BROKEN PROMISES

A Report to Parliament on Bill C-31 & The New Indian Act

submitted to

House of Commons Standing Committee on Aboriginal Affairs and Northern Development

Senate Standing Committee on Legal and Constitutional Affairs

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NATIVE COUNCIL OF CANADA

Ottawa
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Prologue

Pursuant to section 22 of "*An Act to Amend the Indian Act*", 1985, c.27, Parliament is to review a report on the implementation of the Bill itself that was submitted by the Minister of Indian Affairs, as well as to undertake such other investigations of the Indian Act as are deemed warrented. Since the Minister's report was tabled in June of this year, neither the House nor the Senate has proceeded to conduct the legislatively required examinations. Concern about Parliament's role in responding to the two-year review requirement led the Native Council of Canada in April and May of this year to seek all-party agreement to a Special Joint Committee to conduct a full scale review and to permit, as has been the practice in this decade, the participation of ex officio members representing the NCC.

Unfortunately, the government chose to ignore, even deny the existence of, the NCC's Special Committee recommendation. Instead, the government merely utilized the Standing Orders that automatically refer all reports to Parliament to the appropriate Standing Committees of the House and the Senate.

The Standing Committee on Aboriginal Affairs is now, in December of 1987, beginning to review the Minister's report and related Indian Act issues. The Senate Committee on Legal and Constitutional Affairs has indicated that considertion of C-31 and the Minister's report will likely not occur until at least February. The NCC has agreed to appear before both Standing Committees. Nevertheless, it is our belief that a special, possibly joint committee is still required to meet the spirit and letter of the various commitments made to Indian peoples in 1985 by the government, by the legislation, and by both Parliamentary Committees. Only through a special committee, adapted as in the past to allow *ex officio* participation by Indian representatives, can the Indian Act regime inaugurated by Bill C-31 be effectively reviewed for further amendment and improvement.

Since the Fall of 1986 the Native Council of Canada and its thirteen affiliates accross Canada have endeavored to keep faith, under increasingly difficult circumstances, with the initial commitments of the Federal government that the implementation and review of the Indian Act and its 1985 amendments would

be conducted in a spirit of co-operation and openness. It is regretable that the government and the current Minister of Indian Affairs have chosen to abandon these first promises and chosen instead to disregard the fundamental legal and moral obligations they have for Indian peoples.

This Report is not as complete or focussed as the Council would wish. Since September of last year the monitoring, liaison and informational capacity of the NCC has been steadily eroded, first with the sudden termination of all "co-implementation" funding and then with the gradual tranformation of relations between Indian people and the Ministry of Indian Affairs from cautious optimism to open confrontation.

As relations have deteriorated so too has our capacity to access Departmental documentation and to liaise with Departmental officials to attempt to discuss and assist in the fair interpretation of the Act and to prevent unnecessary delays in its implementation. Many individuals within the Department have proved helpful and sympathetic to the concerns and issues raised, and we thank them. Unfortunately, a politicization of senior management occured from mid-1986 on as the Minister's and the government's policies increasingly led them away from co-implementation and towards the implementation of a hidden agenda. With this attitude, the need for effective Departmental and government-wide implementation measures was foregone, a failure that we view as far-reaching in its negative effects on federal policies and in the damage brought to government-aboriginal relations.

Indian people are distressed to think that this same trend of partisan and confrontational attitudes could be reflected within the Standing Committee on Aboriginal Affairs and Northern Development. Despite a broadened autonomy and mandate as provided by the MaGrath reforms, political direction from the Government and the Minister's office has increasingly intruded into the Committee's deliberations and long-range planning. A meek and ill-informed approach to the substantive issues and to Departmental and governmental accountability does credit neither to the Commons Committee nor to its role in safeguarding the special relationship between Parliament and aboriginal peoples. It mearly threatens to abandon the sense of trust and faith that the institution has painstakingly developed over the early years of this decade through such innovations as the Special Parliamentary Task Forces on the Indian Act and on Indian Self-Government.

Aboriginal peoples are not on their own blessed with the kind of ready capacity to alter governmental policies and practices that is apparently needed under a majoritarian system from which they have been historically excluded and in which we are now a small minority. Given the obvious conflicts that would be invited by providing power over aboriginal peoples and their interests at the local and provincial concerns, the framers of Confederation followed in the path laid down by British policy in upholding the special trust relationship between the central government and aboriginal peoples. In this tradition, Parliament and Parliamentary Committees have been charged with a unique task — to pursue an enlarged interest on behalf of Canada's first inhabitants, even when this may seem, in the short run, to require that political risks be taken.

On behalf of the constituents of the Native Council of Canada, we submit this Report in faith that Parliament will respond with the enlarged interest intact. We apoligize for any inadequacies of the Report and we trust that Parliamentarians will understand the pressures imposed on us by lack of resources. We nevertheless hope that our suggestions for legislative, policy and programmatic change, as well as for Parliament's future conduct in addressing the Indian Act, will provide Parliamentarians with something of the review that was absent from the Report tabled on June 25th of this year by the Minister of Indian Affairs in response to the legal requirements of the legislation in question.

The Executive
Native Council of Canada

TABLE OF CONTENTS

Part	Contents	Page
I.	**C-31: Background to Amendments**	
	A. Build up to C-31	p. 3
	B. The Process of Amendment	p. 6
II.	**Analysis of Implementation: 1985-1987**	
	A. Registration	p. 10
	B. Band Membership & Code Development	p. 14
III.	***Indian Act* Issues for Review**	
	A. Legislative issues 1. Interpretation and Regulatory Activities 2. Registration Entitlement 3. Membership Entitlement 4. Band Membership Systems	p. 19
	B. Program and Policy Issues 1 Statutory Programs 2. Discretionary Programs	p. 30
	C. Band Recognition for Indian Communities	p. 31
	D. Special Issues: Aboriginal and Treaty Rights 1. Treaty Annuity administration 2. Treaty Harvesting/Land Entitlements 3. Land Claims and the Indian Act:	p. 37
IV.	**Recommendations**	
	A. Parliament and the Process of Review	p. 39
	B. The Legislative and Regulatory Sector 1. General 2. Parental death and entitlement	p. 40

Table of Contents (continued)

Part		Contents	Page
IV.		3. Registration entitlement and Discrimination	
		4. Band membership	
		5. Protests and Appeals	
		6. Legal Liability	
		7. Band recognition	
		8. Reserve Creation and Additions	
	C.	Constitutional Issues:	p. 44
		1. Treaty entitlement	
		2. Land claims policy	
		4. Community recognition and self-government	
	D.	The Program and Policy Sector	p. 45
		1. Health Care	
		2. Education	
		3. Housing	
		4. Child Welfare	
		5. Subsistence Fishing	
		6. Implementation of the Act	

Annex 1: NCC Special Bulletins on potential loss of entitlement to status and/or membership in the case of parental death.

Part I
Bill C-31: Background to Amendments

The amendments to the Indian Act introduced by Bill C-31 in 1985 have a long history. The first contemporary attempt to eliminate discrimination in the Indian Act (the Act) was in 1968-69, when the Liberal government of the day drafted and tabled its "White Paper" on Indian policy. The 1969 White Paper had a clear assessment in mind: that the Indian Act regime was a colonialist and racist one and that no amount of tinkering with it would alter its basic thrust and effect. The answer then was simple — end the whole regime. Repeal the Act.

Indian people generally agreed then and agree now with the assessment. The system was, and remains, largely a colonialist one premised on the assumption that Indian communities would die off on their own accord as the pressures and inducements of integration and assimilation led Indian people away from their homelands and home communities. However, the conclusion that was drawn in 1969 — that the Act must be replaced by a more effective tool for assimilation — was firmly and utterly rejected by Indian peoples. In essence, the "small - l" liberal philosophy that motivated the White Paper assumed that the aims of the Indian Act were acceptable, only the means were abhorant.

1969 through to the early 1980s was a period of tremendous policy change in aboriginal affairs in Canada. Native peoples organized lasting political bodies at the regional and national level. Led mostly by land-mark court cases such as "Calder", "James Bay" and "Baker Lake", land claims negotiations based on aboriginal title and on treaties were begun. Major shifts in the direction and control over basic education, housing services, child welfare and other key aspects of Native existence were inaugurated, at least for status Indians living on reserves. Economic development schemes — with greater or lesser effectiveness — were developed. Finally, Aboriginal peoples succeeded in forcing their way onto the national Constitutional agenda in 1979-80, a success that led, in 1981, to a major breakthrough in the protection and advancement of aboriginal rights and hopes for aboriginal community growth and development: the entrenchment of rights in the Constitution and the provision for on-going Constitutional reform at the highest level of First Ministerial Conferences.

So what about the Indian Act? Although as many males as females had suffered discrimination under the Act, pressure for change in the public, as well as within the Indian community, didn't really start until 1973 when the Supreme Court of Canada upheld s. 12(1)(b) of the Act against the Canadian Bill of Rights in the case of Jeannette Lavell, despite another provision of the Act having been overturned three years earlier by virtue of the Bill of Rights guarantees of equal treatment. Jeannette Lavell's case symbolized the contradictions in Canadian law, especially as concerned sexual equality rights. Native women's organizations, the NCC and non-Indian women's organizations (realizing that wider sexual equality was under attack) began to rally for change. Why did this not lead to efforts to eliminate such discriminatory provisions as s. 12(1)(b) and 12(1)(a)(iv) in the 1970s?

Part of the answer is that from the early 1970s as well, DIAND began spending about $1 million a year in grants to status Indian groups to research and develop policy options for amending the Indian Act. The people most directly involved — non-status Indians — were not given such assistence and were therefore excluded from participating in the policy review directed at determining their future. The momentum this funding gave other issues tended to deflect organizational interest away from the discrimination issue. Another part of the answer lies in the strategy pursued by Indians generally — but especially in the National Indian Brotherhood — to hold the governmental desire to make cosmetic but politically important changes to the Act hostage to Indian desires to have more far-reaching legislative and policy change in the areas of rights protection, land claims, treaty implementation and increased control over DIAND operations.

Internal contradictions and dilemmas in government also delayed attempts to end discrimination in the Act. DIAND's policy context — already one of the most complex and internally inconsistent in government — would only be made more difficult if tens of thousands of new clients were added. The pressures to address Indian needs and rights beyond the narrow confines of reserve management would have to be addressed. In addition, DIAND increasingly looked to its main client group — the bands and their chiefs and councils — for legitimacy in advancing new programs and policies. Many bands saw dangers in expanding the scope of the status system and there was significant opposition to "repatriation" of non-status Indians to band membership. Not the least of the concerns was monetary, whether in terms of a feared dilution of existing funding bases or in terms of having to spread Band "revenue" per capita

distributions amongst a broader membership. In addition, any widespread reinstatement threatened change in the political order on many reserves.

Beyond DIAND and the bands, there were additional contradictions in federal policy that did not encourage amendments to the Act. Two symbols of this contradiction and the inertia it fostered can be recalled. First, the 1970s saw the federal Human Rights Act come into being to ensure equality of access and treatement throughout government programs and services. The government had the choice of either amending the Indian Act or excluding it entirely from the Human Rights Commission' mandate. By choosing the latter route — making the Indian Act the only federal legislation to be excluded from the Commission's mandate — the government signalled that it was not really pressured to change the Act's discriminatory system. Ironically, even with C-31, this exclusion continues today.

A second example symbolizing inertia relates to the government's policy of dealing with the NCC and its constituents. In the mid 1970s the NCC dealt primarily with the Minsiters of Justice and Social Development, largely because DIAND then, as now, excluded Métis and non-status Indians from their "active" clientele. During this period the Federal government devised a "can't do" defense for inaction on behalf of the NCC's membership. The line taken was disarmingly simple, politically attractive and totally without foundation. The government decided to hide behind a quasi-legal argument that "Métis and non-status Indians" were not within the ambit of s. 91(24) of the B.N.A. Act. So it wasn't a case — said federal Ministers — of not caring, it was a matter of provincial jurisdiction. The dilemma purchased with this tactic was that pressure from "status of women" advocates for change to the Indian Act would, if given in to, lead to non-status Indians being made status Indians, a clear denial of the bogus s. 91(24) argument.

A. Build-up to Amendment

It was not until the *Canadian Charter of Rights and Freedoms* loomed on the horizon that changes to the Act became a serious priority in government. The Charter's sexual equality provision, section 15, was due to come into force on April 17, 1985 and it seemed clear that various sections of the Act could be, and likely would be, struck down under the Charter.

