



Indigenous and
Northern Affairs Canada

Affaires autochtones
et du Nord Canada

Overview of Indian Registration

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Canada



Outline

- Historical Development of the *Indian Act*
- The Role of the Indian Registrar
- Major Amendments - 1985 *Indian Act* (Bill C-31) and its consequences
- 2011 *Gender Equity in Indian Registration Act* (Bill C-3 – *Mclvor*) and its consequences
- Bill S-3 (*An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*)
 - Amendments included in Bill S-3
 - What is the “cousins issue”?
 - What is the “siblings issue”?
 - What is the Issue of “omitted minor children”?
 - What is the issue of “the 1951 cut-off”?
- The Current *Indian Act*: The Basics of Entitlement
- *Appendix A* – Indian Registration Redress Mechanisms
- *Appendix B* – Registration distribution



Historical Development of the *Indian Act*

- The definition of an "Indian" in early colonial legislation (1850 to 1868) was broadly based, focused on tribal and social ties, and was gender-neutral
 - This meant that non-Indian men or women could gain membership on marriage to an Indian
- From 1869 on, federal "Indian" legislation, including successive Indian Acts, introduced and solidified patrilineal descent requirements and gender-based criteria within the definition of an "Indian" and in the treatment of Indian men and women
 - Indian women married to non-Indian men lost their status as an Indian, and so did their children
 - An Indian woman who married an Indian man became member of his band
 - Non-Indian women gained Indian status on marriage to Indian men
- The 1951 *Indian Act* amendments established:
 - the Indian Register (holds names of registered Indians)
 - the Registrar, an officer of the Department
 - a new registration regime with departmental control over registration (status)





The Role of the Indian Registrar

- The Indian Registrar has statutory authority to oversee and administer the Indian Register and departmentally-maintained band lists
- The Indian Registrar is currently responsible for the following:
 - determines eligibility to registration as an Indian under the *Act* (section 5);
 - renders decisions on protests of Indian Registrar decisions to add persons to, omit or delete persons from, the Indian Register or departmentally maintained Band lists;
 - enters/deletes those names into the Indian Register and Band lists;
 - maintains band lists for bands that fall under section 11 of the *Act* and have not yet assumed control of their own membership;
 - coordinates Band submissions for control of membership under section 10 of the *Act*;
 - coordinates Band name changes; and
 - develops policies and procedures relating to registration and the issuance of status cards.

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Major Amendments - 1985 *Indian Act* (Bill C-31)

In 1985, the *Indian Act* was amended to eliminate sex-based and other inequities in Indian registration to comply with the *Charter*. What were its impacts:

- Indian women who married non-Indians no longer lost status, and those that had previously lost status through out-marriage and their children were reinstated.
- Non-Indian women could no longer gain status through marriage, but those who had acquired status through marriage prior to 1985 did not lose their status.
- Enfranchisement was abolished as was the authority of the Indian Registrar to de-register individuals. Individuals who had been previously enfranchised could apply for reinstatement.
- The federal government retained control over Indian registration and categories for Indian status were established under subsections 6(1) and 6(2) of the *Act*.
- New restrictions on registration were introduced under subsection 6(2) through the “second-generation cut-off.”
- Separate systems for membership were established under sections 10 and 11 of the *Indian Act* wherein First Nation authorities to control their membership were re-established under section 10.

*Enfranchisement – a process where an Indian gave up his Indian status (including his family) either voluntarily or involuntarily.
Involuntary: away from Canada for 5 years without permission, become a lawyer, doctor, or clergy.





Consequences of 1985 *Indian Act* amendments

- The aim of Bill C-31 was to remove sex-based and other inequities in Indian registration to comply with the *Charter*. However, because eligibility to registration is based on descendency, residual sex-based inequities from the past were carried forward in the *Indian Act*.
- Also, new issues arose as a result of the introduction of categories for Indian status under subsection 6(1) and the restrictions on registration under subsection 6(2) through the second-generation cut-off.
- Residual sex-based inequities that continued after 1985, coupled with the categories for Indian status, and the restriction of the second-generation cut-off, resulted in a rise in registration-related legal challenges.

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2011 *Gender Equity in Indian Registration Act* (Bill C-3 - *Mclvor*)

- The first legal challenge following the 1985 amendments was the *Mclvor* case, which was decided in 2009 by the Appeal Court of British Columbia.
- In its decision, the Court expanded the eligibility for Indian registration under the *Indian Act*, which in turn informed amendments to the *Indian Act* through the 2011 *Gender Equity in Indian Registration Act* (Bill C-3):
 - Individuals previously entitled to registration under subsection 6(2), became entitled for registration under paragraph 6(1)(c.1) of the *Indian Act* as long as they met certain criteria;
 - By granting registration under paragraph 6 (1)(c.1) to these individuals, their children subsequently became entitled to registration under subsection 6(2) of the *Indian Act* under certain criteria.

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Consequences of the *Gender Equity in Indian Registration Act*

- As was the case in the 1985, the purpose of C-3 was to remove residual sex-based inequities continued after 1985. However, the application of the C-3 amendment, coupled with the categories for Indian status, resulted in new inequities between the maternal and paternal lines.
- For example, while the amendments ensured that eligible grandchildren of women who had lost status as a result of marrying non-Indian men became entitled to registration, they did not bring maternal based entitlement into line with that of paternal based entitlement.
- This meant that while great-grandchildren of paternal lines could be entitled, however great-grandchildren of C-31 registrants would not be eligible for entitlement.
- The *Descheneaux* decision deals with this residual inequity affecting great-grandchildren.

