

## MEMORANDUM ON INDIAN STATUS AND BAND MEMBERSHIP

Some Membership Codes currently provide that persons will only be entitled to automatic membership in a Band or First Nation if both parents are also members of that Band or First Nation. As a result of this membership rule, there are many community members across the country that cannot attain band membership unless a community referendum is held which would permit this to occur.

In this context, the National Centre for First Nations Governance has requested that we provide an overview of the law governing Indian status and band membership rules currently in place under the *Indian Act*, as well as an analysis of the implications of these provisions, for First Nations wishing to develop or revise their Membership Codes.

For purposes of this analysis and for ease of reference, we have appended a copy of the relevant provisions of the *Indian Act* to this memorandum. .

### **Analysis**

In 1985, Parliament introduced certain amendments to the *Indian Act*, which had a direct impact on the way in which Indian status and band membership is determined (the “1985 Amendments”). Prior to the 1985 Amendments, persons who had Indian status and who had band membership were treated the same at law. As of April 17, 1985, however, the 1985 Amendments granted bands the ability to control their own membership by establishing band membership codes. As a result of this change, it is now possible for there to exist status Indians without band membership, as well as legally recognized non-status band members. By contrast, where a band chooses not to establish a band membership code, the *Indian Act* provides that band membership will be determined by the Department of Indian Affairs and Northern Development (“DIAND”). In this case, the regulations governing band membership where the band list is maintained by DIAND mirror those for determining a person’s entitlement to Indian status.

### ***Indian Act Provisions***

The *Indian Act*, R.S.C. 1985, c. I-5, uses a pure blood and ancestry test to determine who is an “Indian” for purposes of the Act. In Section 2(1) of the *Indian Act*, “Indian” is defined as “...a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.” The term “status” Indian is used to refer to persons who are registered or entitled to be registered as Indians under the *Indian Act*. I have set out the relevant provisions in greater detail below. Under the current Act, Indian status is distinct and determined separately from band membership.

## 1. Indian Status

The official list of status Indians in Canada is maintained by DIAND in the Indian Register. An individual entitled to be registered under the Act will not have his or her name recorded in the Indian Register unless an application for registration is made to the Registrar and accepted.<sup>1</sup> Registration is a means by which an individual can provide evidence of his or her Indian status. However, that individual must be entitled to the registration in order to benefit from the rights conferred by the *Indian Act*.

Sections 6 and 7 of the *Indian Act* set out the rules for determining entitlement to registration under the Act.

Section 6(1) of the Act provides that certain categories of persons are entitled to be registered. These categories may be summarized as follows:

- (a) persons who were registered or entitled to be registered immediately prior to April 17, 1985, when the most recent version of the *Indian Act* came into force [see s. 6(1)(a)];<sup>2</sup>
- (b) persons who are members of a group declared to be a band by the Governor in Council on or after April 17, 1985 [see s. 6(1)(b)];
- (c) persons omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under certain specified provisions of the Act,<sup>3</sup> including:
  - (i) persons who lost status because of a former provision known as the “double mother rule”, which provided that when a woman obtained Indian status only by virtue of marriage to an Indian man, her son by that marriage could not pass on that Indian status to his children if he married a non-Indian [see s. 6(1)(c)];
  - (ii) women who married non-Indians [see s. 6(1)(c)];
  - (iii) illegitimate children who lost their status as a result of a protest about their paternity [see s. 6(1)(c)];
  - (iv) children of women who married non-Indians [see s. 6(1)(c)];
  - (v) persons who applied to be enfranchised [see s. 6(1)(d)];
  - (vi) families of Indian men who were enfranchised [see s. 6(1)(d)];

<sup>1</sup> See *Indian Act*, R.S.C. 1985, c. I-5, s. 5.

<sup>2</sup> See also, *Marchand v. Canada*, (2000), 82 B.C.L.R. (3d) 352 (B.C.C.A.).

