THE PENNER REPORT ON INDIAN SELF-GOVERNMENT AND THE STATUS OF THE NON-STATUS INDIAN

The Penner Report, A Report of the Special Committee of the House of Commons on Indian Self-Government in Canada, was released on November 14, 1983. Although the report deals primarily with the concept of Indian Self-Government, it does raise certain issues which are of great concern to the Non-Status Indian population of Saskatchewan. The Report cites that there is a consensus among the various interested parties that the "First Nations" should amongst other things have the right to determine their own membership and the rights which would flow from such membership in a "First Nation". The Report makes reference to the fact that membership and Indian Status have previously been determined by arbitrary federal legislation which in many cases ignored the wishes and practices of the various Indian tribes and bands.

The Native Women's Association of Canada, The Native Council of Canada and the Association of Metis and Non-Status Indians of Saskatchewan support the principle that Indian Governments should be allowed to determine their own membership. The only condition attached to such principle would be that those women, their descendants and all others who have lost their Indian Status in the past by operation of the arbitrary and discriminatory exclusionary provisions of the Indian Act should be re-admitted to Indian Status and band membership status prior to Indian Governments being given the power to define and determine their own membership. The position as adopted by the Womens organizations and The Association of Metis and Non-Status Indians of Saskatchewan is consistent with the real and apprehended fear that if responsibility to determine and define Indian and Band Status is first given to Indian Governments, their constituents will have little or no opportunity to reclaim or re-acquire their lost status as Indians.

In order to address the concerns of the Non-Status Indians, it is essential to understand the various provisions of the Indian Act as they relate to the question of Indian Status.

The major provisions of the Indian Act dealing with the issues of membership are contained in sections 11 and 12 of the Act. Section 11 of the Act details the essential requirements for registration as an Indian while Section 12 of the Act provides for the methods or criteria by which an Indian may be denied membership or status as an Indian. The provisions of the Indian Act dealing with membership or Status as an Indian provide for discrimination on the basis of sex (male) and race (Indian). The ultimate objective of the Indian Act is to establish a single status family, either all Indian or all Non-Indian. The notion of family under the Act being the parents and children, not the notion of the extended family. The following outlines the provisions of the existing Indian Act and an explaination of those provisions alongside:

INDIAN ACT	EXPLAINATION
11(1) Subject to Section 12, a person is entitled to be registered if that person	Sections 11(1)(a),(b) and (c) set out the primary grouping of persons entitled to be registered as Indians.
(a) on the 26th day of May, 1874 was for the purposes of An Act Providing for the Organization of the Department of the Secretary of State of Canada and for the management of Indian and Ordnance Lands, being Chapter 42 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use and benefit of the various tribes, bands or bodies of Indians in Canada;	11(1)(a) - If you were considered to be an Indian on the 26th day of May, 1874, you are entitled to be registered as an Indian. This section forms the basis upon which all ancestoral connections must be made to be registered as an Indian.

(b) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May, 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the perposes of this Act;

11(1)(b) - You are entitled to be registered as an Indian if you are a member of a band who has:
(i) who has received reserve lands or has been promised reserve lands under treaty since the 26th of May, 1874, or,
(ii) been declared to be an Indian band by Order in Council of the Federal Government.

(iii) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b);

11(1)(c) - you are a male person whose ancestors on your father's side of the family (males only) would meet the requirements of (a) or (b) above.

Sections 11(1)(a), (b), and (c) establish the primary group of persons entitled to be registered as Indians. Essentially, to be an Indian, you have to be an Indian or a male person whose ancestors on your father's side of the family tracing through your male ancestors were registered as Indians or entitled to be registered as Indians.

Sections 11(1)(d), (e) and (f) open membership to another group of persons who meet the requirements of the various paragraphs:

11(1)(d) is the legitimate child of
(i) a male person described in (a) or (b), or
(ii) a person described in paragraph (c);

11(1)(d) - legitimate children (male and female) of an Indian male are entitled to be registered as Indians.

