

The Government of Canada's Response to the Descheneaux Decision (Date Modified: October 24, 2016)

Indigenous and Northern Affairs Canada

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Introduction

On August 3, 2015, the Superior Court of Quebec announced its decision in the Descheneaux case. The court found that several paragraphs and one sub-section relating to Indian registration (status) under section 6 of the Indian Act unjustifiably violate equality provisions under the Canadian Charter of Rights and Freedoms (Charter) because they perpetuate a difference in treatment in eligibility to Indian registration between Indian women as compared to Indian men and their respective descendants. The court struck down these provisions, but suspended the implementation of its decision for a period of 18 months, until February 3, 2017, to allow Parliament to make the necessary legislative amendments.

In its decision, the court also advised (in obiter) that legislative amendments to address inequities in Indian registration not be limited to the specific facts in the Descheneaux case.

In response to the Descheneaux decision, the Government of Canada launched a two-staged approach to eliminate known sex-based inequities in Indian registration.

Under Stage I of this approach, the Government will bring forward amendments in response to the Descheneaux decision by introducing legislation that will address known sex-based inequities in Indian registration. As part of Stage II, a collaborative process will be launched with First Nations and other Indigenous groups to examine the broader issues relating to Indian registration and band membership.

Through this approach, the Government of Canada will eliminate residual sex-based inequities in Indian registration (status). Consistent with Canada's commitment to reconciliation with the Indigenous peoples of Canada, the

initiative also seeks to implement a collaborative process with First Nations and other Indigenous groups on the broader issues relating to Indian status and band membership under the Indian Act, with the objective of identifying areas for future reform, in keeping with the Minister's mandate to review laws that impact Indigenous Peoples.

The purpose of this paper is to outline the Government of Canada's two-staged approach to address issues relating to Indian registration and band membership within the context of the response to the Descheneaux decision. Accordingly, the paper provides information on the case and decision, and the specific issues that are raised in Descheneaux, as well as details on the federal government's legislative approach to the response to the decision, and the collaborative process with First Nations and other Indigenous groups to examine the broader-related issues with a view toward future reform.

The Descheneaux Case

In 2011, three members of the Abénakis of Odanak First Nation in Quebec, Stéphane Descheneaux, Susan Yantha and Tammy Yantha, filed litigation in the Superior Court of Quebec challenging the Indian registration provisions under section 6 of the Indian Act as being unconstitutional and in contravention of the Charter.

The plaintiffs argued that the current registration provisions perpetuate different treatment in entitlement to Indian registration between Indian women as compared to Indian men and their respective descendants. They also argued that amendments to the Indian Act under the 2010 Gender Equity in Indian Registration Act (Bill C-3) in response to the 2009 decision of the British Columbia Court of Appeal in the McIvor case did not go far enough in addressing sex-based inequities in Indian registration.

The Descheneaux Decision

On August 3, 2015, the Superior Court of Quebec ruled in favour of the plaintiffs, finding that paragraphs 6(1)(a), (c) and (f) and subsection 6(2) of the Indian Act unjustifiably infringe section 15 of the Charter. The court declared these provisions to be of no force and effect but suspended its decision for a period of 18 months (until February 3, 2017) to allow Parliament time to make the necessary legislative amendments. ¹

In its decision, the court also warned that legislative amendments to address inequities in Indian registration not be limited to the specific facts in the Descheneaux case.

On September 2, 2015, an appeal in the decision was filed pending direction from the new government following the federal election of October 19, 2015. As part of the current government's review of court cases, Canada withdrew its appeal of the decision on February 22, 2016 and began work on the required legislative amendments to respond to the decision.

The court decision obligates Canada to bring forward legislation to amend paragraphs 6(1)(a), (c) and (f) and subsection 6(2) of the Indian Act by February 3, 2017.

The Issues Raised in the Descheneaux Case and Decision

The Descheneaux case deals with two specific situations of residual sex-based inequities in Indian registration affecting cousins and siblings.

The "cousins" issue relates to the differential treatment in how Indian status is acquired and transmitted among first cousins of the same family depending on the sex of their Indian grandparent, in situations where the grandparent was married to a non-Indian prior to 1985. This results in different abilities to acquire and pass on status between the maternal and paternal lines.

Although the 2010 Gender Equity in Indian Registration Act (Bill C-3) removed the inequality directly affecting the grandchildren of Indian women who had married non-Indians in certain circumstances, it did not address a further inequality that directly affected the great-grandchildren of such women. Therefore, it did not bring matrilineal entitlement to Indian registration into line with that of patrilineal entitlement in similar circumstances.

