AN ACT RESPECTING MEMBERSHIP

LEGAL AFFAIRS
AND JUSTICE

CANADA'S COLLABORATIVE PROCESS ON INDIAN REGISTRATION REFORMS

DISCUSSION PAPER – Assembly of First Nations

February 19, 2019

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Section I. Introduction

In 2016, the Quebec Superior Court ruled in *Descheneaux* that the Indian Registration provisions of the Indian Act were unconstitutional. The Court directed Canada to remove all sex-based discrimination from the Indian Act. In addition, the Court directed Canada to address all other forms of discrimination contained within the registration provisions. The latest reforms to the Indian Act, Bill S-3, obligates the Minister of Indian Affairs and Northern Development[1] to report to Parliament by June 12, 2019, on the following issues:

(a) issues relating to adoption;
(b) the 1951 cut-off date for entitlement to registration;
(c) the second-generation cut-off rule;
(d) unknown or unstated paternity;
(e) enfranchisement;
(f) the continued federal government role in determining Indian Status and Band membership; and
(g) First Nations' authorities to determine Band membership.

(2)The Minister, the First Nations and the other interested parties must, during the consultations, consider the impact of the *Canadian Charter of Rights and Freedoms*, of the *United Nations Declaration on the Rights of Indigenous Peoples* and, if applicable, of the *Canadian Human Rights Act*, in regard to those issues.

Furthermore, the Minister is obliged to provide assessment of the review of the registration rules introduced by Bill S-3 by December 12, 2020, "in order to determine whether all of the sex-based inequities have been eliminated."[2]

The government is consulting with First Nations on future reforms to the Indian registration provisions under the Indian Act. Canada consultations focus on three "general content streams"[3]:

(i) The removal of the 1951 cut-off from the Indian Act. Discussions will focus on the implementation of the delayed coming-into-force clauses in Bill S-3 relating to the removal of the 1951 cut-off. First Nations will be consulted on how best to:
- implement the changes;
- identify what resources are required;
- ensure any unintended consequences are mitigated.

(ii) Remaining inequities related to registration and membership under the Indian Act. These inequities were articulated in Bill S-3 and further clarified by the input received during the co-design phase. They include, but are not limited to:
- issues of adoption
- the second-generation cut-off
- enfranchisement
- related issues of resources and impacts on communities.

(iii) First Nations exclusive responsibility for determining membership and citizenship (moving beyond the Indian Act). Discussions will seek views on the development of options to devolve to First Nations the exclusive responsibility for the determination of the identity of their members or citizens.

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[1] The Hon. Carolyn Bennett is the "Minister of Indian Affairs and Northern Development, to be styled Minister of Crown-Indigenous Relations and Northern Affairs": Instrument of Advice, 28 August 2017 http://gazette.gc.ca/rp-pr/p1/2017/2017-09-23/html/notice-avis-eng.html. The administration of the Indian Act remains assigned to the Minister of Indian and Northern Affairs by ss. 2(1) and 3(1) and the *Department of Indian Affairs and Northern Development Act*, RSC 1985, c I-6, has also not been amended.

[2] *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, S.C. 2017, c. 25, ss. 11, 12.

[3] *Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship: Consultation Plan,* June 2018.

Section II. Historical background.

A. "Phase 2" is introduced for the third time since 1985

Following the *Descheneaux* decision, the federal government enacted amendments to Bill S-3 in 2017. In those amendments, the federal government established a "collaborative process" to address additional amendments to the Indian Act. It is important to remember that this marks the third or even fourth time the federal government pledged to deliver a second phase. Those promises took place after amendments to the Indian Act registration rules were left unfinished.

Following the federal government's response to the *McIvor* verdict in Bill C-3, the Department of Indian Affairs and Northern Development pledged a "separate exploratory process" on matters "like registration, membership, and citizenship"[4] in 2010. That activity resulted in no legislative amendments. Canada provided a report of its consultation and the report had no recommendations.[5]

There are striking similarities between the 2010 "exploratory process" and the 1988 reports produced by the Department of Indian Affairs and by the House of Commons Standing Committee on Aboriginal Affairs with regard to the deficiencies of the amendments made in 1985 in Bill C-31.[6] With the exception of the 2009 *McIvor* judgement, these reports brought about no results.

It is worth noting that similar sentiments depicting the lack of results can be traced back to 1970. That year, the Royal Commission on the Status of Women in Canada suggested that amendments to the Indian Act should be made in order to protect the rights of First Nations women. The Royal Commission commented that the federal government was contemplating wider changes to the Indian Act.[7] These deliberations did not put forward any changes. It was not until 1985 that the creation of the *Canadian Charter of Rights and Freedoms* compelled Parliament to implement the amendments in Bill C-31.

Should the Indian Act be amended as a result of the consultation after Bill S-3, it would be a drastic shift from, at least, 33 years of legislative inactivity.

B. Lax policies make it easier for the Crown to accept surrenders

For the past ten years or so, the federal government has been increasingly recognizing Aboriginal groups whose claimed Aboriginal lineage is questionable, unreliable, or outright arguable.

The large number of people claiming Aboriginal heritage proves to be beneficial to the federal government's interests for two reasons. First, the Band creation agreement gave the Crown a full release for programs and services that should have been provided in the past to unrecognized First Nations. Second, the Band creation agreement prohibited any possible reserve creation in the future.

What is much more important is the fact that the federal government recognizes groups of diverse citizens with mixed or questionable Aboriginal lineage as actors entitled to hold and, possibly, surrender Aboriginal rights.

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[4] House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, No. 007, 3rd Session, 40th Parliament, April 1, 2010.

[5] Aboriginal Affairs and Northern Development Canada, "The Exploratory Process on Indian Registration, Band Membership and Citizenship: Highlights of Findings and Recommendations," 2013 https://www.aadnc-aandc.gc.ca/eng/1358354906496/1358355025473

[6] House of Commons, Standing Committee on Aboriginal Affairs, C-31: *Fifth report of the Standing Committee on Aboriginal Affairs and Northern Development on consideration of the implementation of the Act to amend the Indian Act as passed by the House of Commons on June 12, 1985*, 1988.

[7] Canada, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: The Commission, 1970), p. 238. http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/bird1970-eng/bird1970-part2-eng.pdf

The current federal government of the day has launched an Agreement-in-Principle (AIP) with the "Algonquins of Ontario" (AOO). This organization is composed of one Band recognized under the Indian Act (Pikwakanagan) and thousands of other people in eight other "collectives." The criteria used for enrollment of thousands of non-status AOO members were so vague that even the Prime Minister himself, Justin Trudeau, would be eligible because of his one ancestor born in1605.[8] The conditions of the future treaty dictate that only members of the Indian Act Band would be able to maintain their registration as Indians and only Pikwakanagan would qualify for federal funding.[9] Upon the conclusion of the process initiated by the AIP, Canada would acknowledge it has taken surrender of Aboriginal rights and title to most of Ontario's eastern areas, which encompass Parliament Hill.

This is not to say that such an occurrence is limited to First Nations. For instance, in 2015 the federal government signed an AIP with the Northwest Territory Métis Nation (NWTMN). This organization's enrollment criteria defined "Métis" solely by making a reference to Aboriginal ancestry[10] and without applying the *Powley* criteria of ancestral connection, self-identification, and community acceptance with the purpose of protecting historic community-held rights.[11] It is once again perfectly clear that such an arrangement presents a great benefit to the Canadian state, because it strives to nullify all Métis harvesting rights in the designated territory, which includes Métis communities that are not privy to the NWTMN agreement.

In conclusion, actions taken by the federal government have given First Nations plenty of reasons to see dangers in the liberalisation of eligibility criteria. The motive of such relaxation are driven by the federal government's aspiration to get the surrender of rights, but not their proper recognition. For that reason, the federal government is seemingly prepared to accept surrenders from actors that are in no way related to communities that have actual rights to do that.

Section III. Present-day rules governing the Indian Act

A. The effective blood quantum rule

1. Before 1985: Status was conditional on the male line

Until 1985, status under the Indian Act was established by the male line only:

- only a male had a right to be a registered Indian (as of the creation of the Register in 1951) or had the right to be on the Band list (from 1876 to 1951); or
- only the wife or child of such an Indian man had the right to be considered as Indians themselves.

This rule had only two exceptions:

- should a child be born out of wedlock to an Indian woman and an unidentified father, that child had the right to be registered, excepting that the father could not be proven to be a non-Indian himself. This includes the Band's right to contest the child's status by bringing forward allegations of non-Indian paternity; [12]
- should a child be born out of wedlock to an Indian father and a non-Indian woman, as of 1951, only the daughter had the right to be registered, and not the son. [13]

[8] Kyle Duggan, "Justin Trudeau qualifies as Algonquin under new process, chief claims," iPolitics, 3 March 2016 https://ipolitics.ca/2016/03/03/justin-trudeau-qualifies-as-algonquin-under-new-process-chief-claims/ and https://ipolitics.ca/wp-content/uploads/2016/03/Justin-Trudeau-AOO-root-ancestor-copy.pdf

[9] Algonquins of Ontario Agreement-in-Principle, ss. 2.2.6, 2.8.1 http://www.tanakiwin.com/wp-system/uploads/2015/06/Proposed-Agreement-in-Principle.pdf

[10] *Enge v. Canada (Indigenous and Northern Affairs)*, 2017 FC 932, para. 72.

[11] *R. v. Powley,* 2003 SCC 43.

[12] *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, para. 8.

[13] *Martin v. Chapman*, [1983] 1 SCR 365; Descheneaux c. Canada (Procureur Général), 2015 QCCS 3555, para. 92. Before 1951, illegitimate children of either sex were entitled to status, subject to the Superintendent's power to remove them from the band list: Indian Act, RSC 1927, c. 98, ss. 2(d)(ii), 12.

2. After 1985

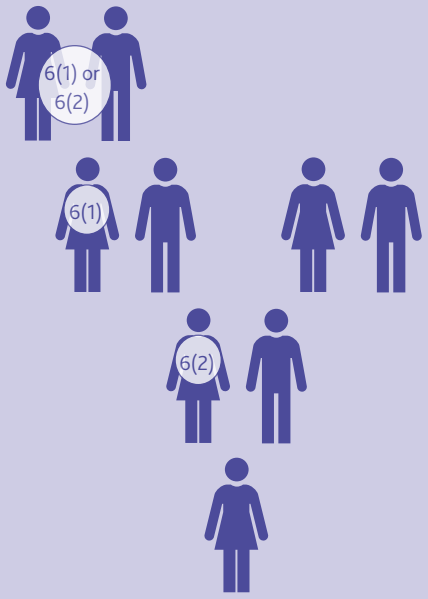
(a) Two status grandparents are required for status

The reason why amendments known as Bill C-31 were introduced was to ensure that the Indian Act was compatible with the right to equality. This right is protected by Section 15 of the *Canadian Charter of Rights and Freedoms*, which was enacted on April 17, 1985.

As of April 17, 1985, the rules did not have any requirements with regard to a person's gender or marital status. The difficulties started to manifest themselves during the transition process from the old, patrilineal rules to the new gender-neutral rules. This problem is outlined below.

In the eyes of the federal government, the basic 1985 rule is a "second-generation cut-off". It means that should two consecutive generations of Indians parenting with non-Indians take place, the third generation would lose the right to be registered.

The second generation cut-off



This registration essentially requires two grandparents in order to take place[14] or a 50% blood quantum but where entitlement to status replaces 100% "Indian blood."

Due to the fact that everyone who has the right to be registered under the rules established before 1985 are registered as 6(1) under the new rules,[15] those people whose ancestors meet the requirements of the pre-1985 discriminatory rules stand at a clear advantage, even under the rules adopted after 1985. The discussion below will demonstrate that women, who are born lacking Indian Status, can still count as status grandmothers provided that they married in. As such, the position of descendants of Indian men who married out was better than the descendants of Indian women who married out.

Furthermore, certain status grandparents held additional legal weight in this scheme than others. For instance, a person who had two 6(1) grandparents will always be registered. Contrariwise, a person who has just one 6(2) grandparent in each of his or her parents' lines will not be eligible for registration.

(b) The amendments enacted in 2010 and 2017

The purpose of the amendments introduced in 2010 (which are known as Bill C-3) and the amendments introduced in 2017 (which are known as Bill S-3) was to deal with discrimination known as the "cousins rule" and the "sibling rule."

(i) The cousins rule

It is vital to keep in mind that in accordance with Bill C-31 and paragraph 6(1)(a), if a non-Indian woman married an Indian man before 1985 and was granted Indian Status, she was counted as a Status Indian grandmother. Paragraph 6(1) was used to register their children, as well. On the other hand, if an Indian woman lost her status due to her marriage to a non-Indian man, her non-Indian man didn't become Indian after 1985. In this case, paragraph 6(2) was used to allow an Indian woman to receive her status back and have her children registered, as well.

[14] Sébastien Grammond. *Identity Captured by Law. Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal: McGill-Queen's University Press, 2009), p. 126.

[15] Current Indian Act, para. 6(1)(a).

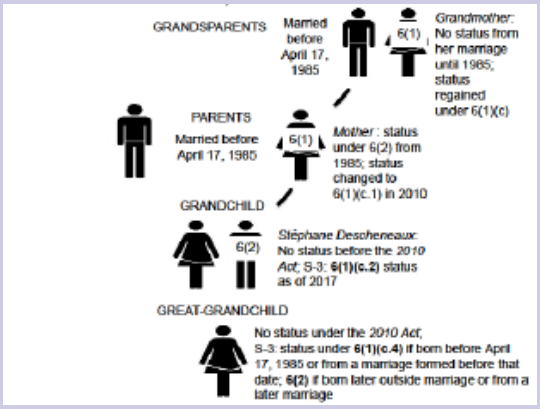
As a result, the children and grandchildren of an Indian man who married to a non-Indian woman before 1985 had more solid legal grounds to obtain status than the children and grandchildren of an Indian woman who married a non-Indian man. This phenomenon became known was the "cousins rule" since first cousins with the same number of parents born with status were entitled to different rights.

