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Bill S-3: A rushed response to *Descheneaux*

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Case Commented On: Bill S-3 "An Act to amend the Indian Act (elimination of sex-based inequities in registration); *Descheneaux c Canada (Procureur General)*, 2015 QCCS 3555 (CanLII)

*Note on terminology: "Indian" is used to describe a person defined as such under the *Indian Act*, and is not intended to carry any derogatory connotations.

In the early days after the 2015 election, Prime Minister Trudeau was honoured by the Tsuut'ina First Nation with a traditional headdress and an indigenous name which translates to "the one that keeps trying." Trudeau and the Liberals will have to keep trying, as they made an extraordinary commitment to address First Nations issues during the campaign, and set multiple deadlines for action within the next few years. One of the first deadlines to come due is an amendment of the *Indian Act*, RSC, 1985 c. I-5 necessitated by a recent Quebec Superior Court ruling.

In *Descheneaux c Canada (Procureur General)*, 2015 QCCS 3555 (CanLII) (*Descheneaux*) the court held that several provisions of the *Indian Act* surrounding who is considered a 'Status Indian' violated the principles of equality protected by Section 15 of the *Charter of Rights and Freedoms*.

After withdrawing an appeal of the decision in February 2016, the federal government has commenced a two-stage response to this ruling. Stage one is Bill S-3 "An Act to amend the Indian Act (elimination of sex-based inequities in registration)", while stage two is a collaborative process between the government and First Nations leadership to identify and implement further reforms.

This post will briefly summarize the issues and findings in *Descheneaux*, and assess how these are impacted by Bill S-3. It will also examine some of the testimony given at the Senate's Standing Committee on Aboriginal Peoples meetings held last week on these issues. Finally, it will briefly look at how *Deschaneaux* fits into the Liberal government's progress on implementing the many campaign promises it made to First Nations' people.

Background – Status and the *Indian Act*

Section 6 of the *Indian Act* *RSC 1985, c I-5* sets out rules for entitlement to Indian registration (Status), based on an individual's descent from a person registered or eligible to be registered as a 'Status Indian'.

Whether or not a Canadian is granted Status, a concept based on 19th century ideas of racial essentialism (and, many would argue, white supremacy), dictates who can be recognized as an Indian person by the Canadian government. This finding has enormous implications for the

individual involved, from their ability to live on reserve, to their access to government programs. Being denied Status can block indigenous peoples from participating in important aspects of indigenous life and exclude them from various rights and forms of government support offered to Status Indians (see helpful descriptions of these issues here, here, and here). Despite its problematic implications, Status is often seen as a necessity if one wishes to access any of the government funded programs for First Nations people and participate fully in reserve or band life.

Section 6(1) v Section 6(2)

Within the broader category of Status Indians, there is a further distinction between persons who have Status under section 6(1) of the *Indian Act*, and those who have Status under 6(2). While this is a gross over-simplification, the main distinctions between the two are:

1. That both parents of a 6(1) Indian had Status, while 6(2) Indians only had one parent with Status; and
2. 6(1) Indians can marry a non-Status person and still pass on Status to their children. If 6(2) Indians marry a non-Status person, Status is not passed onto their children.

A person's 6(1) or 6(2) Status is in many cases affected by whether their mother or grandmother was denied Status based on their gender, a historically common occurrence.

Gender and Status

Historically several provisions of the *Indian Act* worked to exclude women from various rights by terminating their Status, or 'enfranchising' them. Originally, the *Indian Act* held that a Status Indian woman who married a non-Indian man would cease to be an Indian. She would lose her Status and all associated rights. Conversely, if an Indian man married a non-Status woman, he would maintain his Status, and it would be conferred on his wife.

