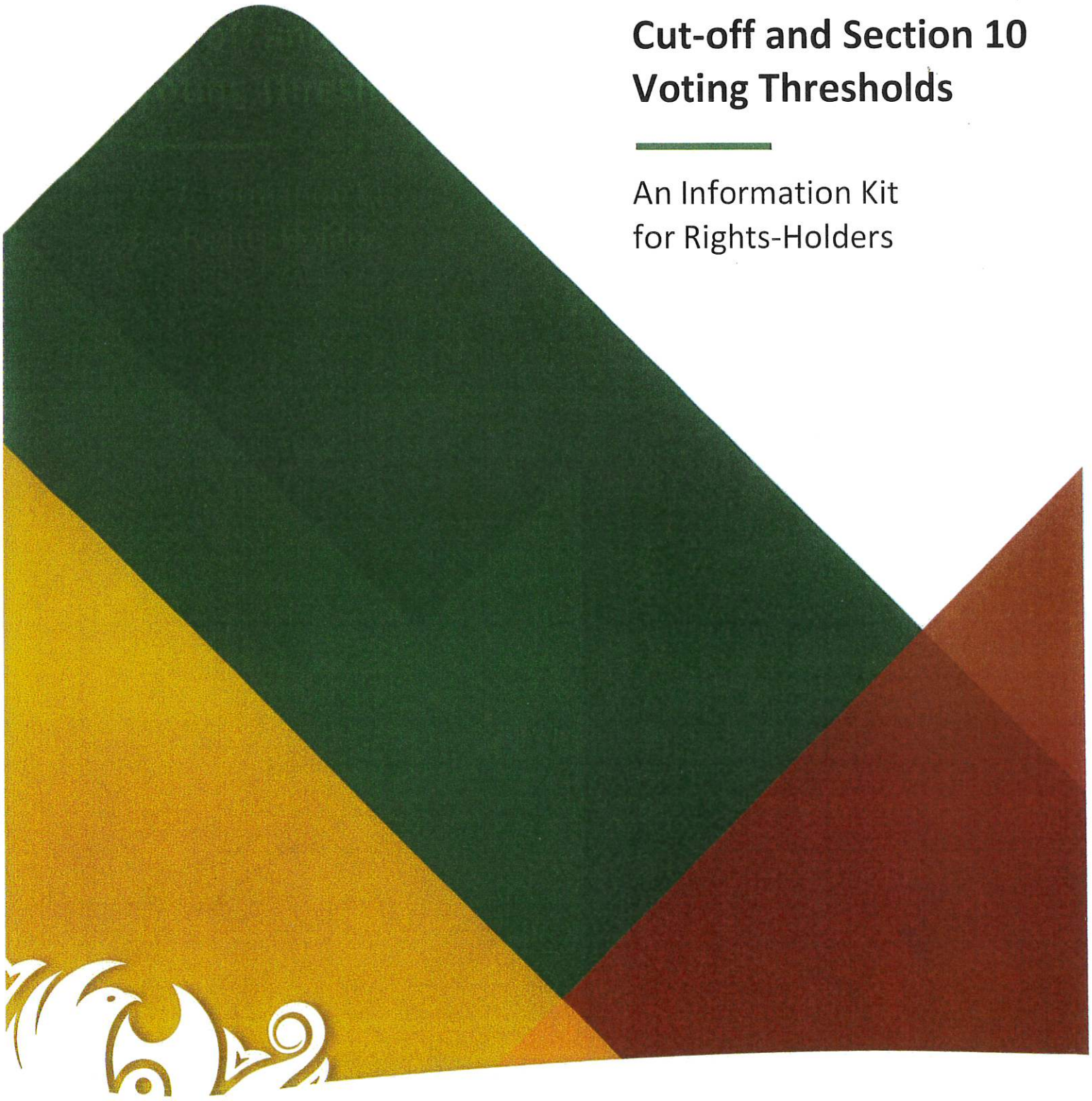
The Collaborative Process on the Second-Generation Cut-off and Section 10 Voting Thresholds

An Information Kit for Rights-Holders



Indigenous Services Canada
Services aux Autochtones Canada

Canada

Community Specific Data Sheet: IMPACT OF THE SECOND-GENERATION CUT-OFF FOR PEGUIS

This community specific data sheet has been prepared to support Peguis with information on the potential impacts of the second-generation cut-off, in preparation for upcoming consultation on the second-generation cut-off.

According to data kept in the Indian Register, Peguis has 11615 individuals who are registered under the *Indian Act.** Of the 11615 people registered, 3749 individuals have a single entitled parent and are registered under 6(2). This represents 32% of Peguis's registered population.

This portion of your registered population will only be able to transmit entitlement to registration under the *Indian Act* to their children if they parent with an individual who is registered or entitled to be registered under the *Indian Act*. This is a result of the second-generation cut-off.

Over the course of a few generations, 32% of Peguis's population may no longer be able to have descendants who are registered under the *Indian Act* unless they parent with another entitled person. If they do not do so, their future descendants will no longer be entitled to registration under the *Indian Act,* and they may no longer have access to the rights, benefits and services that the government provides for individuals who are registered under the *Indian Act.* This also means that even as your Nation's population grows over time, Peguis's total registered populations are likely to decrease in size.

Formal consultation on options for solutions to the second-generation cut-off will launch later in 2024, with the intention of co-developing a legislative remedy for this issue.

If you have any questions related to this data sheet, please contact the Engagement and Registration Reform Team at Reforme-de-linscription-Registration-Reform@sac-isc.gc.ca.

This sheet reflects data as of January 11, 2024.

* This does not include individuals who have been reported as deceased to the Department.

Greetings,

I am pleased to announce that Indigenous Services Canada is moving forward with the Collaborative Process on the Second-Generation Cut-Off and Section 10 Voting Thresholds.

Please find enclosed a Rights-Holders Information Package, designed to support your involvement in a consultation process on these two issues. The process is intended to reflect the requirement for cooperation and consultation set out in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, and may be adjusted along the way, based on input received from First Nations.

Meeting the requirements set out in the *United Declaration on the Rights of Indigenous Peoples Act* requires that the Department works to support your Nation's readiness for consultation – this Information Package is part of those efforts: providing you with information on the issues, and offering you data unique to your community, highlighting the known impacts of these issues.

As you consider the contents of this Information Package, questions will likely arise. Please feel free to reach out to Registration Reform, to request additional information, ask questions, request support or information sessions and/or to provide feedback to engagement Reforme-de-linscription-Registration-Reform@sac-isc.gc.ca.

I look forward to our collaboration, cooperation and consultation on these significant issues.

Yours sincerely,

The Honourable Patty Hajdu, P.C., M.P.

