From Litigation to Legislation: Bill C-38, An Act to amend the Indian Act (new registration entitlements)

Our Gathering – Vancouver, BC
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Outline

1. History of Enfranchisement & Post 1985 Consultation
2. Stories from the Nicholas Civil Litigation
3. Bill C-38's proposed amendments
4. Next Steps and Future Reform
5. Consultation on the Second- Generation Cut-Off

History of Enfranchisement

- Beginning in 1869, enfranchisement was a policy of assimilation that terminated Indigenous peoples' rights to be considered "Indian" under the law.
- Once the Indian Act was introduced, it meant that people who enfranchised were unable to retain status under the *Indian Act*.

Involuntary Enfranchisement (1876, 1920)

Occurred when an individual:

- Attained a university degree
- Became a "professional"
- Met the "civilized" requirements of the day
- Became a priest or minister
- Lived outside of Canada for more than five years without permission.

Enfranchisement by Application (1976 – 1985)

Occurred if an individual or collective:

- Showed they were "fit" to enter Canadian society
- Wanted to access the rights of Canadian citizenship
- Needed a strategic way to protect children from being forced to attend residential schools.

History of Enfranchisement

- In 2012, the Department hosted an information seeking and engagement process called the Exploratory Process.

- The 2018-2019 Collaborative Process on Indian Registration, Band Membership and First Nations Citizenship highlighted recommendations addressing the legacy impacts of people with family histories of enfranchisement.
    - One of the recommendations was that those who are registered under 6(2) as a result of a family history of enfranchisement should have their registration category amended to a 6(1) category, in order to ensure their capacity to transmit status to their descendants.

- Since that time, the Department has committed to continue work to remove inequities and address their discriminatory impacts.

History of Enfranchisement

- In 1985, the process of enfranchisement was eliminated.
- Individuals who had been enfranchised had their entitlement to status restored under sections 6(1)(d) and 6(1)(e).
- Changes were made to the *Indian Act* in 2011, 2017 and 2019, but none of these changes impacted 6(1)(d) or 6(1)(e).
- Today, individuals with a family history of enfranchisement remain less able to transmit status to their descendants, compared with those who did not.

Nicholas v Canada (AGC)

JURISTES POWER LAW

- Sharon Nicholas has been working since the 1980s to have her children registered under the *Indian Act*.
- Their applications were repeatedly denied because Sharon's grandfather, Wilfred Laurier Bennett, was enfranchised in 1944.
- Wilfred Laurier Bennett had been forced to attend Coqualeetza residential school and wanted to ensure his children were never placed in residential schools.

Wilfred Laurier Bennett
as a young man.

Wilfred Laurier Bennett
with
Ivy Constance Octavia
Bennett (née Edenshaw)

Nicholas v Canada (AGC)

JURISTES POWER LAW

- Sharon came to Legal Aid in Victoria in August 2017 and we began working together on her children's registration.
- Sharon and her children are citizens of the Haida Nation under the citizenship laws of the Haida Nation.
- But they are denied registration and band membership under the *Indian Act*.
- Several members of Sharon's family, including her niece, Nadia Salmaniw, are plaintiffs in *Nicholas*.

Nicholas v Canada (AGC)

JURISTES POWER LAW

- Kathryn Fournier contacted us in June 2020. Her grandfather was enfranchised in 1922, wanting the right to vote and to own property as other Canadians could.

- Kathryn is a member of Pinaymootang First Nation. Like Sharon, she is registered under section 6(2) and is unable to pass Indian status to her children.

- A third family with roots in T'it'q'et (Lillooet) and Wei Wai Kum (Campbell River) is also among the plaintiffs.

Nicholas v Canada (AGC)

JURISTES POWER LAW

- The court challenge was filed in June 2021.
- Sharon's mother intended to participate as a plaintiff but had to withdraw for health reasons.
- Kathryn's mother, Edith ("Sandy") Fournier, is a named plaintiff. Sadly, she passed away in late 2021. She was 96 years old.
- The elder generations among the plaintiffs have been waiting many decades for the changes proposed in Bill C-38. The youngest generation has been waiting since birth.

Nicholas v Canada (AGC)

JURISTES POWER LAW

- Patty Hajdu was appointed Minister of Indigenous Services (ISC) in Fall 2021.
- Discussions with ISC since that time have been productive, leading to an agreement to put litigation on hold while pursuing a legislative solution.
- Bill C-38, as currently drafted, provides the changes to Indian registration sought by the plaintiffs in *Nicholas*. If Bill C-38 fails to advance legislatively, the litigation will resume.

“One of the things that I'd always hoped for is that my own children would be able to also claim their Indigenous identity and their Indigenous heritage in a formal, recognized way.”

“For so many of my almost 70 years, I have not ever thought that this kind of change could come about, could be made to happen without lots of resistance and pushback from Canada.”

Kathryn Fournier with a photograph of her mother, Edith Fournier (née Sanderson)

Nadia on the repeated denial letters from the Registrar:
“I believe that just opened up the old wounds and continued to reinforce the harm that was inflicted on my great-grandfather at the time of residential school ... If we were successful in having that harm recognized through a change in the law, I would be joyful because actively, I would've been part, a small part, of being the change I wish to see in the world and for the generations to come, raising my daughter as a proud Haida girl .”

