Presentation to the Standing Committee on Aboriginal Affairs and Northern Development (AANO)

Re:

Bill C-3 - Gender Equity in Indian Registration Act

Submitted by

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Ottawa, Ontario

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I. INTRODUCTION

Thank you for inviting me to speak to you today on this very important matter. I would like to acknowledge the traditional territory of the Algonquin as well as the long, hard struggle of Sharon McIvor to effect real change for the descendants of Indian women. My name is Pam Palmater and my identity is that of a Mi'kmaq woman, but my situation in life is that of a Non-Status Indian. I am a first generation Non-Status Indian because I trace my ancestry through the matrilineal side of my family. *Bill C-3* will not address the gender issue raised in the *McIvor* case and, as a result, **I am here today to speak against Bill C-3 as drafted.**

There is no point in my repeating the history of the *Indian Act*, the details of the *McIvor* case or the process that led us here today. You have all been briefed by government officials and various witnesses who have canvassed the subject thoroughly. Additionally, I made a formal submission during Canada's engagement process which included a copy of my 700 page doctoral thesis on the subject, as well as a subsequent letter detailing the issues I saw with *Bill C-3* once it was introduced. My presentation today will, as much as a lawyer can, get straight to the point - how the *Indian Act* impacts my life; some of the assumptions that are informing this process; the specific issues I see with *Bill C-3;* and my recommendations on how to address them.

II. IMPACT

I descend from my great grandfather, Louis Jerome, who was one of the first chiefs of my home community of Eel River Bar First Nation in New Brunswick. His daughter, Margaret Jerome, was my grandmother and the healer of our community because of her extensive knowledge of traditional medicines. She did not have status because she married a non-Indian. This meant that her son, (my father) Frank Palmater, also did not have status. He went on to fight on Canada's behalf in WWII but was treated unequally as compared with other vets upon his return because of his lack of Indian status. In 1985, my grandmother was reinstated as a section 6(1)(c) Indian and my father a section 6(2) Indian - which left me excluded.

I also have 8 sisters and 3 brothers, most of whom have dedicated their professional and personal time to protecting our Mi'kmaq identity, culture, land, and Aboriginal and treaty rights. They believe that it is our duty to protect the treaties that our ancestors signed with the Crown. Our ancestors made a great deal of sacrifices on our behalf and ensured that their "heirs and heirs forever" would be protected. I am one of those heirs - albeit a less equal one because of my lack of status. My family will be negatively impacted by *Bill C-3* - I have one sister who was adopted, three who were born pre-1951, and three who are illegitimate. This will mean very different things for us under *Bill C-3* or for any limited gender discrimination remedy. Appendix B illustrates how *Bill C-3* will not remedy gender discrimination for our family.

The *Indian Act's* registration criteria has the power to substantially change lives. What may have started out as an administrative way to identify those entitled to federal programs and services, has morphed into something much more complex and insidious. Due to our lack of legal recognition as Indians, my siblings and I are not considered treaty beneficiaries. This is not because the law says this is the case, it is because various federal and provincial enforcement agencies have developed policies based on the premise that only status Indians are "real" Indians.

This means that when we hunt and fish, we are often stopped, our guns are confiscated and charges laid. Even if the charges are eventually dropped, we are treated like criminals on our own traditional territory, for the sole reason that we descend from the matrilineal side of our family instead of the patrilineal side - and therefore lack status. This will continue to be the case for some of my family members even if *Bill C-3* becomes law.

The majority of my family lives at or below the poverty line due to the lack of educational opportunities resulting from their non-status. They suffer from the same poor socio-economic conditions as status Indians do, like lower educational levels, higher rates of unemployment, higher incidences of health diseases and other social issues. The major difference between us and status Indians is that we don't have equal access to health, education and other benefits and supports.

We all have strong Mi'kmaq identities; connections to our traditional territories; familial connections to our home community; and fierce loyalty and service to the Mi'kmaq Nation. However, we are forced to live with the constant legal and political denial of our identities as Mi'kmaq people because of our lack of Indian status, because we trace our ancestry through the matrilineal line. This means that none of us are band members, can speak our language, or have a political voice in our home community.