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The *Descheneaux* Decision

- On August 3, 2015, the Superior Court of Quebec found that paragraphs 6(1)(a), (c) and (f) and subsection 6(2) of the *Indian Act* unjustifiably infringe section 15 of the Charter. The court declared these provisions to be of no force and effect but suspended its decision for a period of 18 months (until February 3, 2017, then to December 22, 2017) to allow Parliament time to make the necessary legislative amendments.
- The Descheneaux case deals with two specific situations of sex-based inequities in Indian registration, which affect:
 - cousins
 - siblings
- In its decision, the court also warned that legislative amendments to address inequities in Indian registration not be limited to the specific facts in the Descheneaux case.
- Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, was introduced in direct response to the Descheneaux decision.



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

- The legislative amendments brought forward by Bill S-3 eliminated the sex-based inequities identified by the court in the Descheneaux case as well as other sex-based inequities in registration.
- Bill S-3 addressed sex-based inequities in the Indian registration provisions of the *Indian Act* for the following situations:
 - the cousins issue: differential treatment of first cousins whose grandmother lost status due to marriage with a non-Indian before April 17, 1985
 - the siblings issue: differential treatment of women who were born out of wedlock to Indian fathers between September 4, 1951 and April 17, 1985
 - the issue of omitted minor children: differential treatment of minor children who were born of Indian parents or of an Indian mother, but could lose entitlement to Indian status, between September 4, 1951 and April 17, 1985, if they were still unmarried minors at the time of their mother's marriage
 - the unstated or unknown parent issue: in response to the Ontario Court of Appeal's *Gehl* decision, which deals with unstated/unknown parent issue, Bill S-3 provides flexibility for the Indian Registrar to consider various forms of evidence in determining eligibility for registration in situations of an unstated or unknown parent, grand-parent or other ancestor.

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Consequences of Bill S-3 – *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 also includes the requirement for the Minister of the Department of Crown-Indigenous Relations and Northern Affairs to report to Parliament on the collaborative process on broader issues related to Indian registration, band membership and First Nations citizenship, and on the implementation of the bill.
- The Minister is required to report to Parliament on the:
 - design of the consultations within five months of royal assent
 - on the status of the consultations within twelve months of royal assent
 - on the implementation of the bill within three years of royal assent .
- The bill also includes provisions that will remove the 1951 cut-off in respect of the cousins. This amendment will come into force at a later date, once consultations with First Nations are completed. Once in force, all descendants born prior to April 17, 1985 (or of a marriage prior to that date) of women who were removed from band lists or not considered Indians because of their marriage to a non-Indian man will be entitled to 6(1) status. This will include circumstances prior to 1951 and in fact, will remedy inequities back to the 1869 *Gradual Enfranchisement Act*.
- Bill S-3, except for the provisions related to the removal of the 1951 cut-off, came into force on December 22, 2017.



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What is the “cousins issue”?

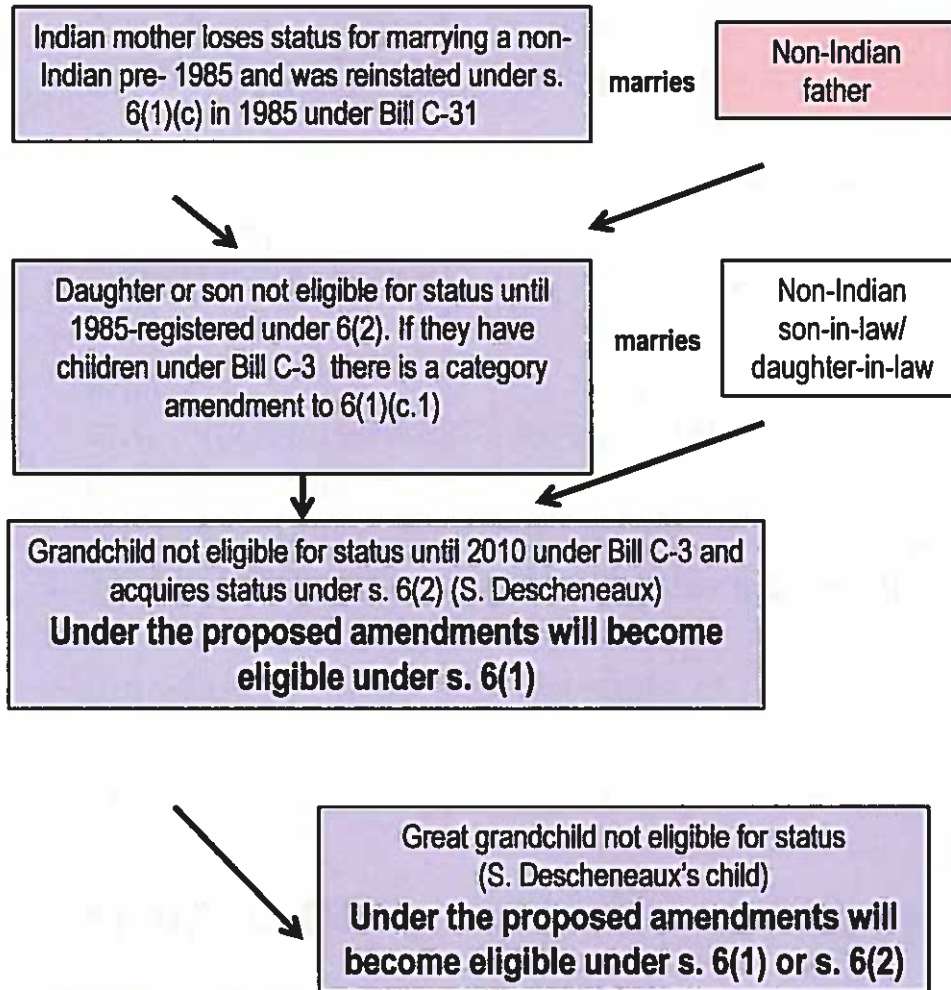
- **The Issue**: The differential treatment in the acquisition and transmission of Indian status that arises among first cousins of the same family depending on the sex of their Indian grandparent.
- **The Effect**: Grandchildren of Indian women can acquire Indian status under subsection 6(2) of the *Indian Act*, but cannot transmit status to their children if they parent with a non-Indian.
- **Comparator Group**: Grandchildren of Indian men are registered under subsection 6(1), which enables them to transmit Indian status to their children, regardless of whether they parent with a non-Indian.
- **Proposed Amendments**: Would eliminate the differential treatment of grandchildren and great-grandchildren of women who had married non-Indian men. Entitlement to registration under subsection 6(1) of the *Indian Act* would be extended to the grandchildren and great-grandchildren of Indian women registered, or entitled to registration, under paragraph 6(1)(c).

