Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Discussion Paper

Changes to the *Indian Act* affecting Indian Registration and Band Membership

McIvor v. Canada

Canada

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Introduction

In April 2009 the Court of Appeal for British Columbia ruled in the case of *McIvor v. Canada* that the *Indian Act* discriminates between men and women in regard to registration as an Indian. As a result, the Act needs to be amended. The purpose of this paper is to describe how the federal Government plans to follow up on the *McIvor* decision, and to invite views from First Nations and other Aboriginal people.

There is some urgency to dealing with this issue. The Court of Appeal has given Parliament only one year to amend the *Indian Act,* until April 6, 2010. After hearing comments on its plans, the Government intends to propose amendments to Parliament with the goal of having them in place by the deadline.

It is possible that the Supreme Court of Canada will agree to consider an appeal by Ms. McIvor challenging the recent Court of Appeal decision. If this happens, the Government would delay finalizing amendments until the Supreme Court has given its decision on the case. However, the April 2010 deadline still currently stands, and the Government must adhere to that timeline.

Background

- **Indian Registration or "Status"**

Registration of Indians under the *Indian Act* is one of the most basic parts of Canadian legislation affecting Aboriginal people. Since before Confederation, Canadian laws made rules setting out whom the Government would recognize as an Indian. As of 1951, the *Indian Act* provided for a national Indian Register listing those people registered as Indians, and indicating to which band they belonged. Those who are registered are often referred to as "status Indians".

Early on, the Government used registration as the means to determine who could live on reserves, or benefit from treaties. Over the years, Indian status has come to determine eligibility for certain programs such as extended health benefits, possible financial assistance with post-secondary education, and exemption from certain taxes. For many people registration under the *Indian Act* also results in acceptance within the First Nations community.

• Historic Gender Bias in Registration

Prior to 1985, the rules for registration favoured men. Most notably, an Indian woman who married a non-Indian ceased to be registered as an Indian, and her children could not be registered. On the other hand, an Indian man who married a non-Indian remained registered, and his wife and children were also registered. This discrimination based on gender was increasingly criticized over the years. With the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, which required Governments to remove such discrimination from all laws by April 17, 1985, the *Indian Act* had to change as well.

• Amending the *Indian Act* in 1985

But how to create a registration policy treating men and women equally was controversial. Most Aboriginal women sought full restoration of Indian status and band membership for themselves and their descendants. However, most First Nations organizations opposed reinstatement, arguing that First Nations should control their membership and who could reside on reserve. After lengthy and sometimes hot debate, Bill C-31 (as it is still widely known) was passed in June 1985, with effect from April 17 of that year, as required by the *Charter.*

The 1985 *Indian Act* amendments sought to balance these competing perspectives. Looking forward, the new legislation removed sex discrimination from the rules for registration. No one in future would gain or lose Indian status because of marriage.

As well, children would be considered for registration according to the same rules if they had only one parent, whether male or female, who was registered as an Indian. Section 6 of the new *Indian Act* set out these rules:

- *All those registered or eligible to be restored to status as of 1985 were registered under subsection 6(1), as are those with two registered parents.*
- *Children of a parent registered under subsection 6(1) and a non-Indian are registered under subsection 6(2).*
- *Children of a parent registered under that subsection and a non-Indian can not be registered. This is often referred to as the "second generation cut-off".*

Bill C-31 also restored Indian status and band membership to those who had lost it in the past because of discrimination in the former legislation. Children of such persons became eligible for registration according to the new rules summarized above.

In the years leading up to 1985 there was also growing pressure for the Government to recognize Indian self-government. In this spirit Bill C-31 allowed for Indian bands (now normally called First Nations) to determine their own membership, provided the rules did not discriminate on the basis of sex. Until this point, Indian status and band membership nearly always went together.

Finally, Bill C-31 preserved all rights acquired under the previous versions of the *Indian Act*. This applied mainly to non-Indian women who had gained Indian status in the past as a result of marrying an Indian. It was thought that it would be disruptive and unfair to take away such rights obtained in good faith in the past.

• Impact of Bill C-31 on Indian Registration and Band Membership

Since the 1985 *Indian Act* amendments, the number of registered Indians in Canada has more than doubled, from about 360,000 in 1985 to more than 778,000 in 2007. Most of this growth resulted from natural increase, that is, the excess of births over deaths. It is estimated that just over 117,000 people who had lost status through discrimination, or whose parent or earlier ancestor had lost status in that way, have been "reinstated" to Indian status. Their subsequent children form part of the natural increase.

