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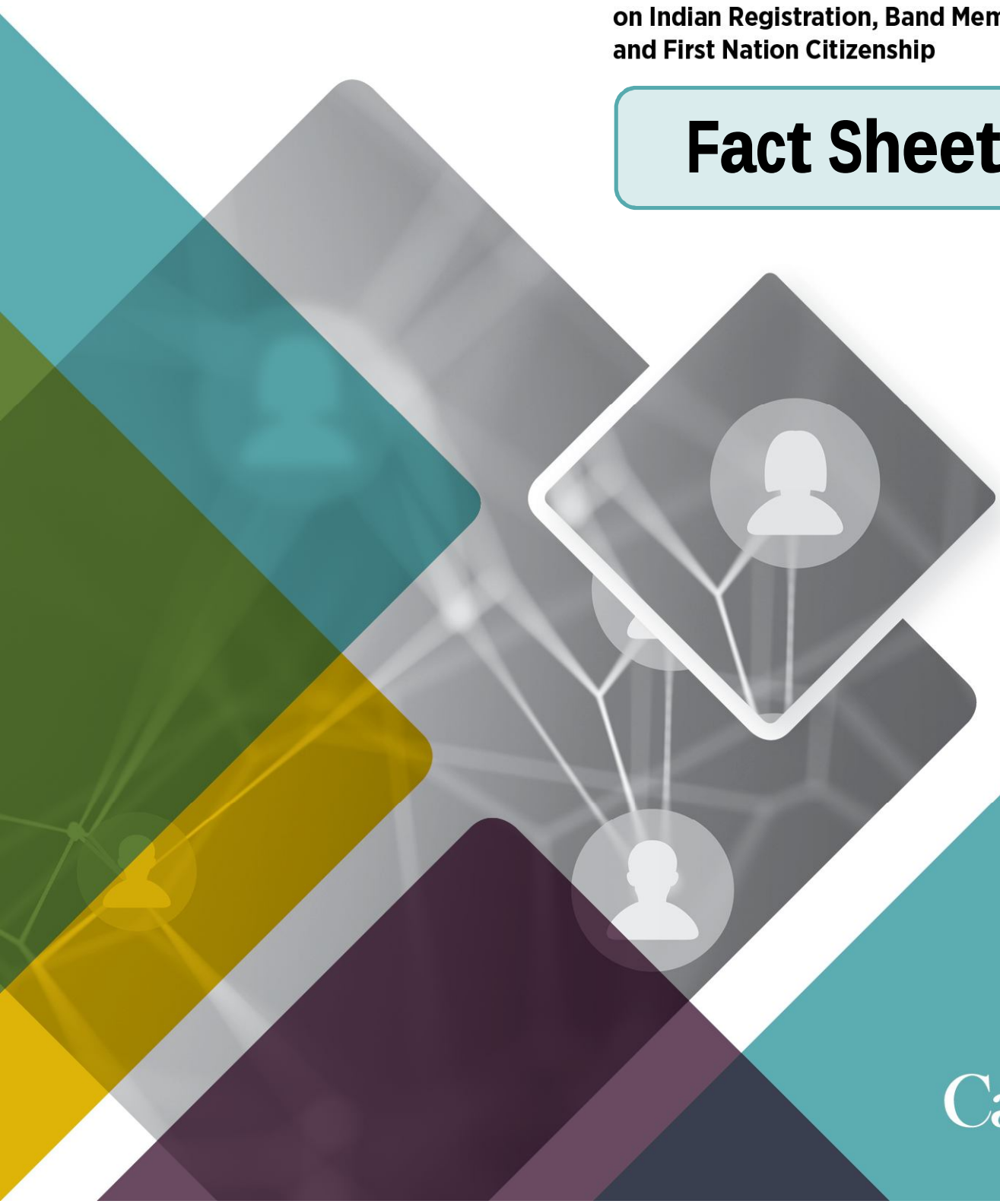
COLLABORATIVE PROCESS

on Indian Registration, Band Membership and First Nation Citizenship

Fact Sheets



Canada

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OVERVIEW

Background

Long before European contact, First Nations had their own systems for determining the "citizens or members" of their nations. While each Indigenous nation established its own societal rules for determining who was part of the First Nation kinship and community ties were common elements.

First Nation systems of governance and cultural norms were undermined and displaced by the many actors of colonialism. The efforts of colonial administrations included the introduction of legislation that determined who could be considered "Indian" for the purposes of residing on Indian reserves. The definition of Indian[1] in colonial legislation (1850 to 1867) was broad based, mostly sex neutral and focused on family, social and tribal/nation ties. While the term Indian was often interpreted broadly, the authority to determine who was an Indian shifted to government control beginning in 1869.

The *Gradual Enfranchisement Act* in 1869 and the first *Indian Act* in 1876 introduced a narrower definition of an Indian. These early post-Confederation laws established sex-based criteria, specifically rules of descent through the male lines in the definition of Indian. Women and children were usually included under the man's name and not as separate individuals under the legislation. Further, the legislation removed Indian status from an Indian woman who married a non-Indian man and also prevented their children and future descendants from acquiring Indian status and the associated benefits. Therefore, beginning in 1869, the definition of Indian was no longer based on First Nation kinship and community ties but instead, built on the predominance of men over women and children, and aimed to remove families headed by a non-Indian man from First Nation communities.

With the introduction of these laws, the concept of enfranchisement was introduced, where an Indian could gain "full citizenship", with the right to vote and own property, and no longer be considered an Indian under the law. Enfranchisement could happen both voluntarily (by choice/application) and involuntarily (for example, by being forced to give up being an Indian due to professional or educational achievement as outlined in legislation). When a man enfranchised, his wife and children automatically lost their Indian status as well, regardless of whether they wanted to or not. This again led to entire families and their descendants losing status and any associated benefits. Families were torn apart and community ties were broken when they were forced to move away from First Nation communities.

Subsequent amendments to the *Indian Act* between 1876 and 1985 further entrenched sex-based criteria and continued to narrow the definition of an Indian. In 1951, the *Indian Act* was amended to establish a centralized Indian register and created the position of an Indian Registrar to determine who was, and who was not, an Indian under

[1] The term "Indian" is used to reflect the language used in legislation, such as the *Indian Act*, both historically and today.

the legislation. It solidified sex-based criteria, enfranchisement provisions and defined exclusive control by the federal government over Indian registration and subsequently band membership. The 1951 amendments created the system where registration (or status) was synonymous with band membership.

Legislative amendments addressing sex-based inequities

In 1985, in response to the passage of the *Canadian Charter of Rights and Freedoms* as well as international pressure exerted by the *Lovelace*[2] case which was heard by the United Nations Human Rights Committee, the federal government acted to eliminate provisions of the *Indian Act* that for years had been criticized as discriminatory. Bill C-31 was the first attempt to address sex-based inequities in the *Indian Act*. Women who married non-Indians no longer lost their status and Indian women who had previously lost their status through marriage to a non-Indian man became eligible to apply for reinstatement, as did their children. Non-Indian women could no longer acquire status through marriage to Indian men and those who had acquired status through marriage prior to Bill C-31 did not lose their status. The concept of enfranchisement and the ability to have someone removed from the Indian register, if they were eligible, was eliminated. The Indian Registrar maintained the ability to remove individuals from the Indian register who were not eligible to be registered. Individuals who had been previously enfranchised could also apply for reinstatement.

The federal government retained control over Indian registration and categories of registered Indians were established through sections 6(1) and 6(2) of the *Indian Act* (Bill C-31) as an attempt to address the concerns raised by First Nations during parliamentary debates around Bill C-31. The concerns of First Nations leaders focused on resource pressures resulting from an expected population increase in First Nation communities, and the fear of ethno-cultural erosion within First Nations due to the large number of individuals with no apparent community or cultural ties that would become entitled to registration. Through the introduction of these registration categories a second-generation cut-off was created when two successive generations of mixed parenting between a person entitled to registration and a person not so entitled (Indian and non-Indian) results in the third generation of children losing entitlement to registration.

Bill C-31 also created separate regimes for the control of band membership under sections 10 and 11 of the *Indian Act.* Section 10 granted the opportunity for First Nations to take control of their band membership by developing membership rules (membership codes) that had to be approved by the Minister as defined by the *Indian Act*. For First Nations that did not choose to seek control of their membership under section 10, their band membership lists remained under the control of the Indian Registrar under section 11 of the *Indian Act*. By including section 10 in the *Indian Act* to allow First Nations to control their own membership lists, the concepts of Indian status and band membership became distinct for the first time since 1951. Self-Government agreements also allowed First Nations to control their membership lists beginning in 1995.

[2] The Lovelace decision can be found at: http://juris.ohchr.org/Search/Details/286.

Despite attempts to remove all sex-based discrimination from the *Indian Act* with the 1985 amendments, residual sex-based inequities were carried forward. These inequities continued to have adverse effects on First Nations' family and community cohesion and, along with the introduction of the registration categories under sections 6(1) and 6(2) and the second-generation cut-off, continued to be sources of grievances and legal challenges against the Government of Canada.

The first legal challenge that was heard by the Courts following the passage of Bill C-31 was the *McIvor v. Canada* case filed in 1987. The *McIvor* case challenged the registration provisions under the *Canadian Charter of Rights and Freedoms* (*Charter*). The Court ruled that certain provisions of the *Indian Act* violated the *Charter* and ordered Canada to amend its legislation. In 2010, the *Gender Equity in Indian Registration Act* (Bill C-3) received Royal Assent and the changes came into effect in January 2011. The amendments ensured that eligible grandchildren of women who had lost status due to marrying a non-Indian man became entitled to registration under the *Indian Act* to align how status was transmitted as a result of rectifying the Double Mother Rule[3] in 1985. However, Bill C-3 did not address a further inequity that directly affected the great-grandchildren of such women. Therefore, it did not bring entitlement for descendants of female lines in line with the entitlement for descendants of male lines in similar circumstances. This resulted in further litigation against Canada, including the *Descheneaux* case.

