 6(1)(a) and 6(1)(c) and how A.A.N.D.C. applies them to Indigenous women and men in an unequal manner, I do not discuss the other paragraphs (sub-subsections) of 6(1). This discussion is beyond the scope of this paper.

¹⁵ See also Gehl, 2006, 2013; Gilbert, 1996; McIvor, 2004.

¹⁶ See also Eberts, 2010.

¹⁷ See also Day and Green, 2010; Eberts, 2010; Haesler, 2010.

the basis of sex and marital status" (Eberts, 2010, p. 32). Ross J. ruled that 6(1)(a) must be equally applied to Indian men and their descendants and the Indian women once enfranchised and their descendants (Eberts, 2010). Alternatively stated, the children and grandchildren of both Indian men and the Indian women who married out should all be registered under 6(1)(a) of the *Indian Act*. This ruling was cause for celebration.

Unfortunately, through yet another questionable line reasoning the Court of Appeal narrowed the scope of Justice Ross' legal remedy by using a comparator group for Grismer thereby completely ignoring McIvor's situation of her inability to pass on status registration to her grandchildren. Yet it was McIvor, not her son, who brought the matter of sex discrimination to court. The new comparator group which Justice Harvey Groberman relied on was the grandchildren once enfranchised through the double-mother clause codified in section 12(1)(a)(iv) that came into effect on September 4, 1951. As discussed above, through the double-mother clause a person was enfranchised at the age of 21 years when both their mother and paternal grandmother were non-Indians prior to their marriage. This change means that McIvor's son is only entitled to 6(1)(c) and his children 6(2) status. In relying on this comparator group Groberman J.A. narrowed the scope, where as a result, and in line with Bill C-31, the legal remedy found in Bill C-3 fails to resolve all the sex discrimination. It is precisely for this reason that Eberts (2010) has argued the "Court of Appeal decision is a deep disappointment" and further "is, in fact, almost a case-book example of judicial activism producing bad law" (p. 39-40).

One can determine, through Justice Groberman's reasoning many caveats remain in the *Indian Act's* current form. First, the grandchildren of Indian women once enfranchised, and born prior to September 4, 1951 – when the double-mother clause was first enacted – will continue to be denied Indian status registration, yet the grandchildren of Indian men in this same situation are registered. Second, grandchildren of Indian women born through common law relationships rather than the institution of marriage will continue to be denied status registration. Third, the female children (and their descendants) of Indian men who co-parented with non-status women in common law union will continue to be excluded, yet the male children (and their descendants) of Indian men who co-parented with non-status women in common law union have status. Fourth, the grandchildren of Indian women once enfranchised and now re-instated are only entitled to 6(2) status and therefore will not be able to pass on status to their children born prior to April 17, 1985, yet the grandchildren of Indian men are registered under 6(1)(a). Clearly, it is in these ways that matrilineal descendants remain targets of sex discrimination (McIvor & Brodsky, 2010).

Unfortunately, on November 5, 2009, the S.C.C. refused to hear the appeal in the case of *McIvor v. Registrar, Indian and Northern Affairs Canada*. Although Brodsky and McIvor argued Bill C-3 as inadequate remedial legislation, in January 2011 it passed into law. Thus, despite the *Charter of Rights and Freedoms*, in particular section 15 which states women have the right to live free from racial and sex discrimination, like Lovelace before her, McIvor has been forced to pursue the elimination of the sex discrimination beyond the domestic arena. Shortly after Bill C-3 became law McIvor filed a complaint against Canada with the U.N.H.R.C (S. Day, 2011). In taking on this process McIvor herself has argued, "Canada needs to be held to account for its intransigence in refusing to completely eliminate sex discrimination from the *Indian Act* and for decades of delay" (as cited in Haesler, 2010, n.p.). Similarly, the Director of the Women's Legal Education and Action Fund (L.E.A.F.), Joanna Birenbaum (2010), has

argued that forcing Indigenous women such as McIvor “to endure the emotional and financial hardship of years and years of additional protracted litigation to remove the remaining areas of sex discrimination in the status provisions is unconscionable” (n.p.). Notwithstanding these issues and arguments, it is estimated that as many as 45,000 grandchildren of Indian women once enfranchised for marrying out will gain the right to status registration through this more recent amendment (Day & Green, 2010; O'Donnell & Wallace, 2012). They will now also be more likely to be entitled to First Nation band membership and their treaty rights.

