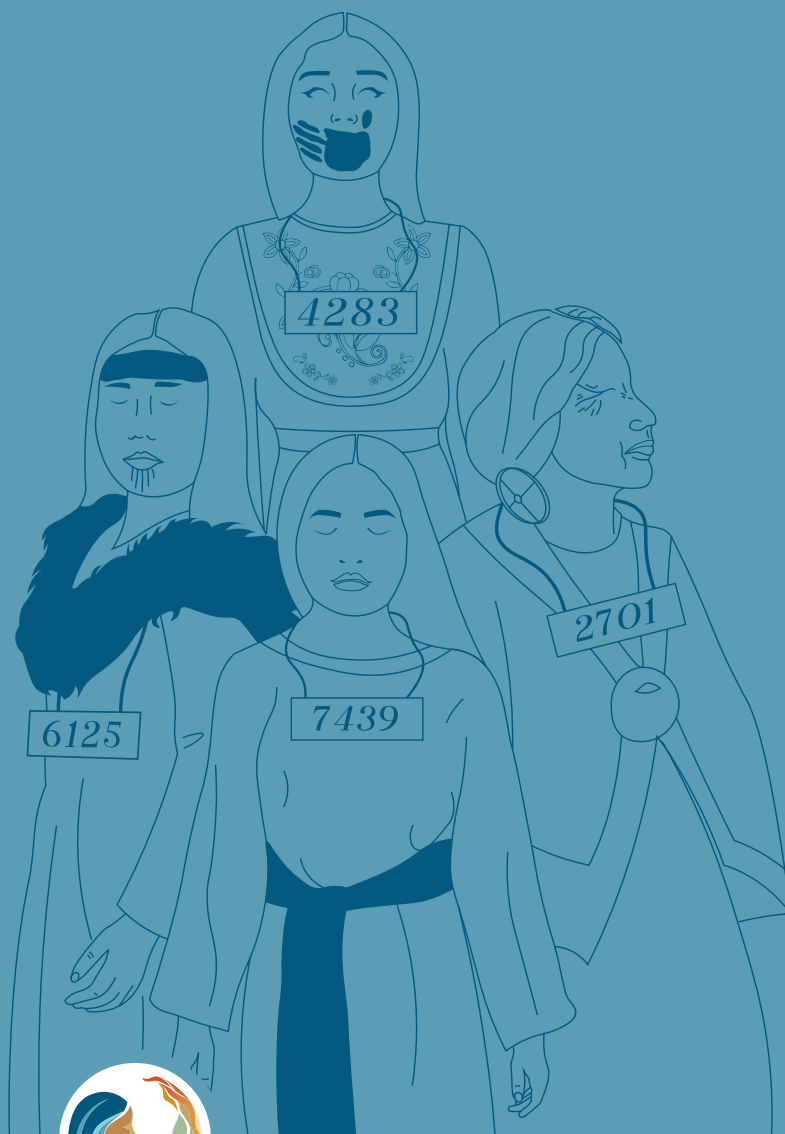


The Native Women's Association of Canada
L'Association des femmes Autochtones du Canada

INDIGENOUS GENDER-BASED ANALYSIS OF
BILL S-3 AND THE REGISTRATION PROVISIONS OF THE

INDIAN ACT

FINAL REPORT



MAY 2022



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INDIGENOUS GENDER-BASED ANALYSIS OF BILL S-3 AND THE REGISTRATION PROVISIONS OF THE *INDIAN ACT*

— FINAL REPORT —

ABOUT NWAC

NWAC is a National Indigenous Organization representing Indigenous women, girls and gender-diverse people in Canada, inclusive of First Nations on and off reserve, status and non-status, disenfranchised, Métis and Inuit. NWAC is an aggregate of Indigenous women's organizations from across the country. NWAC was founded on the collective goal to enhance, promote and foster Indigenous women's social, economic, cultural and political well-being within their respective communities and Canadian societies.

Since 1974, NWAC's strong and lasting governance structures, decision-making processes, financial integrity and networks have helped achieve its overall mission and goals. Today, NWAC engages in national and international advocacy aimed at legislative and policy reforms that promote equality for Indigenous women, girls, Two-Spirit and gender-diverse people, including LGBTQ+ people. Through this advocacy, NWAC works to preserve Indigenous culture and advance Indigenous women, girls and gender-diverse people's well-being, as well as their families and communities.

SUMMARY

The central finding and recommendation of this report is that the time has come for the *Indian Act* to be repealed and replaced with agreements and laws that are consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* and the rights, traditions, customs and procedures of First Nations. This process must be designed in consultation and cooperation with First Nations peoples, including democratic as well as traditional governing bodies, on-reserve and off-reserve organizations, and the grassroots. Ensuring that First Nations women have an equal place at the decision-making table will also be of the utmost importance in order to prevent the recurrence historical mistakes of the marginalization of women.

The legislative origins of the *Indian Act* predates confederation and are rooted in colonial enactments that, although they recognized Indigenous land possession and occupation rights, did so under the assertion of sovereignty by foreign crowns. The core legislative framework developed by colonial governments, and maintained in the *Indian Act*, for the gradual cultural genocide of Indigenous peoples, is the membership attrition provisions that operate to eliminate the legal status of persons with Indigenous rights in Canada.

The Province of Canada enacted the first instrument that sought to define who was and was not entitled to the rights reserved for the First Nations in 1850. In 1857, that province enacted the *Gradual Civilization Act* with the stated purpose of removing all legal distinctions between Indigenous and non-Indigenous people. These acts constituted the legislative foundation for the eventual enactment of the *Indian Act* in 1876 and this Act would operate, and continues to operate today, to affect the gradual elimination of legal distinctions between First Nations and non-First Nations people in Canada. The primary mechanism through which this laws affects the genocide is the registration



provisions. These provisions determine who is and who is not entitled to legal recognition as an individual with entitlement to the rights and privileges reserved in law for only First Nations persons.

In 1985, Parliament passed Bill C-31 with the purpose of removing the overtly sexist provisions from the registration provisions of the *Indian Act*; however, the manner in which Parliament remedied historical sex-based discrimination resulted in discrimination against the children and grandchildren of the women who regained their entitlement to status under Bill C-31.

The focus of this report is on the most recent legislative amendments to remove all known sex-based inequities under the registration provisions with the full coming into force of Bill S-3 in 2019.

Bill S-3 was designed to remove remaining inequities suffered by the descendants of women who had lost their status because of pre-1985 sex-based inequities under the *Indian Act*. The coming into force of Bill S-3 was an important and significant success for Indigenous women and Bill S-3 has clearly addressed the inequities that it was designed to address. This includes issues related to non-marital female children ("illegitimate female child rule"), the marry-out rule, and omitted minor children.

In addition to the success of the legislation itself, the implementation of Bill S-3 by the Government of Canada has also been largely successful. Indigenous Services Canada implemented a national communications strategy on the bill and the Bill S-3 registration rates are in line with estimates of registration rate increases made by the Parliamentary Budget Officer and Statistics Canada. Additionally, Indigenous Services Canada increased investment in registration processing that enabled the department to significantly reduce the average registration processing times down to ten months despite the increased quantity of registration applications following Bill S-3.

Despite these success, ongoing issues persist. Bill S-3 did not address the second generation cut-off and the Government of Canada continues to maintain a policy respecting evidentiary burdens in cases of unknown or unstated parentage that is unreasonable and not consistent with the standard set out in the *Indian Act*. Despite Indigenous Services Canada's success in reducing processing times, many people remain frustrated with the long registration process, the difficulty in obtaining gemological evidence to prove their heritage, and the nature of the federal government as the *de facto* decision-maker about who is and is not entitled to access the rights and privileges reserved for First Nations peoples.

Communications efforts on the part of the Government of Canada, NWAC and other NIOs have sought to ameliorate public awareness and understanding of Bill S-3's amendments to the registration provisions. Despite these efforts, confusion about the amendments persists. This is because the registration provisions themselves are convoluted, use technical language and refer to pre-1985 provisions without context and which are not easily available to anyone without access to a law library.

The *Indian Act* operated (and still has the effect today) to gradually reduce the number of people entitled to recognition by the Government of Canada as persons entitled to enjoyment of the rights and privileges reserved for First Nations peoples. It did this through the registration and enfranchisement provisions as well as the education provisions that facilitated the horrors of the residential school system. By the mid-20th Century, the use of child welfare systems were also engaged in the genocide through intensive and systematic removal of First Nations children from their families and communities.



These state-led efforts to sever children's connection to their heritages and communities continues have adverse effects today. Individuals who are multi-generational descendants of the direct victims of the cultural genocide often are not aware of their Indigenous heritage or do not feel a close enough connection to their Indigenous heritage to register under the *Indian Act*.

By removing the enfranchisement provisions from the *Indian Act* in 1985, Parliament addressed a major mechanism under the Act for perpetuating the gradual enfranchisement of First Nations people.

Unfortunately, one of the unforeseen effects of eliminating all deregistration mechanisms from the Act was the constraints this would place on individuals who are registered as children, but who grow up to identify with one of their other Indigenous heritages. Because membership in some Indigenous Groups prohibits membership in another Indigenous group, including being registered under the *Indian Act*, the absence of a de-registration provision under the *Indian Act* can have the effect of denying individuals membership in different Indigenous groups with which they more closely identify.

Despite Bill S-3's introduction of subsection 5(6) which reduced the burden of proof of proving the status entitlement of an applicant's unknown or unstated parent, grandparent, or other ancestor to a standard of "every reasonable inference" in favour of the applicant, Indigenous Services Canada maintains a policy for such cases that sets the burden of proof at balance of probabilities. This stricter burden of proof is inconsistent with Bill S-3 and risks exposing Indigenous women to risks of emotional, social and physical harm in some instances where the other parent of their child does not want to be identified.

The *Indian Act* continues to include the core vestigial of the gradual enfranchisement mechanisms of the legislative framework in the form of the second generation cut-off. This provision is inconsistent with First Nations membership laws and traditions, results in greater barriers and risks for mothers than fathers, and will cause a significant decline in the population of people entitled to register under the Act throughout the remainder of the 21st Century.

One of the most staggering provisions of the *Indian Act* introduced by Bill S-3 is the age and marital status-based distinctions under paragraph 6(1)(a.3). While Bill S-3 addressed the differential treatment of the grandchildren of women who had lost their status due to the marry out rule and men who had married non-status women by recognizing entitlement to register of the "direct descendants" of individuals who regained their status under Bill C-31, the 1985 cut-off date created two new bases of discrimination.

By limiting entitlement to the direct descendants of Bill C-31 women to individuals born before 17 April 1985 or born to parents married to each other at any time before that, the legislation now creates a distinction. Siblings born to the same un-married parents can be entitled to different status under the *Indian Act* based on nothing other than their date of birth and the marital status of their parents.

While Bill S-3 addressed issues related to involuntary enfranchisement, such as the descendants of the victims of the marry out rule and the omitted minor child rule, it did not address issues related to "voluntary" enfranchisement. The *Indian Act* offered financial incentives for status persons to



enfranchise and many parents felt that enfranchisement was the only way to protect their children from the residential school system. Thus, the coercive nature of “voluntary” enfranchisement strongly indicates that many people enfranchised under conditions of significant pressure.

The Government of Canada recently announced its intention to work with the plaintiffs of a *Charter* challenge against the registration provisions related to enfranchisement to develop a legislative solution to address the ongoing inequity the descendants of “voluntarily” enfranchised individuals suffer.

The registration provisions of the *Indian Act* are difficult to understand and the protest and appeal procedures related to administrative decision-making under the Act are best navigated by legal professionals. Unfortunately, legal aid certificates are not available for individuals to navigate the registration or judicial review processes. Additionally, there are few lawyers that specialize in *Indian Act* registration because of the often time-consuming nature of applications and the disproportionate rates of economic marginalization among many applicants.

In order to address equality issues related to registration procedures, funding earmarked for *Indian Act* registration and judicial review procedures are necessary.

Despite Supreme Court of Canada jurisprudence recognizing that members of Indigenous societies that occupied Canadian territory at the time of European contact are “Aboriginal peoples of Canada”, the *Indian Act* continues to apply the second-generation cut-off in instances of co-parenting between First Nations parents on both sides of the U.S.-Canada boarder.

International human rights law recognizes the rights of peoples to self-determination and the *United Nations Declaration on the Rights of Indigenous Peoples* codified the rights of Indigenous peoples at international law, which recognized, inter alia, the right of Indigenous peoples to determine their own membership. The registration provisions of the *Indian Act* create *de facto* controls by Canada over First Nations membership. With the coming into force of the *UNDRIP Act* and the requirement of conforming the laws of Canada with Declaration, it is very unlikely that the *Indian Act* will survive the process of the *UNDRIP Act*’s implementation.

Accordingly, the Government of Canada should begin working expediently to consult and cooperate with First Nations governing bodies, organizations, and grassroots on repealing the *Indian Act* and replacing it with agreements and laws that conform with the Declaration.

While there are many short-term policy and legislative measures that the Government of Canada can take to address some of the ongoing inequities and challenges under and related to the registration provisions of the *Indian Act*, the ultimate aim should now be to repeal the *Indian Act* and replace it with agreements and laws that conform to UNDRIP. No level of adjustments to the various provisions of the *Indian Act* can change the fundamental nature of the legislative framework. It is a mechanism that operates to assert federal jurisdiction over areas integral to the self-governance and self-determination of First Nations peoples and it’s unalterable design is to gradually remove the legal distinctions between First Nation and non-Indigenous Canadians.



METHODOLOGIES

The primary objectives of this project were to assess the effectiveness of Bill S-3 in eliminating the discrimination under the registration provisions of the *Indian Act* that the bill was designed to address, assess whether there are ongoing issues under the registration provisions, and to promote awareness of Bill S-3's changes to the registration provisions and to encourage potentially newly-entitled individuals to apply to register for status.

To achieve these objectives, NWAC undertook a range of activities, including research and analysis, expert and grassroots engagements, and the development and implementation of an extensive national communications strategy.

RESEARCH AND ANALYSIS

In advance of NWAC's series of nation-wide, online engagement sessions on the effectiveness of Bill S-3 in eliminating gender-based discrimination from the registration provisions of the *Indian Act*, the organization undertook a preliminary literature review to identify laws, treaties, legislation, jurisprudence, government policies, government and civil society reports, academic sources, statistics, and international instruments that are relevant to Indigenous membership rights, interests and issues.

The purpose of this literature review was to assess the issues that Bill S-3 is designed to address as well as other ongoing issues related to equality and Indigenous rights related to the registration provisions of the *Indian Act*. This process enabled NWAC to begin a thorough culturally relevant Indigenous gender-based analysis (CRIGBA) that both informed and was informed by the engagement sessions.

The CRIGBA process enabled the organization to identify organizations and individuals with expertise and experience related to the registration provisions and Indigenous membership and equality rights more broadly and also allowed the organization to identify and analyze potential ongoing issues.

The purpose of applying a CRIGBA is to identify the unique needs, perspectives and rights of Indigenous women, in order to be able to ensure that equality is achieved and their human rights, both collective and individual, are fully advanced. CRIGBA considers the historical and current issues faced by Indigenous women, including the impact that colonization and intergenerational trauma have caused. When policy work lacks a CRIGBA, there is a risk of perpetuating further marginalization, oppression, and/or violence against Indigenous women. It is essential to consider the impacts of policy and programs, specifically as they pertain to First Nations, Metis, and Inuit women. A culturally relevant gender-based perspective is one way of minimizing the potential for harm.

Specifically, applying a CRIGBA lens to the laws, policies, literature and data is important to better understand whether and how Indigenous women and girls are disproportionately impacted by the registration provisions of the *Indian Act* and the effectiveness of the Bill S-3's implementation in addressing the issues it was designed to tackle.

Indigenous women and girls live experiences different from non-Indigenous peoples and Indigenous men as a result of the intersectionality of multiple racial, gender, and cultural identities. Indigenous women's identities encompass world views, cultural practices, social responsibilities, and economic realities that are significantly different from non-Indigenous peoples. There is also solidarity in the devastating effects of violence, harassment and discrimination shared among far too many Indigenous women, disproportionately to the non-Indigenous population.



ENGAGEMENTS

NWAC organized and hosted three expert roundtables and five grassroots roundtables between October and December 2021 on the effectiveness of the implementation of Bill S-3 and ongoing issues under the registration provisions of the *Indian Act*. We also produced and published an online discussion paper, conducted an online survey, and produced and promoted several information resources on NWAC's social media accounts.

Due to the COVID-19 pandemic, all of NWAC's engagements took place online.

ROUND TABLES

NWAC developed backgrounder documents for the expert roundtables and the grassroots roundtables that were based on our research and analysis of Bill S-3, the *Indian Act* and related issues up to the time of planning the engagements. Each session was facilitated by experienced Indigenous women leaders and supported by Elders. The backgrounders were distributed to participants for review in advance of each session and the subjects and discussion questions in those documents helped to guide discussions.

The expert round table participants were composed of individuals from a range of backgrounds, including lawyers, academics, Indigenous leaders, and civil society advocates. Discussions at the expert roundtables focused on legal and policy matters related to the registration provisions, with many participants sharing their lived experiences with issues related to Indigenous membership rights.

NWAC reached out to the organization's grassroots to identify and invite participants to the grassroots roundtable sessions. These discussions were also guided by backgrounder documents and the discussions focused on participant's lived experiences, and the experiences of their communities, related to registration entitlement and processes under the *Indian Act*.

In order to promote greater awareness of Bill S-3's amendments to the registration provisions and to encourage potentially newly entitled individuals to apply to register for status, NWAC invited representatives from Indigenous Services Canada to deliver presentations on the Bill S-3 amendments and the registration process.

Indigenous Services Canada provided highly professional, informed, and sensitive representatives to deliver presentations at each of the grassroots roundtables. In addition to delivering informative presentations, these representatives made themselves available to answer participant questions and provide follow up information. While the discussions became somewhat tense at times, the participants and ISC representatives remained civil and respectful at all times.

The experts and grassroots individuals that participated in NWAC's engagements contributed invaluable information, perspectives and experiences to the organization's analysis and this report would not have been possible without their generosity of time and knowledge.



ONLINE SURVEY

In partnership with Nanos Research, NWAC conducted an online survey to obtain data on First Nations people's views on the reasonableness of the role of the federal government in making membership-related decisions for First Nations as well as views on the reasonableness of alternative hypothetical decision-making scenarios.

Survey participants were also given the opportunity to provide additional comments respecting status and membership decision-making structures at the end of the survey.

The data and comments obtained through this survey were analysed and organized by Nanos Research and this information has informed this report. The online survey report can be found at Appendix J of this report.

ELDERS' GUIDANCE

Elders participated in each of the roundtable engagement sessions, providing ceremonial openings, sharing their knowledge and experiences, and providing emotional and spiritual support and even, on occasion, stepping in to facilitate the sessions.

The guidance, knowledge, support and leadership provided by Elders throughout the duration of this project has been integral to the process and to the substantive outcomes set out in this report.