<sup>3</sup> See *Indian Act*, ss. 6(1)(c), (d) and (e).

- (vii) persons who lost their status because of the foreign residence clause, which provided that any person who resided in a foreign country for five years continuously without the consent of the Superintendent General of Indian Affairs would be removed from band membership [see s. 6(1)(e)]; and
- (viii) persons who were enfranchised as a result of practising certain professions or obtaining university degrees [see s. 6(1)(e)]; and
- (d) persons both of whose parents are or, if no longer living, were at the time of death entitled to be registered under Section 6(1) of the Act [see s. 6(1)(f)].

Further, Section 6(2) of the Act provides as follows:

Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

These registration rules effectively provide that a status Indian who marries a non-Indian person will only be able to pass on his or her status if he or she is entitled to be registered under Section 6(1) of the Act. For example, where a child has only one Indian parent, the status of that child will depend on whether that parent has status under Section 6(1) or Section 6(2) of the Act. Only when the parent has status under Section 6(1) will this child be entitled to Indian status. In turn, the child may only be registered under Section 6(2) of the Act and will not be able to pass Indian status onto his or her own children. In this particular scenario, the rights conferred by Indian status will no longer be applicable by the third generation. This is known as the second generation cut-off rule.<sup>4</sup>

By contrast, two persons with Indian status, even if they are both registered under Section 6(2) of the Act, can pass on full status (i.e., entitlement to registration with successorship) to their children. These children will be entitled to be registered under Section 6(1) of the Act.

The overall effect of Section 6 of the *Indian Act*, particularly Sections 6(1)(f) and 6(2), is that children will be excluded from entitlement to Indian status if for two generations either parent, regardless of sex, has married a non-Indian.

According to Section 7 of the Act, the following persons are not entitled to be registered:

- (a) the entire class of women who had previously (i.e. prior to April 17, 1985) obtained Indian status because they were the “wife or widow” of a man entitled to

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<sup>4</sup> L. Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (Toronto: Thomson Canada Limited, 1996) at 62.

be registered and whose names were subsequently omitted or deleted from the Indian Register;<sup>5</sup> and

- (b) the children of women in the category described above who are also the children of persons not entitled to be registered.<sup>6</sup>

Subsections 7(2) and 7(3) of the Act further provide that these exclusions do not apply if the women who had been registered as the “wife or widow” of a man entitled to be registered prior to April 17, 1985 were entitled to be registered under any other provision of the *Indian Act*.

## 2. Band Membership

The *Indian Act* also recognizes and regulates bands. Section 8 of the Act provides that a band list, containing the name of every person who is a band member, shall be maintained for each band. While the Indian Register defines persons with Indian status, band lists assign band membership. Band lists may be maintained in DIAND by the Registrar or by the band itself.<sup>7</sup>

As noted above, the 1985 Amendments to the *Indian Act* granted bands the ability to control their own membership. Section 10 of the *Indian Act* provides that a band may control its own membership by establishing membership rules for itself in writing.

Section 11 of the *Indian Act* sets out the membership rules for Departmental band lists. According to this section, the following classes of persons are entitled to have their names entered in a band list maintained by DIAND:

- (a) persons who were entered in the band list for a particular band, or who were entitled to have their names entered in that band list, immediately prior to April 17, 1985;<sup>8</sup>
- (b) persons who are members of bands created by a Cabinet declaration in accordance with subsection 6(1)(b) of the Act;<sup>9</sup>
- (c) persons entitled to regain their Indian status, having lost it as a result of one of the circumstances set out in subsection 6(1)(c) of the Act, including:
  - (i) persons excluded from registration as a result of the “double mother rule”;
  - (ii) women excluded from registration because they married non-Indians;

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<sup>5</sup> *Indian Act*, s. 7(1)(a).

<sup>6</sup> *Indian Act*, s. 7(1)(b).

<sup>7</sup> *Indian Act*, s. 9.

