Eliminating Discrimination under the Registration Provisions of the *Indian Act*: Culturally Appropriate Consultation with Indigenous Women

Summary Report on Consultation

Native Women's Association of Canada

L'Association des femmes autochtones du Canada

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Contents

Summary

In January 2018, the Native Women's Association of Canada's (NWAC) Board of Directors (the Board) convened in Ottawa to review and discuss discrimination under the registration provisions of the *Indian Act* and the Government's next phase of consultation on these matters.

NWAC's legal department prepared and delivered an in-depth report on the case law and legislative reforms related to the discrimination under the registration provisions. Legal Counsel provided a comprehensive overview of Bill S-3 and answered questions on the matter from the Board. The Board engaged in an extensive and informative discussion on discrimination under the registration provisions and necessary components of consultations with Indigenous women affected by this legislation.

The Board provided valuable information on consultation requirements in their regions through open and frank discussion as well as through surveys provided by NWAC. The results of these discussions and surveys are set out below, distilled into three categories:

1. Understanding: Minimum Standards for Consultation
2. Issues: Key Concerns with the Registration Provisions and Consultation Processes
3. Design: Necessary Components of Consultation by Region

Based on these discussions, NWAC has determined that a multi-pronged national consultation process is required to meaningfully and effectively consult Indigenous women on the issue of discrimination under the *Indian Act*. These processes should take place in safe, accessible and culturally appropriate places in Indigenous communities, at the national level using information technologies to connect with urban and rural Indigenous women, and through conferences with experts in Indigenous and human rights legal issues.

Understanding: Minimum Standards for Meaningful Consultation

For consultation to be meaningful, it must at a very minimum, meet the following standards:

1. It must be undertaken in good faith. The information and understanding gained from consultation must be taken into consideration and clear explanations for how the concerns and issues raised by participants were considered by the government should be made publically available.
2. Indigenous women must be provided safe, accessible and culturally appropriate opportunities, places and methods to engage in the consultation processes.
3. The objects of consultation must include the elimination of discrimination on the basis of sex, age and marital status under the *Indian Act*.
4. The government should recognize that the *Indian Act* is a colonial document that continues to have the effects of assimilation and cultural genocide.
5. Consultation must take place with a recognition of the nation-to-nation relationship between Canada and Indigenous peoples; however, the consultation processes must also ensure that the voices of individuals and groups most directly affected by the legislation, particularly women, are heard in Indigenous communities, in urban areas, on campuses and in institutions.

Issues & Recommendations: Key Concerns with the Registration Provisions and Consultation Processes

The Board, composed of representatives from the Provincial and Territorial Member Associations (PTMA), received a presentation from the Organization's In-House Legal Counsel on recent case law and legislative reforms affecting the registration provisions of the *Indian Act*. Throughout the presentation, the Board discussed numerous issues related to discrimination under the registration provisions of the Act in general and provided valuable comments and concerns. The Board members also provided input to NWAC's Legal Counsel on these matters through one-on-one conversations.

The comments and recommendations that follow are the product of NWACs discussions with its Board members on what constituted meaningful consultation with Indigenous women on the issue of discrimination under the *Indian Act*.

1. *Consultations must be meaningful and in good faith. The government must not only listen to Indigenous women, but it must be prepared to transform what it learns through the consultations into meaningful, comprehensive and prompt action.*

Consultation is the "interactive method by which states seek to prevent or resolve disputes"[1] and the government has an obligation to always act with good faith to provide meaningful consultations when dealing with Indigenous peoples.[2]

NWAC is encouraged by the Government of Canada's position that it will not act unilaterally to amend the registration provisions and that it has committed to comprehensive consultations with Indigenous peoples affected by these provisions of the Act.[3] NWAC and its Board are deeply concerned, however, that the government may have pre-determined its legislative response to what it learns through these consultation processes.

The layered coming into force provisions of Bill S-3 require some explanation. It appears that the provisions of the Bill which will come into force pursuant to subsection 15(2) of *An Act to amend the Indian Act in Response to the Superior Court of Quebec decision in Descheneaux c Canada* may be the Government's legislative response to its consultations with Indigenous peoples. Should this be the case, it would strongly indicate that the Government has determined its course of action in addressing the broader issues of discrimination under the registration provisions before the consultation processes have begun.

Consultation must be "interactive". Inviting public comment and discussion on the issues of discrimination under the registration provisions without any intent to incorporate the products of that consultation into the Government's response to the issues substantially undermines the confidence Indigenous peoples can have in the government's good faith engagement in these proceedings.

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[1] Bryan A Garner, *Black's Law Dictionary*, 9th ed (Thomson Reuters, 2009).
[2] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 16.

[3] INAC, "The Government of Canada's Response to the Descheneaux Decision" (Date modified: 12 April 017), online: Government of Canada < https://www.aadnc-aandc.gc.ca/eng/1467227680166/1467227697623 >.

The issues of discrimination under the registration provisions are both overt and systemic with far-reaching and painful impacts. Consultations which can reasonably and meaningfully address this discrimination must be receptive of the need for comprehensive and prompt reforms as prescribed by the Indigenous peoples most impacted by the legislation.

NWAC is confident that meaningful, good faith consultations with affected Indigenous peoples can produce the solutions necessary to end the discrimination under the registration provisions; however, such comprehensive and effective solutions will not be attainable if the government has already prescribed the legislative response to these consultation processes.

Recommendation: The Government should clarify the purpose of the layered coming into force provisions of S-3 and confirm that it will incorporate the products of the consultation processes into its ultimate prescription to end discrimination under the registration provisions of the *Indian Act*.

2. *Individuals and communities should be provided with clear and accessible information on the consultation processes through the use of traditional media as well as online/ social media.*

Information on the consultation processes and how those processes will take place in each community or region should be clearly explained through multiple media. These communications should include information on the registration provisions of the *Indian Act*, recent case law and legislative amendments related to those provisions, and specific information on the consultation processes themselves, including who will be consulted, when, how and where.

These communications must be in clear and accessible language and significant efforts must be made to explain in digestible terms the complex elements of the registration provisions.

Recommendation: Communication plans should be developed for each community or region which identify a range of traditional and social media options for promoting awareness of the consultation processes and understanding of the issues on which the processes aim to focus.

3. *Indigenous women must be provided safe and accessible places and means for participating in the consultation processes.*

Meaningful consultation can only occur where participants feel that they can safely express their concerns and beliefs. Indigenous women must be provided safe and accessible places to participate in consultation processes. This means locations that are culturally appropriate, safe and accessible both geographically and for persons with mobility challenges.

Women should be able to participate anonymously if they do not feel safe disclosing their identity.

Where physically attending consultation events is not reasonably possible, options for participation through online, teleconference or written submissions should be available.

Recommendation: consultations should allow Indigenous women to participate in-person, online or through mail-in options. Where consultations take place in-person, participants should be provided culturally appropriate, safe and accessible environments.

4. *Indigenous women impacted by the registration provisions live on and off "reserves" and the consultation processes must ensure that the voices of Indigenous women in urban areas, on campuses and in shelters are heard.*

Women impacted by the discrimination under the registration provisions under the *Indian Act* live both on and off "reserves". Indigenous women in urban and rural areas, on university and college campuses and in shelters and who are incarcerated should have the opportunity to participate in the consultation processes.

Discriminatory denial of status can have significant impacts on individuals and communities. Hearing from Indigenous women who have been unable to continue to live in their communities is a very important component of the consultation processes. These people and their children are often most affected by the discrimination under the legislation.

Recommendation: Efforts must be made to reach out to Indigenous women living in urban centres and urban areas through online resources supported by a communications plan to promote engagement. Universities and colleges, women's shelters and correctional centres should also be contacted to provide Indigenous women with opportunities to participate.

5. *The current Indian Act registration provisions are perpetuating the cultural genocide against Indigenous peoples in Canada.*

NWAC's Board Members indicated that, in some Indigenous communities, there are estimates that between 50 per cent and 90 per cent of the youth are 6(2) status. This is a serious concern because these people will be able to pass on this status to their children only if the other parent also has status.

The inability of some Indigenous peoples in Canada to pass on their status limits their ability to pass on their identity because, under the current *Indian Act* framework, "Indian" status is tethered to services and residence in the community. Without access to services and housing, individuals are at serious risk of losing membership in their Indigenous communities and, therefore, face significant challenges in passing on their identity to their children.

By effectively creating two classes of status, one class which affords individuals the right to pass on their status (6(1)) and on which permits individuals to pass on their status only in limited circumstances (6(2)), the Government is permitting the continued colonial objective and effects of assimilation of Canada's Indigenous peoples.

The registration provisions of the *Indian Act* deprive Indigenous people of the right to determine their own membership, limits access to services and community, unjustly constrains the rights of Indigenous peoples to pass on their Identities to their children, and constitutes a form of cultural genocide.

Legislation, which perpetuates the assimilation and cultural genocide of Indigenous peoples, is causing great psychological and emotional trauma among indigenous peoples, especially young people.

Recommendation: The consultation processes must invite, accept and consider information on the genocidal and assimilation effects of the registration provisions, how these effects are materializing in the communities and how these effects relate to Indigenous women in particular.

