Status vs Identity

How the Status Regime in the Indian Act Impacts Indigenous Communities

For thousands of years there was no such thing as an Indian Act*. As First Nations we lived free from its constraints. We observed laws that encouraged us to be wise, humble, respectful, truthful, brave, loving, and honest in our dealings with others.* ***Other people did not define our citizenship****.*

For my family, it is now the seventh generation since the Indian Act *was introduced. The seventh generation! This generation holds special significance for Indigenous people. Decisions about the future are not supposed to occur without taking them into account. ... We cannot take account of the seventh generation if the* Indian Act *continues to remove them from us.*

— John Borrows

Acknowledgments

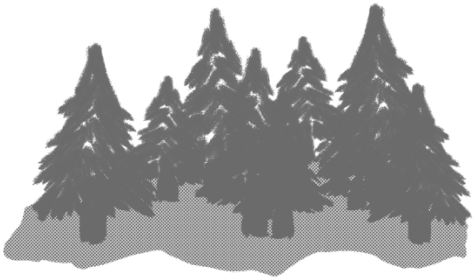
This overview draws on scholarly work by the following people:

John Borrows is Anishinabe and a member of Chippewas of the Nawash First Nation in Ontario. He is currently the Canada Research Chair in Indigenous Law at the University of Victoria Law School. He specializes in Indigenous legal rights and comparative constitutional law (which entails studying the similarities and differences between the laws of different nations, including between Canada and First Nations).

Sébastien Grammond became a judge at the Federal Court of Canada in 2017. Prior to his appointment, he was a law professor at the University of Ottawa. His research focused on the legal recognition of Indigenous identity, Indigenous legal systems, and contractual justice.

Val Napolean is a member of Saulteau First Nation in British Columbia. She is currently the Law Foundation Chair of Indigenous Justice and Governance at the University of Victoria Law School. Her current research focuses on Indigenous legal traditions, Indigenous feminism, citizenship, self-determination, and governance.

The illustrations in this document are by Taylor Krulicki. Krulicki is a member of the Snuneymuxw First Nation located on Vancouver Island in British Columbia. She graduated from the classical animation program at Vancouver Film School in 2015. She also holds a Graphic Design Diploma from Vancouver Community College.



Introduction

This document provides an overview of the provisions in the *Indian Act* that determine whether a person has "Indian status." It explains how those provisions affected Indigenous communities in the past, and how they continue to impact Indigenous communities today.

What's in a name?

Under the *Indian Act*, an "Indian" is a person who is or is entitled to be registered under the Act. A person who is or is entitled to be registered under the Act has "Indian status."

In this way, the Act equates status with "Indianness." The criteria that determine who is entitled to status under the Act are the same criteria that determine who is "Indian."

The *Indian Act* is a colonial instrument, as are the status provisions therein. The criteria that determine who is entitled to status under the Act are designed to reduce the number of people entitled to status as part of a program assimilation. The criteria that determine status under the Act do not reflect First Nations understandings of what it means to be "Indian," or First Nations:

From 1869 to 1985, First Nations women lost their status under the Act upon marriage to a non-Indigenous man under the Marrying Out Rule. Conversely, First Nations men kept their status upon marriage to a non-Indigenous woman. This state of affairs ignored the fact that many First Nations communities were matriarchal.

Since 1985, status has been determined according to genealogical criteria. If a person has two "Indian" parents they are entitled to full status. If a person has only one "Indian parent" they are entitled to half status. A person with half status cannot pass status to their children unless they marry another person with status. The Second-Generation Cut-Off Rule ignores the fact that many First Nations communities did not and do not determine citizenship based on ancestry alone. As explained by the 1996 Royal Commission on Aboriginal People:

> *Aboriginal peoples are not racial groups; rather, they are organic political and cultural entities. Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change in their internal composition.*

A Note on Terminology

The *Indian Act* applies to First Nation people, but not to Inuit or Métis people. Since the word "Indian" is used in the Act, it will be used in this overview where reference is made to the language of the Act or its interpretation. However, in general, the word "Indian" should not be used to refer to First Nations people in Canada. More respectful terms include First Nations people, or Indigenous people.

The Real-Life Implications of Status

Under the *Indian Act*, a person must have status in order to obtain band membership. Band membership entitles a person to certain rights and benefits under the Act, including the right to vote in band council elections and on matters affecting the community, access to health and education benefits, and the right to live on reserve.

On Reserve

Here it is worth pausing to consider the significance of being able to live on reserve.