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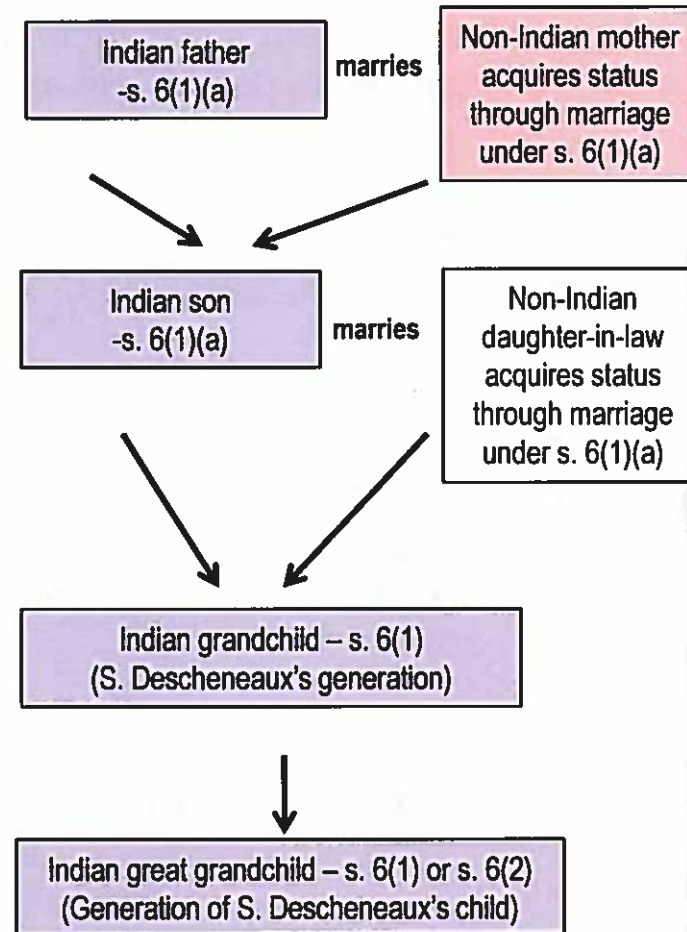


Addressing the Cousins Issue

Maternal Line (Situation of Stéphane Descheneaux)



Paternal Line (Comparator Group)





What is the “siblings issue”?

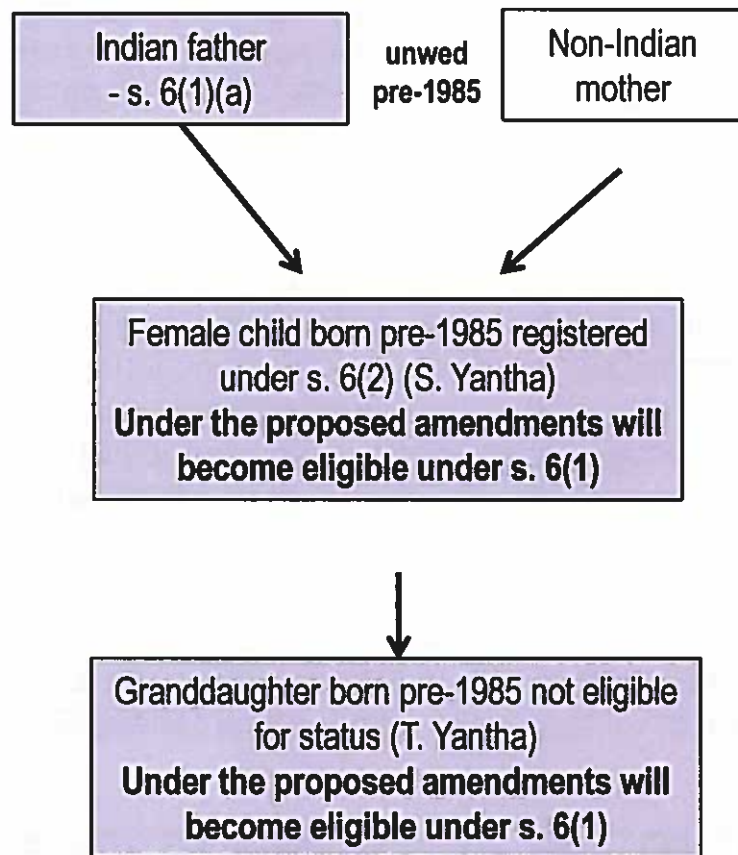
- **The Issue**: The differential treatment in the ability to transmit Indian status between male and female children born out of wedlock between the September 4, 1951 and the April 17, 1985 amendments to the *Indian Act*.
- **The Effect**: Indian women born out of wedlock between the 1951 and 1985 amendments to an Indian father, and who obtained Indian status under subsection 6(2), are more limited in regards to the transmission of Indian status to their children and cannot transmit status to their descendants (unless their child’s father is a status Indian).
- **Comparator Group**: Indian men born out of wedlock to an Indian father who are registered under subsection 6(1) can transmit status to their children regardless of whether they parent with a non-Indian woman.
- **Proposed Amendments**: The siblings issue would be addressed by eliminating the differential treatment of male and female children of Indian men, that were born out of wedlock between the *Indian Act* amendments of September 4, 1951 and April 17, 1985.