To sum up, the amendments to Bill C-3 and Bill S-3 terminated the above-mentioned cousins rule for those people who were born after September 7, 1951.

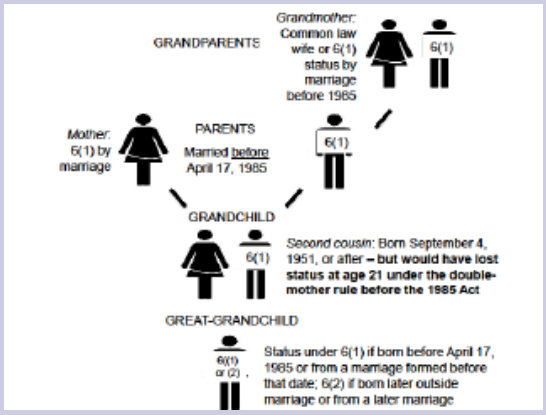
It is possible to say, the only reason why the Descheneaux case was necessary is the federal government resorted to Bill C-3 to make the corrections in the McIvor case – a case that was similar to the Descheneaux case itself. In essence, it dealt with the discrimination experienced by the children and grandchildren of Indian women who lost their status by marrying non-Indian men – provided that her children married or had children themselves out of wedlock after 1985. The 2017 amendments to Bill S-3 prolonged that effect for one more generation, should those women's children be married or have their own children out of wedlock before 1985.

In summary, thanks to Bill C-3, Stéphane Descheneaux was granted status under paragraph 6(2). The same can be said about Sharon McIvor's children, because her grandmother's status had been lost due to her marriage. At the same time, his mother married before 1985, which makes a situation possible where her great-uncle could have had grandchildren registered under paragraph 6(1) should his own sons marry non-Indian women. As of now, Bill S-3 grants 6(1) status to the grandchildren of women whose marriage made them lose their own status – provided that their own parents had children or married prior to April 17, 1985.

Discrimination against women who regained their status in 1985 and their descendants after the McIvor judgment (the Stéphane Descheneaux case)



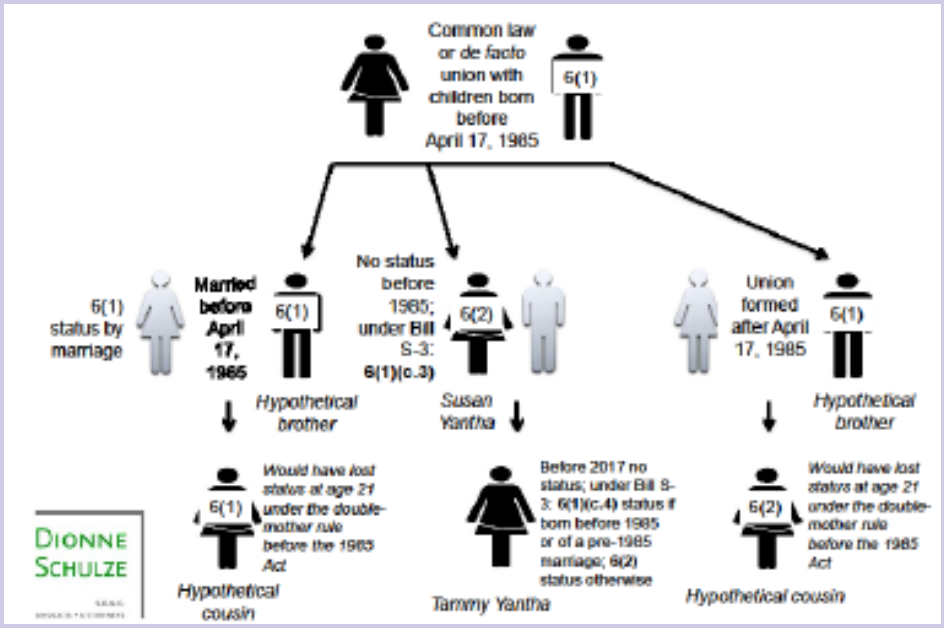
Comparator: Stéphane Descheneaux's second cousin whose grandfather married a non-Indian before 1985



(ii) The siblings rule

As illustrated above, should the son be born out of wedlock to an Indian man and a non-Indian woman, the rules applied from 1951 to 1985 allowed their son to be registered. However, the law had no provisions that allowed the same registration for the daughter born in the same situation. The rules in Bill C-31 were changed after 1985, which enabled the daughter to be registered. Despite that, she was registered under paragraph 6(2) whereas her brothers were registered under paragraph 6(1), because she had only one parent with Indian Status. As a result, the scope of discrimination stemming out of it became even more profound than it was in cases of the cousins rule. Indeed, it was so because, if a son married a non-Indian woman before 1985, his children would be allowed to register under the paragraph 6(1). On the other hand, if his sister did not have an Indian Status husband, she was not allowed to transfer her Indian Status to her own children.

Susan Yantha: daughter of an Indian man born out of wedlock



The amendments introduced to Bill S-3 in 2010 eliminated the discriminatory nature of the siblings rule.[16]

3. The two-grandparent rule: demographic ramifications

According to the rules, Indian Status depends on whether a person has at least two (or preferably, three) status grandparents. Consequently, as more people with Indian Status produce children with Non-Indians (exogamous parenting), fewer people will have the right to obtain either status in the future.

[16] Bill S-3 also corrected the differential effect on minor or adult children of Indian parents whose mother lost her status through a subsequent (usually second) marriage to a non-Indian. Since the minor children lost their status with their mothers before 1985, they could not pass on status in the same way as their siblings who were over 21 when their mother married – this is known as the "emancipate minors" issue.

It is believed that population will progressively increase for about two generations in those First Nations that utilise the Indian Act rules to resolve questions pertaining to membership. However, within nearly three generations, about one in three persons whose ancestors were members in 2005, may have insufficient grounds for Indian registration.[17]

Consider the case of two Abenaki communities who supported the Descheneaux litigation. Expert evidence demonstrated that after approximately 100 years, no new child in either Band will have a legal right to have their name added to the Register of Indians.[18]

B. The effective blood quantum rule

1. The "1951 benchmark"

(a) The significance of 1951

Both Bill C-3 and Bill S-3 failed to introduce any changes to the "cousins rule" for the children of women who married non-Indian men, if the child was born prior to September 4, 1951. According to the Registrar's understanding of Bill C-3, should any child be born to a woman who married a non-Indian man after that date, all of that child's siblings reap benefits from the amendments.

The roots of that reasoning can be traced to the British Columbia Court of Appeal's verdict in *McIvor*. In that decision, the court accepted that the cousins rule was discriminatory in nature, directly violating Section 15 of the *Charter*. At the same time, the court decided that the aforementioned violation of the *Charter* was acceptable by the justification test mandated by Section 1 ("reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society") because it asserted that the cousins rule was the ramification of safeguarding the obtained rights of women who received Indian Status due to their marriage. [19]

The British Columbia Court of Appeal ruled that a certain part of the rules adopted after 1985 was unconstitutional. However, the reason why it was found unconstitutional was because of the discriminatory nature of repealing the "double mother rule" that existed before 1985. More specifically, the "cousins rule" was unconstitutional for everyone who was born after September 4, 1951, to Indian women who lost their status by marrying non-Indian men, because that is the date when the "double-mother rule" came into force. [20]

It is easier to understand the "double-mother" rule if one were to use the French term: the "mother-grandmother rule." Here is how it works: in accordance with the 1951 Indian Act, people born after September 4, 1951 - the date when the Act came into effect – would lose their Indian Status once they reach the age of 21. They would be bereft of that status provided that their grandmother didn't have it, and provided that their mother obtained her own Indian Status by marrying an Indian man. This rule was seldom applied. In other words, this principle was what can be characterised as a second-generation "cut-off" for those Indian men who had children with non-Indian women.

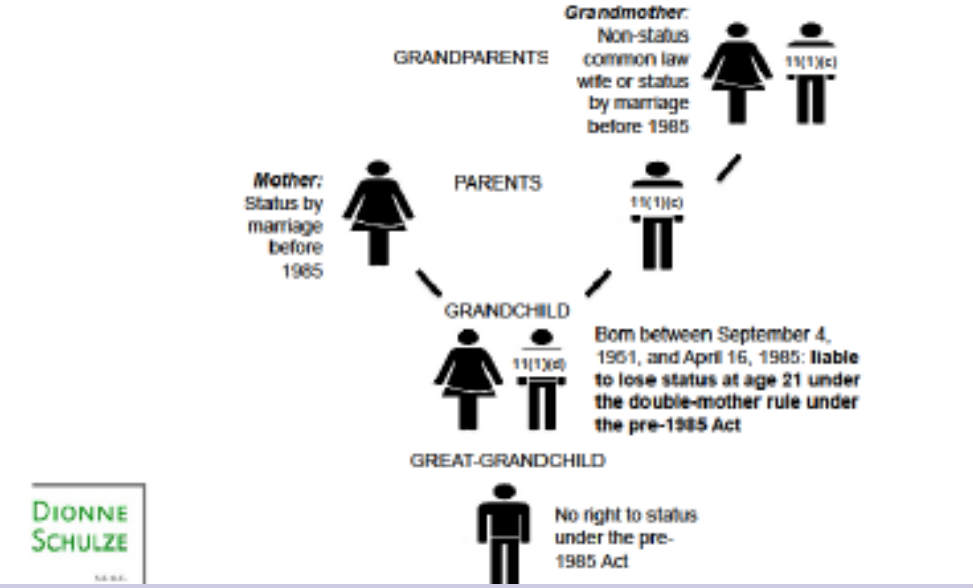
[17] Stewart Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities," February 2005, p. 41 http://epub.sub.uni-hamburg.de/epub/volltexte/2009/2856/pdf/indian_registration.pdf

[18] *Descheneaux*, para. 230.

[19] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, para. 111, 127; leave to appeal to the Supreme Court of Canada refused, 2009 CanLII 61383 (SCC).

[20] *Id.,* para. 154, 161.

The "double-mother" (mother-grandmother) rule: 1951-1985



This "double-mother" rule was nullified by Bill C-31 in 1985. As a result, it left the children of those Indian men who had married non-Indian women in a better position than the children of Indian men who had married non-Indian women. In addition, that nullification also created more favourable conditions for the aforementioned children than the conditions existed for them under the rules operating before 1985. As noted by the British Columbia Court of Appeal, children who fall under the influence of the "double-mother" rule would have had no Indian Status once they reach the age of 21 before 1985. However, they were able to transfer their Indian Status to at least the following generation after 1985. On the contrary, the children of Sharon McIvor could only transfer their Indian Status, if they had their own children with other Status Indians. [21]

As a result, the 2010 and 2017 amendments reduced the scope of their effects. They apply only to descendants of those Indian women whose Indian Status was lost due to their marriage, and whose children were born after September 4, 1951.

(b) Bill S-3's proposed changes and the current discrimination

With the married out rule created in 1876, it is beyond any doubt that the descendants of Indian women who lost their status at any time by marrying non-Indian men are victims of discrimination. The question has become, is that discrimination justified?

The trial judge presiding in the McIvor case decided that discrimination cannot be justifiable, because, according to the judge, "Even if there had been evidence that the new population [entitled to be registered as of 1985] was more culturally removed from the original Indian population, their cultural removal would be entirely the result of historic sex discrimination." [22]

[21] *Id.*, para. 60.

[22] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, para. 314.

Justice Chantal Masse, who issued a verdict in the Descheneaux case, also made it clear that she agreed with the previous argument:

> *[..T]here is no logical reason to deprive individuals of the benefit of law who would no longer be accepted by their collectivities because they were separated from them by government policies and, it must be repeated, in order to respect the same protection of the benefit of law under the right to equality guaranteed by Section 15 of the Canadian Charter. In 1985, however, this is what Parliament did, according to the debates, having made a compromise between the right to equality and the collectivities' wish to decide on the rules concerning Band membership. To tell the truth, the Court was and remains entirely in agreement, in principle, with the remedy granted by the trial judge in the McIvor case. This remedy aimed at nothing less than giving equal treatment to the descendants of Indian women excluded on discriminatory grounds, even as the descendants of Indian men in the male line could and those born before 1985 still can obtain Indian Status by tracing themselves back to a registered Indian or Band member among their ancestors and thereby obtain all the related benefits. […]*[23]

According to Justice Masse, the added effect of both pre-1985 discrimination and the repeal of the "double-mother" rule is that, in the case of a family where Status Indian men married non-Indian women in every generation from 1876 until 1985, the descendants of that family would still have the right to be registered as Indians well into the 21st Century.

An important amendment to resolve this discrimination was proposed by the Senate of Canada. The Senate amended Bill S-3 by changing it to "6(1)(a) all the way." This change would ensure Indian Status for all people born before April 17, 1985 (or as a result of a marriage created before that date) as long as they had a parent who had the right to be registered as an Indian before that date. This modification would grant people the right to use the female line tracing back to 1876 in the same way that the male line is sufficient. It would also grant status to every descendant of any Indian woman who married a non-Indian man.

On account of the government disagreeing with those amendments, they were not adopted. Instead, the final statute presents a deal reflecting middle ground. The 1951 "cut-off" stays in force even under the 2017 amendments excepting that Cabinet revokes it and enforces the "6(1)(a) all the way" rule. [24]

2. Children being discriminated against due to enfranchisement by their fathers

The registration rules are clearly discriminatory in nature; however, they would not be abolished even after Bill S-3. This discrimination will persist even if the federal government opted to rescind the 1951 "cut-off" and used Section 6(1) to grant Indian Status to every Indian woman who lost their status due to marrying non-Indian males.