The Superior Court of Quebec ruled in the *Descheneaux* case that provisions relating to Indian registration under the *Indian Act* unjustifiably violated equality provisions under section 15 of the *Charter* because they perpetuated a difference in treatment between Indian women as compared to Indian men and their respective descendants. Canada accepted the decision and launched a two-part response, including (a) legislative reform with Bill S-3 to eliminate known sex-based inequities in Indian registration, and (b) a Collaborative Process on Indian registration, band membership and First Nation citizenship.

Legislative Response to Descheneaux

An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général) (Bill S-3) received Royal Assent on December 12, 2017, and some parts took effect on December 22, 2017. It addresses specific inequities identified in *Descheneaux* as well as other sex-based inequities. This included amendments related to unknown or unstated parentage in registration to grant flexibility in the types of evidence provided by applicants with an unknown or unstated parent, grandparent or other ancestor. .

Bill S-3 also introduced provisions with a delayed coming into force for the removal of the 1951 cut-off from the registration provisions in the *Indian Act*. Once these delayed provisions are in force, all descendants born prior to April 17, 1985 (or of a marriage that occurred prior to that date) of women who were removed from band lists or not

[3] The double-mother rule was introduced in the 1951 *Indian Act* and removed status from grandchildren at age 21, whose mother and paternal grandmother both acquired status through marriage to an Indian. The rule was repealed in 1985 under Bill C-31.

considered Indians because of their marriage to a non-Indian man prior to 1951 will be entitled to status, allowing the ability to further transmit entitlement to their descendants. This will remedy inequities back to the 1869 *Gradual Enfranchisement Act.*

Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship

Canada committed to consult on the broader issues around Indian registration, band membership and First Nation citizenship when it introduced Bill S-3 amendments to the *Indian Act*. These commitments were written into the bill for Canada to consult with First Nations, Indigenous groups, and impacted individuals on these issues as well as on implementation of the removal of the 1951 cut-off. The list of issues for consultation was further enhanced during the co-design of the Collaborative Process with input from First Nations and Indigenous organizations[4]. The comprehensive consultations under the Collaborative Process were launched on June 12, 2018. Please refer to the Consultation Plan found at www.canada.ca/first-nation-citizenship.

[4] For the Report to Parliament on the Design of a Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship, May 10, 2018: http://www.aadnc-aandc.gc.ca/eng/1525287514413/1525287538376.

HISTORY OF REGISTRATION IN THE *INDIAN ACT*

1850 – *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*

- Canada enacted *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, the first act to define who is considered an Indian.
- An "Indian" was defined as:
  1. All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in Lower Canada lands, and their descendants.
  2. All persons married to such Indians and residing amongst them, and their descendants.
  3. All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe or entitled to be considered as such.
  4. All persons adopted in infancy by any such Indians and residing in the village or upon the lands of such Body or Tribe of Indians, and their descendants.

1869 – Legal Modifications

- Indian women who married non-Indians are no longer considered Indians and children of the marriage are also not considered Indians under the Act.
- Indian women who marry an Indian man become a member of their husband's band.

1876 – *Indian Act*

- The first act to be clearly identified as an *Indian Act* in Upper and Lower Canada.
- "Indian" was defined as:
  - any male person of Indian blood reputed to belong to a particular band;
  - any child of such person;
  - any woman who is or was lawfully married to such person.
- Involuntary enfranchisement for Indians who obtained a university degree or religious orders is introduced; wives and children are automatically enfranchised along with their husband/father.
- Bands are eligible for enfranchisement as a whole.
- Voluntary enfranchisement is first introduced, allowing an individual to not be considered an Indian and removed from their band.
- An Indian who lived outside of Canada for a period in excess of five years without the permission of the department was enfranchised.

1918 – An Act to Amend the *Indian Act*

- Unmarried women and widows, along with their minor unmarried children could seek voluntary enfranchisement beginning in 1918.

1919-1920 – An Act to Amend the *Indian Act*

- The provision to enfranchise Indians who acquired university education or religious orders was repealed in an amendment to the *Indian Act* in 1919-1920.

1951 – *An Act respecting Indians*

- The Indian Register was established to record all individuals entitled to registration.
- The Indian Registrar can add or delete (if they are ineligible) names from the Register.
- Individuals can protest additions or deletions from the Register.
- When a male is added or deleted from the Register, his wife and children are also added or deleted.
- Women who marry a non-Indian man are not eligible for registration, and they were removed from band lists upon marriage.
- Individuals are eligible for voluntary enfranchisement if they meet specific requirements.
- The wife and children of a man who is enfranchising must be clearly named on the order of enfranchisement to be removed from the Register; otherwise, they keep their status.
- The Double Mother Rule was introduced to remove status from grandchildren at age 21, whose mother and paternal grandmother both acquired status through marriage to an Indian.

1985 – Bill C-31 - *An Act to Amend the Indian Act*

- Women do not automatically join their husband's band through marriage.
- All enfranchisement provisions, both voluntary and involuntary, are removed and provisions are created to allow individuals, especially women who had lost status, to be reinstated as status Indians.
- Section 10 introduces the ability for Indian bands to determine their own membership codes/rules.
- Children are treated equally whether they are born in or out of wedlock, and whether they are biological or adopted.
- The definition of "child" included in section 2 of the *Indian Act* was modified to recognize a legally adopted child (not only a legally adopted Indian child) and child adopted in accordance with Indian custom.

2011 – Bill C-3 - *Gender Equity in Indian Registration Act*

- Came into force in response to the *McIvor v. Canada* decision.
- Addressed inequities relating to the removal of the Double Mother Rule under Bill C-31 in 1985 which created an added benefit for the male line of a family.
- Grandchildren of women who lost status due to marrying a non-Indian man prior to 1985 become entitled to registration for the first time.
- Introduced the “1951 Cut-Off” under section 6(1)(c.1)(iv).

2017 – Bill S-3 - *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur general)*

- Came into force in response to the *Descheneaux c. Canada (Procureur general)* decision.
- Provisions related to siblings, cousins, omitted or removed minors, and unknown/unstated parentage came into force on December 22, 2017.
- Provisions related to the removal of the 1951 cut-off will come into force at a later date after the consultation phase of the Collaborative Process. First Nations, Indigenous groups and impacted individuals will be consulted on how to implement the removal of the 1951 cut-off. See the *1951 Cut-off for Registration Fact Sheet.*

SECTION 6(1) AND 6(2) REGISTRATION

What is section 6?

Section 6 of the *Indian Act* defines how a person is entitled to be registered under the *Indian Act.* The federal government has the sole authority, through the Indian Registrar, to determine who is entitled to be registered. Persons registered with Indian status are eligible for services and benefits delivered through federal departments. Although registration is divided into two primary categories, which are commonly known as sections 6(1) and 6(2), individuals registered under sections 6(1) or 6(2) have the same access to services and benefits.

What is the difference between 6(1) and 6(2) status?

A person may be registered under section 6(1) if both of their parents are or were registered or entitled to be registered. There are 14 categories under section 6(1) which identify how someone is entitled for registration.

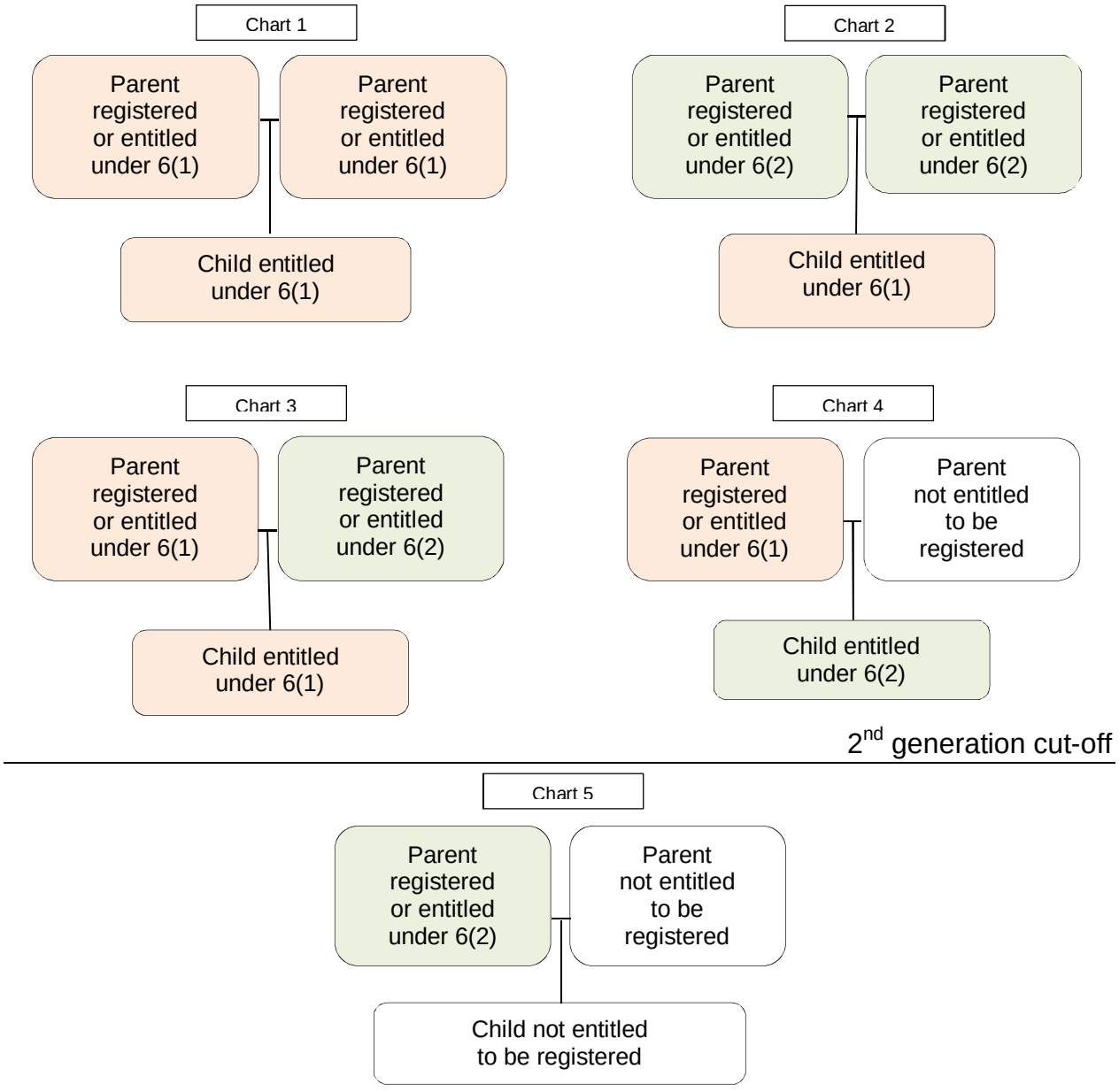
Overview of Sections 6(1) and 6(2) of the *Indian Act*