Nadia Salmaniw (Sharon’s niece) with her daughter, Sage

The *Nicholas* Civil Litigation

- In July 2021, Juristes Power Law filed the Nicholas civil litigation on behalf of 16 plaintiffs, all of whom are impacted by their family histories of enfranchisement.

- In March 2022, the litigation was put on hold as the Minister committed to making legislative changes to remedy the inequity in registration caused by enfranchisement.

- A Cabinet process was put underway, and these legislative amendments have now been introduced.

- The Department took proactive steps by including other amendments for issues previously recognized and brought up by First Nations partners.

Enfranchisement

PROPOSED AMENDMENTS:

1. Repealing the enfranchisement-related provisions of 6(1)(d) and (e) and transferring individuals entitled for registration under these provisions to 6(1)(a.1).
2. Entitling direct descendants of individuals who are, were or would have been entitled to be registered under 6(1)(d) and (e) under the provision 6(1)(a.3), if they were:
    - Born before April 17, 1985, whether or not their parents were married to each other at the time of the birth, or
    - Born after April 16, 1985, and their parents were married to each other at anytime before April 17, 1985.
3. Restoring entitlement to registration to individuals who collectively enfranchised under 6(1)(a.1).

Individual Deregistration

- Today, the *Indian Act* does not allow the Registrar a legal mechanism to remove individuals from the Registrar, even upon their request.
- Requests for removal have been received for reasons such as:
  - Impacts the ability to enrol with an American Tribe or to identify/register as a Métis person
  - Registered as a minor
  - Simply do not want name on a federal register

PROPOSED AMENDMENT:

- The Indian Registrar will be able to remove a name from the Indian Register, when an individual provides a written request.
- An individual will be able to be removed without having to worry about the impact of their decision on their descendants' right to seek registration.
- There will also be an option to apply for re-registration should an individual wish to become registered again.

Natal Band Membership

- Before 1985, a registered First Nations woman who married a registered man from another band was automatically transferred to her husband's band upon that union.
- This automatic loss of membership in her birth band at that time impacted access to any settlements, rights or benefits that she might otherwise have been entitled.

PROPOSED AMENDMENT:

- Creates the legal mechanism for a woman who never lost status, but who lost entitlement to her natal band upon marriage, to ensure that she can re-affiliate to her natal band, if she wishes.
- Individuals who wish to transfer bands will be able to apply to do so through a band transfer request
- Implementation of this amendment will look different for Section 11 bands and Section 10 bands.

Offensive Language in the *Indian Act*

- The current *Indian Act* defines a “Mentally Incompetent Indian” as an individual who requires assistance such as a power of attorney in dealing with their affairs.

PROPOSED AMENDMENT:

- To remove all references to “mentally incompetent Indian” and replace it with “dependent person”.

- This step is being taken to transition away from the epistemic violence directed at Indigenous people with disabilities and their families

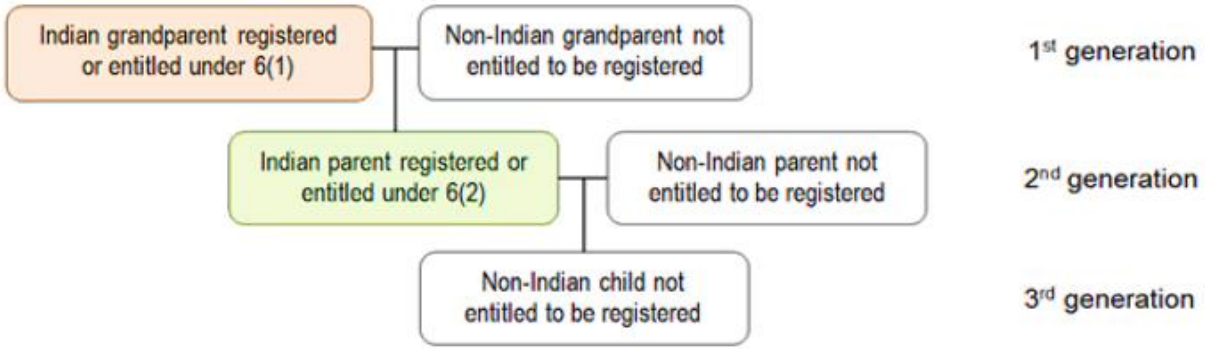
Next Steps

- Second Reading (and beyond) for Bill C-38
- The Department is working to develop and launch a collaborative consultation process with First Nations and partners on options for solutions to broader reform issues, starting with the second-generation cut-off.

Second-Generation Cut-Off

- In 1985, two general registration categories were introduced under C-31: sections 6(1) and 6(2).

- After two consecutive generations of parenting with a person who is not entitled to registration, the third generation is no longer entitled to registration. Entitlement is therefore cut-off after the second-generation.



Upcoming Consultation

- Many nations have raised that many of their members are being cut-off from their communities.

- Based on the recommendations of First Nations, Canada acknowledges that the second-generation cut-off must be addressed through a legislative amendment.

- During the Collaborative Process in 2018/19, the Government of Canada heard that a separate and distinct consultation process was required to ensure that a remedy for the second-generation cut-off could be derived with adequate consultation.

- After the introduction of Bill C-38 in Parliament, in December 2022, the Minister publicly committed to launching a co-developed consultation process on this issue.