In sum, despite the efforts of Ogitchidaa Kwewag – Two-Axe Early, Corbiere-Lavell, Bedard, Lovelace, and more recently McIvor – the 156 year (as of 2013) history of the sex discrimination in the *Indian Act* continues. This is the case, regardless of the fact that Indigenous women have dedicated over fifty years to its elimination (Eberts, 2010, p. 42). Although living in a post-*Charter* era, for me and possibly many others, the equality outlined in section 15 of the *Canadian Charter of Rights and Freedoms* has no real practical value beyond that of a pitiful and meaningless fictional story. Through living, observing, and thinking about the process of remedial legislation – both in 1985 and 2011 – I have come to realize that Canada manipulates legislative change as an opportunity to create new forms of sex discrimination rather than eliminate it. The next section of this article discusses yet another form of sex discrimination that has not received much attention: unknown and unstated paternity and the *Indian Act*.

Unknown and Unstated Paternity and the *Indian Act*

Traditional Knowledge

No one born out of wedlock or any descendant of such a person, even in the tenth generation, may be included among the LORD'S people (Canadian Bible Society, 1979, p. 193).

Although not without limitations, the historical record is a useful source in discussing the Indigenous family model. After assessing the needs of the Indians of Lower Canada, the 1845 Bagot Commission reported on child rearing practices stating, “an event of this nature [child of unknown or unstated paternity] does not cast a stigma upon the mother, nor upon the child, which is usually adopted into the tribe” (App. EEE, section 1, Indians of Canada East). Similarly, in his work on the Algonquin Nation of the Ottawa River, F.G. Speck (1915) observed it was the Chief's responsibility to take care of orphaned children (p. 21). Further to this, Gordon Day (1979) has stated, “the basic unit of Algonquin society was the family: the father and mother, grandparents, children and adopted children” (p. 3).

While the historic record reveals these tidbits of knowledge, my knowledge of the Indigenous family model also emerges from the oral stories my kokomis (grandmother in Algonquin) told me. Originally from Pikwàkanagàn First Nation, Ontario my kokomis was an Anishinaabemowin language speaker and storyteller. Several times she recited to me the story about her kokomis Angeline Jocko. Angeline, a Mohawk woman from the Lake of Two Mountains, was born around 1825 and it was in 1844, when she was nineteen years old, that she married Joseph Gagnon, Sr. Despite having several biological children of her own, my kokomis explained, Angeline adopted two little boys named little Paul Jocko (possibly a sibling's son) and Moses Martell.

In my process of understanding the Indigenous family model, parenting, and community membership, I also turn to Anishinaabe governance laws, in particular the Clan System of Governance. Through clan

teachings such as the need to keep our blood clean, men and women were encouraged to seek new genetic material from outsiders as the diversity assured the health and wellness of the people. In addition to this, it was common practice for Indigenous nations to adopt, kidnap, and assimilate young children when membership loss due to disease and war was great. In this way, parenting and community membership was not always reducible to the biological parents. Pamela D. Palmater (2011) arrives at a similar realization of the limitations of blood as the criteria in determining identity and nationhood when she argues, "blood is not only unnecessary as an indicator of our identities; it is completely irrelevant" (p. 218). Rather, it is the social cultural aspect that determines who we are such as the deeply rooted connections to our nations that include family, larger community relations, and traditional territories, as well as the collective history, values, and beliefs that we share in common with one another (Palmater, 2011). Cannon (2008) concurs with this broader understanding of identity and belonging, offering there exists in Indigenous culture an "ancient context" that informs us of the importance of respecting women and the responsibilities they carry (p. 6).

Within the Anishinaabeg knowledge tradition there are many ancient and sacred stories about Ashkaakamigo-Kwe (Mother Earth), Nokomis Dibik-Giizis (Grandmother Moon), Giizhigoo-Kwe (Sky Woman), Manitou-Kwe (Spirit Woman), and Wenonah (The First Breast Feeder). Anishinaabeg stories teach us that in their role as creators and nurturers of life, these mothers loved all children regardless of what western culture refers to as non-paternity disclosure. Further, through these stories the Anishinaabeg continually learn that all children are valued as gifts from Creator and all are deserving of the love needed to achieve *mino-pimadiziwin*, meaning the good life.