The "siblings" issue concerns the differential treatment in the ability to transmit Indian status between male and female children born out of wedlock between the 1951 and 1985 amendments to the Indian Act. Indian women in this situation cannot pass on status to their descendants, unless their child's father is a status Indian. Unlike Indian men in similar circumstances who can pass on status to their children regardless of whether they parent with a non-Indian.

More broadly, the Descheneaux decision highlights the continued residual sex-based inequities in Indian registration that were carried forward following the 1985 comprehensive changes to Indian registration and Band membership under the Indian Act through Bill C-31 to comply with the Charter. Some of these inequities were not fully addressed in 2010 as part of the Gender Equity in Indian Registration Act (Bill C-3).

The decision also brings to the forefront the long-standing and unaddressed systemic issues relating to Indian registration and Band membership that were raised by First Nations as part of the 2011-2012 Exploratory Process on Indian Registration, Band Membership and Citizenship, such as, the historic and continued federal legal authority to define Indian and Band member under the Indian Act.

The Government of Canada's Response: A Two-Staged Approach

The Government of Canada is aware that residual sex-based inequities in Indian status is one of a number of issues relating to Indian registration and Band membership under the Indian Act that are of concern to First Nations and other Indigenous groups.

The timeframe within which the government must enact legislative amendments to respond to the Descheneaux decision by the court-ordered deadline of February 3, 2017 is short, and therefore other issues relating to Indian registration and band membership cannot be addressed within this time frame. In addition, broader systemic issues pertaining to registration, membership, citizenship and identity are complex and require more fulsome discussion with First Nations. It would not be possible to adequately engage with First Nations on these complex matters in the next few months.

For this reason, the Government of Canada envisions a two-staged approach within the context of the response to the Descheneaux decision. Stage I will focus on the elimination of known sex-based inequities in Indian registration, including the issues raised in Descheneaux, through legislative amendments. Stage II will provide for a collaborative process with First Nations and other Indigenous groups that will examine the broader issues relating to Indian registration and Band membership with a view to future reform.

Stage I: Legislative Process to Address Known Residual Sex-Based Inequities in Indian Registration (Summer-Fall 2016)

Under Stage I, legislation will be introduced to address known residual sex-based inequities in Indian registration under the Indian Act, including the facts in the Descheneaux case and decision.

The proposed amendments would eliminate the inequities found in Descheneaux and address other known sex-based discrimination in Indian registration. More specifically, the following have been identified to date, for inclusion as part of the proposed legislative amendments:

- **Cousins Issue:** Address the differential treatment of first cousins whose grandmother lost status due to marriage with a non-Indian, when that marriage occurred before April 17, 1985 (see [Annex A](#)).
- **Siblings Issue:** Address the differential treatment of women who were born out of wedlock of Indian fathers between September 4, 1951 and April 17, 1985 (see [Annex B](#)).
- **Issue of Omitted Minors:** Address the differential treatment of minor children, compared to their adult or married siblings, who were born of Indian parents or of an Indian mother, but lost entitlement to Indian Status because their mother married a non-Indian after their birth, and between September 4, 1951 and April 17, 1985 (see [Annex C](#)).

Engagement on the proposed amendments under Stage I has been inclusive of First Nations and other Indigenous groups. It started in summer 2016 and will continue through fall of 2016. The engagement is in the form of information sharing and discussion on the proposed amendments.

Information sessions on the proposed amendments are being held across Canada with First Nations governments and Treaty and Nation organizations, and other regional and national organizations representing the interests of First Nations and other Indigenous groups, including organizations that represent the interests of First Nations women.

Due to time limitations and the need to pass legislative amendments before the court-ordered deadline of February 3, 2017, it is not possible to engage directly with individual First Nation communities on the proposed legislative changes. As part of the information-sharing process, the federal government invited and offered funding to First Nation Treaty, Nation and regional and national organizations across Canada, that represent the interests of their respective member First Nations, as well as organizations that represent the interests of First Nations women, to work with the federal government to bring together First Nations individuals and groups, including First Nation

Chiefs, to discuss the proposed legislative amendments. Individual First Nation governments and communities have the opportunity to present their views and input on the proposed amendments through this process.

First Nations and other Indigenous groups also have an opportunity to present their views and input on the proposed legislative amendments as part of the legislative process following the introduction of legislation in Parliament.

A draft of the legislative proposal has been shared with First Nations and other Indigenous groups and posted on the [INAC](#) website for information purposes prior to the introduction of the legislation in Parliament.

In consideration of the court-ordered deadline of February 3, 2017, within which Canada must respond to the Descheneaux decision, it is envisioned that legislation would be introduced in Parliament in fall 2016.