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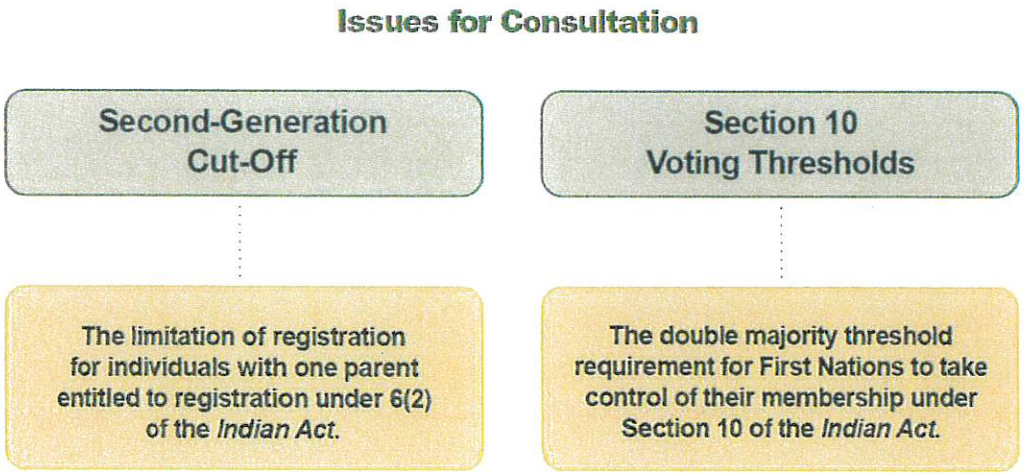
The Collaborative Process on the Second-Generation Cut-Off and Section 10 Voting Thresholds

In 2019, the Minister's Special Representative (MSR) for the *Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship*, reported that "unquestionably, the inequity of greatest concern that was raised throughout the collaborative process was the second-generation cut-off, [and that] this issue will impact all First Nation communities at various times and in varying degrees to the point that some communities will not have any children eligible for registration [under the *Indian Act*] within the next generation."[1] With this urgent risk in mind, the MSR made a clear call to action, "First Nations, in collaboration with the government, must urgently raise awareness of this issue and its impact on First Nation communities."[2]

Today, Indigenous Services Canada (ISC, also referred to as 'the Department') has launched the Collaborative Process on the Second-Generation Cut-Off and Section 10 Voting Thresholds.



This Collaborative Process includes Phase 1: The Co-Development and Information Sharing Phase and Phase 2: The Consultation Phase.

Phase 1 consists of:

- the Rights-Holders Information Sharing Initiative[3], which aims to fulfill the Department's goal of providing early and ongoing information and support to rights-holders, in preparation for consultation; and,
- the Indigenous Advisory Process[4], which aims to co-develop consultation materials, events, and activities with Indigenous partner organizations, while providing guidance on how the Department and consultation participants can work together to achieve deep and meaningful consultation and cooperation as set out in the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA).

Canada is committed to meaningful consultation and cooperation with First Nations and will seek recommendations for the best ways to move forward on these issues. If solutions are recommended and supported by First Nations governing bodies and impacted Indigenous Peoples during consultation, Canada will then continue to work cooperatively with First Nations to co-develop legislative amendments that reflect these recommendations.

History Matters

Canada acknowledges that since its introduction in 1876, the *Indian Act* has been used to administer the lives of First Nations peoples, often through legal provisions that have discriminated against First Nations women and their descendants. Any consultation process on reforms related to registration and membership under the *Indian Act* must acknowledge the colonial history of the *Indian Act,* the ways it has changed over time, and the ways historical law and policy continue to impact people today.

HISTORICAL REVIEW OF AMENDMENTS TO THE REGISTRATION PROVISIONS OF THE *INDIAN ACT*
1869: The *Gradual Enfranchisement Act* created a legal definition of 'Indian',[5] not based on First Nations kinship and community ties, but on the colonial belief in the predominance of men over women. The "marrying out rule" was introduced, resulting in: • First Nations women who married non-entitled men lost their status, and lost the ability to transmit status to their children. • First Nations men who married non-entitled women not only kept their status, but their non-entitled wives were granted status, and they retained the ability to transmit status to their children.
1876: The *Indian Act* was introduced, and the "marrying out rule" was maintained.
1951: Substantial changes were made to the *Indian Act,* including the creation of a centralized Indian Register. Amendments reinforcing discrimination against women and their descendants were made, including the "double mother rule"[6].
1960s and 1970s: Jeanette Lavell of Wikwemkoong, Yvonne Bédard of Six Nations of the Grand River,[7] elder-activist Mary Two Axe Earley of Kahnawà:ke,[8] and Senator Sandra Lovelace Nicholas of Maliseet Nation[9] brought various challenges against the *Indian Act* for its discrimination against women and their descendants.
1985: With the new backdrop of the *Charter of Rights,* and increased international pressure, C-31, *An Act to Amend the Indian Act* was enacted with the intention of eliminating sex-based inequities in the *Indian Act*. It introduced changes that removed some sex-based inequities,[10] reinstated entitlement to registration for many,[11] maintained the status of all people who were entitled prior to C-31 by virtue of section 6(1)(a),[12] created five registration categories under section 6(1) and introduced the "second-generation cut-off" under section 6(2).[13]

Considered an important step forward at the time, C-31 did not address all sex-based inequities, and today, options for solutions to the second-generation cut-off are being consulted on with the intent of reform.
2009: In the *McIvor* decision, the BC Court of Appeal ruled that the *Indian Act* violated the *Charter of Rights* and was discriminatory based on sex,[14] because: • First Nations women who had lost their status because they married a non-entitled man, whose status was restored by C-31, still were unable to pass on entitlement to their grandchildren. • in comparison, First Nations men who married non-entitled women were still able to pass on entitlement to their grandchildren.
2011: C-3, *Gender Equity in Indian Registration Act* introduced changes that restored status to the grandchildren of First Nations women who had married non-entitled men, and created the "1951 cut-off" in attempts to fix the "double mother" rule introduced in 1951.[15] C-3 did not resolve the inequities in entitlement for further descendants of women compared to descendants of men in similar circumstances, resulting in further litigation against Canada.
2015: In the *Descheneaux* decision, the Superior Court of Quebec ruled that the *Indian Act* violated the *Charter of Rights,* and was discriminatory based on sex.
2017: In the *Gehl* decision, the Ontario Court of Appeal supported Dr. Lynn Gehl, an Algonquin Anishinaabe-kwe and determined that women were unfairly disadvantaged by the Registrar's policy with respect to unstated or unknown parentage. To address these persisting sex-based inequities, on December 22, 2017, the first phase of S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)* came into force. The "1951 cut-off" was left in place until consultation with First Nations and impacted individuals occurred, at which time the amendments were brought fully into force.
2018–2019: During the *Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship,* First Nations were consulted on the removal of the "1951 cut-off" as well as broader issues relating to the *Indian Act*. The findings of this consultation process continue to inform present-day consultations.[16]
2019: On August 15, 2019, S-3 was brought fully into force to remove the "1951 cut-off", and new registration provisions mean that descendants of First Nations women who married non-entitled men are treated the same as descendants of First Nations men who married non-entitled women.
2020: In the *Final Report to Parliament on the Review of S-3*,[17] Canada presented next steps towards reform, including addressing enfranchisement and deregistration, and consulting on a legislative remedy for the second-generation cut-off.

2021: *Nicholas v. Canada (Attorney General)* was filed against Canada, arguing that people with family histories of enfranchisement do not have the same capacity to transmit status to their descendants as people without a family history of enfranchisement.

2022: *Nicholas v. Canada (Attorney General)* was put on hold[18] when Canada committed to introduce legislation to fix the inequities caused by enfranchisement-related provisions.

On December 14, 2022, Bill C-38, An Act to amend the *Indian Act* (new registration entitlements) was introduced,[19] and proposed four amendments to address issues recommendations made during the 2018/19 *Collaborative Process,* including enfranchisement and deregistration.[20] At this time, the Minister of Indigenous Services, Patty Hajdu, committed to a consultation and cooperation process on broader reform issues related to registration and band membership under the *Indian Act*, notably including the second-generation cut-off.