Legislative History

As the historical record, my family oral history, traditional governance practices, and sacred teachings inform, eventually the *Indian Act* began to impose European definitions and practices on who was and who was not an Indian child, even though the inclusion of all children regardless of paternity disclosure was once traditional Indigenous practice. In 1927, section 12 of the *Indian Act*, which remained in place until 4 September 1951, stated that "Any illegitimate child may, unless he has, with the consent of the band whereof the father or mother of such child is a member, shared in the distribution moneys of such band for a period exceeding two years, be, at any time, excluded from the membership thereof by the Superintendent General" (as cited in Gilbert, 1996, p. 34). This criterion was broad and inclusive in that all that was required was the sharing of band funds. From 4 September, 1951, through 13 August, 1956 the criteria of who was an Indian shifted slightly where the test was "the Registrar had to be *satisfied* that the father was not an Indian in order to omit adding a name to the register" (as paraphrased in Gilbert, 1996, p. 33, emphasis mine). The criteria shifted once again from 14 August, 1956, through 16 April, 1985, where section 12(2) stated that illegitimate children were automatically added to the Indian register whereby the band had twelve months to protest. This provision protected Indigenous mothers and their children. That said, if and when a protest was made and the Registrar determined that the father of the child was a non-Indian person then the child's name was removed from the official Indian register (Gilbert, 1996, p. 33). In summary, although regulated by legislation, and although the inclusive process was once narrowed, it was eventually re-expanded to include all children regardless of non-paternity disclosure unless a successful protest was made. This process of inclusion remained in place until 1985.

Aboriginal Affairs' Unstated Paternity Policy Explained

Along with the issues that McIvor continues to pursue, today there is an additional form of sex discrimination of which few are aware. This sex discrimination is particularly disconcerting as it places many Indigenous children at risk of being denied their entitlement to Indian status registration and consequently First Nation band membership and treaty rights. This sex discrimination pertains to the Indigenous children whose father's signature is not on their birth certificate. Today, when a child is born and for some reason the father is unable to or does not sign the birth certificate A.A.N.D.C. assumes the father is a non-Indian person as defined by the *Indian Act*. This A.A.N.D.C. unstated paternity policy is best thought of as the application of a negative presumption of paternity, and it occurs whether the parents are married or not. Succinctly, a father's signature must appear on a child's long form birth certificate as it is the long form birth certificate, and both parental signatures, that are relied upon in determining if a child is entitled to Indian status registration.

Interestingly, as with the sex discrimination that McIvor continues to challenge, this sex discrimination was created through the remedial action of the 1985 amendment to the *Indian Act*. What is really important here is that in actuality today the *Indian Act* is silent on this very matter of missing fathers' signatures. Regardless of this legislative silence, through A.A.N.D.C.'s unstated paternity policy these children are placed at risk for the denial of Indian status registration. More particularly, when administrating applications for status registration, this policy instructs the assumption of a non-Indian father to all applicants where a father's signature is lacking.¹⁸ Through this unfair negative assumption of paternity, when a mother is registered under section 6(1), the stronger form of Indian status, and a status Indian father does not sign the birth certificate the child is only registered under 6(2). While this child is entitled to Indian status registration, when a mother is registered under 6(2), the weaker form of Indian status, and a status Indian father does not sign the birth certificate the child is deemed a non-status person (Gehl, 2006, 2013).

What is really dubious about this policy assumption is that A.A.N.D.C. relies on a discourse – unstated paternity – and practice that blames and targets mothers and their babies. Clearly there is the need to understand the situation from the perspective of mothers.¹⁹ My own reasoning informs me that sometimes, due to an abuse of power and sexual violence such as incest and rape, mothers may not obtain the father's signature on the child's birth registration form because they do not want the father to know about the child or have access to the child. Such situations may be best referred to as unreported and unnamed paternity. Again relying on my own reasoning sometimes a mother may record the father's name on the child's birth registration form, yet he refuses to sign the form because he needs to protect his standing in the community, and/or a marriage to another woman, and/or to avoid having to make child support payments, and/or the loss of his driver's license should he not make his child support payments. Such situations may be best referred to as unacknowledged and unestablished paternity. Further, I have been told that in some situations mothers do record the father's name on the birth registration form, but because the father's signature is not obtained, an official of the government of Canada blanks-out his name. Alternately stated, an official removes the father's name from the birth form. Still further, I have also been told that in many situations the father may not be present during the birth of the child, such as when

¹⁸ This A.A.N.D.C. unstated paternity policy also applies to non-Indigenous women whose child's father is a registered status Indian, yet for some reason his signature is not on the birth certificate.