During the period between 1985 and 2007 the proportion of registered Indians identified as living on reserve and Crown land declined from 71% to 56%. An important factor in this shift was the people reinstated as a result of Bill C-31, only 18% of whom reside on reserve or Crown land.

Following the passage of Bill C-31, over 230 First Nations adopted their own membership codes as permitted under section 10. However, they have not all followed the same approach. It appears that about 90 of the membership codes adopted under section 10 are more restrictive than the *Indian Act* registration rules, slightly fewer (84) are more inclusive, and the others (58) are equivalent to the *Indian Act* rules. For the remaining more than 380 First Nations band membership corresponds with registration under the *Indian Act,* as described in section 11.

The McIvor Decision

• Allegations of Discrimination in the *Indian Act* after 1985

Over the years since 1985, there have been various allegations that the *Indian Act* continues to discriminate on the basis of sex, despite the Bill C-31 amendments. Various court cases were commenced to pursue such allegations. The *McIvor* case is the first of these to be decided.

• The McIvor Case

Ms. McIvor was not registered as an Indian prior to 1985, but in any case she would have lost status because she married a non-Indian. She became entitled to registration after the passage of Bill C-31. However, Ms. McIvor contended that she and her son, Mr. Grismer, were not in the same position as they would have been if she had been a male.

Unlike a male Indian in her situation, her ability to pass status to her grandchildren depended on her son parenting with a registered Indian. Children of her male counterpart had status prior to 1985, and so were registered under subsection 6(1) of the *Indian Act.* Any grandchild of this male Indian could be registered. Mr. Grismer, however, having only one registered Indian parent, was registered under subsection 6(2). According to the "second generation cut-off" rule, the fact that he had a child with a non-Indian meant that his child (Ms. McIvor's grandchild) could not be registered.

In June 2007, a Judge of the Supreme Court of British Columbia essentially agreed with Ms. McIvor's contentions and ruled that section 6 of the *Indian Act* (the section that sets out the rules for registration) violates the *Canadian Charter of Rights and Freedoms*, and is therefore without effect insofar as it is discriminatory. The Judge refused to grant Parliament time to address the issue, and issued an order apparently calling for the immediate registration of all descendants of women who married non-Indians at any time prior to 1985, no matter how far in the past.

The federal Government was unable to implement such a broad and imprecise remedy. Canada believed among other things that the court erred in applying the *Canadian Charter of Rights and Freedoms* retrospectively. It therefore decided to appeal the decision to the Court of Appeal for British Columbia. This past April, that court found that section 6 of the *Indian Act* is discriminatory, but in a more limited way than had the Supreme Court of British Columbia.

• The Court of Appeal Decision in McIvor

The Court of Appeal found that the forward-looking rules for registration set out in Bill C-31 are not discriminatory. The Court also recognized the legitimacy of the additional objectives embodied in the 1985 amendments, in particular preserving existing rights (for example, of

women who gained Indian status by marrying a registered Indian in the past). Nevertheless, it concluded that discrimination arose from the manner in which Bill C-31 dealt with the transition from the past registration rules to the future non-discriminatory regime.

Specifically, between 1951 and 1985, the *Indian Act* contained a provision (known as the "double mother" rule) that conferred status on persons, both of whose mother and father's mother were non-Indians prior to marriage, but only until age 21. Bill C-31 eliminated the "double mother" rule, and restored status to people who had been affected by it when they reached age 21.

As part of its analysis under the *Canadian Charter of Rights and Freedoms*, the Court of Appeal compared the ability of Ms. McIvor's son to transmit status to his children with that of the child of a "hypothetical brother" of Ms. McIvor. The Court of Appeal found that eliminating the effects of the "double mother rule" through Bill C-31 created a new inequality that disfavours Ms. McIvor and her descendants. The diagram below, extracted from paragraph 59 of the Court of Appeal decision, illustrates how the ability for the hypothetical brother's child to transmit status was enhanced in 1985:

SITUATION UNDER OLD LEGISLATION	SITUATION UNDER 1985 STATUTE
Hypothetical Brother Status Indian (s. 11(e) of pre-1985 Act) Marries non-Indian Maintains status	**Hypothetical Brother** Status Indian (s.11(e) of pre-1985 Act) Marries non-Indian Maintains status
Child born - Child entitled to status	Child born - Child entitled to status
	1985 ACT COMES INTO FORCE
Assume child marries a non-Indian and has children	Assume child marries a non-Indian and has children
Grandchild of hypothetical brother loses Indian status at age 21 (s. 12(1)(a)(iv) of pre-1985 Act) (Double Mother Rule)	Grandchild of hypothetical brother entitled to Indian status (s. 6(2))

Under the legislation in force between 1951 and 1985, the grandchild of the hypothetical brother would have lost status at age 21, but under the 1985 *Indian Act* he or she is entitled to registration. In contrast, the grandchild of Ms. McIvor, equally the descendant of a non-Indian parent and grandparent, cannot be registered. The Court of Appeal found that this distinction was not justified by the objective of preserving existing rights, because Bill C-31 enhanced the existing

"age-limited" right to transmit status to the ability to transmit it for life.