The question comes down to this: until 1985, an Indian man had the right to "enfranchise" himself, his Indian wife and their children. However, an Indian woman did not have the right to "enfranchise" him. After 1985, the grandchildren

[23] *Landry c. Procureur général du Canada (Registraire du registre des Indiens),* 2017 QCCS 433, fn. 168 (our translation; emphasis added).

[24] *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général),* S.C. 2017, c. 25, s. 15(2).

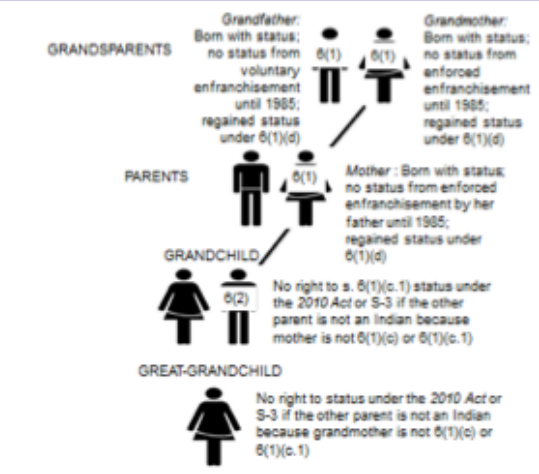
of an Indian woman who was enfranchised by her husband, as depicted above, cannot obtain Indian Status unless her children become parents with other registered Indians.

Nonetheless, as of 2010, should that Indian woman have a sister who married a non-Indian man before 1985, that sister's grandchildren have the right to be registered. After Bill S-3, if that sister's own children married or parented before 1985, her great-grandchildren could be registered, as well.

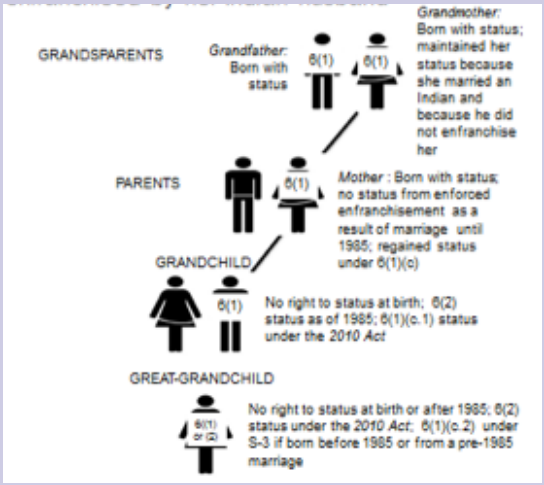
Should that Indian woman have a brother who married woman of any descent – Indian or otherwise – before 1985, and should that woman lack enfranchisement bestowed upon her by her husband, then that brother's children will have status regardless of whom they parent with.

The charts below demonstrate the discrimination and the effects emanating from it.

Descendants of an Indian woman enfranchised by her Indian husband



Comparator: descendants of an Indian woman who was *not* enfranchised by her Indian husband



As a result, the sex-based discrimination is clear here, because it was only an Indian man who could grant this post-2010 result to his wife and their children by opting to provide them with such enfranchisement before 1985. An Indian woman was deprived of that same right. It can also be claimed that this demonstrates discrimination based on marital status because the enfranchisement effects that take place after 2010 are different. Their consequences depend whether the Indian woman was enfranchised during or upon marriage.

3. Indian women being discriminated against due to enfranchisement before marriage

Even after Bill S-3 was passed, discrimination against Indian women who were enfranchised as adults and before marriage, and not by their husbands or fathers, continues to persist.

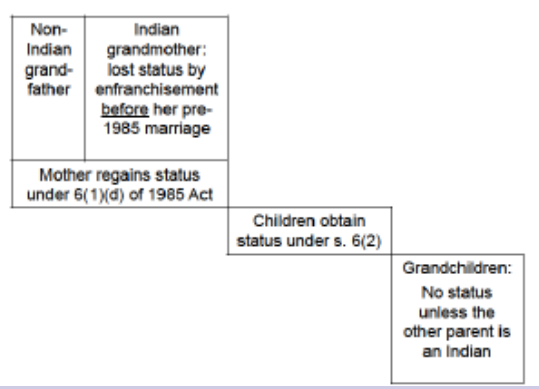
Whether the Indian Act truly allowed single, adult Indian women to be enfranchised in the period from 1951 to 1985 [25] is unclear, but it is a well-known fact that many of these women did indeed seek and receive it. [26] From time to time, the Indian agents encouraged them to do that – especially if these women were engaged to non-Indians, because their share of the Band's money would cover the costs associated with the wedding dress. [27]

In the section above, the discriminatory consequences of Bill C-3 and Bill S-3 for the children of an Indian woman, whose Indian husband opted to enfranchise both herself and their children, were illustrated. Their grandchildren, as a result, will not have status if her children do not become parents with Status Indians.

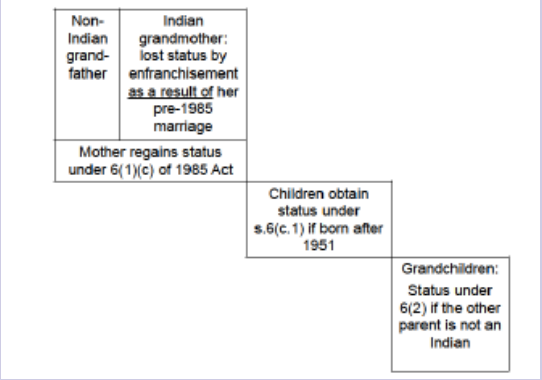
The same discriminatory practice persists with regard to Indian women who elected to receive enfranchisement as adults, but before marriage. In this case, if they didn't marry an Indian, their children will be 6(2) and her grandchildren will have no status if her children do not become parents with other Status Indians.
In 1985, paragraph 6(1)(d) was utilised to allow an Indian woman, who was enfranchised as a single adult, to reclaim her status. Should she have children with a non-Indian man, her grandchildren weren't eligible to receive status lest her children become parents with other registered Indians.

However, as of 2010, should that Indian woman have a sister who married to a non-Indian man before 1985, that sister's grandchildren have the right to be registered. In addition, after Bill S-3, even the sister's great-grandchildren might be eligible for registration prior to 1985.

The effects of enfranchisement before marriage on an Indian woman



The effects of enfranchisement upon marriage for an Indian woman



[25] The legality of such enfranchisements is the subject of the appeal in *Hele v. Canada* , Québec Superior Court, District of Montréal, file no. 500-17-102648-188.

[26] *Larkman v. Canada (Attorney General),* 2014 FCA 299.

[27] Danette Jubinville, "(In)Voluntarily Enfranchised: Bill C-3 and the Need for Strengthening Kinship Laws in Treaty 4," April 27, 2015, p. 3 https://raventrust.com/wp-content/uploads/2015/10/Danette-Jubinville.-Raven-Scholars-Submission.pdf

As a result, a clear pattern of discrimination can be seen based on the family status. Such discrimination wasn't abolished due to Bill C-3's amendments, introduced in 2010. These amendments placed a person, who was enfranchised as a single woman, in a different position from that woman's sisters, who were enfranchised against their will due to their marriage to non-Indian men.

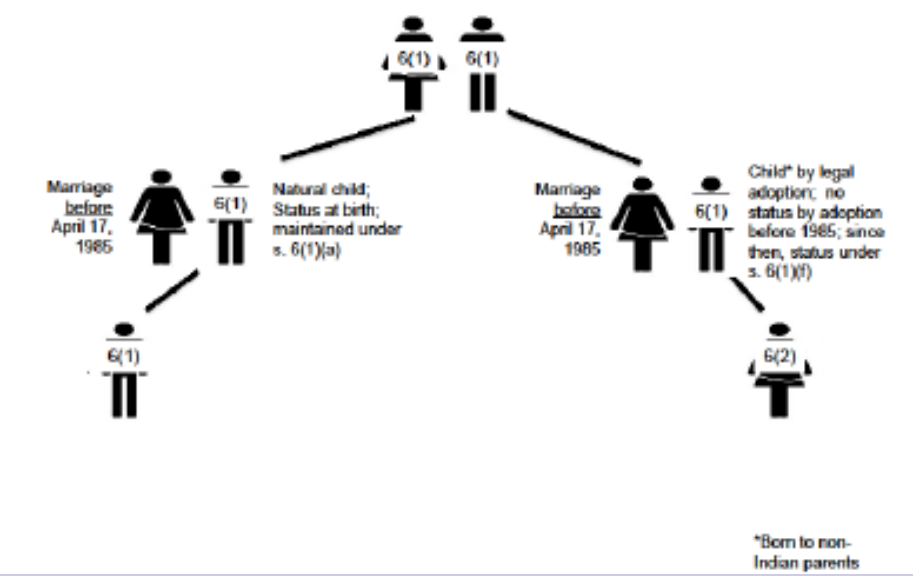
4. Children being discriminated against due to their legal adoption by Indians before 1985

Prior to 1985, the Indian Act had no ramifications for legal adoption. The beneficial effect of this arrangement was that Indian Status could not be terminated by adoption. [28] This principle has stayed in effect due to Bill C-31. However, the detrimental impact of it was that should Status Indian parents legally adopt a non-Indian child, that child would not be allowed to have status transferred to them.

However, if both adoptive parents had Indian Status, their adopted child had the right to receive status after 1985. That included receiving status under the provision of s. 6(1). Yet, if the adopted child married before 1985, the purposes of registration under the Indian Act did not concern that child's marriage.

What did it mean, exactly? It meant that, if an adopted son married a non-Indian woman before 1985, his children would be registered under s 6(2) after Bill C-31. At the same time, if he had an adoptive brother who was a biological child of his parents and who married before 1985, that adoptive brother's children would always have the right to be registered under s. 6(1).

Descendants of a child legally adopted by Indian parents before 1985



[28] *Natural Parents v. Superintendent of Child Welfare et al.*, [1976] 2 SCR 751.

Since 2010, this sort of discrimination has acquired other ramifications for those affected by it. For instance, should the adopted child have an adoptive sister who happened to be his Indian parents' biological child, then that adoptive sister's children would have the right to be registered under s. 6(1). The same applies to that sister's grandchildren, who could be registered under 6(2) as a consequence of Bill C-3. Nonetheless, if adopted children did not become parents with a Status Indian – and the same is true in cases of these adopted children's own children – then their grandchildren would not have any legal grounds to claim status.

As a result, discrimination that emanates from this has its roots in the family status of affected individuals. It touches individuals in a different way merely because these individuals have a different legal relationship with their parents, which is determined by either birth or adoption.

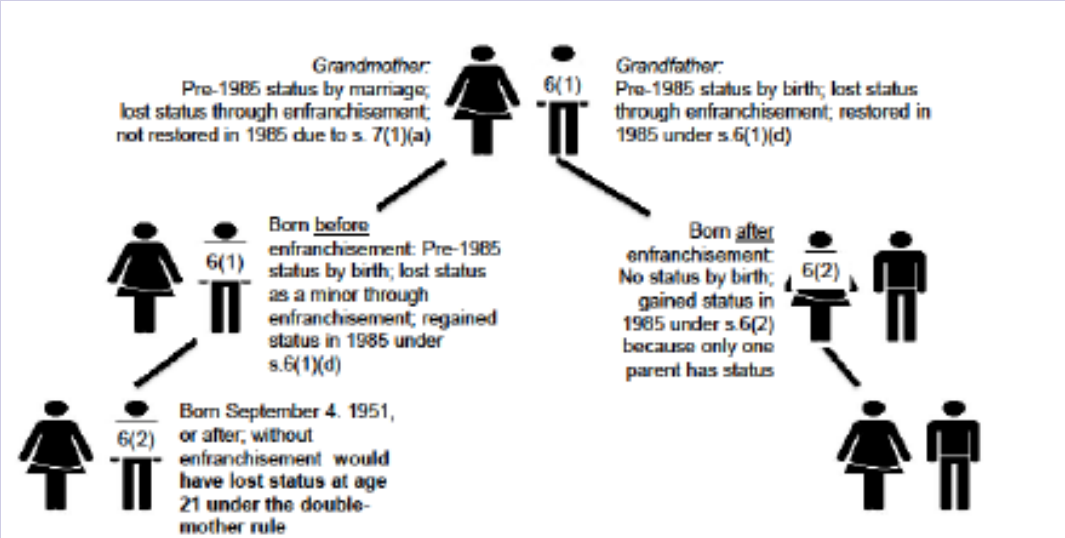
5. Children who are born to the same parents, but have different status

(a) Marriage between enfranchised Indian men and non-Indian women

Prior to 1985, it was possible for an Indian man to transfer his Indian Status to his non-Indian wife through marriage. He also had the right to use enfranchisement to eliminate status from his wife, who became Indian, and also from his children. In 1985, the amendments introduced to Bill C-31 nullified the enfranchisement effects for everyone with the exception of women who received their Indian Status due to their marriage. [29]

Should an Indian man and his non-Indian wife have children, and should some of these children be born before and some after enfranchisement, then the results would be a bit unusual. The older children would be registered under 6(1), because the law would see them as the children of two status parents. However, the younger children who are born after enfranchisement would be registered under 6(2), because they would be seen as children of just one status parent – the father.

Descendants of an Indian man enfranchised before 1985



[29] Current Indian Act, para. 7(1)(a).

