



LIBRARY of PARLIAMENT
BIBLIOTHÈQUE du PARLEMENT

LEGISLATIVE SUMMARY



Bill S-3:

An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)

Publication No. 42-1-S3-E
22 February 2017
Revised 12 March 2018

Norah Kielland
Marlisa Tiedemann

Legal and Social Affairs Division
Parliamentary Information and Research Service

Library of Parliament **Legislative Summaries** summarize government bills currently before Parliament and provide background about them in an objective and impartial manner. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations. Legislative Summaries are revised as needed to reflect amendments made to bills as they move through the legislative process.

Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

© Library of Parliament, Ottawa, Canada, 2018

Legislative Summary of Bill S-3
(Legislative Summary)

Publication No. 42-1-S3-E

Ce document est également publié en français.

CONTENTS

1	BACKGROUND.....	1
1.1	Indian Status and Recent Legislative Developments Surrounding the <i>Indian Act</i>	2
1.1.1	The 1985 Amendments: Bill C-31, An Act to amend the Indian Act.....	2
1.1.2	The 2010 Amendments: Bill C-3, Gender Equity in Indian Registration Act.....	3
1.1.2.1	The Exploratory Process on Indian Registration, Band Membership and Citizenship under Bill C-3.....	4
1.2	<i>Descheneaux c. Canada</i>	4
1.2.1	The Government's Response to the <i>Descheneaux</i> Decision.....	6
1.2.2	Potential Effects of the <i>Descheneaux</i> Decision.....	6
1.2.2.1	Demographic Changes.....	6
1.2.2.2	Band Membership.....	7
2	DESCRIPTION AND ANALYSIS.....	7
2.1	Indian Register (Clause 1)	8
2.2	New Entitlements to Register under Section 6(1) of the <i>Indian Act</i>	8
2.2.1	Individuals Whose Parent as a Minor Child Lost Status as a Result of the Mother's Subsequent Marriage to a Non-Indian (the "Removed or Omitted Minors Issue") (Clause 2(2)).....	8
2.2.2	Individuals Whose Parent Was Omitted or Deleted from the Indian Register (Clause 2(2))	8
2.2.3	Individuals Whose Parent Became Eligible to Be Registered under Section 6(1) as a Result of the 2010 <i>Indian Act</i> Amendments (the "Cousins Issue") (Clause 2(3)).....	9
2.2.4	Individuals Who Were Born Female between 4 September 1951 and 16 April 1985 Whose Parents Were Not Married to Each Other at the Time of Their Birth (the "Siblings Issue") (Clause 2(3)).....	9
2.2.5	Children of Individuals Who Are Entitled to Be Registered Under New Section 6(1)(c.2) or 6(1)(c.3) (Clause 2(3)).....	10
2.2.6	Children of Individuals Who Are Entitled to Be Registered Under New Section 6(1)(c.4) (Clause 2(3))	10
2.2.7	Children of Individuals Who Are Entitled to Be Registered Under New Section 6(1)(c.02) (Clause 2(3))	10
2.3	Clarification Relating to Section 6(2) (Clause 2(5)).....	10
2.4	Deceased Persons Deemed to Be Entitled to Be Registered (Clause 2(6)).....	11
2.5	Repeal, Renumbering and Amendment of Certain Provisions (Clause 2.1)	11

2.6	Amendment to Membership Rules for Departmental Band Lists (Clause 3)	11
2.7	Amendment of Certain Provisions (Clause 3.1)	12
2.8	Expenditure of Capital Moneys with Consent and Expenditure of Capital Moneys in Accordance with By-Laws (Clause 3.2)	12
2.9	Transitional Provisions (Clauses 4 to 8)	12
2.10	Related Provisions (Clauses 9, 10 and 10.1)	12
2.11	Consultations and Reports (Clauses 11 to 14)	13
2.12	Coming into Force (Clause 15)	13
APPENDIX A – THE “COUSINS ISSUE”		
APPENDIX B – THE “SIBLINGS ISSUE”		

LEGISLATIVE SUMMARY OF BILL S-3: AN ACT TO AMEND THE INDIAN ACT IN RESPONSE TO THE SUPERIOR COURT OF QUEBEC DECISION IN DESCHENEAUX C. CANADA (PROCUREUR GÉNÉRAL)

1 BACKGROUND

Bill S-3, An Act to amend the Indian Act (elimination of sex-based inequities in registration) was introduced in the Senate on 25 October 2016.¹ The bill amends the *Indian Act*² to comply with the Superior Court of Quebec's decision of 3 August 2015 in *Descheneaux c. Canada (Procureur général)*,³ which found that certain provisions of the *Indian Act* relating to status violated the equality provisions of the *Canadian Charter of Rights and Freedoms*⁴ on the basis of sex. The Court suspended the declaration of invalidity relating to the registration provisions of the *Indian Act* for 18 months, to 3 February 2017, to enable Parliament to amend the Act.

The bill was referred to the Standing Senate Committee on Aboriginal Peoples on 17 November 2016. Following its examination, the Senate Committee expressed concerns surrounding the scope of the proposed legislation, as well as the consultation process. The Committee decided to hold the bill in abeyance to give the federal government additional time to consult with First Nations and obtain an extension on the initial 3 February 2017 deadline.⁵ On 20 January 2017, the Superior Court of Quebec granted a five-month extension on the suspended declaration of invalidity, to 3 July 2017.⁶ **A second extension was granted by the Quebec Court of Appeal until 22 December 2017.**

The Senate Committee resumed its consideration of the bill in May 2017, amended the bill, and presented its report to the Senate on 30 May 2017. The Committee report was adopted, and the bill was passed by the Senate with one further amendment on 1 June 2017.⁷

Bill S-3 received first reading in the House of Commons on 2 June 2017, was debated at second reading on 13 June 2017 and referred to the House of Commons Standing Committee on Indigenous and Northern Affairs on that same day. The House of Commons Committee, which had done a pre-study of Bill S-3, proceeded to clause-by-clause consideration of the bill on 15 June 2017. The next day, it reported the bill back to the House with amendments, one of which was a revised title, An Act to amend the Indian Act in response to the Superior Court of Quebec decision in *Descheneaux c. Canada (Procureur général)*. The report was concurred in on 21 June 2017, and the bill was read a third time and passed that same day, when the House sent a message to the Senate to tell it that it was returning the bill to the Senate for concurrence with the amendments.⁸

