A. M. N. S. I. S.

Circular Letter to Executive and Board

Attached is a summary research project on Non-Status Indians prepared at the request of Jim Sinclair, President.

This is not meant to be a definitive or comprehensive report. It identifies the following:

- the current Non-Status Indians
- how they became Non-Status Indians
- the type of legislative exclusion from the Indian Act
- the effects of the exclusions
- the federal government tentative plans for responding to the Penner report;

The report concludes with some conclusions and recommendations to A.M.N.S.I.S. as to further action the Association may wish to take on the question of Non-Status Indians.

If the Association wishes to further pursue this matter specific research would need to be done but the nature of that research would depend on how the Association in co-operation with other Non-Status Indian groups wishes to pursue this issue.

Respectfully submitted

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ASSOCIATION OF METIS AND NON-STATUS INDIANS

Non-Status Indians and Aboriginal Rights

I. Introduction

The Canada Act of 1982, in more precisely identifying the Aboriginal peoples as Indian, Inuit and Metis,[1] has left unanswered many questions about that group of persons commonly referred to as non-status Indians. The term non-status Indians is generally used to refer to all of these persons who are descendents of Indians (other than Metis) but who are not covered by the current definition of Indians in the Indian Act.[2] It is generally agreed that the term Indian as defined by the Indian Act is not the same as the term Indian used in the B.N.A. Act 91-24,[3] or as used in section 35 of the Canada Act 1982. The latter Act, it is conceded, refers to all Indians, not just those who are given status by the Indian Act.

In the current constitutional negotiations under section 37 of the Canada Act,[4] it is agreed that in the case of negotiations to define Indian rights, the term Indian is to be interpreted to include non-status Indians. However, since the Prime Minister has chosen to invite national organizations, who supposedly represent the three classes of Aboriginal people in Canada, to send representatives to the First Ministers Conference, the non-status Indians have been left largely unrepresented. This is so because the Assembly of First Nations, is a national umbrella organization made up of Associations or groups who represent status Indians. Although, the N.C.C. claims to represent non-status Indians, that organization has no popular base of support among this class of persons. In addition it has never identified, developed or articulated those issues which are important to this class of Indians. Consequently the question of whether

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non-status Indians have any aboriginal rights and what their rights may be has hardly been touched on to date in the constitutional discussions. Since A.M.N.S.I.S. represents non-status Indians in this province it is therefore important to examine the issues relating to non-status Indians, to determine what they are, how they can best be pursued in constitutional negotiations and whether they can be carried forward by existing organizations or whether new organizations need to be established by non-status Indians themselves to represent their own interests.

II. Who Are The Non-Status Indians Today?

Those descendents of Indians who are not covered by the operation of the Indian Act include the Metis and all the descendents classified as non-status Indians. The Metis are identified as a seperate Aboriginal group in the Canada Act 1982.[5] Historically, they included those people recognized and dealt with as a seperate group in the Manitoba Act 1870 and in the Dominion Lands Act of 1879.[6] Today the descendents of these people form the core group of Metis. Therefore, in this presentation we will address ourselves only to those descendents of Indians who can be classified as Indians without legal Indian status or non-status Indians. There are two distinct groups of non-status Indians. The first group are those persons of Indian ancestry whose ancestors or who themselves have never taken advantage of the opportunity to register as Indians. They fit the current Indian Act definition of an Indian and could register if they so chose. If not accepted by a band they would be added to the general list of Indians. It is generally concluded that there are only a small number of non-status Indians who fit into this category, as most of these persons were registered

in an intensive registration drive carried out by the federal government in the early 1950's.

The second group of non-status Indians includes those persons who themselves or who through their ancestors have lost their status due to the operations of the Indian Act. This Act over the years has included a number of provisions which excluded certain Indians. Some of these exclusions were voluntary and others were involuntary. The voluntary exclusion was the enfranchisement provision of the Indian Act which provided for persons who belonged to a band or tribe to apply for enfranchisement. If they met certain conditions and enfranchisement was granted, they gave up their status as Indians and supposedly were put on an equal footing with all other Canadian citizens.[7]

The involuntary exclusions included all those Indian persons who were aribitrarily excluded by provisions that appeared at different times in history, in the Indian Act. These included:

- Status-Indian women who married a person not a status-Indian, their offspring and descendents; (This is by far the largest group of non-status Indians. This provision still remains in the Act and the Act still operates to exclude them today. This problem is the subject of the Penner Report and changes to the Indian Act are currently being considered by the federal government to rectify this problem;)[8]
- Indians who received professional training were as a matter of Indian Affairs policy, enfranchised whether they requested it or not although this provision of the Act was to be a voluntary exclusion provision. Certain descendents of such Indians are still excluded today even

though that provision is no longer in the Indian Act and the policy of automatic enfranchisement was changed many years ago;[9]