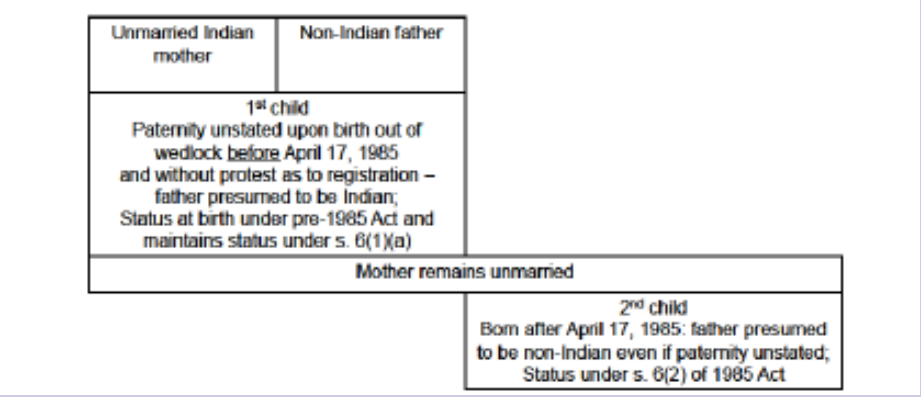
Putting the question whether the Charter regards these results as discriminatory aside, it can be said that the notion of giving different status to children of the same parents makes the registration rules fall into great disesteem.

(b) Indian women who lack stated paternity before and after 1985

As it was illustrated above, the rules enacted in 1985 stated that if a child was born out of wedlock to a non-Indian women and an unidentified father, that child was presumed to have an Indian father. This was true unless it was contested and proven to be wrong. But after 1985, that presumption was turned upside down. An unidentified father was presumed to be a non-Indian. [30]

In reality, some of the Indian women preferred to avoid getting married with the non-Indian fathers of their children (or even identifying them), so that they could transfer their own Indian Status to their children. These practices remained in place before 1985. However, if an Indian woman decided to conceal the identities of non-Indian fathers of their children both before 1985 and after 1985, then her children would have different status, even if they had the same father. These children would fall under the 6(1) classification before C-31, and those children who were born after C-31 would fall under the 6(2) category.

The effects of pre- and post- 1985 unstated paternity



As it was illustrated in the case prior to this one, even with the question whether such rules are discriminatory under the Charter put aside, it doesn't make any sense for the rules to grant a different status to children who share the same parents.

C. Rules for Band membership enacted after 1985

1. Status and membership do not have to coincide anymore

The government, in its goals set for the planned 1985 amendments in Bill C-31,made it clear that it intended to separate Band membership and registration under the Indian Act. As stated by the Minister, the goals put forward were expected to accomplish the following results: "First, removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that Indian First Nations who wish to do so can control their own membership." [31]

[30] *Gehl v. Canada (Attorney General),* 2017 ONCA 319, para. 8, 14.

[31] *McIvor BCSC,* para. 75.

Section 10 Bands are those First Nations that have taken the control of their own membership lists. That means that the Registrar of Indians regulates which of the First Nations members have status. However, the First Nations use their own codes and rules to decide which people have the right to membership. Section 11 Bands are those Bands who have a different interrelation with the Registrar, as it is the Registrar that maintains their membership lists.

As of 2002, out of 311 membership codes submitted by First Nations to Indian and Northern Affairs Canada, only 241 had been granted the approval. The lion's share of these membership codes – 236, to be exact – were established before June 28, 1987. The reasons for that are illustrated below. [32] According to the data obtained from a more recent report, Indigenous and Northern Affairs Canada recognized 618 Bands in 2016. Out of these 618 Bands, only 229 Bands had established membership codes. The difference in these numbers is attributed to those communities that had signed self-government or land claim agreements beforehand. [33]

These numbers indicate that the Indian Act rules on status govern Band lists of a little under two-thirds of all First Nations.

Those Bands that did not have their own membership codes benefited from the 1985 amendments. Such amendments gave Band Councils the exclusive power to receive transfers to their own Band lists by Status Indians who were previously listed on other Band lists, or on the general list. Before these rules were enacted, the Minister was required to grant the approval for each of such transfers. [34]

2. Membership codes used before and after 1987

The rules of Section 10 of the Indian Act did not grant every First Nation the identical rights to establish their own membership regulations. Those First Nations that established their own membership rules before June 28, 1987, had the right to make them stricter than those First Nations that established their membership rules after June 28, 1987. [35]

For instance, during the period from April 17, 1985, to June 28, 1987, it was essential for a Band list to be comprised of:

- those people who were on that Band list before these dates or who had the right to be on that Band list;
- those children born after April 17, 1985, whose both parents were on the Band list before the aforementioned date;
- all of those people who had their Indian Status re-established under the provisions of paragraph 6(1)(c):
  - (i) women whose Indian Status had been forfeited due to their marriage to non-Indian men;
  - (ii) children of those women who had been born prior to their mothers getting married to non-Indian men, and who had subsequently lost their status due to their mother's marriage ("emancipated minors"). This rule did not apply to children who were born as a result of their Indian mother's marriage to a non-Indian man;
  - (iii) Illegitimate children of Indian women who had been protested out. [36]

[32] Stewart Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities," February 2005, p. 6.

[33] Tom Flanagan, *Incentives, Identity, and the Growth of Canada's Indigenous Population* (Vancouver: Fraser Institute, 2017), p. 7. https://www.fraserinstitute.org/sites/default/files/incentives-identity-and-the-growth-of-canadas-indigenous-population.pdf

[34] Current Indian Act, s. 12; Indian Act, SC 1951, c. 29, s. 13.

[35] Canada, *Report of the Royal Commission on Aboriginal Peoples,* vol. 4, *Perspectives and Realities* (Ottawa : Canada Communications Group, 1996), text corresponding to fn. 67.

[36] Current Indian Act, subsection 11(1); *Sawridge Band v. Canada,* 2003 FCT 347, para. 25-27, aff'd. 2004 FCA 16.

Starting with June 28, 1987, a Band list was also obligated to include:

- those Indians who had undergone voluntary enfranchisement and who then had their status re-established under the provisions of paragraph 6(1)(d);
- those Indians who had undergone involuntary enfranchisement and who had their status re-established under the provisions of paragraph 6(1)(e);
- the children of any Indian Band member provided that those children were entitled to status, regardless of whether that entitlement was based on the rights granted:
  - (i) under the provisions of paragraph 6(1)(f) that require two parents; or
  - (ii) due to a single parent under the provisions of s. 6(2). This included the children who were born because of a marriage by an Indian who had their status re-established in accordance with paragraph 6(1)(c). [37]

After a Band had established its own membership codes, the following amendments would not be conducted under the provisions laid out in the Indian Act. However, these amendments would have to correspond to the procedural rules in each particular code, the Charter, and the rules of procedural fairness and natural justice. [38]

3. Membership codes and their categories

When a First Nation established its own control over its membership rules, either before or after 1987 (these rules had to comply with recognizing Band membership status for those people who were on that list at that time), that First Nation had a right to introduce its own membership rules. Such rules could be more or less restrictive or expansive than those that existed under the Indian Act's governing registration structure.

According to a 2002 study, 58 First Nations were utilizing rules that existed under Section 10. These rules were equivalent to the Indian Act rules. However, the rest of the 174 First Nations used rules that were considerably different. For example:

- 84 First Nations opted for unlimited one-parent rules. This means that a person must have at least one of their parents who is a member of a First Nation. That person's legal entitlement to Indian registration did not come into consideration. As a result, this unlimited one-parent rule is significantly less prohibitive than the rules depicted in the Indian Act.
- 64 First Nations utilised two-parent rules. This means that in order to be eligible for membership, a person was required to have both of his or her parents be First Nations members. This rule has slightly more restrictive characteristics than the rules dictated by the Indian Act.
- 26 First Nations resorted to blood quantum rules. This means that in order to qualify for membership, a person had to have a certain amount of "Indian blood."
  - (i) A person had to have a minimum standard of either 25% (in 4 Bands) or 50% (in 22 Bands).
  - (ii) In addition, a 100% blood quantum was assigned to those who were on a list prior to April 17, 1985. A 50% blood quantum was assigned to those Indian women who had their status nullified by marrying non-Indian men, and 25% was assigned to their children. [39]

As such, those regulations created a rule that was much stricter than the rules in the Indian Act.

[37] Current Indian Act, subsection 11(2).

[38] *Canadian Bill of Rights, SC 1960, c 44, s. 2(e); Canadian Pacific Ltd. v. Matsqui Indian Band,* [1995] 1 SCR 3, para. 117; *Sparvier v. Cowessess Indian Band,* [1993] 3 FC 142 (T.D.).

[39] Stewart Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities," February 2005, pp. 4-5, 11-12, fn. 5, p. 16.

4. Ramifications

(a) Consequences for membership and status

Due to the fact that a Band had the right to put forward membership rules that were different in their character from the rules dictated by the Indian Act, two various kinds of Indians were created. The first group was represented by the Status Indians who did not possess membership of any First Nations Band. The second group was comprised of non-status members of Bands who had their Indian Status for some specific purposes only.

(i) Status Indians with no Band affiliation

As it was demonstrated above, Bill C-31 enabled First Nations to have membership codes that were more prohibitive than the registration rules. Consequently, a new population of Indians was created. These people had a Band affiliation as well as status, but they lacked membership in that very same Band. As such, these people's names had to be put on what some refer to as the "general list."[40] The Michel Band case comes to mind here. In 1958, that Band was collectively enfranchised and then dissolved. When their descendants had their status re-established after 1985, they did not have a Band on whose list they could be registered. [41]

The 1951 Indian Act acknowledged that a "general list" of Indians exists, and that list was separate from Band lists.[42] However, merely 80 Indians out of about 300,000 people on the Register did not belong to any Band in 1982.[43] By 1990, there were 520 Indians placed on the general list in INAC's region in central Alberta. This marked a population that was larger than 6 of the other 20 Bands in the region. It is important to note that no other province's general list had more than a few dozen Indians on it. The very same region contained a few Bands such as Ermineskin or Sawridge – these Bands had adopted membership rules prior to June 28, 1987. [44]

(ii) Status Indians with no Band affiliation

Those Band members who lack status do not become Status Indians. However, according to the Indian Act, these non-status Band members are regarded to be indeed Indians for some particular reasons, which include:

- the definition of "Indian moneys" that are "collected, received or held by Her Majesty for the use and benefit of Indians or Bands";
- the belonging of land on reserve, which includes the transfer of certificates of land possession;
- dividing an Indian reserve into several electoral sections where each sector has an equal number of Indians living there. This includes the definition of members who can vote;
- the immunity of personal belongings in reserve lands from municipal property taxes, as well as from seizure. [45]

In reality, this means those members who lack status, have an equal right with those who do not, to live on the reserve's territory, share in revenues received by the federal government from reserve land, and participate in elections.

[40] *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities*, text corresponding to fn. 69.

[41] Indian and Northern Affairs Canada, *The Indian Act Past and Present: A Manual on Registration and Entitlement Legislation*, 1991, pp. 39-40 http://publications.gc.ca/collections/collection_2018/aanc-inac/R32-110-1991.pdf ; *Friends of the Michel Society Inquiry: 1958 Enfranchisement Claim*, (1998) 10 ICCP 69, p. 90. http://iportal.usask.ca/docs/ICC/proc/v10_1998.pdf

[42] Indian Act, SC 1951, c. 29, ss. 7(1), 10, 13(1).

[43] *McIvor* BCSC, para. 65.

[44] Department of Indian Affairs and Northern Development, Indian Register, Population by Sex and Residence 1990, March 1991, p. 45; Jamie McDonell, "Alberta leads way on C-31 membership codes," (1987) 5:10 Windspeaker. http://ammsa.com/publications/windspeaker/alberta-leads-way-c-31-membership-codes

[45] Current Indian Act, s. 4.1.

As explained below, membership codes with unlimited one-parent rules will inevitably create a situation when a gradually increasing number of non-status members can claim a right for entitlements. This situation, in turn, has the capacity to cause strain in a relationship between these people, and those members who are entitled to registration. The Royal Commission on Aboriginal Peoples, created more than 20 years ago, anticipated this situation:

> *Funding based on the number of Status Indians will not be able to keep pace with community needs. Although all Band members, whether Status Indian or not, will be able to vote and to decide on the allocation of vital resources, Band members who are Status Indians and who 'count' for purposes of funding may grow to resent those who are not, but who nonetheless take part in the benefits of Band membership.* [46]

In just one First Nations community that had a one-parent rule for membership, the number of Status Indians among those voters who were eligible to vote was thought to be as much as 30 percent. This situation developed over the course of several decades, which, in turn, contributed to the election disputes becoming commonplace. [47]

(b) Financial consequences

As it was explained above, the most funded programs (those programs that construct structures that the people use and live in) that are offered to any First Nations generally have their budgets determined in accordance with the number of status members who normally live on reserve. New community infrastructure and housing fall in this category. Moreover, the program which allows a First Nation to initiate and keep local administrative control – Band Support Funding – is also based on those members who have status. [48]

As a result, the following situation takes place: should a Band that doesn't have its own-source revenues introduce a membership code where its criteria takes a less strict form than those depicted in the Indian Act, then the non-status members of such Band will saddle it with additional financial burden. The Band will continue with some of its activities (for example, governance or capital projects) for those members for whom the Band isn't entitled to receive financing. However, this Band will also administer different programs (for example, housing), from which itmay have to cut out non-status members.

On the other hand, if a First Nation has membership rules that are more prohibitive than those depicted in the Indian Act, and if that same First Nation has significant own-source revenues, it will have a lesser number of people to share those revenues with or even to spend these revenues on. In addition, it does not matter if these revenues are obtained by the community itself or they are "Indian moneys" obtained from the federal government as a payment for using reserve lands or resources.

Basically, from a financial point of view, First Nations have a good reason to have its membership more stringent. At the same time, they are discouraged from adopting rules that are less prohibitive than those found in the Indian Act.

[46] *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities*, text following fn. 77.

[47] *Medzalabanleth v. Abénaki of Wôlinak Council*, 2014 FC 508, para. 3, 19, 57.

[48] Fiscal Realities Economists , "Evolving First Nations Service Populations: Challenges, Impacts & Implications," January 2018, Table 1.