Now, there is a new generation of Palmaters, my sons Mitchell and Jeremy, ages 17 and 16, who have been raised with strong Mi'kmaq identities, but who must also struggle with the lack of self-worth and exclusion that comes with lack of status. Through no fault or control of their own, they descend from the matrilineal line and are therefore denied status. If we traced our descent through patrilineal lines, not only would the majority of my siblings be section 6(1)(a) Indians, but their children would (at least) be section 6(2) Indians. The proposed *Bill C-3* which contains a pre-1951 cut-off will only give some of us section 6(2) status and will exclude our children. **It is because this Bill does not address the gender discrimination raised in *McIvor* that I speak against it.**

III. ASSUMPTIONS

There are several assumptions that have been made during this process that could significantly impact both the analysis of *Bill C-3*, as well as the decisions that must be made to accept, amend or reject the *Bill*. These include:

(a) *Bill C-3* must be passed quickly to avoid a legislative gap in BC in July;

(b) The Court of Appeal decision in *McIvor* specifically prohibits Canada from addressing anything but the gender discrimination arising between double mother clause and 12(1)(b) reinstatees and their descendants;

(c) *Bill C-3* may not address all of the gender discrimination in the *Indian Act*, but it at least addresses the discrimination mentioned in the Court of Appeal decision in *McIvor*;

(d) Canada cannot amend the status provisions of the *Indian Act* to address the larger gender discrimination issues without consulting with Aboriginal peoples, but it does not need to consult on *McIvor* gender issues;

(e) Canada cannot amend the status provisions of the *Indian Act* to address the larger gender and other discrimination issues because there is no consensus among Aboriginal peoples as to how it should be amended;

(f) The joint process will deal with all the other issues like wider gender discrimination, unstated paternity, illegitimate siblings, the second generation cut-off, band membership, citizenship and First Nations' jurisdiction; and

(g) The gender discrimination in *Bill C-31* was "unintended" and therefore Canada's "good faith" in this regard acts as an absolute shield from liability to new reinstatees.

Compare those assumptions to the facts:

(a) If Canada misses the July 2010 deadline, sections 6(1)(a) and 6(1)(c) will not be of no force and effect in British Columbia; no one will lose status; the *Act* will apply everywhere else in Canada; it will not affect renewals; and, as Parliamentary Secretary Duncan has explained, "it is not a crisis" and "not the end of the world" if it takes a bit longer to amend the *Act*.

(b) Courts do not draft legislation - Parliament does - and Canada is not limited in any way, legally or otherwise, from amending the *Indian Act's* registration provisions to address all gender discrimination, whether it arises from *McIvor* or the 14 other cases working their way through the system.

When Canada responded to the *Lovelace* case with *Bill C-31* in 1985, it did not limit the amendment to the reinstatement of section 12(1)(b) women, it also amended the *Act* to allow bands to control their own membership; changed the legal presumption for unstated paternity from a default of Indian paternity (unless protested) to a presumption of non-Indian paternity and reinstated other categories of previously enfranchised Indians. Canada is no more limited in its ability to amend the *Act* now, than it was in 1985.

(c) Not only does *Bill C-3* not address all of the gender discrimination in the registration provisions of the *Indian Act,* but it does not even entirely address the limited form of discrimination found in the Court of Appeal in *McIvor* between double mother clause and section 12(1)(b) reinstatees and their descendants. Appendix A of this document illustrates how this is the case. Double Mother Clause reinstatees still have a better entitlement to status.

(d) The *Indian Act* is federal legislation which is subject to the *Charter of Rights and Freedoms*. Sections 15 and 28 require equality between men and women. Section 35(4) of the *Constitution Act, 1982* requires that even Aboriginal and treaty rights are subject to gender equality. Therefore, no consultation is required about whether or not federal

laws need to be free from gender discrimination. In this light, Canada's insistence that it cannot deal with the larger issues of discrimination due to the duty to consult is exposed as an excuse.

However, Canada must consult with Aboriginal peoples on how to go about making these mandatory changes which impact Aboriginal peoples. If Canada had consulted on *Bill C-3*, it would have had the benefit of all of the witnesses' concerns prior to drafting any legislation. We would not now be in a situation where we must try to fix the *Bill* or start over. Aboriginal people would know that their views had been taken into account and accommodated, and Aboriginal women would not have to wait even longer for justice.