It was agreed that the message would be considered at the Senate's next sitting, and it was on 7 November 2017 that Senator Peter Harder (Government Representative in the Senate) moved that the Senate concur in two of the three House of Commons amendments. In addition, he moved a series of amendments to address the continuing inequality resulting from the 1951 cut-off date for determining eligibility for registration under section 6(1) of the *Indian Act*.⁹

Senator Harder’s motion was adopted, and those amendments were concurred in by the House of Commons on 4 December 2017. The bill received Royal Assent on 12 December 2017.¹⁰

1.1 INDIAN STATUS AND RECENT LEGISLATIVE DEVELOPMENTS SURROUNDING THE *INDIAN ACT*

Indian status¹¹ is used to determine eligibility for federal programs, such as post-secondary education funding and non-insured health benefits; legislated rights, such as tax exemption on reserves; and treaty rights, such as treaty annuities.¹²

Currently, entitlement to register for, and pass on, Indian status is determined under sections 6(1) and 6(2) of the *Indian Act*. Section 6(1) sets out the criteria for registering for Indian status, while section 6(2) allows an individual with only one parent registered under section 6(1) to register for Indian status. An individual registered under section 6(2) may only pass status on to that individual’s child if the other parent also has Indian status. This provision is typically referred to as the “second generation cut-off rule,” where status is terminated after two successive generations of intermarriage between Indians and non-Indians.

1.1.1 THE 1985 AMENDMENTS: BILL C-31, AN ACT TO AMEND THE INDIAN ACT

Prior to 1985, legislative provisions regarding status explicitly favoured paternal lineage – Indian women who married non-Indian men lost their Indian status, while Indian men who married non-Indian women retained their status and conferred Indian status on their wives and children. Table 1 below briefly illustrates the evolution of the provisions pertaining to Indian status over the past century.

In order to conform to the equality provisions of the *Canadian Charter of Rights and Freedoms*, in 1985, Bill C-31, An Act to amend the Indian Act, introduced significant amendments intended to remove gender discrimination from the registration provisions in the *Indian Act*. Specifically, Bill C-31 provided the following:

- Status was restored to women who had lost their status as a result of marriage to a non-Indian (section 6(1)(c)).
- Status was restored to individuals who had lost their status as a result of what is commonly known as the “double mother rule,” introduced in the 1951 amendments to the *Indian Act*. The double mother rule refers to a provision that removed status at age 21 from individuals whose mother and paternal grandmother acquired status through marriage.¹³
- Status was maintained for individuals who were registered before the 1985 amendments, such as non-Indian women who had married Indian men (section 6(1)(a)).
- Individuals with one parent entitled to registration under section 6(1) were entitled to register for status under section 6(2). Individuals with one parent registered under section 6(2) and one non-status parent were not entitled to registration.

Bill C-31 introduced a new and complex framework to determine eligibility for Indian status under sections 6(1) and 6(2) of the Act. A primary target for criticism of distinctions between registration under section 6(1) and section 6(2) has been what is commonly referred to as the “second generation cut-off rule.” Although the rule is gender neutral for children born after 1985, it created a relative disadvantage for the descendants of First Nations women who had married non-Indian men and regained status under section 6(1). Their children born before 17 April 1985 were registered under section 6(2), making them ineligible to transmit status onward if they married non-Indians (50% descent). Therefore, the women’s grandchildren were without status.

In contrast, the children of Indian men who had married non-Indian women before 1985 were registered under section 6(1) and, despite having the same degree of Indian ancestry as section 6(2) registrants, were able to transmit status to their offspring when they married non-Indian spouses. Those offspring, registered under section 6(2), could in turn pass on status for at least an additional generation (25% descent).¹⁴

1.1.2 THE 2010 AMENDMENTS: BILL C-3, GENDER EQUITY IN INDIAN REGISTRATION ACT

In 2010, Bill C-3, the Gender Equity in Indian Registration Act (short title),¹⁵ introduced further amendments to the registration provisions of the *Indian Act*, in response to the British Columbia Court of Appeal’s decision in *Mclvor v. Canada*.¹⁶ In that decision, the Court found that sections 6(1)(a) and 6(1)(c) of the *Indian Act* violated the equality provisions of the Charter on the basis of sex, “to the extent that they grant individuals to whom the double mother rule applied greater rights than they would have had under section 12(1)(a)(iv) of the former legislation.”¹⁷ Thus, under Bill C-3, the grandchildren of eligible Indian women who had lost status as a result of marriage became entitled to register for status under section 6(2). This amendment was intended to provide entitlement for Indian status equivalent to that of individuals who had their status reinstated beyond the 21 years specified under the double mother rule.¹⁸

Not all issues related to residual gender discrimination were addressed by Bill C-3, as the amendments to the *Indian Act* contained in the bill focused on the specific circumstances outlined by the British Columbia Court of Appeal (i.e., the differential treatment resulting from the restoration of status to those who had lost it because of the double mother rule). Thus, despite the passage of Bill C-3, some individuals continued to have fewer rights – receiving status under section 6(2) rather than section 6(1) – by virtue of having an Indian grandmother instead of an Indian grandfather. As noted by the Canadian Bar Association, “[a] grandchild born before 1985 descended from an Indian grandfather would be able to transmit status for one generation longer than those descended from an Indian grandmother.”¹⁹ Other instances that were not addressed by Bill C-3 include the differential treatment of illegitimate children born before 1985, whereby only male children were entitled to status. Further, Bill C-3 did not address the differential treatment of grandchildren born before 1951.²⁰

1.1.2.1 THE EXPLORATORY PROCESS ON INDIAN REGISTRATION, BAND MEMBERSHIP AND CITIZENSHIP UNDER BILL C-3

In January 2011, the federal government launched an exploratory process with national and regional Indigenous organizations to examine issues surrounding membership, registration and citizenship deemed beyond the scope of Bill C-3. The findings of the exploratory process were released in January 2013 in a report entitled *The Exploratory Process on Indian Registration, Band Membership and Citizenship: Highlights of Findings and Recommendations*.²¹ Throughout the exploratory process, First Nations highlighted the need to recognize First Nations jurisdiction over citizenship, and as a short-term measure, to address the issues affecting membership under the *Indian Act*, including ongoing gender inequities.²²