COMMUNICATIONS STRATEGY

A significant focus of NWAC's work under this project included promoting public awareness about the legislative amendments brought in under Bill S-3 and encouraging potentially newly entitled individuals to apply to register for status. As part of these efforts, NWAC developed and implemented a communications strategy that included the development of information resources, multiple social media posts that garnered almost 75,000 impressions, and a special *Indian Act* edition of NWAC's *Kci-Newsq Magazine*.

The objective of this communications strategy was to inform the public about Bill S-3's removal of multiple basis of inequity, promote awareness of ongoing inequities and infringements of Indigenous rights under the *Indian Act*, and to provide information on how and where to apply to register for status.

INFORMATION RESOURCES

NWAC developed and published six key information resources as part of the communications strategy, including four issue summaries, one quick guide to Bill S-3, and a Bill S-3 infographic (see appendices A through F of this report).

The issue summaries provided brief, accessible language explanations of the enfranchisement, marital status, second-generation cut-off, and unknown and unstated parentage issues and how Bill S-3 did or did not affect these issues.

The quick guide includes information on the process and requirements for applications to register for status and briefly summarizes the non-marital female child, marry-out, omitted



minor child, 1985 cut-off, unknown and unstated parentage, and second-generation cut-off issues. In a table format, the quick guide provides background on each of the issues, outlines how/whether Bill S-3 affected these issues, and identifies some potential ongoing implications. The infographic was designed as a supplement to the issue summaries and the quick guide to provide visualizations by way of charts on these issues and how Bill S-3 did or did not affect them.

ONLINE COMMUNICATIONS

NWAC published the information resources and a discussion paper on the *Indian Act* page of its website and actively promoted these resources on its social media accounts. The organization also updated the landing page content of this webpage from the content that had been developed during NWAC's national engagements on Bill S-3 prior to the order in council that brought into force the remaining provisions of the bill in 2019.

The social media campaign generated over 13,000 impressions and 274 engagements on Twitter; over 52,000 impressions and more than 3,000 engagements on Facebook; more than 6,000 impressions and nearly 350 engagements on LinkedIn; and nearly 3,500 impressions and 291 interactions on Instagram.

INDIAN ACT SPECIAL ISSUE OF NWAC MAGAZINE

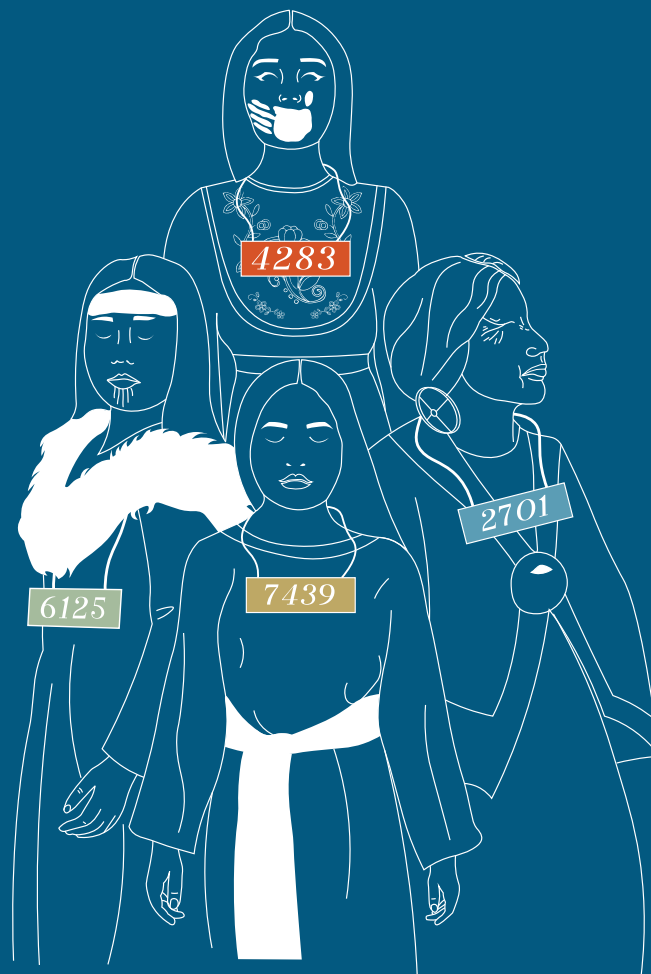
NWAC developed, published and distributed in print and online a special *Indian Act* edition of NWAC's *Kci-Niewsq Magazine*. The organization collaborated with several guest authors with expertise and experience related to the registration provisions to develop the content of this special edition.

The magazine includes articles summarizing the registration provisions, the role of the *Indian Act* in affecting cultural genocide, issues related to blood quantum, enfranchisement and the second-generation cut-off. The issue also includes information on the processes and requirements for applying to register for status under the *Indian Act*.

The special *Indian Act* edition of NWAC's *Kci-Niewsq Magazine* can be found at Appendix G of this report.



HISTORY OF THE *INDIAN ACT*





HISTORY OF THE *INDIAN ACT*

Many legal instruments were used to affect the genocide against Canada's Indigenous populations well before and since confederation, not the least of which is the *Indian Act* and the legislative precursors to the first version of that Act.

Pinpointing the exact beginning of the legislative origins of the *Indian Act* is a difficult undertaking and can result only in debateable results. The long stalking of Turtle Island by European monarchs and their explorers produced a hundred year period of fumbled and misguided attempts to claim the territories of what they deemed to be the "New World". From 1497 through to the early 17th Century, numerous European explorers - from John Cabot and Jacques Cartier to Martin Forbisher and Samuel de Champlain - sought to discover the Northwest Passage and assert position of territories throughout North America on behalf of their financiers.

These attempts by Europe to assert possession of territories throughout North America were predicated on racist doctrines that sought to subjugate and dehumanize the original peoples. From the imposition of the feudal system in New France in 1623 to the Treaty of Paris in 1763, French and English ushered in a new era of conquest and conflict in their savage attempts to assert control over Turtle Island.¹

While colonial governments would recognize the inherent rights of Indigenous peoples to the possession and occupation of unceded territories, the legislatures of the colonies undertook the first strides toward the gradual genocide of Indigenous peoples by asserting *de facto* jurisdiction over membership in Indigenous rights holding groups and implementing legal mechanisms to subjugate First Nations and encourage their populations to surrender their rights.

The core of the legislative framework for cultural genocide is membership attrition. This approach was mapped out by the pre-Confederation legislatures, adopted by Parliament and remains within the DNA of the *Indian Act* despite repeated attempts by Parliament to conform the registration provisions of the Act to the *Canadian Charter of Rights and Freedoms* since 1985. No matter the amendments to the *Indian Act*, the assertion of Parliament's jurisdiction over *de facto* membership controls in First Nations is a cornerstone of Canada's legislative framework for genocide.

PRE-CONFEDERATION

The *Royal Proclamation 1763* may be the genesis of the colonial legal framework that sought to assert the control of the Crown over the First Nations in what is, today, Canada. The Proclamation begins with the claim by the Crown to have taken possession of extensive swaths of North America by way of the Treaty of Paris. It also, however, affirms Crown protection of the original Indigenous nations and acknowledges that the possession of

¹ Beaudoin, Gérard et Tanguay, J. Fernand, "Canada 125: Constitutions 1763-1982" Méridien (Montreal, 1992) ISBN 2-89415-091-1] at pg 65.



unceded territories by those nations is essential to Crown interests and the security of the colonies. This possession, however, is asserted to fall within the sovereignty of the Crown.²

The recognition of the territorial rights of the First Nations over which the British Crown asserted its sovereignty in the Proclamation would be woven into the legislative framework that eventually became the *Indian Act*. The source of Indigenous land rights is the prior occupation of the lands, not the Proclamation which merely recognized Aboriginal title and did create it.³ Despite the inherent nature of Indigenous land rights, colonial governments began asserting *de facto* legislative control over the exercise of such rights. The asserted authority by legislative bodies over determinations of who is or is not entitled to legal recognition as a member of a rights-holding group is a prominent example of this attempt to usurp the inherent rights of Indigenous peoples.

The legislature of the Province of Canada enacted the first legal instrument that sought to define who was and was not entitled to possession or occupation of unceded lands in 1850 by way of *An Act for the protection of Indians in Upper Canada*.⁴ That Act determined that individuals having the right to exercise possession of unceded lands included “Indians” and any persons “inter-married with Indians” and established Crown agents (“Commissioners”) as the gatekeepers of land possession and occupation.⁵

The introduction of this “marry-in” principle would persist in the legislative framework until 1985. The implicit assertion of Crown jurisdiction to decide membership in rights-holding groups persists in the *Indian Act* to this day.

That legislative body enacted substantially more ambitious legislation to affect the cultural eradication of Indigenous peoples just seven years later with *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians* (the “Gradual Civilization Act”). The stated purposes of that Act included the “removal of all legal distinctions between” Indigenous and non-Indigenous people and to facilitate the private ownership of Indigenous lands.⁶

The Gradual Civilization Act exemplifies the legislatures emboldened efforts to more precisely define Indigenous rights holders, narrowing the definition to those who are “acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown” and those persons “intermarried with Indians”.⁷ This Act also introduced the enfranchisement mechanism, combined with incentives of land title rights and payment of money to anyone that enfranchised and, importantly, established the principle of male dominance in enfranchisement: The wife and descendants of any man that enfranchised would also be automatically enfranchised but enabled women to regain First Nations membership by marrying an “Indian” man.⁸

The clear trajectory of the legislative framework respecting First Nations is one of attrition. By asserting jurisdiction over membership in First Nations and gradually contracting the scope of such membership in concert with other incentives and injustices that encouraged

2 George R, Proclamation, 7 October 1763, reprinted in RSC 1985, App II, No 1.

3 *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010, <<https://canlii.ca/t/1fqz8>> at para 114; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (CanLII), <<https://canlii.ca/t/j5cbg>> at para 29.

4 Vic 13 & 14, C 74, (1850) p 1409.

5 *Ibid*, at p 1411.

6 *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, SC 1857, c 26.

7 *Ibid*.

8 *Ibid*, at VIII.



the abandonment of Indigenous rights, the colonial governments sought to gradually reduce First Nations' populations with the ultimate aim of eliminating Indigenous identities.

CONFEDERATION TO 1951

The Parliament of Canada enacted the first post-confederation law to determine entitlement to "Indian" status in 1868 with *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*.⁹ This Act provided broad entitlement to the federal government's recognition of individuals' First Nation status. This entitlement encompassed all persons of "Indian blood, reputed to belong to" a First Nation; persons who are the children and descendants of one or two parents who were "Indian"; and the wives and children of "Indians".

In 1869, Parliament passed the first Act that would deprive women of entitlement to "Indian" status upon marriage to a non-status man. *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend provisions of the Act 31st Victoria, Chapter 42* amended the 1868 Act to deprive women and their children of "Indian" status when marrying non-status men.¹⁰

The first version of the *Indian Act* itself was passed in 1876. The Act carried on the precise definition of "Indian" as "any male person of Indian blood reputed to belong to a particular band" their children and wives¹¹. It also introduced the legal concept of "illegitimate children" and enabled the exclusion of non-marital children from the enjoyment of Indigenous rights.

Parliament amended the *Indian Act* many times through the late 19th and early 20th centuries, but the legislation was consistent in its use of various incentives and punishments to compel and coheres enfranchisement as a means of eroding the very existence of Indigenous peoples in Canada.

Enfranchisement was based on the racist proposition that Indigenous people and ways of life were inferior, as evidenced in the language of the legislation respecting entitlements to enfranchisement. Applications for voluntary enfranchisement required supporting attestations from religious institutions affirming that the applicant is of "good moral character" and "sufficient intelligence".¹² Additionally, individuals who attained advanced degrees or membership in certain professional associations could, by reason of such educational or professional qualifications, be enfranchised.¹³

The conditions and qualifications for enfranchisement are just some of multiple unmistakable markers of social Darwinism that are littered throughout the various versions of the *Indian Act* during the 19th and 20th centuries.

⁹ SC 1868, c 42 (31 Vict.).

¹⁰ SC 1869, c 6, 32-33 Vict., at s 16.

¹¹ *Indian Act*, SC 1876, c 18, 39 Vict, at s. 3.

¹² *Indian Act* 1906, RSC 1906, C 61, at s 108 [*Indian Act* 1906].

¹³ *Ibid*, at s 111.



1951 TO 1985

Parliament enacted major reforms of the *Indian Act* in 1951, including the establishment of a centralized Indian Register.¹⁴ Parliament carried forward the provisions dealing with marrying in and out of status¹⁵ and non-matrimonial children¹⁶ in the 1951 amendments, but a new category of enfranchisement was introduced to further limit entitlement to status. The “Double Mother Rule” caused any persons to lose status at the age of 21 where their mothers had married into status, and their paternal grandmother had also married into status.¹⁷

The 1951 amendments also made explicitly sexist distinctions for entitlement to status under the Act for non-matrimonial children, in which “male” persons who were “direct descendant in the male line” of status men were entitled to status, but denied status entitlement to children who were non-matrimonial (or, “illegitimate”).¹⁸ Essentially, by providing an avenue for status to direct male descendants, regardless of the marital status of their parents, but denying this same avenue for female children, the legislation created an “illegitimate female child” rule.

Pre-*Charter* reports by federal commissions and litigation efforts to challenge the marry-out rule by way of the *Canadian Bill of Rights* and the *International Covenant on Civil and Political Rights* resulted in mixed successes, but ultimately added to the synergistic pressures - along with the coming into force of the *Canadian Charter of Rights and Freedoms* - that compelled Parliament to remove the sex-based distinctions from the registration provisions of the *Indian Act*.

The 1970 Royal Commission on the Status of Women recommended that the *Indian Act* be amended to repeal the marry out rule and include the right for women to also transmit status entitlement to their children.¹⁹

The Supreme Court of Canada, in 1973, overturned a decision from the Ontario Court of Appeal which found that paragraph 12(1)(b) of the *Indian Act* (the marry out rule), was inoperative because it violated equality guarantees set out in the *Canadian Bill of Rights*. In a serious blow to the effectiveness of the Bill of Rights as a meaningful rights instrument in Canada, the majority for the Supreme Court of Canada determined that the Bill of Rights guarantee of equality on the basis of sex did not constitute a substantive egalitarian right, but a procedural right to equality of sexes in the administration of the law.²⁰

Eight years after the Supreme Court of Canada’s decision resulting in the inoculation of the *Indian Act* from challenges under the Bill of Rights, the United Nations Human Rights Committee determined that the registration provisions of the *Indian Act* did violate the membership rights of First Nations individuals guaranteed under international human rights law.²¹

¹⁴ *Indian Act*, RS, 1952, C 149, at s. 8.

¹⁵ *Ibid*, at ss 11(j) and 12(1)(b), respectively.

¹⁶ *Ibid*, at s 11(d).

¹⁷ *Ibid*, at s 12(1)(a)(iv).

¹⁸ *Ibid*, at ss 11(c) and (d).

¹⁹ *Canada, Report of the Royal Commission on the Status of Women* (Ottawa, 1970) [Cat No. Z1-1967-1] at pg 238.

²⁰ *Attorney General of Canada v. Lavell*, 1973 CanLII 175 (SCC), [1974] SCR 1349, <<https://canlii.ca/t/lxv15>>, at p 1366.

²¹ *Sandra Lovelace v Canada*, Communication No. R.6/24, UN Doc Supp No 40 (A/36/40) at para 13.2 (the Committee concluded that the marry out rule, particularly for divorced women, violated Article 27 of the ICCPR’s protections for membership in minority groups).



The sex-based distinctions in the registration provisions of the *Indian Act* were incompatible with the *Canadian Charter of Rights and Freedoms* section 15 equality guarantees, forcing Parliament to amend the Act. In 1982, the House Sub-Committee on Indian Women and the *Indian Act* made several recommendations for the amendment of the registration provisions in advance of the coming into force of section 15 of the *Charter*. These included the elimination of marriage-based entitlement to or loss of status, the re-entitlement of women who had lost status due to the marry out rule, and the preservation of status entitlement to anyone who had acquired status.²²

Parliament enacted Bill C-31 in June 1985 (retroactive to 17 April 1985) ushering significant reforms to the *Indian Act* in an effort to conform the registration provisions with the *Charter*. These amendments included the above-noted recommendations of the House Sub-Committee on Indian Women and the *Indian Act*. Marriage based entitlements and disentanglements to status were repealed and reinstated the status entitlement of persons who were denied or had lost status because of the double mother rule or the marry out rule.²³

Bill C-31 also reinstated entitlement to status for people who lost or were denied status because of an enfranchisement order under subsection 109(1) of the pre-1985 Act.²⁴ This provision permitted the enfranchise a status man²⁵ that applied for enfranchisement as well as his wife and minor children.²⁶

While Bill C-31 removed the double mother rule, Parliament introduced an ostensibly gender-neutral second generation cut off provision. Where both parents of an individual are entitled to status, they are entitled to status under paragraph 6(1)(f).²⁷ If only one of a person's parents are entitled to status under subsection 6(1) (and the individual is not entitled to status under a different paragraph of section 6(1)), that individual is entitled to status under 6(2).²⁸ If a person has only one parent entitled to status, and that parent is entitled to status only under subsection 6(2), that individual is not entitled to status. This is the second generation cut off mechanism in which two consecutive generations of parenting in which only one parent is entitled to status, entitlement is severed for the third generation applicant.

1985 TO 2021

Despite Parliament's efforts to conform the *Indian Act* with the *Charter* with Bill C-31 in 1985, the registration provisions continued to discriminate. The British Columbia Court of Appeal determined in the 2009 *Mclvor* decision that the Bill C-31 amendments to the Act caused discrimination on the basis of sex because the children of First Nations women who

22 Hurley, Mary C. and Simeone, Tonina, "Legislative Summary of Bill C-3: Gender Equality in Indian Registration Act", *Aboriginal Policy Studies*, vol 3, no 3, 2014, pp. 153-172, (18 March 2010) at 155.

23 *Indian Act*, RSC 1985, c 1-5, at s 6(1)(c) [*Indian Act*, 1985].

24 *Ibid*, at s 6(1)(d).

25 The Quebec Superior Court determined that the proper interpretation of the word "Indian" in the enfranchisement provisions of the 1952 *Indian Act* does not include an "unmarried Indian woman". *Hele c Attorney General of Canada*, 2020 QCCS 2406 (CanLII), < <https://canlii.ca/t/j8zvm> > at 157 [*Hele c Canada*].

26 *Indian Act*, RSC 1970, c 1-6, s 109(1) [*Indian Act*, 1970].

27 *Indian Act*, 1985, *supra* note 23, at s 6(1)(f).

