

8. Rights of non-status band members

(a) Partial Indian Act rights

The rights of non-status band members are set out in s. 4.1<sup>180</sup> of the Indian Act, which reads as follows:

4.1 A reference to an Indian in any of the following provisions shall be deemed to include a reference to any person whose name is entered in a Band List and who is entitled to have it entered therein: the definitions "band", "Indian moneys" and "mentally incompetent Indian" in section 2, subsections 4(2) and (3) and 18(2), sections 20 and 22 to 25, subsections 31(1) and (3) and 35(4), sections 51, 52, 52.2 and 52.3, subsections 58(3) 61(1), sections 63 and 65, subsections 66(2) and 70(1) and (4), section 71, paragraphs 73(g) and (h), subsection 74(4), section 84, paragraph 87(a), section 88, subsection 89(1) and paragraph 107(b).

The 1988 amendments to s. 4.1 cleared up sloppy drafting and ambiguities. They added reference to the new ss. 52.2 and 52.3.<sup>181</sup> Importantly, they changed the deeming provision from a person whose name has been entered to a person who is merely entitled to have it entered.

(b) Affirmed rights

Section 4.1 ensures that non-status band members are entitled to receive the same treatment as status Indians with respect to certain matters. Following is a list showing the subject matter of the sections of the Indian Act which apply to non-status band members:

(i) Part of the band

Non-status band members form part of the "body of Indians" which may be considered a band under the Indian Act (included in the definition of "band").

(ii) Beneficiaries of trust funds

Non-status band members may be the beneficiaries of money held by Her Majesty (included in the definition of "Indian moneys", ss. 61(1), 63).

(iii) Estates of mental incompetents and infants under Minister's jurisdiction

The estates of mentally incompetent non-status band members and the infant children of non-status band members are within the exclusive jurisdiction of the Minister (included in the definition of "mentally incompetent Indian" and ss. 51, 52.2 and 52.3).

(iv) Subject to exemptions from the Act

Under s. 4(2)<sup>182</sup> the federal Cabinet may exempt non-status band members from the operation of sections of the Indian Act. Non-status band members who do not

180 Re-en. 1988, c. 57, s. 1.

181 En. 1988, c. 57, s. 3.

182 Re-en. R.S.C. 1985, c. 32 (1st Supp.), s. 2.

ordinarily reside on a reserve are not subject to the provisions of the Indian Act dealing with schools, wills and estates (s. 4(2) or (3)).

(v) Compensation for expropriated land

Non-status band members may be compensated for reserve land taken by the Minister for schools, administration, cemeteries and health projects. They will also be compensated for land expropriated under s. 35 (ss. 18(2), 35(4) and 65).

(vi) Individual possession of reserve lands

Non-status band members may be issued Certificates of Possession, and they are subject to the same laws in relation to them as are status band members (ss. 20, 22 to 25, 58(3)<sup>183</sup>).

(vii) Prosecution of trespassers

Non-status band members have the same rights as status band members with respect to prosecution of trespassers on Indian reserves (s. 31(1) or (3)).

(viii) Benefits from band revenue money

Non-status band members may receive payments from band revenue moneys for the various social welfare purposes set out in s. 66(2) (s. 66(2)).

(ix) Indian loans

Non-status band members may receive certain loans from the Minister (s. 70(1) and (4)).

(x) Farm programs

Non-status band members may receive instruction, seed, loans and other benefits under s. 71.

(xi) Subject to health regulations and hospitalization

Non-status band members are subject to the same regulations as status Indians with respect to medical treatment, health services, compulsory hospitalization and treatment for infectious diseases (s. 73(g) or (h)).<sup>184</sup>

(xii) Participation in band elections

Non-status band members are "Indians eligible to vote" for the purpose of dividing a reserve into electoral sections (s. 74(4)).

(xiii) Subject to enforcement of band taxation by-laws

Non-status band members are subject to the same enforcement procedures as

183 Re-en. 1988, c. 23, s. 8(1).

184 The reference in s. 4.1 to "paragraph 73(g) or (h)" is a drafting error and must be taken to mean "paragraph 73(1)(g) or (h)".

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status band members with respect to unpaid taxes under a s. 83 by-law (s. 84).

## (xiv) Exempt from taxes on reserve land

Non-status band members are exempt from taxation of their interests in reserve or surrendered lands (s. 87(a)).

## (xv) Subject to provincial laws affecting Indian rights

Non-status band members are subject to s. 88, by which provincial laws which affect Indian rights are incorporated by reference to become federal laws.

## (xvi) Exemption from execution against real and personal property on reserve

The general protection from execution afforded to the real and personal property of an Indian situated on a reserve also applies to the property of non-status band members (s. 89(1)).

(xvii) Subject to jurisdiction of special justices appointed to hear certain Indian cases  
Non-status band members and their property are subject to the jurisdiction of special justices appointed under s. 107 (s. 107(b)).

## (c) Denied rights

Because Parliament has chosen to enumerate the sections of the Indian Act that apply to non-status band members, the normal rules of statutory interpretation provide that the sections not mentioned do not apply to non-status band members.<sup>185</sup> Thus, non-status band members are excluded from certain valuable rights afforded to their neighbours who are status band members.

## (i) Exemption from taxation of personal property on reserve

Although included in s. 87(1)(a), relating to taxation of interests in reserve land, non-status band members are not included in s. 87(1)(b), which confers an exemption from taxation of personal property situated on reserve. Non-status band members must pay sales taxes and income tax in the same manner as non-Indians, even with respect to on-reserve personal property.

## (ii) Estates

Non-status band members are not "Indians" within the meaning of s. 42 of the Act. Accordingly, the estates of non-status band members must be administered under provincial legislation. This is frequently a more expensive process than administration by the Minister.

## (iii) Wills

Non-status band members are not covered by ss. 45 and 46 of the Act, which

means that the validity of their wills is governed by provincial legislation. In cases where the strict formalities of provincial laws have not been complied with this occasionally can be a disadvantage. The Minister cannot step in and declare the will to be valid anyway, as he can with status Indians.

## (iv) Family maintenance

Under s. 68<sup>186</sup> the Minister has jurisdiction to order that certain Indian moneys will be applied to the maintenance of spouse or family. This jurisdiction does not apply to non-status band members. The dependants of non-status band members are thereby deprived of a possible source of financial assistance.

## (v) Section 90 deeming provision

Non-status band members are not afforded the benefit of the deeming provision with respect to personal property under s. 90 of the Act. This has the effect of slightly restricting their rights under s. 89 of the Act. (It would also have that effect with respect to s. 87(b) of the Act, but non-status band members are not covered by that paragraph.)

## (vi) Trade in manufactured artifacts

Non-status band members are not protected by the saving provision in s. 91(2) of the Act. Without this saving provision the trade in certain Indian artifacts may be found to be illegal.

## (vii) Indian schooling

The Act does not set forth any jurisdiction for the Minister to provide for the education of non-status band members, either by way of tripartite agreements under s. 114(1) or special Indian schools under s. 114(2). Such children must be educated pursuant to provincial legislation.

## (d) Miscellaneous right of non-status band members

In the New Brunswick Fishery Regulations<sup>187</sup> certain fishing rights are afforded to members of the Kingsclear Band. There is no specification in the regulation that they must be status band members.

<sup>186</sup> Re-en. R.S.C. 1985, c. 32 (1st Supp.), s. 13.

<sup>187</sup> C.R.C. 1978, c. 844, s. 35(8). This subsection is reproduced below, in Chapter XIII.

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