6(1)(a)	Entitlement of person who was registered or entitled to be registered on or before April 17, 1985.
6(1)(b)	Entitlement for individuals who are members of a group declared to be a Band after April 17, 1985.
6(1)(c)	Reinstatement of individuals whose names were omitted or deleted from the Indian Register, or a band list prior to September 4,1951, because of: - the "double mother" provision; - the person was a woman who married a non-Indian; - the person is a child omitted or removed due to their mother marrying a non-Indian; or - the person was removed by protest due to being the illegitimate child of a man who was not an Indian and a woman who was an Indian.
6(1)(c.01)	Amending the status of children whose parent was an enfranchised minor child.
6(1)(c.02)	Amending the status of children whose parent was enfranchised because of the "Double Mother Rule" and amending the status of children of an Indian grandmother who parented out of wedlock with a non-Indian.
6(1)(c.1)	Amending the status of children whose mother lost status due to marrying a non-Indian man.
6(1)(c.2)	Amending the status for children whose parent is registered under 6(1)(c.1).
6(1)(c.3)	Amending the status of children born female to Indian men out of wedlock.
6(1)(c.4)	Entitlement for children with a parent entitled under 6(1)(c.2) or (c.3).
6(1)(c.5)	Entitlement for grandchildren whose grandmother is entitled under 6(1)(c.3) and a parent is entitled under 6(1)(c.4).
6(1)(c.6)	Entitlement for a child whose parent is entitled under 6(1)(c.02) and grandparent was removed by protest due to being the illegitimate child of a man who was not an Indian and a woman who was an Indian.
6(1)(d)	Reinstatement for an individual who was enfranchised by voluntary application prior to April 17, 1985.
6(1)(e)	Reinstatement for an individual that was enfranchised prior to September 4, 1951 for reasons of living abroad for 5+ years without the consent of the Superintendent General or becoming ministers, doctors, lawyers ("professionals" – only until 1920).
6(1)(f)	Entitlement for children with both parents entitled to registration.
6(2)	Entitlement for children when only one parent is entitled to registration under 6(1) and the other parent is not entitled to registration.

There is no difference in access to services and benefits available to registered Indians whether an individual is registered under 6(1) or 6(2). However, the ability to pass Indian status differs depending on whether a parent is registered under 6(1) or 6(2)

How does entitlement to Indian registration work post-1985?

The following diagrams show different parenting scenarios and how those individuals would be registered:



If a person registered under section 6(1) has a child with a person not entitled to registration (non-Indian), their child is entitled to registration under 6(2) – Chart 4. If a person registered under section 6(2) has a child with a person not entitled to registration (non-Indian), their child will not be entitled to registration – Chart 5. Entitlement to registration under the *Indian Act* is lost after two successive generations of parenting

with a person not entitled to registration (non-Indian). This is commonly known as the second-generation cut-off and was introduced in the 1985 Bill C-31 amendments. Please see the *Second-Generation Cut-off Fact Sheet.*

What makes section 6 an important issue?

The creation of a division of entitlement to registration under sections 6(1) and 6(2), as well as the further breakdown of section 6(1) into various sub-categories has resulted in the perception of one category of registration being better than others. For example, many women who were re-instated under section 6(1)(c) following the 1985 amendments were labeled and treated differently (often negatively) than individuals who were entitled under section 6(1)(a). Although there is no difference in access to government services and benefits available to registered Indians whether an individual is registered under 6(1)(a) or 6(1)(c) or section 6(2), there exists a perception that being registered under 6(1)(a) is better or the most desired category. The only legal difference, as defined by the *Indian Act*, based on the category an individual is registered under is in their ability to pass on entitlement to registration to their children depending on who they parent with. If an individual is registered under section 6(1) parents with a non-Indian, their children will be entitled under section 6(2). If an individual is registered under section 6(2) parents with a non-Indian, their children will not be entitled to registration.

For First Nations that control their own membership under section 10, their membership code defines who is entitled to membership. Some membership codes differentiate eligibility for membership by the category an individual is registered under. This subsequently results in registered individuals being treated differently by First Nations in determining who can be band members depending on the category they are registered under.

This perceived hierarchy or viewpoints that there are “better” categories of registration is often described by some as being discriminatory. This can create lines drawn within families and disconnection of community and family ties if individual(s) are not registered under the “right” category.

BILL C-31 AND BILL C-3 AMENDMENTS

What is Bill C-31?

In 1985, the *Indian Act* was amended through Bill C-31 to eliminate discriminatory provisions and ensure compliance with the *Canadian Charter of Rights and Freedoms (Charter)*. As part of these changes:

- Indian women who married a non-Indian man no longer lost their Indian status;
- Indian women who had previously lost their status through marriage to a non-Indian man became eligible to apply for reinstatement, as did their children;
- non-Indian women could no longer acquire status through marriage to an Indian man;
- non-Indian women who had acquired status through marriage prior to 1985 did not lose their status;
- the process of enfranchisement was eliminated altogether as was the authority of the Indian Registrar to remove individuals from the Indian Register who were entitled to registration; and
- individuals who had been previously voluntarily or involuntarily enfranchised under the *Indian Act* could apply for reinstatement.

Involuntary enfranchisement:
Enfranchisement occurred without the consent of the individual(s) concerned.

Voluntary enfranchisement:
An individual made an application to prove they were "civilized" and able to take care of themselves without being dependent upon the government.

The federal government retained control over Indian registration and new categories of registered Indians were established within the *Indian Act* through sections 6(1) and 6(2). The second-generation cut-off was introduced where after two consecutive generations of parenting with a person who is entitled to registration and a person who is not entitled to registration (non-Indian), the third generation is no longer entitled to registration.

The Bill C-31 amendments were an attempt to establish equality between men and women by creating a standard free of sex-based distinctions in the transmission of Indian status, taking into account First Nation concerns around financial considerations and the protection of the ethno-cultural integrity of First Nations. The principles and rationale for the inclusion of the second-generation cut-off was an attempt to balance individual and collective rights.

New authorities to determine band membership were also introduced with Bill C-31 under sections 10 and 11 of the *Indian Act*: Section 10 allowed Bands to determine and control their membership if they meet certain conditions. Under Section 11, the Indian

Registrar administers the band lists for bands that do not seek control of their membership under Section 10.

What were the impacts of Bill C-31?

Registration

The 1985 Bill C-31 amendments did address some sex-based discrimination. However, because an individual's entitlement to registration is based on the entitlement of their parents and previous ancestors, residual sex-based discrimination stemming from past *Indian Acts* were carried forward.

New issues arose as a direct result of the introduction of the categories under sections 6(1) and 6(2), and the creation of the "second-generation cut-off". Inadvertently, the creation of the different categories of registration resulted in the perception among many First Nations that some categories were "better" or "worse" than others.

Membership

With the introduction of two systems for membership under sections 10 and 11, the relationship between Indian registration and band membership began to diverge. For section 10 bands, registration and membership were no longer synonymous, whereas for bands under section 11, they remain connected. As a result, there are situations where an individual is not entitled to registration pursuant to the *Indian Act* but, because they originate from a section 10 band whose membership rules are more expansive, non-registered individuals can be a band member, and vice-versa.

Funding

Over 174,500 individuals became newly registered to registration under Bill C-31.Federal funding did not keep up with the influx in membership and as a result, funding pressures increased for Band Councils to provide programs and services to an increasing number of individuals newly entitled to registration and membership.

What is Bill C-3?

Challenges under the *Canadian Charter of Rights and Freedoms* alleging continued residual sex-based and other inequities in the *Indian Act* registration provisions were launched relatively soon after the passage of Bill C-31. The first of these challenges, launched in 1987, was the *McIvor* case. The plaintiff, Sharon McIvor, had lost entitlement to registration when she married a non-Indian man and was reinstated under section 6(1)(c) following the 1985 amendments to the *Indian Act.* Her son, Jacob Grismer, having only one Indian parent, was entitled to registration under section 6(2) but was unable to transmit that entitlement to his children due to parenting with a non-Indian woman. In contrast, Jacob's cousins in the male line born to a man who married a non-Indian woman before 1985 could pass on their status irrespective of the status of the other parent.

The *McIvor* case was decided by the British Columbia Court of Appeal (BCCA) in 2009. In its decision, the BCCA expanded the definition of Indian and eligibility for Indian registration under the *Indian Act*. The *McIvor* decision prompted further legislative amendments to the Indian registration provisions of the *Indian Act* through the *Gender Equity in Indian Registration Act* (Bill C-3). Bill C-3 amendments resulted in certain individuals previously entitled to registration under section 6(2) such as Mr. Jacob Grismer, becoming entitled for registration under section 6(1)(c.1) of the *Indian Act* as long as they met all the following criteria:

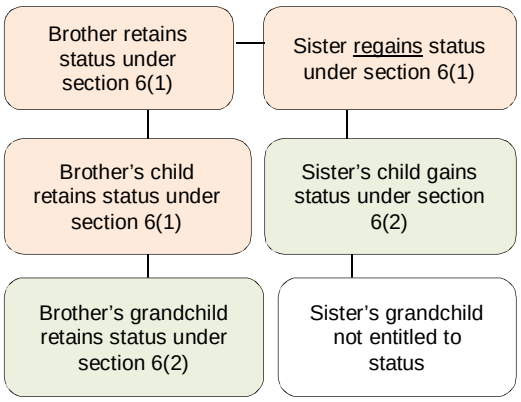
- have a mother who had lost her entitlement to registration as a result of marrying a non-Indian prior to April 17, 1985;
- have a father who is not entitled to be registered, or if no longer living, was not at the time of death entitled to be to be registered;
- was born after the date of his/her mother's marriage resulting in loss of entitlement for his/her mother and prior to April 17, 1985 (unless his/her parents were married prior to that date); and
- have had or adopted a child on or after September 4, 1951 with a person who was not entitled to be registered on the day on which the child was born or adopted.