2023: On June 21, 2023, after two years of consultation and cooperation with First Nations, Inuit and Métis, the Department of Justice released the *UN Declaration on the Rights of Indigenous Peoples Act* Action Plan.[21] Chapter Two of the Action Plan presents Action Plan Measures (APMs) specific to First Nations Priorities.[22]

These include the following three measures:

- **APM #7:** support the adoption of Bill C-38, which seeks to address discrimination in the registration and membership provisions of the *Indian Act*.

- **APM #8:** co-develop a collaborative consultation process on a suite of broader reforms relating to registration and band membership issues, prior to any transition away from the *Indian Act*. This includes to consult, cooperate and effectively engage with First Nations women to eliminate remaining gender-based issues; Canada recognizes that the *Indian Act* is a colonial-era law designed to exert control over the affairs of First Nations, and as such, the Act will never be fully aligned with the UN Declaration. For Canada's laws to fulfill the UN Declaration, the *Indian Act* must be repealed. The government is seeking to make the Act's registration and band membership provisions more consistent with the UN Declaration, until a clear consensus on a way forward on comprehensive change or the Act's repeal is possible.

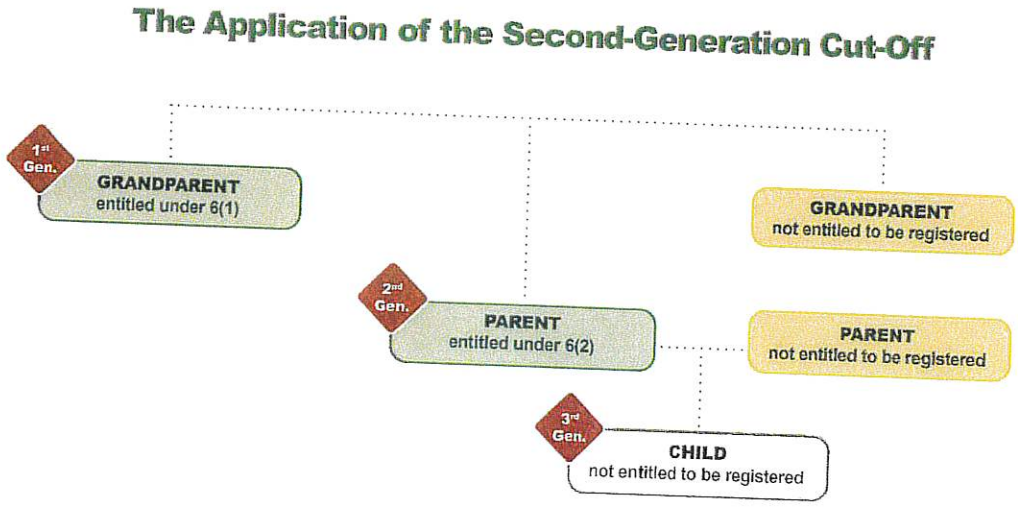
- **APM #9:** consult First Nations and other impacted Indigenous groups to support the co-development of opt-in alternatives to *Indian Act* registration and membership (First Nation citizenship). This will include a broad spectrum of Indigenous demographic groups, such as women, girls and 2SLGBTQIA+ people, Elders, Treaty groups, etc.

Second-Generation Cut-Off Issue Sheet

Background

In 1985, C-31, *An Act to amend the Indian Act* introduced legislative amendments with the intention of bringing the *Act* into alignment with the equality provisions in the *Canadian Charter of Rights and Freedoms.* The previous section of this kit highlights that, although numerous amendments came into force, and Canada aimed to remove sex-based inequities from the registration provisions of the *Indian Act,* not all inequities were addressed, resulting in litigation and legislative changes in the decades that followed.

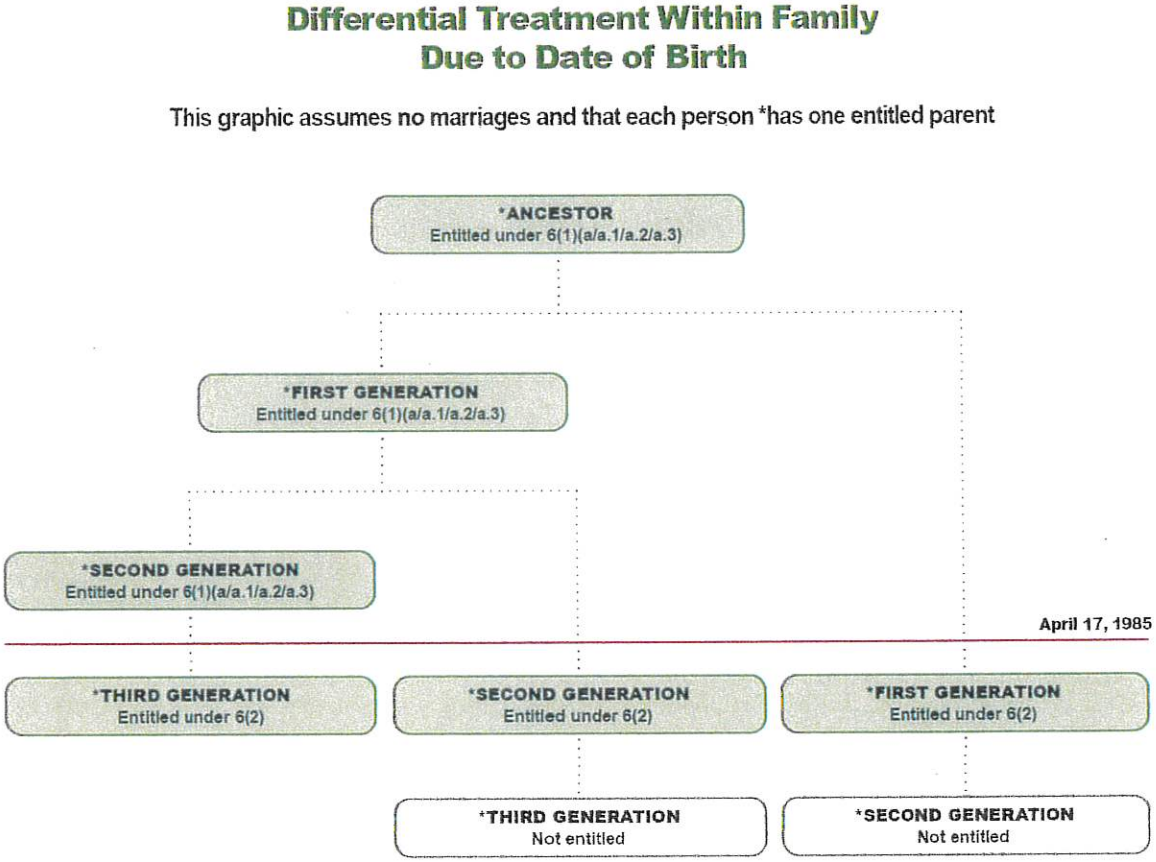
As part of C-31, two general categories for registration were created through sections 6(1) and 6(2). A person may be registered under section 6(1) if both their parents are or were registered or entitled to be registered under the *Indian Act.* A person may be registered under section 6(2) if only one parent is or was registered or entitled to be registered under the *Indian Act.* While both sections 6(1) and 6(2) provide equal access to the services and/or benefits associated with registration under the *Indian Act,* people are impacted by these categories because the ability to transmit or pass on status to descendants differs. They may also have different access to membership, depending on the membership type and membership rules of the First Nation they are affiliated to. The implementation of these two general categories has created a new critical issue – the second-generation cut-off.