Stage II: A Collaborative Process to Examine the Broader Issues Relating to Indian Registration and Band Membership (2017-2018)

As part of Stage II of this initiative and in keeping with the Government's commitment reconciliation with the Indigenous peoples of Canada through a renewed Nation-to-Nation relationship based on recognition, rights, respect, cooperation and partnership, a collaborative process with First Nations and other Indigenous groups will be launched concurrently examine the broader issues relating to Indian registration and band membership that cannot be addressed under Stage I, due to time and other constraints.

The collaborative process will be the iterative next step to, and build on, the wealth of information submitted by First Nations and other Indigenous groups as part of the 2011-2012 Exploratory Process on Indian Registration, Band Membership and Citizenship. ² The purpose of Stage II will be to identify areas for future reform.

Participation in the collaborative process will be inclusive and involve First Nations governments, Treaty and Nation organizations, and regional and national Indigenous organizations that represent the interests of First Nations, including First Nations women, Métis and non-status Indians.

The collaborative process will be jointly designed with First Nations and other Indigenous groups. Preliminary discussions with First Nations and other Indigenous groups will be held to determine the nature and scope of work and discussions to take place, the subject matters that would be examined under this process and the types of activities that would be undertaken by participants.

Without prescribing the subject matters for discussion, based on the findings of the 2011-2012 Exploratory Process, it is anticipated that the issues of interest for First Nations and other Indigenous groups will likely include, but not be limited to, the following:

- other distinctions in Indian registration.
- issues relating to adoption.
- the 1951 cut-off date for eligibility to registration specific to Bill C-3.
- the second-generation cut-off.
- unstated/unknown paternity.
- cross-border issues.
- voluntary de-registration.
- the continued federal role in determining Indian and band member under the Indian Act.
- First Nations authorities to determine membership under the Indian Act.

Canada will also seek to include for discussion issues surrounding children of same-sex parents and non-cisgender identities as they relate to eligibility for Indian registration and band membership.

At the end of Stage II, the Minister will present the results of the collaborative

process to Cabinet. Should recommendations be made for further legislative changes, the Minister could embark on subsequent phases of engagement with First Nations and other Indigenous groups on future legislative or other reform pertaining to Indian registration and band membership.

The collaborative process under Stage II will be conducted within a one-year time frame and launched concurrently with the passage of legislative amendments to address known residual sex-based inequities in Indian registration (as per Stage I), and sequenced to follow priority-setting engagement in respect of the review of laws.

Conclusion

Canada has an obligation to amend the Indian Act to respond to the Descheneaux decision by February 3, 2017. The Government has also committed to reconciliation and a renewed Nation-to-Nation relationship with Indigenous peoples in support of self-determination and as part of this commitment will be reviewing laws, policies and practices that impact the rights of Indigenous peoples.