6. *Comprehensive reform is mandatory: The Indian Act is not compatible with the United Nations Declaration on the Rights of Indigenous Peoples.*

There is no legislative amendment which can correct the discriminatory and colonial effects of the *Indian Act*. Ultimately, any legislation which deprives Indigenous peoples of self determination and self-governance, including subverting First Nations to "wards" of the state and retaining authority over status, is incompatible with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Given the Government of Canada's commitment to fully implement the UNDRIP as well as the introduction of a Private Member's Bill requiring conformity of Canada's laws with UNDRIP, there are major concerns with the fate of the *Indian Act*.

While there is broad consensus that the *Indian Act* must be repealed, the rights and benefits Indigenous peoples enjoy under the Act must be preserved. The most appropriate mechanisms for repealing the *Indian Act* while preserving Indigenous rights and interests under that act in a way that conforms with UNDRIP are likely self-governance agreements. The transition from the *Indian Act* to UNDRIP, however, may pose significant risks for intersectionally-marginalized Indigenous persons, such as Indigenous women.

The Government should be alive to the need for comprehensive reform, not just of the registration provisions, but of the *Indian Act* entirely and the very relationships between Canada and Indigenous peoples. The transition from the *Indian Act* to self-governance and nation-to-nation relationships, however, must ensure that the rights and interests of Indigenous women are respected and advanced.

Recommendation: The consultation processes must invite, accept and consider information on broader, more comprehensive reforms not only of the registration provisions of the *Indian Act*, but on the transition from the *Indian Act* to UNDRIP-compliant self-governance that respects and advances the rights and interests of Indigenous women.

7. *Any changes to the registration provisions, or transitions from the Indian Act to self-determination in Indigenous membership, must ensure the rights of Indigenous women are protected.*

Indigenous women have been historically targeted for discrimination under the *Indian Act*. The pre-1985 provisions under section 12 of the Act stripped women of their status for marrying non-status persons or being the children of single mothers. Indigenous women continue to face disproportional rates of poverty and violence in Canadian society and the Government must ensure that any legislative amendments to the *Indian Act* recognize and work to repair historical injustices and current marginalization and discrimination against Indigenous women.

Indigenous women must have an equal voice in consultations to address discrimination under the Act and to transition to UNDRIP-compliant self-governance agreements. Meaningful consultation with Indigenous women requires providing safe environments where Indigenous women have the opportunity to explain how the registration provisions affects them and their families. It also requires that the government be receptive to the stories of affected Indigenous women and exemplify that it has heard and considered their stories when drafting its legislative and/ or policy prescriptions.

Recommendation: Consultations must actively engage the voices of Indigenous women impacted by discrimination under the *Indian Act*. The Government should commit to specifically and clearly commenting on how it will ensure that the rights and interests of Indigenous women are respected in any legislative amendments to the registration provisions.

8. *Parliament must eliminate the 1951 cut-off date for Indigenous people, particularly women, who lost their status due to the "Marry-Out Rule", "Double Mother Rule", "Illegitimate Female Child Rule" or enfranchisement.*

The government must stop discriminating against individuals who lost their status under sections 12(1)(a)(iv), 12(1)(b), 12(2) or 12(1)(a)(iii) between 1951 and 1985. The government's continued refusal to recognize the rights of Indigenous women to their identity is highly offensive to Indigenous people and incredibly damaging to the individuals, families, communities and nations who continue to suffer from these discriminations.

NWAC believes that the deprivation of a person's status on the basis of their sex, age or marital status is not justifiable and encourages the Government to end this continued discrimination against some of Canada's most vulnerable people. The distribution of community resources is an important matter that requires due consideration when the Government makes any decisions which might impact those resources; however, depriving individuals their right to status on the basis of their sex, marital status or age is reprehensible and cannot be a justifiable method of conserving community resources.

Recommendation: The consultation processes must be specifically mandated with identifying measures to eliminate the discrimination people continue to suffer as a result of pre-1985 provisions of the *Indian Act* that deprived women and their children of their status on the basis of sex, marital status and age.

9. *The 1985 cut-off date for children of unmarried parents discriminates against youths and single mothers on the basis of age and marital status and must be eliminated.*

The registration provisions, under the S-3 amendments, will continue to discriminate against youth and unmarried parents via the 1985 cut-off. Indigenous people must be afforded the right to determine their own membership in accordance with their own customs and the UNDRIP. Under the current *Indian Act* framework, the Government determines who has membership in Indigenous communities by tethering financing for services and access to housing to "Indian" status, thereby effectively denying membership in the community to persons who cannot access housing and services in the communities.

Sections 6(1) and 6(2) establish *de facto* classes of status and the recognition of these classes of status can be based on discriminatory criteria. For example, Bill S-3 amended section 6(1)(c) of the *Indian Act* to afford 6(1) status to any person who is the grandchild of a woman who lost her status due to the marry out rule under paragraph 12(1)(b) of the pre-1985 Act, so long as that person was born before April 17, 1985 or their parents were married to each other at any time before that date.

The provisions that contain these rules create differential treatment on the basis of age and marital status wherein, the children of single Indigenous mothers or individuals born after 1985 who otherwise meet the above requirements are entitled only to 6(2) status. Young people, born after 1985, who meet the

above test in all other ways are deprived 6(1) status on no other basis than their age and the marital status of their parents. This discriminates arbitrarily against young people for their age and against single mothers for their marital status.

Recommendation: The consultation processes must invite, accept and consider information on the effects of discrimination against individuals under the registration provision on the basis of age and marital status. The government must immediately commit to eliminating discrimination against millennials and younger generations on the basis of their age and to eliminating discrimination against unmarried Indigenous mothers on the basis of their marital status.

10. *The Indian Act, especially the registration provisions, are convoluted, indecipherable and reference previous versions of the Act that are no longer publically available.*

Legislation, even complex and intricate legislation, must be comprehendible. The convoluted equations for status and the constant referrals to previous sections of the Act which are no longer publically available render the registration provisions of the *Indian Act* unreadable. Indigenous Canadians, should not require a deciphering code to determine whether they or their children are eligible for status.

The failure to provide clearly written legislation deprives individuals of the tools to assess the correctness of government decisions based on that legislation and perpetuates scepticism of the Government with the impression that Parliament is deliberately passing indecipherable legislation to deny Indigenous peoples their rights.

Individuals ought not to be forced to rely on the Government's interpretation of their rights under legislation. The law must be accessible, and to be accessible it ought to be clear and available to the public for review and interpretation. The registration provisions are not available for interpretation and Parliament's failure to provide clear and legible language under the *Indian Act* perpetuates mistrust that undermines the processes of reconciliation.

Recommendation: The consultation processes should work to gather information and techniques that will enable Parliament to draft legislation that is clear and accessible to the public, especially Indigenous peoples.

11. *Consultations with Indigenous women on registration provisions must take into account cultural and regional differences. Different regions and communities have different customs, norms and priorities.*

There is a diverse range of Indigenous peoples in Canada, each with their own cultures and traditions. When consulting Indigenous women, these cultural differences should be taken into account in the design and implementation of the consultation processes.

Consultation activities and timeframes should accommodate traditional activities and ensure that a maximum number of people are available in the communities to participate in consultation processes as they take place.

While the right of Indigenous peoples to be represented by the leaders of their choosing, all indigenous peoples must be given an opportunity to have their voices heard. This means respecting the customs and traditions of consulting with communities on a nation-to-nation basis, while also ensuring that individuals and specific groups, especially women, are given an opportunity to have their voices heard.

Recommendation: Consultation processes should be scheduled to accommodate customs and traditions of the communities, including traditional activities and holidays, to ensure that the maximum number of people are available to participate in the consultations in culturally appropriate ways.

12. *Consultations must address the unfair additional burdens the "Two Parent Rule" places on women.*

The *Indian Act* continues to have the effect of perpetuating assimilation and cultural genocide by constraining the ability of Indigenous people to pass on their identity to their children. The Act's tethering of services to status ensures that individuals who do not qualify for "Indian" status are obstructed form maintaining their Indigenous identity. Without access to services, it is exceedingly difficult to maintain residence in the community and this inability to maintain residence creates a significant barrier to the passing on of tradition, custom, language and belonging.

The de facto "classes" of "Indian" status created by section 6 of the *Indian Act* are creating entire generations of Indigenous youth who may be unable to pass on their identity. In some communities, as many as 90 per cent of the youth have 6(2) status, and unless they parent children with other status persons, they will be unable to pass on their status, and therefore their identity, to their children.

Requirements of proving that both parents of a child are status creates an unfair burden on women not placed on men. While it is relatively simple to identify the mother of a child, identifying the father can be significantly more challenging and potentially even dangerous for the mother.

While section 6(1)(f) status is not an objectionable criteria, depriving a child of equal status in his community on the basis that only one of his parents is status is offensive and discriminatory.