- Illegitimate children who are or were Status Indians, excluded by a decision of a band or the Superintendent General. This group would include descendents of Indians who have been excluded in the past and those who are still excluded at the present time. Bands have discretion in this area but it was common for those offspring whose fathers were alleged not to be status Indians, to be excluded from band membership;[10]
- Offspring who were victims of the double mother clause, that is both the mother and paternal grandmother were non-status Indians;[11]
- Persons who lived in a foreign country for five continuous years lose their residence and can only by re-instated with the consent of the band and the Superintendent General. This would likely affect primarily Indians going to live on American reserves for whatever reason. This provision did not apply to Indians who spent an extended period overseas in the armed services, or in the service of Canada.

III. The Legal and Other Provisions Which Created Non-Status Indians

Prior to and during the early years of Canadian nationhood, the government believed that the goal of its Indian policy should be to assimilate Indians into the mainstream population. The Indian Acts and Indian policies were designed

to achieve this objective. By isolating Indians on reserves it was believed that they could be acculturized to English or French culture through education and through christian religious training. It was believed that once Indians were "educated" and "christianized" they would want to voluntary become full Canadian citizens. For this reason the enfranchisement provisions were included in the early Indian Acts. The various provisions in the Indian Act which provided for the legal exclusion of Indians from the Indian Act, include the following:

a) Voluntary Exclusion Provisions

In 1869, two years after Confederation the first Act was passed providing for Indian Enfranchisement. The official title of the Act was, "An Act For The Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st. Victoria, Chapter 42."[12] The Act referred to was the Act establishing the Department of State of Canada. Originally this department was responsible for Indian Affairs.

The original provisions of the Act were designed to enable Indians to apply to become proprietors of a parcel of land on the reserve as the private owner of that land in fee simple. The individual Indian families could apply for such land and enfranchisement and if they were considered to be sufficiently civilized to hold land, they would be granted a patent to the land. This policy, if it had been effective, would in the long run have resulted in the breakup and the eventual disapperance of reserves. Persons so enfranchised were no longer considered to be Indians. This provision and policy was patterned after similar provisions in American legislation and policy.

The first Act which went by the title "An Act

Respecting Indians", was passed in 1876.[13] It consolidated a number of other Acts dealing with Indian affairs. This Act extended the voluntary exclusion provisions to include Indian persons obtaining professional degrees. This latter provision was not linked to a land allottment or patent and in this Act was automatic and not voluntary.[14] There was also a provision which allowed a band to decide that all its members could be enfranchised. It should be noted that in these Acts all Indians applying for enfranchisement, required the consent of the band, as the band had to provide a land allottment for such enfranchised Indians. If the whole band became enfranchised every family was to be allotted land and as well any band monies were to be distributed among the band members.[15]

The next amendments dealing with enfranchisement took place in 1884. This Act no longer required band consent for a member to be enfranchised but did still allow the band to raise objections as to why a person should not be enfranchised. The Superintendent General of Indian Affairs, was empowered to decide whether an Indian could become enfranchised and to grant the family a plot of land on a three year probationary period. If the Superintendent deemed the Indian to be ready for enfranchisement the land was granted in fee simple. The results were the same as in previous Acts. The other matter clarified in the Act was that the enfranchisement of an Indian with a professional degree was only automatic if the person applied for such enfranchisement. It should also be noted that this form of enfranchisement makes no mention of the Indian concerned receiving his/her share of band assets.[16]

The next major amendments in 1906 set educational requirements for enfranchisement but made no other changes

in these provisions. Subsequent amendments to the Indian Act have not substantially changed the enfranchisement provisions. The present Act still provides for an Indian to become enfranchised. If he/she owns or controls land and improvements these can be removed from the reserve if the persons wishes to continue to hold the land and occupy it or if the persons wishes to leave the reserve he may sell it privately or to the band.

