Native Women's
Association of Canada

L'Association des
femmes autochtones
du Canada

Board Engagement on Bill C-38, *An Act to amend the Indian Act (new registration entitlements)*

Final Report

August 2023

Summary

On 14 December 2022, Minister of Indigenous Services Patty Hadju, introduced Bill C-38, *An Act to amend the Indian Act (new registration entitlements)* (1st Sess., 44th Parl.) to the House. This Bill proposes further amendments to the registration provisions of the *Indian Act* as well as some of the offensive language under the Act.

Bill C-38 proposes amendments to the Act that aim to resolve the issues in the *Nicholas v Canada (Attorney General) Charter* challenge, specifically related to differential treatment of the descendants of individuals affected by coerced enfranchisement under section 109(1) of the pre-1985 *Indian Act*.

NWAC hosted an engagement session on the proposed amendments to the Act with members of the organization's Board of Directors. Participants shared their experiences, views, concerns, expertise, and recommendations related to the *Indian Act*.

The participants discussed a range of issues relevant to Bill C-38, some of which are addressed in the current (First Reading) version of the Bill and some of which are not addressed by the proposed amendments.

While Bill C-38 does propose a number of important amendments that must be passed as quickly as possible, the Bill fails to address a number of other ongoing issues of inequality under the Act, particularly related to the registration provisions, that also warrant the expedient attention of Parliament.

Removing offensive language related to dependent persons, as Bill C-38 proposes, is laudable; however, the very title of the Act is offensive and the continued and unbridled use of derogatory language to refer to First Nations should be addressed.

Bill C-38 proposes important solutions to de-registration and coerced enfranchisement legacies; however, the Bill fails to make use of this prime opportunity to also address ongoing inequities and Indigenous right infringements related to the second-generation cut-off rule and the 1985 cut-off.

While the time considerations related to resolving the *Nicholas* litigation is likely a factor affecting the scope of the content of the proposed amendments, the ongoing delay in more fulsome resolutions to ongoing inequities and the ultimate path toward the repeal and replace of the *Indian Act* are problematic.

About NWAC

The Native Women's Association of Canada (NWAC) is a national Indigenous organization established in 1974 representing political voices of Indigenous women, girls, and Gender-Diverse People in Canada. NWAC is inclusive of First Nations — on- and off-reserve, status and non-status, — Inuit, and Métis. An aggregate of Indigenous women's organizations from across the country, NWAC was founded on a collective goal to enhance, promote, and foster social, economic, cultural, and political well-being of Indigenous Women and Gender-Diverse People in their respective communities and Canadian societies.

Today, NWAC engages in national and international advocacy aimed at legislative and policy reforms to promote equality for Indigenous people. Through advocacy, policy, and legislative analysis, NWAC works

to preserve Indigenous culture and advance Indigenous people's wellbeing, and their families and communities.

Engagement

On 9 June 2023, NWAC hosted an engagement session on the proposed changes under Bill C-38 to the *Indian Act* with members of the organization's Board of Directors. This meeting was held at NWAC's headquarters in Gatineau Québec and was facilitated by a First Nations woman with significant expertise in gender-based issues under the Act.

In preparation for the engagement, NWAC's legal department prepared a backgrounder on the Bill and other ongoing issues not addressed by the proposed amendments. Specifically, the backgrounder provided a summary of the following issues: De-registration, enfranchisement (coerced, foreign residence, educational and professional designations, and entire bands), reparations, second-generation cut-off, 1985 cut-off, plain language, and repeal and replace.

Over the course of the day, participants shared their experiences, views, concerns, and recommendations respecting each of the issues and this information was collected by a professional note taker. For privacy reasons, we have undertaken to not identify the participants in the engagement or associate their statements to them (unless specifically requested by a participant).

This report summarizes the positions and recommendations of NWAC based on the engagement session.

Analysis

Offensive Language

Bill C-38 proposes amendments to the definition of dependent persons under the *Act*. The Bill does not address other offensive terms and definitions that ought to also be addressed by the Bill, including "Indian" and "voluntary enfranchisement".