By amending registration under section 6 (1)(c.1) for these individuals, their children subsequently become entitled to registration under section 6(2) of the *Indian Act* if they have:

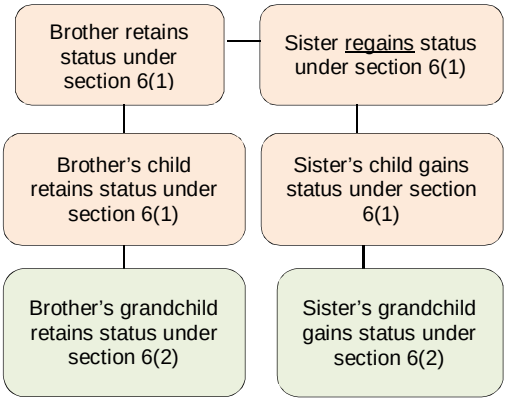
- a grandmother who lost her entitlement as a result of marrying a non-Indian;
- a parent entitled to be registered under section 6(2); and
- a birth date or had a sibling born on or after September 4, 1951.

As a result, more than 37,000 newly entitled individuals were registered from 2011 to 2017 through the implementation of Bill C-3.

The charts below demonstrate the differences in the entitlement of siblings (brother and sister) when the sister regained entitlement to registration following a marriage to a non-Indian man before April 17, 1985 under Bill C-31 and then the same situation following the changes to under the *Gender Equity in Indian Registration Act* (Bill C-3). Both the brother's and sister's children are now entitled under section 6(1) and the grandchildren are entitled under section 6(2).



Bill C-31 Amendments (1985)



Bill C-3 Amendments (2011)

BILL S-3 AMENDMENTS

What is Bill S-3?

In response to the Superior Court of Quebec decision in the *Descheneaux* case, the Government of Canada introduced Bill S-3 to correct sex-based inequities in the registration provisions of the *Indian Act*. The Superior Court of Quebec ruled that provisions relating to Indian registration under the *Indian Act* unjustifiably violated equality provisions under section 15 of the *Canadian Charter of Rights and Freedoms* because they perpetuated a difference in treatment between Indian women as compared to Indian men and their respective descendants.

Canada accepted the decision and launched a two-part response, including:

a) legislative reform with Bill S-3 to eliminate known sex-based inequities in Indian registration, and
b) a Collaborative Process on Indian registration, Band Membership and First Nation Citizenship.

Changes from *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général*) (Bill S-3) come into force at two different times:

1) those in direct response to the situations identified by the Superior Court of Quebec in the *Descheneaux* case that took effect on December 22, 2017; and
2) those that will come into force at a later date after consultation.

What are the Major Changes that came into effect in December 2017?

The changes that came into force in December 2017 ensure that eligible grandchildren and great-grandchildren of women who lost status as a result of marrying a non-Indian man become entitled to registration in accordance with the *Indian Act*. It also ensures children born female and out of wedlock would be entitled to registration as well as their descendants going back to 1951. See a breakdown of the specific changes in the chart below.

Bill S-3 changes that took effect on December 22, 2017

ISSUE	IMPACT
Cousins	Addresses the differential treatment between first cousins of the same family so that the grandchildren and great-grandchildren of women who married non-Indian men before April 17, 1985 are now treated the same as descendants of Indian men.
Siblings	Addresses the differential treatment of male and female children of Indian men that were born out of wedlock from September 4, 1951 to April 16, 1985. Both the male and female children who were born out of wedlock of Indian men will now be entitled to be registered under section 6(1).
Omitted Minors	Addresses situations of Indian children born to an Indian mother and the Indian mother subsequently married a non-Indian man and both the Indian mother and the Indian children were removed from the Indian Register prior to April 17, 1985. The descendants of men and women are now treated the same.
Great-Grandchildren of a parent affected by the double-mother rule	Addresses the differential treatment of great-grandchildren, born prior to April 17, 1985[5] of a parent affected by the double-mother rule[6] (created by cousins remedy).
Great-Grandchildren of a parent affected by the siblings issue	Addresses the differential treatment of great-grandchildren, born prior to April 17, 1985, of a parent affected by the siblings issue (created by the remedy to address great-grandchildren affected by the double-mother rule[2]).
Great-Grandchildren of an Indian woman who parented out of wedlock with a non-Indian man	Addresses the differential treatment of great-grandchildren, born prior to April 17, 1985[1] of a great-grandmother who parented out of wedlock with a non-Indian and the Indian grandparent lost status through protest (created by remedy to address the issue of great-grandchildren affected by the double-mother rule[2]).
Unknown or unstated parentage	Ensures that the Indian Registrar will consider all relevant evidence, with reasonable inference in favour of an individual in situations where there is a parent, grandparent or other ancestor that is unknown or unstated on a birth certificate, when determining entitlement to registration.
Consultation	The Minister must consult on a number of issues through the lens of the *Charter*, the *UN Declaration on the Rights of Indigenous P*eoples, and, if applicable, of the *Canadian Human Rights Act.* See other side for more details. Consultation must begin by June 12, 2018.

What are the amendments that will take effect after consultation?

The amendments that will come into force at a later date following consultation, relate to the removal the 1951 cut-off from the registration provisions in the *Indian Act*. Once these delayed provisions are in force, all descendants born prior to April 17, 1985 (or of marriage that occurred prior to that date) of women who were removed from band lists or not considered Indians because of their marriage to a non-Indian man prior to 1951 will be entitled to status, allowing the ability to further transmit entitlement to their children. This will remedy inequities back to the 1869 *Gradual Enfranchisement Act.*

[5] *Applies also when an individual was born after April 16, 1985 of parents married before April 17, 1985.*
[6] *The double-mother rule was introduced in the 1951 Indian Act and de-registered grandchildren at age 21, whose mother and paternal grandmother both acquired status through marriage to an Indian. The rule was repealed in 1985 under Bill C-31.*

The consultation process will address the implementation of removing the 1951 cut-off and the broader issues of Indian registration, band membership and First Nation citizenship. The consultation process was co-designed with First Nations and Indigenous organizations.[7]

What is the Plan for the Collaborative Process?

Consultations under the Collaborative Process will address three streams:

- the removal of the 1951 cut-off from the *Indian Act;*
- remaining registration/membership inequities under the *Indian Act*; and
- discussions around how First Nations will exercise their responsibility for the determination of the identity of their members or citizens, and Canada getting out of the "business" of determining status under the *Indian Act.*

Comprehensive consultations were launched on June 12, 2018 and will complete with a report to Parliament due by June 12, 2019.

[7] Co-Design Report: https://www.aadnc-aandc.gc.ca/eng/1525287514413/1525287538376

DEMOGRAPHIC IMPACTS OF PAST *INDIAN ACT* AMENDMENTS

Demographic Overview

As of March 2018, the total registered Indian population was **990,445** (502,953 women / 487,482 men). Of that population, it is estimated that 510,430 reside on-reserve and 480,005 off-reserve.

Alberta – 128,814
British Columbia – 147,124
Manitoba – 159,452
New Brunswick – 16,161
Newfoundland – 30,637
Northwest Territories – 19,444
Nova Scotia – 17,397
Ontario – 213,717
Prince Edward Island- 1,348
Quebec- 89,196
Saskatchewan – 157,670
Yukon – 9,475

2018 Registered Indian Population by Province
Source: Based on analysis of data from the March 2018 Indian Register

Previous Demographic Impacts from Legislative Amendments to the *Indian Act*

The 1985 Bill C-31 amendments to the *Indian Act* resulted in an increase of the population entitled to Indian registration of 174,500 from 1985 to 1999. Most of this growth occurred through reinstatements and new registrations (106,781) as well as children born since Bill C-31 who would have not qualified under previous Acts (59,798). The 2011 Bill C-3 amendments to the *Indian Act* resulted in more than 37,000 newly entitled individuals registered from 2011 to 2017 who would have not qualified under previous Acts.

Immediate Impacts of Bill S-3 – Cousins, Siblings, and Omitted Minors Remedies

Based on an analysis using information from the Indian Register on July 2016, Bill S-3 amendments to the *Indian Act* are expected to increase entitlement to Indian registration by 28,970. The majority of this increase comes from the cousins remedy (25,588), followed by the siblings remedy (2,905) and omitted minors (477). It is

expected that 4,557 individuals entitled to registration under section 6(2) will become entitled undersection 6(1).

This increase in entitlement to Indian registration will also apply to band membership. Of the estimated 28,961 newly entitled, 17,260 would be entitled to membership under Section 11 bands and will automatically become a member when registered under the *Indian Act*. The remaining 10,533 would be affiliated with Section 10 bands and could attain membership by application, if they qualify under the individual band membership codes. The remaining 1,168 would be connected to bands under self-government legislation or appear on the general lists (not affiliated with a band).

IMMEDIATE IMPACTS OF BILL S-3 EXCLUDING UNSTATED PATERNITY		
On Reserve	**Off Reserve**	**Total Entitled**
689	**28,282**	**28,961**

Source: Based on analysis of data from the July 2016 Indian Register

Delayed Impacts of Bill S-3 – Removing the 1951 Cut-Off

The amendments that come into force at a later date will remove the 1951 cut-off[8] from the *Indian Act*. During the Collaborative Process, the Government will be consulting on the implementation of the removal of the 1951 cut-off. Upon completion of this process, an implementation plan will be prepared, and the process will begin to bring this amendment into force.

There is significant uncertainty around determining the population impacts for the removal of the 1951 cut-off as there is no data set that can directly identify the number of individuals that could be impacted. Since the Indian Register only came into existence in 1951, crude estimates of the impact of this amendment can only be obtained using the number of individuals who self-reported Indigenous ancestry from the 2016 Census of Canada.