The second-generation cut-off occurs when, after two consecutive generations of parenting with a person not entitled to registration, the third generation is no longer entitled to registration. If an individual has one grandparent and one parent who are not entitled to registration, that individual will not be entitled to registration under the *Indian Act.*

Differential Treatment within Families Caused by the Second-Generation Cut-Off

Today, First Nations and their community members report that the second-generation cut-off is applied without consideration for their individual or family circumstances,[23] and many report that the different categorization between sections 6(1) and 6(2) can cause issues for registered individuals and their non-entitled children.



For some families, siblings are registered under different categories, simply because of the year they were born, and/or the date of their parents' marriage. As a result, they have different capacities to transmit status on to their children.

In the chart above, two different examples of differential treatment within families are presented.

Example 1

- One sibling [left side: first generation], born before April 17, 1985, is entitled under the 6(1) category. As a result, this sibling can transmit status to both of their children.

- The other sibling [right side: first generation], born after April 17, 1985, is entitled under the 6(2) category. If this sibling parents with a non-entitled person, their child is not entitled.

Example 2

- One sibling [left side: second generation], born before April 17, 1985, is entitled under the 6(1) category. If this sibling parents with a non-entitled person, they can still transmit status to their child [left side: third generation].
- The other sibling [middle: second generation], born after April 17, 1985, is entitled under the 6(2) category. If this sibling parents with a non-entitled person, they cannot transmit status to their child [middle: third generation].

Residual Impacts of the 1985 Inclusion of the Second-Generation Cut-Off

In 1985, Canada's rationale for introducing the second-generation cut-off centered around concerns raised by First Nations during parliamentary debates regarding resource pressures and cultural erosion in First Nations communities.

The second-generation cut-off was introduced to address concerns that "First Nations expected a significant increase in registered individuals with no current familial, kinship or community ties" and that it was "an attempt to balance individual and collective rights with a view to protecting First Nation culture and traditions."[24]

With respect to newly entitled individuals who lack community connection, many First Nations, Indigenous Peoples and Indigenous organizations raise concerns about the 1985 decision to implement the second-generation cut-off to 'protect' communities from registered individuals with no current familial, kinship or community ties. Given that in the decades since 1985, the findings of the Courts have held Canada accountable for perpetuating sex-based inequities in registration, and that Canada amended the *Indian Act* and restored entitlement to women and their descendants, those lacking kinship or community ties are often women (and their descendants) whose disconnection was caused solely by historically discriminatory colonial legislation.

The Demographic Impacts of the Second-Generation Cut-Off Across Canada

The following chart reflects data from the Indian Register for each province and territory,[25] including:

- the total number of people registered under the *Indian Act*.
- the total number of people registered under section 6(2).
- the percentage of the total registered population who are registered under section 6(2) in each First Nation.

Province or Territory	Total Registered First Nation Population[26]	Total Number of Individuals Registered at 6(2)	Percentage of Individuals Registered as 6(2)
Alberta	146,016	38,987	27%
British Columbia	158,040	43,026	27%
Manitoba	175,771	49,915	28%
Newfoundland and Labrador	31,703	7,475	24%
New Brunswick[27]	17,968	6,627	37%
Northwest Territories	20,405	6,259	31%
Nova Scotia	19,127	5,703	30%
Ontario	266,338	82,596	31%
Prince Edward Island	1,502	598	40%
Saskatchewan	175,533	52,511	30%
Quebec	103,036	25,107	24%
Yukon	10,952	3,372	31%
Total for all:	1,126,385	322,173	29%

Across Canada, 322,173 individuals (or 29% of the total registered population) are registered under section 6(2). This portion of First Nations who are registered under the *Indian Act* will only be able to transmit entitlement to registration to their children if they parent with an individual who is entitled. If they do not, their future descendants will no longer be recognized as First Nations under the *Indian Act,* and they may no longer have access to the rights, benefits and services that the government provides for individuals registered under the *Indian Act.* This is a result of the second-generation cut-off.

If the registration provisions in the *Indian Act* remain the same, over the course of a few generations, the registered number of individuals is expected to decrease over time resulting in a smaller registered population.

In her final report on the findings of the *Collaborative Process on Indian Registration, Band Membership and First Nations Citizenship*, the Minister's Special Representative[28] presented that the second-generation cut-off:

- has more severe impacts in communities that have a small population base, that are n isolated, and that have more instances of "marrying out".
- will inevitably lead to a significant number of children who, despite being born to a parent who is entitled under the *Indian Act,* will be unentitled for registration under th *Indian Act* due to this cut-off.
- will see the gradual elimination of persons eligible to be registered under the *Indian Ac* with some communities feeling this impact in the next generation while most First Nation communities, regardless of location, will feel this impact within the next four generations.
- will have an end result, "in the not so distant future" where some communities will no longer have any entitled or registered individuals, or the number of entitled or registered individuals will have declined significantly.

While cumulative data reflects a whole of Canada picture of the impact of the second-generation cut-off, it does not demonstrate the magnitude of the impacts for each First Natior Each First Nation has a unique experience with the registration provisions of the *Indian Act*, an on average, the impacts of the second-generation cut-off are more impactful at the communit level. Given the way that the current *Indian Act* registration provisions interact with the band membership provisions, this means that there will not only be an eventual erosion of the number of individuals who can be registered, but also a steady decline in the number of people who will be considered band members.

Potential Solutions to the Second-Generation Cut-Off

In 2019, the Minister's Special Representative (MSR) recommended that the Government facilitate "a separate and more in-depth consultation process, and begin to develop solutions to address this inequity."

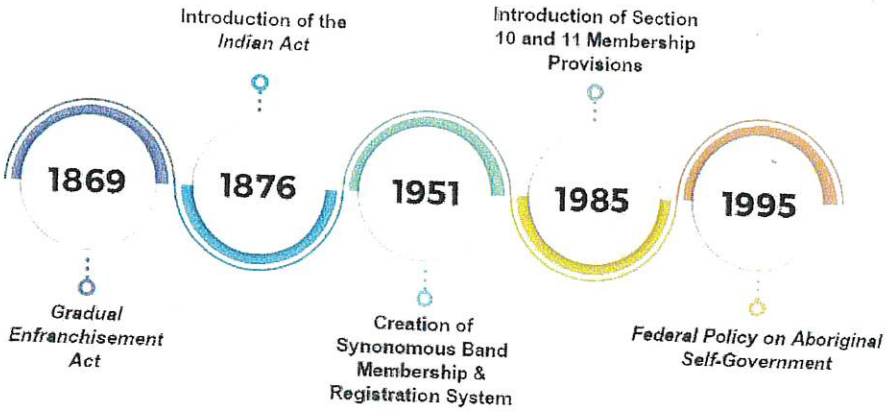
In 2018-2019, there was no agreement or consensus on how best to address the second-generation cut-off, but the following potential solutions were presented by First Nations:

- shifting to a one-parent rule (requiring only one parent to be registered).
- use of blood quantum (a restrictive version of today's registration rules, similar to rules applicable in the United States).
- use of DNA (establishing parameters or thresholds of genetic Indigeneity, possibly similar to blood quantum, possibly less restrictive).
- removing the categories completely so people are either simply registered or not
- transfer of control to First Nations to decide who their people are (common set of minimum requirements established and applied).

In the coming consultation phase, dialogue and consideration will be given to potential options for solutions to the second-generation cut-off, with the intention of determining First Nations' recommendations and preferences on this issue.