At the end of the day, Canada cannot have it both ways - it cannot on the one hand, argue that no consultation is necessary to bring about gender equality with regards to the *MRP*, or legislate equal access to justice with the repeal of section 67 of the *CHRA*, but then on the other hand, say that it can't make wider changes in *Bill C-3* as it must consult on the larger issues of gender discrimination of the *Indian Act.*

(e) Canadians are not required to obtain a consensus on important issues like crime prevention and human rights for example. Canadians have the luxury of being divided into the Liberal Party, the NDP, the Conservatives, the Bloc and even independents. New laws and legislative amendments are made on a regular basis despite the lack of consensus by all parties. Domestic and internationally accepted norms like gender equality does not require an absolute consensus amongst Aboriginal peoples.

(f) The track record for "joint processes" between Aboriginal peoples and Canada does not offer much hope for this one:

> (i) the Royal Commission on Aboriginal Peoples was a significant joint process to study, analyze and recommend solutions to the very problems that were raised in *McIvor*, yet Canada has not acted on those recommendations to address status, membership, citizenship or First Nations' jurisdiction;
>
> (ii) Section 67 of the *CHRA* prevented equal access to justice and equality for Aboriginal peoples for over 25 years, yet it was only meant to be temporary while Canada engaged in a "joint process" with Aboriginal peoples to make the *Indian Act Charter* compliant; and
>
> (iii) the First Ministers' Meetings which led to the *Kelowna Accord* resulted in a rejection by Canada to honour even the spirit and intent of that joint process, let alone the actual agreement;

(g) Nothing about the residual discrimination of *Bill C-31* was unintended. The evidentiary record in *McIvor*, as well as that of Canada's own records, shows that Canada was well aware of the impact of *Bill C-31* but felt that it needed to make a compromise

between those who demanded gender equality and those who opposed gender equality. Regardless of the "intent", liability follows effect in discrimination.

IV. BILL C-3

The following represents the specific problems with *Bill C-3* as currently drafted:

(1) Section (2) of *Bill C-3* simply re-enacts section 6(1)(a) of the *Indian Act* as it reads now, and will not accomplish the goal to eliminate gender discrimination.

The Court of Appeal in *McIvor* specifically stated that it would not draft the legislation. Canada is therefore left with the responsibility to do so in manner which respects gender equality. There is nothing in the Court of Appeal case which prevents Canada from addressing the larger issue of gender discrimination as between section 6(1)(a) and 6(1)(c).

When the Supreme Court of Canada case recognized the treaty right of Mi'kmaq people to fish for eels on a commercial basis in *Marshall*, Canada's response was not to sign commercial fishery agreement with only one First Nation and only in relation to eels - it signed agreements with all willing First Nations based on a wide selection of fish species. To do otherwise would have been ridiculous given that litigation that would have ensued on nearly identical facts.

Therefore, Canada can and should amend section 6(1)(a) of the *Indian Act* by adding the words "or was born prior to April 17, 1985 and was a direct descendant of such a person" in order to address gender discrimination; to avoid further identical litigation; and to give relief to those who have waited long enough. Furthermore, if such an amendment was made, there would be no need to have section 6(1)(c.1) and all the problems contained therein.

(2) Assuming that section 2 of *Bill C-3* was not amended, then section 3 of the *Bill* which adds 6(1)(c.1) to the *Indian Act* is still problematic.

Section 6.(1)(c.1)(iii) contains confusing wording. While Justice Canada appeared before this Committee to explain the intent of this section, it is not clearly evident based on the wording provided. A plain reading of that section indicates that there will be a pre-1951 cut-off where anyone born pre-1951 will not be entitled.

In the *Legislative Summary of Bill C-3*, it is suggested that the reason for this section is to ensure that Indian women do not end up receiving a greater entitlement than Indian men so as to prevent what Justice Canada refers to as "reverse discrimination". Despite assurances from INAC that anyone born pre-1951 who has siblings born post-1951 will all be entitled, the fact remains that those born pre-1951 without any siblings born post-1951 will not be entitled.