28 *Ibid*, at s 6(2).



lost status for marrying non-status men and regained it under Bill C-31 had been treated differently under the law than men who had married non-status wives. The court found that, had these women been men, their children would have been entitled to status under subsection 6(1) and that this differential treatment amounted to discrimination on the basis of sex.²⁹

In response to the *Mclvor* decision, Parliament passed Bill C-3 in 2010 to extend 6(1) status to the children of women who had regained status under Bill C-31; unfortunately, Parliament failed to address continuing forms of sex-based discrimination related to non-matrimonial (“illegitimate”) female children and the grandchildren of women who had regained their status under Bill C-31. In 2015, the Quebec Superior Court found that the 2010 amendments to the registration provisions failed to adequately address sex based discrimination³⁰ requiring Parliament to again amend the provisions with Bill S-3.

Bill S-3 was introduced in the Senate in October 2016 with the initial intent to respond to the issues raised in the *Descheneaux* decision.³¹ Before Bill S-3 was passed by the Senate, however, the Ontario Court of Appeal released the *Gehl* decision determined that the Unknown and Unstated Parentage Policy created an unreasonably high burden of proof for applicants in determining whether and unknown or unstated ancestor was or would have been entitled to status.³² Subsequently, Bill S-3 was amended to include an Unknown or Unstated Parentage provision to establish a legislated burden of proof “every reasonable inference” in favour of the status entitlement of an applicant’s unknown parent, grandparent or other ancestor.³³

Ultimately, Bill S-3 was amended to include a significantly broader range of issues than was addressed by the Quebec Superior Court in the *Descheneaux* decision. In addition to establishing the “every reasonable inference” burden of proof for unknown or unstated parentage, Bill S-3 also removed the 1951 cut-off and addressed:

- Differential entitlement to the descendants of people who lost status under the marry-out rule;
- The omitted minor child rule (involuntary enfranchisement of children because of their mother’s subsequent marriage to non-status man); and
- The non-marital female child rule (“illegitimate” children of status men who were not of the male line).

Importantly, Bill S-3 extended 6(1) status not only to the grandchildren of these individuals, but to the “direct descendants” born before 17 April 1985, or if born after that date, born to parents who were married to each other before that date.³⁴

29 *Mclvor v. Canada* (Registrar of Indian and Northern Affairs), 2009 BCCA 153 (CanLII), at para 117 <<https://canlii.ca/t/230zn>> [application for leave to appeal to the Supreme Court of Canada denied, Sharon Donna Mclvor and Charles Jacob Crismer v. Registrar, Indian and Northern Affairs Canada and Attorney General of Canada, 2009 CanLII 61383 (SCC), <<https://canlii.ca/t/26h7t>>].

30 *Descheneaux c. Canada* (Procureur Général), 2015 QCCS 3555 (CanLII), at para 216 <<https://canlii.ca/t/gtzhm>>.

31 Bill S-3, An Act to amend the Indian Act (elimination of sex-based inequities in registration), Parl 42, Sess 1, First Reading (25 October 2016), at Summary [Bill S-3].

32 *Gehl v. Canada* (Attorney General) [2017] ONCA 319 (CanLII), at paras 70-71 <<https://canlii.ca/t/h38cg>> [*Gehl v. Canada*].

33 Bill S-3, An Act to amend the Indian Act (elimination of sex-based inequities in registration), Parl 42, Sess 1, As Passed by the Senate (1 June 2017).

34 Bill S-3, An Act to amend the Indian Act (elimination of sex-based inequities in registration), Parl 42, Sess 1, Assented to (12 December 2017) Cls 2(2).



While Bill S-3 went further in addressing issues of inequity in the registration provisions than were dealt with in the *Descheneaux* decision, ongoing issues of discrimination on the basis of age, marital status and sex persist under the Act. The 17 April 1985 cut-off date creates prima facie distinction on the basis of age and marital status while the second generation cut-off rule (the non-entitlement of individuals to status in cases of two consecutive generations in which only one parent is entitled to status affected by subsection 6(2)) continues to have disproportionate adverse effects on single mothers.

For a summary of these issues and how Bill S-3 addressed them, see *Appendix F: Quick Guide* of this Report.

Bill S-3 was a major victory for First Nations women and their descendants affected by discrimination under the registration provisions, and the implementation of the Bill has been successful in both removing the barriers the legislation was designed to remove, while greatly reducing registration processing times. Despite these successes, however, inequity remains and the very nature of the *Indian Act* remains a major impediment to the full realization of the Indigenous Rights of First Nations peoples, including the right to determine membership.

The pan-Indigenous nature of the registration provisions are not compatible with the self-determination of First Nations as the provisions apply rules nationally that do not conform to rights holders' traditional laws and customs and determines entitlement to status (a *de facto* recognition by Canada to an individual's entitlement to certain First Nations rights and privileges) based on an individual's parents' status, regardless of their Indigenous heritage.

The ability of Parliament to address the fundamental issues related to the registration provisions and the *Indian Act* in general became significantly constrained on 21 June 2021 when Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* received royal assent³⁵ (*UNDRIP Act*). This Act elevates the Declaration from a non-binding international instrument to a universal international human rights instrument with application in Canadian law; mandates the Government of Canada, in consultation and cooperation with Indigenous peoples, to make the laws of Canada consistent with the Declaration; and requires the Minister, in consultation and cooperation with Indigenous peoples and other federal ministers, to prepare and implement an action plan to achieve the objectives of the Declaration.³⁶

The Declaration codifies several Indigenous rights related to membership, including the right to self-determination and self-government, to participate in distinct political and cultural institutions, to freedom from forced assimilation, to belong to an Indigenous community, to participate in decision-making through their own representatives, and the right to determine identity and membership.³⁷

While the *Indian Act* makes a distinction between status entitlement and band membership,³⁸ the primary avenue by which an individual is entitled to Band membership is by way of

³⁵ Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, Parl 43, Sess 2, Assented to (21 June 2021).

³⁶ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, at ss 4(a), 5, and 6(1) respectively [*UNDRIP Act*].

³⁷ *UNDRIP Act*, supra note 36, at Schedule, at Arts 3, 4, 5, 8, 9, 18, and 33.

³⁸ *Indian Act*, 1985, supra note 23, at ss. 5 and 8.



registration.³⁹ In effect, the registration provisions operate as *de facto* controls over First Nations membership because entitlement to registration is the primary determinant for whether an individual is entitled to reside in or possess lands their community, access to treaty payments, entitlement to participate in democratic processes, and attend school in their communities.⁴⁰

Short-term legislative amendments can be made to the registration provisions to address some of the ongoing inequity issues under the Act; however, the very nature of the *Indian Act* is not compatible with the *UNDRIP Act*. Ultimately, to finally eliminate the adverse effects of the *Indian Act* in equality and Indigenous rights, the Act must be repealed and replaced with agreements and laws that conform with the Declaration.



³⁹ Ibid, at s 11.

⁴⁰ Ibid, at ss 18 and 20, 72, 77, and 116.

RECOMMENDATION 1:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* that includes a legislated mandate for the Minister of Indigenous Services, in consultation and cooperation with First Nations peoples, and in close coordination with the Department of Justice Canada's UN Declaration Act Implementation Secretariat, to develop and implement *an* action plan for the repeal of the *Indian Act*.





ANALYSIS

NWAC's work under the Post-Bill S-3 *Indian Act* Project focused on two categories of issues: First, the implementation of Bill S-3 and its effectiveness in addressing the inequities it was designed to address; and second, ongoing issues related to inequity and Indigenous rights.

Based on our research, engagement and analysis, it appears that Bill S-3 has effectively addressed the issues of inequality that it was designed to address and the Government of Canada has achieved important successes in the implementation of the bill, including the execution of a communications plan that resulted in increased Bill S-3 registration application rates in line with projections by the Parliamentary Budget Office and Statistics Canada and reducing processing times for registration applications despite increased rates following Bill S-3.

Despite these success, several ongoing issues persist under the registration provisions, including (but not limited to) the second generation cut-off rule, age and marital status-based discrimination, convoluted and confusing language in the legislation, pan-indigenous approaches to First Nations identity and membership, and inconsistency with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).

The following analysis examines the successes and shortcomings of Bill S-3; however, the central finding and conclusion of this report is that the time has come for the *Indian Act* to be repealed and replaced with treaties and laws that are consistent with UNDRIP.

IMPLEMENTATION OF BILL S-3

REGISTRATION RATES AND PROCESSING TIMES

Registration rates under Bill S-3 provisions are within estimates to date and Indigenous Services Canada has made significant process in reducing registration processing times and is poised to meet its six-month service standard by September 2022.

The Parliamentary Budget Office estimated that Bill S-3 will have the effect of extending status entitlement to approximately 670,000 additional individuals, with an expected 270,000 with likely to apply to register.⁴¹ Statistics Canada identified a range of registration rate growth as a result of Bill S-3, ranging from a low growth of 16,200 S-3 registration between 2018 and 2032 and 18,200 between 2019 and 2041, to a high growth rate of 25,600 between 2018 and 2032 and 225,200 between 2019 and 2041.⁴² Reports indicate that as of April 2022, over 27,000 individuals have registered under Bill S-3 provisions.⁴³ This likely indicates that S-3 registration rates are somewhere between Statistics Canada's low and high estimates.

41 Canada, "Bill S-3: Addressing sex based inequities in Indian registration" PBO (5 December 2017) at pg 1 < https://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf > [PBO Report].

42 Canada, "Projections of the Indigenous populations and households in Canada, 2016 to 2041: Overview of data sources, methods, assumptions and scenarios" StatsCan (6 October 2021) at Table 5 < <https://www150.statcan.gc.ca/nl/pub/17-20-0001/172000012021001-eng.htm> > [StatsCan, Oct 2021].

43 FAFIA, "Brief on Bill S-3" submitted to the Standing Senate Committee on Aboriginal Peoples (9 May 2022) < https://sencanada.ca/Content/Sen/Committee/44/APPA/briefs/Brief_Day-McIvor-Palmater_e.pdf >.



Long registration application processing times have been a significant point of frustration among applicants. Some participants at NWAC's engagement sessions shared their experiences and the experiences of their family members waiting years to receive decisions on their applications to register for status or being told months after submitting their applications that documents were missing. The extent of these delays have been so significant that they contribute to individuals abandoning their applications in some instances and even cause suspicion that the government is deliberately retarding application processing times to dissuade individuals from applying to register.

A common issue NWAC heard reflected in engagement sessions was the difference between what Indigenous women knew about their family histories and what they could prove. Indigenous family oral histories, teachings and lineages are recorded and passed down in ways that may not fit the documentation standards required by the *Indian Act*. Many Indigenous women indicated to NWAC that government staff were not trained or equipped to answer questions about how to identify family lineages when formal documentation is not available or not reflective of status applicants' lived realities.

These patterns are perpetuating distrust and frustration. The decision-makers at the Indian Status Registration unit wield a lot of power. Status applicants expressed frustration they are not in control of formally determining such a key component of their identity. The decision-maker is often not someone the applicant knows, who does not live in their community, and bases their decision upon submitted documents and ever-changing rules. As one frustrated survey respondent told NWAC, "This really affects my very identity, my kinship ties, my sense of belonging. Why should the settlers decide who is Indian enough?"

The high turnover of staff further makes it difficult for applicants. Applicants are made to wait exceedingly long periods of time, after which they are informed that they are missing documentation and are required to resubmit repeatedly. One survey respondent told NWAC, "The time to process applications is unreasonable. Most applications take over 2 years; not to mention the status card process after registration has taken place [...] How does one suddenly become non-native due to an expired card?" Another respondent told NWAC that her status application has been undergoing processing for 9 years now. Her mother falls under 6(1), and all her cousins, aunts, uncles are full status. Yet, her and her sister cases are still ongoing. She has provided her mother, her uncle and maternal grandparents' full birth certificates, status cards and marriage certificates. Even with all this information, nothing has come of her application status. This leads to people abandoning the process altogether.

NWAC heard many Indigenous women indicate government staff are not trained or equipped to answer questions about how to identify family lineages when formal documents are not available or not reflective of status applicants' lived realities.

Indigenous Services Canada has begun to address the processing issues by investing over \$30 million to reduce registration application processing times since 2017.⁴⁴

As part of Indigenous Services Canada's efforts to deliver timely services for registration, its 2022-2023 Departmental Plan indicates that the department will improve client services by

⁴⁴ Canada, "The Final Report to Parliament on the Review of S-3: December 2020", Indigenous Services Canada (December 2020) < <https://www.sac-isc.gc.ca/eng/1608831631597/1608832913476#chp11> >.



creating training programs so that registrations can be completed on reserve and addressing the registration backlog by bringing services closer to urban clients through, among other things, expanding trusted source partnerships.⁴⁵

As of 14 March 2022, Indigenous Services Canada's S-3 Processing Units reported processing an average of 1,600 files per month, an increase from 775 files per month in April 2021 and resulting in a reduction in registration processing times down to 10 months. Indigenous Services Canada has indicated that it expects to be within its six-month service standard by September 2022.⁴⁶

Individuals can obtain assistance with the application process in three ways: Contacting registration administrators at Band offices⁴⁷, contacting Indigenous Services Canada regional offices⁴⁸, or contacting Indigenous Services Canada's Public Enquiries Contact Centre⁴⁹.

COMMUNICATIONS

Since the coming into force of Bill S-3, significant communications efforts to promote awareness of the legislative amendments have been undertaken by the Government of Canada and NIOs, including NWAC.

The Government of Canada initiated a two-pronged approach in 2016 to respond to the finding by the Superior Court of Quebec in *Descheneaux* that the registration provisions of the *Indian Act* violated the *Charter*-protected equality rights of Indigenous women and their descendants.⁵⁰ This approach included legislative amendments and a collaborative process on registration, band membership, and First Nations citizenship. The collaborative process included the establishment of an Indigenous Advisory Panel, the appointment of a Minister's Special Representative, funding for community-based consultations, and the implementation of a communications strategy that utilized social media, fact sheets, and information sessions.⁵¹

Following the full coming into force of Bill S-3 in 2019, Indigenous Services Canada has developed additional information resources on the legislative changes⁵² and application processes⁵³. These resources include infographics and online videos in accessible language as well as multiple links to further online resources and departmental contact information.

Indigenous Services Canada also made themselves available to deliver presentations and answer questions at several of the engagement sessions NWAC hosted under this project.

45 Canada, "Departmental Plan 2022-23" Minister of Indigenous Services Canada (2022, ISSN: 2561-6153) at 11 < https://www.sac-isc.gc.ca/DAM/DAM-ISC-SAC/DAM-CORP/STAGING/texte-text/dept-plan-2022-2023_1646161786888_eng.pdf >.

46 Figures provided by Stuart Hoofst, Manager at Indigenous Services Canada's Registration and Integrated Program Management on 25 March 2023.

47 Canada, "Search by First Nation", Crown-Indigenous Relations and Northern Affairs Canada (7 December 2021) < <https://fnppn.aadnc-aandc.gc.ca/fnp/Main/Search/SearchFN.aspx?lang=eng> >.

48 Canada, "Regional offices", Indigenous Services Canada (3 November 2021) < <https://www.sac-isc.gc.ca/eng/1100100016936/1534342668402> >.

49 Canada, "Contact Indigenous Services Canada", Indigenous Services Canada (21 December 2021) < <https://www.sac-isc.gc.ca/eng/1291132820288/1603310905799> >.

50 *Descheneaux v. Canada (Procureur Général)*, 2015 QCCS 3555 (CanLII), at para 171 < <https://canlii.ca/t/gtzhm> >.

51 CIRNAC, "Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship: Consultation Plan" (8 July 2019) < <https://www.rcaanc-cirnac.gc.ca/eng/1522949271019/1568896763719> >.

52 ISC, "Bill S-3: Eliminating known sex-based inequities in registration" (10 June 2021) < <https://www.sac-isc.gc.ca/eng/1467214955663/1572460311596> >.

53 ISC, "How to apply for Indian status" (21 March 2022) < <https://www.sac-isc.gc.ca/eng/1462808207464/1572460627149> >.



National Indigenous Organizations have also undertaken significant communications efforts to explain Bill S-3's changes to the registration provisions to the public. The Assembly of First Nations has produced information resources on Bill S-3⁵⁴

One objective of this project is to foster engagement and encourage people to learn more about these new entitlements via NWAC's Bill S-3 Communications Strategy plan. This includes the creation and distribution of information resources on NWAC's website, various social media accounts, magazine publications, and print.

NWAC posted several information resources to our *Indian Act* Webpage⁵⁵, on the legislative amendments brought in under Bill S-3, as well as ongoing issues related to enfranchisement⁵⁶, martial status⁵⁷, the second-generation cut-off rule⁵⁸, and unknown and unstated parentage⁵⁹. As part of NWAC's Kci-Niwesq magazine, Issue 9 was dedicated to issues and stories related to the *Indian Act*, including ongoing inequities and changes under Bill S-3. A supplementary document entitled "Inequality and the *Indian Act*: A History of Harm and the Healing Path Forward"⁶⁰ was distributed in print nationwide.

As part of NWAC's Bill S-3 Communications Strategy plan, NWAC launched the Bill S-3 Social Media Campaign on all its social media platforms. On Twitter, there were 17 posts on the Bill S-3 Campaign, which earned 13,396 impressions and 274 engagements, with an engagement rate of 2% (benchmark rate: 1%). There were 61 reactions, 36 shares, 74 post link clicks, and 100 other post clicks. On Facebook, there were 16 posts on the Bill S-3 Campaign, which earned 52,145 impressions and 3,030 engagements, with an engagement rate 5.8% (benchmark rate: 2%). There were 471 reactions, 354 shares, 810 post link clicks, and 1,272 other post clicks. On LinkedIn, there were 10 posts about the Bill S-3 Campaign, which earned 6,131 impressions and 346 engagements, with an engagement rate of 5.6% (benchmark rate: 2%). Overall, there were 103 reactions and 29 shares. On Instagram, there were 6 posts on the Instagram Feed and 17 Instagram Stories about the Bill S-3 Campaign. The Feed posts earned 3,474 impressions and 291 content interactions, with an engagement rate of 8.4% (benchmark rate: 3%). The Stories earned 3,701 impressions overall.

The Bill S-3 Social Media Campaign was extremely successful in garnering awareness and fostering engagement. Most notably, while Facebook received the greatest number of impressions, Instagram, Facebook, and LinkedIn received the highest engagement rates across all social media platforms respectively, well surpassing their engagement rate benchmarks by a significant margin. Given that the objective of the Bill S-3 Social Media Campaign was to drive the audience to the website for more information and to register, the KPIs for this campaign, including engagements, engagement rates, clicks, and impressions, were successful.