It is estimated that between 750,000 and 1.3 million individuals in Canada could be entitled to registration under Bill S-3 based on the number of individuals who self-reported as having North American Indian ancestry or identity on the 2016 Census. These numbers are not reflective of how many individuals would eventually apply for Indian registration and likely overestimates the number of individuals who would become registered. The Parliamentary Budget Officer's (PBO) report on the demographic impacts of delayed amendments to the *Indian Act* estimated that 270,000 individuals could become registered.[9]

[8] For more information on the delayed amendments to the *Indian Act* regarding the 1951 cut-off: https://www.aadnc-aandc.gc.ca/eng/1467214955663/1467214979755#chp4
[9] http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf

THE 1951 CUT-OFF DATE FOR REGISTRATION

The issues around the 1951 Cut-off are complex and relate to technical requirements under the *Indian Act* registration provisions. It is recommended that you read the following Fact Sheets before reading this one. These Fact Sheets provide context and background to this issue:

- *History of Registration in the Indian Act*
- *Section 6(1) and 6(2) Registration*
- *Bill S-31 and Bill C-3 Amendments*
- *Bill S-3 Amendments*

What is the "1951 cut-off"?

The 1951 cut-off date is the result of one of the four requirements that must be met in order for someone to be entitled to registration under section 6(1)(c.1) of the *Indian Act.* This section was added to the *Indian Act* as a result of the Bill C-3 2011 amendments in response to the *McIvor* decision under the *Gender Equity in Indian Registration Act*. Section 6(1)(c.1) states that, for an individual to be registered under 6(1)(c.1), they must have had a child or adopted a child on or after September 4, 1951 and have a mother who lost entitlement due to a marriage to a non-Indian man. When an individual is entitled under section 6(1)(c.1), all their children would be entitled to registration (even if only one child was born or adopted after September 4, 1951). These children's entitlement to registration could be under section 6(1) or under section 6(2) depending of the circumstances. If there is no child born or adopted after September 4, 1951, then the individual is not entitled. In other words, the birth or adoption date of a grandchild (or of a sibling of the grandchild) of a woman who lost entitlement to registration due to a marriage to a non-Indian man must occur after September 4, 1951 for the grandchild to be entitled to registration. This could mean that two siblings born to the same parents (where the mother lost status due to marriage to a non-Indian man prior to their birth) could have different abilities to pass their entitlement to their descendants. This cut-off has implications for cousins that share a grandmother who lost entitlement due to a marriage to a non-Indian man, to pass on entitlement to their descendants. Some of the cousins can pass on entitlement, while others cannot.

Removing the 1951 cut-off extends entitlement to grandchildren born or adopted prior to September 4, 1951 and allows for entitlement to be passed down to their descendants resulting in the cousins having the same ability to pass on entitlement back to 1869.

Removing the 1951 cut-off

Although the issue of the 1951 cut-off has not been found to constitute sex-based discrimination by Canadian courts, the Government decided to address this issue under Bill S-3. This is a complex issue and there is a need to consult to understand the impacts and identify practical remedies and implementation options. Therefore, in line with the Government's commitments for reconciliation and renewal of the nation-to-nation relationship, the removal of the 1951 cut-off is enshrined in legislation under

Clauses 2.1, 3.1, 3.2 and 10.1 of Bill S-3, but will come into force following consultations on a later date to be set by Order in Council.

The amendments that come into force at a later date will remove the 1951 cut-off from the *Indian Act* for determining eligibility of entitlement for a woman, and her descendants, who were removed from band lists or not considered an Indian due to marrying a non-Indian man, going back to 1869. These amendments will result in individuals previously entitled under section 6(1)(c) to be re-categorized under section 6(1)(a.1) for the women who married out and section 6(1)(a.3) for their direct descendants if they were born prior to April 17, 1985 (or of a marriage prior to that date). Section 6(1)(c) and all it's subcategories will no longer appear in the *Indian Act* following the amendments as outlined in Bill S-3. For anyone who is not already registered at the time the amendments are made, their eligibility will be determined under the *Indian Act* in force at that time

It is important to note that the second-generation cut-off continues to be applied after 1985.

Why is the removal of the 1951 cut-off important?

When the 1951 cut-off is removed, a significant number of individuals currently registered under section 6(2) who had children before September 4, 1951 will become eligible under section 6(1)(a.3) resulting in further entitlements for their direct descendants under 6(1)(a.3), 6(1)(f) and 6(2). This will increase the number of individuals benefitting from new or enhanced entitlement. Once the 1951 cut-off is repealed, sections 6(1)(c.2) and (c.4) will be repealed.

Such a measure will automatically and significantly increase the number of individuals eligible for registration and band membership and may result in pressures for First Nation communities with respect of resources, programs and services, and ethno-cultural integration.

PROJECTED DEMOGRAPHIC IMPACTS

There is significant uncertainty around determining the population impacts of the removal of the 1951 cut-off amendments as there is no data-set that can directly identify the number of individuals that could be affected.

In the 2016 Census, **750,000 to 1.3 million** non-registered individuals self-reported as having North American Indigenous ancestry.

This reflects who may be entitled to, and who may be more likely to apply for Indian registration.

This does not necessarily reflect how many individuals would and likely overestimates the number of individuals who would become registered.

As part of the Collaborative Process, the Government is consulting with First Nations, Indigenous groups and impacted individuals on the implementation of the removal of the 1951 cut-off on how and when it should be implemented. Following the Collaborative Process, an implementation plan will be prepared, and the process will begin to bring the 1951 cut-off into force.

The following chart demonstrates how the 1951 cut-off works:

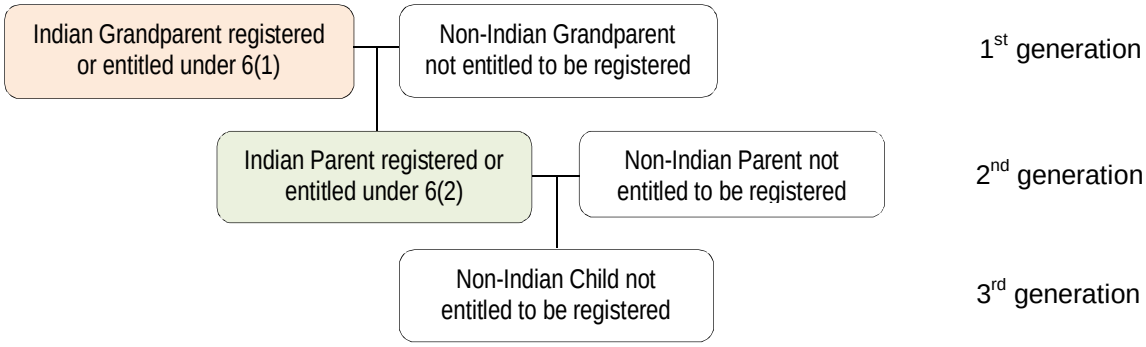
Hypothetical Situation to demonstrate the differences between the various amendments to the *Indian Act* when an Indian woman lost entitlement due to marriage to a non-Indian man.							
Annie and Sarah are siblings born to the same biological parents. Their mother Mary lost status prior to their births when she married a non-Indian. Following the Bill C-31 amendments, their mother regained her status under paragraphs 6(1)(c).							
			Birthdate	**C-31 (1985)**	**C-3 (2011)**	**S-3 (2017)**	**S-3 (delayed) (removal of the 1951 cut-off)**
Mary			Feb.15,1908	6(1)(c)	6(1)(c)	6(1)(c)	6(1)(a.1)
Child	**Annie**			6(2)	6(2)	6(2)	6(1)(a.3)
	Children	Sam	May 2, 1947	Denied	Denied	Denied	6(1)(a.3)
		Sally	Mar.17,1949	Denied	Denied	Denied	6(1)(a.3)
		Steve	Dec.1,1950	Denied	Denied	Denied	6(1)(a.3)
Child	**Sarah**			6(2)	6(1)(c.1)	6(1)(c.1)	6(1)(a.3)
	Children	Jane	Jan.11,1949	Denied	6(2)	6(1)(c.2)	6(1)(a.3)
		John	Nov.5,1950	Denied	6(2)	6(1)(c.2)	6(1)(a.3)
		James	**Feb.3,1953**	Denied	6(2)	6(1)(c.2)	6(1)(a.3)
					See Note 1	**See Note 2**	**See Note 3**

Note 1: Because James was born after September 4, 1951, he and all his siblings became entitled to registration as their mother now met the criteria to be amended from section 6(2) to 6(1)(c.1). James' other parent is not entitled to registration.
Note 2: As James was born after September 4, 1951, he and his siblings meet all the criteria required to be amended from 6(2) to 6(1)(c.2) as a result of Bill S-3. Annie's children however are not entitled as none of them were born on or after September 4, 1951.
Note 3: Once the changes to remove the 1951 cut-off come into effect, section 6(1)(a.1), and(a.3) will extend entitlement to descendants of children born prior to 1951.

SECOND-GENERATION CUT-OFF

What is the second-generation cut-off?

The concept of a "second-generation cut-off" was introduced in 1985 as part of the Bill C-31 amendments through the creation of two general categories of Indian registration (sections 6(1) and 6(2)[10]) and the related ability to transmit entitlement to children. After two consecutive generations of parenting with a person who is not entitled to registration (a non-Indian), the third generation is no longer entitled to registration; entitlement is therefore cut-off after the second-generation. In other words, an individual will not be entitled to Indian registration if they have one grandparent and one parent who are not entitled to registration. The following diagram illustrates how the second-generation cut-off is applied:



The second-generation cut-off is neutral with respect to sex, family status, marital status, ancestry or place of residence.

Why is the second-generation cut-off important?

The Bill C-31 amendments were written to allow for a second-generation cut-off in response to concerns raised by First Nations during Parliamentary debates with respect to resource pressures and cultural erosion in First Nation communities. First Nations expected a significant increase in registered individuals with no current familial, kinship or community ties. The rationale for the inclusion of this cut-off was an attempt to balance individual and collective rights with a view to protecting First Nation culture and traditions.