It is not clear that this section is worded specifically enough to avoid interpretive problems either in the Registrar's office; in the ongoing litigation before the courts; or the human rights complaints at the CHRC. Canada seems to be creating more complexities in the *Act* instead of simply focusing on eliminating gender discrimination. The confusion of this section can be avoided altogether by adding the suggested amendment to section 6(1)(a) as noted above.

(3) Section 3 of *Bill C-3* which adds 6(1)(c.1)(iv) to the *Indian Act*, is the most problematic aspect of this *Bill* as it creates a new distinction between those with non-status children and those without.

It is unnecessary for Canada to create a new distinction between the descendants of Indian women who married out based solely on the "status" or lack thereof of their children, in order to address *McIvor*. The Indian women who married out and her children and grandchildren have all suffered discrimination because of her gender. The children of Indian women who married out are only registered under section 6(2) because of the gender of their mother, and the grandchildren are only non-status Indians because of the section 6(2) status of their parent, which is because of the gender of the grandmother.

To explain in another way, the children of Indian women who married out are not limited to section 6(2) status because they had or adopted non-status Indian children. They are section 6(2) Indians because of the gender of their mother. All the children of Indian women who married out should be equally entitled to a gender discrimination remedy that bumps them from section 6(2) status to section 6(1) status regardless of whether or not they had children, or what kind of children they had.

Status has never been determined based on the status or lack thereof of one's children and the only conceivable reason to do this is to limit numbers of registrations and in so doing, costs. Aboriginal women and their children deserve better than that.

While it is true that some programs and services are based on status, regardless of section 6(1) or(2), the fact remains that there are practical differences between the two. For example, some band membership codes exclude section 6(2) Indians or their equivalent, and thus exclude them from band programs, services, housing and political participation. Additionally, section 6(2) Indians can't transmit their status to their children in their own right; and therefore section 6(2) status is associated with being "half" status and somehow lesser than section 6(1) Indians.

No one wants to be a section 6(2) Indian - so the failure of *Bill C-3* to provide an equal remedy to the section 6(2) children of Indian women who married out, does not remedy the gender discrimination noted in *McIvo*r and in fact creates new discrimination. The refusal of Canada to provide an equal remedy would require another *McIvor* court case based on nearly identical facts. Therefore, section 6.(1)(c.1)(iv) should be deleted in its entirety.

(4) Sections 7 and 8 of *Bill C-3* do not provide adequate protections for those to be registered under *Bill C-3* with regards to band membership.

Sections 7 and 8 of *Bill C-3* deal with membership and are designed to protect those who already had band membership before *Bill C-3* from losing it, but that section is subject to band membership rules that might say otherwise.

Neither section 7 or 8 of *Bill C-3* provide protections for those newly entitled to status for band membership in their home communities. This is in stark contrast to the amendments that were enacted in 1985. In 1985, when *Bill C-31* remedied some of the gender discrimination for Indian

women who married out and their children, some protections were built into the *Act* to ensure that these individuals were not unfairly excluded from band membership. While this protected the Indian women who were reinstated, if the bands acted before 1987, they could exclude their children.

These protections did not go far enough to prevent gender discrimination in band membership in 1985. Pre-1985, Canada was in control of band membership lists. Given that Indian women who married out and their children should have been registered pre-1985, but for the gender discrimination in the *Act*, they should also be entitled to band membership that they would have been pre-1985, but for the discrimination in the *Act*.

The situation with *Bill C-3* entitled Indians is the same. These 45,000 individuals, and especially those born prior to 1985, should be entitled to protections with regards to band membership as *Bill C-31* entitled Indians. They both share the fact that they were born pre-1985 when bands were not in control of their membership and could not have excluded them. A new section should be drafted to provide similar protections for *Bill C-3* individuals, or at least for those born pre-1985 with regards to band membership.

(5) Even if this Committee will not consider a broader amendment to address gender discrimination in section 6, the current *Bill* would have to be amended as it does not address the gender discrimination noted in the *McIvor* Court of Appeal case.