Many negative stereotypes about life on reserve persist. These stereotypes may cause some people to wonder why First Nations people want to live on reserve at all. John Borrows offers a poignant answer:

> *The* Indian Act *kept me from permanent residency on reserve during my young life. … And in the latest generation my daughters have no right to live on reserve or participate in community life, again, because of the* Indian Act.
>
> *Sometimes there is a tendency… to portray everything about reserve life as faulty and broken. Painting everyone negatively with the same broad brush is disrespectful.*
>
> *Speaking personally, I find my reserve to be a place of beauty, wonder and inspiration. I love the people there. I draw some of my deepest fulfillment from the land and others presence in that place.*
>
> *Reserves are… nests for culture, language, the strengthening of familial bonds. Most are living testaments to the sacredness of our ancestor's relationship to our territories.*

Since 1985, First Nations have been able to opt out of the band membership rules in the *Indian Act* and adopt their own membership codes. In theory, this allows First Nations to accept members who do not have status under the Act. In practice, there remains a strong correlation between having status and having band membership:

As of 2002, only 232 out of 600+ bands chose to develop their own membership codes. Out of those 232 bands, 58 adopted codes that were substantially similar to the band membership provisions in the *Indian Act*—which link status and band membership. Of the 174 bands that adopted distinct membership codes, approximately half imposed criteria for membership that were more restrictive than the criteria under the *Indian Act*. Why is this the case?

Under current government policy, the funding that First Nations receive depends on how many members have status. There is genuine concern in some First Nation communities that granting membership to too many people without status could have a negative impact on the community as a whole. This puts pressure on First Nations communities to use status as a criterion for membership.

The Law of Status

This section illustrates how the legal criteria for status has changed over time and the impact of those changes on individuals and communities. Part I focuses on the issue of sex-based discrimination under the Act. Part II explains how the current status provisions to impact First Nations people and communities. Although the Act no longer discriminates on the basis of sex, the status provisions continue to define First Nations people in racial terms.

Part I: Sex-Based Discrimination Under the Indian Act

From 1869 to 1985, the Marrying Out Rule caused First Nations women to lose their status upon marriage to a non-Indigenous man. This rule did not apply to First Nations men. First Nations men kept their status upon marriage to a non-Indigenous woman.

In order to understand how the status provisions in the *Indian Act* discriminated on the basis of sex, it is useful to keep two time periods in mind: before April 17, 1985 and after April 17, 1985.

Until the *Canadian Charter of Rights and Freedoms* was passed in 1982, Canadians (including First Nations Canadians) had no constitutionally protected rights.

Section 15(1) of the Charter, which guarantees equality before the law regardless of a person's "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability," did not become law until three years later, on April 17, 1985. Between 1982 and 1985, the government worked to ensure existing legislation was Charter compliant (in other words, that it did not discriminate on the basis of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability).

The Marrying Out Rule under the *Indian Act* was a clear example of sex-based discrimination. So, in anticipation of section 15(1) coming into force, the government amended the status provisions in the *Indian Act*. The rule was repealed (removed) and First Nations women who lost status upon marriage to a non-Indigenous man regained their status under the new section 6(1)(c).

The changes became law on April 17, 1985, the same day as section 15(1) of the Charter.

However, it soon became apparent that the changes did not go far enough. In terms of status, the descendants of First Nations men continued to benefit over the descendants of First Nations women. Further changes were made in 2010 and 2019 in order to address this "residual" discrimination.

The following charts illustrate how the status provisions operated *before* and *after* the 1985 amendments and follows further changes made in 2010 and 2019. In particular, the charts compare the impact of the status provisions in the 1927, 1985, 2010, and 2019 versions of the *Indian Act* on two hypothetical families:

Family One

A, an Indian man with status, married B, a non-Indian woman, sometime before 1985. A and B had two children—a son, C, and a daughter, D.

C and D both married partners without status before 1985. C and D both had two children—a son and a daughter each. C and D's children are A and B's grandchildren.

Family Two:

E, an Indian woman with status, married F, a non-Indian man, sometime before 1985. E and F had two children—a son, G, and a daughter, H.

G and H both married partners without status before 1985. G and H both had two children—a son and a daughter each. G and H's children are E and F's grandchildren.

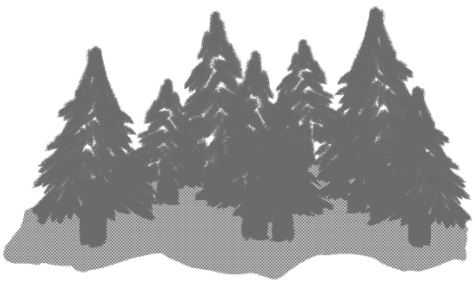
Note that the only difference between Family One and Family Two is the sex of the spouse who has status under the Act.