While Canada consults on a legislative solution to the second-generation cut-off, First Nations have long recommended that the broader issue of First Nations jurisdiction over citizenship must also be prioritized. Previous engagement revealed that removing inequities in registration and membership must happen simultaneous with broader comprehensive reform.[29] Today, multiple simultaneous initiatives are underway, with progress on Bill C-38 being made in Parliament, with the consultation on registration and membership under the *Indian Act* ongoing, and with the Department of Crown-Indigenous Relations and Northern Affairs leading the work on jurisdiction over citizenship. The goals of all initiatives intersect and are not mutually exclusive. Timelines differ based on demographic impact and scope of transformation.

Section 10 Voting Thresholds Issue Sheet



Background on Band Membership

- Prior to the existence of Canada, First Nations had their own systems for determining the 'citizens or members' of their nations. Kinship and community ties were common elements. These systems were targeted by colonizers in deliberate ways, including legislation, land dispossession, violence and forced displacement, and the Indian Residential School and Day School systems.
- In 1869, the *Gradual Enfranchisement Act,* and in 1876, the first *Indian Act*, introduced narrow definitions of who could be considered 'Indian' under the law and who had membership in a 'community of Indians'.
- In 1951, the *Indian Act* was amended to establish an Indian Register and created the position of a Registrar to determine who was or was not entitled to be registered.
- The 1951 amendments created a system where registration and status was synonymous with band membership – if a person was entitled to be registered, they were typically entitled to band membership automatically.
- In 1985, C-31, *An Act to amend the Indian Act* introduced two options for the control of band membership under sections 10 and 11 of the *Indian Act*.
- In 1995, the *Federal Policy on Aboriginal Self-Government* introduced a mechanism for the federal government to recognize the option for First Nations to determine their band membership, through signing a Modern Treaty or a Self-Government Agreement with Canada.

Band Membership under Section 10, Section 11, and Self-Governing Agreements

Band membership is one of the ways that individuals access membership rights in their communities. In 1985, C-31, *An Act to amend the Indian Act* introduced two options for the control of band membership under sections 10 and 11 of the *Indian Act*.

Some programs, services and benefits are available for all registered individuals, such as the Non-Insured Health Benefits program or tax exemption, while other programs and services (e.g. housing, public health), are primarily funded and delivered to the community based on band membership.

When a person entitled to be registered under the *Indian Act* submits an application to be registered, the Department determines which band the applicant will be affiliated to in the Indian Register, based on their family history. Individuals may be affiliated to a band governed under section 10, 11, or a self-governing agreement, and band membership will be determined accordingly.

First Nations under Section 10

- With the introduction of section 10, the concepts of registration and band membership under the *Indian Act* became distinct for the first time since 1951.
- Under section 10, First Nations can assume control of their band membership through the creation of membership rules and codes.
- Membership codes must be approved by the Minister of Indigenous Services, as defined by the *Indian Act*.
- The Department cannot add people to the membership lists for First Nations that have assumed control under section 10.
- When a person's family history connects them to a First Nation that has assumed control of membership, they are registered under the *Indian Act* and are affiliated to that section 10 band. They must then reach out to their First Nation to request to be added to the membership list. All matters related to band membership between applicants or members of a section 10 First Nation are addressed by the band. Similarly, for self-governing First Nations, membership is determined by the First Nation.
- Acceptance to a First Nation band that determines their own membership is dependent on the membership rules established by that band.
- For these First Nations, a registered person who is or is not affiliated to them may or may not be recognized as a band member. Furthermore, since entitlement to a First Nation's membership depends on their own membership rules, and not necessarily on entitlement to registration. Therefore, a band member affiliated to a First Nation that controls membership may or may not be registered under the *Indian Act*.

First Nations under Section 11

- For First Nations that have not been able to take control of their band membership under section 10, their band membership lists are maintained by Indigenous Services Canada, under section 11 of the *Indian Act*.
- When a person is registered to a section 11 band, they are automatically added to th band's membership list by ISC.
- For these First Nations, at the time of registration, entitled people automatically become band members, and have the right to access all benefits, programs, services . settlements associated with band membership.

First Nations and Self-Governing Agreements

- Self-governing agreements provide another avenue for First Nations to take control o their membership.
- For self-governing First Nations, registration is still determined by Canada under the *Indian Act,* but membership and other affairs are governed by the First Nation.

Statistics

As of June 2023, 230 First Nations control their own membership through section 10 of the *Indian Act*, representing 37% of all First Nations.

- 200 transitioned to section 10 on or before June 28, 1987.
- Only 30 First Nations have successfully transitioned from section 11 to section 10 unde the current rules (after June 28, 1987).

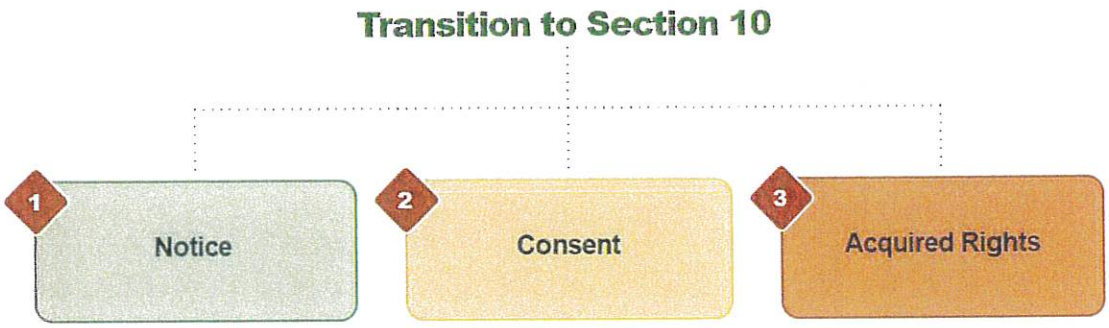
The remaining First Nations are managed through either section 11 of the *Indian Act* or a self-government agreement.

- 350 First Nations are governed by section 11, representing approximately 57% of First Nations.
- An additional 39 First Nations are self-governing[30], representing 6% of all First Nations.

The Process for First Nations' Seeking to Assume Control under Section 10

In order to understand why section 10 voting thresholds are being consulted on alongside the second-generation cut-off issue, an explanation of the process First Nations must undertake to assume section 10 control over their band membership is provided.

To assume section 10 control, First Nations go through a process of assuming control and meet 3 requirements.



Requirement 1: Notice

A First Nation must give two notices to its eligible electors. Notice 1: The band's intention to assume control over their membership; and, Notice 2: The band's intention to establish membership rules for itself. These Notices can be made at the same time, and/or combined in a single notice to vote that reaches all eligible electors.

Notices must be given in a way that makes sure that the band's eligible electors, aged 18 and older, are aware of the First Nation's intentions. If the electors are not notified, and are not able to exercise their right to vote, the First Nation may not be able to achieve the voting thresholds needed to successfully transition to section 10.

After a First Nation has successfully met all the requirements for transition to section 10, it must issue Notice 3 – to inform the Minister and the Department that it is taking control over its membership as per section 10 of the *Indian Act*, and to share a copy of the membership rules for Ministerial approval.

Requirement 2: Consent

The First Nation must obtain consent from its eligible electors about its intention to assum control over its membership and its intention to write its own membership rules.

The First Nation must:

- take reasonable measures to locate electors.
- provide them with the ability to review the content of the membership rules
- inform them about their right to vote.
- inform them about voting.

Under section 10 of the *Indian Act,* consent is only considered achieved when a "double majority" voting threshold is met—and that the majority agrees with the First Nation's intention to assume control over membership and its membership rules. A double majority means that a majority of the eligible electors of the band must vote, and a majority of thos who vote must be in favour.