After extensive litigation, the most overtly discriminatory provisions of the *Indian Act* were amended in 1985 and 2010. These amendments allowed women who had lost their Status by marrying non-Status men to regain it. However, as Jennifer Koshan summarized here, these legislative changes have left many residual problems, as illustrated by the plaintiffs in *Descheneaux.*

Descheneaux c Canada (Procureur General)

In *Descheneaux* the Plaintiffs, Stephane Descheneaux and Susan and Tammy Yantha, claimed that section 6 of the *Indian Act* violates the equality guaranteed in 15(1) of the *Canadian Charter of Rights and Freedoms* by creating discriminatory and differential treatment in regards to who is or is not a Status Indian. These claims of discrimination arose from two factually specific contexts:

Stephane Descheneaux

Stephane Descheneaux maintains that he is deprived of 6(1) status because of sex discrimination (at para 55). Mr. Descheneaux's grandmother lost her status in 1935 after marrying a non-Status Indian. This meant that under the version of the *Indian Act* in force at the time that her child, Mr. Descheneaux's mother, had no Status at birth. Mr. Descheneaux's mother also married a non-

Indian and then gave birth to Mr. Descheneaux, who was thus deprived of status due to his grandmother and mother's marriages (at para 56). The amendments to the *Indian Act* passed in 1985 and 2010 allowed both his grandmother and mother to regain Status. However, as the child of a Status Indian and non-Status Indian, Mr. Descheneaux's mother held 6(2) Status. As discussed above, this meant that by marrying a non-Status Indian she could not pass her Status onto her child Mr. Descheneaux.

If it had been Mr. Descheneaux's grandfather who married a non-Status Indian on the other hand, both of Mr. Deschaneux's mother's parents would have held Status, and Mr. Deschaneux's mother would have been a 6(1) Indian from birth, meaning that she would have passed Status onto Mr. Descheneaux.

He alleges that the distinction based on the sex of an Indian grandparent is discriminatory in that it:

…perpetuates a stereotype whereby the Indian identity of women and their descendants are less worthy of consideration or have less value than that of Indian men and their descendants, and by having the effect that Stéphane Descheneaux's children cannot have Indian status passed down to them or enjoy certain attendant benefits… (at para 59)

Susan & Tammy Yantha

The version of the *Indian Act* in force in 1954 held that illegitimate daughters of Status Indian men and non-Status Indian women would not have Status, while illegitimate sons would have 6(1) Status. Susan Yantha was born in 1954 as the illegitimate daughter of an Indian man and a non-Indian woman. In 1972, she had a child, Tammy Yantha, with a non-Indian man. After the 1985 amendments, Susan obtained 6(2) status (at para 62) since only one of her parents had Status. Tammy is prevented from obtaining Status due to her mother's 6(2) classification and her father not holding Status.

Susan was denied status at birth based purely on her sex. If she had been a male, she would have held 6(1) Indian from birth and her daughter Tammy would have 6(2) Status.
Susan and Tammy argue that the distinctions in terms of registration based on Susan's sex are discriminatory because they:

"perpetuate a stereotype whereby the Indian identity of women and their descendants does not have the same value or importance as that of Indian men and their descendants." (at para 65)

Findings by the Court

The Court declared that sections 6(1)(a),(c), and (f) and subsection 6(2) of the *Indian Act* unjustifiably infringe section 15 of the *Canadian Charter Rights and Freedoms* and are inoperative (at para 244). The Court suspended the effect of the judgment for eighteen months, providing a deadline of February 3, 2017 for Parliament to remedy the provisions (at para 244). In *obiter*, the court instructed Parliament to go beyond the facts in *Descheneaux* in their drafting of legislation to consider all sex discrimination arising out of the *Indian Act* (at para 143).

The Government's Response Stage I – Bill S-3
To comply with the *Descheneaux* ruling, the government introduced Bill S-3, which addresses three discreet issues of sexism in the *Indian Act*:

- **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 September 4, 1951 and April 17, 1985 (See Annex C).

The government claimed that consultation of the bill would be inclusive of First Nations, beginning in Summer 2016 and ending in the Senate committees in Fall of 2016.

The Government's Response Stage II – A Collaborative Process to Examine the Broader Issues Relating to Indian Registration and Band Membership (2017-2018)

Stage II is meant to build upon the submissions of First Nations and other indigenous groups from the 2011-2012 study "*Exploratory Process on Indian Registration, Band Membership and Citizenship*". By working collaboratively with aboriginal groups, the government aims to create a jointly designed process for identifying areas for future reform, and the processes that such reform will require.

Response to Bill S-3 and its Potential Impacts

In two meetings last week*, the Senate Committee on Aboriginal Peoples solicited feedback from the Descheneaux Plaintiffs, representatives of the Minister of Indigenous and Northern Affairs Canada (INAC) office and various First Nations and First Nations' organizations from across the country.