A Note on Sex and Gender

From 1869 onward, whether a person was entitled to status depended in large part on their biological sex (or the biological sex of their Indigenous relatives). Status was passed through the male line. First Nations men could pass status to their children regardless of whom they married. First Nations women could not pass status to their children unless they married a man with status. The gendered language in this document is a reflection of this reality. As you read through the information below, it is worth pausing to consider how the status provisions in the *Indian Act* may have impacted LGTBQIA2S+ people.

A Note on Legitimacy

Earlier versions of the *Indian Act* treated legitimate (born to married parents) and illegitimate children (born to unmarried parents) differently. For the purpose of the following charts, it is assumed that all descendants (children and grandchildren) were born after their parents were married.



The Marrying Out Rule (The 1927 Indian Act)

From 1869 onward First Nations women lost their status upon marriage a non-Indigenous man.*

The Marrying Out Rule only applied to First Nations women. First Nations men who married non-Indigenous women kept their status. Their non-Indigenous spouses *gained* status under the Act.

<table>
<tr><th>Family One</th><th colspan="2">Family Two</th></tr>
<tr><td>Generation 1: Grandparents</td><td colspan="2">Generation 1: Grandparents</td></tr>
<tr><td>A, an Indian man with status, marries B, a non-Indian woman.

A has status under s 2(d)(i).

B obtains status under s 2(d)(iii).

A and B have two children: C and D.
C is male; D is female.</td><td colspan="2">E, an Indian woman with status, marries F, a non-Indian man.

E LOSES STATUS upon marriage to F under s 14.

E's spouse, F, is not entitled to status.

E and F have two children: G and H.
G is male; H is female.</td></tr>
<tr><td colspan="2">Generation 2: Parents</td><td colspan="2">Generation 2: Parents</td></tr>
<tr><td>C has status under ss 2(d)(i) and (ii).

C marries X, a non-Indian woman.

C retains status.

X obtains status under s 2(d)(iii).

C and X have two children, a girl and a boy.</td><td>D has status under s 2(d)(ii) only.

D marries X, non-Indian man.

D LOSES STATUS upon marriage under s 14.

X is not entitled to status.

D and X have two children, a girl and a boy.</td><td>G has NO STATUS because neither of his parents had status.

G marries X, a non-Indian woman.

X is not entitled to status.

G and X have two children, a girl and a boy.</td><td>H has NO STATUS because neither of her parents had status.

H marries X, a non-Indian man.

X is not entitled to status.

G and X have two children, a girl and a boy.</td></tr>
<tr><td colspan="2">Generation 3: Grandchildren</td><td colspan="2">Generation 3: Grandchildren</td></tr>
<tr><td>C's children have status.

His son has status under ss 2(d)(i) and (ii).

His daughter has status under s 2(d)(ii) only.</td><td>D's children have NO STATUS because neither of their parents has status.</td><td>G's children have NO STATUS because neither of their parents has status.</td><td>H's children have NO STATUS because neither of their parents has status.</td></tr>
</table>

* In fact, they lost status upon marriage to any person without status. This included non-Indigenous men, but also Métis men and First Nations men who had their status revoked under another provision in the *Indian Act*. For example, between 1869 and 1951, Indigenous people who lived outside Canada for five years or more lost their status; and between 1876 and 1951, Indigenous people who obtained university degrees had their status revoked.

The Double Mother Rule (1951 Indian Act)

From 1951 to 1985, people whose mother and paternal grandmother (their father's mother) were "not Indian" lost their status at the age of 21. This was known as the Double Mother Rule.

A similar rule was not required for descendants of First Nations women who "married out" because the Marrying Out Rule remained in place. As a result, the descendants of First Nations women who "married out" had no status to lose.

The following chart illustrates how the Double Mother Rule worked:

<table>
<tr><th colspan="2">Family One</th><th colspan="2">Family Two</th></tr>
<tr><td colspan="2">Generation 1: Grandparents</td><td colspan="2">Generation 1: Grandparents</td></tr>
<tr><td colspan="2">A, an Indian man with status, married B, a non-Indian woman.

A has status under s 11(c).

B has status under s 11(f).

A and B have two children: C and D.
C is male; D is female.</td><td colspan="2">E, an Indian woman with status, married F, a non-Indian man.

E LOSES STATUS upon marriage to F under s 12(b).