The effect of all these enfranchisement provisions are that a person who became enfranchised gave up all of their rights and benefits as an Indian under the provisions of the Indian Act or under Treaty if he/she was a treaty Indian.

b) Involuntary Enfranchisement or Loss of Status

Pre-Confederation Acts make no reference to the exclusion of anyone from their band. The first consolidated Indian Act passed in 1876 already contained provisions regarding women marrying other than an Indian. Other exclusions were included in subsequent Acts.[17]

1. Exclusion By Marriage

This Act provided that a woman marrying other than an Indian or non-treaty Indian ceased to be an Indian for the purposes of the Act, except that she could still share in band annuities and other income. There is no specific references in this Act to the children but it must be assumed that if the woman no longer qualified to be a band member than neither would her children. This exclusion was carried through in successive Indian Acts and still applies today. In subsequent Acts provisions were made for such women to become automatically enfranchised, the result being the same as for any other enfranchised Indian.

This provision of the Act is still in the Act and women are still being excluded from their bands under this provision today. The Canada Act 1982 provides that this provision either be made applicable to both Indian men and women or be removed from the Act completely because of its discriminatory nature. The parliamentary committee in it's report on Indian Act Amendments not only proposes a change to this section of the Act but suggests that women who have been excluded from the operations of the Act or their descendents should be allowed to once again become a member of a band to which they once belonged.[18]

2. Other Exclusions

Over the years the following persons have additionally been discharged from bands:

- beginning in 1876 illegitimate children could be excluded from band membership by the decision of the band. This was generally done where it was suspected the father was not an Indian.[19]
- the 1876 Act also provided that any Indian absent from their reserve and living in a foreign country for more than 5 years be automatically excluded from band membership. Exclusions did not include professionals who were outside the country as a requirement of their job.[20]

These last two provisions no longer appear in the 1927 Act:

- there were several other exclusions one of which occured in 1869, that persons of less than ¼ Indian blood would not be able to be registered. No mention is made in subsequent Acts of this category of exclusion.[21]

> The other exclusion is what was called the double mother clause. This referred to the child of a status Indian male by a non-status Indian woman. The children of such a union are normally registered as Indians. However, if both the child's mother and paternal grandmother were not status Indians, their children were generally excluded from the band. The writer can find no early provisions in any Indian Act purporting to cover this unless the role applied dates to the 1869 provision which excluded persons of less than ¼ Indian blood. However, this exclusion provision was include in the 1951, 1952 and 1970 Indian Act Amendments.[22]

IV. The Effects of Enfranchisement

Whether the enfranchisement was voluntary or automatic because of exclusion provisions of the Act, the effect seems to have been to remove such persons for all time from the operations of the Indian Act.[23] The only persons who were able to be re-admitted to a band list included women who at some later date married a status Indian or persons who lived in a foreign country.[24]

The effects of being excluded from the operations of the Indian Act include the following:

- the Indian person and their family can no longer live on the reserve.
- up to 1960 this Indian person and eligible family members could not become registered voters and vote. This provision was changed in 1960 to allow all Indians to vote.

- the excluded person can no longer share in band annuities or in any future assets acquired by the band.
- the person can no longer qualify for housing, economic development, educational, welfare, health or other benefits provided by the Government of Canada to Indians.
- the person no longer can qualify for income tax or provincial sales tax exemptions.
- the person is no longer legally an Indian under the provisions of the Indian Act but may still be an Indian under 91-24 and is considered to be an Indian under Section 35(2) of the Canada Act. However, since they gave up or lost all Indian rights when enfranchised they are not covered by the provision which recognizes and affirms existing rights.

V. The Penner Report

The Parliamentary committee chaired by M.P. Keith Penner makes a number of recommendations regarding those Indians who have been excluded from the Indian Act as follows:

- it does not deal with or make any recommendations regarding Indians who voluntarily enfranchised, who lost their status because they were living in a foreign country, or the enfranchised professionals and the descendents. All descendents who fall in these categories would still be excluded unless parliament acts to include them:
- the committee recommends that Indian bands be given the power to determine who would belong to the band and that all restrictive Indian Act criteria be removed from the Act. It is possible that this would allow Indians to include persons referred to

above, to band membership. The band could also share band benefits with these persons. However, such persons would not be eligible to receive benefits as individual Indians available from the federal government unless the current Act were amended to provide for this change.[25]

- the committee recommends that the federal government recognize all Indian persons as constitutional Indians for the purpose of Indian programs. Those not accepted by bands would be placed on a general list. However, the committee then goes on to say that not all Indians would necessarily be eligible for program benefits but it gives no clues as to who would not be eligible. Since the committee recommends that in regard to status Indians living off reserves, the federal government policy should be to continue its responsibility for such Indians it is even less clear who might be excluded.[26]
- the committee makes no direct recommendations in regard to Indian women who have lost their status through marriage, even though Indian women's organizations advocated that these persons all be re-instated. Regardless of the Penner recommendations this discriminatory clause must be removed from the Indian Act before April 15, 1985.