The House of Commons moved in 1982 to establish a review of the Indian Act vis à vis the Charter, as well as to examine the issue of Indian self-government. A special sub-committee of the Commons' Indian Affairs and Northern Development Committee was struck in mid-1982 to address the issue of discrimination and recommend how to amend the Act. The sub-committee, as well as the special Task Force on Indian Self-government that followed, adopted a unique and important approach to its task by inviting *ex officio* and liaison membership from the Native Council of Canada, the Assembly of First Nations, and the Native Women's Association of Canada. In addition, funding to participate in the sub-Committee and Task Force reviews was promised to the associations, although in the NCC's case the Secretary of State, not DIAND, provided funding and only very late in the process, for reasons apparently associated with a Treasury Board technicality that is still, in 1987, a problem for the NCC.

In its first and second reports, the sub-committee/Task Force addressed the two main areas of concern that Bill C-31 also focussed on: discrimination in the Act and band control over membership. Its recommendations are summarized below:

- Elimination of sexual discrimination and entitlement to status and band membership of first generation children of mixed-marriages, with further Parliamentary study being recommended for the status and membership entitlements of second and higher generation mixed-marriage children. No loss or gain of status by marriage.

- Automatic reinstatement (with a 12 month waiting period) to band membership of all those persons who lost status, including first generation children of 12(1)(b) women.

- Consideration of band control over membership not be contemplated under the Act but under a constitutional provision for self-government, using procedures that ensure that all people belonging to the communities have the opportunity to fully participate in decisions on membership systems and other self-government matters..

- Amendments to allow band control over non-Indian spouses resident on reserves;

- Full funding of all program and service cost increases, as well as transitional funding and other resources including lands and economic development. Federal repayment to bands of per-capita payments made to Indian Women upon their being reinstated to membership;

- Parliament to undertake further studies and develop recommendations on:
  - elimination of enfranchisment as a whole
  - creation of an Aboriginal rights Commission
  - recognition of traditional marriage and adoption under the Act
  - elimination of discrimination against men and children
  - development of a formula for lands/resources supplements to bands tied to reinstatement
  - development of band control over membership in accordance with international covenants, including appeal mechanisms.

In 1984 the federal government moved in response to the two reports from Parliament and tabled two Bills, Bill C-47 and Bill C-52. C-47 proposed the elimination of all sexual discrimination and the reinstatement to status (including band membership) of all women and their first generation children discriminated under the Act. In a companion move, Bill C-52 was developed to allow bands and groups of bands, including non-status communities, to form together to develop self-government legislation which would include broad guarantees for participation and would lead to membership control. In other words, the federal government adopted at least the essence of the all-party Parliamentary committee's recommendations to keep membership control and reinstatement distinct, thereby avoiding conflicts between the two dimensions.

C-47 was approved in the House of Commons in 1984 but died in the Senate with the end of the session and the end of the thirty-second Parliament. C-52 was tabled late in the session in 1984 as an effort at opening discussion of self-government.

Because the deadline for action was pending with the Charter due to come into effect in April, 1985, the new federal administration moved fairly quickly to draft up Bill C-31. However, the momentum for change on the discrimination issue became closely tied to pressure for greater Indian self-government, and the two dimensions became overlapped and confused.

Against the advice of the Parliamentary committee, the new Minister, David Crombie, tried to "balance conflict" through amendments to the Indian Act, instead of seeking a separate route to self-government control over membership.

As originally tabled in Parliament, Bill C-31 tried to accomplish three distinct ends:

- termination of discrimination in the Act;
- reinstatement and restoration of status; and
- provision of band membership control within the Act.

Attempting to link band membership control with addressing the discrimination issue meant that the relatively simple and straight-forward legislative task represented by the latter objective was made vastly more difficult and prone to controversy. The Minister characterized his draft legislation as a "compromise" between conflicting aims, and he was partly correct. However, the conflict was not between bands and those being reinstated, it was between amending the Act to make in "more fair" within its colonialist constraints and attempting to use the Act as the basis for self-government.

What Bill C-31 promised was to sponsor and worsen conflict between two classes of Indian people that the Act had itself created. It was precisely in order to avoid this false conflict that both Parliamentary Committee reports had recommended that self-government and ending discrimination be completely separated.

B. The Process of Amendment

Bill C-31 was considered by Parliament in hearings from late January to late June of 1985. The NCC participated in almost every day's hearings in the Commons, and attempted to facilitate the onerous task of "clause-by-clause" analysis by the House and Senate Committees. Within the constraints of the legislation's mixed objectives, the NCC was generally successful, as witnessed in some of the changes introduced to the legislation during Parliamentary review:

- revision to s. 4.1 to insure that band members, as opposed to

status members, would not be descriminated against in terms of key benefits, programs and services.

- revision to s. 6 (1)(a) to insure that C-31 was not used as an excuse to drop names from existing Band Lists;

- revision to s. 6 to allow persons covered under the former s. 12(1)(a)(i) & (ii) to be eligible for reinstatement, if not for reasons for former loss of status, then at least on other grounds mentioned in s. 6.

- revision to s. 6(3) and 11(3) to try and insure that parental survival was not made a condition for reinstatement;

- revision to s. 7 to try and insure that Indian women and their children who became entitled under the old s. 11(1)(f) were not stripped of the opportunity of reinstatement;

- revision to s. 14.2(6) to insure that oral and affidavit evidence could be introduced for the purposes of protest investigations.

- opposing an attempt to amend the Bill to allow Bands to permanently hold up reinstatements and to cut off reinstatements after a few years.

The NCC was less successful in seeking changes to several key areas that are now plaguing the implementation of the legislation:

- to ensure equality and fairness in the treatment of illegitimate children and Indians enfranchised for reasons other than sexual discrimination;

- to clarify and give teeth to the "acquired rights" to reinstatement to membership;

- to ensure that all members of a band, including returning members, have the opportunity to participate effectively in desions on band membership;

- to insure that band control over residence was not used to exclude persons from membership and rights to reside on reserve;

- to require clear, yet Indian controlled, appeal procedures from band membership decisions;

- to clarify the response-obligation of the Minister to requests under s. 17 or under s. 2 and 73 for band recognition.

- to place a clear financial obligation on the Crown to pick up new costs associated with reinstatement to avoid penalization of reinstatees.

The Minister of the day appeared to recognize that these latter issues did raise serious questions of justice. For that reason, and in keeping with the principle of "co-implementation", Hon. David Crombie undertook, through the Committee, to ensure on-going funding to the NCC and other organizations to allow us to assist our membership to understand and access the revised Indian Act, to allow for on-going monitoring and to facilitate consultations on implementation problems as they arose. Within a year, this commitment had been totally abrogated.

Part II.

Analysis of Implementation: 1985-1987

It is now commonplace for Indians to view the period between June 28, 1985 and June 28, 1987 as one of tremendous anxiety, frustration and confusion. The date — June 28, 1987 — has gathered around it an almost mythical quality of high anticipation coupled with sudden disappointment and occasional tragedy. Technically, two things happened on that date: a review of the implementation of the legislation was to begin and all persons entitled to status as of that date would also become entitled to band membership, subject to the exception that if their band had already taken control over membership, they were subject to the code's rules and could be dis-entitled for any reason, including former loss of status.

The problem with this technical reality is that it sponsored a major conflict between newly entitled Indians and their relations on reserves. Bands — controlled by those who hadn't been discriminated against under the old system — were given almost total freedom to discriminate against all potential reinstatees, including 12(1)(b) women, as long as they acted quickly. Given the absense of clear federal policy on resourcing reinstatees so as not to penalize "open" bands, it is not surprising that many bands chose to discriminate, sometimes in highly innovative ways. On the other hand, Indians seeking reinstatement were almost totally dependent on the degree of efficiency in DIAND and on good luck if they were to get registered in time to have even the hope of influence within their communities over the nature of the membership systems being looked at.

During the initial 2-year period, only those persons who became entitled under section 11(1) — mostly women involuntarily enfranchised upon marriage and children born after 1985 to two Band members — were to be reinstated to band membership. Needless to say, a great many bands and councils have persisted in the assumption that the two year time period was a "deadline" of sorts and as recently as early June many bands were under the impression that if they did not act by June 28th, they forfieted the right to develop their own band membership system. This may explain the very high numbers of band code submissions in June of this year. It may also explain the extremely

variable quality of the codes involved.

Another motivation for bands to act within the two year period was that they could legally discriminate in their codes against persons entitled under section 11(2) — all those persons who were reinstated because of loss due to non-sexual discrimination and those who were first-time registrants. The core of the debate over C-31 has revolved around this issue.

Because of the two year "grace period", which favoured band code development in the absense of significant reinstatement pressure, non-status Indians naturally felt that they too faced a deadline. This was reflected in two ways. For section 11(1) persons, especially women effected by s. 12(1)(b) of the old act, a kind of "race for democracy" was in place. Although technically entitled to membership and status as of April 17th, 1985, they had to prove registration if their new entitlement was to mean anything tangible or be respected by anyone. If they managed to get reinstated before their Band sought a consent for a memberhsip code, they could, possibly, participate in the community decision, especially important as the rules being developed affected their own and their children's entitlement to membership. Most such women did not, at the time, realize that a narrow interpretation of "elector" (discussed in Part III below) would also effectively be used to deny them such participation even if they suceeded in winning the race to be registered.

Those Indians entitled under s. 11(2) faced a different challenge. Many of them — especially never-registered Indians — knew that documenting entitlement was going to be much more difficult than in the case of 12(1)(b) women. The problem was that if they weren't registered, they had no access to federal program benefits.

A. Registration

As shown at Charts I and II below, the backlog of registration is still unacceptably long. A year ago the NCC forcast that at then-current rates, people could wait up to 6 or 7 years for reinstatement, and the data to September of this year does not indicate any shortening of this estimate. It is true that the average time between receipt of application and processing completion is considerably less - about 2 1/2 years. This is still far too long, of course, and by far the greatest number of registrations over the past two years have been for relatively easily documented cases of formerly enfranchised

adults and their children. The relatively high turn-over amongst DIAND reinstatement officials also testifies to a still evident problem. Without an increase of resources in DIAND and for Native associations, the backlog could get longer.

There appears to be two signal reasons for the backlog: low investment of personnel and resourcing by DIAND, and a poorly developed and poorly communicated policy on evidence for entitlement. In terms of personnel and resourcing, the problem is simply that DIAND has not invested enough person-years early enough and with enough training to accomplish the task set out.

Reinstatement officials have constantly referred to the difficulties of dealing with poorly prepared and documented applications at a distance with clients who are frequently confused and isolated in their efforts at satisfying documentation demands. As many as a third of all applications received are without necessary documents. In our view, the solution to this problem is simple — institute a more realistic documentation policy and reinstate and upgrade the applicant assistance funding provided to the NCC and its affiliates that was cut off prematurely in the fall of 1986.

Indian people are particularly disadvantaged in having to "document their existence". Aside from the problems incurred by lower education levels and poorer support systems, Indian people have relatively compressed documentary (as opposed to oral) histories. Moreover, they face an incredibly complex legislative requirement to "classify" reinstatees into upwards of several dozen or so different entitlement categories. The list of possible documentation sources to be reviewed is truly astonishing. In addition, DIAND has a relatively poor data base before 1951 and is drawing upon the relatively "soft" data from often poorly maintained Band and treaty annuity lists — neither of which establish clear links to, or prove exclusion from, former affiliation with Bands. While the exercise may produce top-notch archival researchers and historians in DIAND, it is not at all clear that such meaures are either necessary or legitimate.

A second feature of the registration data illustrates rather uneven coverage of the regions. In the NCC's experience this has two causes — lack of grass-roots assistance programs capable of assisting in completing registration documentation and unevenness of documentation availability. The Yukon is a

case in point. Because of difficulties in obtaining birth registration data for many applicants, the Council of Yukon Indians sought agreement from DIAND to allow for the systematic use of affidavits coupled with the safe-guards of its own well established system for proving beneficiary entitlement under the Yukon land claim. Because there appears to be a poorly developed policy on the acceptability of affidavits, this request was turned down. Because, in addition, many applicants have as a result turned to using death certificates to prove affiliation, the recent "parental death rule" moritorium on registrations (discussed in Part III below) has hit the Yukon particularly hard.

Our data does not show the levels of automatic reinstatement to band membership. The reason is that there is a current controversy about how many people are in fact so entitled. Bill C-31, in sections 10(6) through 10(11), sets out a rather confusing set of rules about when membership systems take effect, who is resonsible for maintaining the lists, and to whom one appeals in the case of a perceived injustice. While this issue remains in limbo (discussed in more detail in Part III below), data on band membership entitlement must be deemed suspect.

Beyond increasing DIAND's work-force and resuming "co-implemetation funding", many groups have recommended a decentralization of the Registrar's office to the regions, to allow for quicker and more sensitive analysis of applications. Also recommended has been the possible co-optation of the local and regional staff of Native associations as deputy Registrars or, at the least, as "vetting officers" to insure that documentation is at least minimally adequate.