The application and operation of the second-generation cut-off is "mechanical." It is applied without any consideration to the individual or their family's circumstances. Under the Exploratory Process[11] in 2011-2012, it was reported by some First Nation communities that some members were unfairly subjected to the second-generation cut-

[10] Please refer to the "6(1) and 6(2) Registration under the *Indian Act*" issue sheet for more information.
[11] Please see the highlight summary report of the 2011-2012 Exploratory Process: https://www.aadnc-aandc.gc.ca/eng/1358354906496/1358355025473

off even though the member and their family had always been connected to the band and community. The issue was also raised during the Parliamentary debates on Bill S-3 and as a result is included as a subject matter for consultation under the Collaborative Process.

In addition, the second-generation cut-off is a gender neutral transmission rule for individuals born post-1985. It allows for entitlement for children of two registered or entitled parents under section 6(1)(f) or where only one parent is registered or entitled under section 6(2) regardless of the gender of the parents or children. This ensures that the transmission of entitlement of status continues forward if the conditions are met. With no such rule, there would be no way for an Indian parent to transmit his/her status to children born after 1985.

Individual rights vs Collective rights

Most human rights reflect an individualistic concept of rights and rights-holders. However for many First Nations people, their identity as an individual is connected to the community to which that individual belongs. Therefore the challenge is that while the *Charter* and human rights laws guarantee individual rights, First Nations ask for protection of their collective rights as a group.

UNKNOWN OR UNSTATED PARENTAGE

What is unknown and unstated parentage?

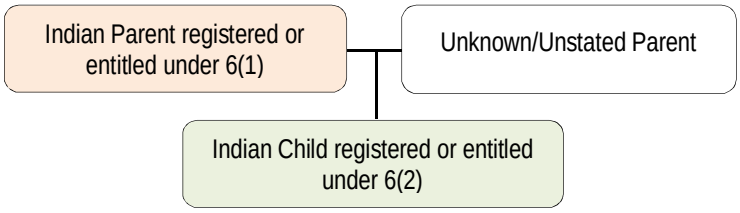
Under the *Indian Act*, the registration of an individual is based on genealogy and is dependent on the status of both parents. When Indian parentage is asserted in an application for registration, there may be situations where the parent, grandparent or other ancestor of the person in respect of whom an application for registration is made is unknown or unstated on birth documents. These types of situations could negatively impact a person's ability to be registered as a status Indian. The Policy on Unknown or Unstated Parentage has recently been revised.[12]

Unknown Parentage is when an individual person who is applying for registration does not know, is unable or is unwilling to provide information about a parent, grandparent or ancestor.

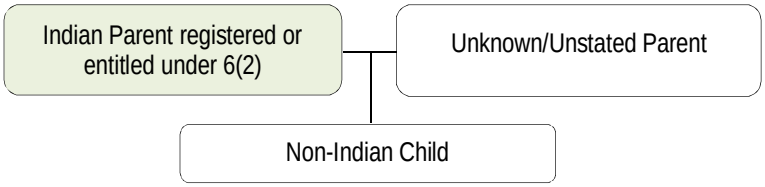
Unstated Parentage is when an individual parent, grandparent or ancestor is known but is not listed on their proof of birth document.

Why is the issue of unknown or unstated parentage important?

As noted, under the *Indian Act*, the registration of an individual depends on their parents' eligibility for registration.[13] In the case of an unknown or unstated parent, an individual with one parent registered under section 6(1) would only be eligible to be registered under section 6(2).



If an individual has one parent that is registered under section 6(2) and the other parent is unknown or unstated, then they would not be eligible to be registered under the *Indian Act*.



Having a parent, grandparent or ancestor that is unknown or unstated could result in an individual who applies for Indian status to not be entitled.

[12] https://www.aadnc-aandc.gc.ca/eng/1516895024877/1516895043577
[13] Please refer to the *Section 6(1) and 6(2) Registration* Fact Sheet for more information.

How has the *Gehl* decision influenced registration for those with an unknown or unstated parent?

In the *Gehl* decision,[14] the Ontario Court of Appeal determined that the Indian Registrar's policy with respect to unstated or unknown parentage was unreasonable as it forced a high burden of evidence on the applicant and required the applicant to state the identity of the parent, grandparent, or ancestor, even in cases where such identity is not known. The Court recognized that women were unfairly disadvantaged by the requirements of proving Indian parentage when compared to men and that a rule requiring the identification of a status parent is unreasonable because it demands evidence not required by the Act. The Court also found that the Indian Registrar's policy did not do enough to address situations where women cannot or will not name their child's biological father.

How is the unknown or unstated parentage issue being addressed?

In response to the *Gehl* decision, a new provision was added to the *Indian Act* through Bill S-3 to address the issue of unstated and unknown parentage. The new provision, now in force, provides flexibility for applicants to present various forms of evidence. It requires the Indian Registrar to draw from any credible evidence and make every reasonable inference in favour of applicants in determining eligibility for registration in situations of an unknown or unstated parent, grandparent or other ancestor. The new policy[15] aligns with Bill S-3 and seeks to address cases of evidentiary difficulties around unknown or unstated parentage. It provides the following rules to be applied by the Indian Registrar when considering applications for registration in situations of unknown or unstated parentage:

- Flexibility in the types of evidence that can be submitted;
- Balance of probabilities of having a parent, grandparent or ancestor entitled to Indian status.

[14] See the Ontario Court of Appeal decision of *Gehl v. Canada (Attorney General)*, 2017 ONCA 319. Online: http://www.ontariocourts.ca/decisions/2017/2017ONCA0319.pdf
[15] http://www.aadnc-aandc.gc.ca/eng/1516895024877/1516895043577

ENFRANCHISEMENT

What is enfranchisement?

Prior to the Bill C-31 amendments in 1985, enfranchisement resulted in an individual no longer being considered an Indian under federal government legislation. Indians who were enfranchised were removed from their band lists before September 4, 1951; **or** lost Indian status if enfranchised after September 4, 1951. When an individual was no longer considered an Indian, the individual lost all associated benefits that resulted from being on a band list (pre-1951) or a status Indian (post-1951). It also meant all their descendants were not considered Indian and could not obtain any related benefits. This impact is still felt by current generations.

Prior to Bill C-31, there were three ways Indian men, women and children could be removed from a band list **or** lose Indian status through enfranchisement.

1. From 1869 to 1985, an Indian woman marrying a non-Indian man would be enfranchised.
2. Previous *Indian Acts* (1876-1920) contained enfranchisement provisions where individuals were removed from their band lists if they:
    a. attained a university degree and joined the medical or legal profession,
    b. attained any university degree and met the “fit” or “civilized” enfranchisement requirements,
    c. became a priest or minister, or
3. From 1876 to 1985, individuals could submit an application to be enfranchised by showing they were “fit” for enfranchisement and entering Canadian society.

When a woman was enfranchised due to marriage to a non-Indian man, any children she already had, or would have, were considered non-Indians. When a man enfranchised, his wife and children would also be enfranchised.

Enfranchisement as described in Items 1 and 2 above was considered involuntary, meaning that enfranchisement occurred without the consent of the person(s) concerned. Item 3 above was considered voluntary. This was done by application where Indian men or women had to prove they were “civilized” and able to take care of themselves without being dependent upon the government. This process included submitting a report and getting approval from their band. If all the requirements were met, they would receive a letter (called Letters Patent), that declared them enfranchised and no longer Indians.

Individuals who enfranchised received the same rights and benefits that existed for non-Indian Canadians. In addition to these rights and benefits, there were a number of benefits that were made available to an enfranchised individual and their family through previous versions of the *Indian Act*.

Land and Financial Compensation for Enfranchised Individuals

From 1869 to 1951, an enfranchised individual could receive land compensation by being provided a portion of the band's land to take care of. An enfranchised individual would have three to five years to prove he was able to be independent. If successful, the enfranchised individual would own the land. From 1951 to 1985, land continued to be available to enfranchised individuals by making compensation to the band.

Financial compensation would also be provided to enfranchised individuals. From 1876 to 1985, enfranchised individuals received a percentage (or *per capita*) payment of what their band would have received from the government. From 1951 to 1985, when a Treaty Indian enfranchised, they would receive an amount equal to twenty years of treaty payments.

Why is the issue of enfranchisement important to registration?

Enfranchisement had an impact on all subsequent generations of people. Regardless of whether an individual was voluntarily, or involuntarily enfranchised, subsequent generations could not appear on band lists or on the Indian register as a status Indian.

Bill C-31 removed both voluntary and involuntary enfranchisement provisions. Individuals who enfranchised, along with their children, could be reinstated or became eligible for registration

The 2017 amendments (Bill S-3) corrected sex-based inequities for women, and their descendants, when the woman involuntarily lost entitlement to registration due to marriage to a non-Indian man. Bill S-3 brings entitlement to descendants of women who married a non-Indian man in line with descendants of individuals who were never enfranchised. However, the descendants of individuals who were enfranchised for other reasons (both voluntary and involuntary) remain at a disadvantage in comparison. These remaining inequities within the *Indian Act* continue to have an impact.

It should be noted that the second-generation cut-off is distinct from the issue of enfranchisement and generally for individual born after April 17, 1985, the second-generation applies. See Fact sheet on *Second-Generation Cut-Off*.

DEREGISTRATION

What is deregistration?

Deregistration, if implemented, would be the act of removing the name of a registered individual, at their request, from the Indian Register and from a the band list maintained in the Department if applicable. Once deregistered, an individual would lose access to services and benefits associated with Indian status but their entitlement to registration would remain (or would continue to exist).

For First Nations who fall under section 11 of the *Indian Act* where the Indian Registrar maintains their band membership list, the individual would also be removed from the membership list. For First Nations that control their own membership lists under section 10 of the *Indian Act* or under self-government type agreements, it would be up to the First Nations to determine what happens for that person who has requested to be removed from the Indian Register (deregister).[16]

Deregistration is not the same as **enfranchisement**.

Deregistration, if implemented, would involve an individual requesting to have only their name removed from the Indian register, but would maintain their entitlement to being registered without impacting subsequent generations**.**

Enfranchisement was the process of removing from an individual their entitlement to registration affecting the entitlement of all subsequent generations.