The chart below demonstrates the different thresholds that can be used in relation to seeki approval by way of a vote. The examples assume that a band has 1,000 eligible voters. The highlighted row describes the "double majority" voting threshold required for transition to section 10.

Voting Threshold for 1,000 voters	Minimum number of voters that must participate out of 1,000	Minimum number that must vote in favour out of 1,000
Absolute majority	501	501
Double majority (Majority of a majority)	501	251
25% + 1	251	251
Simple majority	No minimum	Of those that participate, 50% + 1

Requirement 3: Protection of Acquired Rights

The membership rules must protect the acquired membership rights of individuals whose names were on the membership list maintained by the Department or who were entitled to have their names entered on the membership list up until the day before the First Nation assumes control of membership. First Nations must submit a copy of their proposed rules to the Department for preliminary review, and must ensure the protection of acquired rights under the code. This means that everyone whose name is on the Band List maintained by the Department the day before the First Nation's membership rules take effect will remain legally entitled to membership in the First Nation. It also means that everyone whose name was not yet entered on the Band List maintained by the Department but who were entitled up until the day before the First Nation's membership rules take effect are legally entitled to membership in the First Nation.

After the First Nation has successfully met the requirements of section 10:

- Canada will notify the band of the change of membership control and provide the band with a copy of its Band List, updated the day before membership control is transferred.
- 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 their First Nation office to request to be added to their membership list. This information is communicated to newly registered individuals in a letter that confirms their registration and identifies their affiliation with a section 10 First Nation.
- the Department continues to provide Letters of Authority to the Registration Administrator(s) working with the First Nation, explaining the rationale for inclusion on the Indian Register. This can help the Nation decide whether the person meets their membership criteria.

Potential Challenges to Assuming Control of Membership Under Section 10 of the *Indian Act*

Since 1987, 70 First Nations began the process to assume control under section 10 of the *Indian Act*, but were unsuccessful in the process. One reason for these First Nations not being successful in their attempt to assume control is lack of voter turn-out in their consent vote. Participation in elections and voting can be a challenge; turnout can range from 6 to 90 percent, depending on the community. Some First Nations find it difficult to meet the double majority because of a high population count. For others, engaging off-reserve members has been an ongoing hurdle.[31]

To address this gap, some First Nations engage with off-reserve members by mail or email. However, this requires the First Nation to have up-to-date contact information for all memb Other First Nations have used newspapers, public posters, and online sources, such as socia media, their websites, and service providers to engage and share information about upcom elections. For some issues, First Nations have started using online voting platforms, but to d online voting is not used for taking control of membership under the *Indian Act* on the recommendation of the courts.[32]

Some Indigenous organizations have also highlighted that Indigenous communities often ma decisions in different ways, not solely through democratic majority-rule votes. A majority-vc approach to decision-making among Indigenous governing bodies may not reflect Indigenou ways of knowing and therefore participation in these processes may not be preferred by community members.

Why Consult on the Double Majority Voting Threshold Issue Now?

A potential solution to the second-generation cut-off may result in an additional 225,000 (or more) newly entitled individuals.[33] Any legislative amendment that would result in an influx c new members makes it likely to be more difficult to gain the consent of a majority of electors as per current voting threshold rules.

The Registration Provisions of The *Indian Act* Explained

This document explains sections 5, 6, and 7 of the *Indian Act*,[34] as of August 15, 2019, when the remaining provisions of S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur general)*[35] came into force.

SECTION 5 of the *Indian Act*

Provisions related to applicants with unknown or unstated ancestors

Subsection 5(6)

This provision[36] requires that the Registrar[37] considers all relevant evidence and proof to establish an applicant's entitlement to registration, when an applicant's parent, grandparent or other ancestor is unknown or whose name is unstated on a birth certificate, and without requiring the applicant to establish the identity of the unknown or unstated parent, grandparent or other ancestor.

The Registrar must draw from any credible evidence and make every reasonable inference in favour of the person in respect of whom the application is made.

Subsection 5(7)

This provision was written to create certainty in cases where there is an unknown or unstated parent, grandparent or other ancestor. If an applicant has an unknown or unstated parent, grandparent or other ancestor, it does not mean that any presumption can be made that the unknown or unstated person is not, was not, or would not have been entitled to registration.

SECTION 6 of the *Indian Act*

People who are entitled to registration will be registered under these categories

Subsection 6(1)(a)

This category describes people who were registered or entitled to be registered before the *Indian Act* was amended on April 17, 1985. People who were registered or entitled to be registered before that date continue to be able to be registered after that date.

Because this category describes people born before 1985, no individual born after April 17, 1985, will be registered under subsection 6(1)(a).

- 273,922 people are registered under this category.
- This represents 25.8% of the total registered population of 1,063,654 (as of June 2023).

Subsection 6(1)(a.1)

NOTE: people who were registered/entitled to registration under 6(1)(c) have been registered/entitled to registration under this category since 2019.

This category restores an individual's right to registration/entitlement if they lost status because of one of the following sex-based inequities in registration. A person can be registere under subsection 6(1)(a.1) if they were originally entitled to registration but lost status due t any of the following reasons:

1. they were a woman who married a man who is not entitled to status under the *Indian Act*
2. they were a child who lost status when their mother married a man who is not entitle to status under the *Indian Act*. This was considered an "omitted minor".
3. they were a child who was never given status because their mother parented with a man who is not entitled to status under the *Indian Act*. This was referred to as being "omitted due to 'non-Indian' paternity."
4. they were a child born to unmarried parents who had their entitlement protested with 12 months of being added to the Indian Register, and when the protest led to the discovery that the father was not entitled under the *Indian Act*, their name was removed from the Register.

5. they were a child who lost their status at age 21 because both their mother and paternal grandmother had gained status through marriage to a man who was entitled under the *Indian Act*. This was known as the "double mother clause."

- 16,171 people are registered under this category.
- This represents 1.5% of the total registered population of 1,063,654 (as of June 2023).

Subsection 6(1)(a.2)

NOTE: people who were registered/entitled to be registered under 6(1)(c.3) have been registered/entitled to be registered under this category since 2019.

This category was introduced to ensure that both male and female children born outside of legal marriage to a father who is entitled under the *Indian Act* and a mother who is not entitled under the *Indian Act* are treated equally and registered under section 6(1).

This category provides a 6(1) entitlement instead of a 6(2) entitlement to those women born between September 4, 1951, and April 16, 1985, who were born to a non-legally married father who was entitled to status under the *Indian Act* and whose mother was not entitled to status under the *Indian Act*.

- 2,602 people are registered under this category.
- This represents 0.2% of the total registered population of 1,063,654 (as of June 2023).

Subsection 6(1)(a.3)

NOTE: this section was introduced in 2019.

These people are direct descendants of people who have a right to be registered under subsection 6(1)(a.1). A person can be registered under subsection 6(1)(a.3) if they have a parent, grandparent, great-grandparent, or other ancestor, who lost the right to entitlement to registration and then had it restored under the 6(1)(a.1) or 6(1) (a.2) registration categories and:

1. they were born before April 17, 1985; or,
2. they were born after April 16, 1985, but had parents who legally married before April 17, 1985.

- 95,349 people are registered under this category.
- This represents 9% of the total registered population of 1,063,654 (as of June 2023).