(c) Demographic consequences

As shown above, the frequency at which First Nations members and Status Indians become parents with non-Indians or non-members (in case of exogamous parenting – parenting between a registered Indian and a non-registered person) has an impact on the scope and configuration of future First Nations populations that would have the right to either membership or status. The stricter a First Nation's eligibility rules become, the faster that First Nation's population decline will be due to its members parenting with non-members.

In 2005, research was conducted the First Nations demographic projections over the next 75 years. As a result, certain conclusions were drawn:

- Those First Nations, which use the Indian Act or rules similar to the ones depicted in the Indian Act, will have its population grow over a period of 50 years – this growing population will be eligible for membership. However, their population qualifying for membership will steadily decrease over the period of the following 25 years;
- Those First Nations, which use a 50% blood quantum rule, would have their populations increase for about 40 years – this population would be eligible for membership. However, the population representing descendants from members who would not qualify for First Nations membership, would grow over a period of 75 years, accounting for nearly 40% of total people living there. This remains true even though this excluded group is anticipated to have a rising number of people who do have a right for Indian registration;
- Those First Nations that have a 25% blood quantum rule, a significant majority of members' descendants would indeed be qualified for membership over the entire period of 75 years. In addition, all of those people who have a right to Indian registration would also have the right to obtain First Nation membership. Yet, members who lack rights to be registered under the Indian Act would constitute 18% of the total population qualifying for membership after the 75 years;
- Those First Nations that have two-parent membership rules, the population would grow only mildly over the subsequent 20 years. Then, within 75 years, this population would decline to a level representing one-half of its population numbers observed in 2002. More than half of that population descending from members would not themselves qualify for membership after 25 years – even taking into account the fact that most of the people excluded by the two-parent rule would have a legal right granted to them by the Indian Act to be registered;
- Those First Nations, which resort to using one-parent rules, would also see an increase in their population numbers. However, their membership would involve an actively increasing segment of people who lack legal grounds for registration under the Indian Act. Such people would represent approximately 1/3 of these First Nation's eligible members after the period of 75 years.[49]

To put it briefly, those First Nations that have the most strict membership rules would suffer from the earliest population decline. A significant proportion of its descendants would not qualify for membership even though over the half of these people would still have the right to be registered under the provisions of the Indian Act.

On the other hand, those First Nations that have the least stringent membership rules would see a significant increase in their population numbers. Yet, a substantial and increasing share of their members would not have the right to be registered under the Indian Act.

[49] Stewart Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities," February 2005, pp. 41-42.

Section IV. Other models existing in Canada

A. Land claims agreements in Nunavut and Nunavik Inuit

1. Inuit's initial JBNQA's enrollment rules

In 1975, the James Bay and Northern Québec Agreement (JBNQA) represented the first contemporary land claims agreement. As such, it constituted the first Modern Treaty signed with any Inuit population. In this instance, the treaty was signed with the Inuit living in Nunavik or northern Québec. The Indian Act never extended to cover the Inuit and, unlike the Cree of Québec, the Inuit lacked a Band list for their communities.

Who was an Inuit beneficiary of the JBNQA? Originally, such a person was described in the following way: as of November 15, 1974, he or she was "of Inuit ancestry who was born in Quebec or is ordinarily resident in Quebec." If that person wasn't ordinary resident in the Territory on that particular date, then that person had to be "recognized as a member thereof, by one of the Inuit communities." This definition encompassed a beneficiary's child, as well. It didn't matter if that child was legitimate, illegitimate or adopted. Lastly, that person's lawful spouse was also included.[50]

A federal-provincial-Inuit Enrollment Commission prepared the official list for the beneficiary enrollment process, which, in turn, was provided for with Local Enrollment Committees in each of the Inuit communities.[51] A Native Appeal Board was introduced, which was comprised of a provincial court judge. However, the Board never had to deal with any appeals in 30 years.[52]

2. The Nunavut Land Claims Agreement

In 1993, the Tunngavik Federation of Nunavut, now known as Nunavut Tunngavik Inc. (NTI), signed the Nunavut Land Claims Agreement. In 1999, the lands in question became the Nunavut Territory, which itself was separated from the Northwest Territories.

As a result of negotiations, NTI was able to cement very different eligibility measures from the JBNQA. First, the enrollment section had to meet certain conditions. In the agreement, it:

(a) recognizes that Inuit are best able to define who is an Inuk for the purposes of this Agreement;
(b) guarantees that the Inuit of the Nunavut Settlement Area will be recognized according to their own understanding of themselves, and that Inuit shall determine who is an Inuk for the purposes of this Agreement, and entitled to be enroled under the Agreement;
(c) establishes a process that is just and equitable for determining who is an Inuk for the purposes of this Agreement, and entitled to be enroled under the Agreement.[53]

Second, the eligibility standards established in the Nunavut Agreement stated that enrollment as a beneficiary was available to any person who:

(a) is alive,
(b) is a Canadian citizen,
(c) is an Inuk as determined in accordance with Inuit customs and usages,
(d) identifies himself or herself as an Inuk, and
(e) is associated with
    (i) a community in the Nunavut Settlement Area, or
    (ii) the Nunavut Settlement Area, is entitled to have his or her name enroled on the Inuit Enrolment List.[54]

[50] JBNQA, para. 3.2.4.
[51] JBNQA, para. 3.3.1. to 3.4.6.
[52] JBNQA, para. 3.4.5. Sebastien Grammond, "L'appartenance aux communautés inuit du Nunavik: un cas de réception de l'ordre juridique inuit", (2008) 23 Can. J.L. & Soc. 93, fn. 89.
[53] Nunavut Agreement, Section 35.1.1.
[54] Nunavut Agreement, Section 35.3.1.

3. The updated specifications for Nunavik

Makivik Corporation plays an important role in this section. This organization is what can be characterised as the "birthright corporation." It is comprised of all Inuit beneficiaries to the JBNQA, and it represents the Inuit party that signed the land claims agreement. The Makivik Corporation negotiated a modification to the enrollment criteria with Canada and Québec. It did so because of three reasons. First, the Corporation was influenced by the example set by Nunavut. Second, it was discontented with the then-existing standards. Third, both Makivik and NTI anticipated the prospects of enabling Inuit beneficiaries to shift their enrollment between the two treaties.[55]

According to the JBNQA criteria, which were amended in 2006, in order for a person to be an Inuit beneficiary, that person must be someone who:
(a) is living;
(b) is a Canadian citizen,
(c) is an Inuk according to Inuit customs and traditions;
(d) identifies himself as an Inuk; and
(e) has family, residential, historical, cultural or social ties with an Inuit community.[56]

In essence, these amendments abolished the right of an Inuk's lawful non-Inuit spouse to be registered as an Inuit beneficiary in the future. These amendments also gave birth to a Nunavik Enrollment Review Committee to accept applications from those people who were discontented with a decision of a Community Enrollment Committee.[57]

Makivik established the following policy to govern the work of the local Community Enrollment Committees in 2010:
(a) Unless there are serious reasons to refuse, all applications shall be automatically accepted where an applicant:
    1. is of Inuit ancestry;
    2. has at least one parent (adoptive or biological) who is or was a beneficiary of the JBNQA; and
    3. is a permanent resident of Nunavik.
(b) For the purposes of determining whether an applicant "is an Inuk according to Inuit customs and traditions", the following non-exhaustive list of criteria could be considered as a guide:
    1. Respect for the land and for the animals;
    2. Knowledge of and respect for Inuit customs and traditions;
    3. Assistance in promoting the welfare of JBNQA beneficiaries;
    4. Length of time that the applicant has resided in Nunavik;
    5. Length of time that the applicant has resided outside of Nunavik;
    6. Family and social ties to Nunavik;
    7. Proficiency in the Inuktitut language;
    8. Any other criteria deemed relevant.[58]

[55] Grammond, "L'appartenance aux communautés inuit du Nunavik," pp. 111-114.

[56] JBNQA, Complementary Agreement No. 18; Act respecting Cree, Inuit and Naskapi Native persons, R.S.Q. c. A-33.1,

[57]

[58] Makivik Corporation, *Enrolment Manual for the Inuit Beneficiaries of the James Bay and Northern Quebec Agreement*, April 2006, Appendix B, as cited in Sebastien Grammond, "L'appartenance aux communautés inuit du Nunavik: un cas de réception de l'ordre juridique inuit", 23 Can. J.L. & Soc. 93 (2008), pp. 115-116. This guidance does not appear in Makivik's *Enrolment Program for Nunavik Inuit Beneficiaries of the James Bay and Northern Québec Agreement: Policies and Guidelines,* dated June 1, 2010 http://www.makivik.org/wp-content/uploads/2013/02/01-Regional-Guideline-2012-Eng.pdf

The aforementioned 2010 guidance does not exist in the next version of the guidelines. Instead, they state the following:

> *The association of a person is a question of proof and evidences to be evaluated by the local Community Enrolment Committees. Such a concept refers to the familial, residential, historical, cultural or social connections a person may have with an Inuit community. Evidencing the association could be easy if one person lives and resides in the community. It may be more complex if the person resides out of the Territory or may never have lived in Nunavik. But the association with an Inuit community may be evidenced by the fact that a parent or a grandparent of the person requesting enrolment was a person of Inuit ancestry born and residing in a Nunavik community. The appreciation of the associative elements lies in the hand of the Community Enrolment Committees, which may require further proofs and elements of association from the applicant in order to render its decision.*[59]

4. Financial deliberations

It is vital to point out that the Nunavut territory and the Nunavik region of Québec both have regional non-ethnic governments. These governments are not directly administered by either of the Inuit birthright corporations. The most important of these corporations are the Government of Nunavut and the Kativik Regional Government in Nunavik.

With regard to Nunavik, the federal government grants a portion ofcertain entities' budgets. For example, the federal government has an obligation to provide 25% of the budget of the Kativik School Board.[60] However, the expenses associated with health, education, welfare, housing and local works are covered by public non-ethnic institutions that fall under the provincial jurisdiction. As for Nunavut, the federal government maintains its support for equivalent programs by conducting transfer payments to the public non-ethnic Government of Nunavut. The rules dictating the conditions of such transfers stem from programs such as Canada Health Transfer, the Canada Social Transfer, and equalization payments made to all provinces, or the Territorial Formula Financing that also encompasses the Yukon and Northwest Territories.

As such, the federal government's status as a beneficiary of Inuit land claim agreements in Nunavut and Nunavik results in the government's associated expenses being barely noticeable in the federal budget. The Inuit also traditionally benefited from entrusting local government with responsibility to non-ethnic institutions, because the Inuit constitute the overwhelming majority of the population in both regions. For instance, as of 2011, the Inuit encompass 86% of the population in Nunavut, and 90% of the population in Nunavik.[61] The Inuit experience a much different situation than the majority of First Nations.

B. Final agreements in Yukon

1. The scope of authority and financing

In 1993, an Umbrella Final Agreement (UFA) was signed between the Council of Yukon First Nations (CYFN), Canada, and the Yukon territorial government. This treaty determined which of the 14 First Nations in Yukon had a right to sign a land claim agreement and a self-government agreement. After the UFA was enacted in 1995, 11 Yukon First Nations

[59] Makivik Corporation, Enrolment Program for Nunavik Inuit Beneficiaries of the James Bay and Northern Québec Agreement: Policies and Guidelines, dated June 1, 2010 (emphasis added) http://www.makivik.org/wp-content/uploads/2013/02/01-Regional-Guideline-2012-Eng.pdf

[60] JBNQA, para. 17.0.85.

[61] Statistics Canada, Inuit: Fact Sheets for Nunavut https://www150.statcan.gc.ca/n1/pub/89-656-x/89-656-x2016017-eng.htm and Nunavik https://www150.statcan.gc.ca/n1/pub/89-656-x/89-656-x2016017-eng.htm

have signed Final Agreements and Self-Governing Agreements. By doing so, they have resolved their land claims and, therefore, no longer qualify to be covered by the Indian Act.

The self-government agreements create the First Nations governments. These governments oversee rights and obligations in the land claim agreement. They also extend their control over a land base known as Settlement Lands. In addition, they govern social and cultural programs, health, social services, and education. Moreover, the land claim agreements also institute different rights over the Non-Settlement Lands of the greater traditional territory.

A Financial Transfer Agreement (FTA), which is valid for 5 years, grants the First Nations federal funding to cover public services for their citizens. The self-governing Yukon First Nations also have the right to conduct negotiations about the Programs and Services Transfer Agreements. Such Transfer Agreements shift responsibility and funding for providing territorial and federal programs to First Nations citizens who qualify as Indians in accordance with the rules established by the Indian Act, and who reside in Yukon.[62] Federal funding is administered in accordance with what each First Nation received under the Indian Act. That funding is then adjusted for population changes and inflation. As described by one researcher, this arrangement "assumes that programs and services for Yukon First Nations were adequately funded to meet their needs" prior to the treaty being signed, yet the federal government has firmly made it known that it "will not allow the transfer of programs and services to be an occasion for what it terms 'program enrichment.'" [63]

2. The matters of enrollment, citizenship and status

According to the articles in the Yukon First Nation Final Agreement, a person is allowed to enroll as a beneficiary, provided that such person can meet one of the subsequent conditions:

- is "of 25 percent or more Indian ancestry" and was "Ordinarily Resident" in the Yukon no later than January 1, 1940. By "Ordinarily Resident", it means that this person has lived most of his or her life in the Yukon Territory;
- a direct descendant or an adopted child of a such a person, regardless of whether that person is living or deceased; or
- "is determined by the Enrollment Commission in its discretion, and upon consideration of all relevant circumstances, to have a sufficient affiliation with that Yukon First Nation so as to justify enrollment," but only provided that such person has a Canadian citizenship and submitted his or her application in the period of two years after a relevant Yukon First Nation Final Agreement was enacted. [64]

Taking the earlier procedure for Cree beneficiaries under the JBNQA as well as Canada's following policy under the British Columbia's treaty process as an example, the federal government determined that the enrollment should be separate from the Indian Register.[65] Yet, much unlike the JBNQA, the Agreements made it abundantly clear, if a person had a membership in a Yukon Indian Band guaranteed to him or her under the Indian Act, that membership did "not necessarily result in eligibility" for enrollment as a beneficiary. [66]

[62] Indian and Northern Affairs Canada, *Final Report Evaluation of the Federal Government's Implementation of Self-Government and Self-Government Agreements*, February 2011 , pp. 20-21 http://publications.gc.ca/collections/collection_2014/aadnc-aandc/R5-25-2011-eng.pdf

[63] Gurston Dacks, "Implementing First Nations Self-Government in Yukon: Lessons for Canada," (2004) 37:03 Canadian Journal of Political Science 671-694, p. 679. https://nwlc.ca/files/NWLC/resources/Dacksyukonself-government.pdf

[64] Umbrella Final Agreement, ss. 3.2.2 and 3.2.3.