Dependent Person

Clause 1 of the Bill proposes replacing the term and definition of "mentally incompetent Indian" under s. 2(1) of the *Indian Act* (RSC, 1985, c I-5) with the term "dependent person". The proposed language is less demeaning and gender-neutral.

Participants were supportive of these proposed changes.

Recommendation 1: Include clause 1 of Bill C-38 without further amendment in the final draft of the Bill.

Voluntary Enfranchisement

The use of the term "voluntary enfranchisement" conveys the impression that individuals applied for enfranchisement as a matter of their own volition. Participants discussed the implications of this

language and the importance of using language that reflects the factual realities of many of the people enfranchised under s. 109(1) of the pre-1985 Act.

Voluntary enfranchisement suggests an act committed freely, but NWAC heard that many of those who "voluntarily" enfranchised were actually coerced. Applications for enfranchisement made under s. 109(1) were the result of a colonial and genocidal system which visited significant suffering on First Nations peoples. The constraints on liberties and equal rights and residential school systems imposed on First Nations under the *Indian Act* amounted to force by the state and the threats of force by the state that often gave little option for individuals to relinquish their rights and entitlements under the *Indian Act* via s. 109(1) to avoid the harmful effects of those state threats and exercises of violence.

Recommendation 2: When developing information resources and communications materials related to s. 109(1) enfranchisement, government departments and civil society organizations should use the term "coerced enfranchisement" instead of the term "voluntary enfranchisement".

"Indian"

The use of the term "Indian" to refer to First Nations people is offensive. Despite the legal significance of this term in Canada's legislative history and constitution, the continuing use of this term by Parliament is neither necessary nor appropriate. Participants recommended that the *Indian Act* be renamed. Accordingly, the use of the term should also be replaced with language that is not offensive and which more accurately reflects the peoples to whom the legislation relates.

Recommendation 3: Bill C-38 should be amended to rename the *Indian Act* to the *First Nations Act* and to replace the term "Indian" with "First Nations Person" when referring to a person and "First Nations" when referring to all other "Indian" nouns.

De-Registration

Clause 3 of Bill C-38 proposes amending section 5 of the Act to provide the option for individuals whose names are included on the Register to have their names removed. These proposed provisions are in line with recommendations made by NWAC to Indigenous Services that a Government Bill be introduced to Parliament to provide an option for individuals to de-register. Moreover, clause 9 of the Bill would ensure that de-registration would not affect the individual's ability to re-register and that their de-registration would not adversely affect the entitlement of their children, grand-children, or other descendants to register.

Recommendation 4: The de-registration provisions under Bill C-38 effectively address the issues of de-registration and should not be further amended.

Enfranchisement – Coerced

Clause 4(1) of the Bill would amend paragraph 6(1)(a.1) of the Act to add paragraph (i) to include entitlement to register for individuals who lost or were denied status because they were enfranchised. By removing s. 109(2) order qualifier, this provision would encompass both s. 109(1) and (2) enfranchisement

orders into 6(1)(a.1), thereby extending entitlement to the direct descendants of such persons pursuant to s. 6(1)(a.3).

The proposed amendments would effectively address the issue of status entitlement rights for individuals adversely affected by the coerced enfranchisement provisions.

Recommendation 5: The proposed amendments to address the issue of status entitlement for individuals adversely affected by the coerced enfranchisement provisions would effectively address this issue and should not be further amended.

Enfranchisement – Foreign Residence

Clause 4(1) of the Bill proposes amending paragraph 6(1)(a.1) of the Act to add paragraph (ii) and include entitlement to register for individuals who lost band membership because they resided in a foreign country for five years or longer, pursuant to section 13 of the 1927 version of the *Indian Act*.

These proposed amendments would address the status entitlement issue caused by section 13 and recognize entitlement for the direct descendants of individuals affected by those provisions equal to the status entitlement of the descendants of individuals entitled to register under the current paragraphs 6(1)(a.1) and (a.2) of the current Act.