There is currently no provision in the *Indian Act* to remove a person who is entitled to be registered as an Indian and who wishes to be removed from the Indian Register. The 1985 Bill C-31 *Indian Act* amendments struck out the means to remove someone from the Indian Register who is entitled under the *Indian Act*. The Registrar can only remove someone who is not eligible for registration, regardless of the reason for wanting to deregister.

Why is deregistration an important issue?

Since 1985, many individuals have expressed a desire to be removed from the Indian Register for a variety of reasons, including:

- individuals who want to enroll in American Indian Tribes (who may not allow Canadian status Indians to enroll);
- individuals who want to identify or register as a Métis person; or
- individuals who simply no longer wish to be recognized on the federal Indian Register.

[16] See Band Membership Fact Sheet

The *Peavine-Cunningham* Supreme Court decision ruled that members of the Métis Settlements cannot hold Indian status if they wish to maintain their Métis status under the provincial legislation in Alberta.[17] Some other Métis groups and American Tribes have shaped their membership definitions and rules to exclude those who are registered as Indians under the *Indian Act*.

[17] See paragraphs 72-87 of the Supreme Court Decision of *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670. Online: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7952/index.do

GENDER IDENTITY AND REGISTRATION FOR INDIAN STATUS

How does gender identity impact registration for Indian status?

Since entitlement to registration is determined by genealogy/lineage, there is a legislative need to record birth-assigned sex in the Indian Register. Registration currently only refers to sex as identified on official proof of birth documents and does not account for gender identity, especially when it may differ from an individuals recorded sex designation as male or female. The sex indicated on the application forms for registration as a Status Indian or for the Secure Certificate of Indian Status (SCIS) must match the sex indicated on an applicant's proof of birth document.

Applicants who wish to be registered under a different sex based on their gender identity are required to amend their proof of birth document prior to registration. Sex is currently listed on the SCIS based on the information recorded in the Indian Register. Status Indians who wish to change the sex on their Secure Certificate of Indian Status must apply for an amendment and provide the required supporting documentation.

What is Gender Identity?

Culturally defined roles, behaviors, activities and attributes associated with males and females are known as gender. Gender identity is each person's internal and individual experience of gender, while gender expression is the public presentation of that identity through behavior and appearance. A person's gender identity or expression may be the same as, or different from, the biological and physical characteristics that designate a person's birth-assigned sex.[18]

What is Gender Diverse or Transgender?

A **cisgender** person identifies with the gender traditionally associated with their birth-assigned sex. For example, a cisgender woman is born female and identifies with the female gender.

A gender diverse person may identify with the gender associated to the "opposite" sex, a combination of genders, or no gender identity.

Transgender is an umbrella term that refers to people whose gender identity differs from their sex assigned at birth. A transgender person may or may not have sought gender affirmation surgery. A transgender person may have diverse gender identities and expressions that may differ from societal expectations. There are a wide range of

[18] See, Status of Women, *Glossary*, online: http://www.swc-cfc.gc.ca/violence/strategy-strategie/fs-fi-6-en.html. See also, Status of Women, *Introduction to GBA+* terminology, online: http://www.swc-cfc.gc.ca/gba-acs/course-cours-2017/eng/mod01/mod01_02_04.html.

terms on the gender spectrum such as non-binary gender, gender-queer, gender variant, gender non-conforming, gender neutral, agender, etc.[19]

Gender Diverse and Transgender in Law

Under Bill C-16, legislative amendments to the *Canadian Human Rights Act* and the *Criminal Code* now recognize gender diverse people. *An Act to amend the Canadian Human Rights Act and the Criminal Code* came into force on June 19, 2017 adding gender identity or expression to the prohibited grounds of discrimination under the *Canadian Human Rights Act* and the *Criminal Code* definition of identifiable groups.

As it is currently written, the *Indian Act* does not have provisions that specifically address gender diverse or transgender people. Under Bill S-3, amendments came into force on December 22, 2017 to eliminate sex-based inequities in Indian registration under the *Indian Act*. These amendments are gender neutral and apply equally, regardless of gender identity or expression, in accordance with the recent amendments to the *Canadian Human Rights Act* and the *Criminal Code*.

What are the Future Developments Related to Gender and Indian Registration?

Registration under the *Indian Act* is a key part of Canadian legislation affecting Indigenous people and impacts eligibility for certain programs, such as extended health benefits, post-secondary education funding and exemption from certain provincial taxes. The Collaborative Process allows an opportunity to have discussions and collect information around gender identity in Indian registration.

Interdepartmental discussions are also taking place relating to gender.[20]

[19] https://www.swc-cfc.gc.ca/violence/strategy-strategie/fs-fi-6-en.html
[20] https://www.canada.ca/en/treasury-board-secretariat/services/treasury-board-submissions/gender-based-analysis-plus.html

INDIAN REGISTRATION FOR CHILDREN OF SAME-SEX PARENTS

What is the issue with registration for children of same-sex parents?

The number of same-sex couples has grown considerably in Canada over the past 10 years. The percentage of same-sex couples with children has increased as well. Same-sex couples often face obstacles to having children that may require outside assistance like adoption or medical technology to aid conception. This can lead to issues around the recognition of both same-sex parents on a birth certificate or in some cases, recognition of more than two parents for a child (biological and adopted). Currently, parental rights and recognition vary by province or territory.

Why is the issue of registration of children of same-sex parents important?

Determining Indian status for children of same-sex parents involves looking at both the biological parents and adoptive parents. For children of same-sex couples, there are a number of combinations of parents that may be present in their life. At least one parent, either adoptive or biological, must be registered or entitled to be registered under section 6(1) under the *Indian Act* in order for the child to be entitled to be registered. See Fact Sheet on *Section 6(1) and 6(2) Registration.*

Currently, there are administrative obstacles for children of same-sex parents when applying for registration as some forms require the applicant to provide their father's family name and their mother's maiden name. For same-sex couples and their children, these form requirements may enforce parental relationships that do not exist or do not apply to their situation.

Applications received from children of same-sex parents are assessed on a case-by-case basis.

REGISTRATION AND THE CANADA-UNITED STATES BORDER

What is the issue?

The Canada-United States border can pose challenges for members of many Indigenous communities, with implications for their daily mobility, traditional practices, and economic opportunities as well as for their family and cultural ties with Native Americans from the United States. Border crossing issues were the subject of a 2017 engagement process undertaken by a federal Minister's Special Representative (MSR) with many concerned First Nations communities across Canada, from Yukon to New Brunswick.

Drawing on meetings with representatives from more than 100 First Nations, the MSR's August 2017 report[21] identifies seven key sets of border crossing challenges. These include issues relating to registration, membership, identity and identity documents. The report also touches upon mobility rights, the Jay Treaty, immigration laws, and the experience of crossing the border at ports of entry administered by the Canada Border Services Agency (CBSA).

Registration, the Status Card and the Border

A feature to Canadian immigration legislation since the 1976 *Immigration Act* is the explicit recognition of a right of entry to Canada for First Nations people registered under the *Indian Act*, regardless of whether or not they are Canadian citizens.

Under section 19 of the *Immigration and Refugee Protection Act*, individuals able to satisfy a CBSA officer that they are registered Indians may (re-)enter and remain in Canada. The Secure Certificate of Indian Status (SCIS) and the Certificate of Indian Status (CIS) are documents that the CBSA accepts to establish one's right of entry on the basis of registered Indian status.

Entry into the United States

For its part, the United States (US) explicitly recognizes a right of entry to the US – for the purposes of employment and residence – to "American Indians born in Canada." This right is conditional however, upon an individual being able to demonstrate that, under the terms of the US law, this individual must "possess at least 50 per centum of blood of the American Indian race".[22]

As a matter of policy, the United States accepts the Secure Certificate of Indian Status and the Certificate of Indian Status, issued by Indigenous Services Canada in

[21] The report is currently available online: http://www.aadnc-aandc.gc.ca/eng/1506622719017/1506622893512.
[22] http://www.aadnc-aandc.gc.ca/eng/1506622719017/1506622893512

partnership with First Nations, as documents that registered Indians from Canada may present to enter the US by land or by sea.

Band Membership, First Nations Citizenship and the Border

As noted in the MSR's report, Canada's immigration laws and the *Indian Act* can present challenges for communities with close family, cultural and historical ties with Native American Tribes in neighboring US states. For example:

- Native Americans with family and/or cultural connections to First Nations in Canada, but who are neither Canadian citizens nor registered Indians under the terms of the *Indian Act*, must go through the immigration process in order to be able to reside permanently in Canada.
- Community members who are not registered Indians are not eligible for a Secure Certificate of Indian Status or a Certificate of Indian Status.
- Identity documents produced by communities may not be accepted as ID for border crossing purposes.
- To visit relatives, or to attend cultural events in Canada, Native Americans with a criminal record may be denied entry.
- Regulations may not allow for individuals to be listed as members of communities in both Canada and the United States.

The MSR's Report and Next Steps

A committee of senior officials from concerned federal departments has been carefully reviewing the report of the MSR in order to make recommendations to the Government on next steps that might be taken in partnership with First Nations and other Indigenous communities to address their border crossing concerns.

Following consideration of the recommendations of the committee of senior officials, the Government will re-engage with First Nations and other Indigenous communities to discuss next steps in addressing their border crossing issues.

ADOPTION IN INDIAN REGISTRATION

How is adoption defined?

According to the Government of Canada, there are three recognized types of adoption in relation to registration under the *Indian Act*.

Legal Adoption	**Custom Adoption**[23]	***De Facto* Adoption**
An adoption under provincial/territorial adoption laws, including private adoptions through an accredited third party (may include international adoptions if the agency is recognized by a Canadian authority).	A clear parent-child relationship is established with all the related legal, financial and other benefits and burdens of an adoption, but that is not processed according to provincial/territorial adoption laws.	Where a child has been in the care of the adoptive parent(s) but the legal adoption happens after the person is an adult.

Under 1985 amendments to the *Indian Act*, the definition of a child includes a legally adopted child and a child adopted in accordance with Indian custom.