[65] JBNQA, para. 3.5; First Nations Summit, *We Know Who We Are and We Lift Up Our People: Submission to AANDC on the Bill C-3 Exploratory Process Regarding First Nations Citizenship, Band Membership and Registration*, December 30, 2011, p. 7 http://fns.bc.ca/wp-content/uploads/1970/01/60678_FNS_Citizenship_V3R2_f__web.pdf

[66] JBNQA, sub-para. 3.5.4 c); Umbrella Final Agreement, ss. 3.2.4.

Hence, the Yukon Final Agreements determined that enrollment as a beneficiary did not involve the right to registration under the terms set by the Indian Act. [67]

In addition, the UFA specified that it was possible to use Yukon's self-government agreements to acknowledge the power to adopt Yukon First Nation Constitutions. Such a move would make it possible to use these Constitutions to define "membership."[68] Indeed, in the Yukon First Nations' eyes, membership indeed constitutes "citizenship." This concept is further regulated by the codes these First Nations establish. Yet, the articles of the self-government agreements dictate that every beneficiary must be incorporated as a citizen.[69]

3. The consequences

It was observed by the Self-Government Secretariat of the CYFN that three various lists were produced as a result of the provisions described above. The first list fell under the jurisdiction of the Indian Act, the second list was created to cover the beneficiaries, and the third list involved citizens. There were a lot of differences between these three documents:

> *These three lists have created much confusion because, in some cases, a person may be enrolled as a beneficiary with one Yukon First Nation and also be registered as a Status Indian with another First Nation elsewhere in the Yukon or Canada. This is concerning for the Yukon First Nations since the federal funding provided to a Yukon First Nation under its financial transfer agreement is based on the number of Status Indians registered with that Yukon First Nation, not the number of beneficiaries or citizens of that Yukon First Nation.*
>
> *Some Yukon First Nation people may be enrolled as a beneficiary with one Yukon First Nation because they have family or cultural ties to that area or grew up in that area and they may be registered as a Status Indian with a different First Nation for many reasons. Perhaps they were registered under another First Nation as child. Perhaps one of their parents is registered with a different First Nation. Perhaps they transferred their Status Indian registration to another First Nation in order to access benefits, such as housing, employment or programs and services.* [70]

It was illustrated in the previous section that the participating Yukon First Nations were obliged to conduct negotiations around Programs and Services Transfer Agreements with the federal government. The CYFN indicated that such Agreements had their foundation in the registration rules based on the Indian Act. They were not based on beneficiary status or citizenship

[67] Umbrella Final Agreement, ss. 3.2.4 and 3.2.7.

[68] Umbrella Final Agreement, s. 24.5.1.2.

[69] Yukon First Nations Statistics Agency, Final Report, July 2015, Appendix C: Enrollment Reference Manual, pp. 4-5, 18. https://sgsyukon.ca/wp-content/uploads/2014/01/Appdx-C_Enrollment.manual.25May15.pdf

[70] *Id.*, p.18.

in the First Nations. According to one scholar, as a result of these conditions, citizens were entrusted with responsibilities without receiving any funding for them:

> *[Yukon First Nations] observe that under the Indian Act the money that Canada spent on First Nations programs and services only funded their provision to "registered Indians." However, as noted above, First Nations count among their citizens many people who are not registered Indians in terms of the particular criteria that Canada requires individuals to satisfy in order for them to be recognized as belonging to this category. The First Nations view these non-registered people as citizens by virtue of family relationship or cultural affinity. The problem that arises from the First Nations' new control over defining their membership is that Canada has not given them additional funds to cover the extra cost they bear in delivering programs and services to a larger number of people than before. Canada has not increased its funding levels in the face of these arguments. It simply will not accept an open-ended approach to First Nations citizenship, or increase funding until Yukon First Nations have attained particular targets in terms of social well-being. To commit to these approaches would be to sign a blank cheque whose ultimate cost would be unpredictable and possibly unsustainable. However, INAC's regional staff do acknowledge the First Nations' critique of Canada's funding policies as a substantial and ongoing issue.* [71]

As it was indicated by the Fist Nations Summit, similar challenges are faced by First Nations who signed Modern Treaties in British Columbia. These First Nations were in a difficult situation due to "Citizens for whom they are responsible, but receive little or no funding". This proved "particularly problematic for First Nations that are heavily reliant on federal funding. [72]

Section V. Principles that determine First Nations' jurisdiction over the matters of citizenship

A. The *Constitution Act*, Section 35

Aboriginal and Treaty rights are protected by Section 35 of the *Constitution Act*, adopted in 1982. Its paragraph 34(4) explicitly states the following; "Notwithstanding any other provision of this Act, the Aboriginal and Treaty rights referred to in subsection (1) are guaranteed equally to male and female persons." If a First Nation wants to exercise its inherent right to decide its own membership rules, that First Nation has to be respectful of gender equality principles. If it fails to do so, then that First Nation falls short of respecting a right that is protected by the Constitution. [73]

B. The *Canadian Charter of Rights and Freedoms*

1. The Charter's jurisdiction applies to the First Nations

Section 10 membership codes are governed by the rules established in the *Charter of Rights and Freedoms*. Apparently, membership rules, which are instituted under a First Nation's inherent authority, are also bound by the Charter's provisions.

If a First Nation decides to establish a custom electoral code on its own, that code isn't governed by the rules of election written in the Indian Act. Instead, it is regulated by the *Canadian Charter of Rights and Freedoms*. According to the Federal

[71] Dacks, "Implementing First Nations Self-Government in Yukon: Lessons for Canada," p. 680.

[72] First Nations Summit, *We Know Who We Are and We Lift Up Our People*, p. 10.

[73] *Sawridge Band v. Canada,* [1996] 1 F.C. 3 (T.D.), rev'd. on other grounds [1997] 3 F.C. 580 (C.A.).

Court, while the community has a right to establish its own electoral rules, these rules have to comply with the *Charter* so that they don't discriminate against anyone. [74]

As stated by the Federal Court of Appeal:

> *As noted above, many government actions affecting the lives of Aboriginal Peoples living on reserve result from decisions of the Band Councils acting under the Indian Act, under other federal legislation or pursuant to government programs. As citizens of Canada, Aboriginal Peoples are as much entitled to the protections and benefits of the rights and freedoms set out in the Charter as all other citizens. This includes protection for Aboriginal Peoples from violations to these rights and freedoms by their own governments acting pursuant to federal legislation and in matters falling in the sphere of federal jurisdiction.* [75]

Much in the same vein, the Mohawk Council of Kahnawà:ke recently agreed that, even though its Membership Law and rules about residency were established outside of the scope of the Indian Act, these documents have to comply with the *Charter's* provisions. [76]

2. The Charter rules prohibit discrimination

The *Canadian Charter of Rights and Freedoms* forbids discrimination. More precisely, its Section 15 makes it against the law to adopt laws that discriminate "in particular… based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." In addition, the same section states that discrimination cannot take place even on the basis of what is known as "analogous grounds" recognized by the courts. Analogous grounds recognize a group that has been historically discriminated against because of its members' personal traits. Such personal traits cannot be changed, if their owners tried to do that, the results would alter their personal identity. As such, undergoing these changes would be unacceptable for them as established individuals.

The courts recognize the following analogous grounds:

- marital status; [77]
- being an adoptive parent or an adopted child, rather than biological; [78]
- sexual orientation; [79]
- being a foreign citizen in the eyes of the federal or provincial legislation.[80] At the same time, it is unclear how the matters of citizenship and analogous grounds operate in terms of the Aboriginal contest. Analogous grounds do not restrict First Nations from establishing their own membership criteria, particularly for the purpose of making

[74] Dacks, "Implementing First Nations Self-Government in Yukon: Lessons for Canada," p. 680.

[75] First Nations Summit, *We Know Who We Are and We Lift Up Our People,* p. 10.

[76] Yukon First Nations Statistics Agency, Final Report, July 2015, Appendix C: Enrollment Reference Manual, pp. 4-5, 18. https://sgsyukon.ca/wp-content/uploads/2014/01/Appdx-C_Enrollment.manual.25May15.pdf

[77] *Id.*, p.18.

[78] *Schachter v. Canada*, [1992] 2 SCR 679; *Pratten v. British Columbia (Attorney General)*, 2012 BCCA 480, para. 38.

[79] *M. v. H.*, [1999] 2 S.C.R. 3.

[80] *Lavoie v. Canada,* [2002] 1 S.C.R. 769.

the lives of an Aboriginal group better, provided that such group requires assistance. As a result, Status Indians might be barred from counting as members in Metis settlements ; [81] and,

- in case of what is known as "Aboriginality-residence." This means, if a member of an Indian Act Band chooses to not live on reserve, his or her choice of doing so marks it as his or her personal characteristic. This principle was applied directly with the purpose of granting non-residents the right to vote in Band Council elections.[82]

3. The First Nations' law-making authority and the Charter's influence over it

As it was illustrated in the section above, the Supreme Court ruled that the "status of holding membership in an Indian Act Band, but living off that Band's reserve" represented analogous grounds. In its decision, the Court somewhat oddly labelled such a phenomenon as "Aboriginality-residence." Consequently, the Indian Act's provision that barred off-reserve members from voting in Band Council elections was ruled to be violating the Constitution.[83]

The court decision that ensued ruled, if a Band Council that was elected using a custom electoral code, that Band Council was still exercising its powers of governance. That behaviour was backed by a federal statute and federal jurisdiction. As a result, it would be unconstitutional to restrict the right to vote to those people who lived on reserve.

Recently, the Québec Superior Court made a decision regarding the Mohawk Council of Kahnawà:ke, which the Council then decided to not appeal. The Council adopted a community rule outside of the Indian Act, which stated the following: if its member engaged into marriage or co-habitation "with a person who has no Kanien'kehá:ka [Mohawk] or Indigenous lineage", that action would make that member ineligible to be entitled to receive benefits and services from the Council. The Québec Superior Court decided that such a rule marked discrimination by the Mohawk Council of Kahnawà:ke against its own members on the grounds of civil status and family status. At the same time, the rights of those people who were not members of the Council, were not explicitly addressed.[84]

C. The role of international law

1. The role of international law in Canada's law

The Supreme Court of Canada wrote that the "well-established principle of statutory interpretation that legislation will be presumed to conform to international law." It further clarified that "in interpreting the scope of application of the Charter, the courts should seek to ensure compliance with Canada's binding obligations under international law, where the express words are capable of supporting such a construction."[85]

2. The right of Indigenous peoples to have an Indigenous identity

(a) The role of international treaties

The *International Covenant on Civil and Political Rights*[86] acknowledges that indigenous peoples are entitled to be provided with enough authority to safeguard their cultural autonomy and their self-government. These provisions can be found in Article 25 (participation in public life), as well as in Article 27 (a minority's right to enjoy its language and culture)."[87]

[81] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37.

[82] *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203.

[83] *Id.*, para 58, 62.

[84] *Miller c. Mohawk Council of Kahnawà:ke,* para. 12, 199.

[85] R. v. Hape, 2007 SCC 26, para. 53, 56.

[86] Can. T.S. 1976 No. 47.

[87] United Nations, Expert Mechanism on the Rights of Indigenous Peoples, Country Engagement Mission (10-16 February 2018) – Finland, 28 March 2018.

In addition, the *Convention on the Rights of the Child*,[88] protects the right of Indigenous children to maintain their identity and to live and act in accordance with their Indigenous culture. This convention is a multilateral document signed by Canada:

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

(b) Provisions of the *United Nations Declaration on the Rights of Indigenous Peoples*

The United Nations General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (The Declaration) in October 2007.[89] The Declaration is a United Nations General Assembly resolution. It does not qualify as a treaty, yet there are grounds to believe that it now constitutes a part of international law.

More precisely, the Declaration acknowledges that Indigenous peoples have the right to belong to Indigenous communities, and that they have the right to establish their own membership rules. The Declaration also states that such rights must be exerted with respect for human rights, which involves equality and non-discrimination:

> *Article 9 – Indigenous peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.*
>
> *Article 33 – 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of Indigenous individuals to obtain citizenship of the States in which they live.*
> *2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.*
> *3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.*
> *…*

[88] Can. T.S. 1992 No. 3.

[89] A/RES/61/295.

Article 44 – All the rights and freedoms recognized herein are equally guaranteed to male and female Indigenous individuals.

Article 46 –

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. […]

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

The Declaration has other relevant stipulations. These clauses include: Article 3 (the right to self-determination); Article 4 (the right to autonomy or self-government in matters relating to their internal and local affairs); Article 5 (the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions); Article 8 (the right not to be subjected to forced assimilation or destruction of their culture) Article 35 (the right to determine responsibilities of members); and Article 36 (the right to maintain relations across borders).