¹⁹ In this paragraph I present my own thinking on the topic, as well as knowledge that has emerged through many conversations I have had with Indigenous mothers and community members.

the mother is flown outside of her community to give birth as many communities are not equipped to fulfill this necessary area of health care. Moreover, once again my own reasoning informs me that sometimes the father dies prior to the birth of his child. Such situations may be best referred to as unrecognized paternity. Further, a child may be conceived through the sexual violence of rape, gang rape, sexual slavery, or through prostitution where, as a result, the mother does not know who the father is and, possibly needless to say, could care less who he is as she has other matters to address.²⁰ These latter situations may best named unknown paternity.²¹

Statistics and Figures

According to Stewart Clatworthy (2003) between 1985 and 1999 as many as 37,300 children of so-called unstated paternity were born to status Indian mothers registered under 6(1). During this same time period as many as 13,000 children of so-called unstated paternity were born to status Indian mothers registered under 6(2). Through A.A.N.D.C.'s policy, these latter 13,000 children were immediately denied Indian status registration and, therefore, potentially band membership and treaty rights. In my personal curiosity and need to glean an idea of the number of children that may have been denied as of 2012, I performed a simple extrapolation of Clatworthy's figure of 13,000. If during a 14 year period 13,000 children have been denied Indian status, this averages to 928 annually. Taking this annual figure of 928 forward to the year 2012 – meaning 928 multiplied by 27 years – I calculate that as of 2012 as many as 25,000 Indigenous children have been denied through this policy. This is my estimate.

Mann (2009) provides the percentage rates of so-called unstated paternity respective to age for section 6(1) mothers which, unsurprisingly, is higher for younger mothers. For example, mothers under the age of 15 years had a rate of 45%. Mothers aged 15 to 19 had a rate of 30%. Further, mothers aged 20 to 24 had a rate of 19%, mothers aged 25 to 29 had a rate of 14%, whereas mothers aged 30 to 34 had a rate of 12%. Although these statistics represent rates for mothers registered under 6(1), it is not unreasonable to assume that similar rates also apply to mothers registered under 6(2). When reviewing these numbers and statistics it is important to appreciate that Indigenous women experience a high rate of sexual assault. Non-Indigenous women experience sexual assault at a rate of 23 incidents per 1000, and Indigenous women experience sexual assault at a rate of 70 incidents per 1000 (see Ontario Native Women's Association, 2013; see also Native Women's Association of Canada, 2010).

Administrative Remedies Offered and My Thoughts

According to Clatworthy (2003) 53% of so-called unstated paternity cases are unintentional, while the remainder, 47% are intentional. Unintentional situations emerge due to compliance issues such as the father's signature not being achieved because of his absence during the birth, the dissolution of the relationship, and the inability to pay administrative charges for changes requested after amendment deadlines have passed. Intentional situations emerge because of unstable relationships, a father's denial

²⁰ I need to qualify that many women conceived through the sexual violence that occurred during their Residential School and Day School experience. In these situations it is highly unlikely that the father's signature would be recorded on the birth registration form.

²¹ While thinking through all these situations we also need to keep in mind that while a mother, grandmother, or great-grandmother may know the father, this does not mean a child, a grandchild, or great-grandchild knows. Further, these categories – unstated, unreported, unnamed, unacknowledged, unestablished, unrecognized, and unknown paternity – also apply to the paternity of one's grandfather and/or great-grandfather.

of paternity, confidentiality concerns of the mother, child custody concerns, mothers afraid of losing Indian status registration or First Nation band membership, and an unwillingness to pay administrative fees for birth registration changes (Clatworthy, 2003, p. 16-18). Moving from this limiting framework Clatworthy offers a number of administrative remedies. These remedies include the development of a national policy; First Nation leadership development; the production of new resource materials for parents; education initiatives for parents; and the development of birth and status registration kits for parents (p. 19-22). For the most part these remedies emerge from an androcentric position.