There were several common themes amongst the submissions:

1. Disappointment at the Minister's decision to continue to use the framework of the *Indian Act* as the legislation that determines who is and is not an indigenous person in Canada;
2. The government's failure to solicit fulsome consultation on Bill S-3;
3. Going forward, a desire for the government to look for solutions outside of the *Indian Act* in dealing with band membership and other issues facing indigenous peoples in Canada.

Chief Perry Bellagarde of the Assembly of First Nations (AFN) requested that Minister Bennett apply to the Superior Court of Quebec for an extension to the February 3, 2017 deadline in order to more fully engage in consultation in order to assess the effects of section 6.

President of the Native Women's Association Canada (NWAC), Francyne Joe, stated that her organization was provided with only half a day to review the proposed bill and a short two-hour window with representatives from the Minister's office to address the bill. Francyne urged more fulsome consultation that would respect the struggles that NWAC's membership has endured with regards to citizenship.

Drew Lafond, a representative of the Indigenous Bar Association (IBA), stated that the IBA was disappointed to be "participating in a dialogue which is ultimately premised on tinkering with a formula that is used to determine who is or who is not an Indian under the *Indian Act*." Lafond

argued for an alternative 'nation to nation' approach in which First Nations across Canada could take control of band citizenship outside of the archaic constructs found in the *Indian Act.* The IBA was particularly concerned with the inequitable treatment of the illegitimate children of women versus men, as highlighted by the Yantha Plaintiffs in *Descheneaux*.

Impacts

On its website, INAC sets out what it believes to be the immediate effects if Bill S-3 is passed:

- An increase in the population entitled to Indian registration will result in a corresponding increase in costs in respect of health and post-secondary education benefits;
- First Nations that operate under section 11 of the *Indian Act* (in which the Indian registrar manages their band lists), will be impacted by the proposed legislative amendments, as newly entitled individuals who register and are descendants of these First Nations will be added to their register; and
- First Nations that are self-governing or are controlling their own membership (under section 10 of the *Indian Act*) may choose to amend their laws to incorporate newly entitled registered individuals to their membership lists but are not required to do so.

While not surprising that a Ministry would use an occasion such as this to argue that it requires more funding, it is clear that any increase in the number of Status Indians in the wake of Bill S-3 will require additional resources for INAC.

Keeping Promises?

The completion of the government's two-stage response to *Descheneaux* gives it yet another First Nations related deadline to meet within the next few years. It joins:

1. The Inquiry into Missing and Murdered Aboriginal Women (completing its mandate by August 2018);

2. The promise to swiftly act on all 94 recommendations from the Truth and Reconciliation Commission;

3. The order of Canada's Human Rights Tribunal requiring the government to immediately overhaul and increase funding for First Nation child welfare; and

4. The upcoming human rights tribunal case of Sloan and Marvin, twins on the Mississaugas of New First Credit First Nation who have submitted a human rights complaint regarding the government's refusal to provide them with special education funding (last discussed on Ablawg here).

Each of these commitments is going to require increased funding and a great deal of time and effort. It is thus far unclear whether the Trudeau government is willing to make these commitments.

Conclusion

Descheneaux revealed that despite decades of litigation and several amendments to the *Indian Act*, residual issues of sexism continue to effect the question of who is a Status Indian. Bill S3 will help with some of the people who have fallen through the cracks of past reforms. The reaction of many First Nations groups though is that continued tinkering with the *Indian Act*, a document many people find inherently racist, is a waste of time. What is needed in their view (and this author's) is a full scale reinvention of the relationship between First Nations people and the Canadian government. This relationship would be based on ideas of equality, as opposed to being based on an *Act* imposed on First Nations people without their consent nearly 150 years ago.

There are encouraging signs that the government wants such a relationship, as borne out by its many promises to First Nations people. Whether or not it is willing to make the commitments of time, money and political capital necessary to achieve it remains to be seen. It is gratifying to see the *Deschaneaux* Plaintiffs and other like them granted justice, but enactments like Bill S-3 are like fixing cracks in a foundation that badly needs replacing.

**The Senate Committee meetings can be watched here and here.*

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