11(1)(e) is the illegitimate child of a female person described in paragraph (a),(b) or (c);

11(1)(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a),(b),(c),(d) or (e).

11(1)(e) - illegitimate children (male and female) are entitled to be registered only if born after August 13, 1956.
11(1)(f) - wives and widows of registered Indian males are entitled to be registered as Indians.

11(2) Paragraph 11(1)(e) applies only to persons born after the 13th day of August 1956.

See 11(1)(e) - illegitimate children of Indian women.

Although a person may qualify to be registered as an Indian when section 11 of the Act is considered, that person may be disqualified if that person falls into any of the categories set out in section 12:

12(1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or been alloted half-breed lands or money scrip,

(i) - self-explanatory.
See also Section 12(4).

(ii) is a descendant of a person described in subparagraph (i),

(ii) - self-explanatory.
See also Section 12(4).

(iii) is enfranchised, or

(iii) - leaving voluntarily or by operation of the other sections of the Act.

(iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraphs 11(1)(a),(b) or (d) or entitled to be registered by virtue of paragraph 11(1)(e),

(iv) - if a person's parents were married after Sept. 4, 1951 and that person's mother and his or her father's mother only gained Indian Status by marriage to an Indian male, then that person loses their Indian Status on his or her 21st birthday.

unless being a woman, that person is the wife or widow of a person described in Section 11, and

(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in Section 11.

(b) - Indian women lose their Indian Status upon marriage to a Non-Indian.

12(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

12(2) When the name of an Illegitimate child of an Indian woman has been added to the List, under 11(1)(e), the child's status may be challanged at any time within one year after its name has been added to the Band List. If the father of the child was not an Indian, then that child's name will be removed from the Band List.

12(3) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

12(3) - The Minister of Indian Affairs may give a certificate to an Indian who is no longer an Indian.

12(4) Subparagraphs (1)(a)(i) and (ii) do not apply to a person who

(a) Pursuant to this Act is registered as an Indian on the 13th day of August 1958, or

(b) is a descendant of a person described in paragraph (a) of this subsection.

12(4) - If a person who received Half-Breed scrip was registered as an Indian on or before the 13th Of August, 1958, he or she can not be deprived of their status as Indians only because they or their ancestors took scrip.

12(5) Subsection (2) applies only to persons born after the 13th day of August 1956.

12(5) - This refers to the illegitimate children of Indian women.

In past decades, Indians have lost their status for a number of reasons including:

(a) Non-registration, that is, they did not apply to to be registered or were not registered under the Indian Act.

(b) in the case of Indian women, marriage to a Non-Indian, Section 11(1)(b) takes effect on marraige to enfranchise them.

(c) Involuntary enfranchisement, this includes the minor children of an Indian adult who choses to enfranchise or who was enfranchised by the operation of the Indian Act, ie. the minor children of an Indian woman who choses to marry a Non-Indian male. It is irrelevant to the question that the father of the minor children may have been an Indian.

(d) enfranchisement owing to outside pressures - to get a job, to join the armed forces, to drink alcohol or to obtain the right to vote in Federal or Provincial elections (pre-1960).

(e) the taking of money or land scrip as opposed to treaty and living on reserves; and

(f) the operation of the double mother clause.

In August, 1982, the Sub-Committee on Indian Women and the Indian Act, in response to the presentations from the various Indian and Native Womens organizationa recommended that the issue of mewmbership be re-opened to allow those women who had lost their Indian Status through marriage to a Non-Indian, to apply for re-instatement as members of their respective bands. The recommendation also provided that the first generation children born to those women would also be entitled to apply for registration as members of their mother's bands.

The Department of Indian and Northern Affairs conducted a study in order to determine the number of individuals who would be affected by such a change in policy. The study concluded that in Canada, approximately 54,000 to 58,000 individuals would be entitled for re-admission as Indians if the women who lost their status through marriage and the first generation of their children were allowed to be re-admitted. The study also concluded that approximately only one-half of those affected by the change would apply for re-admission. Saskatchewan has approximately one-sixth of the total Indian population of Canada. If the Indian Affairs figures are accurate, then there are approximately 9,000 to 9,500 persons in the province who would be affected by the change, of whom only 4,500 to 5,000 would bother to apply for Indian Status.