1.2 DESCHENEAUX C. CANADA

On 3 August 2015, the Superior Court of Quebec in *Descheneaux c. Canada (Procureur général)* held that the registration provisions under sections 6(1)(a), 6(1)(c), 6(1)(f) and 6(2) of the *Indian Act* constituted an unjustifiable infringement of section 15 of the *Canadian Charter of Rights and Freedoms*. The Court suspended its declaration of invalidity for 18 months to allow Parliament to amend the Act.²³ The Court advised Parliament not to restrict the amendments to respond to the specific facts of the case, but rather to take the “appropriate measures to identify and settle all other discriminatory situations that may arise from the issue identified.”²⁴ On 20 January 2017, the Court granted a five-month extension on the declaration of invalidity to 3 July 2017, in order provide for additional consultation on the government’s legislative proposal to address discrimination in the Indian registration provisions.²⁵

In this case, the plaintiffs Stéphane Descheneaux, Susan Yantha and Tammy Yantha argued that, despite previous amendments to the *Indian Act*, its registration provisions continued to give rise to gender-based discrimination, affecting, in particular, individuals who regained status beyond 21 years of age, which had been the cut-off under the now-defunct double mother rule.²⁶

The Court agreed, concluding that the 2010 amendments did not resolve all instances of sex discrimination and that the Act continued to treat two categories of persons differently:

- individuals whose grandmother had lost status due to marriage with a non-Indian, when that marriage occurred prior to 17 April 1985 – also known as the “cousins issue” (see figure in Appendix A of this Legislative Summary); and
- women who were born out of wedlock to Indian fathers prior to 17 April 1985 – also known as the “siblings issue” (see figure in Appendix B of this Legislative Summary).

In summary, individuals entitled to Indian status through their male ancestors continued to enjoy a significant advantage over individuals entitled to status through their female ancestors, in particular with respect to their ability to pass on status to their children.

Figure 1 – Legislative History of Registration for Indian Status

<p>Prior to 1951</p>	<ul style="list-style-type: none"> • An Indian woman who marries a non-Indian man loses her Indian status and their children are not eligible for Indian status. • An Indian man who marries a non-Indian woman retains his Indian status and confers it on his wife and their children.
<p>1951</p>	<ul style="list-style-type: none"> • An Indian woman who marries a non-Indian man loses her Indian status and their children are not eligible for Indian status. • An Indian man who marries a non-Indian woman retains his Indian status and confers it on his wife and their children. • While a child of an Indian man and a non-Indian woman is entitled to status, if the child's paternal grandmother is also non-Indian, the child loses Indian status at the age of 21. This is commonly referred to as the "double mother rule." • An Indian registrar is established by the federal government to maintain lists of persons entitled to register as an Indian and of band membership.
<p>1985 Bill C-31</p>	<ul style="list-style-type: none"> • A new system of determining Indian status is introduced under sections 6(1) and 6(2) of the <i>Indian Act</i>, whereby Indian status ceases after two consecutive generations of mixed Indian and non-Indian parentage. This is commonly referred to as the "second generation cut-off." • Status is restored to women who lost their status as a result of marriage (section 6(1)(c) of the <i>Indian Act</i>). • Status is restored to individuals who lost their status as a result of the "double mother rule," which is abolished (section 6(1)(c)). • Status is maintained by individuals who were registered before the 1985 amendments to the <i>Indian Act</i>, such as non-Indian women who married Indian men (section 6(1)(a)). Subsequently, status is no longer conferred through marriage.
<p>2010 Bill C-3</p>	<ul style="list-style-type: none"> • Indian status under section 6(2) is provided to the grandchildren of women who lost their status as a result of marrying non-Indian men and whose child of that marriage had a grandchild with a non-Indian spouse after September 1951. This amendment is made in response to the British Columbia Court of Appeal Decision in <i>Mclvor v. Canada</i>.
<p>2016 Bill S-3</p>	<ul style="list-style-type: none"> • In response to the Superior Court of Quebec decision in <i>Descheneaux c. Canada</i>, amendments contained in Bill S-3 have the following effect: <ul style="list-style-type: none"> ▪ Grandchildren of women who lost their Indian status as a result of marrying non-Indian men are entitled to register under section 6(1), and great-grandchildren of women who lost their status as a result of marrying non-Indian men are entitled to register under either section 6(1) or section 6(2) (to address the "cousins issue"). ▪ Female persons born out of wedlock between 4 September 1951 and 16 April 1985 to an Indian male are entitled to register under section 6(1); the offspring of those female persons are also entitled to register under section 6(1) (to address the "siblings issue"). ▪ Children born before 17 April 1985 to a minor child who had lost status when the child's Indian mother married a non-Indian male after the child was born, and who had become entitled to register under section 6(1)(c) of Bill C-31 are entitled to register under section 6(1) (to address the "removed or omitted minors issue").

Sources: Figure prepared by the authors using data obtained from *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, 32–33 Vict., c. 6, s. 6; *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, 39 Vict., c. 18, s. 3; *Indian Act*, S.C. 1951, c. 29, 15 Geo. VI, ss. 11 and 12; *Indian Act*, R.S.C. 1985, c. I-5; *An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in Mclvor v. Canada (Registrar of Indian and Northern Affairs)*, S.C. 2010, c. 18; and Bill S-3, *An Act to amend the Indian Act (elimination of sex-based inequities in registration)*, 1st Session, 42nd Parliament.

1.2.1 THE GOVERNMENT'S RESPONSE TO THE *DESCHENEAUX* DECISION

In an approach similar to that taken in respect of the 2010 amendments, the federal government has launched a two-stage approach to address issues relating to Indian registration and band membership. The first phase introduces legislative amendments under Bill S-3 to resolve the known gender-based inequities in the *Indian Act*.²⁷ Specifically, in response to the Superior Court of Quebec decision in *Descheneaux c. Canada*, the following amendments to the Act are made:

- Grandchildren of women who lost their status as a result of marrying non-Indian men will be entitled to register under section 6(1), and great-grandchildren of women who lost their status as a result of marrying non-Indian men are now entitled to register under either section 6(1) or section 6(2) (to address the “cousins issue”).
- Female persons born out of wedlock between 4 September 1951 and 16 April 1985 to an Indian male are entitled to register under section 6(1); the offspring of those female persons are also entitled to register under section 6(1) (to address the “siblings issue”).
- Children born before 17 April 1985 to a child who had lost status as a minor when the child’s Indian mother subsequently married a non-Indian male, and who became entitled to register under section 6(1)(c) of the Act as amended by Bill C-31, become entitled to register under section 6(1) (to address the “removed or omitted minors issue”).