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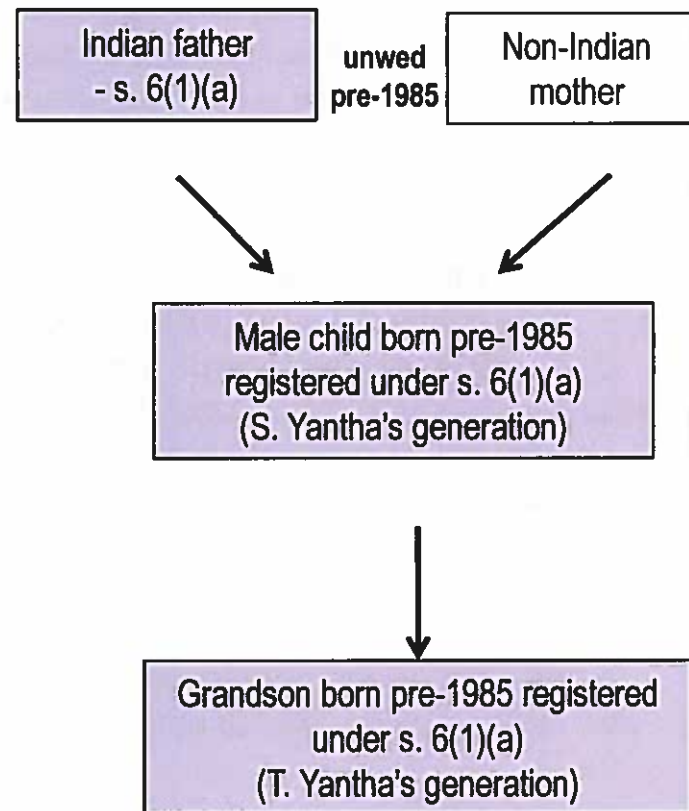


Addressing the Siblings Issue

Female child born out of wedlock to Indian male pre-1985 (Situation of Susan and Tammy Yantha)



Male child born out of wedlock to Indian male pre-1985 (Comparator Group)



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What is the Issue of “omitted minor children”?

- **The Issue:** Minor Indian children born to Indian parents or to an Indian mother could be removed from the Indian Register if their mother married a non-Indian between September 4, 1951 and April 17, 1985 if they were still unmarried minors at the time of their mother’s marriage.
- **The Effect:** At present, these individuals would be entitled to Indian status under paragraph 6(1)(c) of the April 17, 1985 *Indian Act*, which would allow them to transmit status to the next generation under subsection 6(2). If the children of these individuals parent with a non-Indian their off-spring would not be entitled to registration because of the operation of the second-generation cut-off. In addition, the grandchildren of individuals entitled under 6(1)(c) who lost status as a result of their mother's marriage to a non-Indian are not eligible for registration pursuant to the 2010 *Gender Equity in Indian Registration Act* (Bill C-3).
- **Comparator Group:** If an Indian man has children who are registered, and he subsequently married a non-Indian prior to April 17, 1985, there is no impact on the entitlement to registration of his children, or in turn, their ability to transmit eligibility to Indian status to their children.
- **Proposed Amendments:** Would ensure that an individual’s ability to transmit status is not affected by their mother’s marriage to a non-Indian, when that marriage occurred after that individual’s birth.