Subsection 6(1)(b)

A person is registered under 6(1)(b) if they were on the founding member list of a band tha formally recognized by the Governor in Council, on or after April 17, 1985. Examples include Qalipu First Nation and Sheshatshiu Innu First Nation in Newfoundland and Labrador.

- 20,553 people are registered under this category.
- This represents 1.9% of the total registered population of 1,063,654 (as of June 2023).

Subsection 6(1)(d)

NOTE: this is under review, removal pending Bill C-38

This category restores entitlement to men who were enfranchised through a submitted application, as well as their wives and minor children. For a period of time, enfranchisement application was one of the only ways individuals were able to obtain the rights of Canadian citizens by renouncing their 'Indian' status.

A person is entitled to be registered under 6(1)(d) if their name was excluded or deleted fron the Register or a band list because of an application for "enfranchisement" submitted before April 17, 1985.

This category is under review before Parliament. Bill C-38 proposes to repeal 6(1)(d) because i does not allow people to transmit status to their descendants to the same degree as people without a family history of enfranchisement. If Bill C-38 receives Royal Assent, people who are entitled to registration under this category will become entitled under 6(1)(a.1).

- 2,281 people are registered under this category.
- This represents 0.2% of the total registered population of 1,063,654 (as of June 2023).

Subsection 6(1)(e)

NOTE: this is under review, removal pending Bill C-38

This category restores entitlement to men who were "involuntarily enfranchised", as well as their wives and minor children. Involuntary enfranchisement could happen if a person lived outside of Canada for five years in a row, but did not have written approval from the Superintendent General (or their staff); or, received a university degree in Canada; became a minister in a church.

A person is entitled to be registered under 6(1)(e) if their name was excluded or deleted from the Register or a band list because of "involuntary enfranchisement" any time before September 4, 1951.

- 13 people are registered under this category.
- This represents <0.01% of the total registered population of 1,063,654 (as of June 2023).

This category is under review before Parliament. Bill C-38 proposes to repeal 6(1)(e) because it does not allow people to transmit status to their descendants to the same degree as people without a family history of enfranchisement. If Bill C-38 receives Royal Assent, individuals who are entitlement to registration under this category will become entitled under 6(1)(a.1).

Subsection 6(1)(f)

This category provides entitlement to a person who does not meet the requirements for registration under any other 6(1) category, when both of their parents have entitlement under the *Indian Act*.

People who are entitled under this category can pass on entitlement to their descendants under 6(2), as the only entitled parent. They do not have to parent with someone is entitled to registration in order to pass on entitlement to their descendants.

- 334,917 people are registered under this category.
- This represents 31.5% of the total registered population of 1,063,654 (as of June 2023).

Subsection 6(2)

This category provides entitlement to a person who has only one parent entitled to registr under a 6(1) category, when they do not meet the criteria for registration under any othe category.

People who are entitled under this category can only pass on entitlement to their descend if they parent with someone who is also entitled to registration. If a person who is register under this category parents with someone who is not entitled to registration, their child wi be entitled to registration. This is called the "second-generation cut-off".

- 299,408 people are registered under this category.
- This represents 28% of the total registered population of 1,063,654 (as of June 2023).

IMPORTANT: if a person has only one entitled parent, and that parent gained their entitlem through marriage before April 17, 1985, they **ARE NOT** entitled to registration. For more de see the descriptions of section 7 below.

Clarification Provision 6(2.1)

In some instances, a person can be entitled to registration under 6(1)(f) and another 6(1) category. When this happens, they will not be registered under 6(1)(f), and will always be registered under the other 6(1) category.

Sometimes, a person can be entitled to registration under 6(2) and another 6(1) category. When this happens, they will not be registered under 6(2) and will always be registered unde the 6(1) category.

Deeming Provision 6(3)

Sometimes people who are applying for registration have parents who have passed away and may not have been registered at the time of death. When people have passed away, the law i able to "deem" them entitled under whatever category they would be entitled to registration under as if they were still alive today.

This "deeming provision" lets the Department assess today's applicants for registration in a way that restores the entitlement rights of their parents, grandparents or great-grandparents and establishes people's ancestral lineages in relation to entitlement.

SECTION 7 of the *Indian Act*

This section describes people who are not entitled to be registered

Subsection 7(1)(a)

A woman who gained entitlement to registration solely through marriage but who subsequently lost entitlement or was removed from the Register any time before April 17, 1985, is not entitled to registration. No provisions of reinstatement (e.g. 6(1)(a.1), or (d)) apply to these women because original entitlement was gained through marriage.

Subsection 7(1)(b)

The child of a non-entitled father and a mother who gained entitlement to registration solely through marriage is not entitled to registration.

Subsection 7(2)

7(1)(a) does not apply to a woman who is entitled to registration in her own right under any provision of the *Act*.

Subsection 7(3)

7(1)(b) does not apply to the children of a woman who is entitled to registration in her own right under any provision of the *Act*.

Additional Information and Support

The Registration Reform Team at Indigenous Services Canada is dedicated to assisting an engaging with First Nation communities and impacted Indigenous Peoples throughout th Collaborative Process on the Second-Generation Cut-Off and Section 10 Voting Threshold

Contact Information for the Registration Reform Team

For inquiries, guidance, or support regarding the content within this Kit, please contact us Reforme-de-linscription-Registration-Reform@sac-isc.gc.ca

Stay connected with updates and engagement opportunities by visiting the Indigenous Serv Canada website.[38]

Is Your Nation Ready to Consult?

This information kit has been prepared to support your readiness for consultation on the second-generation cut-off and section 10 voting thresholds. The goal is to work towards a meaningful consultation while attaining free, prior, and informed consent. Your Nation's readiness signifies a dedication to an informed and collaborative dialogue.

Does your community feel well-equipped with an understanding of the second-generation cu off and section 10 voting thresholds? Are there any outstanding questions or support needed

Consultation Readiness
Self-Assessment Checklist

We Can Help:

- clarify the information provided in the kit.
- provide additional resources and support materials.
- provide a community-specific data sheet on the impacts of the second-generation cut-off on your community.
- address any concerns or questions you may have.

My First Nation...

- ☐ Understands the information provided in the kit, particularly on the second-generation cut-off and section 10 voting thresholds issues.
- ☐ Has a recommended solution to the issues identified.
- ☐ Has achieved a general consensus amongst the community on readiness.
- ☐ Feels equipped to participate in consultation on these issues.

Notify us

Please complete the optional submission below by June 30, 2024. The start date of the consultation process will be determined upon receipt of feedback confirming readiness.

1. By filling out the online form available at: www.canada.ca/rights-holders-information-kit or by scanning the QR code, OR
2. By sending an email to: Reforme-de-linscription-Registration-Reform@sac-isc.gc.ca with subject line: "Confirming Readiness to Participate in Consultation – [Insert Name of First Nation]." Once received, a member of the registration reform team will contact you with additional details.

Your feedback is invaluable to the success and effectiveness of this initiative, and we appreciate your engagement and participation.

References

[1] Indigenous Services Canada, *Minister's Special Representative final report on the Collaborative Process on Indic Registration, Band Membership and First Nation Citizenship* (Ottawa: Indigenous Services Canada, 2019) Accesse online at: https://www.rcaanc-cirnac.gc.ca/eng/1561561140999/1568902073183#sec.

[2] *Ibid.*

[3] Includes distribution of community-specific information to all First Nations, including: Chiefs, Councillors, band managers, executives, IRAs, clerks, Tribal councils, Treaty organizations, and is publicly accessible online.