Recommendation: The consultation processes must invite, receive and consider information on the impacts that the "Two Parent Rule" has had on individuals, families and the communities. A stated purpose of the consultations must be to arrest and reverse the assimilation and genocidal effects and objects of the *Indian Act*. Conclusion

Conclusion

Meaningful consultation of Indigenous women on matters of discrimination under the *Indian Act*, particularly under the registration provisions, requires a battery of diverse solutions-oriented processes that are culturally and gender appropriate and which recognize the lived realities of Indigenous women across Canada.

There are five minimum standards which must be met for these consultations:

1. The consultations must be undertaken in good faith; specifically, the products of consultation must be reasonably considered by the government before any changes to legislation, policies or programs related to these matters.
2. Indigenous women must be provided safe and culturally appropriate opportunities to participate in the consultations.
3. The objects of the consultation processes must include the elimination of discrimination under the *Indian Act*.
4. The assimilation and cultural genocide effects of the Act should be recognized by the government.
5. Recognition of the nation-to-nation relationships between Indigenous peoples and Canada must not preclude the g=consultation of marginalized groups, families and individuals.

Many issues intersect with discrimination under the *Indian Act*. The planning and design work NWAC undertook with its Board of Directors provided valuable information on important issues that should be taken into account in carrying out these consultations.

The consultation processes must be, and must be seen to be, meaningful in that participation in the processes must be able to affect change. This will require clarification from the government on the purpose of the layered coming into force provisions of Bill S-3 and commitments to consider show how it considered, information provided in the products of the consultation processes.

Individuals, on and off reserve, and communities must be provided with information on the consultation processes and Indigenous women must be provided with safe, culturally appropriate and accessible means of participating in the processes.

The consultation processes must take place in the context of the recognition that the *Indian Act* continues to have assimilation and cultural genocide effects. Addressing these egregious and fundamental issues with the Act require comprehensive reforms that respect the UNDRIP. Recognition and respect for Indigenous rights to self-determination and self-governance, however, must also ensure equality of men and women and respect for domestic and international human rights.

Ultimately, eliminating discrimination under the *Indian Act* requires some basic minimum amendments, including the elimination of discrimination on the basis of age, sex and marital status that result from cut-off dates, marital requirements and unequal treatment under the Two Parent Rule found in the registration provisions.

Amendments to the legislation and/ or the transition from the *Indian Act* to an UNDRIP-compliant nation-to-nation self-governance relationship must be clear. The current convoluted and illegible language of the *Indian Act* must not continue to deny people access to justice. Future legislation and agreements be clear and accessible.

Appendix A: Report to the Board: Sex-based Discrimination and Bill S-3

Sex-based Discrimination and Bill S-3:

From the *Indian Act* to UNDRIP

January 2018

Native Women's Association of Canada

By Adam Bond

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Executive Summary

In response to court decisions in *McIvor* and *Descheneaux*, Parliament has passed legislative amendments to the *Indian Act* in an effort to correct discrimination in contravention of section 15 of the *Charter*. The 2010 amendments which followed the British Columbia Court of Appeal decision in *McIvor* operated to correct sex-based discrimination between the children of the victims of the "double mother rule" (the children of two successive generations of non-status mothers would lose their status) and the children of the victims of 12(1)(b) (women who lost their status for marrying non-status men) which resulted from the 1985 amendments.

Bill S-3 was passed on December 4, 2017 in response to the *Descheneaux* case, with the purpose of correcting the sex-based discrimination to the third generation of the descendants of the victims of the double mother rule, the marry-out rule and the descendants of "illegitimate" children. Bill S-3 includes two stages of amendments to the registration provisions. The first stage addresses only the discrimination addressed in *Descheneaux* on the coming into force of sections pursuant to clause 15(1) of the bill, while the second stage of amendments will address a broader range (although not all grounds) of discrimination in the registration provisions on the coming into force of sections pursuant to clause 15(2).

The government has committed to a comprehensive phase of consultations with indigenous peoples and organizations before implementing further amendments to correct discrimination in the registration provisions of the *Indian Act*. Whether the government intends to engage in the consultation processes meaningfully and in good faith may be called into question on the risk that the government appears to have already decided on its response to the consultation before engaging in the processes. The registration provisions already set out in Bill S-3, which will come into force pursuant to clause 15(2), may be the intended legislative reforms the government will implement following consultation. While this would avoid the lengthy process of returning to Parliament with further legislative amendments through a bill, such a move appears to indicate that the government has already made up its mind on the solution, undermining any consultations with Indigenous peoples on the matter.

The government has indicated that it will support Romeo Saganash's private member's bill to fully implement *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and to conform Canada's laws with it. Because the *Indian Act* is diametrically opposed to many of the rights and principles of UNDRIP, it is likely that the *Indian Act* will have to be abolished in order to fully implement UNDRIP domestically.

NWAC may be able to get out ahead of the national discussion on the implementation of UNDRIP by beginning to advocate in the consultations processes for the replacement of the *Indian Act* with self-government systems that respect existing domestic Indigenous rights and UNDRIP. By pushing the public discourse beyond discrimination in the registration provisions to discrimination throughout the *Indian Act*, NWAC could assume a leadership role in these processes and make significant contributions to the transition from the *Indian Act* to UNDRIP.

Bill S-3 Registration Provisions

McIvor and Descheneaux

Amendments to the *Indian Act* in 1951 established the "double mother rule", wherein two successive generations of non-status mothers would result in the loss of status of their children when those children reached the age of 21.[4] Parliament amended the Act in 1985 in an ostensible attempt to conform the legislation with the recently enacted *Charter*.

The BC Court of Appeal (BCCA) in *McIvor* found that the gender discrimination in the *Indian Act,* which prevented women who lost their status from passing on their regained status in the 1985 legislation, was justified on the basis of preserving existing vested Indigenous rights[5]; however, the discrimination in the 1985 amendments to the Act – which ameliorated the ability of victims of the "double mother rule" to pass on their status to their children without providing this benefit to children of women that lost their status through marriage – were not justified. It is on the basis of this under-inclusiveness in the 1985 amendments that the court found a violation of the plaintiffs' section 15 Charter right to equality in the *McIvor* case.[6]

Parliament's 1985 amendments to the Indian Act failed to correct discrimination in the registration provisions.

The 2010 amendments to the Act aimed to correct the gender discrimination resulting from the 1985 amendments, but only to the strict requirement of the BCCA's decision – Parliament did not seek to remedy all potential discrimination arising from the 1985 amendments.[7]

The Superior Court of Quebec (QCCS) revisited the issue of sex-based discrimination in the registration provisions of the *Indian Act* in the *Descheneaux* case. The facts were similar to those of the *McIvor* case, but for the generation of complainants. Parliament's decision to not implement comprehensive legislative reforms to address sex-based discrimination in the 2010 amendments ultimately exposed the government to further litigation on these sex-based discrimination matters.

Despite the McIvor and Descheneaux decisions, the Indian Act continues to discriminate.

Status children who had, or were to have, lost their status at age 21 due to the "double mother rule" were granted 6(1) status for life under the 1985 amendments, including the capacity to pass on status to their children.[8] Thus, some children of two successive generations of non-status mothers (namely, those children born of a marriage entered into before April 17, 1985) gained a status which could be passed on to their children.

On the other hand, grandchildren of women who had lost their status as a result of marriage, and whom were born to a marriage entered into before April 17, 1985, acquired a lesser status, which cannot be passed on to their children.[9]

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[4] *Descheneaux c Canada (Procureur Géneral)*, 2015 QCCS 3555, at para 139.
[5] *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (CanLII), 306 DLR (4th) 193; 91 BCLR (4th) 1, at para 129 (*McIvor*).
[6] *McIvor*, at para 140.
[7] *Descheneaux*, at para 47.
[8] *Descheneaux*, at para 130.
[9] *Descheneaux*, at para 142.

The QCCS found that the 1985 amendments did not comply with section 15 of the *Charter* where it provides status to persons who have only one status parent, and that parent had only one status parent, but only where that status grandparent is a man, not a woman.[10] Accordingly, the Court delivered an 18-month suspended judgement that paragraphs (6)(1)(a), (c) and (f) and subsection 6(2) are inoperative.

Bill S-3 was introduced to the Senate in October 2016 in response to the QCCS' suspended declaration.[11] The bill passed the Senate in June 2017 with an amendment intended to address all sex-based inequality in the registration provisions of the *Indian Act*[12] and which could have extended eligibility for registration to all persons with First Nations ancestry,[13] commonly referred to as the "6(1)(a) all the way" provision; however, the government opposed the amendments.[14]

The government opposed Senate amendments to eliminate all discrimination from the registration provisions of the Indian Act

Ultimately, the House passed Bill S-3 on December 4, 2017 without the "6(1)(a) all the way" provisions but significantly amended the registration provisions under section 6 of the Act.[15] These amendments will occur in a layered approach, first with significant amendments to paragraph 6(1)(c) that address the immediate *Descheneaux* issues, and then broader, more widely-encompassing amendments to paragraph 6(1)(a). These changes will apply upon the coming into force first of the Paragraph 6(1)(c) amendments and then the coming into force of the broader 6(1)(a) amendments.[16]

Regardless of the legislative amendments made to the registration provisions of the *Indian Act*, the federal government must devolve to Indigenous peoples' authority over determining the status of "Indians" in order for Canada to respect its commitments to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).

