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CANADA'S RESPONSE TO THE *DESCHENEUX* DECISION: Bill S-3 and the Collaborative Process

February 2018



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Introduction

- In the August 3, 2015 decision in the *Descheneaux* case, the Superior Court of Quebec declared key provisions of the *Indian Act* inoperable, because they unjustifiably violated equality rights under the *Charter* by perpetuating sex-based inequities in eligibility for Indian registration between descendants of the male and female lines.
- The *Descheneaux* decision highlighted residual sex-based inequities in Indian registration affecting first cousins and siblings that were carried forward following the 1985 and 2011 amendments to the *Indian Act*. It also brought to light the long-standing and unaddressed broader issues relating to Indian status, Band membership and First Nations citizenship.
- In July 2016, the Government launched its approach to respond to the *Descheneaux* decision. It includes two elements:
 1. **Legislative Changes:** *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)* (Bill S-3).
 2. **Collaborative Process on Indian status, Band membership and First Nations citizenship:** Involves comprehensive consultations on the broader and more complex issues related to registration, membership and citizenship that go beyond the court decision with First Nations and other Indigenous groups with a view to future reform within the context of reconciliation and a renewed relationship.

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Bill S-3

- Bill S-3, was introduced in the Senate on October 25, 2016, following 17 engagement sessions with First Nations and other Indigenous groups.
- The initial bill proposed amendments to the *Indian Act* to address sex-based inequities in registration in direct response to *Descheneaux*.
- Several improvements to the bill were adopted during the parliamentary process with *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)* receiving Royal Assent on December 12, 2017.
- The bulk of the amendments to the *Indian Act* under Bill S-3 came into force on December 22, 2017.
- Broader amendments to the *Indian Act* that will remove the 1951 cut-off from the *Indian Act* registration provisions, and extend entitlement back to 1869, will come into force after meaningful consultation with First Nations. These consultations will be launched in 2018 and will focus on developing an implementation plan to remove the 1951 cut-off, as well as other broader related issues of Indian registration, Band membership, and First Nations citizenship.



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Immediate Amendments in Bill S-3

- Bill S-3 amendments will immediately address the following:
 - **Cousins:** Corrects the differential treatment between first cousins of the same family. Grandchildren of the maternal line were not able to transmit status to their children in comparison to the grandchildren of the paternal line. Bill S-3 eliminates the differential treatment of grandchildren and great-grandchildren of women who had married non-Indian men before April 17, 1985.
 - **Siblings:** Corrects the differential treatment of male and female children of Indian men that were born out of wedlock from September 4, 1951 to April 16, 1985. Male children were entitled to be registered, however the *Indian Act* was silent on female children and therefore they were not entitled to be registered until the passage of Bill C-31. Children of women who were reinstated under Bill C-31, because they were born out of wedlock, were not entitled to be registered. In comparison, the children of men who were born out of wedlock were entitled to be registered.
 - **Omitted Minors:** Corrects situations of Indian children born to Indian parents who were not married, or Indian children born to an Indian mother and the Indian mother subsequently married a non-Indian man and were removed from the Indian Register prior to April 17, 1985. Upon reinstatement, the "omitted minor" children were unable to transmit status to their own children. However, there was no impact on children of men who married a non-Indian woman.



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Immediate Amendments in Bill S-3 (Cont'd.)

- **Great-Grandchildren of a Parent Affected by the Double-Mother Rule:** Corrects the differential treatment of great-grandchildren, born prior to April 17, 1985, (or after April 16, 1985, of parents married before April 17, 1985) of a parent affected by the double-mother rule* (created by the Cousins remedy).
- **Great-Grandchildren of a Parent Affected by the Siblings Issue:** Corrects the differential treatment of great-grandchildren, born prior to April 17, 1985, of a parent affected by the siblings issue (created by the remedy to address great-grandchildren affected by the double-mother rule*).
- **Great-Grandchildren of an Indian Great-Grandmother who Parented Out of Wedlock with a Non-Indian:** Corrects the differential treatment of great-grandchildren, born prior to April 17, 1985 (or after April 16, 1985, of parents married before April 17, 1985), of a great-grandmother who parented out of wedlock with a non-Indian and the Indian grandparent lost status through protest (created by remedy to address the issue of great-grandchildren affected by the double-mother rule*).