Recommendation 6: The proposed amendments to address the issue of status entitlement for individuals adversely affected by the foreign residency provisions would effectively address this issue and should not be further amended.

Enfranchisement – Educational and Professional Designations

Clause 4(1) of the Bill proposes amending paragraph 6(1)(a.1) of the Act to add paragraph (iii) and include entitlement to register for individuals were enfranchised as a result of attaining certain educational or professional designations, pursuant to section 111 of the 1906 version of the *Indian Act*.

These proposed amendments would address the status entitlement issue caused by section 111 and recognize entitlement for the direct descendants of individuals affected by those provisions equal to the status entitlement of the descendants of individuals entitled to register under the current paragraphs 6(1)(a.1) and (a.2) of the current Act.

Recommendation 7: The proposed amendments to address the issue of status entitlement for individuals adversely affected by the educational and professional attainment provisions would effectively address this issue and should not be further amended.

Enfranchisement – Entire Bands

Clause 4(1) of the Bill would amend paragraph 6(1)(a.1) to add paragraph (iv) and include entitlement to register for individuals who lost status because of the enfranchisement of their entire band. Under s. 112(2) of the pre-1985 *Indian Act*, the Governor in Council could order the enfranchisement of all

members of a band where the band applied for enfranchisement and just a simple majority of the band members voted in favour of the enfranchisement application.

The scope of effect of the proposed amendments to address enfranchisement of entire bands is not clear. Participants suggested that the Government of Canada should compile a list of the bands and individuals affected by entire enfranchisement provisions. This list could assist the government in assessing the number of individuals newly entitled to status under the provisions and in measuring the outcomes related to the number of individuals that actually register following the coming into force of the proposed provisions.

Because the amendments would recognize entitlement to register of affected individuals under s. 6(1)(a.), an assessment of the number of individuals newly entitled under the proposed provisions should, of course, include any individuals that would be entitled to register as a result of the proposed provisions under s. 6(1)(a.1) and (a.3).

The issue of entitlement to status for individuals that were affected by s. 112(2) enfranchisement orders raises the related question of band membership.

Section 112 of the pre-1985 Act afforded the Governor in Council the authority to enfranchise all members of a band only under strict circumstances. This included that the band, in its application for enfranchisement, submitted a plan for the "disposal or division of the funds of the band and the lands in the reserve" and that the Minister was satisfied that the "band was capable of managing its own affairs as a municipality or part of a municipality".

In effect, a s. 112 order both enfranchised every member of a band and dissolved the band itself.

Because Bill C-38 proposes to address the enfranchisement of the individuals but does not propose to address the dissolution of the band, the legislation, as amended by the Bill, would be unclear as to the entitlement to band membership of the affected individuals and their descendants, as the bands affected would remain dissolved.

Recommendation 8: The proposed amendments to s. 6(1)(a.1)(iv) should not be further amended; however, Bill C-38 should amend s. 17(1) of the Act to provide the authority to the Minister to re-constitute bands dissolved by s. 112 orders.

Recommendation 9: Indigenous Services Canada should assess the number of individuals that would be newly entitled to status with the coming into force of the proposed provisions related to entire enfranchisement and monitor the actual number of individuals that apply for status under the provisions.

Reparations and Legal Services Supports

Many individuals who lost or were denied entitlement to register because of discrimination under the *Indian Act* have incurred significant financial costs that they would not have incurred had their status entitlements been recognized. In addition to financial costs (such as education and health care expenses), these individuals have suffered the harms of being denied access to their communities, cultures, and heritage in many respects.

Parliament continues to amend the *Indian Act* to address the residual adverse effects related to the 1985 amendments, yet each amending act includes Crown immunity provisions that prevent individuals from bringing actions against the government related to the damages they have suffered because of the unjust denial of their entitlement to status. This continues to be the case with Bill C-38.