How is an adopted individual registered?

Adoptees must have been a minor at the time when they were taken under care. Adoptees may be eligible for entitlement to registration under the *Indian Act,* either through their birth parent(s) or through their adoptive parent(s). At least one parent, either adoptive or birth, must be registered or entitled to be registered under section 6(1) of the *Indian Act* for the adoptee to be entitled to be registered. See Fact Sheet on *Section 6(1) and 6(2) Registration.*

The Indian Registrar will make a determine most in favour of the applicant based on either their birth or adoptive parent(s) to facilitate registration entitlement for subsequent generations.

For adopted individuals there is the choice to be registered with a connection to the band of their adoptive parent(s) or their birth parent(s), if known. The different adoption types have different document requirements when applying for registration.[24] All types of adoption are considered for registration under 6(1) and 6(2).

[23] This is Canada's definition of custom adoption, which may not be the same in all First Nation communities.
[24] How to apply if you are adopted: https://www.aadnc-aandc.gc.ca/eng/1462808207464/1462808233170#chp5

How do you apply under a Custom Adoption?

To be registered following a custom adoption, the applicant must submit documentation signed by a Band Council and Elders of the band stating that the adopted individual was adopted and raised in accordance with the customs of the band of the adoptive parent(s) to ensure a connection to the community and culture where the adoption is not considered a legal adoption. Other documentation may be required along with the application form including: a statement signed by applicant, pre-adoptive proof of birth documentation, and statutory declarations by birth and adoptive parents.

Why is this issue important?

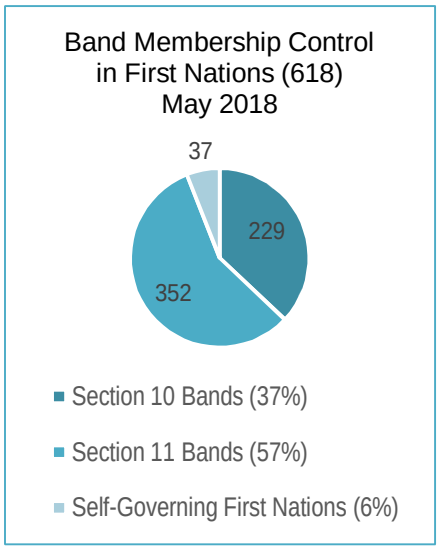
Adoption is not defined in federal law; it is currently under the jurisdiction of provinces and territories, meaning the terms can vary across the country. This could be challenging when applying for Indian status for adoptees that must adhere to the adoption laws of their province or territory.

First Nations' Authorities to Determine Band Membership

What authorities provide First Nations the ability to determine band membership?

In 1985, Bill C-31 created two separate regimes for the control of band membership under sections 10 and 11 of the *Indian Act*. Section 10 grants the opportunity for First Nations to take control of their band membership by developing membership rules/ codes to be approved by the Minister of Crown-Indigenous Relations Canada. Section 11 band membership lists are maintained by the Indian Registrar.

First Nations can also take control of their membership if they have entered into a modern treaty or self-government agreement with Canada. This option was made available in 1995 through the *Federal Policy on Aboriginal Self-Government*.



What is a section 10 Band?

Section 10 of the *Indian Act* allows a band to assume control of its own membership so long as the band can meet the requirements outlined in section 10. A band is required to meet three specific requirements:[25]

- **Notice: a) Notices I and II:** Under section 10(1), the band must give notice to its electors of its intention to assume control of its own membership **and** establish membership rules for itself;
- **Notice III:** Under section 10(6) once all requirements under section1 0 of the *Indian Act* have been met, the band must give notice in writing to the Minister indicating that the band is assuming control of its own membership and provide the Minister with a copy of the membership rules.
- **Consent.** Under section 10(1) the intent to assume control must be approved by a majority of the majority ("double majority") of the eligible electors of the band. This means that the majority of the eligible electors of the band must vote, and a majority of those who vote must be in favor. For further clarification, consent refers specifically to the **intention** to assume control and to establish rules.

In addition to these three specific requirements, bands are also required to respect the acquired rights of individuals who are currently members or entitled to be members of their Band. In other words, the band cannot deny membership to persons who were entitled to be a member on the day before the band's membership rules come into force by reason only of a situation that existed or an action that was taken before the rules

[25] http://www.aadnc-aandc.gc.ca/eng/1100100032469/1100100032470

came into force. The Minister cannot approve a code if these acquired rights are not preserved. If the requirements of section 10 are met, Canada will notify the band of the change of membership control and provide the band with a copy of its band list. From that day forward, the band is required to maintain its own band list and the Department has no further responsibility with respect to the Band's membership. Any individual who wishes to be a band member must contact the band to be added to their membership list.

What is a section 11 Band?

Section 11 of the *Indian Act* describes membership rules for band lists maintained by the Indian Registrar. Membership on these lists is dependent upon an individual's eligibility for registration as a status Indian under the *Indian Act*. If an individual is registered and identifies with a band whose band lists is maintained by the Indian Registrar, this individual automatically becomes a member of the band. Family lineage is used to see if the individual's parents or grandparents were members or entitled to be members of the band as well. No consent is required on behalf of the band.

What is a self-government agreement?

Self-government agreements set out arrangements for First Nation communities to govern their internal affairs and assume greater responsibility and control over the decision making that affects their communities. Self-government agreements address areas such as the structure and accountability of First Nation governments, their law-making powers, financial arrangements, and their responsibilities for providing programs and services to their members. Self-government arrangements can also enable a First Nation community to exercise its own control over membership outside of the *Indian Act*. Registration of status Indians under the *Indian Act* remains the responsibility of the Indian Registrar under these agreements.[26] Modern treaties are also a way for First Nations to take control of their internal affairs and decision making that affects their communities. Self-governing First Nations may fall under self-government agreements or modern treaties.

Why is First Nations' authority in determining band membership important?

Based on the findings of the *Exploratory Process*[27], First Nations have highlighted that bands are dependent upon federal legislation to determine who belongs to their communities or Nations, and this is contrary to international covenants such as the *United Nations Declaration on the Rights of Indigenous Peoples* where Indigenous peoples have the right to determine their citizenship.

The work undertaken under the Collaborative Process on Indian registration, band membership and First Nation citizenship will inform these issues through consultation on how First Nations can exercise exclusive responsibility for the determination of the identity of their members or citizens, and Canada getting out of the "business" of determining status under the *Indian Act.*

[26] https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314
[27] *2011-2012 Exploratory Process*: https://www.aadnc-aandc.gc.ca/eng/1358354906496/1358355025473

THE CONTINUED FEDERAL GOVERNMENT ROLE IN DETERMINING INDIAN STATUS AND BAND MEMBERSHIP

What is Canada's current role?

The Government of Canada has exclusive control over the registration of status Indians under Canadian law. Indian status is determined through the application of sections 6(1) and 6(2) of the *Indian Act*. Indian registration provides status Indians with access to certain entitlements and programs, such as: tax exemptions for income earned on-reserve and for federal sales tax; access to non-insured health benefits; access to post-secondary education funding; and is linked to Treaty Rights (e.g.: Treaty annuity payments) and Aboriginal rights (e.g.: hunting and fishing). The purpose of Indian registration is to enable the Government to clearly identify who is entitled to federal programs and funding.

Indian Register

The Indian Register is the official record identifying persons registered as status Indians under the *Indian Act*. The Indian Registrar is responsible for maintaining the Indian Register. Registered Indians, also known as status Indians, have certain rights and benefits not available to non-status Indians, Métis, Inuit or other Canadians. These rights and benefits include on-reserve housing, non-insured health benefits, education, and exemptions from federal, provincial and territorial taxes in specific situations.

The **Indian Registrar** has the sole authority under the *Indian Act* to determine eligibility for Indian registration. The Indian Registrar is a federal government employee and is responsible for maintaining the Indian Register and departmentally controlled band lists under section 11 of the *Indian Act*.

To be included in the Indian Register, you must have successfully applied for registration under the *Indian Act,* as determined by the Indian Registrar.

Processing Applications

Department officials have the responsibility for processing applications for Indian registration under the authority of the Indian Registrar. Applications are assessed by the National Processing Unit in Ottawa or the Processing Unit in Winnipeg, Manitoba. The Winnipeg office is responsible for processing Bill S-3 applications and formerly Bill C-3 applications. Regional Offices across the country are responsible for registration of applicants born after April 17, 1985 who have one parent registered under section 6(1) of the *Indian Act* or for cases where both parents are registered under section 6 of the *Indian Act*.[28]

[28] http://www.aadnc-aandc.gc.ca/eng/1462808207464/1462808233170#How_do_you_apply

Section 10 and 11 Band Lists

The Indian Registrar maintains band lists under section 11 of the *Indian Act* and currently controls the band lists for 352 First Nation communities. Bands also have the option of determining their own membership under section 10 of the *Indian Act* where they can obtain control over their band list through an application and creation of a membership code or rules that are approved by the Minister as defined by the *Indian Act*.[29] Find out more by consulting the *First Nations' Authorities to Determine Band Membership* Fact Sheet.

Government Transition and how it relates to its role in determining Indian status and band membership

On August 28, 2017, the Government of Canada announced the creation of two departments:

- Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC)
- Indigenous Services Canada (ISC)

These departments replace the Department of Indigenous and Northern Affairs Canada. This change was described as a step towards ending the *Indian Act* with mandates intended to accelerate self-government and self-determination agreements based on new policies, laws and operational practices.[30] Canada hopes to tear down the outdated and paternalistic structure that supported the *Indian Act* in favour of a true nation-to-nation relationship based on recognition and respect for the right to self-determination. This will require complete reform of many policies. It will involve discussions on many issues including urban groups, treaties, and land agreements in addition to defining who is and is not an Indian.

The *Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship* will inform these issues through consultation with discussions around how First Nations will exercise their responsibility for the determination of the identity of their members or citizens.

[29] http://www.aadnc-aandc.gc.ca/eng/1100100032469/1100100032470
[30] https://pm.gc.ca/eng/news/2017/08/28/new-ministers-support-renewed-relationship-indigenous-peoples