<sup>8</sup> *Indian Act*, s. 11(1)(a).

<sup>9</sup> *Indian Act*, s. 11(1)(b).

- (iii) illegitimate children of Indian women excluded from registration after a successful protest respecting paternity; and
  - (iv) Indian children enfranchised and excluded from registration because their mother married a non-Indian.<sup>10</sup>
- (d) persons born on or after April 17, 1985 and who are entitled to be registered under subsection 6(1)(f) and whose parents are or, if no longer living, were at their time of death, both entitled to have their names entered in the band list;<sup>11</sup>
- (e) persons who lost their status because they were previously enfranchised or because their husband or father applied for enfranchisement or due to the foreign residence rule and are entitled to be registered under subsections 6(1)(d) or 6(1)(e);<sup>12</sup> and
- (f) persons that have at least one parent that is both a status Indian and a member of that band, provided that that parent did not obtain status through only one parent.<sup>13</sup>

Section 11 makes clear that the basis for entitlement to a band membership list maintained by the Department is whether the applicant is entitled to be registered as an Indian under Section 6 of the Act.

Section 12 of the *Indian Act* provides that a band council may consent to the inclusion of status Indians or band members from another band in their band list maintained by DIAND.<sup>14</sup>

### ***Implications of the Indian Act Registration and Band Membership Provisions***

#### **1. Implications for Status vs. Non-Status Band Members**

Section 4.1 of the *Indian Act* provides that non-status band members are entitled to receive the same treatment as status Indians with respect to certain matters. In particular, non-status band members:

- (a) may form part of the band; is noteworthy that at common law all band members are entitled to the band's collective interest in reserve lands and resources;
- (b) may be the beneficiaries of trust funds;

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<sup>10</sup> *Indian Act*, s. 11(1)(c).

<sup>11</sup> *Indian Act*, s. 11(1)(d).

<sup>12</sup> *Indian Act*, s. 11(2)(a).

<sup>13</sup> *Indian Act*, s. 11(2)(b).

<sup>14</sup> *Indian Act*, s. 12.

- (c) are regulated by the provisions concerning the estates of mentally incompetent band members and the infant children of band members;
- (d) may be exempt from the operation of certain sections of the *Indian Act*;
- (e) may be compensated for expropriated land;
- (f) may be issued Certificates of Possession;
- (g) have the same rights as status members with respect to prosecution of trespassers on reserves;
- (h) may receive benefits from band revenue money;
- (i) may receive certain loans from the Minister;
- (j) may receive benefits under farm programs;
- (k) are subject to the same regulations with respect to health and hospitalization;
- (l) may participate in band elections;
- (m) are subject to the enforcement of band taxation by-laws;
- (n) are exempt from taxes on reserve land;
- (o) are subject to provincial laws affecting Indian rights;
- (p) are exempt from execution against real and personal property on reserve; and
- (q) along with their property are subject to the jurisdiction of special appointed to hear certain Indian cases.

By enumerating those sections of the *Indian Act* that apply to non-status band members, Parliament has effectively excluded these members from certain rights granted to status band members or, alternatively, applied different policies or laws to these two groups. For example:

- (a) non-status band members are not exempt from taxation of personal property on reserve;
- (b) the estates of non-status band members and the validity of their wills are governed by provincial legislation whereas the estates of status band members are governed under the *Indian Act*;

- (c) while the Minister has jurisdiction to order that certain Indian moneys be applied for the maintenance of a spouse or family of a status Indian, this jurisdiction does not apply to non-status band members; and
- (d) while the Minister has jurisdiction to provide for the education of status Indian children, this jurisdiction does not apply to non-status Indian children, although education funds are provided by provincial authorities for non-status Indians as part of the non-aboriginal education system.

It is noteworthy that as a matter of policy and practice, the Minister will provide funding for housing, infrastructure, water and sewer facilities for status Indians on reserve but will generally not do so for non-status Indians. This distinction is a matter of policy and past practice and is not required by legislation.