Fiske and George (2006) critique Clatworthy for failing to explore in greater detail why Indigenous mothers might not disclose who the father is. They argue, paternity disclosure can at times place women in "jeopardy, perhaps endanger them, and at the very least cause social conflicts where a man either denies paternity or refuses to acknowledge it to state authorities" (Fiske & George, 2006, p. 4). Similarly, the Native Women's Association of Canada (N.W.A.C.) (2007) has noted, "Issues related to personal safety, violence, or abuse may provide a reason for a woman deciding to disassociate herself with a former partner or spouse" (p.1). Adding, "mothers may wish to avoid custody or access claims on the part of the father: leaving the paternity unstated forms a partial protection against such actions by a biological father who may be unstable, abusive or engaged in unhealthy behaviours" (N.W.A.C., 2007, p. 1). Mann (2009) adds intentional situations also emerge when a mother knows who a father is yet is unwilling to identify and name the father when the pregnancy is the result of abuse, incest, or rape (p.33). Certainly Fiske and George, N.W.A.C., and Mann are getting closer to the issues and reality that many Indigenous women are forced to endure in a sexist and racist patriarchal society.

Mann (2005) offers her own discussion of administrative remedies. In some ways they do pick up where Clatworthy left off. Mann suggests; access to travel funding for fathers when mothers have to leave the community to give birth, birth forms signed in the community prior to the mother leaving to give birth, increased administrative support in communities, and alternatives to notarization when there is the need to amend birth registration forms (p. 21). In offering this discussion of remedies, Mann admits that they will serve little in situations where a mother for some very legitimate reason cannot or will not disclose the name the father. Mann then proceeds to offer several recommendations: the use of affidavits or declarations as proof of paternity by either the mother or father, or at the very least allow for affidavits or declarations to identify who the father is when the child is the result of sexual violence such as incest or rape; provide necessary resources when affidavits or declarations are required; the need for educational initiatives for both men and women; conduct research to determine additional administrative remedies; and conduct research where key stakeholders such as First Nation women and First Nation representatives are included throughout the development of policy or legislative change (p. 26). In this way, Mann's analysis moves in the right direction extending Clatworthy's limitations. But there is more thinking and research required.

Certainly, administrative remedies are within A.A.N.D.C.'s jurisdiction, and while these remedies offered by Clatworthy and Mann are on the right track – again, Mann more so – my own reasoning informs me that they do not begin to consider and thus address situations where a father, for whatever reason, while accepting paternity refuses to officially acknowledge paternity and sign their child's birth certificate. For example, it is common knowledge that sometimes fathers go through a period of insecurity and jealousy when their partner becomes pregnant. When I think about this state of being I view it as analogous to the

postpartum depression – psychosis continuum that some mothers experience after childbirth. While this state of pathology has yet to be identified, named, and defined in the Diagnostic and Statistical Manual of Mental Disorders, and thus effectively addressed in our societal structures, many people know that it is during a woman's pregnancy when a father is more likely to become neglectful, abusive, and consequently likely to refuse to acknowledge paternity and sign a child's birth certificate.

Nor for that matter, and again drawing from my reasoning, do these administrative remedies offered by Clatworthy and Mann address situations where a mother does not know who the father is due to situations of rape or gang rape by unknown perpetrators. While in some situations of sexualized violence a mother may know who the perpetrator is, in other situations she may not. Moreover, there may be more than one perpetrator. In addition, and this time drawing from my own experience of being denied Indian status, these administrative remedies offered do not address situations where an individual such as myself does not know who her grandfather was or is, and has no way of determining his identity. Like the Ogitchidaa Kwewag before me, I am forced to take the matter of an unknown paternity in my lineage, and consequently the denial of Indian status registration, through Canada's legal system.

That said, I think it is also important to understand that these remedies and recommendations offered by Clatworthy and Mann do not address situations where a non-Indigenous woman has a child with an Indian man yet for some reason is unable to attain the father's signature on their child's birth certificate. Certainly administrative remedies, whether at the policy level or legislative level, need to incorporate the realities of non-Indigenous mothers who have parented with Indian men. Further research is required, research that includes non-Indigenous mothers of Indigenous children as a stakeholder group.

