NATIVE WOMEN'S ASSOCIATION OF CANADA

L'ASSOCIATION DES FEMMES AUTOCHTONES DU CANADA

DESCHENEAUX INFORMATION SESSION - PTMA TOOLKIT

February 2017

II. FIRST NATIONS WOMEN AND THE *INDIAN ACT*

The *Indian Act* continues to provide a legal framework to determine who is eligible for 'Indian Status.' The Act does this by creating an objective standard of "out-parenting." "Out-parenting" is defined as the process of parenting with an individual who is not an 'Indian' as defined by the *Indian Act*. After successive generations of "out-parenting" an individual no longer becomes eligible for 'Indian Status.' The application of the status provisions did not apply equally to men and women. Historically, men were able to successively "out-parent" for several more generations than women based on their gender and how the *Indian Act* granted status to men.

Over time some of the discriminatory aspects of the *Indian Act* have been phased out. Bill C-31 was an attempt to change the sections of the *Act* that treated the legal status of 'Indian' women and 'Indian' men differently. Bill C-31 is best known for reinstating 'Indian Status' to Indian women who lost status when marrying a non-Indian. Bill C-31 also introduced the classification of 'Indian Status' through Sections 6(1) and 6(2).

Bill C-31 did not remove all sex-based discrimination. The application of the Act still favoured men and continued to grant them enhanced status with successive "out-parenting," whereas women did not receive the same benefit. Sharon McIvor launched a court challenge on this residual discrimination of those provisions and asked the court to enhance her 'Indian Status' so that she could pass status to her son and grandson. The Court responded positively to part of her challenge. McIvor obtained enhanced status but could only pass 'Indian Status' to her son and not her grandson. In response to the Court's decision, the Government of Canada passed Bill C-3, *Gender Equity in Indian Registration Act*.

Despite the 1985 and 2010 amendments, there are continuing concerns about the equal status of women under the *Indian Act*. In 2015, Stephane Descheneaux challenged the *Indian Act* and in part carried forward McIvor's challenge to pass on 'Indian Status' to her grandson which were similar circumstances as Descheneaux. The Court ruled in favour of Descheneaux ordering the Government of Canada to address the sex-based discrimination that continued to exist in the status provisions of the *Indian Act*.

TABLE 1. SUMMARY OF FEDERAL LEGISLATION CONCERNING INDIAN STATUS[1]

Table 1 provides a comprehensive list of amendments and acts that pertain to 'Indian Status.'

1850	An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada Similar law for Upper Canada	"Indian" broadly defined to include any person of Indian birth or blood belonging to a particular group of Indians, any person married to an Indian and their children, and any person adopted at birth into an Indian family.
1857	An Act for the Gradual Civilization of the Indian Tribes in the Canadas	"Indian" had to be one quarter blood. Voluntary enfranchisement for anyone who was male, over 21, able to read or write either English or French, educated, debt free, and of good moral character; also had to meet the requirements under law for property ownership. Enfranchisement of a man automatically enfranchised his wife and children.
1859	An Act Respecting Civilization and Enfranchisement of Certain Indians	"Indian" defined as to include any person of Indian blood or anyone married to a person of Indian blood, belonging to a band or tribe and living amongst the Indians. Enfranchisement provisions expanded to include male Indians who do not meet criteria to read or write English or French but who can speak English or French and who have "sober and industrious habits" and are intelligent enough to manage their own affairs
1860	The Management of Indian Lands and Property Act	Transferred authority for Indians and Indian land from the Imperial Crown to the Province of Canada.
1867	Constitution Act, 1867 (British North America Act)	Federal Government authority under s. 91(24) to legislate for "Indians and lands reserved for the Indians
1868	An Act providing for the organization of the Department of the secretary of State of Canada and for the management of Indian and Ordinance Lands	The first national legislation dealing with "Indians." The definition of "Indian" included any person with Indian blood belonging to a band or tribe, their descendants, non Indian women who married Indian men and their children
1869	An Act respecting the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act	One-quarter blood quantum requirement; First Nations women who married non-Indian men lost status and Band membership; children not entitled to status. Voluntary enfranchisement provisions more encompassing & includes Indian men with "integrity and sobriety" and who "appears to be a safe and suitable person for becoming a proprietor of land."