In Appendix A to this submission, I have attached a chart which illustrates how *Bill C-3* does not address the gender discrimination found in *McIvor*. The descendants of Double Mother Clause reinstatees still have a better entitlement to status than the descendants of section 12(1)(b) reinstatees. To not remedy the minimal gender discrimination noted in the Court of Appeal defeats the whole purpose of *Bill C-3*. It also further delays justice for Indian women and their children who have already waited more than 20 years for the *McIvor* case.

In Appendix B to this submission, I have also included chart which compares my own family line with that of a patrilineal family line in the same circumstances. One can see that the double mother clause reinstatees have better entitlements than my siblings who are s.12(1)(b) descendants. The second-generation cut-off date is applied much earlier to my family of female lineage than to a family of male lineage. Canada was tasked with addressing this discrimination and *Bill C-3* as currently drafted does not address *McIvor* in its entirety. The only way to easily remedy the discrimination in *McIvor* is to amend section 6(1)(a) as noted earlier.

(6) Section 9 is an offense to Indian women and their descendants who have already waited more than 25 years for justice, and is counter to the spirit and intent of the *Charter*.

Canada fought the *Lavell* case all the way to the Supreme Court of Canada. Canada also fought the *Lovelace* case before the international human rights tribunal before it went on to fight the *McIvor* case for over 20 years. Canada is once again, being forced to make amendments to respect gender equality - while at the same time is denying human rights claims being brought at the CHRC on the very same subject matter.

Canada has introduced a minimalist amendment to the *Act* and is seeking to deny compensation to those Indian women and their descendants who were wrongfully denied their identities, membership, and federal and band programs that have all affected their quality of life. In 1985, Canada argued that they should not be held liable for the harm suffered by Indian women who married out due to gender discrimination that resulted from the *Indian Act* because it was prior to the *Charter* coming into force.

However, the situation with *Bill C-3* is very different. The Court of Appeal in *McIvor* found the discrimination to be newly created in 1985 and not prior to the coming into force of the *Charter*. The *Charter* has been in force for many decades since 1985 and Canada cannot now say they can't be held liable for discriminatory actions that have caused significant harm to Indian women and their descendants.

To do otherwise is to perpetuate the very negative stereotypes against Indian women that *McIvor* (and others) fought against - that they are less worthy, less Aboriginal, and less able to transmit their Aboriginality to their children simply by virtue of being Aboriginal women. Furthermore, their inability to seek redress for ongoing discrimination would likely be considered a significant conflict with *Charter* and no doubt inspire an immediate *Charter* challenge.

There is an additional complication with regards to section 9 of *Bill C-3* and the *CHRA*. The repeal of section 67 of the *CHRA* allowed individuals to bring claims against Canada right away. However, if Canada shields itself from liability, how will this impact an individual's right to seek redress and compensation under the *CHRA*? This section should either be deleted in its entirety or amended to provide limited protections for bands, but only in relation to status.

VI. RECOMMENDATIONS

I do not support *Bill C-3* as drafted.

(1) I believe that Canada should withdraw the *Bill* and redraft more appropriate legislation that deals with gender discrimination, in conjunction with Sharon McIvor and other Aboriginal technical experts from the AFN, NWAC, and CAP.

If this could not be done, then I would recommend the following:

(2) Make an amendment to section 2 of *Bill C-3*, by adding the words "or was born prior to April 17, 1985 and was a direct descendant of such a person" to section 6(1)(a) of the *Indian Act, 1985*;

(3) Delete sections 3 and 4 of *Bill C-3* and any references to a new section 6(1)(c.1) of the *Indian Act*;

(4) A new section should be added before or after sections 7 and 8 of *Bill C-3* that provide protections for *Bill C-3* individuals with regards to band membership, especially for those born pre-1985;

(5) Section 9 of *Bill C-3* should be deleted in its entirety or amended to provide limited protection for bands and only in relation to status;

(6) Adequate funding be provided to First Nations for band-delivered programs and services based on their increased membership numbers (if any) and funding to enable all bands to draft membership codes, to review their current band membership codes and make the necessary amendments to incorporate gender equality;

(7) Canada, in partnership with AFN, NWAC, CAP, Aboriginal communities and individuals negotiate a process by which to compensate those affected by *Bill C-3* (or some other form of the *Bill*) in the fairest, quickest manner possible;

(8) Additional legislation be drafted in partnership with AFN, NWAC, CAP, Aboriginal communities and individuals to proactively address the remaining aspects of gender discrimination in the *Indian Act*; and

(9) That Canada, in partnership with AFN, NWAC, CAP, Aboriginal communities and individuals negotiate the mandate, terms of reference, funding structures and deliverable objectives of the joint consultation process that will lead to further amendments dealing with the larger discrimination and jurisdiction issues under the *Indian Act* in the short term, and negotiate a similar process to engage in longer term solutions like modern treaties, self-government agreements and so forth.