Information sessions regarding these amendments to the *Indian Act* were held with national and regional Indigenous organizations in the fall of 2016 and winter of 2017. The federal government stated that, due to time constraints, it was not possible to engage directly with individual First Nation communities.²⁸

In the second phase, the federal government committed to launch a “collaborative process” to work with First Nations and other Indigenous groups to examine the broader issues surrounding Indian registration and band membership that were not addressed under legislative amendments. **As part of that process, First Nations and Indigenous organizations provided input into the design of consultation activities that will start on 12 June 2018 and last a year.**²⁹

1.2.2 POTENTIAL EFFECTS OF THE *DESCHENEAUX* DECISION

1.2.2.1 DEMOGRAPHIC CHANGES

Preliminary projections provided by the federal government estimate that between 28,000 and 35,000 individuals will become entitled to register following legislative amendments to the *Indian Act* introduced by Bill S-3.³⁰ Amendments to the *Indian Act* under Bill C-31 extended eligibility to register for Indian status³¹ to over 150,000 individuals, while approximately 37,000 additional individuals became entitled to register as Indian under Bill C-3.³²

Any growth in the status Indian population could have a financial impact on federal programs, as well as on First Nations themselves. As noted in departmental briefing documents, funding for federal programs offered on reserves is determined by

on-reserve residency and band membership lists.³³ Increases in the number of status Indians living on reserves will affect funding allotments for primary and secondary education, housing and social programs. Further, federal on- and off-reserve programs, such as funding for post-secondary education and non-insured health benefits, are affected by increases in the status Indian population.³⁴ First Nations have previously indicated that no additional federal funding was provided to accommodate the increased number of individuals living on reserves who became registered as a result of Bill C-31 and Bill C-3.³⁵

1.2.2.2 BAND MEMBERSHIP

Increases in the number of individuals eligible for Indian status could also affect band membership. Band membership provides access to band-administered programs and services, political rights (such as the ability to vote in band elections) and the right to on-reserve residency.³⁶

Band membership is distinct from Indian status. Following the 1985 amendments to the *Indian Act*, the determination of band membership and Indian status were severed for the first time, and two regimes were established for determining membership under the Act. Under section 10, First Nations are able to create their own membership codes in accordance with the procedures outlined in the Act. Under section 11, Indigenous and Northern Affairs Canada (the Department) maintains band membership lists and relies on Indian status as the criteria for determining membership. Following these amendments, some registrants were granted automatic band membership, while others obtained only conditional membership. The former group included women who had lost status by marrying out and were reinstated under section 6(1)(c). The latter group included their children, who acquired status under section 6(2).

The manner in which band membership lists are managed under sections 10 and 11 of the *Indian Act* may result in situations where persons possess Indian status but are not accepted as members of a band. Thus, First Nations that control their own band membership under section 10 can create membership codes that are more restrictive than those used by the Department to determine band membership under section 11. A First Nation may choose to adopt a more restrictive membership code for a number of reasons, including limited availability of reserve land, housing or federal funding.³⁷

2 DESCRIPTION AND ANALYSIS

Bill S-3 consists of **15** clauses. Rather than examine each provision, the description and analysis section that follows focuses on the substantive changes resulting from the bill. In short, the bill attempts to correct the differential treatment accorded to women in previous versions of the *Indian Act*.

Section 2.1 of this Legislative Summary describes **an amendment to the *Indian Act* provisions relating to the Indian Register. Section 2.2 describes** new categories of persons entitled to be registered under section 6(1) of the *Indian Act* (clauses 1(2) and 1(3) in the bill). The remaining sections deal with clarifications, transitional provisions and the coming into force of the legislative provisions.

2.1 INDIAN REGISTER (CLAUSE 1)

The Senate Committee amended clause 1, which now adds new sections 5(6) and 5(7) to the *Indian Act*. Those sections provide that in applications for registration where an ancestor is unknown or unstated on a birth certificate, the Registrar of Indian and Northern Affairs shall consider all relevant evidence to determine whether the ancestor would have been entitled to be registered.

2.2 NEW ENTITLEMENTS TO REGISTER UNDER SECTION 6(1) OF THE *INDIAN ACT*

2.2.1 INDIVIDUALS WHOSE PARENT AS A MINOR CHILD LOST STATUS AS A RESULT OF THE MOTHER'S SUBSEQUENT MARRIAGE TO A NON-INDIAN (THE "REMOVED OR OMITTED MINORS ISSUE") (CLAUSE 2(2))

Clause 2(2) adds new section 6(1)(c.01) to the *Indian Act*. This provision relates to an individual whose grandmother had lost her status as a result of her marriage to a non-Indian, which in turn resulted in the parent of the individual either lacking entitlement to be registered or losing status. One of the conditions of that individual being entitled to be registered under new section 6(1)(c.01) is that the other parent is not or, prior to death, was not, entitled to be registered. An additional condition for an individual to be entitled to register under new section 6(1)(c.01) relates to the individual's date of birth and the marital status of the parents. The individual is entitled to be registered if born before 17 April 1985, regardless of whether the parents were married to each other; however, if the individual was born after 16 April 1985, the parents had to have been married to each other before 17 April 1985.

2.2.2 INDIVIDUALS WHOSE PARENT WAS OMITTED OR DELETED FROM THE INDIAN REGISTER (CLAUSE 2(2))

The Senate Committee added new section 6(1)(c.02) to the *Indian Act*. This provision relates to an individual who had a parent whose name was omitted or deleted from the Indian Register on or after 4 September 1951 under former provisions of the *Indian Act*. One of the conditions of that individual being entitled to be registered under new section 6(1)(c.02) is that the other parent is not or, prior to death, was not, entitled to be registered, or was not an Indian at the time of death if it occurred before 4 September 1951. An additional condition for an individual to be entitled to register under new section 6(1)(c.02) relates to the individual's date of birth and the marital status of the parents. The individual is entitled to be registered if born before 17 April 1985, regardless of whether the parents were married to each other; however, if the individual was born after 16 April 1985, the parents had to have been married to each other before 17 April 1985.