[1] Federation of Saskatchewan Indian Nations Treaty Governance Office, *Final Report: Exploratory Process on Membership and Citizenship,* online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AP/STAGING/texte-text/gov_fs_1358368043864_eng.pdf>

1876	*Indian Act*	The definition of "Indian" was finalized on a patrilineal model "any male person of Indian blood" and their children. First Nations women who married non-Indian men lost status and their children not entitled to status; certain illegitimate children could lose status; non-Indian women who married First Nations men gained status. Enfranchisement provisions continued including mandatory enfranchisement for First Nations who lived outside Canada for five years without permission of Superintendent-General or anyone who became a doctor, lawyer, Minister or earned a university degree.
1880	*Indian Act* amended	Women who lost status by marrying a non-Indian could continue to receive Treaty annuity payments.
1886	*Indian Act* amended	The definition of "Indian" is expanded to include "any person, male or female, who is reputed to belong to a particular band, or who follows the Indian mode of life, or any child of such person." Mandatory enfranchisement in the 1876 Act became voluntary for anyone who became a doctor, lawyer, Minister or earned a university degree. Voluntary enfranchisement also allowed for anyone who is "of good moral character, temperate in his or her habits, and of sufficient intelligence to be qualified to hold land in fee simple."
1920	*Indian Act* amended	The Governor in Council can order compulsory enfranchisement of qualified First Nations men, includes automatic enfranchisement for his wife and children.
1924	*Indian Act* amended	Women no longer automatically enfranchised with husbands if the "wife is living apart from her husband."
1951	*Indian Act* amended	Indian registry created. 'Indian blood' replaced by 'registration.' Descent through the male line. An Indian woman who married a non-Indian man was automatically enfranchised and lost band membership. A non-Indian woman who married an Indian man gained Indian status. Double mother clause introduced – a child lost Indian status at age 21 if their mother and grandmother gained status through marriage.
1956	*Indian Act* amended	Anyone erroneously omitted from the Indian Registry may appeal; burden of proof on appellant. Illegitimate children of Indian women could lose status if someone appeals and it could be shown that the father was not an Indian. Women who lost status by marrying a non-Indian man would be paid 10 years Treaty annuities.
1961	*Indian Act* amended	Compulsory enfranchisement removed.
1985	*Indian Act* amended (Bill C-31)	Sections 6(1) and 6(2) contain new rules for entitlement to Indian registration. Restored status to people who lost status under

		earlier Acts and their children. First Nations women who marry non-Indian men no longer lose status; non-Indian women who marry First Nations men no longer gain status.
2010	*Indian Act* amended (Bill C-3)	Grandchildren of women who lost Indian status by marrying a non-Indian man eligible for status.

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Backgrounder: Descheneaux and Bill S-3

Please Note:
This is not a legal opinion
This is not a legal commentary
This is not a legal submission
This is not a policy position

The Case

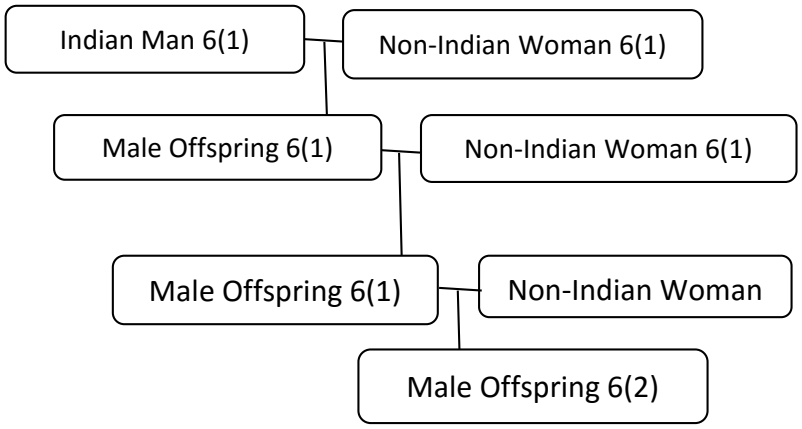
The *Descheneaux* case is a Superior Court of Quebec case that involves two plaintiffs: Stéphane Descheneaux and Susan (and Tammy) Yantha. Both plaintiffs are affiliated with Abénakis of Odanak First Nation of Quebec. Each plaintiff challenged the status provisions of the *Indian Act* alleging sex-based discrimination violating section 15 of the *Charter of Rights and Freedoms*. It was heard by Justice Chantal Masse in the winter of 2015 and a *reasons for judgement* delivered on August 3, 2015.

Stéphane Descheneaux (and his daughters)

Following the amendments stemming from *McIvor*,[1] Descheneaux was entitled to Indian status and obtained 6(2) status. However, the 2010 amendments continued to treat women differently. Descheneaux argued that an Indian man in the same circumstances as his grandmother would have been entitled to 6(1) status and that Indian man's great grandchild would be entitled to 6(2). His daughters were not eligible for 6(2) status. This has become known as the "cousins" issue.