E's spouse, F, is not entitled to status.

E and F have two children: G and H.
G is male; H is female.</td></tr>
<tr><td colspan="2">Generation 2: Parents</td><td colspan="2">Generation 2: Parents</td></tr>
<tr><td>C has status under ss 11(c) and (d).

C marries X, a non-Indian woman.

C retains status.

X obtains status under s 11(f).

C and X have two children, a girl and a boy.</td><td>D has status under s 11(d) only.

D marries X, a non-Indian man.

D LOSES STATUS upon marriage under s 12(b).

X is not entitled to status.

D and X have two children, a girl and a boy.</td><td>G has NO STATUS because neither of his parents had status.

G marries X, a non-Indian woman.

X is not entitled to status.

G and X have two children, a girl and a boy.</td><td>H has NO STATUS because neither of her parents had status.

H marries X, a non-Indian man.

X is not entitled to status.

G and X have two children, a girl and a boy.</td></tr>
<tr><td colspan="2">Generation 3: Grandchildren</td><td colspan="2">Generation 3: Grandchildren</td></tr>
<tr><td>C's children have status. However, because both their mother and their grandmother were non-Indian, they will LOSE STATUS at the age of 21 under s 12(1)(a)(iv) —the new "double mother" rule.</td><td>D's children have NO STATUS because neither of their parents has status.</td><td>G's children have NO STATUS because neither of their parents has status.</td><td>H's children have NO STATUS because neither of their parents has status.</td></tr>
</table>

Residual Discrimination (the 1985 Indian Act)

In 1985 the government amended the *Indian Act* in an effort to make it Charter-compliant. The Marrying Out Rule was repealed (removed) and First Nations women who lost their status upon marriage to a non-Indigenous man regained status under the new section 6(1)(c).

However, the changes did not go far enough. The descendants of Indigenous women who "married out" before April 17, 1985 still lost status a generation before the descendants of Indigenous men who "married out" before April 17, 1985.

This phenomenon came to be referred to as "residual discrimination." The word "residual" reflected the fact that the discrimination was not caused by the new status provisions alone, but by the *interaction between* the new status provisions and the status provisions under previous versions of the Act. In this regard there are several things to note about the 1985 amendments:

Full Status vs Half Status

Under previous versions of the Act, a person either had status or they didn't. The 1985 amendments introduced the concepts of "full status" and "half status."

Following the 1985 amendments, a person could be registered under one of two sections. A person registered under section 6(1) had "full status," while a person registered under section 6(2) had "half status." In order to be registered under section 6(1) a person had to have *two* parents with status. A person who had only *one* parent with status could be registered under section 6(2), so long as that one parent had full status under s 6(1).

A person with "full status" could pass status to their children regardless of who they married. A person with "half status" could only pass status to their children if they married another person with status. This phenomenon became known as the Second-Generation Cut-Off Rule: after two generations of "out marriages" (meaning marriages to non-Indigenous persons), a family would no longer be entitled to status.

However, at least initially, the Second-Generation Cut-Off Rule had a disproportionate impact on the descendants of Indigenous women as compared to the descendants of Indigenous men.

Under the 1985 Act, children of Indigenous women who "married out" before April 17, 1985 received half status under section 6(2) while children of Indigenous men who "married out" before April 17, 1985 received full status under section 6(1). This meant that children of Indigenous women who "married out" before April 17, 1985 could only pass status to their children if they married another person with status. In contrast, children of Indigenous men who "married out" before April 17, 1985 could pass status to their children regardless of whom they married—under 6(1) if they married another person with status, or under 6(2) if they married a person without status.

This discrepancy was caused by the unequal treatment of non-Indigenous spouses under sections 6(1)(a) and 6(1)(c).

Section 6(1)(a) vs Section 6(1)(c)

Under section 6(1)(a) of the 1985 Act, an Indigenous man who married a non-Indigenous woman before April 17, 1985 retained his status, *as did his spouse*. Thus, their children were entitled to "full status" under section 6(1).

Under section 6(1)(c) an Indigenous woman who married a non-Indigenous man before April 17, 1985 regained her status, *but her spouse remained without status*. Thus, their children were only entitled to "half status" under section 6(2).

The Abolition of the Double Mother Rule

Another consequence of the 1985 amendments was that abolition of the Double Mother Rule bestowed an additional benefit on the descendants of Indigenous men who married out.