The proposal of the Sub-Committee on Indian Women and the Indian Act specifically excluded the participation of the individual Indian bands in the re-instatement process. The current Registrar responsible for membership would be called upon to rule upon the individual applications. This proposal received great support from the various Native and Indian Womens organizations as a great number on women expressed concern that if the matter of re-instatement were left to the indvidual bands concerned,

they would have little or no hope of ever re-gaining their lost status. Great dissatisfaction was expressed by the various Provincial Indian organizations and the Assembly of First Nations who viewed such a proposal as being an unwarranted intrusion upon the soverignty of Indian Nations.

The Sub-Committee further recommended that if the women and the first generation of their children were to be admitted under tha Indian Act, then they were to be re-admitted as members of the bands from which they had been excluded. This recommendation specifically excluded the option of re-instatement as members of a General List.

Under the current Indian Act there are provisions to register Indians who are not members of a specific Indian Band. Members of the General List have no band affiliation and are for all intents and purposes, Indians at large who do not share in the benefits accruing to Indians who are members of a specific band. As such General List Indians do not receive Treaty monies, treaty benefits, no shares of band revenues or capital funds, band housing, and do not have the right to live on, use, occupy or inherit real property on an Indian reserve. In essence, a General List Indian is a left over Indian who has no band affiliation and who is dependant upon the good will and beneficicance of the Department of Indian and Northern Affairs for whatever benefits he doew receive.

The Indian and Native Women in their presentations to the Sub-Committee on Indian Women and the Indian Act were adamant that their re-admission to Indian Status as General List Indians would be meaningless as the General List confers only the benefit of being an Indian without the priviliges that would normally flow with band membership.

The Penner Report of November, 1983, re-examined the contraversial issue of Indian Status and made the following recommendations:

IN THE TRANSITION FROM THE INDIAN ACT TO

SELF-GOVERNMENT, THE COMMITTEE RECOMMENDS THAT THE STARTING POINT BE THE BAND, WITH ITS MEMBERSHIP NEWLY DEFINED. THE FEDERAL GOVERNMENT SHOULD LEAVE IT TO EACH BAND TO DECIDE WHETHER ITS PEOPLE SHOULD CONSTITUTE THEMSELVES AS AN INDIAN GOVERNMENT, OR WOULD JOIN WITH OTHERS TO FORM AN INDIAN GOVERNMENT OF WHICH THE BAND WOULD BE A PART.
(Recommendation No. 8 at p. 54).

THE COMMITTEE ASSERTS AS A PRINCIPLE THAT IT IS THE RIGHTFUL JURISDICTION OF EACH INDIAN FIRST NATION TO DETERMINE ITS MEMBERSHIP, ACCORDING TO ITS OWN PARTICULAR CRITERIA. THE COMMITEE RECOMMENDS THAT EACH INDIAN FIRST NATION ADOPT, AS A NECESSARY FIRST STEP TO FORMING A GOVERNMENT, A PROCEDURE THAT WILL ENSURE THAT ALL PEOPLE BELONGING TO THAT FIRST NATION HAVE THE OPPORTUNITY OF PARTICIPATING IN THE PROCESS OF FORMING A GOVERNMENT, WITHOUT REGARD TO THE RESTR-CTIONS OF THE INDIAN ACT.
(Recommendation No. 8 at p. 55).

THE COMMITTEE RECOMMENDS THAT THE FEDERAL GOVERNMENT CONSIDER USING A GENERAL LIST AS A MEANS OF PROVIDING SPECIAL STATUS TO PEOPLE WHO ARE INDIAN FOR THE PURPOSE OF INDIAN PROGRAMS, BUT WHO ARE NOT INCLUDED IN THE MEMBERSHIP OF AN INDIAN FIRST NATION.
(Recommendation No. 10 at p. 56).