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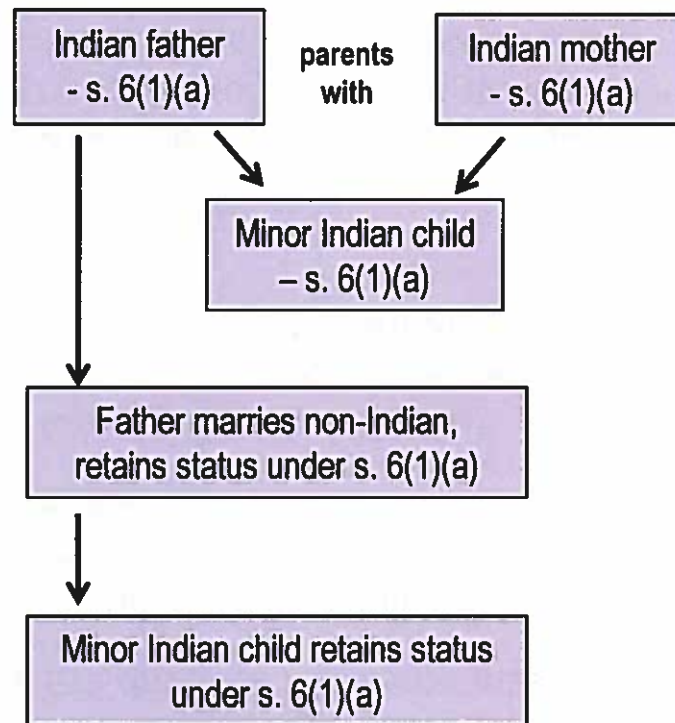
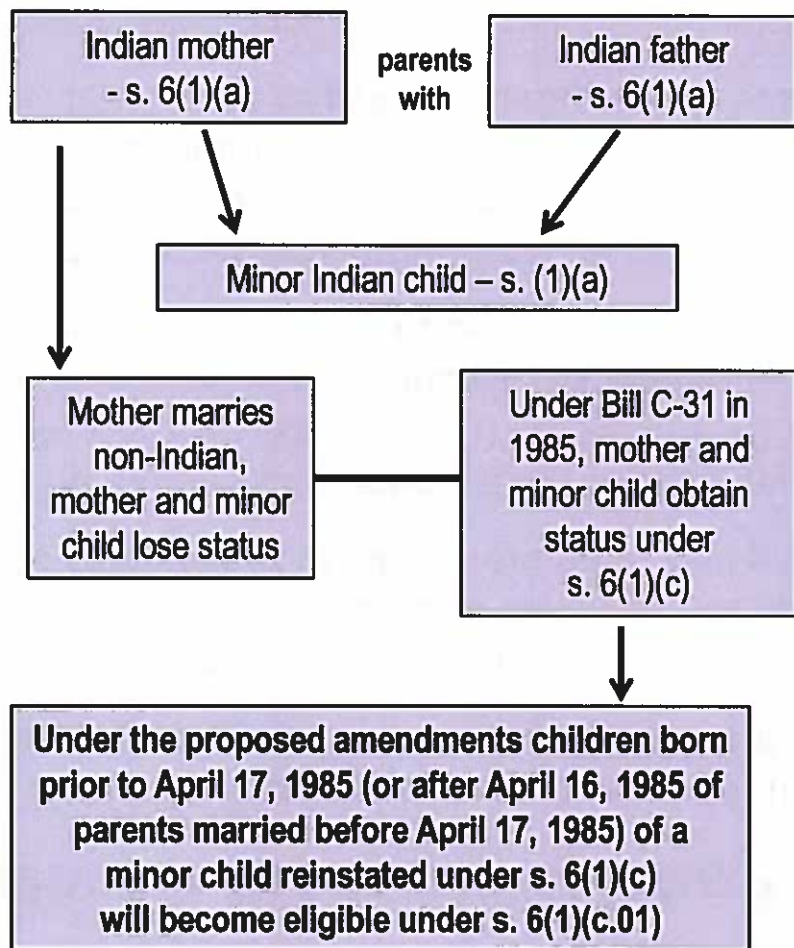




Addressing the Issue of Omitted Minor Children

Minor child born of Indian parents or an Indian mother; mother subsequently marries non-Indian man; minor child loses status

Child born of Indian parents; father subsequently marries a non-Indian woman prior to April 17, 1985, after the birth of his child; child retains their Indian status (comparator group)



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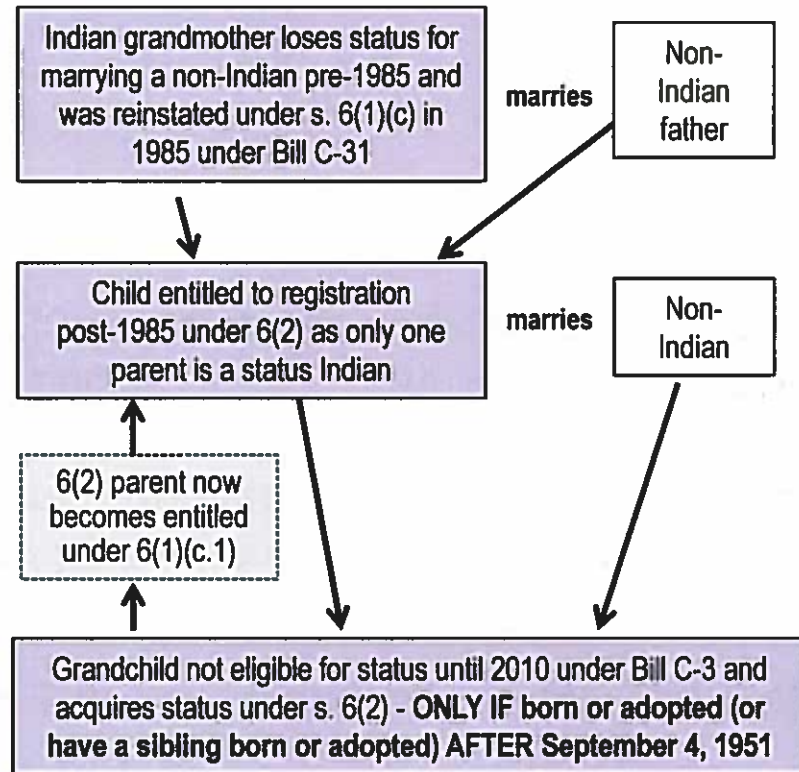
What is the Issue of “the 1951 cut-off”?

- The Indian Register was created under the 1951 *Indian Act* using information from band lists and other records. September 4, 1951 is the date the *Act* came into effect.
- Since then, the *Indian Act* registration provisions have allowed for eligibility for entitlement of individuals who may not have been included in the Indian Register due to omission or deletion from band lists prior to September 4, 1951.
- The *Indian Act* amendments made under the 2010 *Gender Equity in Indian Registration Act* (Bill C-3) created the 1951 cut-off with the introduction of section 6(1)(c.1) which specifically responded to the *Mclvor* decision and included the September 4, 1951 date as a defining element.
- Whether an individual was born or adopted before OR after September 4, 1951 impacts whether they are entitled to be registered when they have a grandmother who lost her status due to marriage to a non-Indian man and one of their parents was entitled to be registered under s. 6(2) of the *Indian Act* and the other is not entitled.
- When the conditions are met, individuals born or adopted **prior** to September 4, 1951 **would not** be entitled to registration, whereas individuals born or adopted **on or after** September 4, 1951 **would** be entitled creating a 1951 cut-off.
 - If the individual was born before September 4, 1951 but has a sibling born on or after that date, they would also be entitled.