As a measure of fairness, objectivity, and to assure this article is comprehensive, readers will find it interesting to know that A.A.N.D.C. (2012) offers three administrative remedies on this topic. First, A.A.N.D.C. recommends that applicants for Indian status have their birth certificate amended. Second, a statutory declaration signed by the applicant's mother and biological father should be provided. Third, in the event that a biological father is uncooperative, unavailable, or deceased, it is suggested that the applicant provide a statutory declaration from the biological father's family members that affirms what they believe. These remedies fail to address many of the issues discussed by Clatworthy, Mann, and myself and as such fail to crest the horizon of the issues.

The next section of this article offers a discussion about my process of litigating the matter of A.A.N.D.C.'s unstated paternity policy. Undoubtedly, lessons can be learned from people telling their stories.

My Process of Navigating the Canadian Legal System

My grandfather's paternity in my father's lineage is both unknown and thus unstated. As a result I do not know who this man, or his ancestry, was or possibly is (Gehl, 2006, 2013). On my father's birth certificate his father's name and signature is left unrecorded. As I have discussed in this article, this situation of mine differs from that of a mother deciding not to name the father, and for that matter a situation where a father refuses to acknowledge – officially or unofficially – paternity. As the grandchild I can and will never know who this person was or is.

After a lengthy research period that began with the oral tradition with my kokomis as well as months of archival work at the Archives of Ontario searching for a link to an Indian ancestor, the Registrar of what

was then called Indian and Northern Affairs Canada (I.N.A.C.) denied my application for status registration relying on their unstated paternity policy. Alternately understood, with their unstated paternity policy assumption I am denied Indian status as the second-generation cut-off rule is applied – meaning I.N.A.C. assumed my unknown grandfather (again, my father's father) was or is a non-Indian and my mother is not registered as a status Indian.

Interestingly, in applying the unstated paternity policy to my birth year (1962), I.N.A.C.'s policy was applied in a retroactive manner. Alternately stated, the new 1985 policy is applied to births that predated the policy's year of creation. It is in this way that the unstated paternity policy has a wider scope of denying Indigenous people Indian status registration, and it is in this way that the policy adds to the sex discrimination with which Indigenous women and their descendants have to contend. It was in 1995 when I first approached Aboriginal Legal Services of Toronto (A.L.S.T.) asking for help (Gehl, 2006, 2013). Shortly after this time, and following the requirement of the *Indian Act*, A.L.S.T. filed a protest on my behalf. In 1997, the Registrar of I.N.A.C. denied my protest claiming that my name was indeed *correctly omitted* from the Indian Register.

In sum, in I.N.A.C.'s process of determining my entitlement to Indian status registration, the Registrar assumed that my unknown, and thus unstated, grandfather was or is a non-Indian. Said another way, I.N.A.C. applied a negative assumption of paternity and as a result I am denied Indian status registration (Gehl, 2006, 2013). My case is significant and has implications for many First Nations mothers and their children. Regardless, my case was denied funding from the I.N.A.C. test case funding program as it seems they do not fund section 15 *Charter* challenges to the status provisions of the *Indian Act*. Nonetheless, in April 2000 we (A.L.S.T. and I) applied for and received funding from the Court Challenges Program of Canada. While the remainder of my funding remains intact, the Court Challenges Program is now defunct as it was one of the first programs the Harper Government cut when it came into power in September 2006.