VII. SUMMARY:

Part of the problem with *Bill C-3* is how to respect gender equality in practice and not just the law. Delayed equality is not full equality. Canada fought the *McIvor* case for over 20 years and now proposes a minimal amendment that would require another person like Sharon McIvor to spend another 25 years to seek gender equality on essentially the same facts. An undefined joint process that does not have a specific mandate, clear objectives or identified funding for wide-spread participation does not provide any real comfort that gender discrimination, or any discrimination, will be addressed any time soon.

This situation is coupled with the fact that no additional funding has been identified for bands based on their increased membership numbers. This could result in bands feeling that they do not have sufficient resources to accommodate all their members and may amend or create band membership codes which specifically exclude those affected by *Bill C-3.* Canada often blames Aboriginal peoples for not being of one mind on these issues.

How quickly Canada forgets that this registration system was not only imposed upon us, but we were never consulted about what we wanted and the decision-making power rests solely with Canada. Aboriginal peoples have been living under the dark cloud of the *Indian Act* for over 130 years. How could Canada expect any result other than exactly what the *Indian Act* was designed to do - ensure that we were dependent, divided, and without our beliefs guide us. It's time for Canada to right its wrongs. To do other than address all the gender (and other) discrimination could mean additional and significant delays in justice for Aboriginal women and children with regard to:

(i) equal access to status and band membership;
(ii) equal access to citizenship in self-government agreements;
(iii) equal access to beneficiary status under treaties (historic and modern);
(iv) equal access to beneficiary status under land claim agreements (specific and comprehensive);
(v) an equal political voice in their communities (as electors and/or nominees for chief and council); and
(vi) equal access to programs and services from Canada in relation to health, education, economic development, and tax supports;
(vii) equal access to band programs and services like education & training, head start, on-reserve schooling, housing, and tax supports; and
(viii) equal access to elders, mentors, leaders, community members, land bases, cultural traditions, customs and practices, cultural events, and language training, etc.

Respecting our *Constitution, Charter, CHRA*, and international human rights instruments and norms means we no longer have the option to exclude Indian women and their descendants from their birth right on the basis of political compromise, administrative inconvenience, opposition to human rights or added costs. Canada has previously exercised its legislative jurisdiction to amend the *Act* much more broadly than the litigation required and there is no reason it can't do so again. Let's try to get it right this time - my children are counting on you to uphold Canada's commitment to gender equality and human rights both in the letter and in spirit.