Based on the operation of the 1927 and 1951 *Indian Acts*, an Indian man who married a non-Indian woman would maintain his status while his non-Indian spouse gained identical status. Their male child would gain identical status as his parents. When the male child married a non-Indian woman; she would obtain identical status (so long as they were married prior to April 16, 1985). The male child of this marriage would obtain identical status as his parents (so long as he was born prior to April 16, 1985). If this particular male child married a non-Indian woman before April 16, 1985 she would obtain identical status as her male spouse; otherwise status was no longer granted to non-Indian spouses. Any children born after April 17, 1985 would be entitled to 6(2). The following diagram illustrates the above scenario:

[1] *McIvor v. Canada (Registrar, Indian and Northern Affairs)* [2009] B.C.J. No. 669. See also: *Gender and Equity in Indian Registration Act* (Bill C-3, 2010).



Married in 1935, Non-Indian woman entitled to status.

Married in 1965, Non-Indian woman entitled to status.

Male offspring born 1968, entitled to status. Married after 1985 to Non-Indian woman, not entitled to status.

Male offspring born 2002, subsequent generation subject to "second generation cut-off" rule.

In Descheneaux's case: his grandmother (who held 6(1) status at birth) lost her status upon marriage to a non-Indian man as per the 1951 *Indian Act*. Therefore, her daughter (Descheneaux's mother) was also ineligible for status. The daughter married a non-Indian man (before April 16, 1985) which resulted in the birth of Descheneaux (in 1968). Descheneaux and his mother remained ineligible for status. Descheneaux married a non-Indian woman and subsequently had two daughters; all of whom are ineligible for status.

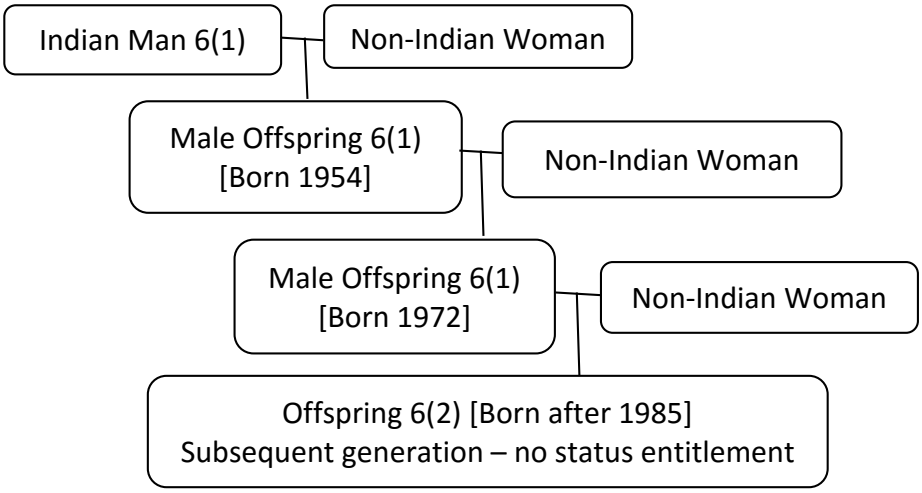
Bill C-31 (1985) returned Indian status to Descheneaux's grandmother (6(1)(c) status); thereby entitling Descheneaux's mother to 6(2) status. Descheneaux was subject to the "second generation cut-off" rule and was not eligible for any Indian status much like his daughters.

Bill C-3 (2010) enhanced Descheneaux's mother's status from 6(2) to 6(1)(c.1) status and subsequently this entitled Descheneaux to 6(2) status. His daughters were then subject to the "second generation cut-off" rule and not entitled to Indian status. Had Descheneaux's grandfather been an Indian man and his issue subsequently out-parented for two generations, his daughter's would be entitled to 6(2) today falling within the "second generation cut-off" rule.

Susan and Tammy Yantha

The situation of Susan and her daughter Tammy is entirely different. Their grievance is embedded in the differences between how a male is treated versus a female when either is an illegitimate child of an Indian man who held 6(1) Indian status prior to April 16, 1985 and who did not marry a non-Indian woman. Had both Susan and Tammy been men under the same circumstances, they would both hold 6(1) Indian status today. This has become known as the "siblings" issue.

Based on the operation of the 1951 *Indian Act*, an Indian man who produced male offspring with a non-Indian woman out of wedlock would be entitled to be registered under 6(1). The operation of the 1951 Indian Act treated a non-Indian woman as though she had 6(1) status in order to pass on the same status to her son (although she did not gain 6(1) status herself). Subsequently, if this male offspring produce another male with a non-Indian woman out of wedlock before April 16, 1985, that male child would be entitled to 6(1) status in the same way as the previous generation. Any offspring born after April 17, 1985 would be entitled to 6(2) Indian status with the subsequent generation being subject to the "second generation cut-off" rule with successive out-parenting. The following diagram illustrates the above scenario:



Based on the operation of the 1951 *Indian Act*, Susan, who is the illegitimate daughter of an Indian man (who held 6(1) status), was entitled to be registered under 6(2) because she was a girl. Susan was subjected to the "second generation cut-off" rule one generation too soon and therefore unable to pass on status to her daughter who was born before April 16, 1985. Had Susan been a man, she would have obtained 6(1) status under the operation of the 1951 Indian Act. Had Susan's daughter Tammy been a boy; Tammy would have obtained 6(1) status under the same 1951 Act. Tammy, having out-parented with a non-Indian man, would have been able to pass on 6(2) status to her daughter.