The remainder of the Penner Report deals with Indian self-government and fiscal and economic matters. In the opinion of the writer, the committee did not realistically address or come to grips with the problems of Indians who have been excluded from the Act over the years.

VI. The Federal Government Response

The Prime Minister, in his opening address to the first ministers conference indicated that the Indian Act will be amended so that a status Indian woman who marries a non-status person and any children of the union will no longer lose their status due to marraige. Likewise, a non-Indian woman marrying an Indian will not gain Indian status but children of this union will be registered.[27] The Act will also be amended to automatically re-instate all those Indian women alive today who lost their status by marraige and their first generation children as well as the living children of deceased Indian women. However, second generation children do not become status Indians unless accepted by the band. Bands will also have the discretion to accept other persons into their membership. In theory this means that some of the other non-status Indians who have been excluded may be re-instated as status Indians.

The federal government proposals however, do not address the voluntary exclusions or any of the other mandatory exclusions of Indians resulting from the operation of the Indian Act over the years. It would appear that such persons will continue to be considered as having given up their rights as Indians. This is an arbitrary and unfair way of resolving the issue of non-status Indians.

It is assumed that the non-status Indian women and their children who are to be re-instated make up the majority of the non-status Indians. However, there are no accurate statistics as to how many non-status Indians will not be covered by the proposed amendments. None of these issues have been addressed in constitutional discussions to date. Unless the N.C.C. addresses these issues, it is clear the A.F.N. will not since it is not in their interest to do so.

The issue of those who are to be re-instated also needs further clarification since unless they choose to live on

a reserve, they would not be eligible for any Indian Act benefits under the present federal government policy. All other persons who have been enfranchised and their descendents, would not under present policy, be dealt with by the proposed amendments. It is not known how many non-status Indians would be excluded by this provision. Further, it is not known how many of this group might choose to identify as and be accepted as members of the Metis community. In view of the present confusion over who is a non-status Indian and what rights or benefits if any, would be enjoyed by those who are not re-instated the following is recommended:

a) that non-status Indians organize, take over control of the Native Council of Canada and make it into an organization to solely press for rights and constitutional provisions for non-status Indians.

b) that all those persons who voluntarily enfranchised be included as non-status Indians. At the time of enfranchisement, this was the only way that an Indian could exercise and enjoy full Canadian citizenship rights. Indians no longer have to surrender their status to exercise these rights. Therefore, fairness and equity demands, that these persons rights as Indians be restored, except their right to share in band assets.

c) that those who wish to be re-instated to an Indian band be allowed to apply for such re-instatement. Bands should be given additional land and other compensation as an inducement to accept such persons into the band.

d) those persons having no clearcut identification with an existing band or who do not wish to rejoin a band, be entered on the general Indian list.

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e) Indians on the general list be allowed to form new bands and provisions be made to allow such bands to acquire land if they wish. For those who wish to live in an urban area they should be allowed to form bands and establish self-governing institutions appropriate to the urban setting.

FOOTNOTES

1.
The Canada Act, 1982. S 35.

2
R.S.C. 1970, C. 1-6, S9(5), An Act Respecting Indians.

3
British North America Act, S.S.C. 1867, Victoria 30 & 31, S 91(24).

4
Canada Act, S.37.

5
Ibid, S.35(2).

6
Manitoba Act, 1870, 33 Victoria, C 3.

7
S.C. 1876, 43, Victoria, C 18, S 3(5), An Act Respecting Indians.

8
Ibid, 1880, S.C., C 28, S.12.

9
Ibid, 1876, C 18, S.3(b).

10
Ibid, 3(a).

11
Ibid, S.C. 1951, C 29, S.12(1)(a)(iv).

12
Ibid, S.C., C 6, S.22.

13
Supra, S.C. 1876, 43 Vict.

14
Ibid, S.86(1) ".... shall ipso facto become and be enfranchised).

15
Ibid, S.93.

16
Ibid, S.C. 1884, S.4.

17 Supra. See footnote 7.

18 Indian Self Government, Report of a Special Committee 1983, P 54.

19 Supra, S.C. 1876, S. 3(a).

20 Ibid, S.(b).

21 Ibid, S.C. 1869.

22 Supra. See footnote 11.

23 Supra, S.C. 1869, S. 16.

24 Supra. See footnote 19.

25 Supra. See footnote 18.

26 Ibid.

27 Prime Minister Address To First Minister's Conference, March 8, 1984.