Under the 1951 Act, a person whose mother and paternal grandmother (their father's mother) were non-Indigenous lost status at the age of 21 under section 12(1)(a)(iv) – the Double Mother Rule. When section 12(1)(a)(iv) was repealed under the 1985 amendments, people who lost their status as a result of that provision were granted "full status" under section 6(1)(c).

Thus, a person whose Indigenous ancestry flowed through the male line (from their grandfather, to their father, to them) obtained "full status" under section 6(1) of the 1985 Act even if their mother and grandmother were non-Indigenous. Conversely, a person whose Indigenous ancestry flowed through the female line (from their grandmother, to their mother *or father*, to them) could only obtain status if both their parents had status.

The chart below illustrates the impact of sections 6(1)(a), 6(1)(c), and 6(2):

<table>
<tr><th colspan="2">Family One</th><th colspan="2">Family Two</th></tr>
<tr><td colspan="2">Generation 1: Grandparents</td><td colspan="2">Generation 1: Grandparents</td></tr>
<tr><td colspan="2">A, an Indian man with status, married B,
a non-Indian woman, before April 17, 1985.

A retains FULL STATUS under s 6(1)(a).

B retains FULL STATUS under s 6(1)(a). Under the 1985 Act, a non-Indian woman is no longer entitled to status upon marriage to an Indian man. However, because B married A before the 1985 Act came into force, she is “grandfathered in” under s 6(1)(a).

A and B have two children: C and D.
C is male; D is female.</td><td colspan="2">E, an Indian woman with status, married F,
a non-Indian man, before April 17, 1985.

E regains FULL STATUS under s 6(1)(c).

E’s spouse, F, is not entitled to status.

E and F have two children: G and H.
G is male; H is female.</td></tr>
<tr><td colspan="2">Generation 2: Parents</td><td colspan="2">Generation 2: Parents</td></tr>
<tr><td>C married X, a non-Indian woman, before April 17, 1985.

C retains FULL STATUS under ss 6(1)(a) and (f).

X retains FULL STATUS under s 6(1)(a) for the same reasons as B.

C and X have two children, a girl and a boy.</td><td>D married X, a non-Indian man, before April 17, 1985.

D lost status upon marriage to X, but regains FULL STATUS under s 6(1)(c) of the 1985 Act.

X is not entitled to status.

D and X have two children, a girl and a boy.</td><td>G married X, a non-Indian woman, before April 17, 1985.

Since only one of his parents has status, G has HALF STATUS under 6(2).

X is not entitled to status.

G and X have two children, a girl and a boy.</td><td>H married X, a non-Indian man, before April 17, 1985.

Since only one of her parents has status, H has HALF STATUS under 6(2).

X is not entitled to status.

H and X have two children, a girl and a boy.</td></tr>
<tr><td colspan="2">Generation 3: Grandchildren</td><td colspan="2">Generation 3: Grandchildren</td></tr>
<tr><td>If C’s children have not turned 21 by the time the 1985 Act comes into force (and thus have not yet lost status under the “double mother” rule), they retain FULL STATUS under s 6(1)(a).

If C’s children are over 21 by the time the 1985 Act comes into force, they regain FULL STATUS under s 6(1)(c).</td><td>D’s children have HALF STATUS under s 6(2) because although only one of their parents has status, that parent has “full status” under s 6(1).</td><td>G’s children have NO STATUS because only one of their parents has status, and that parent only has “half status” under s 6(2).</td><td>H’s children have NO STATUS because only one of their parents has status, and that parent only has “half status” under s 6(2).</td></tr>
</table>

McIvor v Canada (The 2010 Indian Act)

In 1989, Sharon McIvor started legal proceedings against the federal government. She argued that the status provisions in the 1985 *Indian Act* discriminated on the basis of sex and thus violated her right to equal treatment under the law as guaranteed by section 15(1) of the Charter. McIvor regained full status under s 6(1)(c), but her son was only entitled to half status under s 6(2). Had McIvor been male, her son would have been entitled to full status.

It took seventeen years for the case to go to trial. In 2006, the British Columbia Supreme Court held in favor of McIvor, finding that the status provisions in the 1985 Act did discriminate on the basis of sex. The federal government appealed to the British Columbia Court of Appeal. In 2009, the Court of Appeal also held in favor of McIvor. The federal government chose not to argue the case further. Instead, it made the following changes to the Act:

<table>
<tr><th colspan="2">Family One</th><th colspan="2">Family Two</th></tr>
<tr><td colspan="2">Generation 1: Grandparents</td><td colspan="2">Generation 1: Grandparents</td></tr>
<tr><td colspan="2">A, an Indian man with status, married B,
a non-Indian woman, before April 17, 1985.