54 See, for example: AFN, "Rights: Bill S-3 and First Nations Citizenship" Sector Update (June 2021) < <https://www.afn.ca/wp-content/uploads/2021/07/Sector-Update-Bill-S-3-First-Nations-Citizenship-June-2021-EN.pdf> >; AFN, "An Act Respecting Membership" Discussion Paper (19 February 2019) < <https://www.afn.ca/wp-content/uploads/2020/01/00-19-02-06-Discussion-Paper-Citizenship.pdf> >;

55 NWAC, "Indian Act" < <https://www.nwac.ca/policy-areas/indian-act/> >.

56 Appendix A.

57 Appendix B.

58 Appendix C.

59 Appendix D.

60 Appendix G



AWARENESS AND COMPLEXITY OF REGISTRATION PROVISIONS

The registration provisions of the *Indian Act* are convoluted, complicated and unreadable without reference to pre-1985 versions of the Act which are not easily available. Despite multiple communications instruments published by the Government of Canada, NWAC and other National Indigenous Organizations that work to explain Bill S-3 and the registration provisions, the confusing nature of section 6 of the *Indian Act* remains a significant barrier to registration.

The wording of the registration provisions is not conducive to the understanding necessary for individuals to determine whether they are entitled to status. In addition to the inaccessible language in section 6, the references in that section to pre-Bill C-31 provisions without explanation renders paragraphs 6(1)(a.1) through (a.3), (d) and (e) virtually unreadable to anyone not intimately familiar with the historical versions of the legislation, or access to a law library and legal research training.

The heavy lifting of undertaking genealogical research has only just begun once an individual has deciphered the esoteric language of section 6.

Referring to paragraphs 12(1)(a)(iv), 12(1)(b), 12(2), or 12(1)(a)(iii) per 109(2) without explanation is meaningless. These provisions refer, respectively, to the double mother rule, the marry out rule, the non-matrimonial female child rule, and the omitted minor child rule. Unfortunately, there is practically no way for the vast majority of the public to know that references to these pre-1985 provisions refer to the corresponding circumstances.

It is not reasonable to expect that complex legislative provisions can always be distilled down for public consumption. In the case of section 6 of the *Indian Act*, however, reference to versions of the legislation that are available almost exclusively at law libraries and the convoluted and technical use of language is not commensurate with the purpose of provisions that are targeted to non-expert members of the public. It is undeniable that certain acts are necessarily complex and that efficiency demands reference to other provisions, acts or regulations by way of pinpoint. This is not the case for section 6 of the *Indian Act* because it is not targeted to financial, legal, or technical experts in any particular field. It is targeted to average individuals who ought to not be required to possess a legal degree in order to be able to decode the provisions.

During our Round Table engagements, some participants discussed the barriers they faced in understanding the *Indian Act*—namely, what their rights are and how to attain status they qualify for.¹ A lack of clarity concerning Bill S-3 provisions was a common issue for participants. For example, many participants do not understand who has 6(2) status or found the cut-off dates with regards to the marital status issue of 1985 and 1987 too confusing. One recommendation that was repeatedly expressed for addressing this concern was that bands should be responsible for keeping people more informed and educated about *Indian Act* provisions, rights, and Bill S-3 eligibility.

During the application process, there is generally a lack of information. According to participants who have gone through or who are currently undergoing the process, reasons as to why they are placed on a particular level of status are not provided, even where both parents have status and band membership. If a person's status is changed (e.g., a categorical amendment from 6(2) to 6(1) status), the individual is not notified and usually comes to learn of the change later (e.g., while registering a family member or relative).



Some community centers that are known for helping applicants with their status applications, such as the Hamilton Regional Indian Centre, have not always been able to accurately identify who qualifies. Some participants have said that they were told that their children qualified for status and should apply but after applying and doing all the paperwork (including getting their long-form birth certificates), they were still denied status as they did not qualify after all.

One participant shared that making parents apply for status for their children is yet another prohibiting factor due to the overwhelming process and believes status should automatically apply for children born to Indigenous parents. Some even claim that the reasons their applications were denied are incorrect. This has led many to believe that Indigenous people need to have access to the information the government has about them, as some of this information is inaccurate at best.

Front-loading the registration process with convoluted provisions that refer to historical provisions without explanation is dissuasive for individuals considering applying to register for status, particularly in the context of limited availability of support for individuals in the registration process.



RECOMMENDATION 2:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* that includes the re-wording of section 6, based on consultations with First Nations, that is clear and accessible.



RECOMMENDATION 3:

That Indigenous Services Canada continue working with Bands, NIOs and urban Indigenous organizations so that these organizations can provide support and advice to individuals throughout the registration process.





INDIAN RESIDENTIAL SCHOOLS

NWAC releases this Final Report at a time where thousands of unmarked graves of Indigenous children who attended Indian residential schools have been discovered, with more discoveries ongoing. NWAC reminds everyone Indigenous families and communities are carrying intergenerational and generational pain and ask for courage as they walk their healing journeys.

The *Indian Act* introduced the band council system, replacing existing Indigenous governance structures with a system over which Canada could more easily exert control. In this legislated transition, the *Indian Act* greatly disempowered Indigenous women who traditionally held powerful positions. The Indian Residential School (IRS) system then took their children away, severing links to their culture and identity.⁶¹ This was genocide.

The assumptions underpinning IRS policies regarded Indigenous People as unfit parents, heathens who believed in inferior traditions and laws.⁶² These assumptions bolstered the government's control over Indigenous children's upbringing. Church-run IRS facilities sought to civilize Indigenous children by discouraging Indigenous languages and traditions (often through corporal punishment) and by enforcing Euro-Christian worldviews through brainwashing techniques. This tutelage was frequently accompanied by sexual, physical and emotional abuses.

The IRS system enacted great harms on Indigenous family structures. Removing children en masse and by force to institutions set up to "kill the Indian in the child" was genocide.⁶³ The IRS system was a key pillar in Canada's assimilationist agenda.

In today's equality rights lens, separating children from their parents and sending them to state-run institutions rampant with abuse is an egregious human rights violation on the basis of race. A child listed on the Indian Register went to IRS because the government assumed the child needed reforming.

Indigenous parents and community leaders were powerless to stop state authorities from rounding up children each September and shipping them to far away institutions. Some Indigenous People enfranchised just to spare their children from being listed on the Indian Register.⁶⁴ Many parents did not see their children again. Death rates for Indigenous students at IRS are difficult to determine with accuracy due to missing records, but the TRC estimates over 6,000 children died, or 1 in 25.⁶⁵

The IRS system operated for over a hundred years, destroying cultural identities for hundreds of thousands of Indigenous children who survived. Indeed, many participants in NWAC's engagement sessions on this project referred to their ongoing experiences with intergenerational trauma and the broken ancestral bonds stemming from the IRS system.

61 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: 2015) [TRC Final Report] at page 2.

62 TRC Final Report, supra note 61, at page 4.

63 *Tk'emlúps te Secwépemc First Nation v Canada*, 2021 FC 988 at para 56.

64 *Nicholas v Canada*, BCSC File No 215579.

65 See TRC Final Report and Daniel Schwartz, "Truth and Reconciliation Commission: By the numbers" CBC News (2 June 2015), online: < <https://www.cbc.ca/news/indigenous/truth-and-reconciliation-commission-by-the-numbers-1.3096185> >.



The severing of familial relationships through the IRS system had a devastating impact on the intergenerational conveyance of knowledge and culture that very likely contributes to a divide between the descendants of the direct victims of the genocide and their Indigenous communities, thereby suppressing post-Bill S-3 registration rates.

INTERGENERATIONAL SEPARATION

The state-severed familial and community relationships among First Nations has created significant challenges for individuals to obtain the information and evidence they require to prepare an application to register for status.

Indigenous women are the bedrock of community social development and relations. Indigenous mothers and aunts raise children in their tradition, imparting language and knowledge. Elder grandmothers teach culture and spirituality. Indigenous girls are the next generation's Knowledge Keepers and changemakers.

The *Indian Act* and its preceding legislative frameworks operated for over a century to gradually enfranchise First Nations by legislating the circumstances under which the Government of Canada would recognize the legal status of Indigenous peoples. The gradual enfranchisement objectives and the education provisions of the *Indian Act* were combined with racist child welfare systems to manufacture a multifaceted system of intergenerational cultural genocide.

First Nations children have been over-represented in foster care systems for many decades and continue to be over-represented today. Although Indigenous children account for just 7.7% of Canada's child population, they represent over 52% of children in foster care.⁶⁶ One of the most famous efforts by colonial governments to sever First Nations children from their heritage per *viam* the child welfare system was the Sixties Scoop. The large-scale removal of Indigenous children from their homes and communities beginning in the mid-1960s inflicted a collective trauma on First Nations families and communities⁶⁷ and this trauma has reverberated throughout generations.

Canadian government records estimate over 11,000 children were scooped, but more recent research suggests that figure is closer to 20,000.⁶⁸

Participants at the Roundtables noted that there remains a huge need to help families deal with inter-generational trauma from residential schools, the 60s scoop, and the continuing trend of over-representation in the foster care system.

The *Indian Act* does not explicitly govern child welfare services, because those laws fall under provincial-territorial jurisdiction. An Act respecting First Nations, Inuit and Métis children, youth and families came into force January 2020 and provides First Nation governance bodies the authority to take over child welfare services.⁶⁹ So far, a small number of Indigenous governance bodies are proceeding to exercise their authority to enact their own child welfare laws.

66 Canada, "Reducing the number of Indigenous children in care", ISC, (17 January 2022) < <https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851> >.

67 *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (CanLII), <<https://canlii.ca/t/gn2vg>>, at 218 [*Caring Society v. Canada*].

68 Maren Tait, "Impacts of Colonialism on Indigenous Children and Families in Manitoba" Manitoba Association for Rights and Liberties (26 November 2018), online: < <http://www.marl.mb.ca/articles/35-impacts-of-colonialism-on-indigenous-children-and-families-in-manitoba> >.

69 An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24, [FNIMCYF Act].



NWAC did not engage with Indigenous women about child welfare experiences through this project. NWAC offers this brief issue summary to provide necessary context for understanding the *Indian Act's* remaining inequities. As Canada takes steps to reconcile with Indigenous Peoples, revisiting the *Indian Act's* provisions and operation, status entitlement decision-makers must remain sensitive to how inequities continue to adversely impact Indigenous families today.



CASE STUDY

Marcia Brown was born a member of the Indigenous community at Beaverhouse, 35 km north-east of Kirkland Lake, Ontario. She received status through her father's membership in the Temagami First Nation.⁷⁰ Children's Aid Society workers first took her from her family at age four, the first in a series of removals that eventually led to a permanent foster placement with a non-Indigenous family when she was nine years old.

When Ms. Brown turned 17, her foster parents put her on a plane to North Bay Ontario with only the clothes she was wearing and the clothes she wore when she arrived at their house at age 9.⁷¹ Ms. Brown had completely lost her Indigenous identity and culture. She was unable to cope, failed to integrate back with her home community, and returned to non-Indigenous society where she continued to struggle.

Ms. Brown sued the federal government for breaching its duty to take care of her in alignment with treaty and Indigenous rights agreements.⁷² Her case became a class action on behalf of Indigenous children taken from their homes and placed with non-Indigenous families. Ms. Brown came to represent generations of children who could have grown up knowing their ancestry, learning their culture, and speaking their language. Instead, child welfare policies forcibly assimilated these children.

The class action concluded with an \$800 million settlement and a ruling that Canada failed to protect vulnerable Indigenous children's cultural identities.⁷³



Until recently, Canada and the provinces exercised their authority to provide child and family social services for Indigenous Peoples. These top-down, state-imposed programs continued the traumas Indian Residential school started.

⁷⁰ *Brown v Canada (Attorney General)*, 2010 ONSC 3095, at para 20.

⁷¹ *Ibid*, at para 50.

⁷² *Ibid*, at para 120.

⁷³ *Ibid*.



The vast consensus among Indigenous stakeholders is Indigenous kids belong at home with their families and communities, to avoid repeating the traumas associated with their removal through the IRS and 60s scoop systems. Whether this means leaving Indigenous kids in homes and communities among harm or removing them from their cultural homelands remains unsettled.⁷⁴ This is not an impasse, but rather a cause-and-effect cycle: When Indigenous communities are not provided consistent funding to deliver child and family services, workers burn out and children can more easily fall through the cracks. Some experts argue that balancing Indigenous governance rights and sufficient funding will eliminate the justifications for removing Indigenous kids from their communities.⁷⁵

The first five TRC Calls to Action relate to child welfare, including a Call to develop legislation affirming Indigenous government rights to establish their own child welfare agencies.⁷⁶ Canada's laws governing Indigenous child and family services are shifting to allow Indigenous governance structures to assume responsibility for child and family services in their territories.

The Indian residential school system, the 60s scoop and ongoing discriminatory child welfare policies shape Indigenous People's identities and connections to their ancestry. These impacts intersect with the *Indian Act* membership provisions' remaining inequities.

There are examples of individuals who have been successful in gaining status under the *Indian Act* as a result of Bill C-31, Bill C-3, or Bill S-3, but who still face great challenges obtaining information about their familial relationships at the community level. One participant, a 60s scoop survivor who gained status, was placed in a band, but did not know why it was that particular band. All inquiries that she had made to her Ontario-based band over the years were met with hostility or were simply ignored. She continues to deal with rejection by her band community. Although she applied for status for her children two years ago, she has received no information about the status of their applicants to date. She believes that having status does not automatically guarantee connection with one's heritage or community. As another survey respondent told NWAC,

"Whether we live on or off reserve should not determine what rights we are or are not entitled to."

74 Hadley Friedland, "Tragic Choices and the Division of Sorrow: Speaking about Race, Culture and Community Traumatization in the Lives of Children" (2009) 25 Can J Fam L 223.

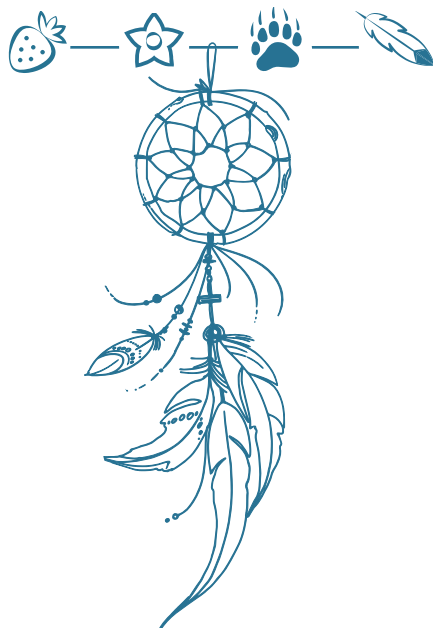
75 Wanda Wiegman, "Child Placement and the Legal Claims of Foster Caregivers" (2019) 52 UBC L Rev 631 – 695.

76 Truth and Reconciliation Commission of Canada: Calls to Action (Winnipeg: Truth and Reconciliation Commission of Canada, 2012).

RECOMMENDATION 4:

That Indigenous Services Canada develop a funding program, in consultation and cooperation with First Nations peoples, NIOs and grassroots organizations, for the purpose of supporting programs and activities that help the descendants of the direct victims of the cultural genocide learn about and connect with their Indigenous heritages and communities.





OTHER INDIGENOUS MEMBERSHIP AND DE-REGISTRATION

While the *Indian Act* itself does not preclude entitlement to register because of membership in a non-First Nation Indigenous group, being registered under the *Indian Act* can prevent membership in other Indigenous groups because of membership rules, treaties and legislation. The enfranchisement provisions of the *Indian Act* operated for over a century to separate First Nations women and their children from their communities, yet the complete removal of deregistration options from the *Indian Act* creates a framework for some individuals that prevents them from enjoying membership rights different Indigenous groups with whom they more closely identify.

Many individuals are registered under the *Indian Act* as children. Were one of the parents of a child registered under the *Indian Act* is a member of an Inuit or Métis community the child can face barriers in exercising their full membership rights.⁷⁷

Additionally, some individuals from multi-cultural Indigenous families who have not been registered under the *Indian Act* as children may be dissuaded from registering for status because of the permeant nature of registration. The singular nature of membership in some Indigenous groups causes significant barriers for individuals from multi-cultural Indigenous families that can prevent them from associating with and enjoying the benefit of membership in two or more of their Indigenous ancestral lineages.

Because membership in some Indigenous Groups prohibits membership in another Indigenous group, including being registered under the *Indian Act*, the absence of a de-registration provision under the *Indian Act* can have the effect of denying individuals membership in different Indigenous groups with which they more closely identify.

⁷⁷ For example: *Metis Settlement Act*, RSA 2000, c M-14, at s. 75; Métis Nation of Ontario, *Registration Policy* (adopted by special resolution of the 21st MNO AGA, August 2014), at "Self-Identification"; Nunavut Tunngavik, *The Nunavut Agreement*, at Art. 1.1.1 "Inuit means (a) ... but does not include persons enrolled in any other Canadian aboriginal land claim agreement..."

RECOMMENDATION 5:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* that includes a provision to permit an individual to de-register from the Indian Register without affecting the registration entitlement of their children.





IMPLEMENTATION IN URBAN AREAS

First Nations individuals living in urban areas do not have access to all of the benefits that status individuals located on-reserve can access and this may diminish the impetus for some entitled individuals from undertaking the efforts to register.

The Supreme Court of Canada determined 20 years ago that “Aboriginality-residence (off-reserve band membership status)” is an analogous ground of prohibited discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*.⁷⁸ While recognition that the *Charter* prohibits discrimination against band members on the basis of off-reserve residency has protected individual’s rights to continue to participate in and benefit from membership in their First Nations’ band councils even when the move to urban centres, the practical reality is that the majority of band services are provided at the local level.

Urban First Nations individuals who are, or think they may be, entitled to register under the *Indian Act* will weigh the benefits of registration against the costs and risks. Even where an individual may determine that the benefits of registration are worth the time, effort and expense of the registration process, additional risks related to community-level acceptance can be factors that determine whether an individual will ultimately submit their application to register.

The rights of non-status Indigenous people living on reserve are quite limited. Without band membership, they do not enjoy the same rights and benefits, including the right to vote, treaty benefits, and tax exemptions.¹⁶ Since decisions related to housing and education are made by band council, the ability of non-status and non-member Indigenous people to gain access to benefits is, in many cases, restricted or entirely denied. Divorced or separated Indigenous women often face discrimination by band councils, hence barring them from accessing these benefits.

Some have reported that bands do not recognize individuals residing outside of the reserve, even after they have successfully obtained status.¹⁷ For many Urban-residing Indigenous people still seeking to gain status, they are often excluded since they are unknown by the members of their community. This makes it difficult for them to prove entitlement to status. Off-reserve band members also do not qualify for many benefits and resources through their bands the same way a band member residing on the reserve would qualify. Ultimately, connections to reserves are being lost, and one does not simply regain band membership by obtaining status. The *Indian Act* does not require the names of individuals who are entitled to have their names entered on band lists maintained by the Department to be entered on such lists unless an application is made to the Registrar.⁷⁹ After gaining status, an individual must go through their band council for acceptance, whereby they are often met with rejection.

Some urban-residing individuals who have regained status continue to be discriminated against by their band community, as they are denied band membership. The reasons are

⁷⁸ *Corbiere v. Canada* (Minister of Indian and Northern Affairs), 1999 CanLII 687 (SCC), [1999] 2 SCR 203, <<https://canlii.ca/t/1fqhc>>, at para 6.