A final problem reflected in the registration data is not procedural at all, but interpretive. The Indian Act is so complex — incorporating as it does legislation going back to 1868 — that even the most experienced legal minds balk at trying to fathom either its logic or its interpretation in law. C-31 introduced a wholly new and newly complex system of status and membership entitlements and did so without due attention being paid to ensuring clear interpretation. The Indian Act is a piece of "total legislation". It governs peoples lives from cradle to grave and in all dimensions of existence. A simple change to one section has a ripple effect thoughout the law. This was not adequately grasped as the legislation was drafted, and only now are some of the impacts being felt.

To a significant degree, the capacity of DIAND to efficiently register

applicants depends on a clear, open and progressive process of implementation and amendment to supplement the changes made in 1985. This has not, unfortunately, been a strong feature of implementation to date. It was, however, one of the reasons that the NCC sought to "co-implement" the legislation and conduct on-going interpretation sessions with DIAND and with our affiliates to ensure that problems could be solved as they arose. With the cut-off of funding in 1986, this approach has been abandoned. The NCC is, nevertheless, prepared to resume active co-operation with the government, and with Parliament, to address this deeper on-going problem with the legislation.

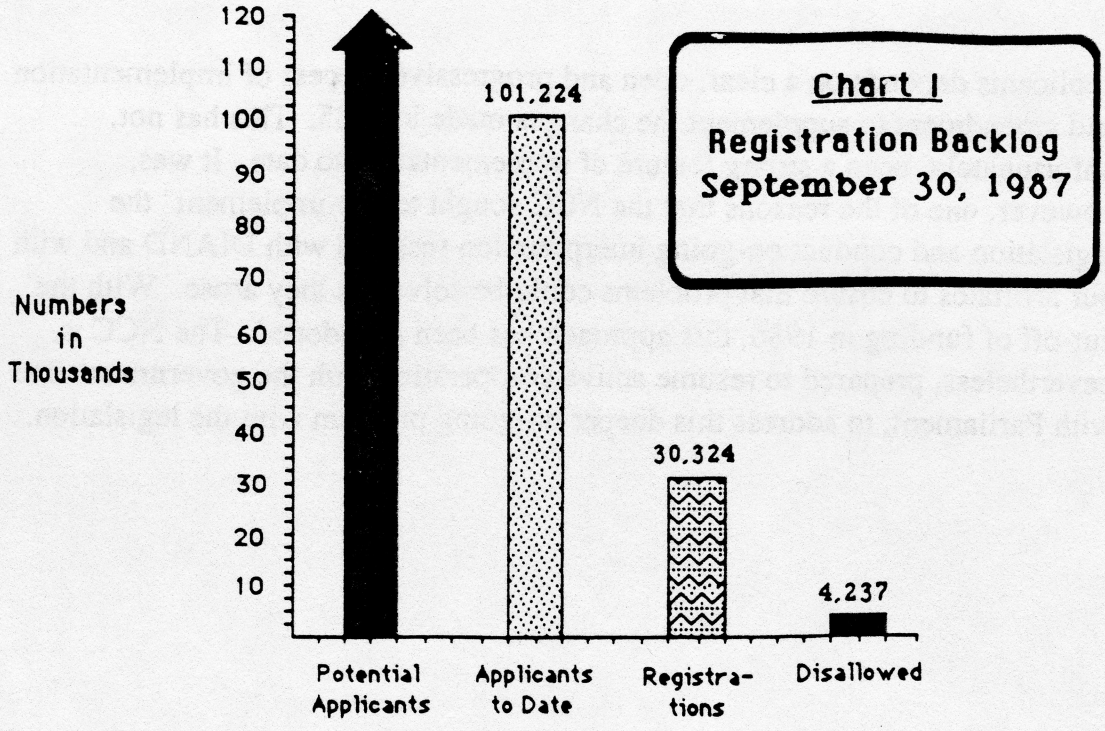


Chart II
Applicants and Registration by Region & Status Type

	6(1)(a)	6(1)(c)	6(1)(d,e,f)	6(2)	**Totals**	Rejections	**Applicants**
Atlantic	37	447	67	1036	1587	222	3514
Quebec	68	1076	170	2415	3729	626	10936
Ontario	185	2554	1134	4632	8505	1198	29431
Manitoba	36	1153	464	1796	3449	462	11906
Sask.	37	992	246	1671	2946	308	9731
Alberta	58	1188	244	2013	3503	798	12931
B.C.	89	1905	669	2640	5303	436	18341
Yukon	16	282	100	566	964	127	2350
N.W.T.	3	140	33	162	338	60	1923
Canada	529	9,737	1,638	16,931	30,324	4,237	101,224

Source: DIAND Membership and Entitlement Directorate. All data are as of September 30, 1987

B. Band Membership & Code Development

The data shown at Charts III and IV below indicate clearly the degree to which the development of membership systems, far from being a careful and open process, has been artificially forced into a stampede of Bands being induced into adopting restrictive membership systems.

Until the "rush" of May-June, 1987, most of the band codes that were developed were exeptions. The first, Sawridge, is a tiny, wealthy band involved in strenuous efforts to restrict membership. It is not clear that it has a membership code, per se, since the guts of the code are set out in its residence by-law, without which it is not clear anyone has a right to membership at all. Another, Sechelt, had to have its Code in place to give effect to the Sechelt Act, passed last year. The two other early runners were Lubicon and Cumberland House. Lubicon is a band which has seen almost half of its membership arbitrarily dropped from its band lists and is in the midst of a major battle to obtain reserve lands under aboriginal title. Its membership system, like Sechelt's, is quite open. Cumberland House is a minority reserve community within a larger non-status and Metis community also seeking band recognition. Predictably, its system is somewhat restrictive, adopting a "blood quantum" rule.

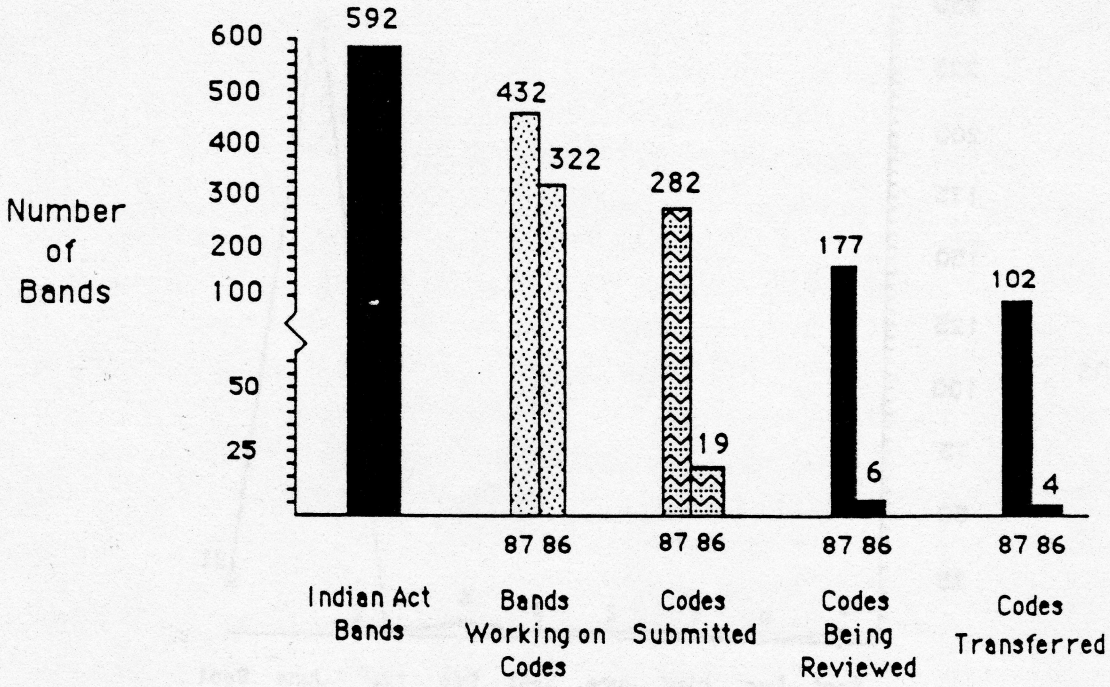
Most of the other codes came in a rush just before June of this year. As discussed more fully in Part III below, the legislation has not promoted fairness or clarity in the development of membership rules by Bands. The codes that have been developed attest to this most clearly. Many of them are of a "standard format" that was rushed through to meet the supposed "deadline" of June 28, 1987. In our view, the poor quality of many of the band codes does not reflect community desire or consideration so much as it reflects the fatal error of C-31 in attempting to pass off membership control as a step toward self-government.

It is important to recognize that band code and band membership data do not reflect reserve residence or "effective" participation in the band concerned. Governments are used to assuming some correlation between membership in a band and active political representation by the band of the membership. This can no longer be assumed. Data from in-house DIAND sources indicates that only some 12% of reinstatees are actually seeking active band membership. In

addition, the narrow interpretation being given the power of Bands to pass residence by-laws under section 81(p.4) may be leading to a "covert" membership system, after the pattern of the Sawridge code.

Chart III

Band Membership Code Development
October, 1986 to September, 1987

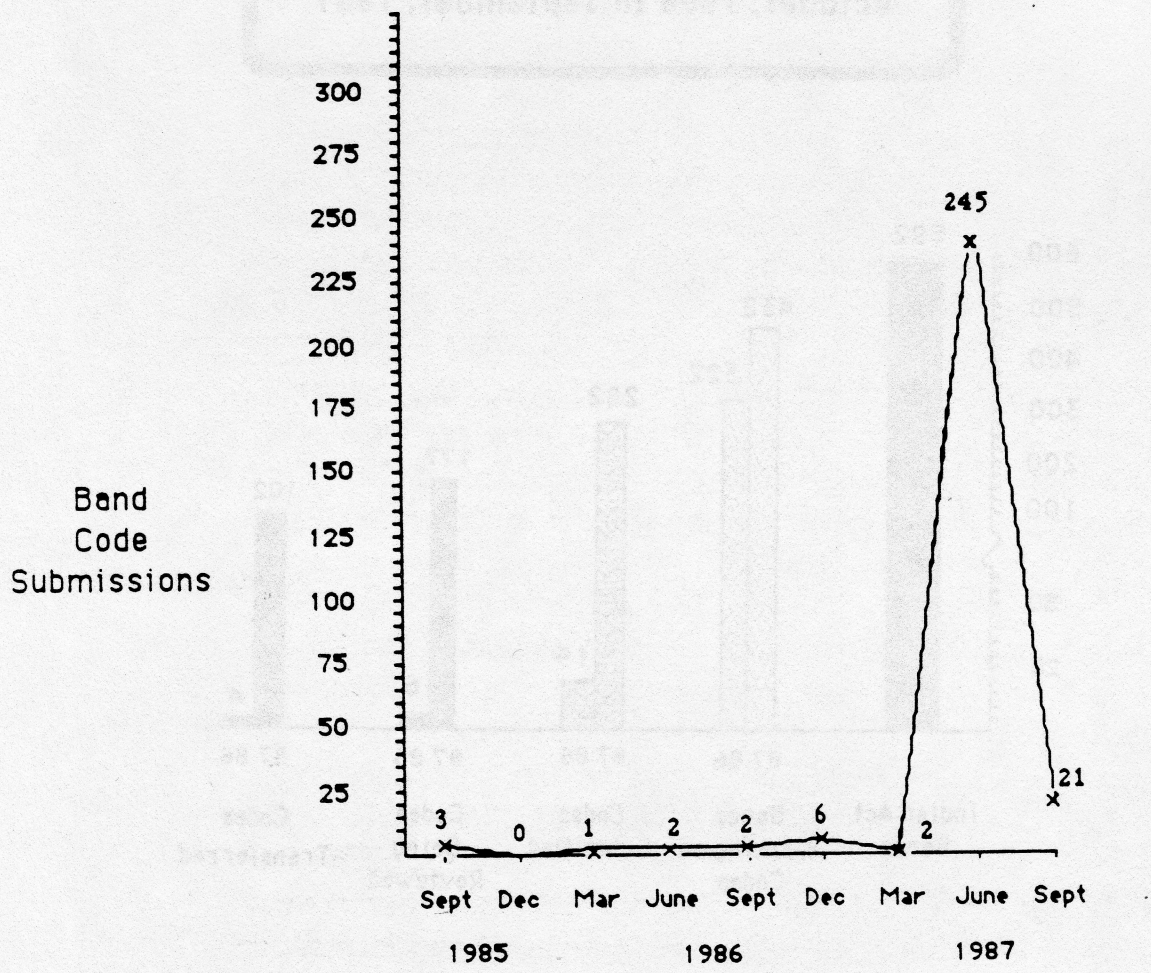


Notes: 1. Figures on the left hand refer to Code development as of September 25, 1987. Figures on the right side refer to data as of October, 1986.
2. 432 Bands had received funding for the development of codes by March 31, 1987
3. Of the 282 Codes sent to DIAND to date, 3 have been returned to bands with a recommendation that they be amended to accord with acquired rights or with the Charter. 15 of the 177 being reviewed are being recommended for return for amendment or have not shown evidence of proper consents.