A retains FULL STATUS under s 6(1)(a).

B retains FULL STATUS under s 6(1)(a). Under the 1985 Act, a non-Indian woman is no longer entitled to status upon marriage to an Indian man. However, because B married A before the 1985 Act came into force, she is “grandfathered in” under s 6(1)(a).

A and B have two children: C and D.
C is male; D is female.</td><td colspan="2">E, an Indian woman with status, married F,
a non-Indian man, before April 17, 1985.

E regains FULL STATUS under s 6(1)(c).

E’s spouse, F, is not entitled to status.

E and F have two children: G and H.
G is male; H is female.</td></tr>
<tr><td colspan="2">Generation 2: Parents</td><td colspan="2">Generation 2: Parents</td></tr>
<tr><td>C married X, a non-Indian woman, before April 17, 1985.

C retains FULL STATUS under ss 6(1)(a) and (f).

X retains FULL STATUS under s 6(1)(a) for the same reasons as B.

C and X have two children, a girl and a boy.</td><td>D married X, a non-Indian man, before April 17, 1985.

D lost status upon marriage to X, but regains FULL STATUS under s 6(1)(c) of the 1985 Act.

X is not entitled to status.

D and X have two children, a girl and a boy.</td><td>G married X, a non-Indian woman, before April 17, 1985.

Under the 1985 Act, G regained half status under s 6(2). Under the 2010 Act he regains FULL STATUS under s 6(1)(c.1).

X is not entitled to status.

G and X have two children, a girl and a boy.</td><td>H married X, a non-Indian man, before April 17, 1985.

Under the 1985 Act, H regained half status under s 6(2). Under the 2010 Act she regains FULL STATUS under s 6(1)(c.1).

X is not entitled to status.

H and X have two children, a girl and a boy.</td></tr>
</table>

Generation 3: Grandchildren		Generation 3: Grandchildren	
If C's children had not turned 21 by the time the 1985 Act came into force (and thus had not yet lost status under the "double mother" rule), they retain FULL STATUS under s 6(1)(a). If C's children were over 21 when the 1985 Act came into force, they regain FULL STATUS under s 6(1)(c).	D's children have HALF STATUS under s 6(2) because although only one of their parents has status, that parent has "full status" under s 6(1).	G's children have HALF STATUS under s 6(2) because although only one of their parents has status, that parent has "full status" under s 6(1).	H's children have HALF STATUS under s 6(2) because although only one of their parents has status, that parent has "full status" under s 6(1).

Descheneaux v Canada (The 2019 Indian Act)

As illustrated above, the 2010 amendments to the status provisions did not succeed in removing all sex-based discrimination inherent in the status provisions.

In 2015, the Superior Court of Quebec heard a case brought by Stéphane Descheneaux. Descheneaux argued that the status provisions in the 2010 *Indian Act* continued to discriminate on the basis of sex and thus violated section 15(1) of the Charter.

Descheneaux's grandmother lost her status in 1935 upon her marriage to a non-Indigenous man. Descheneaux's mother was not entitled the status at birth. In 1968, Descheneaux's mother married a non-Indigenous man. Descheneaux was born that same year.

In 1985, Descheneaux's grandmother regained full status under section 6(1)(c). His mother obtained half status under section 6(2). Descheneaux was not entitled to status.

Following the 2010 amendments, Descheneaux's mother obtained full status under section 6(1)(c.1). Descheneaux obtained half status under section 6(2).

As a "6(2) Indian," Descheneaux could only pass status to his children if he married another person with status. Were Descheneaux able to trace his Indigenous ancestry through the male line (from his grandfather, to his father, to him) he would have been entitled to full status under section 6(1), and would thus have been able to pass status to his children regardless of whom he married.

The Court agreed with Descheneaux that the status provisions in the 2010 *Indian Act* continued to discriminate against the descendants of Indigenous women on the basis of sex. In response to the Court's decision, the federal government made the following, most recent changes to the Act:

<table>
<tr><th colspan="2">Family One</th><th colspan="2">Family Two</th></tr>
<tr><td colspan="2">Generation 1: Grandparents</td><td colspan="2">Generation 1: Grandparents</td></tr>
<tr><td colspan="2">A, an Indian man with status, married B, a non-Indian woman, before April 17, 1985.

A retains FULL STATUS under s 6(1)(a).

B retains FULL STATUS under s 6(1)(a). Under the 1985 Act, a non-Indian woman is no longer entitled to status upon marriage to an Indian man. However, because B married A before the 1985 Act came into force, she is “grandfathered in” under s 6(1)(a).