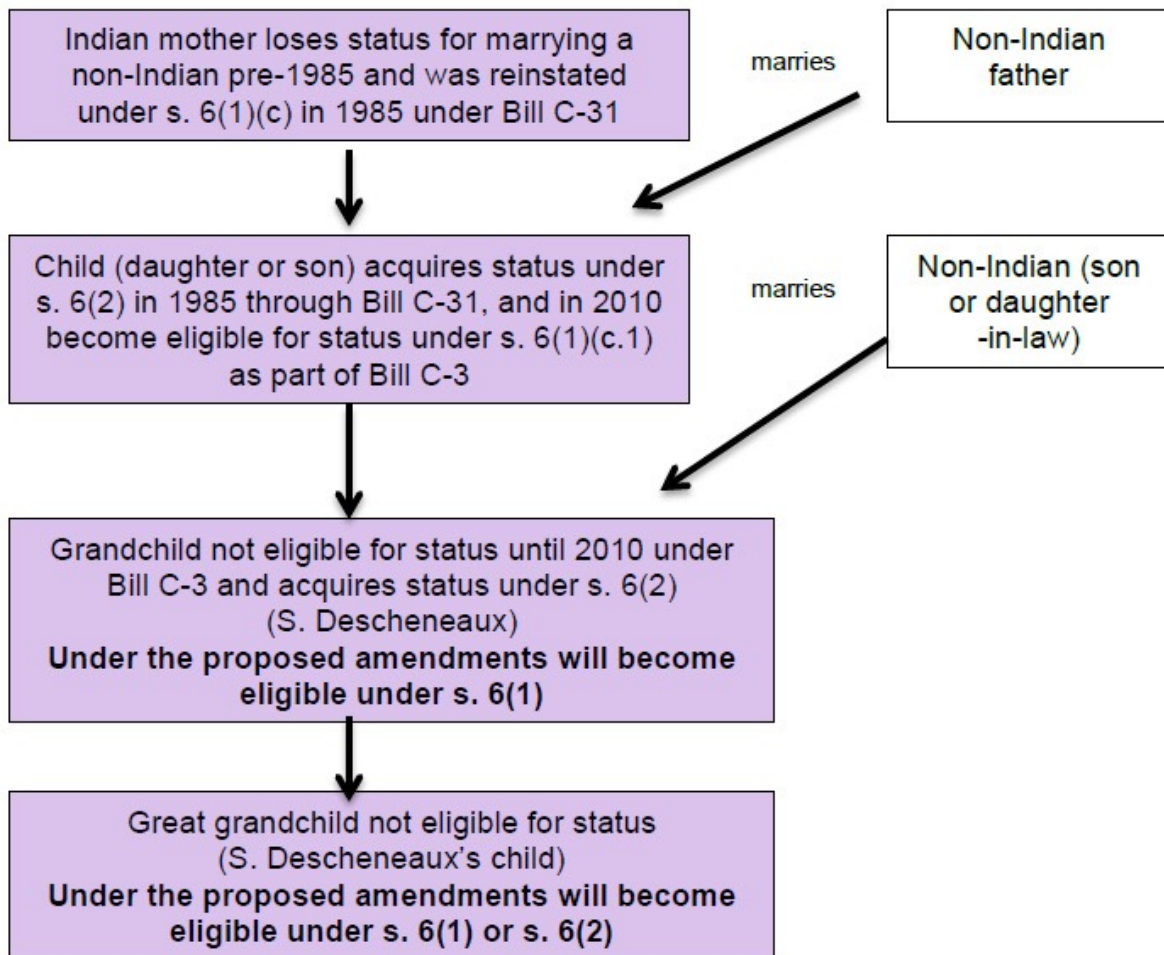
To meet all the commitments, a two-stage approach has been developed to eliminate historic sex-based inequities in Indian registration under the Indian Act and open the door for dialogue and collaborative work with First Nations and other Indigenous groups on the broader systemic issues associated with Indian registration and band membership.

[Annex D](#) of this document provides comprehensive information on Frequently Asked Questions relating to this initiative.

Annex A: The Cousins Issue

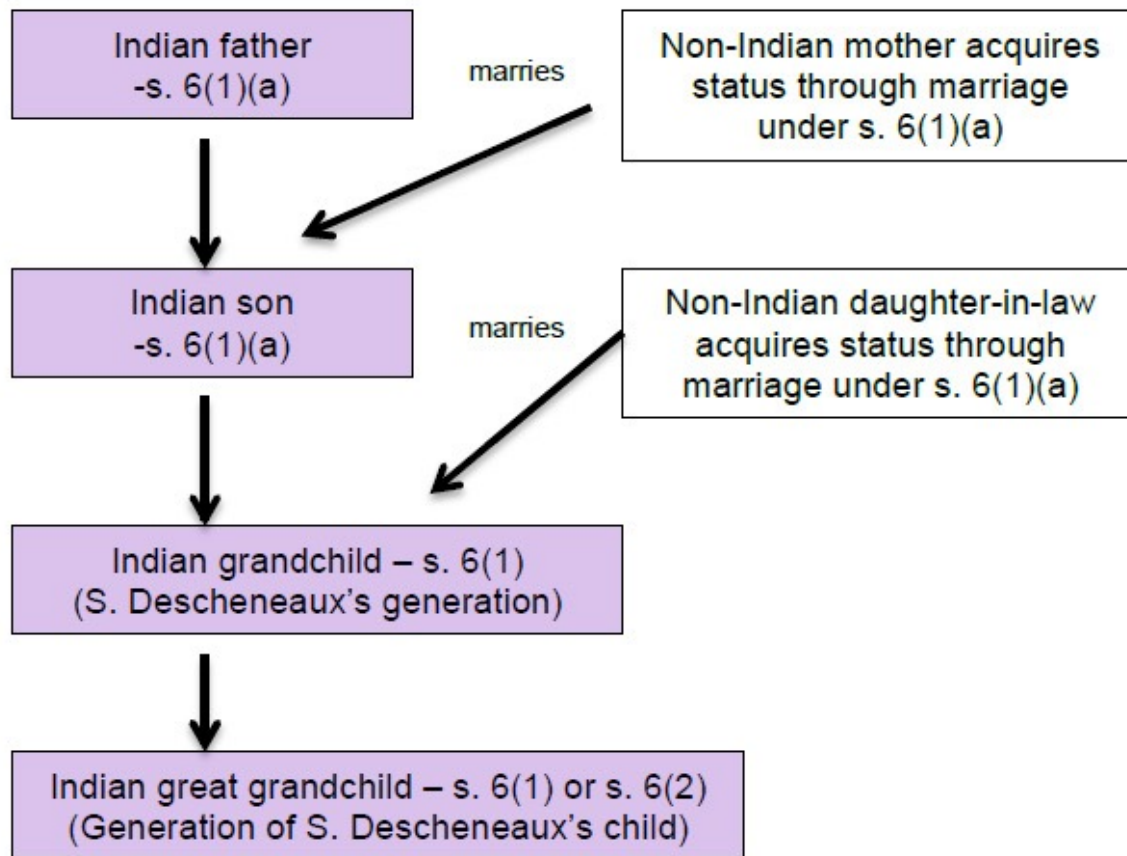
Addressing the differential treatment of first cousins whose grandmother lost status due to marriage with a non-Indian before April 17, 1985