⁷⁹ *Indian Act*, 1985, supra note 23, at s. 8(5).



usually unclear and arbitrary. One participant residing in an urban setting stated that, even though she obtained her status 5 years ago, she still faces discrimination on the reserve. Some claim that this may be due to the imbalance of power among Indigenous families on the reserve. In other words, Indigenous families with powerful stature and influence on the reserve may deter other Indigenous people with lesser cultural connections from seeking membership rights to their First Nation band community. The lack of connections to one's community also makes it difficult, or in some cases, impossible to obtain the necessary information required for a status application.

For a full analysis on some of the issues affecting registration among First Nations individuals in urban areas, see Appendix I: Implementation of Bill S-3 in Urban Areas.

Recommendation 3 (above): That Indigenous Services Canada continue working with Bands, NIOs and urban Indigenous organizations so that these organizations can provide support and advice to individuals throughout the registration process.

Recommendation 4 (above): That Indigenous Services Canada develop a funding program, in consultation and cooperation with First Nations peoples, NIOs and grassroots organizations, for the purpose of supporting programs and activities that help the descendants of the direct victims of the cultural genocide learn about and connect with their Indigenous heritages and communities.

UNKNOWN AND UNSTATED PARENTAGE POLICY

The *Indian Act* imposes the onus of proof of entitlement to register on the applicant. In the context of over a century of stat-led strategic family separation laws and policies, applicants face enormous challenges accessing information and documentary evidence to support an application to register under the *Indian Act*. Despite recent appellate level jurisprudence that circumstantial evidence of Indian status of an ancestor is the reasonable burden of proof⁸⁰ and the reduced burden of proof for unknown or unstated parentage introduced by Bill S-3 to paragraph 5(6) of the *Indian Act* of "every reasonable inference in favour of" the applicant,⁸¹ the government continues to maintain a policy that status entitlement of unknown or unstated parents, grandparents or other ancestors is to be determined on a balance of probabilities.⁸²

Had Parliament intended that the Registrar apply the balance of probabilities burden in instances of unknown or unstated parentage, it likely would have used such language in Bill S-3, as it has in dozens of other acts. In this instance, Parliament chose language for the burden of proof in such instances that is clearly less than "more likely than not", "balance of probabilities", or "preponderance of the evidence". This strongly indicates that the legislated burden of proof of "every reasonable inference" on applicants for proving the status entitlement of an unknown or unstated parent, grandparent or other ancestor is a lesser burden than balance of probabilities.

80 *Gehl v. Canada*, supra note 32, at paras 72-73.

81 *Indian Act* RSC, 1985, supra note 23, at s 5(6).

82 Canada, "Unknown or unstated parentage" ISC (27 April 2022) < <https://www.sac-isc.gc.ca/eng/1516895024877/1572460772889> >.



Such a reduced burden of proof is consistent with the legislative history of the registration provisions of the *Indian Act*. Prior to Bill C-3, the *Indian Act* contained a presumption of status entitlement for the non-matrimonial (“illegitimate”) children of status women.⁸³ While this presumption in favour of status entitlement was rebuttable by way of protest,⁸⁴ the initial burden of proof in such instances was less than balance of probabilities.

The unknown or unstated parentage issue relates closely with ongoing sex-based inequities caused by the second generation cut-off rule (discussed below) because Indigenous women are often disproportionately affected by the burdens and risks related to identifying the status fathers of their children where conception resulted from circumstances that may put either or both parents at social, economic, or physical jeopardy.

In order to limit the disproportionate distribution of risks for women related to the second generation cut-off rule and to conform with the legislated burden of proof in instances of unknown or unstated parentage, Indigenous Services Canada should amend its policy to ensure that a evidentiary burden of “every reasonable inference” is applied by the Registrar in these circumstances.

This stricter burden of proof is inconsistent with Bill S-3 and risks exposing Indigenous women to risks of emotional, social and physical harm in some instances where the other parent of their child does not want to be identified. In effect, maintaining the balance of probabilities burden in instances of unknown or unstated paternity can force women to choose between passing on entitlement to register to their children or preserving their social and even physical safety.



83 *Indian Act*, 1970, *supra* note 26, at s 11(1)(e).

84 *Ibid*, at s 12(2).

RECOMMENDATION 6:

That Indigenous Services Canada amend its policy with respect to unknown or unstated parentage to ensure that every reasonable inference in favour of a determination that an applicant's unknown or unstated parent, grandparent, or other ancestor is or was entitled to register for status, including but not limited to, sworn affidavits to the affect that an unstated parent or grandparent of the applicant is or was entitled to register.





ONGOING ISSUES

SECOND GENERATION CUT-OFF

The second generation cut-off rule is a vestigial of the Act's gradual enfranchisement origins and has the effect of reducing status entitlement over time and, ultimately, to denude First Nations of their legal status as Indigenous peoples. Prior to Bill C-31, the *Indian Act* limited status entitlement in instances of two consecutive generations of mixed status-non-status parentage through the double mother rule.⁸⁵ The rule only applied to instances where status men married non-status women because the marry-out rule removed the status entitlement of a status women and her children upon marriage to a non-status man.

Parliament sought to conform the registration provisions with the *Charter* of Rights and Freedoms while maintaining a registration entitlement cut-off in instances of two consecutive generations of mixed status-non-status parentage. In order to achieve an ostensibly gender-neutral second generation cut-off, Parliament created two categories of status: one, 6(1), that granted individuals the right to pass on status entitlement to their children, and another, 6(2), that prevented individuals from passing on their status unless the other parent of their child(ren) is also entitled to status.⁸⁶

The UN Human Rights Committee recalled, in reference to the differential treatment individuals can suffer based on different status under the *Indian Act*, that governments are required to adopt special measures to diminish or eliminate conditions that perpetuate discrimination, even when the differential treatment is practiced by the community or private persons or bodies.⁸⁷ The stigma faced by some individuals with 6(2) status can be deeply harmful. While the *Indian Act* does not state that 6(1) status is a superior or better status than 6(2), the implications of the legislative framework gives rise to differential treatment on the basis that individuals with 6(2) status have a diminished status under the Act. This is enforced by the fact that the Act limits the right of 6(2) individuals to pass their status on to their children.

The pre-1985 double mother rule and the current second generation cut off rule are predicated on the notion that limiting entitlement to register to not more than two generations of mixed status-non-status parentage is necessary to preserve Indigenous identity; however whether there is empirical evidence supporting the premise that single-parent households or multi-cultural families are less-capable of conveying cultural identity to children is debateable.

Strong statistical evidence shows that on-reserve status First Nations children are far more likely to speak an Aboriginal language as their first language than off-reserve or non-status children (36% compared to 6% and 1%, respectively).⁸⁸ This trend, however, may be a symptom of the much lower availability of educational and cultural services for off-reserve and non-status children. In essence, the second generation cut-off rule creates a

⁸⁵ *Indian Act*, 1970, supra note 26, at s 12(1)(a)(iv).

⁸⁶ *Indian Act*, 1985, Supra note 23, at s 6(2).

⁸⁷ UNHRC, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2020/2010, CCPR/C/124/D/2020/2010 (11 January 2019), at para. 7.11 [McIvor, UNHRC].

⁸⁸ Bougie, Evelyne, "Family, community, and Aboriginal language among young First Nations children living off reserve in Canada" StatsCan (23 April 2014) < <https://www150.statcan.gc.ca/n1/pub/11-008-x/2010002/article/11336-eng.htm> >.



self-fulfilling prophecy that mixed-ancestral families are less inclined to convey Indigenous culture to their children by limiting entitlement to status of these children, thereby severing access to educational and cultural services and activities that are necessary to maintain bonds with their Indigenous heritage.

SECOND GENERATION CUT-OFF AND INDIGENOUS POPULATION SUSTAINABILITY

While there has been major population growth due to the expansion of status entitlement parameters in the *Indian Act*, the second generation cut-off will increase the rate of First Nations individuals not entitled to register in line with the increasing rates of status-non-status parenting.⁸⁹ Co-parenting between status and non-status individuals will likely cause a substantial decline in status entitlement of newborn children throughout the 21st Century.⁹⁰

There is increasing prevalence of status-non-status parenting across Canada leading to increasing prevalence of the second-generation cut-off especially among off-reserve population.⁹¹ The population of descendants who will not be entitled to status is projected to increase within four generations (100 years) occurring both on and off reserve but will be more drastic off-reserve.⁹²

While Indigenous population may seem to be on a rise as at today due to the changes to eliminate sex-based inequities of the *Indian Act*, this may not be the same in many years to come. As more Indigenous people inevitably go into relationships with non-Indigenous people and have children, the second-generation cut-off rule will have more impact thereby limiting the future generation of Indigenous people entitled to status. Many of the participant at NWAC's round tables saw this as the Government of Canada's attempt to continue the colonial elimination of Indigenous people and cultures in Canada.

Some participants raised concerns about the sustainability of status populations because of the second generation cut-off rule, with one participant suggesting that some reserves in Ontario will likely disappear in the next 100 years because the last status baby in these communities was born in the last ten years.

One of the recommendations to the issue of population decrease that will be caused by the second generation cut-off rule is Indigenous self-determination and self-government agreements. Indigenous people should be allowed to determine their own membership according to their cultures and tradition.

89 Spolnik, M. (2021). The Second-Generation Cut-Off: Effect on Indigenous People in Canada (Unpublished master's project). University of Calgary, Calgary, AB. <http://hdl.handle.net/1880/114210> report. Pg.21.

90 Ibid, at pg 19.

91 Clatworthy, Stewart, Norris, Mary Jane, and Guiond Éric, "A New Open Model Approach to Projecting Aboriginal Populations" in White, Jerry P, "Aboriginal Policy Research: Moving Forward, Making a Difference" Vol 4, Thompson Educational Publishing (2007), at pg 249 [ISBN 978-1-55077-164-0].

92 Ibid, at pg 249.

RECOMMENDATION 7:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* to repeal the second generation cut-off rule by removing subsection 6(2) and amending paragraph 6(1)(f) to recognize entitlement to register where “either or both” of an individual’s parents are entitled to be registered.



AGE AND MARITAL STATUS

Despite Bill S-3's core purpose of eliminating known bases of discrimination from the registration provisions, the amendments actually created new discriminatory provisions on the basis of age and marital status under paragraph 6(1)(a.3).

Bill S-3 removed the gender-based distinctions between the grandchildren of First Nations women and men who married or co-parented with non-status persons by extending entitlement to status to the "direct descendants" of individuals who lost or were denied status because of the double mother rule, the marry out rule, the non-matrimonial female child rule, or the omitted minor child rule.⁹³ This addressed the issues raised in the *Descheneaux* decision, and more.

Unfortunately, Parliament chose to limit the application of entitlement to status to the direct descendants of individuals who suffered discrimination pursuant to the above-mentioned provisions to people born before 17 April 1985, or if born after 16 April 1985 they were born to parents who were married to each other before that date.⁹⁴

These age and marital status-based distinctions treat applicants differently on the basis of their age or the marital status of their parents, both of which are prohibited grounds of discrimination under the *Charter* of Rights and Freedoms.⁹⁵ These age and marital status-based distinctions can and do result in siblings, born to the same parents, before and after 17 April 1985, being differently entitled to status (6(1) vs 6(2)) for no other reason than their age and the marital status of their parents.

Bill S-3's age-based considerations in the *Indian Act's* status registration provisions create arbitrary distinctions. NWAC heard how the current registration rules can treat siblings within the same family differently depending on whether their parents were legally married and when each sibling was born. These distinctions further marginalize Indigenous Peoples.

Indigenous women told NWAC the status rules pertaining to age and marital status are confusing, and government staff are not adequately trained to address age and marital status-based questions.

One survey respondent told NWAC because she and her sister are born on different sides of the April 16, 1985, cut-off, they are entitled to different status types. "My heart is shattered," the respondent wrote.

As Indigenous families and communities work to reclaim their individual and collective identities today. Colonial policies aimed at assimilation, including status entitlement rules, continue to create divisions between Indigenous siblings. The *Indian Act* status registration provisions treat applicants as "less" or "more" native depending on their birth date.

Siblings can be entitled to different status types depending on their birth date and their parents' marital status. Specifically, in these circumstances, if the applicant was born after

⁹³ *Indian Act*, 1985, supra note 23, at s 6(1)(a.3).

⁹⁴ *Ibid*, at s 6(1)(a.3).

⁹⁵ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, at s 15 (age) [*Constitution Act, 1982*]; *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 SCR 418, <<https://canlii.ca/t/lfrkr>>, at para LXXVI (Marital Status).



16 April 1985, they will only be entitled to status if their parents had been married to each other at any time before 17 April 1987. These dates cause confusion. The provisions rely on recorded dates as opposed to an Indigenous applicant's lived experiences and identity.

The first problem with this approach is the rules assume a two-parent heterosexual family structure with legally married parents. NWAC's early research and engagement session made clear this does not reflect the reality for most Indigenous families. The second problem is children born on either side of April 16, 1985, receive different status entitlements, under either ss. 6(1) or 6(2). These differences impact the applicant's ability to pass status to their children and grandchildren.

Today's *Indian Act* registration rules rely on a person's parents being legally married, in some cases. This requirement assumes Indigenous men and women got married in legally recognized ceremonies, not customary Indigenous ceremonies. The rules do not reflect the ways Indigenous relationships, including parenting and marriages, might differ from non-Indigenous cultures and societies. It remains unclear whether Indigenous customary marriages meet the *Indian Act* registration threshold.

Indigenous women told NWAC the remaining distinctions based on marital status and age divide exclude and harm Indigenous families and communities.

Aside from the specific dates in the current registration rules, marital status as a consideration perpetuates inequities, NWAC heard. The necessity to prove marriage or partnership is difficult without a marriage certificate or other government-approved document. One survey respondent told NWAC because her ancestors lost status for marrying non-status men, and her records were destroyed, ending the status applicant's eligibility for good. "Why is marriage a relevant consideration to status entitlement at all?" wondered another engagement session participant.

Indigenous women told NWAC the cut-off dates for marital status and age in the *Indian Act's* registration provisions are confusing and seem arbitrary.

April 16, 1985, appears in the status eligibility laws because this is the legal date on which Canada abolished enfranchisement laws when the legislature passed Bill C-31. The law assumes anyone who lost status before this date due to the sexist provisions is entitled to have it restored, depending on their circumstances. The reality is, however, that second-generation descendants of Bill C-31 women are arbitrarily affected by this cut-off date. Where two siblings were born to unmarried, status-non-status parents across the 16 April 1985 divide, and where their grandmother regained status entitlement under Bill C-31, the 1985 cut-off date does not operate to limit the application of entitlement only to individuals that would have been adversely affected by the marry out rule, because they would not have been affected by this rule. Rather, it creates an arbitrary distinction on the basis of age and marital status wherein the sibling born before 1985 is entitled to 6(1) status and the sibling born after the cut-off date is entitled to the more limited 6(2) status.

The legislature set these age and marital status distinctions based on this date to provide status entitlement to descendants of people who lost status entitlement under previous enfranchisement laws. In navigating the complex logistics surrounding status loss through enfranchisement, the legislature attempts to cover its bases, but in effect, these age and marital status distinctions are causing confusion and additional evidentiary burdens for status applicants today.



Because applicants are only differently affected by paragraph 6(1)(a.3) in instances of mixed status-non-status parenting,⁹⁶ removing the second generation cut off as recommended in this report's Recommendation 7 would also eliminate the age and marital status-based discrimination under paragraph 6(1)(a.3). Thus, we reiterate that recommendation here:

Recommendation 7 (above): That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* to repeal the second generation cut-off rule by removing subsection 6(2) and amending paragraph 6(1)(f) to recognize entitlement to register where "either or both" of an individual's parents are entitled to be registered.

ENFRANCHISEMENT

Enfranchisement is a legal term describing the process by which an Indigenous person could renounce their Indian Status under the *Indian Act*. Enfranchisement laws served the Canadian government's broader goal to assimilate Indigenous Peoples, eradicate their culture and fold them into what leaders regarded as "mainstream culture."⁹⁷

Enfranchisement meant an Indigenous person lost their treaty and statutory rights, the right to live in their reserve community and the right to vote for their leadership. An enfranchised person also lost these rights for all their descendants, living and future. Historic *Indian Act* versions created two paths to enfranchisement: involuntary and voluntary.

Involuntary enfranchisement refers to those who lost Indian status automatically. The actions leading to automatic enfranchisement changed through the years, but included marriage of a woman to a non-status man,⁹⁸ re-marriage of status children's mother to a non-status man,⁹⁹ earning a university degree, joining the medical or legal professions or becoming a priest or minister.¹⁰⁰

Involuntary enfranchisement devastated Indigenous women. An Indigenous woman automatically lost status upon marrying a non-status man. This loss impacted her children, and theirs, and so on. Status-holding men, by contrast, retained and transferred status to their non-status wife.

Indigenous children also lost their status involuntarily as minors if their father voluntarily enfranchised. NWAC heard descendants express frustration they have little legal recourse today. Many are left to create their own Indigenous identities outside their community because they are legally barred from participating in some activities alongside their status-holding neighbours.

Indigenous women told NWAC while 1985 ended the enfranchisement, subsequent amendments to the *Indian Act* continue to cause harm. The *Indian Act* status registration rules create separate status classes. Women who involuntarily lost status and had it restored

⁹⁶ Where both parents are entitled to register, their children are entitled to register under paragraph 6(1)(f), so there would be no differential treatment between the siblings as they would both be entitled to register under subsection 6(1) and have equal entitlement to pass down status to their children.

⁹⁷ *Attorney General (Canada) v Larkman*, 2012 FCA 204 [Larkman] at para 2.

⁹⁸ *Indian Act*, 1970, supra note 26, at s 12(1)(b).

⁹⁹ *Ibid*, at s 109(2).

¹⁰⁰ *Indian Act* 1906, supra note 12, at s 111.



after 1985 continued to see their status distilled depending on whether they chose to marry non-status men. These women, and their descendants, told NWAC they are made to feel like second-class citizens in their communities and continue to experience discrimination.

Canadian lawmakers continue to pursue equality for all Indigenous Peoples applying for status today, but many women expressed to NWAC they wanted Canada to redress harms on a deeper level. Canada can do more to repair the complex, layered harms enfranchisement laws caused in Indigenous communities and families.

Enfranchisement laws represent a dark stain on the fabric of Canada's nationhood. Enfranchisement is an ink that continues to run and spill into today's generations and into the future ones. Enfranchisement represents a foul attempt to quantify Indigeneity based on blood quantum and reflects efforts to distill the rich cultures, traditions and social structures associated with Indigenous membership and identity.

Involuntary enfranchisement legally removed an Indigenous person's birthright to choose their identity and community. It took this choice away from Indigenous women and their children and grandchildren for many generations.

Enfranchisement laws also created a legal murky zone for Indigenous women and their descendants who voluntarily enfranchised on paper, but argue their decision was anything but freely made. The next section addresses the lived experiences surrounding voluntary enfranchisement.