A and B have two children: C and D.
C is male; D is female.</td><td colspan="2">E, an Indian woman with status, married F, a non-Indian man, before April 17, 1985.

E regains FULL STATUS under s 6(1)(a.1).

E’s spouse, F, is not entitled to status.

E and F have two children: G and H.
G is male; H is female.</td></tr>
<tr><td colspan="2">Generation 2: Parents</td><td colspan="2">Generation 2: Parents</td></tr>
<tr><td>C married X, a non-Indian woman, before April 17, 1985.

C retains FULL STATUS under ss 6(1)(a) and (f).

X retains FULL STATUS under s 6(1)(a) for the same reasons as B.

C and X have two children, a girl and a boy.</td><td>D married X, a non-Indian man, before April 17, 1985.

D lost status upon marriage to X, but regains FULL STATUS under s 6(1)(a.1) of the 2019 Act.

X is not entitled to status.

D and X have two children, a girl and a boy.</td><td>G married X, a non-Indian woman, before April 17, 1985.

Under the 1985 Act, G regained half status under s 6(2). Under the 2019 Act he regains FULL STATUS under s 6(1)(a.3).

X is not entitled to status.

G and X have two children, a girl and a boy.</td><td>H married X, a non-Indian man, before April 17, 1985.

Under the 1985 Act, H regained half status under s 6(2). Under the 2019 Act she regains FULL STATUS under s 6(1)(a.3).

X is not entitled to status.

H and X have two children, a girl and a boy.</td></tr>
<tr><td colspan="2">Generation 3: Grandchildren</td><td colspan="2">Generation 3: Grandchildren</td></tr>
<tr><td>If C’s children had not turned 21 by the time the 1985 Act came into force (and thus had not yet lost status under the “double mother” rule), they retain FULL STATUS under s 6(1)(a).

If C’s children were over 21 when the 1985 Act came into force, they regain FULL STATUS under s 6(1)(a.1) and (f).</td><td>D’s children have FULL STATUS under s 6(1)(a.3).</td><td>D’s children have FULL STATUS under s 6(1)(a.3).</td><td>D’s children have FULL STATUS under s 6(1)(a.3).</td></tr>
</table>

Part II: The Second-Generation Cut-Off Rule

The Second-Generation Cut-Off Rule was introduced under the 1985 amendments to the *Indian Act*. The rule is explained above, but Sébastien Grammond's description of how it operates provides a useful refresher:

> *Section 6(1) of the* Indian Act *states that you have Indian status if* ***both*** *your parents have... status. Section 6(2) of the* Indian Act *states that you are Indian if* ***one*** *your parents is Indian* ***under section 6(1)****. As a result, a '6(2) Indian' cannot, alone, transmit his or her Indian status to his or her children. Another way of expressing the rule is to say that in order to be Indian, you must have two Indian grandparents. Yet another way is to say that Indian status is lost after two generations of marriages with non-Indians.*

Initially, the rule had a disproportionate impact on the descendants of Indigenous women. The most recent changes to the *Indian Act* appear to have remedied the issue of residual sex-based discrimination: the grandchildren of Indigenous women who "married out" before 1985 now have the same rights and benefits as the grandchildren of Indigenous men who "married out" before 1985. But is that enough?

According to Grammond, the answer is no. He argues that the status provisions in the Act continue to discriminate on the basis of race. He writes,

> *Although this is not made explicit in the legislation, section 6 [including sections 6(1) and 6(2)] amounts to a form of blood quantum requirement (50% Indian blood is needed to have Indian status)...*
>
> *Indian status is determined at birth based on one's ancestry, and that status cannot thereafter change. ... That is a racial conception of identity.*

The Origins of the Rule

From 1951 to 1985, people whose mother and paternal grandmother (their father's mother) were not Indian lost their status at the age of 21. This was known as the Double Mother Rule.

The Double Mother Rule only applied to people who traced their Indigenous ancestry through the male line (from their grandfather, to their father, to them). Before 1985, Indigenous women lost their status upon marriage to a non-Indigenous man. Their children were also disentitled to status. As such, there was no need for a "Double Father Rule."

The Double Mother Rule was, in essence, an early version of the Second-Generation Cut-Off Rule.

The Rule Today

The following chart illustrates how the Second-Generation Cut-Off Rule operates today:

<table>
<tr><td colspan="2">Generation 1: Grandparents</td><td colspan="2">Generation 1: Grandparents</td></tr>
<tr><td colspan="2">Jon, an Indian man with full status under s 6(1)(f) marries, Claire, a non-Indian woman.