Figure 1a: maternal line (situation of Stéphane Descheneaux)



Text description of Figure 1a: maternal line (situation of Stéphane Descheneaux)

Figure 1b: paternal line (Comparator group)

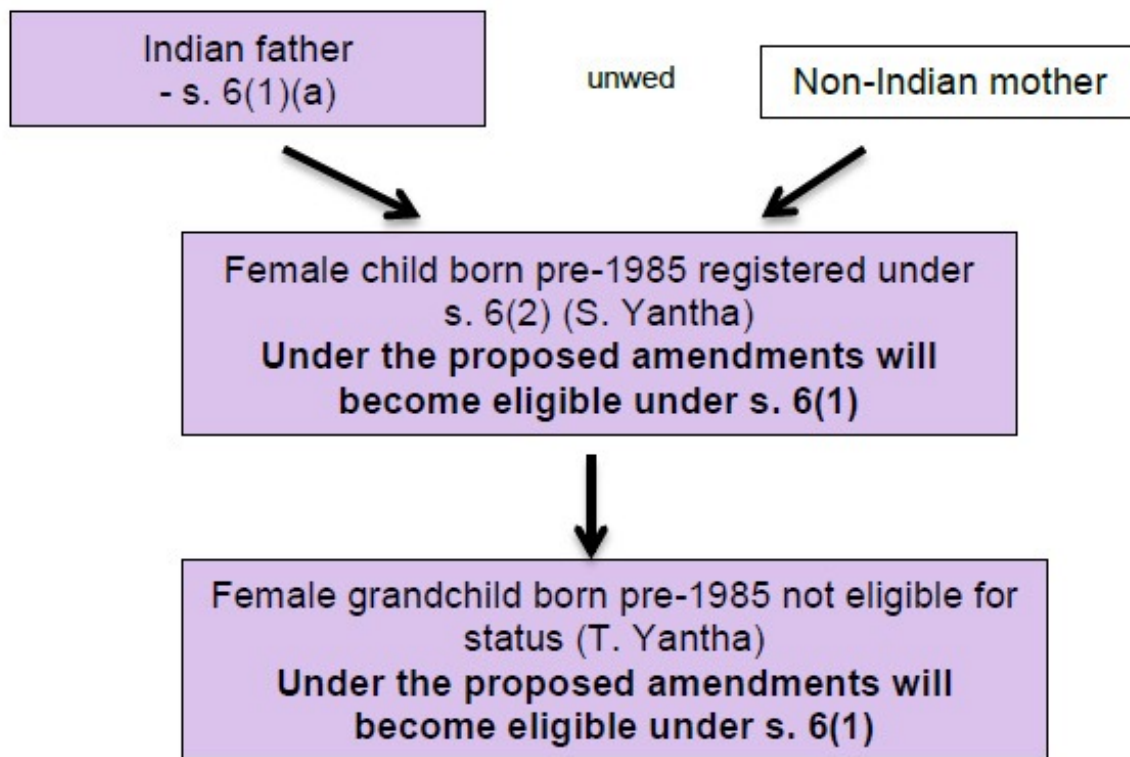


Text description of Figure 1b: paternal line (Comparator group)