"VOLUNTARY" ENFRANCHISEMENT

Canada's latest update to the *Indian Act*, Bill S-3, does not reflect changes to those descending from women who 'voluntarily' enfranchised.

Hundreds of unmarried Indigenous women voluntarily enfranchised between 1951 and 1985.¹⁰¹ Few held genuine desires to leave their Indigenous community; many were coerced or forced to enfranchise. Many unmarried Indigenous women had no choice but to enfranchise when facing threats to send their children to residential school.

The following case study illustrates how voluntary enfranchisement policies continue to harm Indigenous People today. Angel Larkman participated in NWAC's discussions and consented to share her family's saga in this report. Her story is also reflected in the *Larkman v Canada* series and in various news outlets.

101 Ka'nehsfio Deer, "Quebec judge rules in favour of Anishinaabe professor over *Indian Act* inequities" (11 August 2020) CBC News, online: < <https://www.cbc.ca/news/indigenous/quebec-ruling-indian-act-voluntary-enfranchisement-1.5681971> >.



CASE STUDY

Laura Flood was one of 11,000 Indigenous women who ‘voluntarily’ enfranchised. This meant she lost her legal recognition as an Indigenous person, her tax exemption, her membership in her Matachewan First Nation, her right to live in her community and her right to vote for her community’s leaders.

In 2022, the bar for what the law considers considered voluntary is much higher than in 1952.

When Ms. Flood voluntarily enfranchised in 1952, she could not read the statements she allegedly signed, and she denies she ever instructed anyone to type letters to the Indian agent on her behalf. The Federal Court judge reviewing her case in 2013, wrote “This Court is therefore put in the difficult position of evaluating the internal validity of an administrative decision made within a legal regime which is repugnant to modern eyes.”¹⁰²

Ms. Flood left her community in 1945 because the local Indian Agent told her if she stayed, her children would go to residential school. The Indian Agent produced typewritten letters, allegedly written by Ms. Flood, voluntarily enfranchising. Ms. Flood was unable to read or write. She denies she typed or instructed anyone to type on her behalf, any letters to the Indian agent renouncing her status.

The Indian agent forwarded Ms. Flood’s allegedly voluntary enfranchisement papers to the Department of Citizenship and Immigration. An Order in Council passed December 4, 1952, granting Ms. Flood her Canadian citizenship and renouncing her Indian status.

Ms. Flood regained her status after the 1985 *Indian Act* changes under Bill C-31. Her daughter Dorothy, being born before 1985 to a mother without status, also regained her status in 1985, but under section 6(2). Dorothy lived as a member of the Matachewan First Nation with her family, but was not entitled to vote, live on reserve, or receive funding for post-secondary studies the way section 6(1) status holders could.

The Registrar did not recognize Dorothy’s children as status-eligible because their mother had 6(2) status. They lived in accordance with Matachewan First Nation traditions and customs, participated in ceremonies, and learned their teachings, but did not have status. One of Dorothy’s children, Angel Larkman, appealed the 1952 Order in Council, arguing the enfranchisement was not truly voluntary. Ms. Larkman’s appeal started in the Federal Court in 2010 and was denied by the Supreme Court in 2015.

Ms. Flood passed onto the spirit world during the legal proceedings. Her grandchildren lived their Indigenous culture but remained not legally recognized as Indigenous people. It seemed they were out of legal options.

In 2020, Ms. Larkman, now a law student, came across a Québec case ruling an Indigenous

¹⁰² Larkman, *supra* note 97, at para 63.



woman's 1965 voluntary enfranchisement to have been invalid under historic *Indian Act* laws. Only Indigenous men over the age 21 could enfranchise, since the law did not recognize an Indigenous woman's legal personhood. This decision, *Hele v Canada*, meant the 1952 decision to enfranchise Ms. Larkman's grandmother was legally invalid because Ms. Flood had been 19 and unmarried when she enfranchised.¹⁰³

The *Hele* decision meant Indigenous women who 'voluntarily' enfranchised between 1951 and 1985 were eligible to have status restored to themselves and their descendants.

Ms. Larkman sent the *Hele* decision to Indigenous and Northern Affairs Canada, hoping they would review her status application. In January 2021, the government allowed Ms. Larkman and her siblings to re-apply for status. After living her whole life as an Indigenous woman, steeped in the rich history of her customs and traditions, Ms. Larkman finally received her Indian status in October 2021.



The *Hele* case changed the way the Indian Registrar will evaluate 'voluntariness' in status eligibility decisions. In that case, the Court had to interpret *Indian Act* s.108 as written in 1951. That section said an 'Indian' could voluntarily apply to enfranchise. Margaret Laura *Hele*, the Indigenous woman who 'voluntarily' enfranchised in the *Hele* case, was an unmarried woman who was pressured.

In 1985, Ms. *Hele* became eligible to re-apply for the status she lost when the government abolished enfranchisement. Because she and her children married non-Indigenous partners, Ms. *Hele's* granddaughter, Annora *Hele*, was ineligible for status when she applied in 2011. The Québec Superior Court decided s. 108 only applied to 'Indians' between 1951 and 1985. The *Indian Act* only recognized Indigenous men over age 21 and married Indigenous women as 'Indian.' Single Indigenous women were not legal persons and could not voluntarily enfranchise.

Today, if an Indigenous person can find an unmarried Indigenous woman who enfranchised between 1951 and 1985 in their family tree, those descendants are now eligible to re-apply for status. The *Hele* case is responsible for this change, opening up status eligibility to an unknown number of Indigenous People.

Whether or not an Indigenous woman was threatened, coerced, pressured or forced to voluntarily enfranchise between 1951 and 1985 is, legally, not a relevant consideration. The Indian Registrar will only need to know the Indigenous woman was unmarried. This change means applicants today will not have to persuade the Indian Registrar their ancestor's enfranchisement was "involuntary."

This is a significant change for Indigenous People applying for status, especially those previously denied because a female ancestor voluntarily enfranchised.

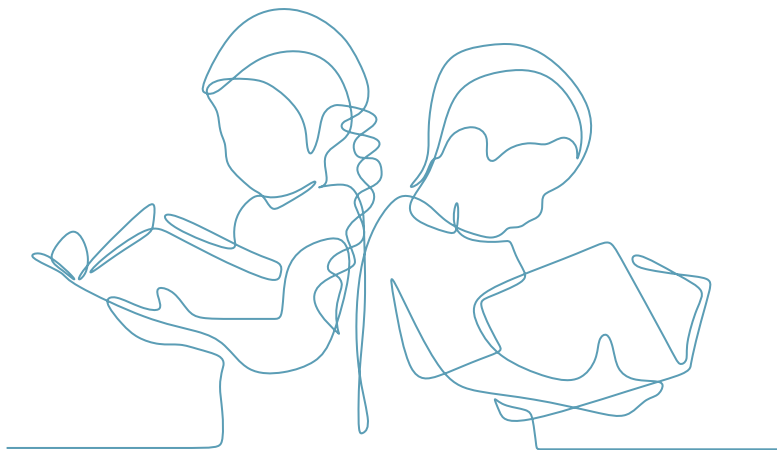
Although the "voluntary" enfranchisement provisions of the pre-1985 *Indian Act* convey a voluntary application process for Orders in Council for individuals, their wives and minor

¹⁰³ *Hele v Canada*, supra note 25.



children,¹⁰⁴ the factual circumstances that led many individuals to enfranchise include financial inducement and coercion. The *Indian Act* provided payment incentives for individuals that enfranchised¹⁰⁵ and many families felt enfranchisement was the only option to protect their children from the residential school system.

On 3 March 2022, the Minister of Indigenous Services and a law firm representing plaintiffs in a *Charter* challenge against ongoing inequities under the registration provisions related to enfranchisement announced an agreement to put the litigation on hold while working to develop a legislative solution to the issues.



¹⁰⁴ *Indian Act*, 1970, *supra* note 26, at s 109(1).

¹⁰⁵ *Ibid*, at s 15(1).

RECOMMENDATION 8:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* to:

- a) Align section 6 with the *Hele* decision, specifically, to clarify that unmarried status women who “voluntarily” enfranchised between 1951 and 1985 were and are entitled to register; and
- b) include individuals who lost status pursuant to section 109(1) among the categories of individuals entitled to be registered under paragraph 6(1)(a.3).





COMPENSATION AND REPARATIONS

The discriminatory provisions of the registration provisions denied tens of thousands of individuals access to benefits and services which they would have enjoyed but for discrimination under the *Indian Act* between 1985 and 2019. Many participants at NWAC's grassroots round tables indicated that they and/or their family members incurred significant amounts of debt related to education and health care that they would not have incurred had the government recognized their entitlement to register under the *Indian Act*.

The financial burdens incurred by individuals who were denied status because of discrimination under the registration provisions were not a result of a benefits scheme which Parliament chose for policy reasons to expand entitlement under Bill C-3 and Bill S-3. The legislative amendments were required because the legislation was unconstitutional. As such, the Government of Canada should provide compensation to individuals who incurred costs related to health care and education that they would not have incurred but for the discrimination under the registration provisions.



RECOMMENDATION 9:

That the Government of Canada establish a compensation fund for individuals that incurred education and health care related expenses since the Bill C-31 amendments to the *Indian Act* that are expenses that they would not have incurred had their entitlement to register not been precluded by discriminatory provisions of the *Indian Act*.





ACCESS TO JUSTICE

Although the *Indian Act* provides for appeal processes for decisions made under the legislation,¹⁰⁶ giving practical effect to such provisions requires that applicants have access to legal services that will enable them to navigate judicial review procedures.

The six month limitation on appeals of protest decisions¹⁰⁷ provides a limited window of opportunity for applicants to bring their cases before the Superior Courts. As Legal Aid certificates are typically not available for judicial review of Registrar decisions, applicants who seek to challenge decisions in the courts must have sufficient financial means to bring costly legal proceedings, obtain *pro bono* legal service, or be capable of self-representing.

The United Nations Committee on the Elimination of All Forms of Discrimination against Women asked Canada to provide information on measures it has taken to increase the availability of legal aid in civil cases, particularly for Indigenous women.¹⁰⁸

While 78% of Indigenous applicants for civil legal aid certificates in Canada in 2019-20 were approved¹⁰⁹ and more than half of Indigenous legal aid clients that received full legal representation in civil matters were female,¹¹⁰ without specific set asides of legal aid certificates for matters related to Indigenous membership and rights, the access to justice issue will continue to persist for Indigenous women seeking to exercise their rights.

Access to justice issues are particularly unique in the context of First Nations, not only because of different legal and socio-economic circumstances, but also because of the historical context of Parliament's efforts to restrict legal recourse under the *Indian Act*.

The *Indian Act* created a parallel justice system for Indigenous peoples in which legal professionals had been restricted from providing certain legal services to First Nations,¹¹¹ and Indian agents were elevated to *ex officio* justices of the peace¹¹². Parliament's historical disregard for principles of procedural fairness in the justice system as it applied to Indigenous peoples provides an important contextual framework for the current disproportionate distribution of burdens imposed by the current access to justice crisis.



¹⁰⁶ *Indian Act*, 1985, supra note 23, at ss 14.2 and 14.3.

¹⁰⁷ *Ibid*, at s 14.3(1).

¹⁰⁸ UNCEDAW, *List of issues and questions prior to the submission of the tenth periodic report of Canada*, (18 Nov 2019) CEDAW//C/CAN/QPR/10, at para

¹⁰⁹ DOJ, "Legal Aid in Canada 2019-20" Department of Justice Canada (2021), at pg 14 < https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1920/docs/RSD_RR2021_Legal%20Aid%20in%20Canada%202019-20.pdf >.

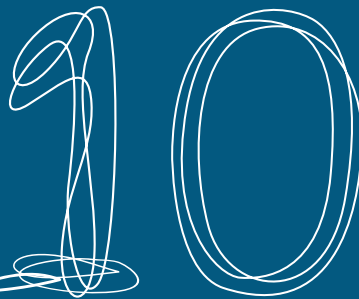
¹¹⁰ *Ibid*, at pg 22.

¹¹¹ *Indian Act*, 1927, RSC 1952, C 65 at s 141.

¹¹² *Ibid*, at 152.

RECOMMENDATION 10:

That the Department of Justice Canada establish a funding stream through the Legal Aid Program to provide funding to recipients for Indigenous rights matters, including legal issues related to the *Indian Act*.





DISCRIMINATION IN CHILD WELFARE SYSTEMS

In 2007, the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society filed a human rights complaint alleging two discrimination harms:

- 1) Canada unequally and insufficiently funds First Nation child and family services that aim to protect children from abuse and neglect.¹¹³ The plaintiffs alleged that underfunded social services for Indigenous children directly links to a disproportionate number of Indigenous children taken from their homes and placed in foster care.
- 2) Canada failed to implement Jordan's Principle, despite a 2009 Memorandum of Understanding on the Federal Response to Jordan's Principle.

In 2016, the CHRT wrote a 500-paragraph ruling beginning with the simple declaration, "This decision concerns children."¹¹⁴ (Emphasis in original)

In 2019, the CHRT issued a compensation order.¹¹⁵ The Tribunal found Canada created tragic worst-case scenarios for First Nations children, finding their conduct wilful and reckless.¹¹⁶ Under the order, First Nations children, their parents and grandparents would receive a pain and suffering remedy of \$20,000 in each case where a child was unnecessarily removed from their home since January 1, 2006.¹¹⁷ The CHRT clarified if a family had 3 children removed in these circumstances, they should receive \$60,000.

The Tribunal also ordered Canada to pay a \$20,000 pain and suffering to each First Nation child removed from their home and placed in care to access services and for each First Nations child who was not removed from the home but was denied services. This order extends to each First Nations parent or grandparent who had their child removed and placed in out-of-home care to access services, and to each First Nations parent or grandparent whose child was not removed from the home but was denied services.¹¹⁸

Canada failed to comply with the order. The CHRT issued nine non-compliance orders against Canada for failing to ensure funding did not discriminate against First Nations kids and that Jordan's Principle applied wholly and broadly.¹¹⁹

The parties recently negotiated an Agreement-in-Principle to lay the groundwork to come to a more formal settlement agreement and a commitment to reform child welfare policies.¹²⁰

The Millennial scoop patterns and impacts tell Indigenous women, girls and gender-diverse people today that much work remains to address the complex issues related to racism and undoing the effects of genocide.

The *Indian Act's* remaining inequities compound these ongoing struggles insofar as they pile on barriers to establishing Indigenous identities.

¹¹³ *Caring Society v Canada*, supra note 67, at paras 2, 5.

¹¹⁴ *Ibid*, at paras 2, 5.

¹¹⁵ *Caring Society v Canada*, supra note 67.

¹¹⁶ *Ibid*, at para 242.

¹¹⁷ *Ibid*, at para 245.

¹¹⁸ *Ibid*, at para 250-251.

¹¹⁹ First Nations Child and Family Caring Society, "Non-Compliance Orders" *I Am a Witness*, (2021) online: < <https://fncaringsociety.com/fr/non-compliance-orders> >.

¹²⁰ First Nations Child and Family Caring Society of Canada, "AIP on Long-Term Reform of the First Nations Child and Family Services Program and Jordan's Principle" (19 January 2022), pdf online: < https://fncaringsociety.com/sites/default/files/aip_on_long-term_reform_info_sheet_english.pdf >.



Indigenous participants in NWAC's engagement sessions are justified in expressing fear *Indian Act* membership policies today continue policies designed to reduce the number of Indigenous-identifying people in Canada. Harmful, genocidal and assimilationist policies, including the IRS system, 60s scoop and Millennial scoop policies, inform these fears.

Participants speaking for members of their families, friends, and other Indigenous women said that the two-tier system of subsection 6(1) and 6(2) has deprived people with Indian blood from being a part of the Indigenous community because they do not qualify to register under the Act and obtain status.

They expressed concern over Indigenous communities using 6(1) and 6(2) categories as a method of labelling and differentiating rights within the community leading to discrimination within the community.

This painful history of IRS and child welfare policy harms points to the need for a shift in the way Canada honours Indigenous People so history does not repeat itself.

POPULATION SUSTAINABILITY AND STATUS ENTITLEMENT

In 2010, the Aboriginal population in Canada included 615 First Nation communities and more than 50 nations; eight Métis settlements; and 53 Inuit communities.¹²¹ According to Statistics Canada, approximately 799,010 people, or 3.8% of Canada's population, identified themselves as having an Aboriginal identity in 1996. In 2016, there were 1,673,785 Aboriginal people in Canada, accounting for 4.9% of the total population.¹²²

The percentage of Indigenous people in Canada has gone from 2.8% in 1996 to 3.8% in 2006 to 4.9% in 2016. Statistics Canada reports that the Indigenous population has grown by 42.5%, four times more than the growth rate of non-Indigenous population of Canada.¹²³

There are two main factors identified to have contributed to the growing Indigenous population: the first is natural growth, which includes increased life expectancy and relatively high fertility rates; the second factor relates to changes in self-reported identification.¹²⁴

Changes in the *Indian Act* has allowed room for more people to identify as Indigenous. With the enactment of Bill C-31, the parameter for Indigenous status entitlement expanded leading to population growth. With the enactment of Bill S-3 expanding the parameters wider, it is expected that Indigenous population rate will grow even bigger.

In 2021, Statistics Canada's release on the projections of Indigenous population stated that growth rate could reach 2,495,000 in 2041 under the low-growth scenario, 2,848,000 under the medium-growth scenario, and 3,182,000 under the high-growth scenario.¹²⁵

The population of Indigenous people has been growing as a result of the enactment of Bill S-3 *Indian Act* amendment. At the initial proposal of Bill S-3, 28,000 to 35,000 would

¹²¹ Trovato, Frank and Aylsworth, Laura, "Demography of Indigenous Peoples in Canada" (1 February 2012/ edited 17 January 2018) < <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-people-demography> >.

¹²² Canada, "Aboriginal peoples in Canada: Key results from the 2016 Census" StatsCan (25 October 2017) < <https://www150.statcan.gc.ca/n1/en/daily-quotidien/171025/dq171025a-eng.pdf?st=uLJQXSjX> >.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ StatsCan, Oct 2021, supra note 42.



be eligible to register under the *Indian Act*.¹²⁶ Under the June 2017 Senate amendments, approximately 670,000 additional First Nations persons (reflecting the number of persons self-reporting First Nations ancestry who are not already registered) were estimated to be eligible for status.¹²⁷

While parliament considered the issue of gender discrimination in the *Indian Act*, it also considered the issue of funding provided to Indigenous people to meet this population growth. The 2017 parliamentary Budget report on Bill S-3 gave an estimate on what it would cost to fund the population growth resulting from the amendment of Bill S-3. The cost estimate provided by the office of the parliamentary Budget Officer was stated to be uncertain due to a lack of evidence regarding registration rates, administration plans and long-term migration patterns.¹²⁸

Funding for programs is meant to benefit all Indigenous status holders regardless of whether they live on reserve or not. The major funding programs offered to Indigenous persons are supplemental health benefit and post-secondary school education benefit.