Source: DIAND Membership and Entitlement Directorate, September 25, 1987.

Chart IV

2 -Year Trend for Band Membership Development



Notes: 1. Over 230 Bands submitted codes just prior to the end of the "grace period", which elapsed on June 28, 1987. Technically, if the codes involved are held as valid, they come into force as of the date received by DIAND.

Source: DIAND Membership and Entitlement Directorate, September, 1987.

Part III

Indian Act Issues For Review

Introduction:

This Part of the Report is aimed at assisting reasoned and informed discussion about action that Parliament should consider in the coming months to amend or alter the Indian Act, the policy by which it is implemented, and the various federal and provincial government policies and programs that exist in connection to the Indian Act regime.

In section III.A a series of important issues are addressed that require legislative changes to the Act and to related legislation. There are three broad issues involved: the general interpretive and regulatory activities of DIAND entitlement to registration; and entitlement to membership and band membership systems.

The next section, III.B, addresses the complex of established and prospective or required statutory and discretionary programs designed for status Indians or developed primarily against the backdrop of the Act. The Indian Act regime is accompanied by a number of established programs or policies for services, such as post-secondary education (DIAND), Child Welfare (DIAND), uninsured health benefits (Health and Welfare), and Food Fisheries Programs (Fisheries and Oceans). In some cases, programs such as economic development (IEDF and ICHRS) and housing are determined by or focussed on reserve residence or status, and these too are effected by the changes to the Indian Act.

The third section of this part, III.C, explores a key policy issue that has emerged since 1985: Band recognition. Thousands of Indians newly recognized under the Act already have established commuities and are not willing to simply abandon these to return as individuals to existing bands and reserves. The diaspora created by the Act has had its social effects and a policy of new band recognition is required to address reality. In addition, several dozen "non-registered Indian" communities exist who have no policy by which to access recognition and registration.

The final section of Part III outlines some of the special issues raised by Bill C-31 for constitutionally protected rights of aboriginal peoples and related policies on such matters as land claims. The importance of these issues may seem at first blush to be unrelated to the Act or any amendments to it. In the normal course of events, it would be expected that "where the Constitution goes, the Indian Act must follow". However, certainly as far as the assumptions in government about the interpretation and application of the Indian Act regime, the reverse seems to be the guiding policy: "where the Indian Act goes, the Constitution must follow". While it seems clear that there is no legal capacity of the Act to limit or restrict constitutional rights, it is nevertheless the major single administrative regime in place for the effective access of Indian (status and non-status) as well as Métis peoples to many of these rights. Long practice, bureaucrative and legislative precedent and governmental priority seems heavily biased as of this date against the kind of serious and consistent reform to federal and provincial legislation to bring them into conformity with modern constitutional law, policy and expectations.

A. Legislative issues

During and since the passage of Bill C-31, the NCC has constantly attempted to research and publicize the exact consequences of the legal wording of the Indian Act. Because of these efforts, over forty changes to the proposed wording of C-31 were made before the legislation was passed into law. Since passage, the NCC has published two detailed guide-books on the Act and circulated several special Bulletins on key issues raised by C-31.

We also fought strongly for an extensive and openly conducted review by Parliament of C-31 within 2 years in order to address additional legal issues that we saw as in need of change but which could not be changed in 1985 because of the political and legislative pressures involved and because some experience was needed with the implementation of C-31 before all the effects of the new legal wordings could be analysed. With the assistance of Members of the House Standing Committee, the Minister did announce such a process on April 24, 1985 as an integral measure toward "co-implementation".

With Ministerial agreement, the NCC began meeting with DIAND in the Fall of 1985 to begin the task of monitoring the implementation of the legislation and to develop a joint interpretation of the meaning of the different clauses of

the Bill. In some cases, these consultation meetings have led to changes in Departmental policies and interpretations. In other cases, the meetings identified areas where the NCC felt that one interpretation was either possible or legally required but where the Department or its Justice legal advisors took another interpretation. In some of these cases, the NCC feels that the real problem is not with the Department, but with the legislation. In other cases, the law seems clear but, because in does not "fit" with Departmental policy established before Bill C-31, it has been "interpreted" to the advantage of the old policy. Unfortunately, the promising early consultations between DIAND and the NCC on interpretation ended in late 1986 with the termination of funding support from DIAND, a full eight months before the date on which DIAND was to issue its report on implementation. Therefore the NCC cannot provide Parliament with a full or fully effective assessment of implementation. DIAND precluded this by abandoning, half way through the effort, any pretense at co-operative implementation.

In early November of this year, DIAND apparently had a change of mind and struck a "C-31 Task Force" which is attempting to co-ordinate federal departmental implementation, especially as regards funding requirements. The NCC sought just such an initiative from DIAND in August of 1985. The C-31 Chiefs Committee of the Assembly of First Nations has been invited to work closely with this Task Force and has received funds to allow for this. The NCC has not been so invited, nor have we as yet received any funds for this purpose.

A.1 Interpretation and Regulatory Activities in DIAND

Careful planning as to the nature and scope of the interpretive and regulatory requirements of C-31 should have been untertaken well in advance of promulgation. There is, however, very little evidence that such planning occured or was even considered. To a certain degree Parliament's precise intentions could not be predicted — the legislation as promulgated on June 28th of 1985 was in many instances significantly different from the draft Bill C-31 as originally tabled. This reality faces all legislation however and cannot be used to excuse the truly cavalier fashion in which the government approached planning on what it itself claimed was the most important and far-reaching change to the system since 1951. Some cases in point:

• *Take-up of the legislation*:

The Department consistently under-represented the the number of potential Indians who might seek registration. The initial forcasts as contained in DIAND's Cabinet submission in late January, 1985 were not revised, despite the fact that over four months elapsed before the legislation was given third reading and during that period the Department was informed repeatedly by the NCC that over 100,000 people would be affected. Worse still, the Department at no time in the first 18 months of the implementation went back to Cabinet to seek a more appropriate allocation of resources to implement the Act once it was clear that the original estimates were grossly in error. Indeed, it has now taken DIAND over two years to reassess funding requirements for implementation and the department is just now consulting on a proposed Cabinet Submission in 1988.

• *Departmental machinery & staffing requirements*:

DIAND's assessment of organizational and staffing requirements were not really completed until 3-4 months after the Act had passed, and then only with the bare requirement of registrations, housing and social services on reserve in mind. No sytematic analysis was conducted to determine the full extend to which the Departments various program and policy sectors would be effected and consequently the staffing and resourcing estimates submitted to the government only reflected the nominal increases needed to register applicants. The only other resourcing consideration given was with regard to per/capita funding increases for housing, post-secondary education grants and for un-insured health benefits. As with registration, the latter were grossly under-estimated and, as with registration, DIAND has been exceedingly slow to take accurate and updated estimates to Cabinet for new resources.

• *Policy on Dates of entitlement to rights and programs*:

Characteristic of the kind of issue that should have been ironed out well in advance of implementation is the matter of "dates". Without a clear and well-reasoned policy on what dates applied with regard to entitlements to registration, benefits and rights, the machinery and progress of implementation soon began to verge on chaos. DIAND did not attempt to co-ordinate in advance its own operations in this regard, thereby leading to major discrepencies between the dates on which persons were being deemed entitled to registration, membership and to

DIAND administered rights and benefits such as treaty annuities and education support. Variations accross each of these "date-sensitive" entitlements emerged not only between regions but between the headquarters offices themselves. Nor did DIAND undertake to ensure some consistency accross government departments. This resulted in Departments such as Health & Welfare, Fisheries and Oceans and Revenue Canada developing ad hoc and inconsistent policies on the dates on which un-insured health, food fisheries and tax exemptions come into effect.

- *Consultative policy*:

Despite the clear and open commitments of the Minister made before the legislative committees of the House and the Senate, the Department largely ignored the need to give some consistent thought to how consultations with bands and with non-band constituencies were to be conducted on forcasted and emerging policy and program matters. DIAND has over the years developed a wide-ranging, though largely decentralized policy on consultation with band-based organizations. Some $9-12 million annually is dedicated at the regions to policy development and consultations with bands. The AFN, representing bands, receives in the order of $4-6 million annually in "global program funding". No thought was given by DIAND to sensitizing itself to its new clients by re-organizing its consultation structure. Take for example the pre-C-31 system by which post-secondary education and food fisheries benefits were administered. Bands were essentially integrated as the basic starting point for applications for such benefits. The need to find alternative, though still community-sensitive, processes for non-band applicants was apparently lost on DIAND officials as well as those in Fisheries.

DIAND also effectively undermined the Minister's clear commitment to a process of on-going consultation with organizations representing non-band Indians. Instead of providing for on-going funding and consultative structures to meet the Minister's decision to sponsor "assistance, monitoring, consultation and reporting" by the NCC and other organizations, DIAND officials undermined the capacity of the organizations by under-funding them, providing for no consistent inter-change on the progress of co-implementation measures and then having the funds turned into a "one-time only" grant that lapsed as

early as 8 months before the Department was due to report to Parliament. The reasons for this decision are, in our view, three-fold:

a) the failure of Mr. Crombie to prepare and follow up on additional Cabinet submissions to reflect his commitments — which were ignored in the initial Cabinet submission of January;

b) some officials chose to undermine the spirit of the commitment by fueling a misplaced but potent conflict between the "old" and the "new" clients over funds made artificially scarce by the failure to seek reasonable increases from Cabinet; and

c) the new Minister, Bill McKnight, chose to view the new client group and its representatives, such as the NCC, confrontationally and as obstacles rather than as partners in implementation.

It cannot be argued that these and other potential issues were not forseen. The NCC met with the Minister on several occasions on the issue and the Standing Committee addressed the matter as well, notably by demanding, and receiving, assurances concerning "co-implementation" and an indepth review within two years. Coupled with the assumption that the Department was capable of handling a major shift in its primary legislation and was undertaking all appropriate planning as regards implementation and the spill-over effect on Departmental programs and policies, this seemed to be satisfactory.

Unfortunately neither the assurances nor the assumptions have proved worthy of trust. The Department seemed unable or unwilling to effectively liaise with the NCC on interpretation issues except to adopt the strategy of terminating the NCC's capacity to continue its efforts before we could become a major embarrassement to the Department. While there was co-operation at the middle and lower levels of the Department, senior management neither responded to nor supported the initial consultative efforts. Whether this was due to bureaucratic or Ministerial assessments and priorities is unclear. To be sure, major changes at both levels occured between the time that C-31 was passed and the time when the review of the legislation came up for completion.

As to the safeguard of review that both the House and Senate Committees

felt necessary, Parliamentarians have but to look to the report tabled on June 25th of this year for an answer as to the seriousness of the Department's commitment or capacity. The report provides no analysis at all — merely collated data. Moreover, it contains an admission of failure in its request that the report be considered "interim" until a more complete picture, especially as regards band impacts, can be done for 1990.

A.2 Registration Entitlement

Generally, the Act establishes a complex list of different entitlements to status and membership that, in turn, result in different persons having different rights to pass on or receive status and/or membership. As a first fact, Parliament must recognize that this system is inherently discriminatory. Ironically, C-31 was generally looked upon as an end to discrimination. However, discrimination is built into the Indian Act system at a much deeper level than was addressed by C-31. Parliament must decide if there should be an Indian Act at all and if so, whether to continue with the current system of distinguishing between different classes of Indians and between Indians and other aboriginal peoples or whether to extend "status" to all people of Indian descent or only those who are identified with a community, a decision which requires deciding how and which communities should be recognized as valid for the purposes of determining status/membership.

The Act excludes or denies reinstatement to four categories of people:

- persons who lost status because of the scrip system, many of whom were "treaty Indians" induced off reserves by the offer of scrip and turned,

- many 2nd and higher generation children of those entitled to stripped of status under the old Indian Act, because of the effect of the "second generation cut-off" contained in section 6(2)

- persons in the 2nd or higher generations who, even if otherwise entitled, are denied entitlement because their parents died before April 17, 1985

- Women and children excluded from entitlement by section 7

where they would otherwise be entitled by descent under sections 6(1)(f) or s. 6(2).