Annex B: The Siblings Issue

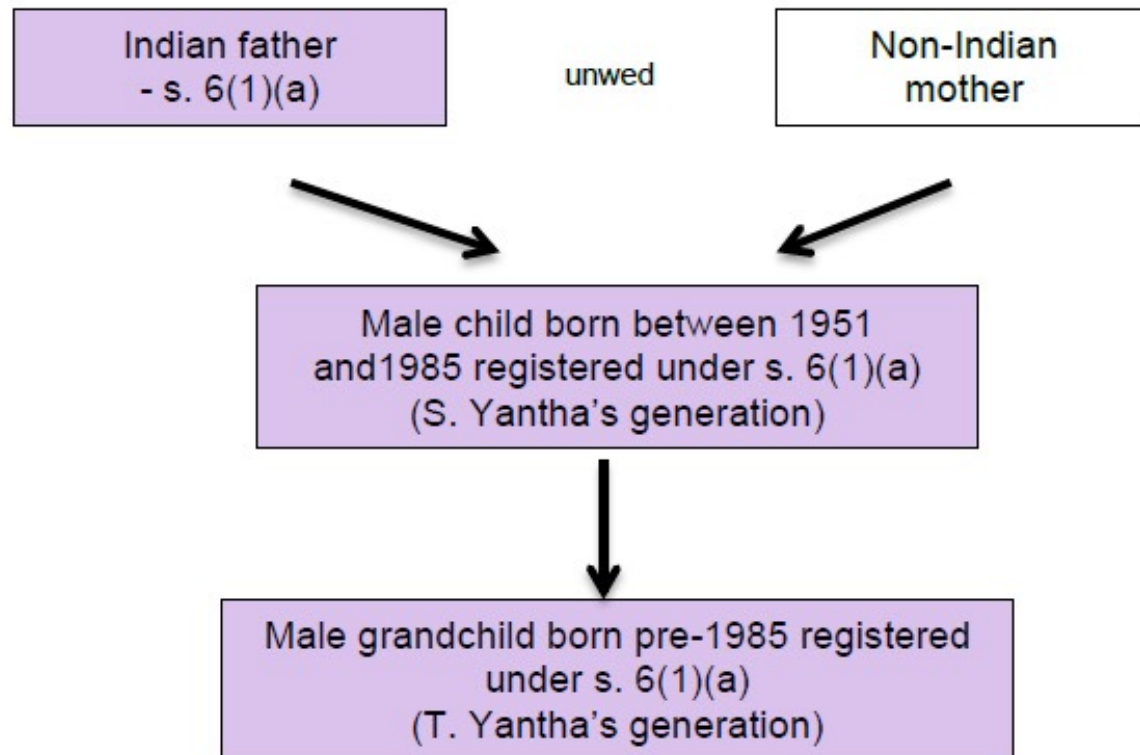
Addressing the differential treatment of women who were born out of wedlock to Indian fathers between September 4, 1951 and April 17, 1985

Figure 2a: Female born out of wedlock to an Indian father between 1951 and 1985 (situation of Susan and Tammy Yantha)



Text description of Figure 2a: Female born out of wedlock to an Indian father between 1951 and 1985 (situation of Susan and Tammy Yantha)

Figure 2b: paternal line (Comparator group)