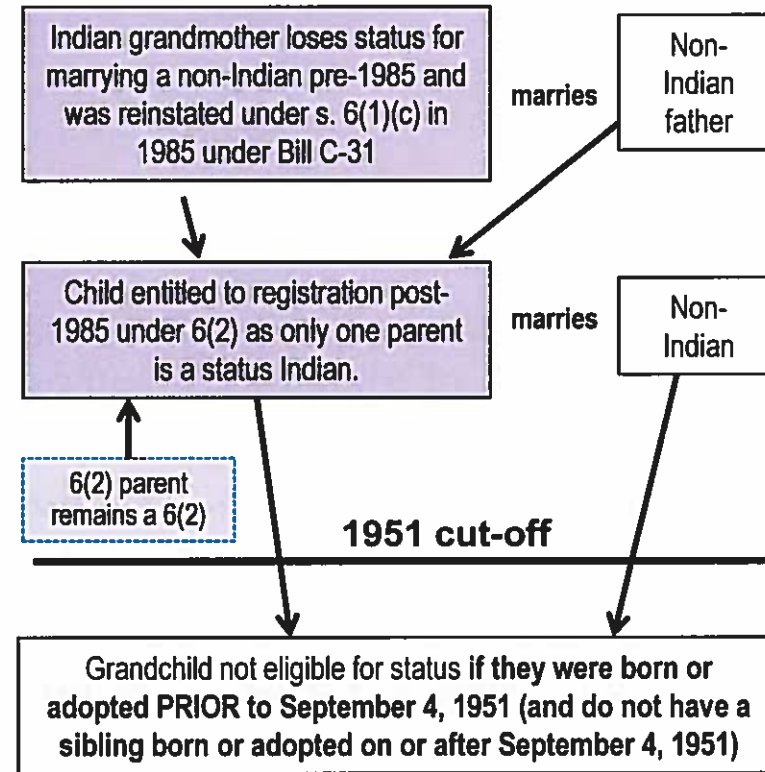


The 1951 Cut-Off under the *Mclvor* Amendments

For individuals born or adopted on or after September 4, 1951



For individuals born or adopted before September 4, 1951



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When will the 1951 cut-off be eliminated?

- The 1951 cut-off will be eliminated at a later date, once consultations with First Nations on how best to implement these changes are completed.
- Once in force, all descendants born prior to April 17, 1985 (or of a marriage prior to that date) of women who were removed from band lists or not considered Indians because of their marriage to a non-Indian man will be entitled to 6(1) status. This will include circumstances prior to 1951 and in fact, will remedy inequities back to the 1869 *Gradual Enfranchisement Act*.

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The Current *Indian Act*: The Basics of Entitlement

- Eligibility for registration is based on rules set out in section 6 of the *Indian Act*.
 - Often requires the interpretation and application of previous iterations of the *Indian Act* to determine an individual's entitlement (i.e. although ancestors are deceased and not eligible for registration, they may be deemed entitled in order to determine an applicant's entitlement).
 - A rigorous genealogical assessment is regularly required for each application for registration.
- Applicants must establish a **direct link** to a **Canadian** Indian ancestor based on documentary evidence such as a birth certificate.
 - This can result in non-Canadian citizens being registered as Canadian Indians, where a grandparent(s) or parent(s) was a Canadian Indian.
- Eligibility is determined based on descent from a person registered or eligible to be registered as an Indian.
- Formal and informal redress mechanisms exist to mitigate complaints against decisions of the Registrar in respect of eligibility to be registered.





The Current *Indian Act*: Indian Registration

- The *Indian Act* defines who is an Indian and identifies with whom Canada has a relationship.
- Following the 1985 amendments to the *Act*, two main categories of Indians were established and defined:

Section 6(1) assigns status to all those who were currently registered Indians, members of new Bands created after the amendments came into effect, and those who lost status under the discriminatory sections of the *Indian Act*, i.e. s.12(1)(b).

Section 6(2) assigns status to all those with only one Indian parent registered under section 6(1). Those with one Indian parent registered in section 6(2) and one non Indian parent would not be entitled to Indian status.

- Registration provides access to certain benefits and federal programs:
 - tax exemption for status Indians for income earned on-reserve and for federal sales tax; and
 - access to Health Canada's Non-Insured Health Benefits Program and INAC's Post-Secondary Education Support Program.
- Indian status is also linked to treaty rights (i.e. annuity payments) and some Aboriginal rights (i.e. hunting, fishing and harvesting).



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What is section 6 of the *Indian Act*?

- In summary, section 6 includes the rules that determine entitlement to registration under the *Indian Act*.

6(1)(a) - individuals who were registered or entitled to be registered immediately before the April 17, 1985.

6(1)(b) - members of Indian bands created on or after 17 April 1985.

6(1)(c) - reinstatement of those individuals whose names were omitted or deleted from the Indian Register, or a band list prior to September 4, 1951, because of:

- the "double mother" provision
- the person was a woman who married a non-Indian;
- the person was enfranchised;
- the person is a child who was omitted or removed as a result of their mother marrying a non-Indian; or
- the person was the illegitimate child of a man who was not an Indian and a woman who was an Indian.

6(1)(d) - Reinstatement of entitlement to registration - voluntary enfranchisement.

6(1)(e) - Reinstatement of entitlement to registration – they resided in a foreign country continuously for five years without the consent of the Superintendent General or they obtained a university degree or became a lawyer or "a minister of the gospel."