- The Act is written in such a way that leaves open to interpretation the entitlement of the following people, thus allowing their status to be denied or allowing them to receive a lesser status than other interpretations would allow:

  - Illegitimate female children of Indian men born between 1951 and 1985 and illegitimate children of Indian men or women born before 1951.

  - Children of women who lost status because of marriage are treated differently than children of men who married "out".

As in the case of the "death rule", the Act should be immediately amended in the latter two cases. All three issues involve fairly clear violations of the *Charter of Rights and Freedoms* and the Courts may decide the issue unless quick legislative action is taken. If the Courts are to be the decision-makers, Parliament must understand that the entire fabric of the Indian Act entitlement provisions may be held as *ultra vires*. The NCC recommends that an independent legal review of the Indian Act be established to propose changes that are consistent with the Charter. The Minister of Justice is supposed to carry out such a review, by virtue of s. 4.1(1) of the Department of Justice Act (1985), but he has not done so.

- *Protests and Appeals*:
  The Act sets up a protest and appeal provision that gives the Registrar, a relatively junior Departmental employee, total control over the kind of evidence that will be acceptable as proof of entitlement. The Registrar can refuse oral testimony or other indirect evidence at any phase of investigation. The NCC wishes to see oral and heresay testimony admissable at all stages of the process. Because of the Registrar's legal authority under the Act, the NCC is wuld recommend a change to make the Registrar directly answerable to Parliament rather than through the Minister of Indian Affairs.

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- The time deadlines for Protests and Appeals are 3 years and 6 months respectively. These deadlines are too short and the NCC recommends a 5 year/3 year deadline system.

A3. Entitlement to Membership, Membership Codes, and Residence:

As a totally new element of the Act, the membership and residence provisions are desparately in need of clear and thorough review. The Indian Act splits the definition of status from that of membership and clearly restricts the right to be a band member in several ways:

- Generally, the Act gives Bands control over past as well as future members, which merely confirms the old Act's definition of a Band as the controlling force in deciding the membership of the future community. This reinforces the influence of the "colonial past" despite the claims of the Act to have "ended colonialism".

- It gave Bands a "grace period" of two years to exclude people who would otherwise be entitled to membership.

- Only people who were stripped of membership because of section 12(1)(b) and section 109(1) enfranchisements were given an automatic "acquired" right of membership. All others had to wait till June 28th, 1987 and then acquired membership only if their bands had not taken control and excluded them.

- Some people receive status but not membership even after June 28th, 1987 under the Departmental rules, because of the "parental death rule" (see Annex 1).

- It treats members who are status and those who are non-status differently, in section 4.1. For the same reason, Bands are not able to provide registered status to their members, even if they are of Indian descent.

- *Passage of Codes*:

The procedures for passing Membership codes are very controversial

and unclear. For example:

- it is not clear what right to membership a person has if he or she applied for registration before a Code was passed but was not registered until after the Code was put into effect;

- The Act requires "appropriate" notice without defining what that is. The NCC is recommends amendment to include a provision requiring "reasonable and appropriate" since this has greater meaning in requiring written notice, access to the proposed Codes, and possibly a longer time period before a consent can be sought;

- The definition of "elector" in section 10 of the Act which sets out who can participate in a consent for a Memebership Code is very unclear. Generally, DIAND and bands interpret "elector" to mean a person who is on the Band List, over 18 and normally resident on reserve. This tends to discriminate against all former members who are in the process of registration or who have not been able to establish residence. It also results in the absurd imposition of the Indian Act Elections Regulations on non-election system bands (customary bands), even when a "consent" need not be by vote. The NCC has tended to interpret "elector" to mean just those on a Band List over 18. The Act shoulld be clarified, as this is critical issue of local democracy;

• *Acquired Rights*:
The Minister's duty to uphold "acquired rights" is very slim: It is left up to the courts to decide. There is no adequate definition of what an "acquired right" is, such as to residence on reserve or to participate equally as a member of the band. There are many Charter issues involved here. "Acquired rights" should be defined;

• *Appeal Mechanisms*:
The Act does not provide for a consistent appeal mechanism from Membership Code decisions and forces individuals to enter into the expensive and foreign environment of the general court system. Some Band codes attempt to exclude the possibility of appeals entirely, and yet these codes have been "transfered" unamended. The

NCC's recommendation is to have the nature of appeals clarified and to sponsor Indian appeal courts at the regional/provincial level.

- *Gazetting/Promulgation*:

Codes that were allowed before June 25th, 1987 may be illegal unless they are officially promulgated in the *Canada Gazette*. Despite repeated requests, DIAND has delayed Gazetting Codes for over 2 years. Finally, in June, the Governor-in-Council passed an Order "exempting" Codes from the requirement to be promulgated as law in the Gazette. The NCC feels that this may not be sufficient, and does not solve the problem of Codes allowed before June of this year, which may well be of no legal force unless and until they are promulgated. The NCC has proposed that to resolve this issue, legislation should be introduced requiring the maintenance of an "Aborigial Gazette" for the promulgation of all Codes, Treaties or self-government agreements, by-laws and other legislation affecting aboriginal peoples.

- *Duty of Registrar/Bands to Register*:

The duty of the Registrar to maintain Band Lists in accordance with the Act is clearly spelled out in section 9 and 14. But the duty of the Band to also maintain the Band Lists in accordance with the Act is not clear, even though it seems required by s.8. This is an especially crucial matter in determining the rights and access to due process of reinstatees to have their entitlement recorded and respected, even where their registration follows in time their Band taking over membership. A clear and rational system should operate accross the country. Too many reinstatees are being left in limbo and this has major repercussions for their rights as members.

- *Reserve Residence*:

Traditionally and with solid legal foundation, Indians have viewed reserve residence as an integral aspect of the right of membership. The S. 81(p.1) by-law power over "residence on reserve" seems to divorce this past association and threatens new and returning members with a new form of discrimination. In our view, the power over reserve residence should be strictly limited to setting the pace and conditions of establishing residence. As Bands already have power to exclude membership through the codes, it would seem highly

suspect to also provide a "back-door" vehicle for the denial of effective membership. In addition, the new by-law power cannot oust federal regulations regarding residence of non-Indians on reserve. It would seem strange if bands were restricted in this latter aspect while able to effectively deny residence rights to members.

- *Residence of Spouses/Dependents*:

The rights of spouses and dependents to reside on reserve is far from secure under C-31. Under section 18.1 of the Act only dependent children and children in custody have a clear right to reside with their parent. Dependents over the age of 18 and children under 18 who are not "dependent" or in custody are not protected in their residence rights. The status of spouses is completely in limbo, leading to the prospect that Bands can essentially deny reinstatees with residence by refusing their spouses access to the reserve.

- *The $1,000 penalty rule*:

Section 64.1 levies a direct penalty and burden of repayment on reinstatees by requiring repayment of former per/capita distributions and/or forgoing of these monies before participation in the Band can be assured. Particularly disturbing is the power given to Bands to require direct repayment of distributions over $1,000 and restrict "individual benefit" from Band revenues and Band financed programs. The NCC feels that the original Special Committee recommendation that the federal government repay all such per/capita payments (possibly up to a certain limit, such as 10,000) to bands upon acceptance of reinstatees on the Band list should be revisited.

- *Liability Limitation*:

C-31 seeks to establish what can only be described as an immoral and probably illegal precedent: to limit the liability of all persons, including third parties and the Crown, with regard to actions taken leading to former loss of status. While it does make some sense to limit the liability of Bands and members in this regard, surely Parliament would object to a rule that former illegal acts cannot be simply excused in this fashion. The fact is that individuals were often denied their rights of due process and review in cases of enfranchisement and "informal de-listing", especially in the 1930s and 1940s when political activism was responded to at the local level

through sometimes illegal means.

B. Program Issues

B.1. Statutory Rights and Programs

The NCC is particularly concerned about the lack of any statutory base for most programs applying to status Indians living off-reserve. As we have seen, Education and health benefits can be easily "capped" in such an environment.

Even in the case of Food fisheries entitlements, which are provided a legal foundation, access by reinstatees has been frustrated by Fisheries and Oceans officials, who have sought to leave Bands totally in control of the distribution of licenses. The simple reality is that Bands cannot be expected to act with equal vigour for both members and non-members. Some system for recognizing the role of non-Band native associations must be developed.

The case of health care is particularly in need of reassessment. Medical Services Branch programs and NAADAP are simply not well tuned to dealing with the organizational realities of the "new-status" Indians in need of services. The NCC is now attempting to conduct a pilot project study of health needs of its constituents in this regard, and looks forward to discussing the results with this Committee in the future.

The NCC recommends that a Special Task Force be struck to examine the full range of programs and services available to status Indians to assess their adequacy in the post C-31 context.

B.2. Discretionary Programs

Post-secondary education benefits and uninsured health coverage are the only real national programs available to status Indians. A crisis has emerged over the last year in the education program due to shortfalls, uneven policies on institutional accreditation and the introduction of new "criteria" that penalize reinstatees in a variety of ways tied to the status of their registration processing.

One pressing urgent example concerns the current DIAND "moritorium" on

registering any person who may be affected by the s. 6 or 11 "death rules". Aside from the dubious legality of such a moritorium, the practical consequences of delay are of great concern. Literally hundreds of aspiring students have been held up for yet another year without the opportunity to seek the higher education they desparately need and seek. With the "capping" of the program, the situation is becoming rapidly worsened.

Additional "programs" available to status Indians include economic development under IEDP, the Indian Community Human Resources Strategy and consultation and policy development assistance from DIAND. To date the NCC and its affiliates, who represent a growing body of status Indians, have been largely excluded from accessing these programs. Through its "Bilateral Work-Programme" that was requested by the Prime Minister in 1985, the NCC has attempted to at least start addressing access to these areas. Unfortunately, neither DIAND nor other federal Ministries have chosen to invest resources in this Bilateral work and it is currently stalled.

Test Case Litigation Funding for C-31 Test Cases is available to individuals and groups, but the fact that DIAND's practice is to seek only one Treasury Board submission each year and must lapse unused funds means that no real flexibility is involved in responding to urgent requests for funding unless the requests suface near the end of the Fiscal year. This planning cycle also increases the opportunity for the politicization of the Fund. Given the high involvement of the NCC in defending its constituent's interests, we feel that the Test Case Fund should probably be divorced from the normal DIAND line authorities and administered independently by a body with Indian input and involvement, much as is the case with the Charter test case funds administered by the Canadian Council on Social Development.

C. Band Recognition For Indian Communities

A Capsule History:

There are 592 bands currently recognized by the federal government. 13 have been recognized since 1982; one for the non-registered Micmacs of Conne River and 11 for bands that have split off from other bands in northern Ontario and band established for non-registered treaty Indians in Inuvik, NWT.

Historically bands have been recognized for various reasons. Some were

recognized as a result of treaties and reserve-creation, some were set up to centralize service delivery, and many have emerged over the years in response to natural community developments, including the splitting of former bands to reflect community growth of dual or multiple-community reserves.

In this century, dozens of bands have been recognized on the basis of communities that were simply missed in previous governmental incursions into their territories. In other cases, forced community migrations and administrative convenience in providing services has led to new bands being designated, as has the desire to allow for local community decision-making. For example, all Nova Scotia communities were formed into one band prior to the 1950s and then separated into 17 new bands in order to match community recognition to demands for local decision-making and services.

The types of communities seeking recognition are varied:

- Never-registered Indian communities, like the Micmac communities in Newfoundland and the "isolated" Cree communities in north-central Alberta. Conne River, recognized in 1984, was in this category;

- Status Indian communities seeking band splits, additional bands on existing reserves, or simple recognition as new bands off reserve lands;

- Mixed communities of status, non and never-registered Indians in remote, rural and even urban areas, seeking local community recognition whether or not tied to some claim for a land base;

- Former members of "irregular" or "wandering" bands who have been administratively 'lost' over the years or who have been forced onto other band lists for administrative convenience; and

- Communities (Status, non-status and/or never registered) seeking a settlement under treaty or comprehensive claims and needing band recognition to secure access to and protection for their rights.

Of all groups the NCC is effected the most by new bands policy as it represents most of those communities seeking band recognition, especially

never-registered Indian communities and mixed status and non-status communities.

Band Recognition — Legislation without Policy:

Most Canadians understand the process by which villages, towns and cities are granted status under provincial law and the process by which provinces emerge out of territories. Elaborate constitutional, legislative, policy and procedural schemes are in place to handle this area of community growth. It is seen as natural and essential. Not so when it comes to growth in the Indian community. While there are some archaic legislative provisions in place, there is no policy and no procedure other than ones geared to deny or to deter Indian communities from growing and developing.