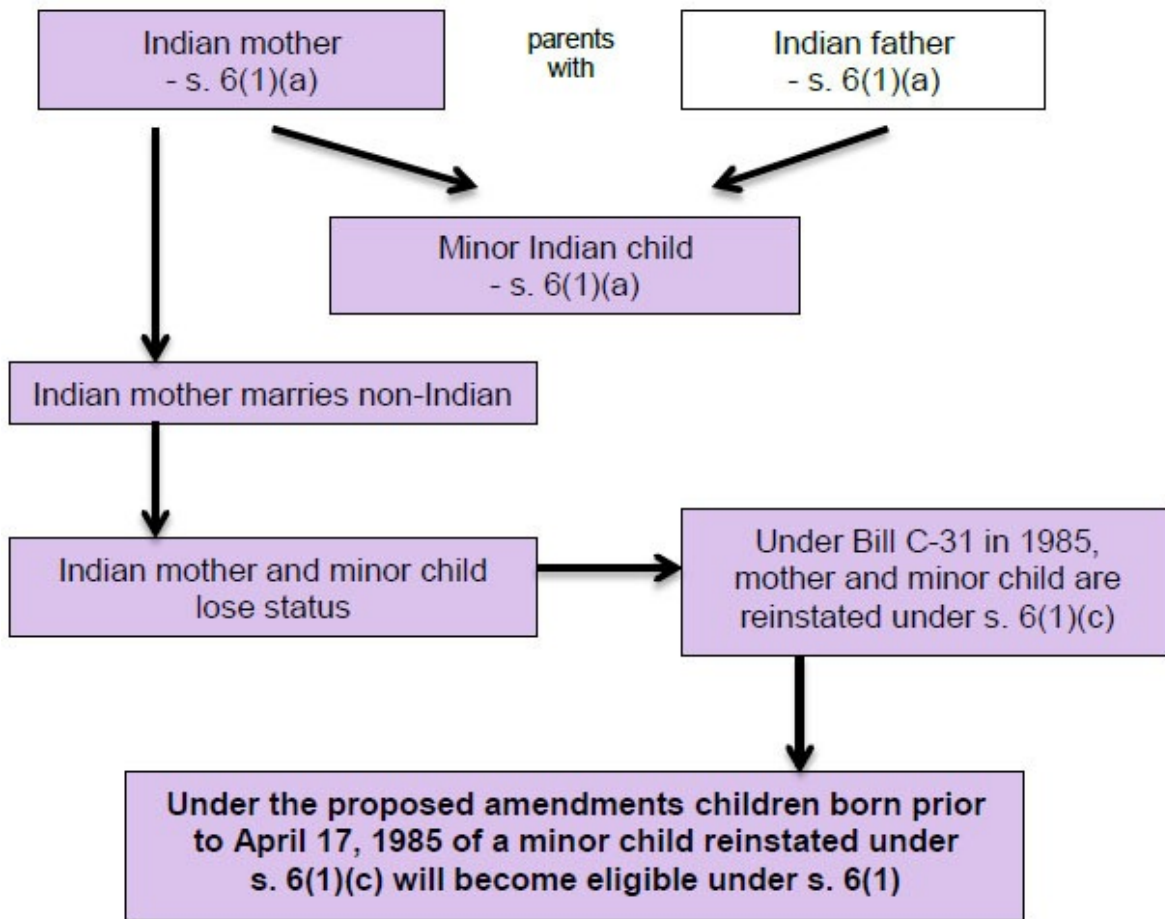


Text description of Figure 2b: paternal line (Comparator group)

Annex C: The Issue of Omitted Minor Children

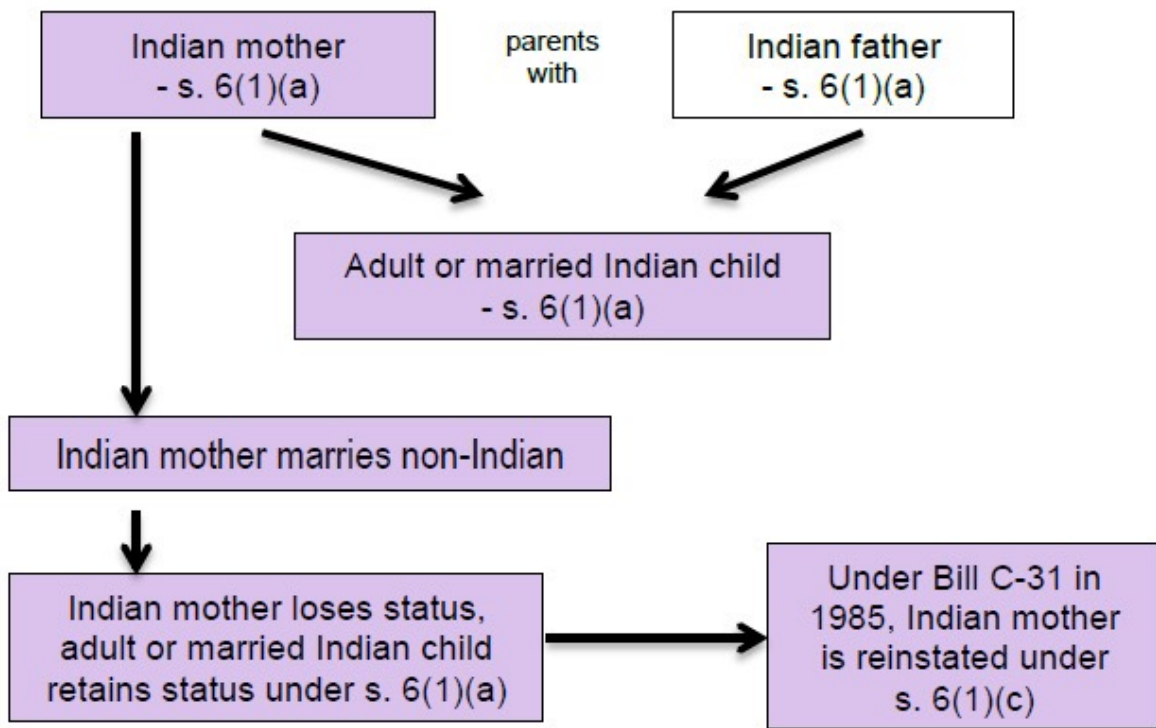
Addressing the differential treatment of minor children, compared to their adult or married siblings, who were born of Indian parents or of an Indian mother, but lost entitlement to Indian status because their mother married a non-Indian after their birth, and between September 4, 1951 and April 17, 1985.