The government's support for legislation that will require compliance with UNDRIP will require that Canada respect the rights of Indigenous peoples to determine their own identity

Reforms of the Indian Act must be informed by UNDRIP.

[10] *Descheneaux*, at para 152.
[11] Bill S-3, *An Act to amend the Indian Act (elimination of sex-based inequities in registration)*, October 25, 2016, Parliament of Canada, LegisInfo < http://www.parl.ca/DocumentViewer/en/42-1/bill/S-3/first-reading> at Summary (Bill S-3, Initial).
[12] Bill S-3, *An Act to amend the Indian Act (elimination of sex-based inequities in registration)*, June 1, 2017, Parliament of Canada, LegisInfo < www.parl.ca/DocumentViewer/en/42-1/bill/S-3/third-reading> at section 2 (Bill S-3, Amended).
[13] Ben Segel-Brown, PBO, *Bill S-3: Addressing Sex-Based Inequalities in Registration* (December 5, 2017) <www.pbo-dpb.gc.ca/en/blog/news/Bill_S-3> (PBO, S-3)
[14] For example, House of Commons Debates, (2017)C Edited Hansard, Vol. 148, No. 198 1st Session, 42nd Parliament, at pg 13030 (Ms. Yvonne Jones (Parliamentary Secretary to the Minister of Indigenous and Northern Affairs, Lib.).
[15] Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c Canada*, 1st Sess, 42nd Parl, 2017 (S-3 Assented).
[16] S-3 Assented, *Ibid* at Cl 15.

and membership. [17] Because the *Indian Act* asserts government authority over "Indian" status, it controls membership in Canada's Indigenous communities in contravention of Article 33 of UNDRIP. While this issue is more closely addressed under *Implications of UNDRIP on the Indian Act* below, it is suffice here to say that efforts to address discrimination in the *Indian Act* ought to be informed by broader legislative changes and the application of international Indigenous law domestically.

NWAC Efforts to Address Discrimination in the Registration Provisions

The Native Women's Association of Canada has advocated for the removal of discriminatory registration provisions from the *Indian Act*, including providing media support for Sharon McIvor's efforts to address this discrimination at the United Nations Human Rights Committee[18] as well as promoting public awareness of the issue through publications on the NWAC website[19].

NWAC is currently developing a communications strategy which will promote awareness of issues related to the *Indian Act*, including the use of video, blogs and social media with the aim of providing easily digestible information for the public and generating support for NWAC's efforts to affect positive change.

Registration Pursuant to Coming into Force Provision 15(1)

The Bill S-3 amendments to the registration provisions of the *Indian Act* which will first take effect are designed to address the section 15 *Charter* violations identified in *Descheneaux*. In keeping with the convoluted tradition of the *Indian Act*, these provisions which are ostensibly designed to address sex-based discrimination in the registration provisions are complex, difficult to follow and often refer to the pre-1985 version of the *Indian Act*, which is no longer available on the Government of Canada's Justice website.

Bill S-3 will amend the registration provisions in two stages, with the first stage addressing only Descheneaux matters.

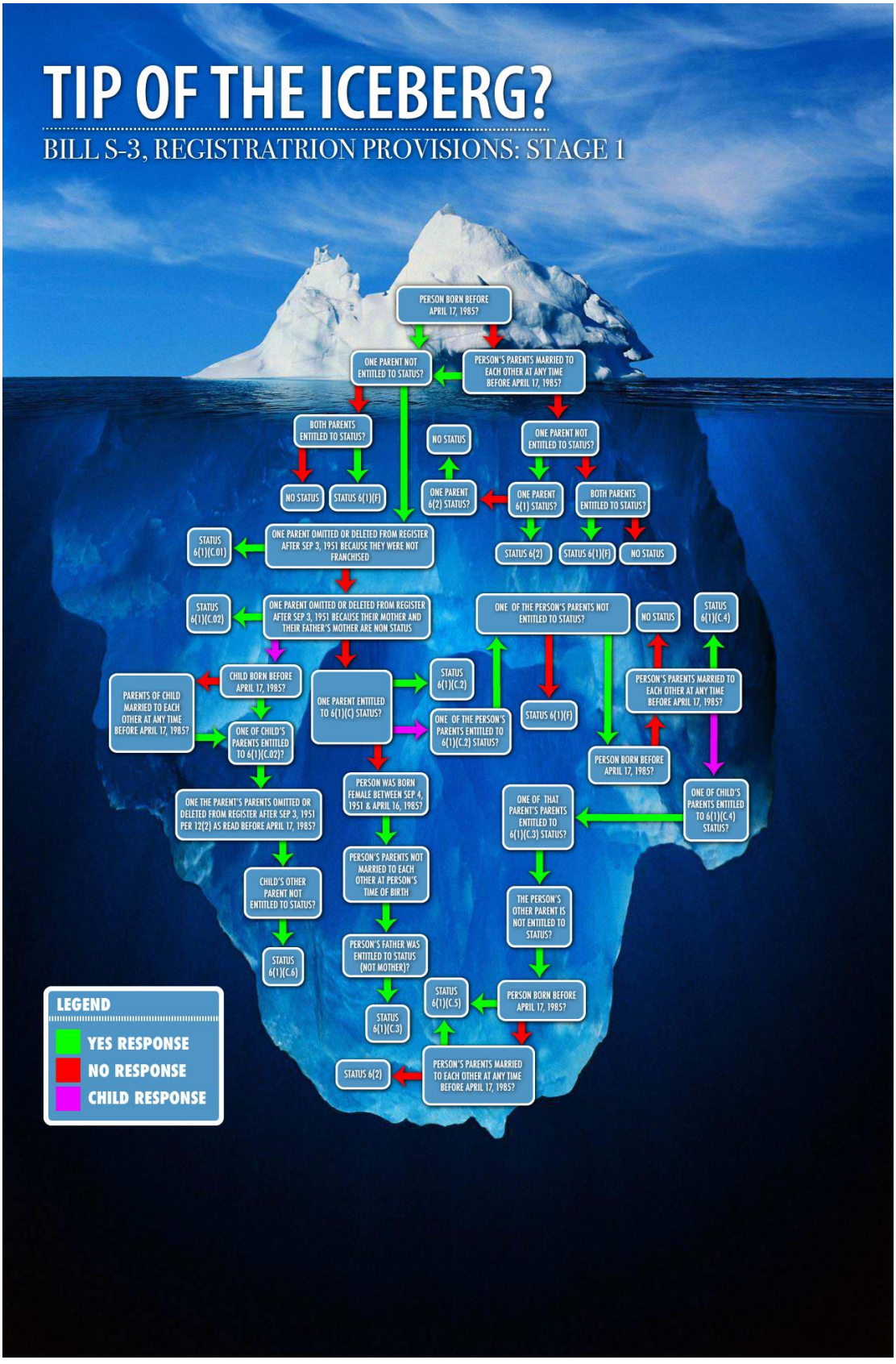
The registration provisions which will take effect pursuant to Bill S-3 clause 15(1) will resolve the inequality to some of the grandchildren of Indigenous women who were denied their status that resulted from the 1985 amendments to the *Indian Act*. The infographic below provides a visualization of the Clause 15(1) amendments to the registration provisions.

[17] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf, at Article 33.1 (UNDRIP).