3. Provisions that forbid discrimination

The Declaration's preamble affirms directly "that Indigenous individuals are entitled without discrimination to all human rights recognized in international law." In addition, it proclaims that "Indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples." As such, Article 46(3) explicitly asserts the need for the right of Indigenous peoples to determine their own identity to be implemented in line with the right to equality. As a result, this would outlaw discrimination based on grounds such as race, colour, sex, language, birth, or civil or marital status. This provision will be further explained in the section below.[90]

Canada signed a range of international treaties to which this country has to conform. These treaties involve stipulations that bear similarity to the right to equality, which is protected by Section 15 of the Charter. They also forbid "discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[91]

The *International Convention on the Elimination of All Forms of Racial Discrimination*,[92] the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),[93] and the *Convention on the Rights of Persons with Disabilities*[94] also put forward particular requirements that Canada is obliged to observe.

In its Article 1, the Convention on the Elimination of All Forms of Discrimination against Women commits the signatory parties to facilitate the "enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." The 2010 and 2017 amendments to the Indian Act, removed discriminatory rules directed at Indigenous women and their descendants due to their marital status. These improvements were in accordance with international law. It is believed that rules created by First Nations themselves would also have to conform with these regulations.

[90] See: Shin Imai and Kathryn Gunn, "Chapter 8: Indigenous Belonging: Membership and Identity in the UNDRIP: Articles 9, 33, 35, and 36," in Jessie Hohmann and Marc Weller, eds., The UN Declaration on the Rights of Indigenous Peoples : A Commentary (Oxford : Oxford University Press, 2018), text corresponding to fn. 104.

[91] *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, article 26.

[92] Can. T.S. 1970 No. 28.

[93] Can. T.S.1982 No. 31.

[94] Can. T.S. 2010 No. 8.

Section VI. Reflections on the need for Aboriginal citizenship reform

A. Recommendations created by the Royal Commission on Aboriginal Peoples

1. A right to establish citizenship as granted by the Constitution

The question of citizenship in Aboriginal Nations constituted a lion's share of the Royal Commission on Aboriginal Peoples' overall deliberations. The Commission thought about the ways to make changes, but at the end, it concluded that the matter of determining citizenship itself was a right of Aboriginal Nations. That right was protected by Section 35 of the *Constitution Act*, 1982:

> *In our view, the right of an Aboriginal Nation to determine its own citizenship is an existing Aboriginal and Treaty right within the meaning of Section 35(1) of the Constitution Act, 1982. At the same time, any rules and processes governing citizenship must satisfy certain basic constitutional standards flowing from the terms of Section 35 itself. The purpose of these standards is to prevent an Aboriginal group from unfairly excluding anyone from participating in the enjoyment of collective Aboriginal and Treaty rights guaranteed by Section 35(1), including the right of self-government. In other words, the guarantee of Aboriginal and Treaty rights in Section 35 could be frustrated if a nation were free to deny citizenship to individuals on an arbitrary basis and thus prevent them from sharing in the benefit of the collective rights recognized in Section 35.* [95]

In this regard, the RCAP's view coincides with the UN's Declaration's interpretation put forward by Professor Shin Imai:

> *[…W]hen discussing membership in an Indigenous group or community […] Article 9 recognizes that "Indigenous peoples and individuals have the right to belong to an Indigenous community or nation" suggesting that it if a group or individual claims indigeneity, they have a right to belong to the group. But Article 9 also stipulates that this right is to be exercised "in accordance with the traditions and customs of the community or nation concerned", which suggests that the community or nation determines who belongs and who does not.* [96]

[95] *Report of the Royal Commission on Aboriginal Peoples, vol. 2, Restructuring the Relationship*, text preceding Recommendation 2.3.8.

[96] Shin Imai and Kathryn Gunn, "Chapter 8: Indigenous Belonging: Membership and Identity in the UNDRIP: Articles 9, 33, 35, and 36," in Jessie Hohmann and Marc Weller, eds., The UN Declaration on the Rights of Indigenous Peoples: A Commentary (Oxford: Oxford University Press, 2018), text corresponding to fn. 2.

2. The questions of gender equality and political nationhood

Nevertheless, the RCAP established that Section 35(4) mandates the right to regulate the matters of citizenship to conform to the principles of gender equality depicted there. It also stated that such requirements were also based on the fact that blood quantum cannot be the only benchmark to establish Aboriginal nationhood:

> *The most obvious of these constitutional standards is laid down in Section 35(4), which states that Aboriginal and Treaty rights are guaranteed equally to male and female persons. Since Aboriginal and Treaty rights are generally collective rather than individual rights, an individual can have access to them only through membership in an Aboriginal group. It follows that the rules and processes governing membership cannot discriminate against individuals on grounds of sex, for to do so would violate the guarantee embodied in Section 35(4).*
>
> *Section 35 embodies a second basic standard. As we saw earlier, the Aboriginal Peoples recognized in the section are political and cultural entities rather than racial groups. While it is true that a group must descend from the original peoples of North America to qualify as Aboriginal, that historical link can be established in a variety of ways. Modern Aboriginal Nations, like other nations in the world today, usually represent a mixture of genetic backgrounds. The Aboriginal identity lies in people's collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.*
>
> *In our view, this fundamental principle has implications at two levels. It not only governs recognition of Aboriginal groups as collective entities under Section 35, it also lays down a basic standard governing individual membership in such groups. It prevents an Aboriginal group from specifying that a certain degree of Aboriginal blood (what is often called blood quantum) is a general prerequisite for citizenship. On this point, it is important to distinguish between rules that specify ancestry as one among several ways of establishing eligibility for membership and rules that specify ancestry as a general prerequisite. By general prerequisite, we mean a requirement that applies in all cases or that only allows for very limited exceptions. For example, a citizenship code that requires that a candidate must be at least 'half-blood', except in cases of marriage or adoption, would lay down a general prerequisite and as such, in our view, be unconstitutional. By contrast, it would be acceptable for a code to specify, for example, that someone with at least one parent belonging to the group qualifies for citizenship, so long as this provision represents only one among several general ways for an individual to qualify for membership, including, for example, meeting such criteria as birth in the community, long-time residency, group acceptance and so on.*
>
> *In our view, any code that specifies a minimum blood quantum as a general prerequisite for citizenship is not only unconstitutional under Section 35, it is also wrong in principle, inconsistent with the historical evolution and traditions of most Aboriginal Peoples, and an impediment to their future development as autonomous political communities.* [97]

[97] *Report of the Royal Commission on Aboriginal Peoples, vol. 2, Restructuring the Relationship,* text preceding Recommendation 2.3.8.

The RCAP made it clear that it preferred the principles of descent and connection. That preference was considered to have a broader scope than the scope of the rules dictated by the Indian Act:

> *One of the most important tasks in the first stage will be enumerating potential populations of citizens. At this early stage in the recognition process, the errors and injustices of past federal Indian policy should be corrected by identifying candidates for citizenship in the Aboriginal Nation. Candidates should include not only those persons who are now members of the communities concerned but also those persons who wish to be members of the nation and can trace their descent from or otherwise show a current or historical social, political or family connection to that nation. Financial resources to meet the needs of all citizens of a nation will be a matter for Treaty negotiation between Aboriginal Nations and the federal and provincial governments.*
>
> *As nations are rebuilt, it is envisioned that their citizenship codes will embrace all individuals who have ties to the nation but who, for reasons highlighted here, have been excluded in the past. These new citizenship provisions will eliminate concerns about the effects of Bill C-31 in creating categories of 'full Indians' and 'half Indians'. Rather than imposing restrictive Band membership codes that may result in the destruction of communities over time, Aboriginal Nations, renewed and strengthened in the ways we have proposed, would implement a citizenship code that fosters inclusion and nurtures nation building.*[98]

The RCAP's analysis is congruous with Professor Shin Imai's understanding of the UN's Declaration, which put forward the principle of protecting the right to identify. This right is exerted in accordance with other standards required by international law:

> *The only way out of the circularity of indigeneity and membership is to accept there are preexisting groups that can act as reference points for acceptance. This pre-existing group will decide which "customs and traditions" will determine who are members and who are not. As a practical matter, it makes sense to begin with what is already there.*
>
> ....
>
> *Finally, the international human rights norms can affect both decisions of States and decisions of Indigenous peoples. […] International standards relating to human rights may also apply to the actions of Indigenous governments themselves.*[99]

[98] *Report of the Royal Commission on Aboriginal Peoples,* vol. 4, *Perspectives and Realities,* text corresponding to fn. 83.

[99] *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship*, text preceding Recommendation 2.3.8.

3. Regarding the goals of the final recommendations, what constitutes "Aboriginal Nation"?
The RCAP on produced several final recommendations, such as:

2.3.10 – Aboriginal Nations, in exercising the right to determine citizenship, and in establishing rules and processes for this purpose, adopt citizenship criteria that
(a) are consistent with Section 35(4) of the Constitution Act, 1982;
(b) reflect Aboriginal Nations as political and cultural entities rather than as racial groups, and therefore do not make blood quantum a general prerequisite for citizenship determination; and
(c) may include elements such as self-identification, community or nation acceptance, cultural and linguistic knowledge, marriage, adoption, residency, birthplace, descent and ancestry among the different ways to establish citizenship.

2.3.11 – As part of their citizenship rules, Aboriginal Nations establish mechanisms for resolving disputes concerning the nation's citizenship rules generally, or individual applications specifically. These mechanisms are to be
(a) characterized by fairness, openness and impartiality;
(b) structured at arm's length from the central decision-making bodies of the Aboriginal government; and
(c) operated in accordance with the Canadian Charter of Rights and Freedoms and with international norms and standards concerning human rights.

At the same time, it is important to point out that the RCAP did not make references to each Band that had been recognized under the Indian Act. Instead, it referred to what it called, "Aboriginal Nations":

4. By Aboriginal Nation we mean a sizeable body of Aboriginal People with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories. Currently, there are between 60 and 80 historically based nations in Canada, compared with a thousand or so local Aboriginal communities.
5. The more specific attributes of an Aboriginal Nation are that
• the nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland;
• it is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and
• it constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base. [100]

[100] *Report of the Royal Commission on Aboriginal Peoples, Volume 2, Restructuring the Relationship, text preceding Recommendation 2.3.3.*

It is unclear whether "Aboriginal Nations" could have been, or can now be, created based on the characteristics depicted above.

To start with, the Crown signed treaties with Indigenous communities or Bands that were often smaller in size than the Indigenous nations of which they were a part. This state of affairs continued for two centuries before modern land claims agreements started to take place. For example, the Treaty of 1752 was signed with "the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province [of Nova Scotia]," and not with all of the Mi'gmaq.[101]

Bands that signed or conformed to Treaty 8, which lasted from 1899 to 2000, belonged to many different larger nations. These nations included the Cree, Denesuline (Chipewyan), Dane-zaa (Beaver) Tlicho, T'atsaot'ine, and Deh Cho, covering parts of Alberta, Saskatchewan, the Northwest Territories and northeastern B.C. [102]

Likewise, Modern Treaties were signed with political organizations that were smaller in size than the nation. For example, after half of the Bands, which were depicted in the Indian Act and which were represented by the Nuu-chah-nulth Tribal Council, refused to accept an agreement-in-principle, the government of Canada and the province of British Columbia took a different path. They conducted a negotiation with five communities that had supported the draft version of the agreement-in-principle, reaching a final agreement with those entities. After that, those five communities separated from the rest of the group and formed the Maa-nulth First Nations.[103]

The RCAP is correct to place a greater accent on nationhood beyond actors recognized under the Indian Act. At this time, the federal government has not worked on this issue yet. However, the history of modern and historic treaties demonstrates that there are certain communities who have rights to sign agreements – and these communities differ from 60 to 80 Aboriginal Nations indicated by the RCAP in its report.

B. Canadian citizenship rules and the Indian Act registration – the need for reform?

The Prime Minister's Office clarified that the Prime Minister modified the Minister's title from "Indian and Northern Affairs" to "Crown-Indigenous Relations", because, in his view, such a change would mark "a next step toward ending the Indian Act."[104] Yet, one of the issues left untouched by the federal government is centered on the need for the Crown to protect the right to cross borders with a means other than what is currently used in the Indian Act.

The Immigration and Refugee Protection Act explains that "every person registered as an Indian under the Indian Act has the right to enter and remain in Canada."[105] An individual can merely display his or her Indian registration to be legally present in Canada. Canadian citizenship or permanent resident status are not required for that.[106]

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[101] *Simon v. The Queen,* [1985] 2 SCR 387, para. 6.

[102] Alex Tesar, "Treaty 8," *The Canadian Encyclopedia*, August 30, 2016 https://www.thecanadianencyclopedia.ca/en/article/treaty-8 ; *McLeod Lake Indian Band Treaty No. 8 Adhesion and Settlement Agreement Act*, SBC 2000, c 8.

[103] Brent Olthuis, "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the *Constitution Act*, 1982", (2009) 54 McGill L.J. 1, p. 24; *Maanulth First Nations Final Agreement Act*, SC 2009, c 18; *Maa-nulth First Nations Final Agreement Act*, SBC 2007, c 43

[104] Prime Minister, "New Ministers to support the renewed relationship with Indigenous Peoples," August 28, 2017 https://pm.gc.ca/eng/news/2017/08/28/new-ministers-support-renewed-relationship-indigenous-peoples

[105] Immigration and Refugee Protection Act, SC 2001, c 27, para. 19(1).

[106] Citizenship and Immigration Canada, Operational Bulletin 250 - Deeming Permanent Residence for Registered Indians Applying for Citizenship, November 22, 2010 <http://www.cic.gc.ca/english/resources/manuals/bulletins/2010/ob250.asp>

The Indian Act is the sole legal document that grants the members of First Nations or Inuit that right. For instance, the Yukon Umbrella Final Agreement explicitly states that those people who qualify to be enrolled under a Yukon First Nation Final Agreement, have a right to do so, even though they are not Canadian citizens. At the same time, such enrollment does not grant them a right to enter Canada.[107]

It is crucial to remember that American law does not offer the same right. Being registered under the Indian Act is not enough, because the American laws directly state that "the right of American Indians born in Canada to pass the borders of the United States… shall extend only to persons who possess at least 50 per centum of blood of the American Indian race."[108]

Numerous First Nations in Canada are separated from other members of the same people by the border with the United States. The most prominent illustration of this can be found in case of the Mohawks of Akwesasne. Their reserve in Québec and Ontario neighbours the St. Regis Reservation in New York State.