The Indian Act has always provided for either Cabinet or the Minister to recognize bands for the purposes of the Act. Band recognition is in fact the major statutory role the government has in establishing relations between the Crown and an Indian community. The Indian Act does not in fact provide for the creation of reserves or for the administration of treaties. Therefore the basic legislative function of the govenment is in respect of recognizing bands and relating to them in regards to reserve lands, programs and services.

Bill C-31 introduced major changes to the Indian Act system but did not change the legislative system for band recognition. With the new registration and band membership systems introduced by C-31, the Indian Act provides for two forms of band recognition:

1. Section 2 , along with section 73 of the Act, allows the Governor-in-Council (Cabinet) to declare any group of Indians (especially those not registered as such) as a band and, by virtue of section 6, the Registrar must register them. This provision dates back to the time when Cabinet approvals were regularly being sought for reserve creation under treaty and otherwise, approvals that also naturally required band recognition.

2. Section 17 of the Act allows the Minister, if requested, to amalgamate bands or constitute new bands. However, he is only allowed to constitute new bands for people on existing band lists or from amongst status Indians. The Minister cannot create new bands from non-status or never registered Indians unless he can first register

them. In the case of new bands constituted out of one or more existing Band Lists, the Minister may also allocate a portion of the lands and moneys involved to the new band, without the consent of the existing Bands.

Until 1985 there was no particular procedure developed to handle requests to form new bands: it was an ad hoc process. However, in practice the government did not deny recognition on grounds of cost. The emergence of demands for new bands was seen as a 'normal' development — similar to 'normal' community development in the non-Indian context — and was responded to by DIAND requests to Parliament for additional funds to bear the costs involved.

With the Indian Act amendments in 1985, at least 100,000 Indians became entitled to registration and several dozens of prospective "section 17" band recognition requests were forcast by the NCC. At the time, most communities were also able to look beyond the Indian Act to constitutionally based recognition, and so actual requests for band recognition were not heavy until this year when, with the failure of the First Ministers' Conference, this preferred avenue was closed off.

Federal Consultation Commitments:

The past two years have been a trail of broken promises when it comes to federal commitments to consultation, the Prime Minister definitely not excepted. Negative reaction to Erik Neilson's "Buffalo Jump" Report led Prime Minister Mulroney to issue, on April 18, 1985, a detailed statement on consultation in aboriginal policy areas:

- The federal "Special Relationship" to aboriginal peoples was to be reinforced;
- funding was not to be cut; and
- no changes to federal policies were to be made without full 'grass-roots' consultations.

At the First Ministers' Conference (FMC) in 1985, the Prime Minister agreed to establish a formal process of bilateral talks with the NCC on land rights, treaty issues and policy issues regarding land claims and the Indian Act, including band recognition. At the P.M.s request the NCC developed a detailed

work programme in early 1986 which was ignored by the government until just before the 1987 FMC, when all of a sudden the NCC's request for bilateral policy development on treaties and treaty rights was agreed to. Since the FMC the process has been in limbo as the government refuses to dedicate any resources to the process.

On April 24, 1985 the Minister of Indian Affairs made a public commitment to Members of Parliament on the C-31 Legislative Committee to provide resources to the NCC to allow for full policy consultations to take place on the implementation of the Act and on related issues, including band recognition policy. During discussion of C-31 at Second Reading in the House, the NCC felt that even with the FMC process some open and realistic policy on band recognition was needed, both for "section 17" as well as for "section 2" bands. The NCC proposed a simple legislatively based procedural requirement on the Minister to investigate and to report to Parliament. This, the NCC felt, would allow for the emergence of acceptance policies that accurately reflected community needs and yet clearly required open, public and Parliamentary involvement in the matter. This procedure would also introduce an orderly procedure for Cabinet consideration of "section 2" band recognition requests, for which the Minister of Indian Affairs has no statutory mandate. The proposed amendment to C-31 was voted down in Committee but the Minister repeated his undertaking to consult closely on the development of a new policy.

The NCC wrote to David Crombie in October 2,1985 and subsequently seeking a policy on new band creation and a clarification of what could be done under the revised Indian Act sections 2 and 17. To date, DIAND has acknowledged but not responded to this or any other correspondance other than to state that all requests for new band recognition must await a new policy.

Shortly after coming into office, Bill McKnight terminated funding to the NCC, despite the commitment his predecessor made to Parliament, and refused to respond to requests for consultation on new bands policy. Repeated efforts to resume consultations and funding for the NCC have been frustrated by McKnight and senior Departmental officials. No consultation has been invited by DIAND on the "New Bands Policy" since McKnight assumed control over DIAND.

The 1984 and the 1987 "Policies" Compared:

The 1984 policy was based on the erroneous assumption that all Indian

communities had already been recognized years before. Therefore no policy was deemed required other than for splits within existing bands or as a result of treaty entitlement and/or claims, in which case the issue of band recognition was incidental to the issue of reserve creation. The 1984 policy set out no ground rules on application procedures or acceptance criteria. The policy was simply "ad hoc" and depended on bands exerting political pressure for their recognition. The inability of the 1984 policy to respond to band recognition needs prompted the NCC and other organizations to demand a new policy, more in tune with reality.

The leaked policy paper, dated February 23, 1987, is really little more than a supplement to the 1984 policy. It tightens up the 1984 policy on reserve additions considerably by tying acceptance to minimal or no-cost alternatives. Given that most communities involved are already recieving at least some provincial serives that, with recognition, would be funded federally, this criterial effectively requires the communities to prove "cost-savings". On the band recogntion side, the policy has been expanded to take into account Bill C-31 but is equally, if not more restrictive.

- It cites as the only relevant factor the "$ 600-700 million" price tag for recognizing 100 bands, without any analysis of the 100 requests supposedly received or of the social cost factors of not recognizing the communities involved.

- It restricts DIAND to two possible cases in which new band recognition can be recommended: cases that involve no new funding commitments (which means none outside of band splits where the two bands agree to share existing funding), and cases where there is a legal obligation such as on the basis of land or treaty claims or other legislative commitments.

- No clarification is given in the policy as to under what circumstances a non-band community could determine if a legal commitment exists, a problem since only bands can enter the treaty claims process under the current specific claims policy.

- DIAND officials are not to take any action to encourage or support any proposal or request for new band recognition unless and until the Deputy Minister gives written concurrence. DIAND is to repond to

requests by:

- assessing the potential costs and implications and then responding promptly, indicating DIAND policy that no resources exist to meet the requests.
- reviewing remaining cases (no-cost or possible legal obligation cases) at region and send to the DM for written concurrence before any support indicated.

- No new reserve lands are to be provided and existing bands must concur with band splits. This part of the policy is in direct conflict with a plain reading of the Act, which does not provide the old or existing band with a veto.

In summary, the "new-policy" is to turn down all requests for new band recognition that stem from C-31 or have been held over from before 1985 and only accept requests in the rare cases where no or minimal costs are involved - which means in practice only band-splits where the existing band concurs and agrees to split existing revenues (an unlikely event). The only other way to get band recognition is to prove a legal obligation under claims -- however DIAND also controls this by not allowing non-band communities to access the claims process. In short, the policy presents communities with a "double catch-22" rule under which they will simply not be able succeed.

D. Special Issues: Aboriginal and Treaty Rights:

D. 1 Treaty Annuity Administration:

In the distribution of treaty annuities, DIAND is interpreting entitlement on the basis of status and descent from the treaty group, or band membership and status regardless of descent. In no section of the Indian Act are treaty rights associated with status or band membership. In 1985 the NCC sought a specific clause stating that the Act and its amendments shall not derogate or abrogate from aboriginal and treaty rights. The NCC now recommends that an independent treaty authority be established to insure that DIAND mandates and biases do not intrude into the administration of these Constitutional rights and benefits.

D.2 Treaty Harvesting/ Land Entitlement

The Indian Act system is used within DIAND, by other Departments and by other Governments to determine legal entitlements that are often rooted in Treaties or special Constitutional rights, such as the *Natural Resources Transfer Acts, 1930*. Provincial wildlife officers still prosecute non-status treaty descendents for treaty-based harvesting. The process of treaty land entitlement negotiations in the West completely ignores the fact that Bands only represent some, but not all, treaty Indians. This systematic policy of exclusion and denial of equitable access not only affects status Indians but also unregistered status Indians and non-status Indians and their non-band associations that wish to help and govern their members' activities in hunting and fishing.

Quite clearly, this area is need of major analysis and overhaul to disentagle it from the Act and the DIAND system of excluding non-status and non-band Indians from accessing their rights under Treaties and the Constitution. In 1983, the Special sub-Committee recommended that this area be reviewed urgently. The time has long-passed for further delays.

D.3. Land Claims and the Indian Act:

Since 1969, the Federal specific land claims policy has been geared to address band-based claims under treaty or because of governmental actions that resulted in losses of revenue or lands to bands. The NCC has a duty to represent the interests of non-band status and non-status Indians who may have treaty based claims or who may have suffered from losses of reserve lands when members of a band. We have consistently sought a revised specific claims policy to allow non-band claims, and the Coolican Report in 1986 pointed out the need for a clear policy. DIAND failed to respond.

The situation with comprehensive claims is similar, especially south of 60. DIAND's policy has been to deny access to land claims funding and the process of negotiation to any Indian group that is not either a Band or affiliated with a Band and has that Bands support. Again, this importation of the Indian Act regime into a policy sector that is supposed to be independent of such matters is intolerable.

Part IV.
Summary of Recommendations

A. Parliament and the Process of Review

- That a permanent Senate Standing Committee be established on Aboriginal Affairs with a broad mandate with regard to any Minister, department or departmental estimate with particular relevance to aboriginal peoples.

- That a special Joint Committee on the Indian Act be struct forthwith, with *ex officio* representation of bands, status Indians, non-status Indians and Indian women's interests, to conduct a thorough review of the Indian Act, Bill C-31 and its implementation, and related policy and program issues, and report to Parliament no later than one year from the date of the Committee's establishment.

- That in future all legislative committees of either the House or the Senate considering legislation directed towards aboriginal peoples include *ex officio* aboriginal members, selected in consultation with the peoples concerned.

- That the House Standing Committee on Aboriginal Affairs and Northern Development have its membership expanded so as to reflect the principle of non-partisan consideration of aboriginal affairs, and that its capacity and duty to call Ministers and officials as witnesses, and to investigate estimates, be clarified so as to ensure that all relevant Ministries are included.

- That the Standing Orders of the House be amended so as to require that any legislative requirement on the Government or a Minister to table a report on previously passed legislation must be tabled with a special legislative review committee established for that purpose, as well as being directed to relevant standing committees.

B. The Legislative and Regulatory Sector

1. General:

- That all Regulations and other statutory Instruments pursuant to the Act, [other than band membership codes and by-laws], be tabled automatically with the appropriate standing committees for review and recommendation prior to approval and/or promulgation.

- That, consistent with his statutory obligations, the Registrar be required to report independently to Parliament on an annual basis as to any and all duties conducted pursuant to the Act and that the conditions for employment of the Registrar, insofar as he carries out quasi-judicial functions, include the requirement that the person hold a degree in law and have been called to a provincial or territorial bar.

- That, consistent with his obligations under the Department of Justice Act, the Minister of Justice review all Band Codes as to their consistency with the *Canadian Charter of Rights and Freedoms* and report any inconsistency to Parliament.

2. Parental Death and Entitlement:

- That the Indian Act be amended forthwith to remove the provisions in sections 6 and 11 that may be constured as prohibiting the registration or entitlement to membership of individuals solely because of the date of a parent's death.

3. Registration Entitlement:

- That the Act be amended forthwith to remove all sexual, generational and other forms of discrimination; more precisely:

  - by amending section 6(1)(c) so as to equalize the treatment of male and female children out of wedlock of either male or female Indian parents;

  - by amending section 6(1)(c) so as to entitle all those persons who were omitted or deleted from the Indian Register, or from

a band list prior to September 4, 1951, under sub-paragraphs 12(1)(a)(i) or (ii) or under any former provision relating to the same subject matter.

- by amending section 6 to eliminate the entitlement distinction between, on the one hand, children of Male Indians and women who acquired status solely under the former section 11(1)(f) or under any former provision relating to the same subject matter, and, on the other hand, children of Female Indians and men who were not entitled to registration.

- by amending section 7 so as to restrict its applications to only those women and children who acquired status under the former Acts solely by virtue of section 11(1)(f) as it read prior to April 17, 1985 or under any former provision relating to the same subject matter and who would not otherwise be entitled to status under any other provision of section 6 of the Act.

- That the implementation of the Act not allow persons to be denied benefit of their entitlements by virture of delays in application processing and be consistent as regards the effective dates of entitlements to registration, being no later than April 17, 1985.

4. Band Membership

- That the implementation of the Act not allow persons to be denied benefit of their entitlements to membership by virtue of delays in application processing.