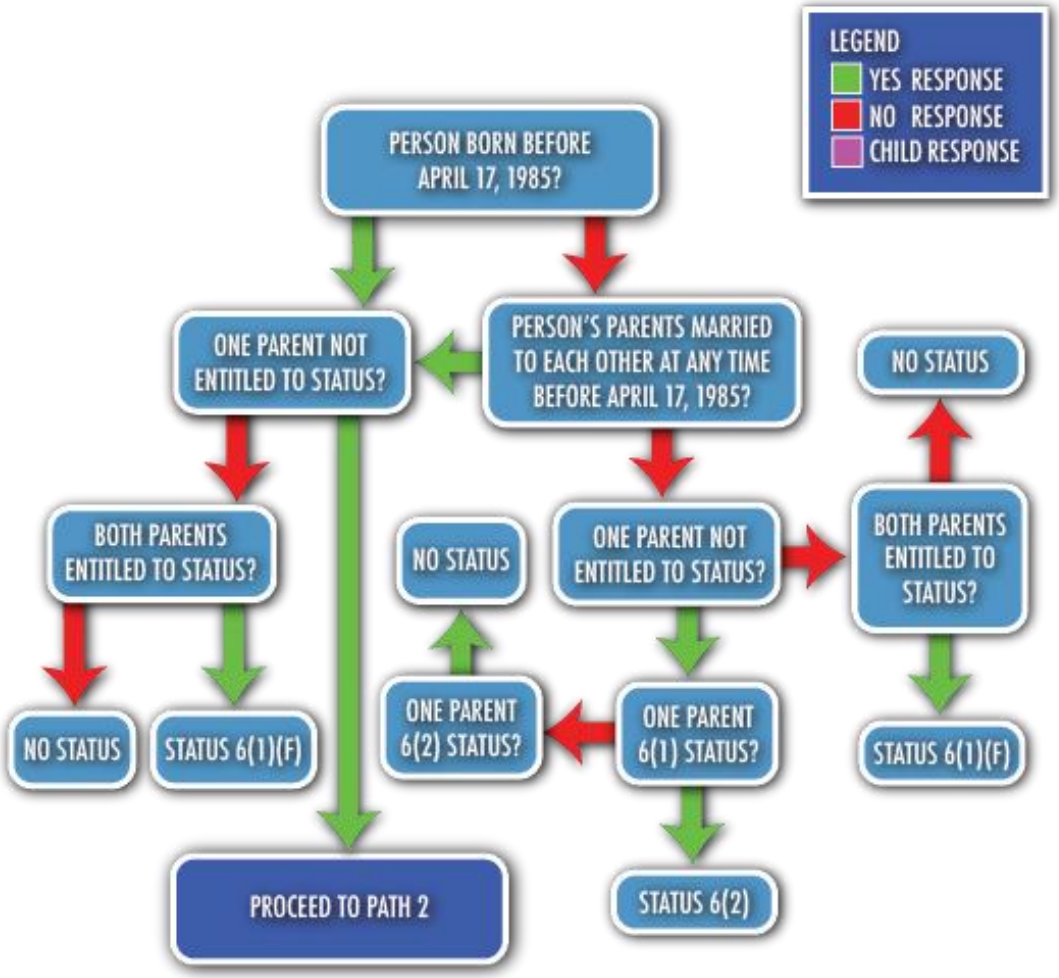
[18] Native Women's Association of Canada, "Canada jeopardizes credible footing for national inquiry by delaying on eliminating sex discrimination from the Indian Act" Press Release (23 June 2016) < https://www.nwac.ca/2016/06/press-release-canada-jeopardizes-credible-footing-national-inquiry-delaying-eliminating-sex-discrimination-indian-act/ >.

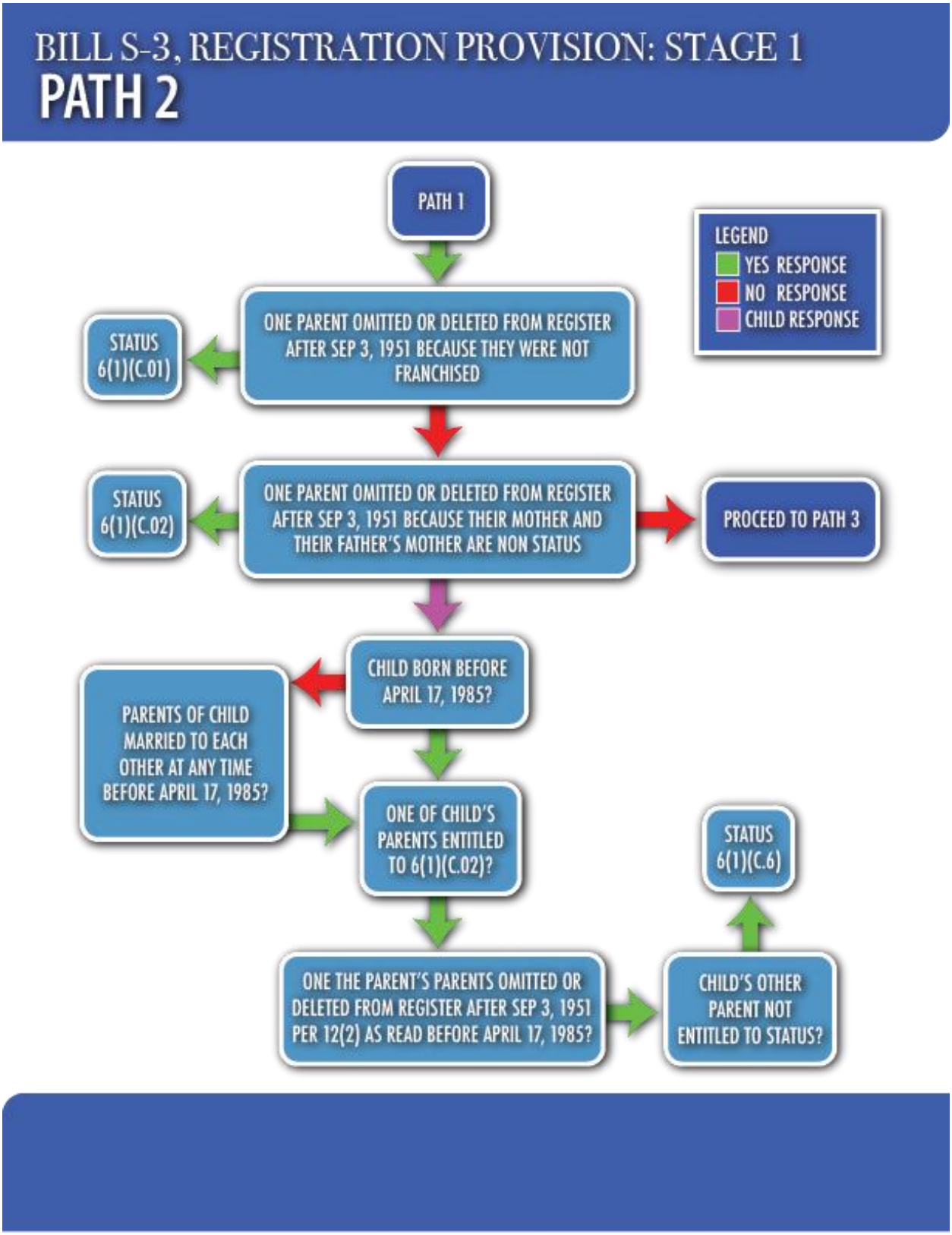
[19] For example: Native Women's Association, "Updates" (26 December 2016) < http://voices-voix.ca/en/facts/profile/native-womens-association-canada >.

Infographic: CiF 15(1)