[4] Includes 17 organizations, for a full list of all participants, consult: Indigenous Services Canada, *The Collaborativ Process on the Second-Generation Cut-Off and Section 10 Voting Thresholds* (Ottawa: Indigenous Services Canad 2023) Accessed online at: https://sac-isc.gc.ca/eng/1706281094364/1706281216732.

[5] Despite having negative connotations, being outdated and insensitive, the term "Indian" is used when the preci legal meaning is required because that is how it's defined in the *Indian Act*. For the purposes of registration and Secure Certificate of Indian Status (SCIS) issuance, "Indian" refers to a First Nations person who is registered or is entitled to be registered on the Indian Register. Additionally, the term "band" refers to the government of a Peop subject to and as outlined by the *Indian Act*.

[6] The "double-mother rule" removed status from grandchildren at age 21, whose mother and paternal grandmother both acquired status through marriage to an 'Indian" person.

[7] Lavell and Bédard argued that the removal of entitled women from the Indian Register based on who they married was discriminatory and against the 1960 *Bill of Rights*, which guaranteed equity under Canadian law. See *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349 Supreme Court of Canada. Accessed online at: https://www.canlii.org/en/ca/scc/doc/1973/1973canlii175/1973canlii175.html

[8] Earley challenged the sex-based provisions that saw her removed from reserve lands because of her marriage to a non-'Indian' man. Indigenous Services Canada, *The Final Report to Parliament on the Review of S-3 December 2020* (Ottawa: Indigenous Services Canada, 2020) Accessed online at: https://sac-isc.gc.ca/eng/1608831631597/1608832913476

[9] Lovelace appealed to the United Nations Human Rights Commission and, in 1981, ruled that the *Indian Act* violated her rights to enjoy her own culture. *Lovelace v. Canada*, Comm. 24/1977, U.N. Doc. CCPR/C/OP/1, (HRC 1979) Accessed online at: https://www.iilj.org/wp-content/uploads/2016/08/Lovelace-v.-Canada.pdf

[10] Removed the "marrying out" rule, the "double mother" rule, enfranchisement by application, involuntary enfranchisement, and the ability to be removed from the Register via protest due to non-'Indian' paternity.

[11] Reinstated entitlement to registration for persons affected by the double mother rule, and for women who had lost status or were no longer recognized under the *Indian Act* when they married a non-'Indian' man.

[12] Including women who gained status through marriage to an entitled man. T

[13] An individual is entitled under 6(1) if both parents were registered or entitled to be registered and under 6(2) if they only had one eligible parent. Additionally, the children of one parent entitled under 6(2) are no longer considered entitled (also known as the "second generation cut-off" rule).

[14] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153. Accessed online at: https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=33201

[15] The "1951 cut-off" required that an individual 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 to be registered under 6(1)(c.1).

[16] Indigenous Services Canada, *The Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship, Report to Parliament* (Ottawa: Indigenous Services Canada, 2019) Accessed online at: https://www.rcaanc-cirnac.gc.ca/eng/1560878580290/1568897675238

[17] Indigenous Services Canada, *The Final Report to Parliament on the Review of S-3 December 2020.*

[18] Indigenous Services Canada, *First Nations families and Canada agree to put litigation on hold while working to end the legacy of enfranchisement under the Indian Act* (Ottawa: Indigenous Services Canada, 2022). Accessed online at: https://www.canada.ca/en/indigenous-services-canada/news/2022/03/first-nations-families-and-canada-agree-to-put-litigation-on-hold-while-working-to-endvthe-legacy-of-enfranchisement-under-the-indian-act.html

[19] Bill C-38, An Act to amend the *Indian Act* (new registration entitlements) is currently moving through the legislative process and aims to address inequities caused by the *Indian Act*'s historical policy of assimilation – that is, enfranchisement. If adopted, people with family histories of enfranchisement will have the same capacity to transmit entitlements to their descendants as people who do not. Accessed online at: https://www.parl.ca/legisinfo/en/bill/44-1/c-38

[20] Indigenous Services Canada, *Bill C-38, An Act to amend the Indian Act (new registration entitlements)* (Ottawa: Indigenous Services Canada, 2023) Accessed online at: https://www.sac-isc.gc.ca/eng/1662142490384/1662142638971.

[21] Department of Justice, *United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan* (Ottawa: Department of Justice, 2023). Accessed online at: https://www.justice.gc.ca/eng/declaration/ap-pa/ah/index.html.

[22] Department of Justice, *Action Plan, Chapter 2: First Nations Priorities.*

[23] Indigenous Services Canada, *Minister's Special Representative final report on the Collaborative Process.*

[24] Indigenous Services Canada, *Remaining inequities related to registration and membership* (Ottawa: Indigenous Services Canada, 2022) Accessed online at: https://www.rcaanc-cirnac.gc.ca/eng/1540403281222/1568898803889#_Second-Generation_Cut-Off

[25] This sheet reflects data as of January 11, 2024.

[26] This does not include individuals who have been reported as deceased to Indigenous Services Canada.

[27] New Brunswick data includes the Atlantic General List. The Atlantic General list includes a total population of 458 registered individuals and 175 individuals registered as 6(2).

[28] Indigenous Services Canada, *Minister's Special Representative final report on the Collaborative Process.*

[29] Indigenous Services Canada, *The Exploratory Process on Indian Registration, Band Membership and Citizenship: Highlights of Findings and Recommendations* (Ottawa: Indigenous Services Canada, 2018) Accessed online at: https://sac-isc.gc.ca/eng/1358354906496/1565361390714

[30] View the PDF downloadable map of the self-government agreements signed to date across Canada and search the Aboriginal and Treaty Rights Information System to find out more about each agreement. Accessible online at: https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314

[31] Liam Midzain-Gobin et al., "Policy Options, Reforming the Indian Act to Allow for Online Voting," *Policy Options*, October 12, 2017. Accessed online at: https://policyoptions.irpp.org/magazines/october-2017/reforming-the-indian-act-to-allow-for-online-voting/

[32] *Abenakis of Odanak Indian Band v Canada (Minister of Indian Affairs and Northern Development),* 2008 386 N.R. 105 (FCA). Accessed online at: https://www.ottertooth.com/Temagami/Native/2008Odanakdecision.pdf

[33] Indigenous Services Canada, *Appearance before the Standing Committee on Indigenous Peoples (APPA), Current and Upcoming Priorities* (Ottawa: Indigenous Services Canada, 2022) Accessed online at: https://www.sac-isc.gc.ca/eng/1674492547674/1674492578394

[34] *Indian Act* (R.S.C., 1985, c. 1-5). Accessible online at: https://laws-lois.justice.gc.ca/eng/acts/i-5/

[35] Canada, S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)* (Ottawa: Parliament of Canada, 2017) Accessible online at: https://www.parl.ca/DocumentViewer/en/42-1/bill/S-3/royal-assent

[36] Before subsection 5(6) of the *Indian Act* came into effect, cases with unknown and unstated paternity was much stricter, posing challenges for women especially when the father's identity was unverifiable. Today, under the provisions of 5(6), the Registrar considers various evidence for a determination on a balance of probabilities.

[37] The Registrar has an exclusive statutory obligation to apply the *Indian Act* in determining registration, band membership, and entries (additions, omissions or deletions) in the Indian Register and band lists maintained by the Department. The *Indian Act* does not grant the Registrar any discretion in applying the registration provisions, including the interpretation of prior *Indian Acts*.

[38] Indigenous Services Canada, *The Collaborative Process on the Second-Generation Cut-Off.*