6(1)(f) - Persons born after 17 April 1985, where both of that person's parents must be or, if deceased, must have been entitled, at the time of their deaths, to registration under section 6. Or a person born before April 17, 1985, where both of his/her parents were entitled to be registered as a result of the 1985 amendments to the Indian Act under sections 6(1) c, e, or f.

6(2) - Persons born after 17 April 1985 where one parent is entitled to registration. Or persons born before April 17, 1985, where one of their parents were entitled to be reinstated under sections 6(1) c, d, e, f.



What is section 6 of the *Indian Act*?

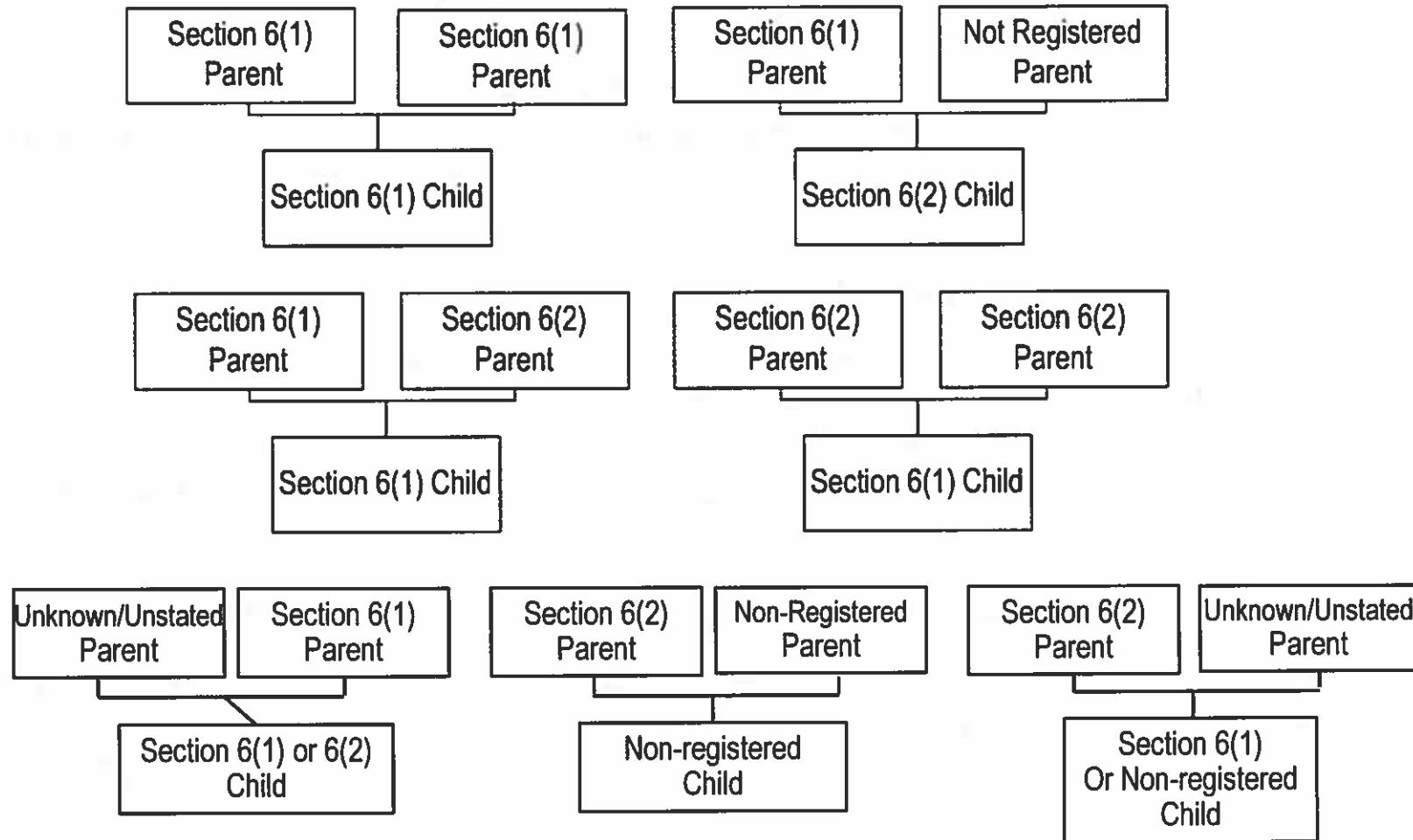
- In addition, the following provisions were added by Bill S-3:
 - **6(1)(c.01)** - reinstatement of those individuals who were enfranchised as a child due to their mother marrying a non-Indian between September 4, 1951 and April 16, 1985.
 - **6(1)(c.02)** - reinstatement of grandchildren of an Indian grandmother parented out of wedlock with a non-Indian and was born prior to April 17, 1985 or after April 16, 1985 if their parents married before April 17, 1985; and reinstatement of great-grandchildren born prior to April 17, 1985 or after April 16, 1985 if their parents married before April 17, 1985 where one of their parents was affected by the “double mother” rule and the other is not entitled to registration.
 - **6(1)(c.2)** - the “cousins” issue - in order to be entitled to registration under (c.2), an individual must have had on parent entitled or deemed entitled to be registered under (c.1) and must be born prior to April 17, 1985, or born after April 16, 1985 if their parents married before April 17, 1985.
 - **6(1)(c.3)** - the “siblings” issue – reinstatement of individuals born female and out of wedlock of an Indian father and a non-Indian mother.
 - **6(1)(c.4)** - entitlement to registration if the individual is a grandchild or great-grandchild of a grand parent or great-grandparent affected by either the “cousins” issue or the “siblings” issue and was born prior to April 17, 1985, or born after April 17, 1985 if their parents married each other prior to April 17, 1985.
 - **6(1)(c.5)** - entitlement to registration to the great-grandchild born prior to April 17, 1985 or after April 16, 1985 if their parents married before April 17, 1985, where one parent was affected by the “siblings” issue and the other parent is not entitled to registration. The great-grandchild could also be entitled for registration under 6(1)(f) or 6(2).
 - **6(1)(c.6)** - entitlement to registration to the great-grandchild born prior to April 17, 1985 or after April 16, 1985 if their parents married before April 17, 1985, where one grandparent was born out of wedlock prior to April 17, 1985 to an Indian mother and non-Indian father and the grandparent lost status through protest, and one of their parents is entitled under (c.02) and their other parent is not entitled to be registered. The great-grandchild could also be entitled for registration under 6(1)(f) or 6(2).