The Supreme Court of Canada refused to accept the Aboriginal right for the Mohawks of Awkwesasne to cross the border at will without the need to pay customs duties.[109] However, the UN's Declaration officially acknowledges the right to cross the border:

> *Article 36 – 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.*
> *2. States, in consultation and cooperation with Indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.*

Be as it may, even if Canada has obligations established by the Declaration under international law, these obligations do not constitute a part of the Canadian legal system.

However, even if Declaration imposes obligations on Canada under international law, its provisions are not part of Canadian law. While there are no changes to the federal legislation to enable that, the only way to exercise that border-crossing right is to resort to the Immigration and Refugee Protection Act and its reference to the Indian Act.

[107] Umbrella Final Agreement, s. 3.2.4.

[108] *Immigration and Nationality Act,* Pub.L. 82-414, 66 Stat. 163. See also: Greg Boos and Greg McLawsen, "American Indians Born in Canada and the Right of Free Access to the United States," *Border Policy Research Institute Publication No. 20*, Western Washington University, 2013 https://cedar.wwu.edu/cgi/viewcontent.cgi?article=1068&context=bpri_publications

[109] *Mitchell v. M.N.R.,* 2001 SCC 33.

Section VII. Initial results

A. The real situation de-facto

In 2017, Parliament made changes to the registration rules in the Indian Act. That amendment marked the third time since 1985 when Parliament tried to bring consistency between the registration rules and the right to equality guaranteed by the *Canadian Charter of Rights and Freedoms*. The ongoing discussions on additional changes also represents the third time these amendments were introduced after a second phase. However, no changes were brought about by any of these prior consultations: such changes were produced by court decisions.

It would be true to say that the federal government has recently shown that it is sometimes willing to take the criteria for membership in Indigenous communities seriously. It is much more commonplace to see the federal government grant ing official recognition to groups of various individuals with unclear or questionable Aboriginal ancestry. A majority of the so-called "Algonquins of Ontario" fall under this category. These actors will never receive recognition under the Indian Act, yet the federal government regards them as entities that have the right to surrender Aboriginal rights.

In order for the federal government to grant funding to First Nations as Bands acknowledged in the Indian Act, two requirements have to be met. First, a person must maintain registration under the Indian Act (he or she must be "status" Indians), and that person has to reside on reserve. A majority of programs are meant for Status Band Members living on reserve. The other funding specifications can be separated into various categories. These categories are: several programs that have no equivalent on the provincial level and that are available to all Status Band Members without regard to their residence (for instance, post-secondary education); health, education, and social assistance programs open to all residents of a reserve. The rules of a program prohibit non-status members from accessing it.

Most federal funding conforms to the registration mandated by the Indian Act. It also requires that its recipients maintained residence on reserve. However, since it is unclear when these requirements will change, it is difficult to understand how the federal government would continue to fund First Nations if it decided to nullify the Indian Register.

B. Ongoing discrimination

1. Discrimination prior to the amendments made in 2010 and 2017

Since 1985, the modern registration or status rules constitute a "two-grandparent" rule. This rule mandates a 50% blood quantum, yet those people who do have status are regarded as if they had "100 blood". For instance, an Indian with two status parents will have his or her registration under the provisions of 6(1), and that person's children will always have status. Furthermore, an Indian who has only one status parent will have his or her registration under the provisions of 6(2), and only by becoming parents with another Status Indian will his or her children be registered under the Indian Act.

Even though these rules did not seem to bear any discriminatory characteristics, they did, in fact, enable discrimination against women. The root of this discrimination harkened back to the way these rules administered the shift from the previous rules enacted before 1985. Under these rules, status depended on having an Indian father or an Indian husband. This arrangement led to the creation of the cousins rule due to the situation when non-Indian women who received status by marriage were registered under 6(1). Depending on their Indian parent's gender, first cousins born to Indian men or Indian women, who married non-Indians before 1985, were given different status. As a result of amendments adopted following the *McIvor* and *Descheneaux* cases, these discriminatory practices ceased to exist for those born after 1951. The amendments adopted at a later date introduced corrections to the siblings rule and the case of emancipated minors. The siblings rule referred to women who were born out of wedlock prior to 1985 to Indian fathers and non-

Indian mothers – these women were given a different legal treatment from the legal treatment received by their brothers. The case of emancipated minors applied to those children who were born before 1985 and who lost their Indian Status after their Indian mothers married non-Indian men.

2. The present situation

Despite the fact that two rounds of amendments took place, discrimination enabled by the rules adopted before 1985 continues to have an impact on people with post-1985 status.

The 1951 cut-off represents the most glaring example of discrimination: the cousins rule was only fixed for those children of women who married out, provided that they or their siblings were born after the date when the 1951 Indian Act was adopted. The reason for it can be found in the *McIvor* case. In this case, the court established that the cousins rule was discriminatory in nature. Yet, such discriminatory traits were permissible for the sake of safeguarding the obtained rights of non-Indian mothers who received their Indian Status by the virtue of marriage. The court ruled that the discrimination could not have a justification. Yet, for those people who were born after the 1951, the Indian Act applied the double-mother rule. Under the provisions of that rule, the children of two generations of Indian men, who married non-Indian women, would have their Indian Status abolished at the age of 21. This forfeiture would take place because after the 1985 amendments eliminated the "double-mother" rule, the male line was left in a more favourable position than it had prior to these amendments.

The ongoing discrimination against descendants of the Indian women who had their Indian Status forfeited a long time ago represents the result of the 1951 cut-off. The question is, "can that discrimination be justified?" According to the trial judge in *Descheneaux*, it cannot. That judge's decision marked a difference from the British Columbia Court of Appeal's conclusion in *McIvor*.

In addition, there are other vivid examples of ongoing discrimination that grow out of enfranchisement and legal adoption.

For example, certain categories of people did not benefit from the 2010 and 2017 amendments. Among these are children of Status Indian parents whose father enfranchised them and their mothers before 1985. That enfranchisement was allowed by the Indian Act. But if they avoided parenting with Status Indians, their grandchildren were registered under the provision of 6(2). At the same time, if Indian men chose to avoid enfranchising their wives and children, then their grandchildren would be registered under 6(1) – provided that they were born before 1985, or from a marriage which was formed prior to 1985.

Moreover, Indian women did not become beneficiaries from the 2010 and 2017 amendments, if they had been enfranchised as adult, single women. If they avoided parenting with Status Indians, then their children had a 6(2) registration. On the other hand, if the children of their sisters married Indian men or had their status forfeited due to their marriage to non-Indian men prior to 1985, then these children would be registered under 6(1).

Lastly, children who were legally adopted before 1985 by Indian parents – provided that these children were not born to biological parents with Indian Status – then they can only transfer 6(2) status to their own grandchildren if they became parents with non-Indians. However, their adoptive siblings (who are biological children) have no restrictions to pass their 6(1) status.

C. Membership rules established after 1985.

In its stated goals for Bill C-31's 1985 amendments, the federal government declared that it was determined to "ensure that Indian First Nations who wish to do so can control their own membership." A little more than one-third of Bands registered under the Indian Act adopted their own codes or membership rules. Moreover, approximately about two-thirds of the Bands continue to have their Band lists governed by the Registrar of Indians, therefore utilizing the status rules depicted in the Indian Act.

Those membership codes that were established prior to June 28, 1987, were forced to include a smaller number of those people who obtained or had their status given back to them due to the 1985 amendments. As a result, most codes were accepted prior to that date. Every membership code has to depict everyone on the Band list as it was on the date when the Band assumed control. Membership codes that operated before 1987 were bound to list Indian women from their pre-1985 marriages to non-Indian men. Yet, these codes did not have to list these women's children, as well as those women who lost their status because of voluntary or involuntary enfranchisement of their children. Codes created after 1987 had to list the children of those women who married non-Indian men. They also had to include the victims of enfranchisement and their children.

D. Other models created by different land claims agreements

1. Agreements negotiated by the Nunavut and Nunavik Inuit

Under their land claims agreements, the Inuit managed to negotiate very comparable provisions in both Nunavut and Nunavik (located in northern Québec). It was done with the consideration that it was the Inuit themselves who were most qualified to give a definition to the term "Inuk" for the goals put forward in each of the agreements. The fundamental pillar of establishing an Inuit identity of a person was "determined in accordance with Inuit customs and usages". The mandatory requirement was for the individual to "identify himself or herself as an Inuk" and "have family, residential, historical, cultural or social ties" to an Inuit community living in the settlement area. With regard to the Nunavik Inuit, these people were able to negotiate an amendment to the James Bay and Northern Québec Agreement that abolished rules which were founded exclusively on the principle of descent from the original list of beneficiaries.

In these two cases, the Inuit were never covered by the Indian Act, nor were they covered by its register. Moreover, because Nunavut and northern Québec are governed by public non-ethnic governments, an extremely limited scope of federal funding for programs and services revolved around the definition of a beneficiary.

2. Yukon First Nations

There are two requirements for an individual to enroll in the Yukon First Nation Final Agreements as a beneficiary. First, that person had to be a direct descendant of a person who had "25 percent or more Indian ancestry". Second, that person had to have his residency established in the Yukon no later than January 1, 1940.

The federal government, however, was determined that an enrollment process had to be different from the Indian Register. In addition, according to the provisions of the Yukon Final Agreements, if a person wanted to enroll as a beneficiary, that person's status as a beneficiary would not grant him or her the right to be registered under the Indian Act. Plus, Yukon First Nations had the authority granted to them by the Yukon self-government agreements to establish constitutions. Such constitutions cover a range of matters, including the definition of citizenship. At the same time, these agreements specified that all beneficiaries had to be incorporated as citizens.

As claimed by the CYFN, the results faced by individuals were met with a great deal of uncertainty and misunderstanding. This lack of certainty took place due to the fact that every single First Nation had three separate lists, such as the list of First Nations citizens, the Indian Act Band lists, and the list of treaty beneficiaries. Subsequently, an Indigenous person could undergo enrollment as a beneficiary with one Yukon First Nation, and the same individual could have a registration as a Status Indian with a different First Nation. In addition, that person could be a citizen without Indian Status.

The financial ramifications of that situation were clear. The federal financing received by the Yukon First Nations in accordance with their financial transfer agreements continued to depend on the number of persons with Indian Status registered in each of these Yukon First Nations. As a result, those Yukon First Nations that have citizens or non-status beneficiaries will be in a less advantageous position than those Yukon First Nations that do not have them.

E. First Nations and their authority as interpreted by legal rules

Specific legal rules govern membership codes created under Section 10 of the Indian Act. There are grounds to believe that rules endorsed under a First Nation's inherent authority also conform to the same legal rules.

First of all, Aboriginal and Treaty rights are protected by Section 35 of the *Constitution Act, 1982*. That section also states that such rights "are guaranteed equally to male and female persons."

Furthermore, when a First Nation opts to create its own laws, such a decision has to conform to the *Canadian Charter of Rights and Freedoms*' provisions that ban discrimination. The questions of that First Nation's autonomy and its rights are important here, but no decisions, laws or actions taken are allowed to reflect discriminatory principles.

A range of international laws, which include the UN's Declaration, acknowledge that the Indigenous peoples have the right to belong to their Indigenous communities. In addition, these people have the right to establish the rules governing their membership "in accordance with their customs and traditions."

Yet, the Declaration also states that the implementation of such rights must conform to respect for human rights. This includes the principles of non-discrimination and equality. A number of other international accords and declarations, such as Section 15 of the Charter, disallow discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, or other status.

F. Recommendations presented by the Royal Commission

The matter of citizenship in Aboriginal Nations constituted one of the most important subjects for the Royal Commission on Aboriginal Peoples. The Commission researched whether any reforms on that matter would be in the Indigenous people's best interests. At the end, it concluded that the authority to decide what constitutes citizenship is an Aboriginal right that is protected by Section 25 of the *Constitution Act, 1982*.

Yet, the Commission also came to a conclusion that such a right has to conform to the principles of gender equality mandated by Section 35(4), and also by the fact that the matter of Indigenous nationhood cannot be diminished by depending on the blood quantum only. The Commission made it clear that the principles of descent and connection were instrumental in deciding Aboriginal nationhood. Such an approach presented a broader interpretation of what constitutes Indigenous nationhood than the interpretation set out in the rules of the Indian Act.

Nonetheless, it is important to point out that the Commission did not make references to each of the Indian Bands whose existence was acknowledged under the Indian Act. Instead, it mentioned "between 60 and 80 historically based nations in Canada." Putting aside question whether such interpretation of these "historically based" Indigenous Nations is correct, it should be said that the federal government conducted negotiations about rights with Indian groups that were smaller in size or even totally different from the Indian Nations, of which the aforementioned Indian groups were a part. Having said that, the Commission was correct in its decision to place an emphasis on nationhood that transcended bodies acknowledged under the provisions of the Indian Act. As of now, the federal government has not resolved this matter.

G. Registered Indians and the matter of Canada's laws governing citizenship

Under the provisions of the *Immigration and Refugee Protection Act*, "every person registered as an Indian under the Indian Act has the right to enter and remain in Canada". The Indian Act is the sole legal instrument that offers this right to First Nations members and the Inuit.

The border between Canada and the United States separates multiple First Nations that live on the territory of these two countries. Even though the Declaration acknowledges the right to cross that border, that right is not reflected in the Canadian laws.

The right to cross the border cannot be exercised without making appropriate changes in the federal legislation. As of now, the only way to use that right is through the *Immigration and Refugee Protection Act* and its mention of the Indian Act.