2.2.3 INDIVIDUALS WHOSE PARENT BECAME ELIGIBLE TO BE REGISTERED UNDER SECTION 6(1) AS A RESULT OF THE 2010 *INDIAN ACT* AMENDMENTS (THE “COUSINS ISSUE”) (CLAUSE 2(3))

The core of the 2010 amendments to the *Indian Act* (Bill C-3) were contained in section 6(1)(c.1), which entitled individuals whose mother had lost status as a result of her marriage to a non-Indian, and who was subsequently reinstated under Bill C-31, to be registered under that section. However, the children of these individuals would have status under section 6(2), and the grandchildren of these individuals (i.e., the great-grandchildren of the women who were reinstated) would not have status at all if they had a non-Indian parent. By comparison, as is demonstrated by the figure in Appendix A, the great-grandchildren of an Indian man would have status either under section 6(1) or section 6(2).

New section 6(1)(c.2) establishes that an individual is entitled to be registered under this section if one of the parents is entitled to be registered under section 6(1)(c.1) or would have been entitled to be registered under section 6(1)(c.1) if that parent is deceased. The other condition relating to eligibility to be registered under this section concerns the marital status of the parents: if the individual was born after 16 April 1985, the individual’s parents had to have been married to each other before 17 April 1985. If the individual was born before 17 April 1985, it does not matter whether the parents were married to each other at the time of the individual’s birth.

2.2.4 INDIVIDUALS WHO WERE BORN FEMALE BETWEEN 4 SEPTEMBER 1951 AND 16 APRIL 1985 WHOSE PARENTS WERE NOT MARRIED TO EACH OTHER AT THE TIME OF THEIR BIRTH (THE “SIBLINGS ISSUE”) (CLAUSE 2(3))

Prior to the 1985 *Indian Act* amendments, only male children born out of wedlock to a father with status and a mother without status were entitled to register as Indian. This interpretation is based on reading the 1951 *Indian Act* provision relating to “legitimate” children together with the 1951 provision that a male individual “is a direct descendant in the male line of a male person.” Section 11(c) of the 1951 *Indian Act* provided that a person was entitled to be registered if the person “is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b).” This entitlement to be registered existed regardless of whether the male person referred to was born in or out of wedlock. At the same time, section 11(d) of the 1951 *Indian Act* specified that a person was entitled to be registered if that person was the legitimate child of “a male person described in paragraph (a) or (b).” Reading these two provisions together results in a male child born out of wedlock to a father with status and a mother without status being entitled to register, while a female child in the same circumstances is not entitled to register.³⁸

New section 6(1)(c.3) entitles an individual who was born female and out of wedlock between 4 September 1951 and 16 April 1985 to be registered if the father **was at the time of the individual’s birth** entitled to be registered, or, **if he was no longer alive at that time**, was at the time of his death entitled to be registered. The other condition that must be met for an individual to be registered under this section is that the person’s mother was not entitled to be registered at the time of the individual’s birth.

2.2.5 CHILDREN OF INDIVIDUALS WHO ARE ENTITLED TO BE REGISTERED UNDER NEW SECTION 6(1)(C.2) OR 6(1)(C.3) (CLAUSE 2(3))

New section 6(1)(c.4) entitles the children of a parent entitled to be registered under either new section 6(1)(c.2) or new section 6(1)(c.3) to be registered. This category also includes those individuals whose parent, at the time of death, would have been entitled to be registered under either of these new sections, and whose other parent is not or, prior to death, was not, entitled to be registered. In addition, in order for an individual born after 16 April 1985 to be registered under new section 6(1)(c.4), the individual's parents had to have been married to each other before 17 April 1985. In the case of an individual born before 17 April 1985, it does not matter whether the parents were married to each other at the time of the individual's birth.

2.2.6 CHILDREN OF INDIVIDUALS WHO ARE ENTITLED TO BE REGISTERED UNDER NEW SECTION 6(1)(C.4) (CLAUSE 2(3))

The Senate Committee added new section 6(1)(c.5), which entitles the children of a parent entitled to be registered under new section 6(1)(c.4) to be registered in cases where one of that parent's parents is entitled to be registered under new section 6(1)(c.3). This category also includes those individuals whose parent, at the time of death, would have been entitled to be registered under either of these new sections, and whose other parent is not or, prior to death, was not, entitled to be registered. In addition, in order for an individual born after 16 April 1985 to be registered under new section 6(1)(c.5), the individual's parents had to have been married to each other before 17 April 1985. In the case of an individual born before 17 April 1985, it does not matter whether the parents were married to each other at the time of the individual's birth.

2.2.7 CHILDREN OF INDIVIDUALS WHO ARE ENTITLED TO BE REGISTERED UNDER NEW SECTION 6(1)(C.02) (CLAUSE 2(3))

The Senate Committee added new section 6(1)(c.6), which entitles the children of a parent entitled to be registered under new section 6(1)(c.02) to be registered in cases where the name of one of that parent's parents was omitted or deleted from the Indian Register on or after 4 September 1951 under former provisions of the *Indian Act*. This category also includes those individuals whose parent, at the time of death, would have been entitled to be registered under either of these new sections, and whose other parent is not or, prior to death, was not, entitled to be registered. In addition, in order for an individual born after 16 April 1985 to be registered under new section 6(1)(c.6), the parents had to have been married to each other before 17 April 1985. In the case of an individual born before 17 April 1985, it does not matter whether the parents were married to each other at the time of the individual's birth.

2.3 CLARIFICATION RELATING TO SECTION 6(2) (CLAUSE 2(5))

New section 6(2.1) clarifies that if a person is entitled to be registered both under section 6(1)(f) (i.e., both parents are entitled to be registered under 6(1) or were so entitled at the time of their deaths) and any other part of section 6(1), then that

person is considered to be entitled to be registered under the other part of section 6(1) only. Similarly, if a person is entitled to be registered under section 6(2) as well as under a part of section 6(1), the person is considered to be entitled to register under that part of section 6(1) only.