THE COMMITTEE ASSERTS THAT THE CONTINUING RESPONSIBILITIES OF THE FEDERAL GOVERNMENT TOWARD INDIAN PEOPLE, WHETHER OR NOT THEY BECOME MEMBERS OF INDIAN FIRST NATIONS, MUST BE RECOGNIZED. THE COMMITTEE URGES FEDERAL, PROVINCIAL AND FIRST NATIONS GOVERNMENTS, ALONG WITH REPRESENTATIVES OF INDIAN PEOPLE WHO ARE NOT MEMBERS OF INDIAN FIRST NATIONS, TO WORK TOWARDS ARRANGEMENTS THAT RESPECT THE RIGHTS AND ASPIRATIONS OF ALL INDIAN PEOPLE.
(Recommendation No. 23 at p. 68).

The recommendations if adopted by the Federal Government will result in aa complete reversal of the recommendations made slightly more than a year previously by the Sub-Committee on Indian women and the Indian Act. The recommendations provide that the issues of membership and the rights that are to flow with such membership shall be determined individually by each

Indian Band. The Sub-Committee further goes on to suggest that the individual Indian Band may wish to consider using the existing Band List and anyone who might be so fortunate to be re-admitted by way of legislative change to decide and set the criteria for future in the band. The recommendation provides that there will be no universal standards by which Indian Status can be determined. It also establishes a mechanism by which those individuals having a vested interest in the assets, programs, rights and monies flowing to a particular Indian Band will have the power to decide upon some unspecified criteria who will or will not share in those assets etc.. It would be naive to believe that decisions will be made without consideration being given by the decision makers to their diminishing share of the proceeds.

The recommendation does not require the establishment of Appeals procedures nor does it make any reference to the application of the newly proclaimed Canadaian Charter of Rights being made applicable to the criteria to be adopted by the individual Indian Bands.

There are many Non-Status Indians alive today who remember all too well the effects of the Band Lists published and posted pursuant to the Indian

act of 1951. The course of action proposed by the Penner Report of 1983 almost gurantees that the same horror show will be carried out once again, however, without the benefit of an impartial referee to control the combattants.

When one considers the whole of the Penner recommendations dealing with the issue of membership, it is more than apparent that there is to a subgroup of Indians, who for all intents and purposes will be recognized by the Canadian Constitution as being Indians but, not having any of the rights, privileges and benefits that are to flow to members of the various Indian Governments. Those who are to become members of the various "First Nations" will have the rights to share in the assets of that band, the programs to be made available to that band and to hold land on that particular Reserve. For those on the General List, they will have the right

to call themselves Indians, once again, and to pick up the few crumbs that the Federal Government happens to toss their way because they happen to be Indians under the Constitution.

The Penner Report goes even further in that it specifically recognizes that these Constitutional Non-Status Indians are a Federal responsibility but, their future and their aspirations will be determined by the various levels of Government including the Federal, Provincial and Indian Governments. It is clear that this group of Constitutional Non-Status Indians will have the right to discuss their future and their rights with the various levels of governments. It is also abundantly clear that they shall not have the rights of self-determination. They will be condemned to the dance floor, caught in the walse of three political elephants with blinders on their eyes.

One only has to remember the words of Commissioner Morris when negotiating the western Treaties with the Indians. He made reference to those Metis who lived the Indian way of life but, who did not live among the Indians in the following terms: "Something should be done for them, not Treaties. The Penner Report advocates that the present day Non-Status Indian be treated in the same fashion as the Metis of more than a century ago.

If the Penner Report is to be adopted, the Non-Status Indian in Saskatchewan may be classified as an Indian in the Province for the purpose of the hunting and fishing rights granted to Indians in the Province under the terms of the Saskatchewan Natural Resources Transfer Agreement Act of 1930, as well he of she may receive the benefits of the Provincial policy with respect to the sales tax exemption as well as the legal right to call himself or herself an Indian.

I am not sure if being a Non-Status Indian is as bad as being a General List Constitutional Non-Status Indian.