

BEYOND BLOOD:
RETHINKING ABORIGINAL IDENTITY AND BELONGING

by

Pamela D. Palmater

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for the degree of Doctor in the Science of Law

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DEDICATION

This thesis is dedicated to my two sons, Mitchell and Jeremy Palmater. They are the ultimate inspiration for this subject and have made sacrifices along the way so that I could complete this important work. I see my father's spirit in my sons and I receive great comfort in knowing that he has also been with me on this journey through my children. There is nothing I can do to change the suffering my father endured when he was alive; but I do have the power to change the future for the benefit of my children and their children seven generations into the future. It is with this goal that I have written this thesis.

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ABSTRACT

The traditional Aboriginal Nations in Canada, like the Mi'kmaq, Mohawk, or Maliseet, have been divided into multiple Indian bands. Their vast traditional territories have been taken up for settlement and the little land that remains in their possession is concentrated in tiny reserves. Similarly, traditional Aboriginal identities have been divided into so many legal and political units, that even families can be divided along these same lines. Many Aboriginal people now identify as status and non-status Indians, with further sub-categories like 6(1) and 6(2) status Indians, or original members and restored members. Single communities can be bitterly divided along these lines and attempts of reasserting traditional identities often incorporate these same divisions.

This thesis looks at the long history of government interference with the identities of Aboriginal peoples and their communities and how that continued interference has resulted in divided communities, lengthy litigation and bitter politics. While Canada has officially rejected assimilation as a goal, the antiquated *Indian Act* still imposes Indian identities upon Aboriginal peoples and excludes large groups of Aboriginal people. This issue is legally, culturally, and politically sensitive and solutions are often seen as too controversial to effect much-needed change.

My contributions to this issue can be categorised into four main arguments: (1) the preservation of Aboriginal culture identity is not only a worthwhile endeavour, but is a necessary part of ensuring that Aboriginal peoples have access to the good life, (2) Aboriginal Nations have the right to determine their own identities (citizenship criteria), however this right is limited by the rights of others, including the right of individual Aboriginal people to belong, (3) the exclusion of some individuals, like non-status Indians for example, is currently based on discriminatory characteristics like blood quantum/descent, which do not reflect cultural identity, and (4) if band membership and self-government citizenship codes are based on these same discriminatory characteristics, then neither offers solutions for the future, but merely perpetuate the “status” quo. The solutions that I offer are based on the reinforcement of relationships between individuals, families, communities, and Nations, versus the sole reliance on singular identity markers.

ACKNOWLEDGEMENTS

The completion of this thesis would not have been possible without the help and support of a very long list of people. First, my children and my large extended family have supported me throughout the entire process. They provided me with no shortage of opinions and views with regards to my thesis topic, many of which became the subject of protracted, Palmater-style, no-holds barred debates. While Frankie, Nelson and Phil often challenged me to think outside of the current legal context, Patsy, Glenda and Phebe offered words of encouragement when I needed it most. Many times I thought I would not finish this project, but Mitchell and Jeremy reminded me of how important it was to keep going. After I had emerged from what felt like years of total academic seclusion, my loyal friend Sonia M. was also there to celebrate my success. She stayed a true friend through the entire course of this project, though I missed many of her calls and numerous gatherings and parties. For this faithfulness, I can never repay her, but I am sure she will hold that over me until I have tried!

There are also other special people who contributed to my doctoral studies in different ways. I must mention my dear friend Ann W., who was like my life line during the course of this project. She always found a way to see the positive and never doubted for a moment that I would finish. I also thank my former employer, Justice Canada, for their support of this project by allowing me to take extended periods of leave to advance my research. Without the support and advocacy on Michael Butler's part, I may not have been able to even start this project. Others at Justice, like Ted Tax, Clare Beckton and Ann McAllister also supported me professionally and with regards to my doctoral studies. The same goes for the folks at Indian and Northern Affairs Canada (INAC) who also granted me extended leave. Steve Joudry was the force behind INAC's support of my educational endeavours continues to support me academically and professionally. I can never thank him enough for his ongoing support.

Then there was my amazing thesis committee. I was fortunate to have all of Dalhousie University's top legal experts on my committee. Each of them offered something completely unique. My thesis supervisor, Philip Girard, was always patient when I missed deadlines and had to edit lengthy drafts. He had a way of gently pushing me forward whenever I started to slow down. Ronald Murphy challenged me to think about broader theoretical issues, which has only benefited this thesis. Richard Devlin made sure I supported the claims I made throughout the thesis, demanding that I footnote just about every thought I have ever had over the last six years. Similarly, Dianne Pothier used her constitutional expertise to go through my arguments with a fine tooth comb and demanded nothing less than arguments that could hold their own against criticism. Constance MacIntosh offered expert advice with regards to Aboriginal law, but she also offered encouraging words when I was feeling unsure of myself or frustrated. I feel very blessed that I had such a well-rounded thesis team to support me and push me all at the same time.