**2.4 DECEASED PERSONS DEEMED TO BE ENTITLED TO BE REGISTERED
(CLAUSE 2(6))**

New section 6(3)(d) provides that a person who meets the conditions established in new section 6(1)(c.01), 6(1)(c.02) or 6(1)(c.2) to 6(1)(c.6) is deemed to be entitled to be registered under that section if that person was deceased on the day the relevant new section came into force.

**2.5 REPEAL, RENUMBERING AND AMENDMENT OF CERTAIN PROVISIONS
(CLAUSE 2.1)**

Clause 2.1 repeals certain sections and renumbers others with respect to entitlement to be registered. It also amends some provisions. All of this will occur, as provided in clause 15(2), on a day to be fixed by an order in council after the expiry date of the suspension of the Superior Court of Quebec's declaration of invalidity relating to the registration provisions of the *Indian Act*.

Clauses 2.1(1) and 2.1(2) repeal sections 6(1)(c.01) to 6(1)(c.2) and sections 6(1)(c.4) to 6(1)(c.6).

Clause 2.1(3) renumbers section 6(1)(c) as section 6(1)(a.1), and clause 2.1(4) renumbers section 6(1)(c.3) as section 6(1)(a.2).

Clause 2.1(5) adds an additional category of individual entitled to be registered. New section 6(1)(a.3) adds individuals who are direct descendants of persons who are, or would have been, entitled to register under section 6(1)(a.1) or 6(1)(a.2). In order for an individual born after 16 April 1985 to be registered under new section 6(1)(a.3), the individual's parents had to have been married to each other before 17 April 1985. In the case of an individual born before 17 April 1985, it does not matter whether the parents were married to each other at the time of the individual's birth.

**2.6 AMENDMENT TO MEMBERSHIP RULES FOR DEPARTMENTAL BAND LISTS
(CLAUSE 3)**

Clause 3(1) amends section 11(3) of the *Indian Act* by specifying that individuals who would have been entitled to be registered under new section 6(1)(c.01), 6(1)(c.2), 6(1)(c.3) or 6(1)(c.4) had they been alive on the day the relevant new section came into force are entitled to have their names entered in the Band List maintained by the Department.

Clause 3(2) establishes that individuals who are entitled to be registered under new **sections 6(1)(c.01) to 6(1)(c.6)** are entitled to have their names entered in the Band List maintained by the Department, provided that they meet the requirements set out in the relevant section (amended section 11(3.1)).

2.7 AMENDMENT OF CERTAIN PROVISIONS (CLAUSE 3.1)

Clause 3.1 replaces a number of sections relating to individuals entitled to have their names entered on the Band List maintained by the Department. These amendments reflect the repeal of sections 6(1)(c.01) to 6(1)(c.2) and sections 6(1)(c.4) to 6(1)(c.6). These changes come into force on a day to be fixed by order in council that is after the day on which the suspension of the declaration of invalidity relating to the registration provisions of the *Indian Act* expires (clause 15(2)).

2.8 EXPENDITURE OF CAPITAL MONEYS WITH CONSENT AND EXPENDITURE OF CAPITAL MONEYS IN ACCORDANCE WITH BY-LAWS (CLAUSE 3.2)

Clause 3.2 replaces existing sections 64.1(1) and 64.1(2) of the *Indian Act* to reflect the renumbering of sections 6(1)(c) to 6(1)(a.1).

2.9 TRANSITIONAL PROVISIONS (CLAUSES 4 TO 8)

Bill S-3 contains a number of transitional provisions that will apply if the suspension of the declaration issued in *Descheneaux* expires before the provisions of the bill come into force. These provisions establish that a person who was registered and was entitled to be registered under section 6(1)(a), 6(1)(c), 6(1)(f) or 6(2) continues to be registered (clause 6). Band membership under section 11 of the *Indian Act* would also continue (clause 8).

2.10 RELATED PROVISIONS (CLAUSES 9, 10 AND 10.1)

The Senate Committee added a provision to Bill S-3 (clause 9) according to which the amendments contained in Bill S-3:

are to be liberally construed and interpreted so as to remedy any disadvantage to a woman, or her descendants, born before April 17, 1985, with respect to registration under the *Indian Act* as it read on April 17, 1985, and to enhance the equal treatment of women and men and their descendants under the *Indian Act*.

Clause 10 provides that no claim may be made against the Crown, an employee or agent of the Crown, or a council of a band “for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties” in relation to a person not being registered, or not having the person’s name entered in a Band List immediately before the provisions of **this section** come into force, or in relation to a person’s parent being entitled to be registered under new section 6(1)(c.01) **or 6(1)(c.02), or 6(1)(c.2) to 6(1)(c.6) of the *Indian Act*.**

Clause 10.1 is identical to clause 10 except that it reflects clause 2.1's repeal and renumbering of some of the entitlement-to-registration provisions. Clause 10.1 comes into force on a day to be fixed by order in council that is after the day on which the suspension of the declaration issued in *Descheneaux* expires (clause 15(2)).

2.11 CONSULTATIONS AND REPORTS (CLAUSES 11 TO 14)

The Senate Committee added a provision requiring the Minister to initiate consultations with First Nations and other interested parties on a number of topics related to registration and band membership. These consultations must be initiated within six months after the bill receives Royal Assent and include consultations on the following topics:

- adoption;
- the 1951 cut-off date for entitlement to registration;
- the second-generation cut-off rule;
- unknown or unstated paternity;
- enfranchisement;³⁹
- the federal role in determining Indian status and band membership; and
- First Nations' authorities to determine band membership.

Within five months of the bill's receiving Royal Assent, the Minister must report to Parliament on the design of the consultation process (clause 11(3)). The Minister must also report to Parliament on the progress of those consultations within 12 months of their commencement (clause 11(4)). Both reports must be referred to any parliamentary committee that reviews matters connected with Indigenous affairs (clause 11(5)).

In addition, within three years of the bill's receiving Royal Assent the Minister must undertake a review of the provisions of section 6 of the *Indian Act* enacted by Bill S-3 to determine whether all sex-based inequalities have been eliminated, as well as a review of the operation of the provisions of the bill (clause 12(1)). These reviews must be undertaken and must be reported to Parliament and referred to any parliamentary committee that reviews matters related to Indigenous affairs (clause 12(2)). Reports laid before Parliament must be published on the Department's website (clause 13).

