

Background Information on the Collaborative Process: On Indian Registration, Band Membership and First Nation Citizenship

1. Introduction

In August 2015, a decision was rendered in the *Descheneaux* case by the Superior Court of Quebec which declared key provisions of the *Indian Act* inoperable because they violated equality rights under the *Charter*. 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 longstanding and unaddressed broader issues relating to Indian registration, band membership and First Nation citizenship.

In July 2016, the Government launched its approach to respond to the *Descheneaux* decision. It includes two elements:

- 1) **Legislative changes** to respond to the decision; and
- 2) **A Collaborative Process** on Indian registration, band membership and First Nation citizenship which involves comprehensive consultations on the broader and more complex issues related to registration, membership and citizenship. The Collaborative Process will involve consultations with First Nations, Indigenous groups and impacted individuals with a view to future legislative reform within the context of reconciliation and a renewed relationship.

Legislative Changes

For the first element, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)* came into force on December 22, 2017. Bill S-3 not only remedied the issues identified in the *Descheneaux* decision, it also included provisions to remove what is commonly known as the 1951 cut-off (the practice of linking registration reform to the date of the creation of the modern Indian registry in 1951), but with a delayed coming into force to allow for consultation on an implementation plan.

Bill S-3 addresses 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; and
- 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, grandparent or other ancestor.

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.

A Collaborative Process

For the second element, Minister Bennett launched the co-design phase of the Collaborative Process on Indian registration, band membership and First Nation citizenship on October 31, 2017. The focus of the co-design was identifying what issues will be discussed and what activities will be undertaken by participants as part of the consultations.

The results of the co-design phase were summarized in the *Report to Parliament on the Design of a Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship* is available on the Department's website at www.aadncaandc.gc.ca/eng/1525287514413/1525287538376.

Consultations under the Collaborative Process were launched on June 12, 2018. An Indigenous Minister's Special Representative (MSR) was appointed by the Minister of Crown-Indigenous Relations and Northern Affairs Canada to lead consultation activities, regional events, and participate in community-organized activities. The MSR's participation is recommended subject to availability. Government representatives are also available to participate in sessions and provide information.

The purpose of this document is to provide information on the requirements and process for First Nations and Indigenous organizations who wish to submit a proposal to apply for funding to hold community-organized sessions to discuss these issues.

2. What Are We Consulting On?

The Department has prepared a Consultation Plan which outlines the gathering of information through various government and community organized consultation activities, regional events, online engagement, and expert panels. The Consultation Plan was informed by input from the co-design and suggestions raised from a recently created Indigenous Advisory Panel who will provide advice and guidance to the government throughout the Collaborative Process. In addition to what was legislated under Bill S-3, the analysis of the co-design input saw the emergence of three general content streams that will be considered through consultation.

1) The removal of the 1951 cut-off from the *Indian Act*

Discussions will focus on the implementation of the delayed coming-into-force provision 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, to identify what resources could be required, and to ensure unintended consequences are mitigated.

2) Remaining inequities related to registration and membership under the *Indian Act*

These issues were articulated in Bill S-3 and enhanced by the input received during the co-design phase. This includes issues such as, but not limited to: adoption, the second generation cut-off, or enfranchisement, as well as the related issues of resources and impacts on communities. See Annex A for further details.

3) Devolution of the responsibility for determining membership / citizenship to First Nations

This includes discussions and developing options to devolve the exclusive responsibility for the determination of the identity of their membership to First Nations. What is the federal versus First Nation role in determining status and band membership in regards to section 10 and section 11 of the *Indian Act*?