While Parliament could remove these Crown immunity clauses to permit individuals to seek just compensation for the damages they have suffered related to the unjust denial of entitlement to register, the ongoing access to justice crises create a significant obstacle for the expedient resolution of these types of disputes. Alternatively, Parliament could establish a statutory benefits and compensation schedule under which individuals would be entitled to apply for compensation for the expenses they incurred because of unjust registration provisions.

Participants noted that financial compensation alone would not be sufficient and highlighted the importance that "moral compensation" be included in such a framework.

While navigating a statutory benefits and compensation scheme would be significantly less complicated than litigation, individuals would still benefit from the assistance of legal professionals. Moreover, a system of supports that includes access to legal advice could also be of great assistance to individuals navigating the registration, membership, protest, and appeal procedures under the *Indian Act*.

Recommendation 10: Bill C-38 should be amended to include provisions for establishing a statutory benefits and compensation schedule under the *Indian Act* to compensate individuals for the damages they suffered due to unjust registration provisions.

Recommendation 11: Parliament should amend Bill C-38 to remove Crown immunity clauses respecting the removal of a person's name from the register.

Recommendation 12: Bill C-38 should be amended to include a requirement that the Minister establish a framework under the *Indian Act* that enables individuals to access legal services for matters related to the Act. Such a framework may include providing funding certificates and entering into agreements with legal clinics and law schools.

Second Generation Cut-Off

Bill C-38 does not address the second-generation cut-off. Under section 6 of the *Indian Act*, where only one of an individual's parents are entitled to register under subsection 6(1), they are entitled to register under subsection 6(2). There is no entitlement for an individual to register where only one of their parents is registered under subsection 6(2). In effect, this creates a status entitlement cut-off, where there are two consecutive generations of parents but only one is entitled to register.

Participants noted that the second-generation cut-off does not take into consideration First Nations' traditional understanding of community inclusion, such as, for example, the principle of Seven Generations. The imposition of a generational cut-off imposed by Parliament on First Nations is demeaning and infringes on their rights to determine membership, as affirmed within the *UN Declaration on the Rights of Indigenous Peoples*.

While the *Indian Act* distinguishes between entitlement to register and band membership, the registration provisions create rules determining who does and does not have entitlements under the

legislation. In effect, the registration provisions are *de facto* membership rules imposed by Parliament on all First Nations regardless of their customs and traditions.

Participants expressed their offence to Parliament's presumption to dictate to First Nations who they are as Peoples by asserting jurisdiction over entitlement to membership in this way. The removal of children from their communities, including through arbitrary limitations on entitlement to register, causes profound harms, including the loss of rights, identity and family.

Recommendation 13: Bill C-38 should be amended 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 14: Bill C-38 should be amended to create a statutory mandate, with timelines, to work with First Nations governing bodies, organizations, and grassroots to develop amendments to the registration provisions that conform to the rights of First Nations under the *United Nations Declaration on the Rights of Indigenous People* to exercise self-determination, including the right to determine membership.

1985 Cut-Off

The Act creates inequities based on age or parental marital status. Individuals descending from those entitled to register under provisions enacted to address historic inequities are treated differently depending on their age or the marital status of their parents.

Paragraph 6(1)(a.3) of the Act extends entitlement to register to the direct descendants of persons who are entitled to be registered under paragraphs 6(1)(a.1) and (a.2) if they were born before 17 April 1985 or, if their parents were married to each other at any time before that date. The effect of this paragraph is to make a distinction on the basis of a person's age or the marital status of their parents that will determine whether they are entitled to the exercise of full status, namely, the right to pass on status to their children.

The differential treatment on the basis of age and marital status under paragraph 6(1)(a.3) causes siblings and cousins to be denied the right to pass on status entitlement to their children for no reason other than the date of their birth or the marital status of their parents. This distinction does not only perpetuate the harmful stereotype that First Nations people are less deserving of equality in determining community and national membership, it also perpetuates residual discrimination at the community level.