Other funding costs that were considered were expenditures in relations to reserves. Such expenditure includes:

- Governance expenditures, which are largely unrelated to the number of persons ordinarily resident on reserve.
- Infrastructure investments and program expenditures, which are related to the number of persons ordinarily resident but may exhibit economies of scale or stepwise cost functions.
- Social benefits, which are related to the number of persons ordinarily resident on reserve.
- Tax expenditures, which are related to the number of Status Indians ordinarily resident on reserve.¹²⁹

Due to the uncertainty of the estimated population growth, fear that the funding budget by the government for Indigenous social programs being insufficient to cater to the increasing population has led to resistance of some communities to recognize new members who have just obtained status as they have to provide additional facilities and services.

During the engagement session with NWAC many of the participants voiced that Indigenous Bands are not interested in having more members, thereby making the registration process difficult for applicants. While some are denied band memberships, others do not get the support needed to prove status entitlement. This majorly affects Indigenous women especially those in urban areas leaving them without a community and sense of belonging.

Participants recommended that government empower Indigenous communities with increased sufficient funding to accommodate new members. Government should properly

¹²⁶ PBO Report, supra note 41, at pg 1.

¹²⁷ Ibid, at pgs 6-7.

¹²⁸ Ibid, at pg 2.

¹²⁹ Ibid, at pg 16.



and fairly fund the criteria set within individual nations through self-determination and governance structures.

The *Indian Act* is incompatible with the rights of Indigenous peoples as set out in UNDRIP and the implementation of the *UNDRIP Act* will require the repeal of the *Indian Act* and its replacement with agreements and laws that are consistent with the Declaration. One of the major challenges in such a process is properly recognizing the governing bodies representing First Nations.

Under UNDRIP, Indigenous peoples have the right to participate in decision-making in matters affecting their rights through representatives chosen by themselves in accordance with their own procedures.¹³⁰ Band Councils are established under the *Indian Act* and are not governing bodies reflective of Indigenous procedures. While the elections provisions of the Act afford for the democratic selection of representatives, they do not account for the procedures of particular First Nations.

Respondents to NWAC's Bill S-3 Survey had a strong preference for traditional Indigenous Governing Bodies over Band Councils and the Government of Canada when asked who ought to have responsibility for deciding who ought to be granted entitlement to status/access to rights as First Nations persons.¹³¹

Repealing the *Indian Act* and replacing it with agreements and laws for determining membership will be necessary for the implementation of UNDRIP in Canada; however, Canada must be very attentive to the diversity of procedures and structures that are relevant to First Nations representation to ensure that post-*Indian Act* decision-making respecting rights entitlement and membership are reflective of the peoples they affect.

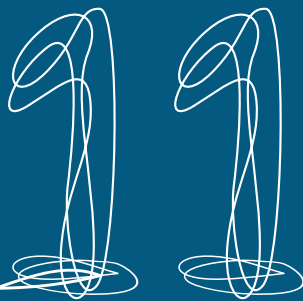


¹³⁰ *UNDRIP Act*, supra note 36, at Schedule, Art 18.

¹³¹ Appendix J: Online Survey Results, at pg 10 (55.9% for Traditional Indigenous Governing Bodies, 12.1% for Band Councils, and 13.9% for the Government of Canada).

RECOMMENDATION 11:

That Indigenous Services Canada initiate consultation processes with First Nations peoples on the repeal and replacement of the *Indian Act* that includes an initial process of ensuring each rights holding group is appropriately represented in the consultations processes.





CROSS-BORDER STATUS

In December 2016, the minister of Indigenous and Northern Affairs appointed a special representative on the First Nation border crossing issues to engage with first nation communities to examine issues and challenges faced by First Nations near the Canada-United States border with respect to their ability to cross that border for a variety of purposes including family and cultural connection, employment, education and trade.¹³²

A report on these issues was submitted by the Special Representative and two of the issues identified in the report were: 1. lack of recognition of inherent rights; and 2. the adverse impact of border imposition on family and cultural connections.¹³³

The Majority in the Supreme Court of Canada case of *R v. Desautel*,¹³⁴ said that “Aboriginal peoples of Canada” means the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact, even if such societies are now located outside Canada. Excluding Aboriginal peoples who moved or were forced to move, or whose territory was divided by a border, would add to the injustice of colonialism.

One relevant example stated in the report of the Special Representative is the difficulties experienced with respect to Native American spouses who are not registered as Indians under the *Indian Act* and who wish to reside with their First Nation spouse in Canada. Although some First Nations traditions recognize the rights of spouses to live with their spouses in their territories, Canadian law treats non-Canadian citizens who are Aboriginal peoples of Canada, as foreign nationals without an automatic right of residence in Canada.¹³⁵

In NWAC’s engagement with Indigenous women on the post bill S-3 remaining inequities, participants pointed out that cross-border issues still affect many Indigenous people in Canada as they lose their communities when they marry a Native American. An Indigenous person without Canadian status living in the US is non-status in the eyes of the federal government. If an Indigenous person in Canada holding 6(2) status was to parent with an Indigenous person from the US, their child(ren), although Indigenous, will experience the second-generation cut-off and will not be entitled to Indian status in Canada.

One of the solutions proposed in the report of the Special Representative was that a legislative or other framework be developed which would serve as a framework for the recognition of historic and inherent rights in a modern context.

¹³² Caron, Fred, “Minister’s Special Representative Report on First Nation border crossing issues” CIRNA (31 August 2017) < https://www.rcaanc-cirnac.gc.ca/eng/1506622719017/1609249944512#sec1_1 > [Caron].

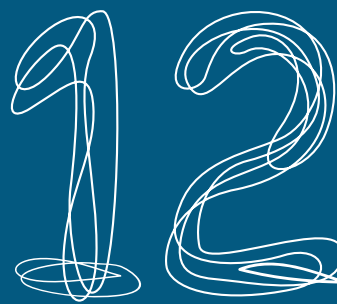
¹³³ Ibid.

¹³⁴ *R. v. Desautel*, 2021 SCC 17 (CanLII), <<https://canlii.ca/t/jfjqc>>, at para 22.

¹³⁵ Caron, supra note 132.

RECOMMENDATION 12:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* to recognize the entitlement to register of First Nations persons who belong to Aboriginal societies that occupied Canadian territory at the time of European contact where those persons are parents to Canadian citizens or married or in common law relationships with Canadian citizens.





THE *INDIAN ACT* AND INTERNATIONAL LAW – PREPARED BY OSPREY LAW

The status provisions of the *Indian Act* have repeatedly been found to be in violation of international law and the Bill S-3 amendments are no different. Although Canada has addressed some technical issues regarding sex-based discrimination, other issues remain, such as the two-tiered system of 6(1) and 6(2) status (the second generation cut-off), which disproportionately impact women.

Canada has an international legal obligation to prevent discrimination against women, Indigenous peoples, children, and other minority groups. Five core international human rights instruments (all ratified by Canada) and two declarations apply to the status provisions under the *Indian Act*:

1. *International Covenant on Civil and Political Rights* (United Nations Human Rights Committee “HRC”);
2. *International Covenant on Economic, Social and Cultural Rights* (“ICCPR”);
3. *International Convention on the Elimination of All Forms of Racial Discrimination* (“CERD”);
4. *Convention on the Rights of the Child* (Committee on the Rights of the Child);
5. *Convention on the Elimination of All Forms of Discrimination Against Women* (“CEDAW”); and
6. *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”); and
7. *American Declaration of the Rights and Duties of Man* (Organization of American States).

Indigenous peoples’ human rights are codified in UNDRIP, which sets out the obligations of states and Indigenous nations “to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”¹³⁶ Article 9 provides that: “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.”

UNDRIP is a binding source of law in Canada, and the *Indian Act* must be interpreted and amended in accordance with these principles. On June 21, 2021, Canada’s Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (the “UNDRIP Act”), came into force, recognizing UNDRIP as domestic law that must be applied to all Canadian statutes, including the *Indian Act*. The UNDRIP Act launched a consultation process with Indigenous peoples to develop an action plan to harmonize Canadian laws with UNDRIP. It also reaffirms Canada’s obligation under article 38 of UNDRIP: “States in consultation

¹³⁶ UNDRIP Act, *supra* note 36, at Schedule, Art 22 (2).



and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”¹³⁷ A recent Quebec court decision confirmed that Canada’s protections of Indigenous rights under section 35 of the Constitution Act, 1982¹³⁸ must be read in conformity with Canada’s legal obligations under UNDRIP.¹³⁹ When interpreting section 35 rights, the courts must treat UNDRIP as a binding human rights instrument, particularly given the implementation and affirmation of the Declaration in the *UNDRIP Act*.

The Supreme Court of Canada (“SCC”) has held that: “[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law” and that “courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations.”¹⁴⁰ The SCC further clarified that “in interpreting the scope of application of the [Canadian] *Charter* [of Rights and Freedoms], 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.”¹⁴¹ The SCC confirmed that international human rights obligations and those under the *Charter* mutually reinforce each other: “whenever possible, [the Court] has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other.”¹⁴²

With respect to the *Indian Act* status provisions, Canada has been found to be in breach of international law repeatedly, including:

1. **Lovelace**—In 1981, the ICCPR Committee found that the *Indian Act* violated the ICCPR, particularly article 27, due to provisions that forced a married women to lose her status if she married a non-status person. Article 27 of the ICCPR requires that Indigenous peoples: “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”
2. **McIvor**—In 2019, the HRC determined that Canada violated the ICCPR again.¹⁴³ The Committee found that Canada had violated article 3 (concerning effective remedies for harms) and article 26 (concerning equal protection of the law and freedom from discrimination) when these articles are read in conjunction with article 27 of the ICCPR.¹⁴⁴ To date, Canada has failed to fully implement the recommendations of the Committee and remedy the issues in the *Indian Act*.
3. **Matson**—On March 3, 2022, the CEDAW Committee released a report finding discrimination in the *Indian Act* status provisions.¹⁴⁵ Jeremy Matson had submitted a

¹³⁷ Ibid, at art 38 [emphasis added].

¹³⁸ *Constitution Act, 1982*, supra note 32, s 35, explicitly recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. Section 35 also indicates that the term “Aboriginal peoples of Canada” includes the First Nation, Inuit and Métis peoples of Canada.

¹³⁹ *Renvoi à la Cour d’appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at para 512.

¹⁴⁰ *R v Hape*, 2007 SCC 26 at para 53 [Hape].

¹⁴¹ Ibid, at para 56.

¹⁴² Ibid, at para 55.

¹⁴³ *McIvor*, UNHRC, supra note 87.

¹⁴⁴ Ibid, at para 8.

¹⁴⁵ CEDAW Committee, *Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 68/2014*, 3 March 2022, UN Doc C/81/D/68/2014 at para 15.4(b) [UN Communication No. 68/2014].



complaint regarding entitlement to status of his children, who were denied due to the second generation cut-off and the discrimination of matrilineal descendants. The Committee found that not only had Canada breached CEDAW, but was in violation of articles 8 and 9 of UNDRIP, which prohibit forced assimilation and allow for the right to belong to a community or nation.

In 2015, the CEDAW Committee recommended that Canada “amend the *Indian Act* to eliminate discrimination against women [and] ensure that [Indigenous] women enjoy the same rights as men” when it comes to the ability to transmit status and family history.¹⁴⁶ The Committee also recommended that Canada “remove administrative impediments to ensure effective registration as a Status Indian for [Indigenous] women and their children, regardless of whether or not the father has recognized the child.”¹⁴⁷

Under international human rights law, Canada must ensure Indigenous women and their descendants enjoy equal access to band membership, reserve housing and services, treaty entitlements, participation in political decision-making in their communities, and other entitlements of band membership. All of these are negatively affected by denial of status. Additionally, Indigenous people denied status or left off band lists may be disconnected from their community, family, and culture. International law requires the family unit to be protected.¹⁴⁸ The HRC has held that Indigenous peoples’ right to culture entails a range of other rights—including rights to participate in customary activities; access lands, territories and resources; maintain family units; and participate in decision-making processes that affect their cultural rights.¹⁴⁹ In 2002, for example, the CERD Committee commented on the fact that “the *Indian Act* may not be in conformity with rights protected under article 5 of the Convention [on the Elimination of All Forms of Racial Discrimination], in particular the right to marry and to choose one’s spouse, the right to own property and the right to inherit, with a specific impact on Aboriginal women and children.”¹⁵⁰

Amendments to the *Indian Act* in Bill S-3 are the bare minimum for a formalistic approach to erasing sex-based discrimination. Formally removing discriminatory language from the text of the *Indian Act* is not enough. Such an approach is not in accordance with either domestic or international law, which requires substantive equality between men and women.¹⁵¹ States’ duties to protect the equality rights of Indigenous peoples under ICCPR are broad and extend beyond formal recognition or the absence of express discrimination in statute. Canada has an obligation to eliminate discrimination in fact, as much as in law.¹⁵² The UN Expert Mechanism on the Rights of Indigenous Peoples notes that substantive equality requires states to take special measures to ensure Indigenous peoples’ human rights are

¹⁴⁶ CEDAW Committee, *Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 March 2015, CAN/CEDAW/C/OP.8/CAN/1 at para 219(e) [CEDAW 2015 Report].

¹⁴⁷ CEDAW 2015 Report, at para 219(e); The Inter-American Commission on Human Rights previously made the same findings in its 2014 report: “Missing and Murdered Indigenous Women in British Columbia, Canada” (21 December 2014) OEA/Ser.L/V/II Doc30/14 [Missing].

¹⁴⁸ Inter-American Commission on Human Rights, *American Convention on Human Rights*, adopted 22 November 1969, at art 17.

¹⁴⁹ Office of the United Nations High Commissioner for Human Rights, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (Sydney: Asia Pacific Forum of National Human Rights Institutions, 2013) at 14.

¹⁵⁰ UN Committee on the Elimination of Racial Discrimination, *Report of the UN Committee on the Elimination of Racial Discrimination, Sixtieth Session*, (4–22 March 2002) and Sixty-first Session (5–23 August 2002) 1 November 2002, UN Doc A/57/18 at para 332.

¹⁵¹ *R v Kapp*, 2008 SCC 41 at para 15.

¹⁵² UN Human Rights Committee, *CCPR General Comment No 18: Non-Discrimination*, 10 November 1989, at para 9; UN Communication No. 2020/2010, *supra* note 143 at para 7.11.



realized.¹⁵³ Real and practical barriers to registration remain, including a lack of information on recent changes and a lack of dedicated process to address Indigenous peoples who were historically denied status but now may be eligible, as noted by the petitioners in their 2021 submissions to the ICCPR Committee regarding Canada's failure to implement *Mclvor*.¹⁵⁴

Bill S-3's changes to the *Indian Act* address neither substantive equality, nor existing structural issues. Many legacy issues remain, such as those recently articulated in the court's decision in *Hele c Attorney General of Canada*, 2020 QCCS 2406 and in the *Nicholas v Canada (AG)* case.¹⁵⁵

The continuation of this sex-based discrimination is not consistent with Canada's international legal obligation to avoid future violations.¹⁵⁶ The second generation cut-off is a direct violation of UNDRIP articles 8 and 9, and will eventually result in an extreme reduction in the number of people entitled to status (illegal forced assimilation).¹⁵⁷ Having different categories of "Indians" creates a system where some women are seen as "less Indian" in their communities. In *Mclvor*, the HRC agreed with the petitioners that the categories of 6(1) and 6(2) status have created stigma and discrimination and should be removed.¹⁵⁸

The *Indian Act* status provisions directly conflict with Indigenous peoples' right to self-determination. Although the *Indian Act* provides for custom band membership lists in the control of a First Nation, not all Nations make use of this, and many who do base their membership criteria on the *Indian Act* status provisions. Such provisions are often outdated and do not reflect recent legislative amendments. Under UNDRIP, Indigenous peoples have a right to choose who is a member of their nation or community, and Indigenous women, specifically, have the right to determine their own identity (see articles 3, 4, 9, 18, 19 and especially 33).¹⁵⁹ The Committee for CEDAW found that the *Indian Act* provisions violate an Indigenous person's right "to transmit their indigenous identity to their descendants, [...] an element which is precisely contrary to this fundamental right to self-identification."¹⁶⁰

Changes to the *Indian Act* through Bill S-3 fail to address past harms and provide no clear mechanism for redress, correction of harms, restitution, or reparations, in violation of articles 2, 8.2, and 28 of UNDRIP. The Inter-American Court has held that the right to an effective remedy for human rights violations is a binding rule of customary international law and "constitutes one of the basic principles of contemporary International Law regarding the responsibility of States."¹⁶¹ Canada needs to comply with international law and offer appropriate reparations and remedies for discrimination and human rights violations suffered by Indigenous women and as a result of the sex-based discrimination in the *Indian Act*.

153 United Nations Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, *Summary of responses to the questionnaire seeking the views of States and indigenous peoples on best practices regarding possible appropriate measures and implementation strategies to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples*, 5 September 2014, A/HRC/EMRIP/2014/4/Rev.1 at para 166. The Inter-American Commission on Human Rights has made similar statements: *Missing*, *supra* note 147 at paras 306-308.

154 UN Human Rights Committee, *Petitioner Submission Regarding Implementation by Canada of the 11 January 2019 Decision of the Committee Concerning the Petition of Sharon Mclvor and Jacob Grismer*, 15 June 2021, CCPR/C/124/D/2020/2010 at 5-7 [*Mclvor* 2021 Submission].

155 *Hele c Canada*, *supra* note 25; Indigenous Services Canada, "First Nations families and Canada agree to put litigation on hold while working to end the legacy of "enfranchisement" under the *Indian Act*," 3 March 2022.

156 *Mclvor* 2021 Submission, Mary Eberts June 14, 2021 letter to the Committee at 57.

157 Stewart Clatworthy, *Re-assessing the Population Impacts of Bill C-31* (Ottawa: INAC, 2001) at ix.

158 *Mclvor*, UNHRC, *supra* note 87, at paras 5.25, 7.3, and 7.8 at paras 5.25, 7.3, and 7.8.

159 See also UN GA, *International Covenant on Civil and Political Rights*, 16 December 1966, UN Treaty Series, vol 999, p 171, at Art 1.1.

160 *Communication No. 68/2014*, *supra* note 45, at para 18.4.

161 Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v Paraguay*, Judgment of June 17, 2005, (Ser C) No 125 at para 180.



