



BILL S-3 – AMEND INDIAN ACT: DESCHENEUX VS CANADA

OVERVIEW

On December 12, 2017, S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada*, received royal assent. This enactment enables individuals to obtain Indian status who fall under the following:

- Individuals whose grandmother lost status due to marriage to an unregistered man, when that marriage occurred before April 17, 1985.
- Women who were born out of wedlock of registered fathers between September 4, 1951, and April 17, 1985.
- Minor children, who were born of registered parents or of a registered mother, but lost entitlement to Indian Status because their mother married an unregistered person after their birth, and between September 4, 1951 and April 17, 1985.

- Children of the above individuals.

The amended legislation also required the Minister of Indigenous Services Canada (ISC) to initiate consultations on a wide range of issues related to registration and band membership, and to conduct reviews on gender-based inequities under the *Indian Act*, and to report to Parliament on those activities.

The second report to Parliament was tabled on June 12, 2019, whereby it was recommended that Canada fully implement Bill S-3, including the elimination of the 1951 cut-off rule. On August 15, 2019, the federal government issued an Order-in-Council officially removing the 1951 cut-off from the *Indian Act* registration provisions. This was the last remaining provision of Bill S-3 to come into force.

UPDATE

Crown-Indigenous Relations Canada (CIRC) estimated that between 28,000 and 35,000 individuals would initially become eligible for Indian status as a result of Bill S-3.

Descendants of the individuals who gained Indian status under Bill S-3 are also now eligible to register under the amended rules set out in the *Indian Act*. Thus, the number of additional individuals who will gain Indian status as a result of Bill S-3 will increase in the

decades to come. Children of those registered under Bill S-3 will gain status under 6(1) if their other parent also had status. Otherwise, they will gain status under 6(2).

The federal government committed to a comprehensive phase of consultations with Indigenous peoples and organizations before implementing further amendments to correct discrimination in the registration provisions of the *Indian Act*.

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The Collaborative Process involved three phases on further legislative and/or policy reforms:

- 1) The removal of the 1951 cut-off from the *Indian Act* – Pursuant to Clause 15(2) of Bill S-3, Parliament delayed the enforcement of amendments that grant Indian status to all descendants of Indigenous women who lost Indian status upon marrying a non-Indian man between 1869 and 1985 (the 1951 “cut off”). Consultations focused solely on when this provision would come into force.
- 2) Remaining inequities related to registration and membership under the *Indian Act* – consultations focused on all remaining non-gender-based discrimination in the Indian Registry. These topics included: adoption; the second-generation cut-off; enfranchisement; etc.
- 3) Devolution of the responsibility for determining membership/citizenship of First Nations. Discussions were centered around how First Nations would execute their responsibility to establish the identity of their members of citizens, and the responsibility of Canada to withdraw from the process of determining members’ status under the *Indian Act*.

The consultation process had a number of separate facets:

- a) Call for proposals - First Nations and Indigenous groups were able to apply for funding to organize their own consultation activities. A total of 179 funding proposals have been approved for a total of \$3.55 million. First Nations started their consultation activities in October 2018.
- b) Information gathering – From September 2018 to March 2019, CIRC held a number of engagement sessions across Canada:
 - Yellowknife, NWT – January 8-9, 2019
 - Toronto, ON – January 21-22, 2019

- Ottawa, ON – January 24-25, 2019
- Quebec City, QC – January 30-31, 2019
- Winnipeg, MB – February 4-5, 2019
- Halifax, NS – February 13-14, 2019
- Edmonton, AB – February 25-26, 2019
- Calgary, AB – February 28-March 1, 2019
- Nanaimo, BC – March 7-8, 2019
- Vancouver, BC – March 11-12, 2019
- Prince George, BC – March 14-15, 2019
- Thunder Bay, ON – March 25-26, 2019

To support these activities, a consultation guide was made available in selected Indigenous languages. In addition, discussion papers by third-party experts and academics were prepared and offered to the participants of the Collaborative Process’ consultations.

- c) CIRC issued a call for academic and scholarly papers on December 10, 2018, with the objective to gather papers from First Nations and Indigenous academics and scholars. The intent is to award 8 papers from each stream for a total of 24 papers. The deadline for proposals was January 4, 2019.
- d) At the conclusion of the consultation process in March 2019, an analysis and report outlining recommendations to Parliament was tabled by MSR on June 12, 2019.
- e) In June 2019 CIRNAC’s indicated its intention to enact the amendments from Bill S-3 before the October federal election. This “soft announcement” was followed by an official news release issued by CIRNAC on August 15, 2019.
- f) According to the CIRNAC press release, “This means that as of August 15, 2019, all descendants born prior to April 17, 1985 to women who lost their status or were removed from band lists because of their marriage to a non-Indian man dating back to 1869, will be entitled to registration,

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bringing them in line with the descendants of men who never lost status.”

- g) According to ISC, the number of new registrants to the Indian Register could range from 270,000 to 450,000.
- h) Applications are expected to take anywhere between 6 to 8 months to process. More complicated files, which require verification of information, may take longer.
- i) Impacts will be noticed by First Nations as individuals are added. Those First Nations whose membership is controlled under Section 10 of the Indian Act, may or may

not receive new members. Section 11 Bands will receive new band members as individuals become entitled to registration, because Bill S-3 is being fully implemented.

- j) Treaty payments and federal programs, such as Non-Insured Health Benefits, will receive additional funding as more individuals are added to the Indian Register. Other programs, such as the Post-Secondary Student Support Program, may face additional pressures with the increasing number of people eligible to apply for post-secondary funding.

NEXT STEPS

- The Assembly of First Nations (AFN) will continue to provide updates on developments and continue to support First Nations in exercising their inherent jurisdiction over all aspects of First Nations identity.
- The AFN will continue monitoring developments on policy changes and developments with regard to Bill S-3, and will relay information to First Nations governments once Canada continues its efforts to work on further reforms to Indian status.
- The AFN has developed a template citizenship law for interested First Nations.
- The AFN will continue to advocate for the removal of federal policy barriers for First Nations women and girls.