Individuals without status or with section 6(2) status are sometimes discriminated against within their own communities as there are sometimes perceptions that status under the Act is a reflection of one's connection to their culture. Entitlement to status can conjure feelings of connectedness to one's culture and the denial of status can cause profound emotional and psychological harms. It can also exclude non-Status holders from participating in culturally significant and legally-protected activities, such as hunting, trapping and fishing.

The United Nations Human Rights Committee determined that Canada has an obligation to take steps to address residual discrimination within First Nations communities arising from prohibited forms of

discrimination under the *Indian Act* (*McIvor and Grismer v Canada*, UNHRC (20 November 2019) CCPR/C/124/D/2020/2010, at para 9). The continued imposition by Parliament on First Nations peoples of a categorized statutory registration entitlement framework perpetuates community-level discrimination on the concept that status under the Act is a reflection of someone's connectedness to their Indigenous culture.

Removing the second-generation cut-off as proposed above would render the 1985 cut-off issue moot. Recognizing entitlement to status on the basis that either or both parents are entitled to register under paragraph 6(1)(f) would remove any distinction under paragraph 6(1)(a.3) because the affected individuals would be entitled to section 6(1) status on the basis that at least one of their parents is entitled to status.

As such, NWAC reiterates the above recommendations to repeal the second-generation cut-off rule, as set out above.

Plain Language

The registration provisions of the *Indian Act* cannot be coherently understood without access to previous versions of the Act which are largely only accessible via access to a law library.

Moreover, the language used in the Act is often confusing and inaccessible to the average person.

Participants noted that it can be challenging for Indigenous language keepers to translate ideas and concepts into English and French where there may not be words that properly capture the meanings of the Indigenous words. There is great support for the development of a plain language version of the Act, including annotations, diagrams, and examples, in order to make the legislation more accessible. Participants also emphasized the importance of developing plain language resources with Indigenous peoples.

Recommendation 15: Bill C-38 should be amended to mandate the Minister to develop, in consultation and cooperation with First Nations Peoples, a plain language version of the *Indian Act* and an action plan for the translation of the plain language document into First Nations languages.

Repeal and Replace

The *Indian Act* is not compatible with traditional First Nations governing structures and approaches and participants insisted that the status quo is not acceptable. The repeal of the *Indian Act* cannot happen without the establishment of appropriate treaties and laws to ensure that the removal of the colonial elements of the Act does not result in the loss of rights and entitlements woven into the Act. The great and difficult work of repealing and replacing the *Indian Act* must not be delayed any further.

A legislative framework to repeal and replace the *Indian Act* must go further than that set out under the *Indian Act Amendment and Replacement Act* (S.C. 2014, c 38) and should include statutory timelines for specific outcomes. This framework must also ensure that First Nations Peoples, including specifically First Nations Women and Gender-Diverse People are properly and equally included in the processes for the development of the procedures and the substantive outcomes of repealing and replacing the Act.

Participants insisted, when referring to the repeal and replace processes, “Nothing about us, without us”.

Recommendation 16: Bill C-38 should be amended to mandate the Minister to work with First Nations Peoples to develop an action plan for the repeal and replace of the *Indian Act* that includes set deadlines for the action plan and requirements that Indigenous Women and Gender-Diverse People are equally included in the processes.

Conclusion

Bill C-38 proposes some important amendments to the *Indian Act* that should be implemented as soon as possible. The importance of the proposed amendments under the Bill, however, do not justify continuing delays in addressing other ongoing inequities under the Act.

NWAC supports the proposed amendments to address offensive language, de-registration, and entitlement to status for individuals affected by coerced enfranchisement and their descendants. Nonetheless, Bill C-38 can and should go further in addressing more of the ongoing issues with the registration provisions of the Act and beyond.

In particular, the Bill should provide for avenues of reparations and compensation for the victims of discrimination under the registration provisions, remove the second-generation cut-off rule and 1985 cut-off, ensure the availability of accessible versions of the Act, and set out binding timelines for the development of a framework for the repeal of the Act.