Following the 1985 amendments to the Act, a non-Indian woman is no longer entitled to status upon marriage to an Indian man. Thus, Claire remains without status.

Jon and Claire have two children: Jessie, a boy, and Sarah, a girl.</td><td colspan="2">Anne-Marie, an Indian women with full status under s 6(1)(f) marries, Roger, a non-Indian man.

Roger is not entitled to status under the Act.

Anne-Marie and Roger have two children: Ben, a boy, and Jenn, a girl.</td></tr>
<tr><td colspan="2">Generation 2: Parents</td><td colspan="2">Generation 2: Parents</td></tr>
<tr><td>Jessie is entitled to HALF STATUS under s 6(2).

Jessie marries Jane, a non-Indian woman.

Jessie and Jane have two children.</td><td>Sarah is entitled to HALF STATUS under s 6(2).

Sarah marries Ted, a non-Indian man.

Sarah and Ted have two children.</td><td>Ben is entitled to HALF STATUS under s 6(2).

Ben marries Goldie, a non-Indian woman.

Ben and Goldie have two children.</td><td>Jenn is entitled to HALF STATUS under s 6(2).

Jenn marries Marc, a non-Indian man.

Jenn and Marc have two children.</td></tr>
<tr><td colspan="2">Generation 3: Grandchildren</td><td colspan="2">Generation 3: Grandchildren</td></tr>
<tr><td>Jessie's children have NO STATUS because neither of their parents is entitled to status under s 6(1).</td><td>Sarah's children have NO STATUS because neither of their parents is entitled to status under s 6(1).</td><td>Ben's children have NO STATUS because neither of their parents is entitled to status under s 6(1).</td><td>Jenn's children have NO STATUS because neither of their parents is entitled to status under s 6(1).</td></tr>
</table>

The Implications of the Rule

Throughout history the status provisions in the *Indian Act* have functioned to reduce the number of people entitled to status with the goal of assimilating as many Indigenous people as possible. In 1920, Duncan Campbell Scott, Deputy Minister of the Indian Department, wrote:

> *Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department.*

The Second-Generation Cut-Off Rule operates in furtherance of this goal today. As Val Napoleon writes, "[W]hat better way to accomplish Duncan Campbell Scott's goal of not having a single Indian left in Canada than simply not to count them?"

For this reason, Indigenous scholars like Val Napoleon and John Borrows urge First Nations communities to define membership more inclusively. They reject fears that more liberal membership codes will render First Nations financially destitute and incapable of providing services to all their members. To the contrary, they assert that greater inclusivity will bolster First Nations communities against the dual forces of colonialism and assimilation.

As John Borrows explains:

> *We are not a race. ... The 'Indian race' is a social construction forced on us by those who wanted to take our land and then have us disappear. Being Anishinabek does not rest on blood. ... [We] were never genetically 'pure', even before Europeans arrived. We married and intermixed with Hurons, Odawa, Potawatomi, Shawnee, Cree and others for centuries. When Europeans arrived this process continued. ... This process continues today. ...we are First Nations. A Nation rests on citizenship, families, culture, outlook and action—on its political standing—not race.*

Val Napoleon argues that First Nations must choose between a "nation-building approach" and a "nation-diminishing" approach. She writes:

> *[A] nation-diminishing model is one that limits and excludes from membership according to ethnicity and blood. It is this model that the* Indian Act *has fostered within First Nations and that has been internalized through membership codes.*

A nation-building model is one whereby citizens are invited and welcomed... because it is through its citizens that a nation creates political power, stability, wealth and civil society. In this model, diversity and difference are power, bringing natural alliances with other nations of the world.

List of Sources

Class Notes

Module 5: Charter and Human Rights

Articles

"Extinction by Number: Colonialism Made Easy" by Val Napoleon.

"Discrimination in the Rules of Indian Status and the McIvor Case" by Sébastien Grammond

"Seven Generations, Seven Teachings: Ending the Indian Act" by John Borrows

"Indian Registration, Membership, and Population Change in First Nations Communities" by Stewart Clatworthy

Websites

"Background on Indian registration" on Crown-Indigenous Relations and Northern Affairs Canada site https://www.rcaanc-cirnac.gc.ca/eng/1540405608208/1568898474141#_Bill_C-31_and

Textbooks

"Native Law" by Jack Woodward, QC

Statues

Various versions of the *Indian Act*

Caselaw

McIvor v Canada

Descheneaux v Canada

Teslin Tlingit Council v Canada