There are lots of other people whose help and kindness have nourished (like my mother, my cousins, my nieces and nephews) and pushed me along over the years; so many that I could never list them all here. They know who they are and that I am indebted to them for their part in ensuring that I reached my goal. Thank you.

Chapter One: Introduction

In order to understand what this thesis is truly about, it will be necessary to understand who I am.¹ In the Mi'kmaq tradition, a large part of what makes me who I am today relates to where I came from: my ancestors, my large extended family, my children, my traditional territories, customs and practices, and my home community. I did not write this doctoral thesis to become a doctor, to sell books or to obtain employment. I wrote this thesis to make a contribution that would have practical use for my family and the larger Mi'kmaq Nation. I hope that I will be able to explain how the historical injustices forced upon my people by colonial and modern governments have caused a sickness of sorts within my community and others. I want to emphasize how out-dated, racist, colonial policies evolved and have become part of the mindset of many Aboriginal peoples, to our own detriment. Finally, my goal is to highlight the severity of the harms suffered by those who are excluded from their communities and their identities. I believe that it is only through acknowledgement of our problems and a willingness to change that our communities can heal and move forward. I want to leave my children and our future generations all the strength, wisdom and security that comes from a strong identity based on our solid connections to our culture, history, traditions, and traditional territories. I have undertaken this particular thesis because it represents my life's work. My ancestors negotiated treaties to protect our lands, rights, and identities for our heirs forever. My family fought for justice for those who have been excluded from their communities, and my future generations are relying on me to do my part. It is with the above purpose in

¹ The views that I have expressed in this thesis are my own and do not necessarily reflect the views of my previous employers, Justice Canada, Indian and Northern Affairs Canada, and/or any other organisation with which I am, or have been, associated.

mind that I offer the following historical context which, I hope, will help readers to understand what this effort has been about.

I am a Mi'kmaq mother of two boys whose home community is the Eel River Bar First Nation.² The Eel River Bar Reserve #3 was established by Order-in-Council on February 28, 1807.³ It is a tiny reserve located on the Bay of Chaleur on the northern tip of New Brunswick, just a few kilometres outside of the town of Dalhousie. The band's current population of 608 members is divided into 326 band members on reserve and 282 band members off reserve.⁴ Historically, the Mi'kmaq people were the first to inhabit the area now known as Dalhousie, New Brunswick. During the summers, they lived close to the shore where they ate salmon, shellfish and other seasonal fish and fowl.⁵ In winters they would live in the forest for better shelter and where they would hunt and trap fur-bearing animals.⁶ They had close relations to the rest of their Nation which was spread out over other parts of what is now known as New Brunswick, Nova Scotia, Prince

² Unless otherwise cited to a specific documentary source, please note that the familial information provided in this chapter comes from my own personal knowledge or that of the various members of my large extended family.

³ Indian Claims Commission, "Eel River Bar First Nation Inquiry: Eel River Dam Claim", Indian Claims, online: <<http://www.indianclaims.ca/pdf/EelRiverEng.pdf>> [*Eel River Inquiry*] at 6.

⁴ Indian and Northern Affairs Canada, "Eel River Bar First Nation", online: INAC<http://www.ainc-inac.gc.ca/at/mp/pg8_e.html>.

⁵ B. LeCouffe, "One in Brotherhood: The Labillois and Related Families" (Moncton, 1989, unpublished) (a family genealogy and history in the possession of the author) [*Family History*] at 24. This book is a genealogy compiled by one of the sisters of the local church who recorded all the information from church records, vital statistics and news articles in relation to the Labillois family, who are related to my family: the Jeromes.

⁶ *Ibid.*

Edward Island, and parts of Quebec and the United States.⁷ They were especially close with the Mi'kmaq community at Restigouche (known as Listuguj).⁸ Many Aboriginal communities were relocated during the colonial period to suit the settlement requirements of the settlers and Eel River Bar was no exception.