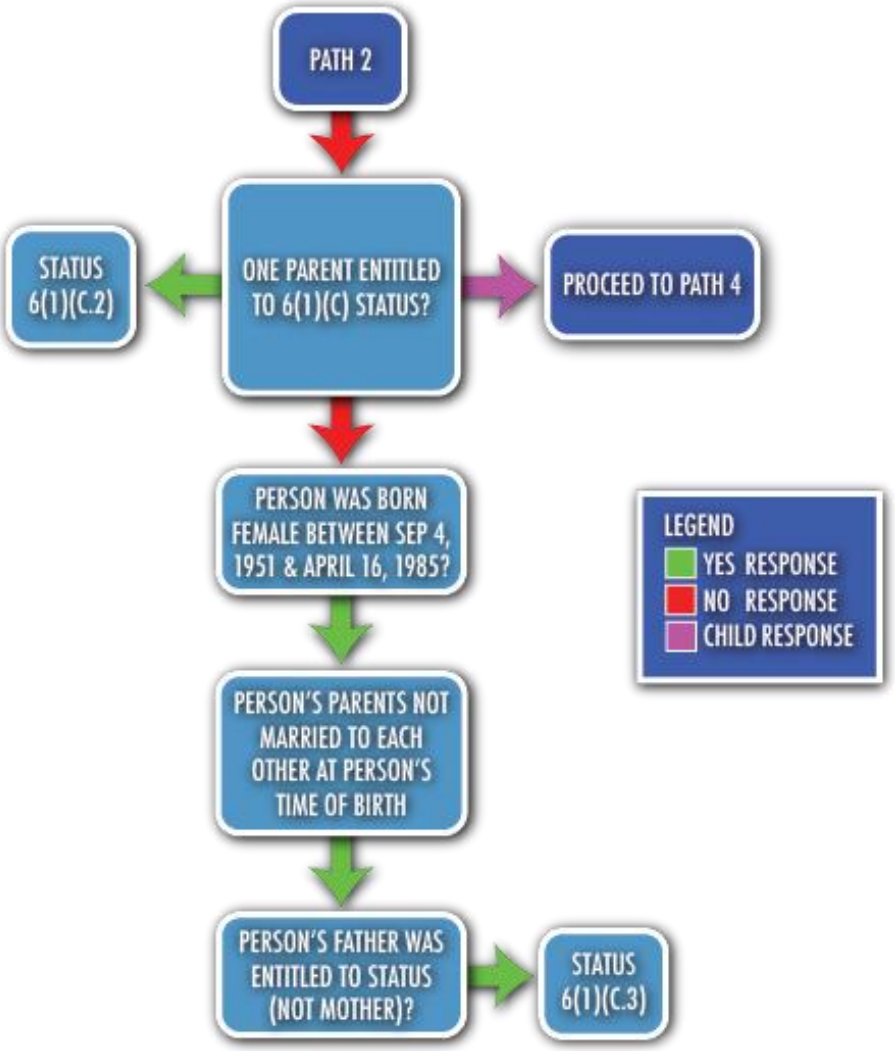


BILL S-3, REGISTRATION PROVISION: STAGE 1
PATH 1

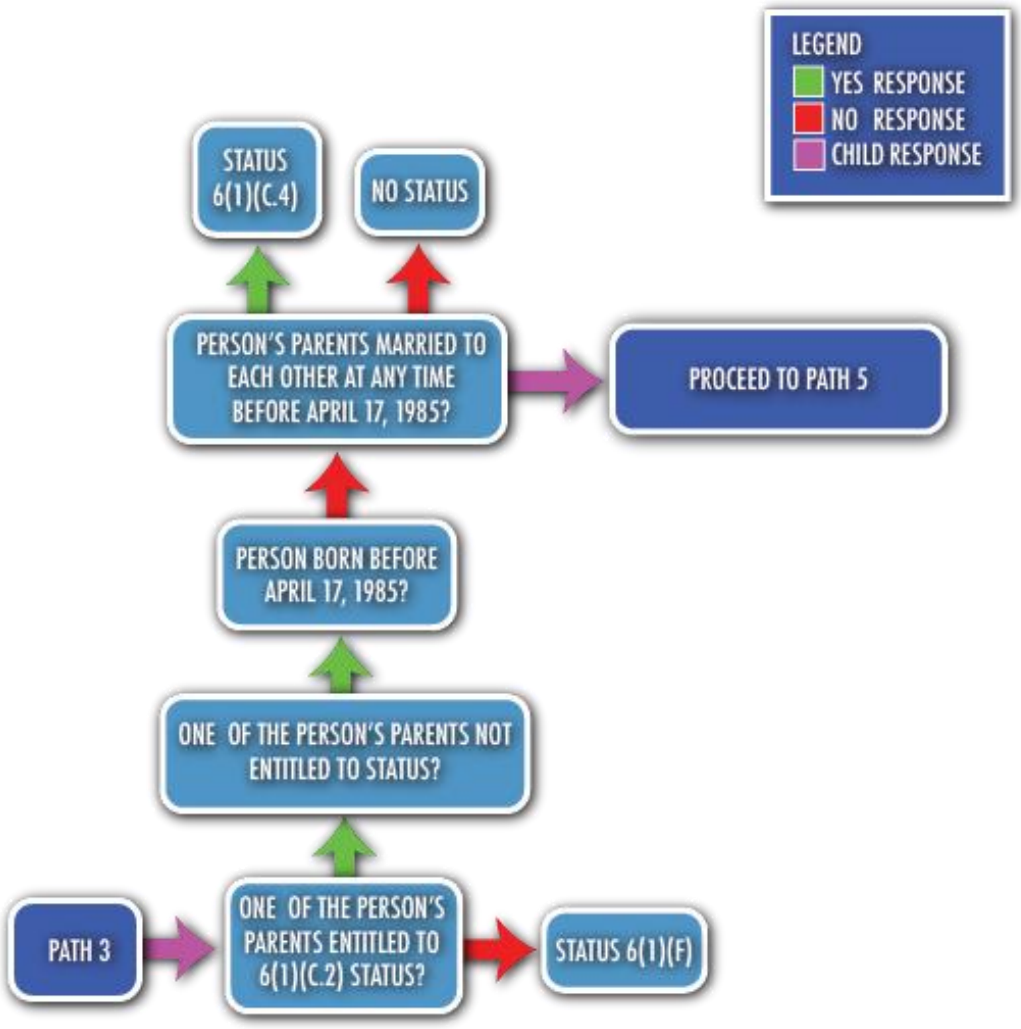



BILL S-3, REGISTRATION PROVISION: STAGE 1
PATH 2
PATH 1
LEGEND
YES RESPONSE
NO RESPONSE
CHILD RESPONSE
ONE PARENT OMITTED OR DELETED FROM REGISTER AFTER SEP 3, 1951 BECAUSE THEY WERE NOT FRANCHISED
STATUS 6(1)(C.01)
ONE PARENT OMITTED OR DELETED FROM REGISTER AFTER SEP 3, 1951 BECAUSE THEIR MOTHER AND THEIR FATHER'S MOTHER ARE NON STATUS
STATUS 6(1)(C.02)
PROCEED TO PATH 3
CHILD BORN BEFORE APRIL 17, 1985?
PARENTS OF CHILD MARRIED TO EACH OTHER AT ANY TIME BEFORE APRIL 17, 1985?
ONE OF CHILD'S PARENTS ENTITLED TO 6(1)(C.02)?
STATUS 6(1)(C.6)
ONE THE PARENT'S PARENTS OMITTED OR DELETED FROM REGISTER AFTER SEP 3, 1951 PER 12(2) AS READ BEFORE APRIL 17, 1985?
CHILD'S OTHER PARENT NOT ENTITLED TO STATUS?

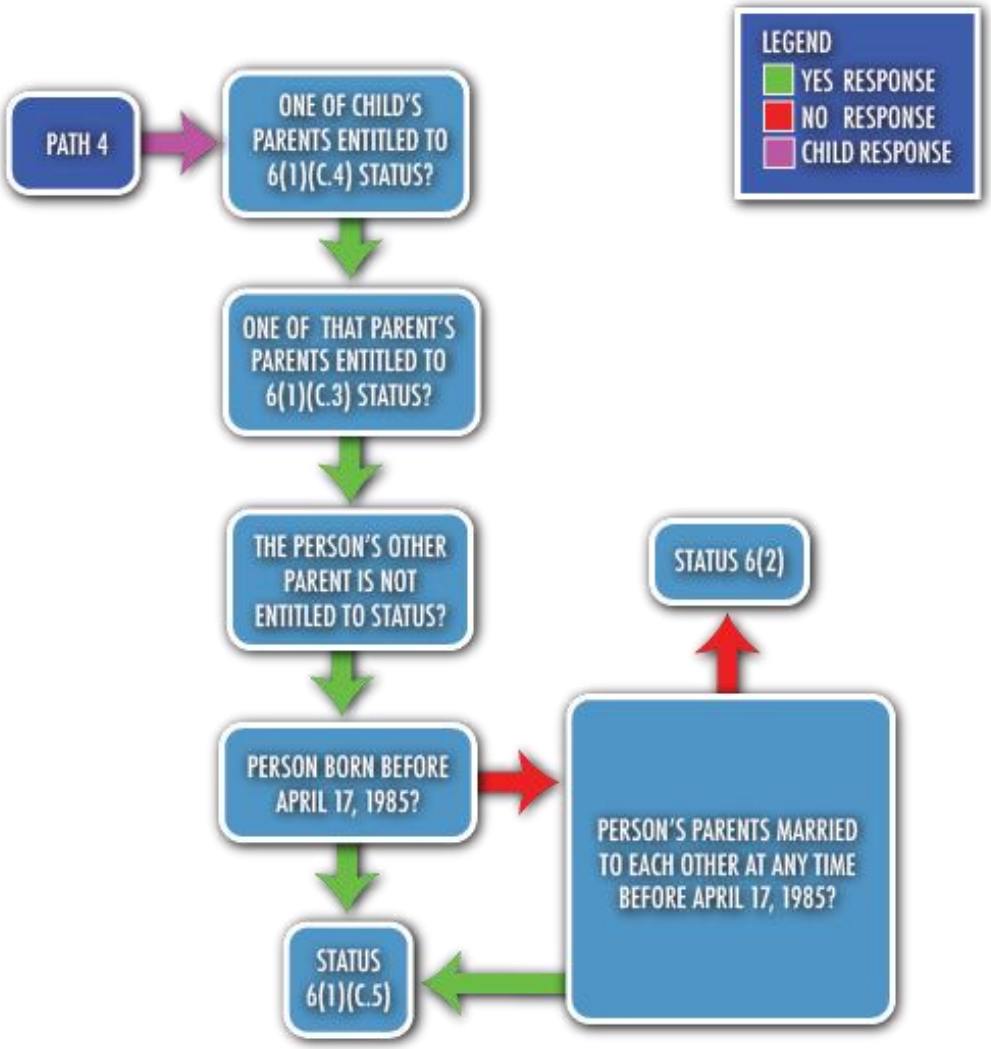
BILL S-3, REGISTRATION PROVISIONS: STAGE 1
PATH 3



BILL S-3, REGISTRATION PROVISIONS: STAGE 1
PATH 4



BILL S-3, REGISTRATION PROVISIONS: STAGE 1
PATH 5



Registration Pursuant to Coming into Force Provisions 15(2)

The amendments to the registration provisions which will come into force in accordance with Clause 15(2) of Bill S-3 are less complex and more broadly encompassing. The numerous and convoluted categories created under 6(1)(c) will be replaced with a broader section 6(1)(a).

The second stage of amendments will address a broader range of (but not all) discrimination in the registration provisions.

Under the 15(2) amendments, individuals will have a pathway to status where they are "a direct descendant of a person who is, was or would have been entitled to be registered under paragraph (a.1) (double mother rule, women married to non-status man, enfranchisement) or (a.2) ("illegitimate" female child).

These amendments, however, continue to discriminate on the basis of age or marital status in that children born before April 17, 1985 will be entitled to status under these provisions regardless of the marital status of their parents, while children born after April 16, 1985 will be entitled to status only if their parents were married to each other at some time before April 17, 1985.