For this reason, the Court of Appeal declared paragraphs 6(1)(a) and (c) contrary to the *Charter.* The Court expressed doubt about whether more remote descendants of persons affected by the old rules should receive a remedy today. In light of the complexity of the issues involved, the Court of Appeal chose to leave it to Parliament to develop an appropriate remedy, and suspended its declaration of invalidity for one year to allow time for Parliament to act.

Responding to the McIvor Decision

The decision of the Court of Appeal for British Columbia requires the Government to take legislative action to remedy the discrimination in the *Indian Act* by April 6, 2010. This is a tight deadline. The process of legislative change is often lengthy and unpredictable. First the Government needs to consider its options. It needs to hear from interested parties, before finalizing its position. It then needs to develop and introduce legislation. In Parliament, the proposed law needs to be debated and approved in both the House of Commons and the Senate.

If there is a broad consensus in favour of a particular measure, a new law or amendments to an existing law can be passed quickly. But when there are major differences of view, with outspoken and active defenders and critics, it is impossible to predict with confidence how long it will take for Parliament to give its approval, or indeed if it will do so.

• Conflicting Views on the *Indian Act*

Over the years, the *Indian Act* has always been controversial. Most observers agree that it is out of date. Some argue that it should be abolished, and replaced with some form of recognition of First Nations self-government. The sections on Indian registration have been especially criticized, but from different perspectives. Many find the rules too restrictive; others argue that they are too inclusive.

The historic link between Indian registration and band (First Nation community) membership complicates the debate. Some communities welcome additional members; others do not want to expand their membership.

From both points of view, many maintain that Canada's legislative definition of who is an "Indian" is detrimental to First Nations identity and autonomy, and that First Nations themselves should be responsible for such definitions. Since 1985, about 40% of First Nations have established their own membership codes, but registration has remained

a responsibility of the federal Government. Such a role remains appropriate as long as status is a key factor in determining eligibility for Government programs designed for First Nations.

- **A Pragmatic Approach**

So, taking account of the tight timeframe and the controversial nature of the *Indian Act,* especially the sections on Indian registration, the best approach seems to be to develop and propose legislative amendments that respond specifically to the Court of Appeal ruling in the *McIvor* case. Broader or more ambitious options would take years to accomplish, if in fact sufficient consensus could be found. In general it seems wise to limit legislative changes to the registration rules to those that are mandatory as a result of a court decision, or that enjoy wide consensus support.

- **The Amendment Concept**

In this pragmatic spirit, the Government considers that the *Indian Act* needs to be amended to remedy the specific problem of discrimination brought to light in the case of Sharon McIvor and her family, as analyzed by the decision of the Court of Appeal for British Columbia.

Specifically, the amendment concept under consideration would provide Indian registration under s. 6(2) of the *Indian Act* to any grandchild of a woman:

(a) who lost status due to marrying a non-Indian; and

(b) whose children born of that marriage had the grandchild with a non-Indian after September 4, 1951 (when the "double mother" rule was first included in the *Indian Act*).

To accomplish this, section 6(1) of the *Indian Act* would be amended to include any person in the situation of the "child" mentioned in (b) above.

A more narrow amendment concept, which the Government does not propose to pursue, would limit its application to situations where the woman's child (the subsequent parent of the grandchild with a non-Indian) was born before 1985.

With either type of amendment, entitlement to band membership would flow to those gaining the right to registration under the *Indian Act* for those bands whose membership is determined according to section 11 of the *Act.* For First Nations that control their own membership codes under section 10 of the *Act,* eligibility for band membership would follow the First Nation's rules.

• Likely Impact of Such an Amendment

It is difficult to foresee exactly how many people would be affected by an *Indian Act* amendment along the lines described above. The complexity of families and fertility patterns, as well as limitations on the information available to the Indian Registrar favour caution in making estimates. Nevertheless, to assist in considering how to proceed it is useful to offer a broad idea of the likely impact on the registered Indian population.

Overall, the Department of Indian and Northern Affairs believes that total new registrations under the *Indian Act* resulting from such an amendment could number in the range of 20,000 to 40,000. This range would result in an increase of about 3% to 5% of the existing status population. There would of course be additional registrations in the future, as new registrants themselves have additional children that meet the rules for obtaining Indian status. The distribution of new registrants across Canada is unknown at present.