2.12 COMING INTO FORCE (CLAUSE 15)

Clause 15(1) provides that, with the exception of sections 2.1, 3.1, 3.2 and 10.1, which relate to further changes to the entitlement-to-registration provisions, the provisions contained in the bill come into force or are deemed to come into force "on a day to be fixed by order of the Governor in Council, but that day must be the day on which the suspension of the declaration [issued in *Descheneaux*] expires."

Clause 15(2) provides that sections 2.1, 3.1, 3.2 and 10.1 come into force on a day to be fixed by order of the Governor in Council that is after the day on which the suspension of the declaration expires.

NOTES

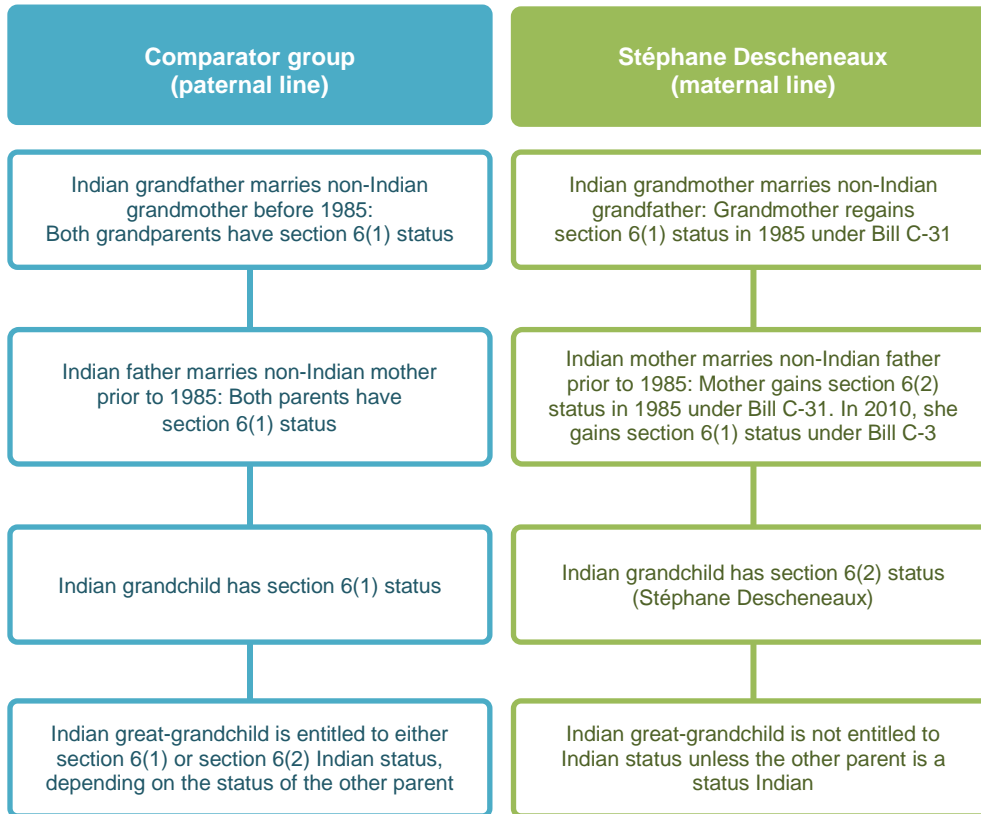
1. [Bill S-3, An Act to amend the Indian Act \(elimination of sex-based inequities in registration\)](#), 1st Session, 42nd Parliament (first reading version, 25 October 2016).
2. [Indian Act](#), R.S.C. 1985, c. I-5.
3. [Descheneaux c. Canada \(Procureur général\)](#), 2015 QCCS 3555. [Translation]
4. [Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
5. Senate, Standing Committee on Aboriginal Peoples, "[Government should salvage flawed Indian Act bill, Senate committee says](#)," News release, 13 December 2016.
6. [Descheneaux c. Le Procureur général du Canada](#), 2017 QCCS 153. [Translation]
7. [Bill S-3, An Act to amend the Indian Act \(elimination of sex-based inequities in registration\)](#), 1st Session, 42nd Parliament ("As passed by the Senate" version, 1 June 2017).
8. Senate, [Journals of the Senate](#), 1st Session, 42nd Parliament, Issue 136 (Unrevised), 21 June 2017.
9. Senate, [Debates of the Senate](#), 1st Session, 42nd Parliament, Vol. 150, Issue 156, 7 November 2017, 1435 (Hon. Peter Harder, Government Representative in the Senate). In Indigenous and Northern Affairs Canada, "On the 1951 cut-off," [The Government of Canada's Response to the Descheneaux Decision](#), the 1951 cut-off date is described as follows: "The current registration provisions of the Indian Act reference September 4, 1951 as a cut-off date to determine eligibility for registration under that section 6(1)(c.1)(iv)."
10. [Bill S-3, An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada \(Procureur général\)](#), 1st Session, 42nd Parliament (Royal Assent version, 12 December 2017).
11. The term "Indian status" refers to the legal entitlement to be registered as an Indian under the *Indian Act*. While the term "Indian" is generally viewed as outdated, it continues to be used to refer to the legal definition of First Nation individuals as recognized under the *Indian Act*. See Government of Canada, [What is Indian status?](#); and Tonina Simeone, [Indigenous Peoples: Terminology and Identity](#), HillNotes, Library of Parliament, 14 December 2015.
12. Indigenous and Northern Affairs Canada [INAC], "[Annex I: Frequently Asked Questions](#)," *The Government of Canada's Response to the Descheneaux Decision*. ["Annex I"]
13. *Indian Act*, S.C. 1951, c. 29, 15 Geo. VI, s. 12(1)(a)(iv).
14. Parts of this description of Bill C-31 have been excerpted from Mary C. Hurley and Tonina Simeone, [Legislative Summary of Bill C-3: Gender Equity in Indian Registration Act](#), Publication no. 40-3-C3E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 15 November 2010.