*The double-mother rule was introduced in the 1951 Indian Act and excluded from registration grandchildren at age 21, whose mother and paternal grandmother both acquired status through marriage to an Indian. The rule was repealed in 1985 under Bill C-31 and the grandchildren who had lost status at the age of 21 years were reinstated.



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Immediate Amendments in Bill S-3 (Cont'd.)

- **Unknown or Unstated Parentage:** Ensures that the Indian Registrar, when determining entitlement to registration, will consider all relevant evidence with reasonable inference in favour of an individual in situations where there is an ancestor that is unknown or unstated on a birth certificate.
- **Consultation:** Canada has 6 months to begin the consultation process (until June 12, 2018). The Minister must consult on a number of issues through the lens of the *Charter*, the *UN Declaration on the Rights of Indigenous Peoples*, and the *Canadian Human Rights Act*, including:

- Adoption	- 1951 Cut-off	- FN authority to determining membership
- Unknown/unstated paternity	- Enfranchisement	- Gov't role for determining status and membership
- Second generation cut-off		
- **Reporting:** The Minister must report back to Parliament in three instances:
 1. Within 5 months of Royal Assent (May 12, 2018), a report on the design of the consultations (Collaborative Process);
 2. Within 1 year after the consultations begin, a report on what was heard through the consultations process; and
 3. Within 3 years after Royal Assent (December 12, 2020), a report on a review of the registration provisions of the *Indian Act* to determine if all sex-based inequities have been removed, the operation of the amendments within Bill S-3, and any recommended changes to the *Indian Act* to reduce or eliminate any sex-based inequities.



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Delayed Amendments in Bill S-3

- In response to concerns raised by the Senate and various Indigenous groups that the original bill did not go far enough in addressing sex-based inequities, broader amendments were included in the final form of Bill S-3. In line with the Government's commitments for reconciliation and renewal of the nation-to-nation relationship, the broader amendments do not come into force immediately in order to allow time for consultation.
- The amendments that come into force at a later date will remove the 1951 cut-off from the *Indian Act* for determining eligibility of entitlement for a woman, and her descendants, who were removed from band lists or not considered an Indian due to marrying a non-Indian man, going back to 1869.
- These amendments essentially remove s. 6(1)(c) from the *Indian Act*, and ensure that women who lost entitlement due to marriage with a non-Indian man, and their descendants, will be entitled to registration under s. 6(1)(a).
- During the Collaborative Process, the Government will be consulting on the implementation of the removal of the 1951 cut-off (i.e. how and when it is to be put in place) along with a number of other issues.
- Upon completion of the Collaborative Process, an implementation plan will be prepared and the process will begin to bring the remaining clauses of Bill S-3 (Clauses 2.1, 3.1, 3.2 and 10.1) into force.



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Immediate Impacts of Bill S-3

- It was initially estimated that 28,000 and 35,000 individuals would become newly entitled to registration under the *Indian Act* through the Bill S-3 amendments. Costing estimates were prepared based on these numbers.
- Two federal programs directly linked to Indian registration will be impacted:
 - Post-Secondary Education Program; and
 - Non-Insured Health Benefits Program.
- The Fall Economic Statement of 2016 identified \$149 million in funding to implement Bill S-3:
 - \$130 million will be for the Non-Insured Health Benefits Program; and
 - \$19 million will be for the processing of increased applications for Indian registration.
- In addition, Budget 2017 proposed to increase funding to the Post-Secondary Education Program by \$90 million over two years, beginning in 2017-2018.
- Most on-reserve federal programs are residency-based. Based on previous experience and past mobility trends and data, it is not anticipated that there will be a dramatic increase in costs for on-reserve residency-based programs. We will monitor the number of new registrants and adjust funding to First Nations accordingly.