The Eel River Bar community used to be located in the New Mills area of northern New Brunswick where they previously held thousands of acres of good land.⁹ They were forcibly relocated from their traditional community's territory to the current reserve location which many of the current residents have described as swampland.¹⁰ The Mi'kmaq name for Eel River Bar is Oppi'kanjik.¹¹ While the community itself may be one of the smaller ones, relatively speaking, it makes up for its size with its rich history and close knit community members who continually pass on oral histories about their large extended families and important historical events, as well as their Mi'kmaq language, traditions and practices. One cannot mention Eel River Bar without honouring a very special elder: Margaret Labillois.¹² Margaret has dedicated her life to teaching

⁷ D. Paul, "Mi'kmaq Territory", online: <<http://www.danielnpaul.com/Map-Mi'kmaqTerritory.html>>. *Family History*, *supra* note 5 at 24.

⁸ Listuguj Mi'gmaq Government, "Listuguj", online: <<http://www.listuguj.ca/>>. Listuguj (formerly Restigouche band) were once located at the southside of the Restigouche river. However, a reserve was created for them in 1853 and they were relocated to the southeastern corner of Quebec.

⁹ *Family History*, *supra* note 5 at 24.

¹⁰ *Ibid.* The additional information about the land quality at Eel River Bar comes from my father, Frank Palmater, my uncle Guy Palmater, and my cousin Gordon Labillois who is currently a band councillor at Eel River Bar.

¹¹ Economic Expert, "Mi'kmaq Communities", online: <<http://www.economicexpert.com/a/Mi:kmaq.htm>>. *Family History*, *supra* note 5 at 24.

¹² *Family History*, *supra* note 5 at 131-142.

Mi'kmaq language, culture and tradition to children and adults alike.¹³ Margaret has an amazing collection of stories and history about all the families that live at Eel River Bar, one could lose days just listening to them. She has been an inspiration to all who know her and I have to admit that her homemade bread and lobster boils are too hard to resist. She is representative of the strength, wisdom and perseverance of the Mi'kmaq families who live both on and off the Eel River Bar First Nation.

One of the first families to have lived in this new reserve-based community was headed by my great grandfather, Louis Jerome, and my great grandmother, Susan Hamilton. The affection between Louis and Susan was apparently a forbidden one, as she was much younger than he was and her family did not approve. As the family story goes, Louis decided that he had to have Susan as his wife and so got in his canoe, paddled across the Bay to what is now the Quebec side and “stole” Susan from her family.¹⁴ Louis and Susan were subsequently married on June 22, 1875 in the St. John Baptist church in Dalhousie, New Brunswick.¹⁵ Apparently, his strong will served him well as a leader of his community as well. Louis Jerome was one of the first chiefs of Eel River Bar First Nation and was considered to be a great leader by those who knew him:

One of the first chiefs on the Bar Reserve was a great leader by the name of Louis Jerome. Large in stature, clothed in deerskin, decorated with porcupine quills, this christian man travelled the North American Continent by foot. He would

¹³ *Ibid.* Margaret joined our extended family when she married Mike Labillois.

¹⁴ This is one of my favourite family stories and, depending on who is doing the telling, the story has many more exciting twists and turns.

¹⁵ *Family History*, *supra* note 5 at 69. They were both specifically noted as “Indians” on the church marriage records.

journey every summer to the Miramichi with his family to meet other Mic-Macs and celebrate in the Indian festivities.¹⁶

Chief Jerome and his wife Susan went on to have 10 children: Monica, May, Mary Angelica, Christopher, Elizabeth, Joseph Noel, Rosalie, Christina Ann, Rose and my grandmother, Margaret.¹⁷ My grandmother Margaret Jerome was born October 5, 1888.¹⁸ She grew up on the reserve and had close connections with many friends and relatives in Listuguj whom she visited often.¹⁹ Margaret married William Palmater on June 7, 1910, and later gave birth to my father, Frank Palmater, on April 8, 1914.²⁰ When the reserve was first established, there were only a handful of large extended families.²¹ However, by 1930, the reserve's population had grown to over thirty extended families, including the Jeromes, Labillois, Martins and Caplans to name a few.²²

Chief Jerome's daughter, Margaret Jerome, lived on the Eel River Bar reserve for many years. She was a special woman who had many connections with various Mi'kmaq communities. She was often sought out by community members for her detailed knowledge of the healing properties of local plants and herbs. She tended to the wounds

¹⁶ *Ibid.* at 24.

¹⁷ *Ibid.* at 67-69. My great grandmother, Susan, died at the age of 65 on October 17, 1923, and my great grandfather, Louis, died at the age of 92 on December 13, 1934.

¹⁸ *Ibid.* However, early census records notes her birth as Oct.19, 1889. Our family is currently in the process of having a registered genealogist verify our records.

¹⁹ Listuguj is fairly close to Eel River Bar and, as a result, there is a good deal of intermarriage between the two communities.