The impact on the membership of individual First Nations communities (bands) is even more challenging to specify. In this regard, it is worth recalling that over 230 bands have their own membership codes, which are quite varied. For First Nations that do not control their own membership, new registrants will be added to the appropriate band list by the Indian Registrar.

As with those registered as a result of Bill C-31, the great majority likely live off reserve or off Crown land. Thus the direct impact on First Nations communities may be limited in such areas as demand for on-reserve housing and services. However, voting lists would be affected, since off-reserve First Nations members generally have the right to vote in band elections.

On the matter of financial consequences, a few points can be made. Essentially, in the absence of any broader policy changes on eligibility for funding, new registrants under the *Indian Act* will have the same access to programs as do existing status Indians.

For programs such as extended health benefits eligibility depends on status and circumstances. Tax exemptions apply to people based on being registered, and in some cases on where they live or derive their income. Other programs such as post-secondary education financial assistance are limited in total funding, so access depends on various criteria. Funding for on-reserve programs and services is worked out according to various policies and criteria, largely based on residency on reserve.

As in the early days following the passage of Bill C-31 in 1985, implementation of new registration rules will take some time, as the Office of the Indian Registrar works through the cases presented. Access to programming will follow registration.

Next Steps

The next step is for First Nations communities and people, other Aboriginal groups and individuals, and other Canadians to share any comments they may have on the amendment concept set out in this paper. Reactions are invited through two channels.

First, feedback and input will be solicited at a series of meetings across the country. Departmental officials will also meet with their counterparts in the main First Nations and Aboriginal national organizations. This work will be completed by November 2009.

Second, everyone is invited to send written comments on the proposed amendment concept to the Department until November13, 2009.

After considering the views offered, the Minister of Indian Affairs and Northern Development plans to consult with his Cabinet colleagues and prepare legislation with the goal of having the proposed amendments in place by April 6, 2010. This is the time limit set out by the Court of Appeal for British Columbia, after which the declaration of invalidity would take effect.

• Some Contingencies

As noted earlier, Ms. McIvor has sought leave from the Supreme Court of Canada to appeal the April 2009 decision of the British Columbia Court of Appeal. If the Supreme Court decides to hear the appeal, the Government will seek a delay in the deadline for amending the *Indian Act* until after the Supreme Court has delivered its ruling and the process to develop legislative amendments to respond to the British Columbia Court of Appeal ruling would be suspended; Canada and all interested parties would then await the decision of the nation's highest Court. Canada would have no choice but to take part in a Supreme Court of Canada hearing of *McIvor* and, with a view to presenting to the Court all the aspects of the complex issues in play, has therefore sought leave to cross-appeal should the Court decide to hear the matter. Canada's positions before the Court would be shaped not only by the history of the case to date but by the arguments - not yet known - that would be advanced by the *McIvor* Plaintiffs.

If the Supreme Court decides not to hear the appeal, and for some reason the *Indian Act* is not amended by the April 2010 deadline, it is important to emphasize two points. First, no one who has been included in the Indian Register by that time under the existing law will lose his or her status because the deadline is missed. Second, until courts in other provinces deal with these issues, the process of registration would be cast into doubt only in the province of British Columbia.

Such an outcome could be unfortunate, in that it would cause uncertainty in First Nations communities in the province of British Columbia. The federal Government would continue to push as quickly as possible for *Indian Act* amendments to eliminate the discrimination criticized by the Court of Appeal.

Conclusion

The Court of Appeal for British Columbia has found in its decision in the *McIvor* case that parts of section 6 of the *Indian Act* do not comply with the *Canadian Charter of Rights and Freedoms.* This section deals with the rules for deciding the important question of who can be registered as an Indian in Canada. It also determines who is a band member for First Nations that do not control their own membership. The Court has suspended its declaration of invalidity for a year, until April 6, 2010, to allow time for Parliament to amend the *Indian Act* to bring it into conformity with the *Charter*.

This paper summarizes the background to this decision, and sets out a proposed concept for amending the *Indian Act.* There are many views on that legislation, and many ideas for amending or replacing it. For now, however, time is short. In order to preserve clarity on registration and band membership for First Nations in British Columbia (and ultimately across Canada), the Government favours focusing on remedying the specific deficiency identified by the Court of Appeal for British Columbia, by amending the *Indian Act* prior to April 6 next year.

Written submissions can be provided via e-mail, fax, or mail to the address below before November 13, 2009.

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