While marital status is not an enumerated ground of discrimination prohibited under section 15 of the *Charter*, the Supreme Court of Canada has held that it is an analogous ground on which discrimination is prohibited under section 15.[20] Because these provisions provide an unequal benefit to persons that did marry over those who did not, this constitutes an unequal benefit under the law in violation of section 15 of the *Charter*.

Bill S-3 amendments will likely discriminate on the prohibited ground of marital status.

A significant issue with the registration provisions which will come into force pursuant to clause 15(2) is the inconsistency in status between persons born after April 16, 1985 and "direct descendants" of persons who were removed or omitted from the Register or a Band List because of the double mother rule, marrying non-status men, or "illegitimate" children. Bill S-3 provides a route to 6(1) status for anyone who is a direct descendant of these individuals; however, people with 6(1) status who have children with non-status people can pass on only 6(2) status where those children are born after April 16, 1985 and those children are not direct descendants of people who were denied their status due to the double mother rule, marrying non-status men, enfranchisement, etc.

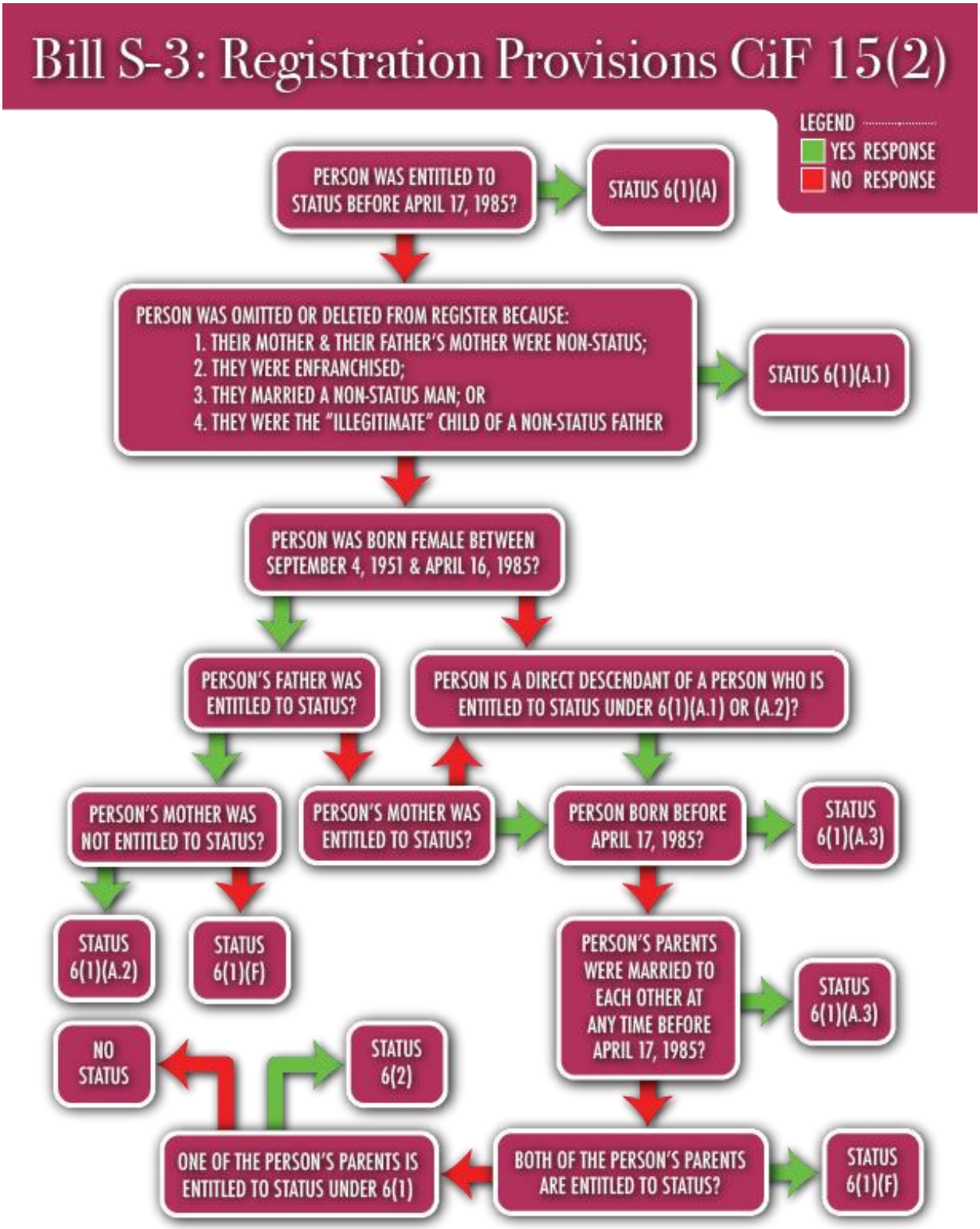
These provisions will, for example, afford a "class" of status to the grandchildren of women who lost their status for marrying non-status men which grants those children the right to pass on 6(2) status to their children when marrying non-status persons; whereas, the children of one status and one non-status parent born after April 16, 1985 will not be able to pass on even 6(2) status to their children when marrying non-status persons. Thus, millennials of unmarried parents are being deprived their right to pass on their status to their children.

Millennials of unmarried parents are being deprived their right to pass on their status.

Thus, while the 15(2) registration provisions are simpler and broader, the Act will continue to discriminate against Indigenous people on the basis of marital status and age and afford inconsistent "classes" of status.

[20] *Miron v Trudel*, [1995] 2 SCR 418, at paras LXX and LXXX.

Infographic: CiF 15(2)



Consultation: The Duty to Meaningfully Consult

The government has committed to comprehensive consultation processes with Indigenous peoples before making any further legislative amendments that may impact registration under the *Indian Act*; however, the meaningfulness of this consultation may be brought into question if the government has already decided on its response to the consultation processes.

The government will be conducting further consultations on discrimination in the registration provisions.

Minister Bennett has promised that the Government of Canada would engage in a second phase of consultations to address *Charter* violations in the registration provisions of the *Indian Act*.[21] In statements to the Standing Committee on Indigenous and Northern Affairs, Minister Bennett stated that the government could address the Charter-complaint discrimination under the Act only if it bases that action on meaningful consultation.[22]

The Indigenous and Northern Affairs Canada website states that the federal government launched a two-stage approach to respond to the *Descheneaux* decision and that the government "will not act unilaterally to bring about legislative change" in these matters. The site asserts that the government will address the "known sex-based inequities in Indian registration" in the first of the two stages (not achieved through passage of Bill S-3) and that the broader issues of discrimination relating to Indian registration will be addressed through comprehensive consultations in the second stage.[23]

The Senate amendments would have granted band membership to persons who traced their Indigenous ancestry to bands that have not yet assumed control over their membership.[24] Because these amendments would have had a direct impact on many First Nations, the government claims it was obliged to undertake significant consultations.

It is well-established law that the "honour of the Crown" is always at stake in its dealings with Indigenous peoples[25] and it requires the Crown to act with good faith to provide meaningful consultation.[26] The duty to consult Indigenous peoples arises, based on this honour, where the government has knowledge of the potential existence of an Indigenous right to title that may be affected by its decision-making.[27]

The "honour of the Crown" requires the government to consult meaningfully and in good faith.

UNDRIP also requires that governments consult in good faith with Indigenous peoples to obtain free, prior and informed consent (FPIC) before adopting any legislative or administrative measures that may affect those Indigenous peoples.[28] Although UNDRIP is a

[21] Galloway, Gloria, "Bennett urges MPs to kill Senate amendment that aims to take sexism out of the Indian Act, *Globe and Mail* (8 June 2017) online: Globe and Mail < https://www.theglobeandmail.com/news/politics/bennett-urges-mps-to-kill-senate-amendment-that-would-take-sexism-out-of-the-indian-act/article35256574/ >.
[22] Canada,Standing Committee on Indigenous and Northern Affairs, *INAN*, No 062, 1st Sess, 4nd Parl (8 June 2017) at pg 16.
[23] INAC, "The Government of Canada's Response to the Descheneaux Decision" (Date modified: 12 April 017), online: Government of Canada < https://www.aadnc-aandc.gc.ca/eng/1467227680166/1467227697623 >.
[24] PBO S-3, at pgs 4-5.
[25] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 16 (*Haida Nation*).
[26] *Ibid*, at para 41.
[27] *Haida Nation*, *Supra* Note 19*, at para 35.*
[28] UNDRIP, *supra* note 14, at Article 19.

non-binding international declaration, the document articulates many principles of customary international law, including the right of peoples to self-determination, on which courts can base binding decisions in accordance with the doctrine of adoption.[29]

Because the right to self-determination is inalienably linked to FPIC, it is arguable that, in addition to the honour of the Crown, the government is required to refrain from impacting Indigenous rights without consultation and FPIC in accordance with principles of customary international law as articulated in UNDRIP.

There may be merit in the government's assertion that eliminating discrimination in the *Indian Act,* which has been found by the courts to be "justified" under section 1 of the *Charter* and which may affect the rights or interests of Indigenous peoples, cannot take place without meaningful consultation; however, if the government has pre-determined its response to the consultation processes, this would bring into question the government's good faith and meaningfulness of the consultation processes.