²⁰ *Family History, supra* note 5 at 67. Her first husband, William, left the family when Margaret's children (my aunt, uncles and father) were quite young. She subsequently married William McIlbreagh on April 7, 1956.

²¹ Louis Jerome passed away on December 13, 1934, at the age of 92, and his wife, Susan, passed away on October 17, 1923, at the age of 65.

²² *Family History, supra* note 5 at 24B, 48A.

of her large extended family and other community members without the need for doctors or nurses. I have heard many stories about my father and his brothers having their heads or noses stitched up by her right in their kitchen. According to our family history, many years ago there was a very fatal illness that spread through the Mi'kmaq and non-Mi'kmaq communities of the north shore of NB. Very few of the people that my grandmother, Margaret, treated, ever died from this illness. She was very successful using traditional medicines to treat a wide range of ailments. Meanwhile, large numbers of people from the non-Aboriginal community were dying from the same illness despite being attended to by the local doctor. It was then that the local doctor asked my grandmother to attend with him to treat his non-Aboriginal patients. For the first time in her life, she was permitted to enter the front doors of those she treated. She successfully treated his patients, doing it all without pay. Unfortunately, when the illness was over, she was no longer permitted through the front doors of her former patients.²³

Margaret Jerome was raised in a traditional Mi'kmaq family and could, therefore, speak her Mi'kmaq language fluently and often did so with her friends and family. However, outside her community, she did not speak her language as it was not approved of by those in the non-Mi'kmaq community. She grew up in an age when there were governmental laws and policies, day schools, residential schools and poor social attitudes, all of which were directed against Aboriginal people who practised their traditions, customs, languages and beliefs. She later married William Palmater, a non-Aboriginal man with whom she had five children, one of whom was a son named Francis (Frank)

²³ This story has been passed down to me from my siblings, and to them from Margaret Labillois and other community elders who knew my grandmother very well.

Xavier Palmater.²⁴ Despite my grandmother's ability to speak fluently in her Mi'kmaq language, she told all her children, including Frank, that speaking his traditional language would only cause him harm in the outside world. It was out of a sense of protection for her children that she never taught them their traditional language. She was never free to be herself, or to pass on her language to her children and grandchildren.²⁵ She had a very difficult life.

Frank Palmater, Margaret's eldest son (my father), also had a difficult life growing up as a Mi'kmaq person. He was made to feel ashamed of his heritage. At a very young age, his father, William, left the young family alone to fend for themselves. As a result, my father had to leave school around grade 3 in order to work to support the family.²⁶ My father used to tell us that he really missed going to school and that whenever his brothers and sister would get home from school, he would read all of their school books and try to teach himself as much as he could. All of his brothers and his sister looked up to him. My Uncle, Guy Palmater, said that his brother Frank was more like a father to them than a brother. Frank was extremely intelligent and even owned his own electrical company at one point. He was also well known for his artistic hand and would create masterpieces on scrap paper, on kitchen walls and even in his own self-applied homemade tattoos. However, there was another part of my father that suffered in silence, in that in-between world of knowing his roots and having close, communal, social and

²⁴ Margaret and William were married September 5, 1912. INAC, however, reported their marriage taking place on June 7, 1910. Frank Palmater was my father. He was born on April 8, 1914, and passed away on September 17, 2000, at the age of 86.

²⁵ My grandmother, Margaret, passed away in 1965 at the approximate age of 76.

²⁶ My father had 4 siblings: John, Guy, Lummy, and Doris, all of whom have passed away.

familial ties, but not allowed to be part of the community because of the rules under the *Indian Act*. He was also not welcome in the non-Aboriginal community, many of whose members viewed him with as much distain as they did other Mi'kmaq people. This was notwithstanding the many talents he had to share with the world. His hard life led to several bad decisions and further suffering that he regretted terribly and warned us against making.

Frank's coming-of-age coincided with the Second World War (WWII), and he jumped at the chance to serve his country and find his place in this world. He and his brothers and sisters enlisted in the army which forever changed their lives. Upon their return, and after seeing the atrocities of war, Frank and his siblings were significantly impacted. To add insult to injury, not only were they not recognized for their efforts as were other non-Aboriginal veterans, but as Aboriginal veterans, they received far less than non-Aboriginal veterans, and were treated with the same distain as they had previously been treated as Mi'kmaq people.²⁷ Frank Palmater always felt very lucky that he had made it back from the war, got married and had many of his own sons and daughters. What he wanted was for us was to get an education and not just a regular high