## 2. Implications for Aboriginal Rights and Title

As noted above, a band member's designation as status or non-status may determine the extent of benefits conferred on that person under the *Indian Act*. However, it is important to distinguish between Indian status rights, which, in certain circumstances, will only be available to status band members, and Aboriginal rights more generally, which are those rights that extend to all band members regardless of their status under the *Indian Act* and which are guaranteed in the Canadian Constitution.

Section 35(1) of the *Constitution Act, 1982* provides that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Canadian courts have confirmed in a number of cases that the exercise of these rights is not limited to status or registered Indians.<sup>15</sup> Rather, Aboriginal rights are collective or communal in nature and are held by all members of an Aboriginal nation.<sup>16</sup>

Examples of collective aboriginal rights held by all band members, regardless of status under the *Indian Act* include:

- a) the right to self-government: aspects of this general right include specific rights to select the First Nation's leadership in accordance with customary law; to determine the First Nation's membership or citizenship; to govern and determine child custody, child welfare and adoption; to determine the disposition of property; to regulate economic development; and to regulate matters affecting the safety of the community;

<sup>15</sup> See, for example: *R. v. Fowler* (1993), 134 N.B.R. (2d) 361 (N.B. Prov. Ct.); *R. v. Chevrier*, [1989] 1 C.N.L.R. 128 (Ont. Dist. Ct.); *R. v. Powley* (2001), 53 O.R. (3d) 35 (Ont. C.A.), affirmed [2003] 2 S.C.R. 207; *R. v. Lavigne*, [2005] 3 C.N.L.R. 176 (N.B. Prov. Ct.).

<sup>16</sup> See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. at para. 115; *R. v. Pike* (1993), [1994] 1 C.N.L.R. 160 (B.C.S.C.); *Oregon Jack Creek Indian Band v. Canadian National Railway*, 34 B.C.L.R. (2d) 344 (B.C.C.A.), affirmed [1989] 2 S.C.R. 1069.

b) the aboriginal title right to occupy and access traditional lands and resources: aspects of this general right include specific rights to use, allocate and regulate traditional lands and resources ( e.g., oil and gas, timber, water ) including the proceeds of those lands and resources.

In this light, band membership, and the right to determine who will be included in that membership, is of great consequence to a band, as it is a person's designation as a band member that will enable him or her to benefit from and exercise the band's aboriginal governance and title rights. If band membership is limited to only those persons with Indian status under the *Indian Act*, then the number of persons who may participate in the band's collective Aboriginal rights, as enumerated above, may be significantly diminished.

The importance of the limitations imposed on status successorship by the *Indian Act* cannot be underestimated in this regard. As noted above, subsections 6(1)(f) and 6(2) of the *Indian Act* significantly limit the opportunity for the children of status Indians registered under those provisions to pass on status to their children. Only persons entitled to Indian status under subsection 6(1)(f) (i.e., where both parents are entitled to Indian status) are able to pass on status to their children. Unless these persons marry other status Indians, their children will only be able to register under subsection 6(2). This means that, unless these children also marry other status Indians, the entitlement to Indian status will end with them. Eventually, all Indians in Canada will lose the opportunity to pass on Indian status to their children. In a book published in 1996, Larry Gilbert predicted that this would likely occur over the next half century.<sup>17</sup>

It is also important to remember that those benefits which the *Indian Act* does extend to persons registered as status Indians are wholly dependent on the political will of the day. The *Indian Act* is a statute that is regulated by government policy and that may be altered by Parliament. By contrast, the Aboriginal and treaty rights that are "recognized and affirmed" by Section 35 of the *Constitution Act, 1982* are entrenched in the Canadian Constitution. This distinction is fundamental and will help ensure the long-term recognition and protection of the collective rights held by Aboriginal persons.

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<sup>17</sup> Gilbert, *supra* note 4 at 60.