In sum, Canada continues to ignore its international legal obligations and refuses to follow the recommendations made by international bodies such as the HRC to address discrimination against women in the *Indian Act*. International law requires Canada to make legislative changes.¹⁶²

INDIGENOUS VS CANADIAN DEFINITIONS

The *Indian Act* is colonial legislation written and amended in the common law tradition. Conversely, Indigenous world views apply membership and identity laws reflecting the many Indigenous legal orders operating across the country.¹⁶³ Two-eyed seeing (Etuaptmumk in Mi'kmaw) is an Indigenous framework from Mi'kmaw Elder Albert Marshall addressing the apparent discordance between Indigenous and Western legal approaches. Two-eyed seeing is "learning to see from one eye with the strengths of Indigenous knowledge and ways of knowing, and from the other eye with the strengths of mainstream knowledge and ways of knowing, and to use both these eyes together, for the benefit of all."¹⁶⁴

The *Indian Act* does not apply a Two-eyed seeing approach, which may help explain why the registration provisions as written may not reflect Indigenous realities.

In engagement sessions and survey responses, Indigenous People told NWAC the *Indian Act's* narrow, Western definitions of parentage, family structures and marriages are inconsistent with Indigenous lived experiences.

The *Indian Act* does not operate under Elder Marshall's concept of two-eyed seeing. This confuses and frustrates status applicants whose families, lived experiences and traditions do not line up with the *Indian Act's* reliance on Western legal documents proving ancestry.

Both two-eyed seeing and family law concepts reflect today's fluid, evolving family structures. The *Indian Act* does not reflect these evolutions.

The *Indian Act's* status registration provisions and guidelines ask applicants to submit documents proving the applicant's claims about their ancestry. Documentary proof means marriage certificates, long form birth certificates, band numbers, membership rolls and other records. The registration provisions assume a family tree where two opposite-sex people legally marry and have children, reflecting historic church-based family concepts.

Indigenous family histories may not contain legally recognized unions, documented with marriage certificates issued by a legally recognized authority. Customary marriages and other traditional Indigenous union ceremonies rely on an officiant's land-based and community authority.¹⁶⁵ These ceremonies operate to join two partners and ground the relationship in Indigenous concepts for love, relationship and commitment, as reflected in each nation's unique languages. Until recently, the law did not recognize these ceremonies without adequate records in status registration applications.

¹⁶² UNDRIP Act, supra note 36, at preamble and Schedule, Art 38: "States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."

¹⁶³ See e.g., John Burrows, *Canada's Indigenous Constitution*, (2010, Toronto: University of Toronto Press).

¹⁶⁴ Cheryl Bartlett et al, *Two-eyed seeing and other lessons learned within a co-learning journey of bringing together Indigenous and mainstream knowledges and ways of knowing*, (2012) 2:4 *Journal of Environmental Studies and Sciences* at pp 331–340.

¹⁶⁵ See, for example, the potlatch marriage ceremony: René R. Gadacz, "Potlatch", *The Canadian Encyclopedia*, (24 October 2019), < <https://www.thecanadianencyclopedia.ca/en/article/potlatch> >.



In 2020, Ontario amended its Marriage Act to enable Indigenous officiants to perform marriage ceremonies according to their customs and traditions and submit a marriage for registration with the Ontario Registrar General.¹⁶⁶ This is an example of two-eyed seeing in action.

The *Indian Act* does not reflect same-sex partnerships from before 2005. Until that year, Canada did not legalize same-sex marriages. This means applicants seeking Indian status cannot prove their ancestors' same-sex marriages from before 2005.

Today's Indigenous People are reclaiming their family structures and identities despite historic traumas. *Indian Act* application requirements do not reflect these painful histories. To underscore the disconnect between heteronormative-nuclear family structures and Indigenous family structures, one must remember Canada's role in disrupting Indigenous family structures. Canada's laws and policies aimed at assimilation separated children from their families to indoctrinate them with non-Indigenous societal values.¹⁶⁷ *Indian Act* enfranchisement laws determined status eligibility and Indigeneity based on family ties that discriminated against women.

The disconnect between Western and Indigenous family structures creates varying legal and social tensions. Approaching such conflicts with two-eyed seeing reconciles this tension but must also apply in the *Indian Act* status eligibility requirements.

Indigenous People inherit rich cultural and traditional legacies. Sometimes, the adults responsible for child-rearing, cultural teachings and legal guardianship are not a child's biological heterosexual parents.

An Indigenous person applying for Indian Status today must prove their parentage and ancestry using documents and recorded proof. This list of adults responsible for parenting this person may include adults beyond the parents listed on the birth certificate. Exponentially, the adults who raised those children may not appear on a birth certificate. The social structures informing child-rearing can vary among Indigenous communities but must conform to narrow *Indian Act* guidelines.

The *Indian Act's* rigid requirements for names and documents verifiable through government records may exclude applicants from being eligible for status because these requirements do not match the applicant's lived experience. Exclusion is a relevant concern because applicants living connected to their ancestry, customs, traditions and nation who are denied Indian status and the associated economic benefits cannot participate as can their status-holding relations. This perpetuates harmful exclusion patterns.

The *Indian Act* relies on family structures where parents raise children. The *Indian Act* defines parents as adoptive or biological mothers and fathers. Indigenous women in engagement sessions told NWAC this does not reflect Indigenous families where Aunties, grandparents and other adults raised children, sometimes for different childhood periods. The women told NWAC whether the *Indian Act* would accept an undocumented parent where the documented parent (the parent named on the birth certificate) did not raise the child.

¹⁶⁶ Indigenous Affairs, "Ontario Recognizes Indigenous Marriage Ceremonies" News Release (8 October 2020), online: < <https://news.ontario.ca/en/release/58746/ontario-recognizes-indigenous-marriage-ceremonies>>.

¹⁶⁷ TRC Final Report, supra note 61, at Executive Summary.



New legislation passed in 2019, *An Act respecting First Nations, Inuit and Métis children, youth and families*, reflects the reality Indigenous children are sometimes raised by and learn their culture from adults who are not their biological parents.¹⁶⁸ This statute's fluid definition reads, "family includes a person whom a child considers to be a close relative or whom the Indigenous group, community or people to which the child belongs considers, in accordance with the customs, traditions or customary adoption practices of that Indigenous group, community or people, to be a close relative of the child." This is two-eyed seeing in action.

The *Indian Act* relies on documents proving parentage and ancestry, making it ill-equipped to recognize Indigenous family structures and systems not recorded on paper. NWAC heard from survey respondents and engagement session participants the tension between Indigenous identity concepts and *Indian Act* status eligibility rules exacerbates harm. One survey respondent wrote, "I look forward to the day when we do not talk about Indian status at all, because all it does is create a tribe of Indians and not our nations."

NON-INDIGENOUS WOMEN AND STATUS

In the opinion of many participants engaged in our Round Table discussions, the *Indian Act* is a colonial document, and race shifting is a huge factor of interference to Indigenous women's right to status. White or non-Indigenous women have historically been included in the family histories of on-reserve Indigenous peoples by way of marriage.¹⁶⁹ Today, many non-Indigenous women and their children continue to have status because they were married to Indigenous men. The women and children of these unions are considered to be Indian and have never had to leave their communities. Even when non-Indigenous women divorce their Indigenous partners and marry non-Indigenous men, they retain their right to status. Indeed, as one survey respondent confirms, "There are far too many non-Indigenous women who are no longer affiliated with the spouse with whom they gained status and have remarried to a non-Indigenous person and have borne children who still have status entitlement."¹⁷⁰

Many First Nations women and their children, on the other hand, do not have status. Participants at NWAC's round tables stated that their inability to obtain status has forced many to become urban "Indians", making them "outsiders" in the eyes of their Indigenous community of origin. This is because they are labelled by some as "not being Indian" due to the fact that they are "mixed" race and grew up urban.¹⁷¹ These factors have played a crucial role in determining who has been able to remain in their respective communities. One participant told NWAC, "Many of our people are fighting hard to regain status and have to trace the lineage to begin the process for status entitlement [...] There are white women who have been granted status over the past decades yet those with Indigenous blood lines are denied registration." Gender discrimination in the *Indian Act* has therefore shaped the way

¹⁶⁸ FNIMCYF Act, *supra* note 69, at s 1 definition of family.

¹⁶⁹ Lawrence, Bonita, "Gender, Race and the Regulation of Native Identity in Canada and the United States: An Overview" *Hypatia*, Vol 18, Iss 2 (April 2013): 3-31 [Lawrence].

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*



we think about who is Indigenous, who is entitled to access Indian land, and by extensions, who is entitled to status and band membership.¹⁷²

Several participants have told NWAC that “[they] would like to see non-natives who gained status through marriage have it revoked” immediately.²⁴

BELONGING AND IDENTITY

Dr. Martin Brokenleg, an Indigenous scholar, emphasizes that belonging is one of the highest human needs, and what happens when this need is not met. Belonging ranks among one of four principles in Brokenleg’s synthesis of research on tribal wisdom and is the basis of various publications.¹⁷³ It can also be found in the traditional writings and practices of Indigenous peoples throughout North America. For Indigenous people, belonging and identity is greatly influenced by community.¹⁷⁴

According to many of our Round Table engagement participants and survey respondents, issues related to belonging and identity have emerged as direct or indirect consequences of not being able to obtain status.

One integral aspect of Indigenous peoples’ belief system is their strong connection to their ancestors, regardless of whether their identity is recognized by the government, their community and their peers. They either live in their First Nations communities, or they live in urban areas due to opportunity or the inability to live on the reserve due to membership restrictions. This creates barriers for connecting with their culture, customs, and ways. Since many Indigenous people identify themselves by their reserve or community, it is incumbent on a community and its people to validate who they are and provide a sense of belonging. Due to the status provisions of the *Indian Act*, dislocation from community has become common, hence, negatively affecting Indigenous people’s sense of belonging and identity.

A critical point to understand here is that Indigenous people are not permitted in most circumstances to live on any land part of an Indian reserve without Indian status and band membership.¹⁷⁵ This means that unless they have Indian status and band membership, they are not able to take part in the life of their own band community.¹⁷⁶ As one survey respondent wrote, “As someone unable to have status, it can feel invalidating, like I am not a part of my own culture. I know others feel this too, this needs to change. The government does not get to decide who is, and who is not Indigenous.”

Many Indigenous people who grew up outside of their communities have felt a sense of distance and loss of their cultural identity. Since Indigenous traditional knowledge is dependent on community connections, when there is an absence of community, individuals who do not or are unable to live within the community feel as if they do not belong anywhere.¹⁷⁷ One survey respondent shared, “You don’t have that same community belonging. So essentially, I have been robbed of my cultural identity. Easy to say immerse yourself now but growing up it was the equivalent of a scarlet letter. You don’t belong in community, but you’re not fully accepted into the white world because you are different.”

¹⁷² Ibid.

¹⁷³ Brokenleg, Martin. “Native Wisdom on Belonging.” *Reclaiming Children and Youth*, vol. 7, no. 3, 1998, pp. 130–132.

¹⁷⁴ Warton, Carolynne (2010): Identity Development and Belonging of First Nations Women from Georgina Island. Ryerson University, Thesis [Warton].

¹⁷⁵ Lawrence, Bonita. “Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview.” *Hypatia*, vol. 18, no. 2, 2003, pp. 3–31.

¹⁷⁶ Warton, supra note 174.

¹⁷⁷ Ibid.



This issue is key to understanding how the gendered regulation of Indigenous identity under the *Indian Act* has upset the viability of Indigenous communities for over a century.¹⁷⁸ Today, the descendants of Indigenous women who were forcibly removed from their communities for marrying non-status or non-Indian men, are struggling to place themselves in relation to their mothers' and grandmothers' communities in a way that not only recognizes their Indigenous identity but acknowledges their present reality.¹⁷⁸

The registration provisions of the *Indian Act* do not truthfully reflect concepts of citizenship and belonging of First Nations Peoples in relation to their communities, and the attempts to remedy the gender discrimination, to date, have not been sufficient. Government's role in determining cultural belonging through prescribing requirements for granting or denying status, or membership within First Nations communities, is an infringement of the inherent rights of First Nations Peoples and is a violation of Article 33 of the United Nations Declaration on the Rights on Indigenous Peoples. Specifically, the provisions of the *Indian Act* concerning Indian Status usurps First Nations' inherent right and ability to determine citizenship. Denial of self-determination and jurisdiction is a form of systemic violence that impacts the individual, the family, the community, and the Nation.

In addition to having their identities challenged by legislation, Indigenous peoples also find themselves being challenged within their own communities. The inability to claim membership to one's band community is a common barrier. The right of Bands to control their membership gives them the power to decide who becomes a member, and this power can sometimes be exercised negatively, leaving many Indigenous people without a Band and community. As one survey respondent put it, "While I believe band councils have a role in playing in registration, I too believe there are concerns regarding nepotism and local politics at play." Rejection by the band or community creates barriers to developing a healthy sense of belonging and self-acceptance, which can lead to a sense of abandonment and frustration. Indeed, according to Dr. Peter Menzies, one source of trauma at the community level arises from the unwillingness to "reclaim" community members.¹⁷⁹

One survey respondent told NWAC, "It is problematic to have elected officers from band councils making these decisions [...] It is also problematic that the government is making these decisions." Restoration of family and community ties is key to the revitalization of culture and belonging. Reconnecting with distinctive languages, cultures, territories, and ways of knowing represents an important solution to healing, Nation rebuilding, and community belonging.

Under section 35 of the Constitution Act, 1982, an Aboriginal nation has the right to determine which individuals belong to the nation as members and citizens. However, this right is subject to two basic limitations. First, it cannot be exercised in a manner that discriminates between men and women. Second, it cannot specify a minimum blood quantum as a general prerequisite for citizenship. The status registration provisions of the *Indian Act* and membership rules determined by band councils clearly violate the two limitations; that is, decisions are exercised in gender discriminatory ways and follow minimum blood quantum

¹⁷⁸ Lawrence, *supra* note 169.

¹⁷⁹ Menzies, Peter. "Intergenerational Trauma from a Mental Health Perspective." *Native Social Work Journal*, vol. 7, 2010, pp. 63-85.



rules. Engagement participants have told NWAC that, “Blood quantum [in particular] is problematic and is related to the issue of belonging and identity.” As one survey respondent told NWAC, “I think that ‘blood’ alone is not a good indicator of who belongs to a community but acknowledge that colonization has displaced Indigenous people from their identities, communities and traditions in complex ways.”

Recommendation 11 (above): That Indigenous Services Canada initiate consultation processes with First Nations peoples on the repeal and replacement of the *Indian Act* that includes an initial process of ensuring each rights holding group is appropriately represented in the consultations processes.

CONCLUSION

Bill S-3 has addressed the inequities that it was designed to address and the Government of Canada has achieved important successes in the bill’s implementation. Despite these successes, ongoing inequities persist related to the second-generation cut-off, age and marital status, access to justice, and self-determination.

This report recommends some policy and legislative measures that the Government of Canada should take to address ongoing issues related to the registration provisions; however, the central finding and recommendation of this report is that the *Indian Act* is not compatible with the *United Nations Declaration on the Rights of Indigenous Peoples* and the time has come for serious consultations and close coordinated work between the Government of Canada and First Nations peoples to design a roadmap for repealing the *Indian Act* and replacing it with agreements and laws that do conform with UNDRIP.





SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* that includes a legislated mandate for the Minister of Indigenous Services, in consultation and cooperation with First Nations peoples, and in close coordination with the Department of Justice Canada's UN Declaration Act Implementation Secretariat, to develop and implement an action plan for the repeal of the *Indian Act*.

RECOMMENDATION 2:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* that includes the re-wording of section 6, based on consultations with First Nations, that is clear and accessible.

RECOMMENDATION 3:

That Indigenous Services Canada continue working with Bands, NIOs and urban Indigenous organizations so that these organizations can provide support and advice to individuals throughout the registration process.

RECOMMENDATION 4:

That Indigenous Services Canada develop a funding program, in consultation and cooperation with First Nations peoples, NIOs and grassroots organizations, for the purpose of supporting programs and activities that help the descendants of the direct victims of the cultural genocide learn about and connect with their Indigenous heritages and communities.

RECOMMENDATION 5:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* that includes a provision to permit an individual to de-register from the Indian Register without affecting the registration entitlement of their children.

RECOMMENDATION 6:

That Indigenous Services Canada amend its policy with respect to unknown or unstated parentage to ensure that every reasonable inference in favour of a determination that an applicant's unknown or unstated parent, grandparent, or other ancestor is or was entitled to register for status, including but not limited to, sworn affidavits to the effect that an unstated parent or grandparent of the applicant is or was entitled to register.



RECOMMENDATION 7:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* to repeal the second generation cut-off rule by removing subsection 6(2) and amending paragraph 6(1)(f) to recognize entitlement to register where “either or both” of an individual’s parents are entitled to be registered.

RECOMMENDATION 8:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* to:

- a) Align section 6 with the *Hele* decision, specifically, to clarify that unmarried status women who “voluntarily” enfranchised between 1951 and 1985 were and are entitled to register; and
 - b) include individuals who lost status pursuant to section 109(1) among the categories of individuals entitled to be registered under paragraph 6(1)(a.3).
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RECOMMENDATION 9:

That the Government of Canada establish a compensation fund for individuals that incurred education and health care related expenses since the Bill C-31 amendments to the *Indian Act* that are expenses that they would not have incurred had their entitlement to register not been precluded by discriminatory provisions of the *Indian Act*.

RECOMMENDATION 10:

That the Department of Justice Canada establish a funding stream through the Legal Aid Program to provide funding to recipients for Indigenous rights matters, including legal issues related to the *Indian Act*.

RECOMMENDATION 11:

That Indigenous Services Canada initiate consultation processes with First Nations peoples on the repeal and replacement of the *Indian Act* that includes an initial process of ensuring each rights holding group is appropriately represented in the consultations processes.

RECOMMENDATION 12:

That the Minister of Indigenous Services Canada introduce a government bill to Parliament for the amendment of the registration provisions of the *Indian Act* to recognize the entitlement to register of First Nations persons who belong to Aboriginal societies that occupied Canadian territory at the time of European contact where those persons are parents to Canadian citizens or married or in common law relationships with Canadian citizens.

[APPENDIX A:](#) ISSUE SUMMARY - ENFRANCHISEMENT

[APPENDIX B:](#) ISSUE SUMMARY - MARITAL STATUS

[APPENDIX C:](#) ISSUE SUMMARY - SECOND GENERATION CUT-OFF RULE

[APPENDIX D:](#) ISSUE SUMMARY - UNKNOWN AND UNSTATED PARENTAGE

[APPENDIX E:](#) INFOGRAPHICS

[APPENDIX F:](#) QUICK GUIDE

[APPENDIX G:](#) KCI-NEWSQ MAGAZINE – INDIAN ACT SPECIAL EDITION

[APPENDIX H:](#) THE INDIAN ACT AND INTERNATIONAL LAW

[APPENDIX I:](#) IMPLEMENTATION OF BILL S-3 IN URBAN AREAS

[APPENDIX J:](#) ONLINE SURVEY REPORT





INDIGENOUS GENDER-BASED ANALYSIS OF
BILL S-3 AND THE **REGISTRATION PROVISIONS** OF THE

INDIAN ACT

FINAL REPORT



The Native Women's Association of Canada
L'Association des femmes Autochtones du Canada

MAY 2022