- That the Registrar's and the Band's obligations be clarified so as to ensure that a person's entitlement to be added to a Band List is fully respected where that person's entitlement precedes a Band assuming control of its membership [the date being the date the Band receives notice under section 10(7)(a)].

- That the requirement that codes be promulgated be upheld and that to have the force of law codes must be gazetted within 2 months of taking effect, failing which the codes must receive new consents from the band(s) concerned.

- That the promulgation by gazetting of codes not be subject to exemption under the *Statutory Instruments Act*.

- That legislation be introduced providing for an official publication of all Codes, amendments to Codes, and by laws directly related to band codes styled the "Indian Gazette" and that consideration be given to providing for a consolidated "Aboriginal Gazette" recording the promulgation of all federal-Aboriginal agreements having the force of law, federal legislation and related regulations and by-laws.

- That "appropriate notice" in section 10(1) and section 10(2)(a) be amended to read "reasonable and appropriate notice", to provide for greater availability of notice in writing to persons affected.

- That the Act be amended to clarify that "electors" for the purposes of section 10 consents includes all persons entitled to be members of the band over 18 years of age, regardless of ordinary residence.

- That the Act be clarified to ensure that section 10 "acquired rights":
  a) apply equally to all persons entitled under section 6
  b) are defined with greater certainty, especially as to the right of residence and occupation of reserve land

- That all persons connected to a band and who are eligible for registration are protected by the "acquired rights" provision.

- That the Act be clarified to determine which courts have jurisdiction to hear appeals from decisions on membership pursuant to a membership code or, alternatively, that provision be made for a uniform system of appeal mechanisms, incorporating Indian customary law procedures and evidenciary rules similar to those provided in the case of Protests and Appeals under the Act.

- That the Act be clarified as to the obligations of the Registrar which pass to the Band upon its assumption of control over its own Band List, in accordance with the requirements of section 8 of the Act.

- That section 81(1)(p.1) of the Act be amended to ensure that the right of

residence is not severed from the right of membership and to ensure that by-laws under this sub-paragraph cannot be used to strip a person of membership directly or indirectly.

- That the Act be amended in section 18 to ensure that dependent adults, including the impaired, are assured of the right to reside with their parent or parents on reserve.

5. Protests and Appeals:

- That the Act be amended to allow oral and other forms of evidence not normally admissible in a court of law to be introduced as evidence during investigations of protests.

- That the Act be amended to extend the deadlines for Protests from 3 to 5 years and for Appeals from 6 months to 3 years.

6. Legal Liability:

- That section 21 of Bill C-31 be repealed and replaced with a limitation provision applying solely to Bands, Band Councils and members of Bands prior to April 17th, 1985.

7. Band Recognition

- That the government immediately reassure Indian non-band communities that a policy on the recognition under the Act as Bands will be prepared and announced only after full and open consultations with Indian peoples.

- That a special Parliamentary study or inquiry be initiated to investigate band recognition requests

- That the Act be amended to require the Minister to investigate all requests from an Indian community for recognition as a Band under the Act and to table a report in Parliament on his investigations including his recommendations concerning recognition within two years of any such request.

8. Reserve Creation

- That the government immediately reassure Indian communities that a policy on the setting aside of new lands as reserves will be prepared and announced only after full and open consultations with Indian peoples and in accordance with the principles of Federal responsibility for obligations in accordance with aboriginal and treaty rights and the right of Indian communities to have a land base.

C. Constitutional Issues

1. Treaty entitlement

- That Treaty annuities be assured to all descendents of treaty Indians and not be administered in connection with either status or band membership.

- That Treaty based harvesting rights and land entitlements be negotiated with all treaty-linked people within a treaty area as beneficiaries and as participants in the negotiations.

- That the federal government forthwith notify provinces affected of the inadmissiblity of entitlement to registration under the Act with regard to establishing entitlement under the Natural Resources Transfer Acts and as soon as possible meet with those governments, together with representatives of all aboriginal peoples of those provinces, to address federal and provincial responsibilities with regard to the *Constitution Act, 1930* regarding subsistence harvesting rights.

2. Land claims policy

- Federal Specific Claims policies and practices should immediately be reviewed as to its exclusion of non-status or non-band based organizations from pursuing treaty-related claims. Consideration should be given to the establishment of a separate agency for the acceptance and negotiation of specific claims so as to avoid the intrusion of the Act into the consideration of their eligibility, merit and settlement.

D. The Policy and Program Sector

1. Health Care

- That NHW immediately address, in conjunction with the NCC's affiliates, the health care needs of off-reserve Indians and Metis.

- That uninsured health benefits be provided, at the very minimum, to all persons entitled to registration, with recoverable expenditures back to the date of entitlement, April 17, 1985.

2. Education

- That post-secondary education benefits be provided on an equal basis to all Indian people and gradually expanded to cover all aboriginal peoples.

- That existing inconsistencies in the eligibility of institutions for accreditation under the program be resolved in full consultation with the NCC and other Indian organizations.

- That the Minister of DIAND direct the resoucing of the NCC Task Force on Education and the establishment of a joint review committee to review policy and program requirements for Indian peoples not served by current federal programs and policies targetted for on-reserve residents.

3. Housing

- That the off-reserve housing program extant prior to C-31 be re-established, in consultation with Native housing delivery agencies and so as to avoid over-laps with CMHC programs for non-status and Métis people.

4. Child Welfare

- That DIAND assist in the development of tripartite child welfare agreements for non-reserve Indians.

5. Subsistence Fishing

- That DFO establish a joint policy agency with the NCC and its affiliates to ensure that food fishing rights of non-band Indians are afforded equitable implementation and that due regard is given to effective conservation and stock enhancement of the resource.

6. Implementation of Indian Act

- That co-implementation be re-stored as a guiding principle for the Indian Act and that monitoring, liaison and information/assistance funding be restored at adequate levels to Indian organizations.

- That the registration entitlement unit in DIAND be decentralized the regions to allow for greater client-sensitivity and faster turn-around time in processing applications.

- That the DIAND Test Case Litigation fund set aside for C-31 related cases be withdrawn from political control of the Minister and rest with a special litigation review panel drawn from non-governmental and aboriginal organizations, as is the case with the Depatment of Justice Charter test case fund.

ANNEX 1

NCC
Bulletin: The Bill C-31 Death Rule

Loss of Entitlement to Status
in the case of Parental Death

Background:

This special bulletin reports on the effects of a little-known "Death Rule" built into the revised Indian Act on entitlement to status. In a separate special bulletin, the possible effects of the "Death Rule" on entitlement to membership in bands is addressed. Until recently, the Registrar has not been applying the narrow interpretation of the "Death Rule" discussed in this bulletin. However, if the Registrar changes his mind about the rule, and if the narrow interpretation is upheld by the courts, many individuals who are now registered might suddenly lose their status and, if they were entitled, their membership in bands.

In summary, Bill C-31 contains a parental death rule that could, if it is applied narrowly, mean that persons who would otherwise be entitled to status under paragraph 6(1)(f) or subsection 6(2) because their parent or parents are also entitled to status under one or both of those sections are not entitled to status if the parent or parents died before April 17, 1985.

The Parental Death Rule and Status:

A "parental death rule" affecting status entitlement is written into sections 6(1)(f) and 6(2) of the revised Indian Act. Taken alone, the wording of these two clauses would have meant that all first time-registrants would be affected by the death rule, even those persons who had two parents who were reinstated because of former loss of status. What limits the effect of the death rule is section 6(3). This clause is a "deeming" or interpretation clause which says that for the purposes of determining entitlement under either 6(1)(f) or 6(2), a parent referred to in either of those clauses is to be

deemed as entitled to be registered even where the parent or parents died before April 17, 1985.

The issue is: does section 6(3) protect all people from the application of the "death rule"? To date DIAND has been registering applicants as if the death rule applies to nobody. However, that situation may be changing since DIAND has recently sought a legal opinion as to the effect of the death rule. If a narrow interpretation of section 6(3) is agreed to, then some people may now be excluded from registration who would, under the more liberal interpretation of section 6(3), be deemed as entitled.

The Narrow Interpretation of the Death Rule:

Subsection 6(3) is important not for what it says but for what it may leave out. In a narrow interpretation, it could be seen to mean that a person is **only** entitled to status under either 6(1)(f) or 6(2) if their parents were either entitled under 6(1)(a), (c), (d) or (e), whether they are dead or alive, **or** if their parent or parents were entitled under either 6(1)(f) and/or 6(2) **and** were alive as of April 17, 1985. The following chart provides a guide to who would and would not be affected by the section 6 "death rule" under this narrow interpretation:

Entitlement of Parent(s):	"Death Rule" applies to Child?
A. Parent(s) who had or lost status	A. First Generation Child entilteld under either 6(1)(f) or 6(2)
s. 6(1)(a) [pre-C-31 Indian]	no
s. 6(1)(b) [member of new Band after 1985]	no
s. 6(1)(c) [lost status because of sexual discrimination in old Act.]	no
s. 6(1)(d) ["voluntary enfranchisees' and their enfranchised families]	no
s. 6(1)(e) [involuntary enfranchisees before 1951)	no

B. Parent(s) entitled under 6(1)(f) or(2)		B. Second and Higher Generation Child entitled under either 6(1)(f) or s. 6(2).
s.6(1)(f)	both parents entitled to reinstatement under 6(1)(a), (c), (d) or (e)	yes
s. 6(2)	one one parent entitled to reinstatement under 6(1)(a), (c), (d) or (e)	yes

The Date of Death

Following the narrow interpretation, if you are a 2nd or higher generation child the "death rule" could apply to you if your Indian parent or parents died before April 17, 1985. You would not be affected if your parent or parents had status or were entitled to registration under the old, pre-1985 Indian Act. You would be affected only if your parents are themselves only entitled to first-time registration because of Bill C-31. To give a few examples:

Example 1:

Mother (reinstated under 6(1)(c)) —— **Father** (non-Indian)

I

1st Generation: **Child** (entitled under 6(2)) —— **Spouse** (also a s.6(2))

I

2nd Generation **Child** 6(1)(f) or not entitled

Example 2:

Mother (registered under 6(1)(c)) —— **Father** (reinstated under 6(1)(d))

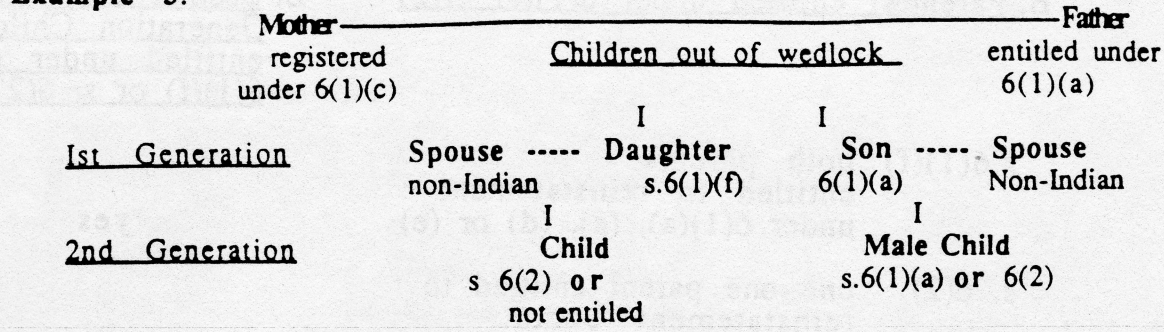
I

1st Generation **Child** (s.6(1)(f)) —— **Spouse** (s. 6(1)(c))

I

2nd Generation **Child** s 6(1)(f) or 6(2)

Example 3:



In all three examples, the 1st Generation child would be entitled to registration even if both parents were dead long before 1985. The reason is because the "deeming" provision in subsection 6(3) treats the reinstated parents as reinstated even when they were not alive to see Bill C-31.

In Example 1, the 2nd Generation Child would be entitled to registration after April 17, 1985 **if and only if both parents,** the 1st Generation Child and the Spouse, were alive as of April 17, 1985.

In Example 2, the 2nd Generation Child would be entitled to be registered as of April 17, 1987 under section 6(2) even if both parents were dead before April 17th, 1985, because one parent had lost or was denied status under the old Indian Act. **If both parents were alive** on April 17th of 1985, then the "2nd Generation Child" is entitled under s. 6(1)(f) and **can pass on status** to his or her children (if, of course, the 2nd Generation Child" is also alive as of April 17th, 1985). **If only one parent is alive or if both are dead,** then the 2nd Generation Child is only entitled to status under s.6(2) and **cannot automatically pass on status** to his or her children in the 3rd Generation.