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Delayed Impacts of Bill S-3

- There is significant uncertainty around determining the population impacts of the removal of the 1951 cut-off amendments and the subsequent financial implications. There is no data-set that can directly identify the number of individuals that could be affected by the removal of the 1951 cut-off.
- Stewart Clatworthy estimated the number of individuals that could be impacted by the removal of the 1951 cut-off from the 2016 Census using the number of individuals who self-reported Indigenous ancestry.
- The census data estimates range from 750,000 to 1.3 million additional people. This is not necessarily reflective of how many individuals would decide to apply for Indian registration and likely overestimates the number of individuals who would become registered.
- The Parliamentary Budget Officer (PBO) report, *Bill S-3: Addressing Sex Based Inequities in Indian Registration*, estimated that 670,000 individuals could potentially become newly entitled to Indian registration with only about 270,000 (40%) expected to become registered due to the remote connection between those entitled and First Nations communities.
- The Parliamentary Budget Officer also estimated that the associated financial implications would be \$52 million of upfront administrative cost and \$352 million per year for programs.

http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf



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Collaborative Process on the Broader Issues

- In keeping with Canada's commitment to reconciliation and renewal of the nation-to-nation relationship with Indigenous Peoples, a Collaborative Process with First Nations and other Indigenous groups and individuals has been launched to consult on the broader issues relating to Indian registration, Band membership and First Nations citizenship with the objective of identifying areas for future reform.
- The Collaborative Process is being jointly designed with input from First Nations and other Indigenous groups to determine the subject matters for consultation and the types of activities that would be undertaken by participants.
- Consultations on the design of the Collaborative Process were launched on October 31, 2017 with the formal consultations expected to begin in April 2018 and will last for at least 12 months.
- The Government is obligated under Bill S-3 to consult on the implementation of the removal of the 1951 cut-off as well as the other issues defined within the bill and will build on the wealth of information submitted by First Nations as part of the 2011-2012 *Exploratory Process on Indian Registration, Band Membership and Citizenship*.



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Collaborative Process on the Broader Issues (cont'd)

- Consultations will include, but are not limited to, the following issues:
 - Adoption
 - Implementation of the 1951 cut-off
 - Second generation cut-off
 - Unknown/unstated paternity
 - Enfranchisement
 - Federal role for determining status and membership
 - FN authority to determining membership
 - Categories in Indian registration
 - Cross-border issues
 - Voluntary de-registration
 - Children of same sex parents
 - Non-cisgender identities as it relates to Indian registration and band membership
- Comprehensive consultations under the Collaborative Process will be conducted through the lens of the *Charter*, the *UN Declaration on the Rights of Indigenous Peoples* and the *Canadian Human Rights Act*.
- Participation in the Collaborative Process, in both the design and the broader consultations, will be inclusive and involve First Nations, Treaty and Nation organizations, regional and national Indigenous organizations, and affected individuals.
- Funding is currently available for participation in the design process (until the end of February 2018) and further funding will be available for the broader consultations closer to April 2018.



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Conclusion

- Indian registration under the *Indian Act* is a key issue of concern to First Nations and Indigenous individuals.
- These issues are complex as they relate to identity, belonging, culture and ethnicity, and the balance between individual and collective rights. Impacted individuals and communities bring a wide range of views on how to address these matters.
- Unilaterally bringing about substantive change in respect of the broader complex issues would not be in keeping with Canada's commitment to reconciliation and a renewed nation-to-nation relationship. These issues will be the subject of meaningful consultations with First Nations and other Indigenous groups and individuals.
- Consultations with First Nations and other Indigenous groups on the broader and more complex issues relating to Indian registration, Band membership and First Nations citizenship, that could set the path for much needed transformative change and the dismantling of outdated *Indian Act* provisions at the heart are targeted to begin in April 2018.



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Contact and Related Information

If you wish to participate in the consultation process, contact:

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OR

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For General Information:

www.canada.ca/indian-status

(INAC Web Page, under Indian Status heading)