The Decision

The court ruled that paragraphs 6(1)(a), (c), and (f) and subsection 6(2) of the *Indian Act* to be declared inoperative as they violate section 15 of the *Charter of Rights and Freedoms*. Justice Masse instructed Parliament to address (1) the sex-based discrimination brought forth within the case, as well as (2) correct any other sex-based discriminatory provisions that can be identified, and (3) any other forms of discrimination based on other enumerated grounds. Justice Masse suspended her declaration for a period of 18 months to allow Parliament to make amendments.

Justice Masse relied on common law jurisprudence to guide her on the length of her suspension. Based on the jurisprudence; 12 months was a common and reasonable length for a suspended decision and an additional 6 months was included to account for an election.

A suspended decision (or suspended declaration) means that the court's decision will not take effect until the time allotted has expired. In this case, Justice Masse's declaration of those paragraphs mentioned will be inoperative after 18 months. Therefore, the judgement was released on August 3, 2015 and will take effect on February 3, 2017. Those paragraphs will no longer be able to operate and no one will be able to be registered as a status Indian under those paragraphs.

Government's Response to *Descheneaux*: Two-Phase Process

At the time of the decision, the federal government was approaching an election period. The Harper Government (Department of Justice) tabled an appeal of Justice Masse's judgement on September 2, 2015. There the appeal waited until after the election period completed which was October 19, 2015. In its Speech from the Throne, the Trudeau Government declared that it would "undertake to renew, nation-to-nation, the relationship between Canada and Indigenous peoples" on December 4, 2015. In the New Year, the Trudeau Government reviewed its court cases and decided to withdraw the appeal on *Descheneaux* on February 22, 2016 and proceed with the judgement's order. Up to this point, a little over six months of the 18 month period had lapsed giving the Trudeau Government 12 months to complete the judge's order.

The government proposed a two-phase process to address the judge's order. Phase I would address the sex-based discrimination which was at issue in *Descheneaux*: the cousins issue and siblings issue. Based off of the previous *Exploratory Process on Indian Registration, Band Membership and Citizenship* following the passage of the *Gender Equity in Indian Registration Act* (Bill C-3) in 2010; the government would include other sex-based discrimination within the same amending bill; namely the "omitted minor child" issue.

Phase II would provide for a collaborative process with First Nations and other Indigenous groups that would examine the broader issues to Indian registration and Band membership with a view to future reform.

Phase I was scheduled to begin during the summer of 2016 and expected to last until the fall of 2016. It was noted by the government that Phase I ought not to be considered an engagement or consultation process, rather it would be an information sharing process. NWAC's information session was held on September 26, 2016. At this point, there would be only four months to complete work before Justice Masse's judgement would take effect.

Bill S-3 was drafted by the Department of Justice and introduced into the Senate by Senator Harder. Its first reading took place on October 25, 2016 with its second reading spanning two debates, November 1, 2016 and November 17, 2016. The Bill was referred to the Standing Senate Committee on Aboriginal Peoples for further research. The Standing Senate Committee schedule six meetings in which it heard evidence from various interested groups. The Bill is currently with the Standing Senate Committee as the Senate adjourned until January 31, 2017.

The Bill

Three overarching changes to the *Indian Act* proposed in Bill S-3 are: the cousins issue, the siblings issue and the "omitted minor child" issue.

The "omitted minor child" issue deals with the children belonging to an Indian woman who would lose status upon marriage to a non-Indian man. An Indian woman who parented a child with an Indian man but did not marry him would be entitled to 6(1) in her own right and her child would also gain 6(1) status as their Indian parents. When the Indian woman married a non-Indian man, she and her minor child would lose status. However, should the child not be a minor or the child married, only the mother would lose status upon her marriage to a non-Indian man. Bill C-31 corrected this issue and restored the Indian woman's status to 6(1)(c). The amendments would enhance her and her minor child(ren) status back to 6(1).

The Recent *Descheneaux* Decision

The Standing Senate Committee, on December 13, 2016, addressed a letter to the Senate recommending that the Bill should not proceed further in the Senate and requested an extension as it was the committee's understanding that Bill S-3, as it stood, would continue to discriminate on the enumerated grounds of sex as well as the possibility that the Crown may have failed to fulfill its duty to consult under section 35 of the *Constitution Act, 1982*.

The Crown requested at the Superior Court of Quebec an extension on Justice Masse's suspended decision. Justice Masse decided to extend her suspension until July 3, 2017. The government has been granted an additional five months to complete her orders.