In Example 3, the 2nd Generation Children would be entitled to be registered depending on two factors, the sex of their Indian parent and the date of death of their parent in the Indian line. The 2nd Generation Child (whether a boy or girl), would be entitled under s.6(2) **only if** the child's mother (the 1st Generation Daughter) was alive on April 17, 1985. In this case, the death rule operates together with a complex sexual discrimination rule that Bill C-31 contains. Between 1951 and 1985 any male Indian could pass on status and band membership to his son, even if the son were born

out of **wedlock.** However, as in this case, the male Indian had a daughter out of **wedlock** to an Indian woman who before or after the birth lost status by marriage to a non-registered Indian. Because DIAND is interpreting C-31 narrowly, the 1st Generation daughter is not treated equally to her brother and is only entitled to status under s.6(2) through her Father. Since she is also entitled to status through her mother, she becomes entitled to status under s. 6(1)(f), which means that she can, if she were alive on April 17th, 1985, pass on status automatically to her children. If she did not live past April 17th, her child, the 2nd Generation Child in this example, is not entitled to status at all, even though that child's cousin (the 2nd Generation Male Child) would be entitled to status under s.6(2) regardless of the date of death of his father. If the 2nd Generation Male Child was born before April 17, 1985, he would be entitled to both status and band membership under s. 6(1)(a).

What can be done about the Death Rule?

As with the section 11 death rule that may be interpreted so as to deny band membership to some people because of the date of their parents death, the NCC argues that interpreting the status or section 6 "death rule" narrowly would be unjust and un-constitutional. It would be unjust because it arbitrarily denies people the right to registration solely because of the date of their parent's death. When added to other unjust provisions of the new Indian Act, such as the sexual discrimination rule affecting illegitimate daughters of male Indians, the results would not only be doubly unjust but absurd.

The NCC also sees the the Registrar as being required, in the face of ambiguous wording in the Act, to interpret the application of the Act in a liberal manner consistent with the interests of Indian people. This rule of interpretation is one laid down by the Supreme Court and must be followed by the Registrar. Applying the "death rule" to any applicant for status under the Act would violate this rule.

The NCC also feels that the rule is discriminatory on the basis of age, contrary to the requirements of the *Canadian Charter of Rights and Freedoms* passed in 1982. Because the Act was passed in 1985, after s. 15 of the

Charter came into effect on April 17th, it seems clear that the discrimination would be applied illegally. The only legal grounds for such discrimination would be if the rule was aimed at improving the condition of disadvantaged individuals or groups. Since this rule penalizes individuals solely because of the age of their parents and not because of any reason that their entitlement to registered status might cause a "worsening" of the situation faced by Indian groups, the NCC feels that the rule would be clearly unconstitutional.

In September of 1987, the Standing Committee on Aboriginal Affairs and Northern Development is supposed to investigate the impact of Bill C-31 and make recommendations for changes to the legislation. The NCC will be tabling its own report and recommendations to Parliament calling for the elimination or repeal of both the status and the membership "death rules", along with other discriminatory sections of the Indian Act.

All affiliates of the NCC and other interested groups and individuals are encouraged to support the elimination of any application of a "death rule" and provide the NCC with any information of known cases where the rule is being applied.

NCC Bulletin: The Bill C-31 Death Rule

Loss of Entitlement to Band Membership in the case of Parental Death

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Background:

Depending upon how the Indian Act is interpreted by DIAND, it is possible that as of June 28, 1987 **most but not all** people entitled to status under the new Indian Act became entitled to Band Membership as long as their Band had not already had a membership code in operation that legally excluded them from membership.

This **Bulletin** provides summary information on a significant interpretation issue that has become the focus of recent attention within DIAND and with Band councils and legal advisors. The issue concerns the possibility that section 11 of the revised Indian Act excluded some people from entitled to membership on June 28 of 1987 because their parents were not alive on that date.

Since Bill C-31 was passed in 1985 it has been widely known that one group of people entitled to **status** under the revised Indian Act might **not** become entitled to **membership** automatically on June 28th of this year:

- Any person whose band took control over membership before June 28, 1987 is subject to the rules of the membership code. As of June 28th there were only about 15 confirmed Band codes in operation; but several hundred proposed codes had been forwarded and could well be upheld as valid as of June 28th. Any person who did not become entitled to band membership until June 28, 1987 **and** whose band takes control of its Band Membership system prior to that date, or prior to the person becoming entitled to membership (e.g. in the case of children born after June 28) can be excluded from entitlement to membership if the Band's Membership Code allows it.

The "parental death rule", if upheld as valid, means that a second group of persons would not become entitled even where a Band had no code in place on June 28, 1987.

- **Any person** who became entitled under sections 11(1)(d) or 11(2) [**because** of entitlement to registration under sections 6(1)(f) or 6(2)] and whose parent or parents were also only entitled under those sections **and** where the parent or parents who are entitled were not alive as of June 28th of 1987.

To date, the Registrar has **not** been interpreting the Act in accordance with the "parental death rule" that section 11(2)(b) clearly sets out, because of the special but ambiguous wording of section 11(3) which seem to eliminate the parental death rule in most if not all cases. But this may change at any time with the result that hundreds, and possibly thousands of individuals may find that they are not entitled to band membership as of June 28th of this year.

The Parental Death Rule:

Relatively few people are aware that there was a "death rule" built into the way the Indian Act was drafted. Most people, including the M.P.s who passed Bill C-31, have thought that **all** Indians entitled to reinstatement or first-time registration under the revised Act automatically became Band Members on June 28th of 1987, subject only to the case where a Band Membership Code came into force before that date.

However, a "death rule" is clearly written into section 11(2)(b) of the revised Act. Section 11(2)(b) states that a person is entitled to have his or her name entered into the Band List maintained by the Department:

> "(b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entrered in the Band List **or, if no longer living, was at the time of death entitled** to have his name entered in the Band List."

Taken by itself, this clause would have meant that all Indians entitled to first-time registration in 1985 because their parent or parents were entitled to reinstatement would not be entitled to membership in 1987 if the parent or parents that were reinstated died before April 17th 1985 [in the case of parents entitled under ss. 6(1)(a),(b)or (c)] or before June 28th of 1987 [in the case of parents entitled under ss. 6(1)(d) or (e)]. This would even include "first-generation" children of s 12(1)(b) women who became

reinstated under s. 6(1)(c) and s. 11(1)(c) to both status and membership in 1985.

However, the very next section of the revised Indian Act, section 11(3), reduces or eliminates the effect of the "death rule". The question that is now being addressed in DIAND is whether or not all persons are protected from the "death rule" by section 11(3). If not, then the section 11(2)(b) death rule may apply to first-time registrants in the second and higher (third, fourth, and so on) generations.

The Narrow Interpretation of the Death Rule:

Under a narrow interpretation, the "death rule" would mean that Indians newly entitled to status by Bill C-31 under sections 6(1)(f) or section 6(2) are not entitled to membership on June 28th, 1987 unless their parents had personally lost status and were reinstated [i.e. reinstated under ss. 6(1)(a),(b),(c)(d) or (e] **or** at least one of their parents was alive at the time that parent also became entitled to have their names entered on the Band List maintained by the Department.

Remember, even with a narrow interpretation that excludes persons from memberhsip in the Band Lists maintained by the Department, a person can still obtain membership if his Band has or is going to take control over its own memberhsip rules. The Band can make anyone entitled to membership no matter what the Indian Act says. It is up to the Band.

The chart on the following page provides a guide to who would and would not be affected by the "death rule" under the narrow interpretation:

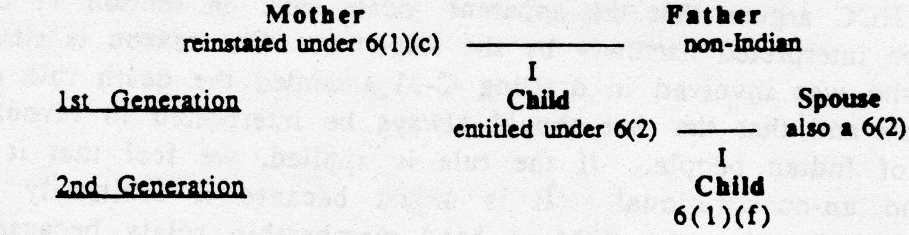
Entitlement of Parent(s):	**"Death Rule" applies to Child?**
A. Parent(s) who had or lost status	A. First Generation Child entitled under either 6(1)(f) or 6(2)
s. 6(1)(a) [pre-C-31 Indian]	no
s. 6(1)(b) [member of new Band after 1985]	no
s. 6(1)(c) [lost status because of sexual discrimination in old Act.]	no
s. 6(1)(d) ["voluntary enfranchisees' and their enfranchised families]	no
s. 6(1)(e) [involuntary enfranchisees before 1951)	no
B. Parent(s) entitled under 6(1)(f) or(2)	B. Second and Higher Generation Child entitled under either 6(1)(f) or s. 6(2).
s.6(1)(f) [born on or after April 17th 1985 with both parents entitled to band membership before June 28th 1987]	yes
s.6(1)(f) [born before or after April 17th 1985 with neither parent entitled to band membership until June 28th 1987]	yes
s. 6(2) [one parent entitled to band membership before June 28, 1987]	yes
s. 6(2) [neither parent entitled to band membership until June 28, 1987]	yes

The Date of Death

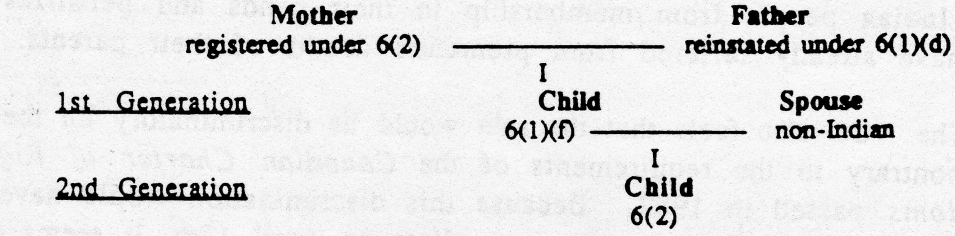
If you are a 2nd or higher generation child the "death rule" may apply to you if your Indian parent or parents died before they became entitled to Band membership under the Departmental rules (in other words, before June 28, 1987).

To give a few examples:

Example 1:



Example 2:



In both Examples, the 1st Generation child would be entitled to have his or her name added to the Departmental Band List even if both parents were dead long before 1985.

In Example 1, the 2nd generation child would be entitled to have his name added to the Band List maintained by the Department on June 28, 1987 **if and only if at least one of his parents** was alive as of June 28, 1987. In Example 2, the 2nd generation child would be entitled to have his name added to the Band List maintained by the Department on June 28, 1987 **if and only if** his Indian parent, the 1st generation child, was alive on June 28th of 1987.

When the 3rd or 4th generations are considered, it is easy to see that some absurd results could take place if the death rule is in fact applied. For example, even if a child has all four of his grand-parents entitled to be

members of the same band as of June 28th 1987, the child would only be entitled to membership in that band if his parents were alive on June 28th. In the case of a traffic accident that occurred on June 27th killing both his parents, the child would not be entitled to band membership under the Department's rules, no matter that the child's only relations, all four of his grand-parents, are alive and well as members of that band.

What can be done about the Death Rule?

The NCC argues that the apparent "death rule" in section 11 does not need to be interpreted narrowly by the Registrar. The reason is simply that no one who was involved in drafting C-31 intended the death rule to apply to anybody and that the Act should always be interpreted in favour of the interests of Indian people. If the rule is applied, we feel that it is both unjust and un-constitutional. It is unjust because it arbitrarily prevents people from acquiring the right to band membership solely because of the date of their parent's death. This has the effect of cutting off many of the older Indian people from membership in their bands and penalizes persons who have already suffered from premature deaths of their parents.

The NCC also feels that the rule would be discriminatory on the basis of age, contrary to the requirements of the *Canadian Charter of Rights and Freedoms* passed in 1982. Because this discrimination would have occured after s. 15 of the Charter came into effect on April 17th, it seems clear that the discrimination would be applied illegally. The only legal grounds for such discrimination would be if the rule was aimed at improving the condition of disadvantaged individuals or groups. Since this rule would penalize individuals solely because of the age of their parents and not because of any reason that their entitlement to membership might cause a "worsening" of the situation faced by Indian Band communities, the NCC feels that the rule would be clearly unconstitutional.

In September of 1987, the Standing Committee on Aboriginal Affairs and Northern Development is supposed to investigate the impact of Bill C-31 and make recommendations for changes to the legislation. The NCC will be tabling its own report and recommendations to Parliament calling for the elimination or the repeal of any possible "death rule", along with other discriminatory sections of the Indian Act. All affiliates of the NCC and other interested groups and individuals are encouraged to support the elimination of the the "death rule" and provide the NCC with any information of known cases where the rule is being applied.