15. [Bill C-3, An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in *Mclvor v. Canada \(Registrar of Indian and Northern Affairs\)*](#), 3rd Session, 40th Parliament (S.C. 2010, c. 18).
16. Sharon Mclvor married, and had a child with, a non-Indian man prior to 1985. Following Bill C-31, Ms. Mclvor was reinstated under section 6(1)(c), and her son, James Grismer, was registered under section 6(2) – meaning that Mr. Grismer was unable to transmit his status to his children. Conversely, under a comparable male line, a child of an Indian father who married a non-Indian and was previously subject to the double mother rule had the section 6(1) status reinstated under Bill C-31 for life and could transmit this status to that child’s children. Ms. Mclvor challenged the constitutional validity of sections 6(1) and 6(2), alleging that these sections were discriminatory on the basis of sex and marriage, as they continued to favour the male line in the transmission of status to descendants born prior to 1985. The British Columbia Supreme Court agreed and found that section 6 of the *Indian Act* violated the *Canadian Charter of Rights and Freedoms* and was in no force or effect insofar as it was discriminatory. On appeal, the British Columbia Court of Appeal significantly narrowed the scope of the judgment, finding that different treatment created by the 1985 Act was justified under section 1 of the Charter, except for “the advantageous treatment that the 1985 legislation accorded those to whom the double mother rule under previous legislation applied.” [Mclvor v. Canada \(Registrar of Indian and Northern Affairs\)](#), BCCA 2009 153.
17. *Ibid.*, para. 161.
18. Hurley and Simeone (2010).
19. Canadian Bar Association, [Bill C-3 – Gender Equity in Indian Registration Act](#), April 2010, p. 8.
20. House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, [Evidence](#), 3rd Session, 40th Parliament, 13 April 2010 (Sharon Mclvor, as an individual).
21. INAC, [The Exploratory Process on Indian Registration, Band Membership and Citizenship: Highlights of Findings and Recommendations](#). [Exploratory Process]
22. *Ibid.*
23. *Descheneaux c. Canada* (2015), para. 244.
24. *Ibid.*, para. 235.
25. *Descheneaux c. Le Procureur général du Canada* (2017).
26. *Descheneaux c. Canada* (2015), paras. 140 and 165.
27. INAC, [The Government of Canada’s Response to the Descheneaux Decision](#).
28. *Ibid.*
29. **Government of Canada, [Report to Parliament on the Design of a Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship](#).**
30. INAC, “Annex I.”
31. *Ibid.*
32. House of Commons, [Debates](#), 1st Session, 42nd Parliament, 31 May 2016, Question No. 105.
33. INAC, “Annex I.”
34. *Ibid.*
35. INAC, *Exploratory Process*.

36. INAC, “Annex I”; and AFN-INAC Joint Technical Working Group, [*First Nations Registration \(Status\) and Membership Research Report*](#), July 2008.
37. Megan Furi and Jill Wherrett, [*Indian Status and Band Membership Issues*](#), Publication no. BP-410E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, February 2003.
38. *Descheneaux c. Canada* (2015), “Schedule: Most relevant excerpts from legislation – 2. *Indian Act*, S.C. 1951, c. 29 (excerpts).”
39. **“Enfranchisement” refers to the loss or termination of Indian status.**

APPENDIX A – THE “COUSINS ISSUE”

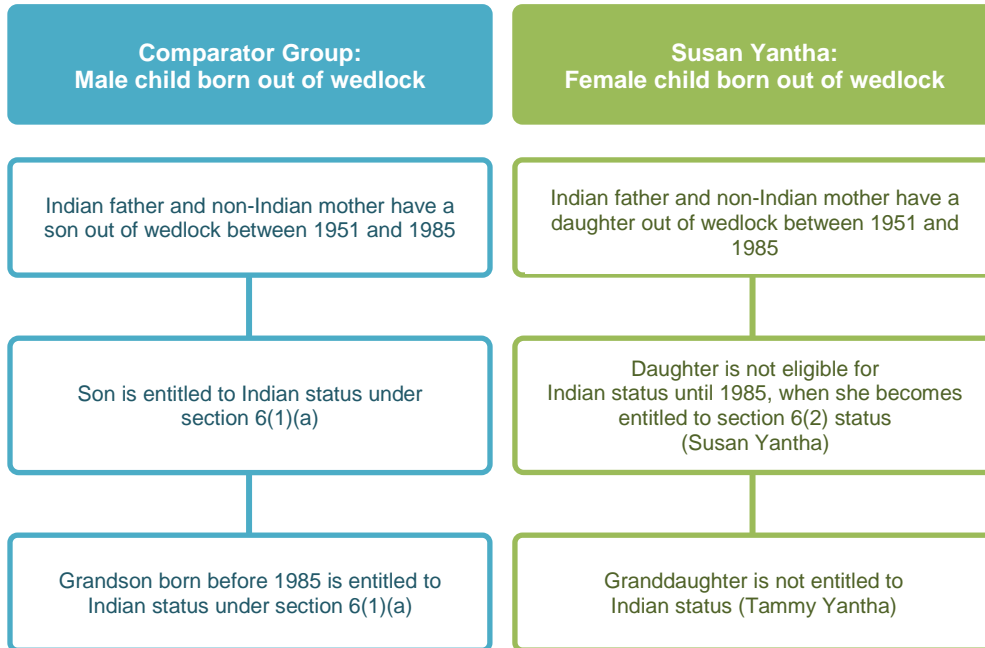
Figure A.1 – The “Cousins Issue”: Differential Treatment of Grandchildren Born between 1951 and 1985 (Maternal and Paternal Lines) as Outlined in *Descheneaux c. Canada (Procureur général)*



Source: Figure prepared by the authors using data obtained from Indigenous and Northern Affairs Canada, [The Government of Canada's Response to the Descheneaux Decision](#); and [Descheneaux c. Canada \(Procureur général\)](#), 2015 QCCS 3555. [Translation]

APPENDIX B – THE “SIBLINGS ISSUE”

Figure B.1 – The “Siblings Issue”: Differential Treatment of Male and Female Children Born out of Wedlock as Outlined in *Descheneaux c. Canada (Procureur général)*



Source: Figure prepared by the authors using data obtained from Indigenous and Northern Affairs Canada, [The Government of Canada's Response to the Descheneaux Decision](#).