A government decision on its response to consultation processes before those processes are commenced would undermine the meaningfulness of those consultations.

As explained above, the clause 15(2) coming into force provisions of Bill S-3 will replace the registration provisions which will come into force pursuant to clause 15(1) of Bill S-3. The 15(2) registration provisions are more encompassing than those provisions which will come into force pursuant to 15(1). This suggests that the government may intend to replace the 15(1) provisions which dealt only with the *Descheneaux* discrimination with the broader 15(2) provisions after the second stage consultation processes have been completed.

While this may seem like a clever approach to avoiding the lengthy legislative amendment procedures required in passing an additional bill through Parliament, if the government's intention is to respond to the consultation processes by bringing into force provisions pursuant to clause 15(2), this would seriously undermine the consultations. If this were to be the case, the government will have already decided on its response to the consultations before having listened to the affected people.

Implications of UNDRIP on the *Indian Act*

The government's commitment to fully implement UNDRIP and to pass legislation which will conform all of Canada's laws with the Declaration presents significant challenges for the continued existence of the *Indian Act*. Due to the Act's significant infringement on many rights and principles recognized under UNDRIP, it is likely that the Act will not be able to survive the lengthy legislative reform processes which will be required to implement UNDRIP domestically.

Fully implementing UNDRIP will likely require abolishing the Indian Act.

The government's consultation processes on the registration provisions is a good opportunity for NWAC to begin to define the dialogue and become a leading advocate for processes that will ultimately replace the *Indian Act* with self-government systems that respect the existing rights of Indigenous peoples and conforms with the rights and principles of UNDRIP.

[29] *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 at para 36.

Relevant Articles under UNDRIP

Although UNDRIP is a non-binding international document – unlike binding international law such as treaties, conventions and customary international law – the Government of Canada has undertaken unilateral declarations that it will fully implement the UNDRIP and has expressed support for Romeo Saganash's Bill C-262 (the Saganash Bill) which will require conformity of all of Canada's laws with the declaration. Therefore, there are strong arguments in favour of the position that UNDRIP has attracted a binding character for Canada.

In addition to the binding nature of UNDRIP on the Canadian state under international and domestic law based on unilateral undertakings and legislative development, UNDRIP also expresses principles of customary international law, including the right of peoples (not just states) to self-determination as expressed in the common Article 1 of the International Covenants.[30]

Thus, while UNDRIP is a non-binding document at international law, the declaration has likely attracted some level of binding authority domestically for Canada and will likely constitute binding law upon the passage and coming into force of the Saganash Bill.

Although UNDRIP is a non-binding declaration, it is likely attracting a binding character in Canada.

While there are many rights articulated in UNDRIP, there are some key Articles and principles which are particularly relevant to the *Indian Act* and registration provisions under that act. Some such Articles include:

- Article 4: The right to self-determination and self-government in matters relating to internal and local affairs;
- Article 6: The right to a nationality;
- Article 7.2: The right to live in freedom and security as distinct peoples free from any act of genocide;
- Article 8.1: The right not to be subjected to forced assimilation;
- Article 9: The right to belong to an indigenous community or nation;
- Article 13: The right to transmit to future generations their histories, languages, oral traditions and philosophies and the duty of states to take effective measures to ensure these rights are protected;
- Article 18: The right to participate in decision-making in matters which would affect their rights and to maintain and develop their own indigenous decision-making institutions;
- Article 22.1: Duty of states to pay particular attention to the rights and special needs of elders, women, children and persons with disabilities when implementing UNDRIP;

[30] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, at Art 1, available at: < http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx > and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, at Art 1, available at: < http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx >.

- 22.2: Duty of the state to take measures to ensure the protection of indigenous women and children from all forms of violence and discrimination;
- Article 33: The right to determine identify and membership;
- Article 35: The right to determine the responsibilities of individuals to their communities;
- Article 37: The right to the recognition, observance and enforcement of treaties; and
- Article 44: The right to equality between male and female indigenous individuals.

UNDRIP Private Member's Bills

Romeo Saganash introduced Bill C-262 (the Saganash Bill) in the House of Commons on April 21, 2016. The Saganash Bill would require conforming Canada's laws with UNDRIP and developing an action plan to achieve the objectives of the Declaration.[31] The Saganash Bill also contains a provision requiring the Minister to submit to both the House and Senate an annual report on the implementation of the bill.[32] Robert Falcon-Ouellette introduced a bill to the House on December 14, 2016 which would also require the Minister to submit a report annually to Parliament on Canada's compliance with the UNDRIP.[33]

Romeo Saganash and Robert Ouellette have brought private member's bills to implement UNDRIP domestically.

The government was initially opposed to the Saganash Bill; however, in November 2017, Justice Minister Wilson-Raybould announced that the government will support the bill.[34] Given the government's support for the Saganash Bill, it is unclear what the fate will be for the Ouellette Bill.

Truth and Reconciliation Commission Calls to Action on UNDRIP

The Truth and Reconciliation Commission called on the federal government to fully adopt and implement UNDRIP and to develop plans, strategies and other measures to achieve the goals of the Declaration.[35] The Saganash Bill will likely satisfy these calls to actions; however, the full implementation of the Declaration will require long-term extensive consultation and legislative reforms.

[31] Bill C-262, *An Act tot ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016, at cls 4 & 5 (first reading 21 April 2016) (Saganash Bill).
[32] *Ibid*, at at cl 6.
[33] Bill C-332, *An Act to provide for reporting on compliance with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl 2016, Cl 2 (first reading 14 December 2016).
[34] John Paul Tasker, "Liberal government backs bill that demands full implementation of UN Indigenous rights declaration" (Nov 21, 2017) CBC News < http://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037>.
[35] Truth and Reconciliation Commission of Canada, *TRC Final Report: Calls to Action*, (2015) at pg 4 < http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf >.

Impact of UNDRIP on the *Indian Act*

Replacing the Indian Act with UNDRIP must respect existing Indigenous rights and rights under UNDRIP.

Implementing UNDRIP in Canada will likely require abolishing the *Indian Act*. How to do this in a way that respects the rights and interests of Indigenous peoples will be complex and will require extensive consultations. NWAC can play an important leadership role in protecting and advancing the rights and interests of Indigenous women, girls and LGBTQ+ persons throughout these processes.

As discussed above, there are a number of Articles under UNDRIP which are incompatible with the *Indian Act*; however, despite the colonial and bigoted nature of the *Indian Act*, there are also rights and interests of Indigenous Canadians set out under that legislation that must continue to be respected post-*Indian Act*.

The 1969 White Paper proposal to abolish the *Indian Act* would have resulted in significant loss of rights and status as distinct peoples.[36] The transition from the *Indian Act* to UNDRIP must correct the injustices and discrimination imposed on Indigenous peoples, while simultaneously preserving the existing rights of Indigenous peoples, continuing to recognize the special relationship between Indigenous peoples and the Crown and enshrining the rights recognized under UNDRIP.

Processes to abolish the *Indian Act* ought to work to replace the Act with systems that respect UNDRIP principles. The right to self-governance and self-determination for Indigenous peoples are central principles in UNDRIP, and these principles ought to replace the Act in a way that respects the existing rights and interests of Indigenous peoples and the rights under UNDRIP, while eliminating the discrimination and colonization effects of the Act.

A process of replacing the *Indian Act* with systems of self-governance will require a great deal of time and consultation. Ensuring that the rights and interests of Indigenous women and girls are advanced and defended in the process of replacing the Act with self-governance systems will be an important and challenging goal that can likely best be accomplished by NWAC.

Conclusion

Parliament's responses to discrimination in the registration provisions of the *Indian Act* have been limited to the specific instances of discrimination which the courts have found to be in violation of the *Charter*. The government's refusal to eradicate all discrimination in the registration provisions under the *Indian Act* are likely a measure to limit potential cost implications of significant increases in the number of persons entitled to "Indian" status; however, the legal arguments put forward by the government to justify these failures – namely, the duty to consult before implementing legislative measures which may impact the rights and interests of Indigenous peoples – may have merit.

[36] Indigenous and Northern Affairs Canada, "Highlights from the Report of the Royal Commission on Aboriginal Peoples", Government of Canada (15 September 2010) < https://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637 >.

Bill S-3 received Royal Assent on December 12, 2017. The bill contains coming into force provisions that will see two stages of amendments to the *Indian Act* registration provisions. The first stage will bring amendments narrowly designed to address discrimination identified in the *Descheneaux* decision. The second stage will introduce broader, more encompassing amendments; however the Act will continue to discriminate on the basis of age and marital status.

Ultimately, the government's commitment to fully implement UNDRIP and coming legislation which will require conformity of all of Canada's laws with the Declaration will likely require the abolition of the *Indian Act*. This must be done through extensive and meaningful consultation and it must result in the transition from the *Indian Act* to self-governance systems which respect and uphold the existing rights of Indigenous peoples as well as the rights and principles set out in UNDRIP.