APPENDIX A

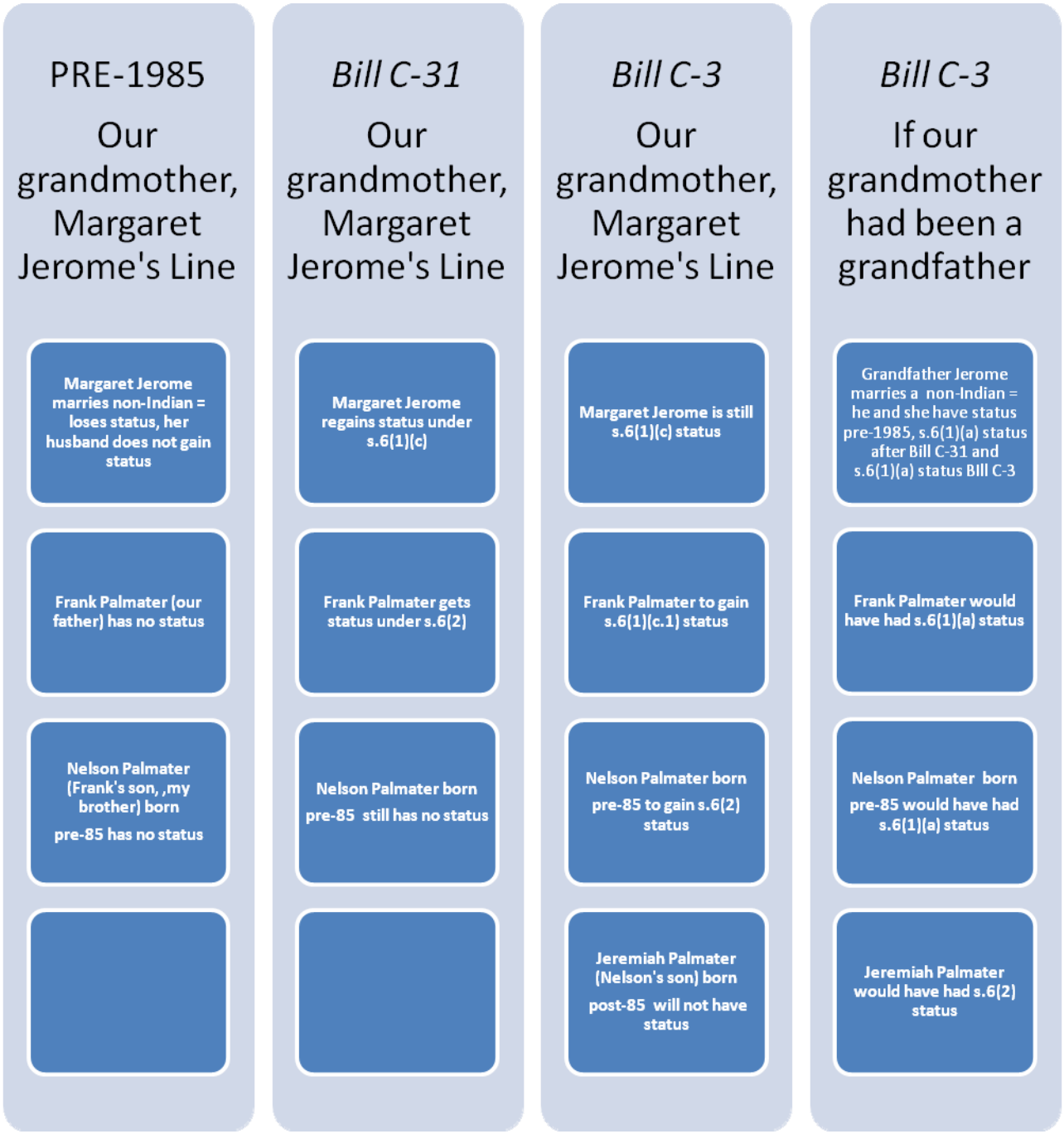
Three children of an Indian woman who married out, who themselves, each have different "types" of children (A) non-status Indian children; (B) status Indian children; and (C) no children, are compared to (D) the children of the brother who married out.*

*Assumptions

- all generations continue to parent with non-Indians (except for column "B")
- all children and grandchildren are born pre-85 (and post-64 or had OIC exemptions)
- **Columns A and D are the main comparator groups**

APPENDIX B

Comparing the Status of My Family's Grandmother's Line to My Family's Line Had She Been a Grandfather



- I used my brother Nelson as an example as he has the least complicated fact scenario (he was born post-1951 and pre-1985 to legally married father and mother)
- Ex. one sibling was adopted, three were illegitimate, another three siblings were born pre-1951

APPENDIX C

Dr. Pamela D. Palmater:
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Education:

JSD - Dalhousie University Law School

LLM - Dalhousie University Law School

LLB - University of New Brunswick Law School

BA, Native Studies - St. Thomas University

Professional:

Law Society of New Brunswick (1998)

Canadian Bar Association

Ontario Bar Association

Indigenous Bar Association

Selected Publications:

Beyond Blood: Rethinking Aboriginal Identity and Belonging (JSD Thesis, Dalhousie Law School 2009) [publication forthcoming].

"An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians" (2000) 23 Dal. L.J. 102.

"In My Brother's Footsteps? Is *R. v. Powley* the Path to Recognized Aboriginal Identity for Non-Status Indians?" in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation* (Markham: LexisNexis, 2003) 149.

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