Figure 3a: Minor child born of Indian parents; mother marries a non-Indian man, between 1951 and 1985, after the birth of the minor child; minor child loses status



- Text description of Figure 3a: Minor child born of Indian parents; mother marries a non-Indian man, between 1951 and 1985, after the birth of the minor child; minor child loses status

Figure 3b: Adult or married child born of Indian parents; mother marries a non-Indian man, between 1951 and 1985, after the birth of the adult or married child; adult/married child retains Indian status



- Text description of Figure 3b: Adult or married child born of Indian parents; mother marries a non-Indian man, between 1951 and 1985, after the birth of the adult or married child; adult/married child retains Indian status

Annex D: Frequently Asked Questions

On the Overall Federal Approach in the Response to Descheneaux

- What is the government's overall approach to the response to the Descheneaux decision?
- Why is a two-staged approach the preferred option?

On the Government's Response to the Descheneaux Decision

- What is the Descheneaux case?
- What issues are raised in the Descheneaux case?
- What was the court decision in the Descheneaux case?
- What specific issues in Indian registration will be addressed as part of the proposed legislative amendments?
- How many people would become newly entitled to Indian registration as a result of the proposed legislative amendments?
- How does this initiative meet the broader government commitment to gender equality?
- Will the proposed amendments address other issues in Indian registration?
- Why not address all issues relating to Indian registration as part of the proposed legislation to respond to the Descheneaux decision?
- When will the proposed legislation be introduced in Parliament?
- Why did it take the federal government almost one year to begin a process to respond to the Descheneaux decision?

- Will the government consult with First Nations prior to introducing the legislation?
- Will funding be provided to First Nations and other Indigenous groups for their participation in the information sessions on the proposed amendments under Stage I?
- Why is Canada not engaging directly with individual First Nation governments and communities on the proposed amendments?
- Why are other Indigenous groups, such as Métis and non-status Indians, involved in an initiative that deals with First Nations issues, such as Indian registration (status) and Band membership under the Indian Act?
- Will the proposed amendments impact membership in First Nations communities?
- What will be the impact of the proposed amendments on federal programs for First Nations?
- What happens if legislative amendments are not in place by February 3, 2017?
- What are the consequences if no legislative amendments are in place by February 3, 2017, and the court has not granted an extension of this deadline?
- If the amendments cannot be completed by February 3, 2017, and no extension of the court deadline is granted will all registered Indians lose their status?

- If the amendments are not in place by February 3, 2017, and no extension of the court deadline is granted, will the reserve system cease to exist after February 3, 2017?
- As a new registrant, can I apply now for Indian status as a result of the Descheneaux decision? If not, when can I apply?

On the Stage II Collaborative Process with First Nations and Other Indigenous Groups

- What is the collaborative process under Stage II of this initiative?
- When will the collaborative process be launched?
- Which Indigenous groups will be involved in the collaborative process?
- Will funding be provided to First Nations and other Indigenous groups for their participation in the Stage II collaborative process?
- What types of activities will take place as part of the Stage II collaborative process?
- What broader and systemic issues will be examined as part of the collaborative process under Stage II?
- How does Stage II align with the government's commitment to reconciliation with Indigenous peoples and the review of laws, policies and practices that impact Indigenous peoples?
- What was the 2011-2012 Exploratory Process on Indian Registration,

Band Membership and Citizenship?

- What is the voluntary de-registration issue?

- How is the collaborative process under Stage II different from the 2011-2012 Exploratory Process?

On the Decision of the Supreme Court of Canada in the Daniels case

- Does the Supreme Court of Canada decision in the Daniels case mean that Métis and non-status Indians are now eligible to register as status Indians?

On Indian Registration (Status) under the Indian Act

- What is Indian registration or Indian status?

- Are all Indigenous people entitled to Indian registration?

- What are the rights and benefits of Indian registration?

- Are individuals registered under different categories of section 6 of the Indian Act, such as 6(1)(a) or 6(2), treated differently?

- What is the Indian Register and who is the Indian Registrar?

- What was Bill C-31 and what were its impacts?

- What were the impacts of Bill C-31?
- What is the Gender Equity in Indian Registration Act (Bill C-3) and what were its impacts?

On Band Membership under the Indian Act

- What is Band membership under the Indian Act?
- What is the difference between Indian status and band membership?
- What rights and benefits are available to band members?

Footnotes

- ¹ The full decision can be accessed at: [Descheneaux Decision](#)
- ² Information on the findings of the 2011-2012 [Exploratory Process on Indian Registration, Band Membership and Citizenship](#)

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