What do these provisions mean in terms of entitlement and how status is transmitted?...





Entitlement in its Simplest Form



Note: Eligibility for registration is based on rules set out in section 6 of the *Indian Act*. Often requires the interpretation and application of previous iterations of *Indian Act* to determine an individual's entitlement as such rigorous genealogical assessment is regularly required for each application for registration.

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Appendix A – Indian Registration Redress Mechanisms

Informal Mechanism:

- Before a decision is made on entitlement, including a deletion or change in category, the applicant is given 90 days to provide additional evidence that would support a different finding
- The Registrar will receive evidence, at any time, after a decision is taken, provided the decision was not protested and a final decision rendered

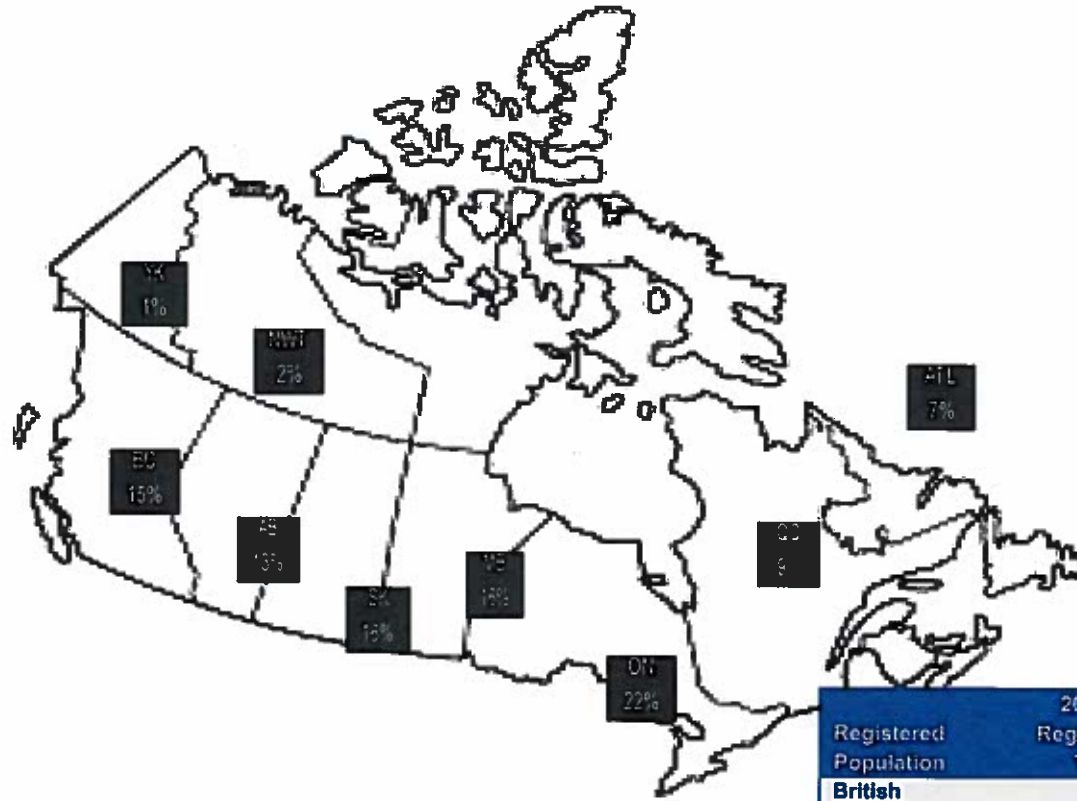
Formal Mechanism:

- Within three years of the Registrar's decision, the Applicant may file a protest, with grounds, regarding the decision, if they are not satisfied with the decision (denial or category of entitlement):
 - in addition, a band or member may file a protest regarding membership in the band, but not the registration
- Upon the Registrar rendering a final decision on the protest, the Applicant may, within six months, file an appeal with a superior court
 - at this point the Registrar cannot change the decision
- The court may affirm, vary or reverse the decision of the Registrar, or refer the matter back to the Registrar for reconsideration or further investigation
- There are approximately 40 legal challenges (court, Human Rights Tribunal, etc.) to the current legislative framework.

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Appendix B – Registration distribution



Source: Indian Registration System, 2017

Registered Population	2015-16 Registration Total	2016-2017 Registration Total	Registration in 2016-2017 Total	2016-17 %
British Columbia	143,325	146,507	3,182	15%
Alberta	123,087	127,241	4,154	13%
Saskatchewan	151,166	155,784	4,618	16%
Manitoba	154,054	158,174	4,120	16%
Ontario	207,612	212,039	4,427	22%
Québec	86,311	88,454	2,143	9%
Atlantic	63,658	64,992	1,334	7%
Yukon	9,295	9,410	115	1%
Northwest Territories	18,958	19,343	385	2%
Total	957,466	981,944	24,478	100%



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