In 2001, on my behalf, A.L.S.T. filed a statement of claim (also called an action or pleading) with the Ontario Superior Court of Justice, thus formally launching a challenge against the Attorney General of Canada (A.G.C.). A.L.S.T. was challenging the Registrar's assumption and administrative practice of non-Indian paternity in situations where the paternity of the applicant is unknown and consequently unstated. In October 2001, the Department of Justice (D.O.J.), representing the A.G.C., motioned to strike this statement of claim. The D.O.J. argued that there was no basis to attack an administrative decision under the *Charter*, meaning the challenge taken must be to the statute, meaning the *Indian Act* itself. On 8 November, 2001, seventeen days after the statement of claim was filed, Justice Swinton ruled in the A.G.C.'s favour (Gehl v. Canada, 2001). On 5 September, 2002, the Ontario Court of Appeal agreed with this lower court decision (Gehl v. Canada, 2002). Although my claim was struck, with the consent of the A.G.C., we were granted leave by the court to re-file a statement of claim as a challenge to the *Indian Act*. In November 2002, A.L.S.T. filed a second statement of claim. As with the first, the challenge is based on section 15 of the *Charter* – the equality guarantee. The discovery, affidavit, and cross-examination process is now complete and the expert reports are in. Recently, though, the case was dismissed because the timeline for the action had lapsed. On November 29, 2012, A.L.S.T. filed a motion to set aside the dismissal. This motion has been adjourned and the Master assigned the file is now seeking a deadline by which the matter must be heard before he approves and signs the order. Possibly needless to say here, as

McIvor (2004) has argued before me, my process of seeking equality in Canada has been “a hard and lonely road” (p. 111).

Canada Violates International Conventions and Declarations

Given that Canada's unstated paternity policy violates the *Charter* and the *Constitution* it should come as little surprise to learn that through this policy, Canada is also violating several international conventions and declarations. To help the reader digest these international instruments and the sections of them that Canada violates I offer a numbered list here.

1. The *Universal Declaration of Human Rights*, adopted by the United Nations 1948:

Article 25(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.

2. The *International Covenant on Civil and Political Rights*, adopted by the United Nations 1966:

Article 27, In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

3. The *Convention on the Rights of the Child*, adopted by the United Nations 1989:

Article 8 (1), States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference; (2), Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity; Article 30, In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

4. The *Declaration on the Rights of Indigenous Peoples*, adopted by the United Nations 2007:

Article 33(1), Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live; (2), Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

5. The *Convention on the Prevention and the Punishment of the Crime of Genocide*, adopted by the United Nations 1948 includes in its definition of genocide:

Article 2 (e), forcibly transferring children of the group to another group.

Summary and Conclusion

Despite decades of advocacy and litigation work by Indigenous women that eventually led to amendments to the *Indian Act*, under A.A.N.D.C.'s current regime of determining Indian status registration, and as of

1985, a father must sign his baby's birth certificate for his Indian status registration to be factored into the child's eligibility. Otherwise, through an unstated paternity policy the Registrar of A.A.N.D.C. applies a negative assumption of paternity whereby the child may not be entitled to Indian status and consequently band membership, and their treaty rights. This assumption of non-Indian paternity is sex discrimination.

What is particularly disturbing about A.A.N.D.C.'s unstated paternity policy is the way it targets Indigenous mothers and children. As I have discussed in this article, women sometimes conceive through an abuse of power such as in situations of incest, rape, gang rape, sexual slavery, and prostitution where as such the terms un-reported, unnamed, unacknowledged, un-established, unrecognized, and unknown paternity are more appropriate descriptors than the inadequate "unstated".

Through the creation of the 1985 A.A.N.D.C. unstated paternity policy it is now clear to me that the remedial legislation intended to eliminate the sex discrimination was little more than an opportunity for Canada to manipulate the legislative change process into an opportunity to create new and worse forms of sex discrimination. While many people may correctly argue additional research is required in remedying A.A.N.D.C.'s unstated paternity policy, it is my contention that a well-defined research methodology alone will not resolve the issues faced by Indigenous women. It is my view that the legislative silence presently coded in the *Indian Act* was manipulatively crafted by sexist and racist patriachs as a mechanism to then create discriminatory policy at the departmental level. A.A.N.D.C.'s unstated paternity policy is a new low for the Canadian state that is "morally reprehensible" (McIvor, 2004 p. 133).

It is precisely this A.A.N.D.C. unstated paternity policy that is preventing me from Indian status registration and consequently First Nation band membership in my kokomis' community, citizenship in the broader Anishinaabek citizenship endeavour, as well as access to my treaty rights such as health care. When A.A.N.D.C. denies me Indian status registration they deny me important aspects of my identity as an Indigenous person, and as a result my right to live mino-pimadiziwin as an Algonquin Anishinaabekwe. It is precisely for this reason, as well as for young mothers and their babies, that I continue my effort.

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