²⁷ Nation Council of Veterans Association Canada, "Submission: Canada's Aboriginal War Veterans" (2006), online: War Amps <<http://www.waramps.ca/news/abvet/pdf/06-06-28.pdf>>. Aboriginal veterans did not receive the same benefits as non-Aboriginal veterans and, in some instances, reserve lands were taken up to provide to non-aboriginal veterans. I can only assume that Aboriginal veterans were later identified by their status under the *Act* (as that is how my father was identified) with regards to modern compensation. This would explain why so many non-status Aboriginal veterans have not been identified. My father received a small settlement after he had already passed away and, therefore, was never recognized for his contributions during his lifetime. See: National Aboriginal Veterans Association, "NAVA News", online: <<http://www.abo-peoples.org/Vets/AbVets.pdf>>.

school degree; he wanted us to get to the highest levels of education possible. He wanted us to all become scientists and have the training necessary to explain all the mysteries of the world. He knew that he missed out on an education and did not want the same thing to happen to us.

Instead of the usual presents children receive on birthdays, Christmas and other special occasions, my father's gifts were not given on recognized holidays and they were always unique. He would find used books in flea markets, yard sales and church events to give to me each time he saw me. He gave me many books about the Lost City of Atlantis, the secrets of the pyramids, the Loch Ness Monster, Sasquatch, UFOs and others dealing with subjects like ghosts, haunted houses or the powers of the mind. Each time he gave me a new book, he would always show me all the news clippings he had saved in relation to that particular book and we would talk for hours about the credibility of the evidence and how one would go about researching these subjects. Most exciting were our conversations about the many discoveries one could make if they had an open mind. Conversations with him were always fun and if we weren't discussing science he was telling funny stories about his life, including his time in WWII. His stories were never negative and he always found a way to inject humour into their narration. It was only when I was grown up, and my older siblings and relatives filled in all the missing details of his stories, that I realized how much he had edited for my benefit. He wanted me to see the positive side to life and to not know his suffering. Sadly, some of his suffering was impossible to cover up and we all felt his pain.

Overlaid on this family history was the imposition of the *Indian Act* and other federal policies relating to Indians.²⁸ My great-grandfather, Chief Louis Jerome, who had every reason to believe in the text of the sacred treaties and that the rights of his heirs and heirs forever would be protected, had no idea what the future would bring.²⁹ He could never have known that Canada would later impose the *Indian Act* upon his descendants in such a way as to deny them not only their treaty rights, but their recognized identity and communal membership as well.³⁰ My grandmother lived a long life, but had no way of knowing that the identity she held on to so tightly could be taken from her in death.³¹ It seems unimaginable that Canada could deem someone to be an Indian, take away their Indian status, and then to reinstate their status after they had died.³² This is exactly what happens when INAC processes status applications involving deceased relatives who married out.³³ My father also had no way of knowing that fighting for his own country in

²⁸ *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*].

²⁹ Mikmawey, Cape Breton University, “Mi’kmaq Resource Centre” Treaties”, online: Mikmawey <<http://mikmawey.uccb.ns.ca/treaties.html>>. Some of the Treaties signed by the Mi’kmaq which our elders always referred to are the treaties of 1725, 1749, 1752, and 1760-61.

³⁰ *Indian Act*, *supra* note 28 at ss.6-11.

³¹ My grandmother, Margaret, lived to be 75 years old. In correspondence with INAC regarding my grandmother’s status as a s.6(1)(c) Indian, they were not clear whether she officially had and lost her status during her lifetime. INAC seems to indicate that they deemed her to have lost her status and then deemed her to have been reinstated.

³² *An Act to Amend the Indian Act*, S.C. 1988, c.52. *Indian Act*, *supra* note 28 at s.6(3). This section is known as the “deeming” section which allowed the children of deceased parents to be able to apply for registration. While this section is necessary, it is what Canada deems that is seen as objectionable by some.

³³ By “married out”, I am referring to the fact that my grandmother Margaret (a Mi’kmaq) married a non-Mi’kmaq person. S. Clatworthy, A. Smith, “Population Implications of the 1985 Amendments to the Indian Act: Final Report”, (Winnipeg: Four Directions Consulting Group, 1992). The issue of parenting outside one’s cultural group

the WWII would have resulted in such inequitable treatment upon his return. Near the end of his life, he would be granted status as an Indian but would not be able to access benefits, like post-secondary education, his lifelong dream. My great-grandfather, my grandmother, and my father would never have expected that I would be completely excluded from my legally recognized Indian identity and membership in our own home community. My father was heartbroken when INAC sent him his letter telling him that he was a status Indian but that his children would not be so recognized.³⁴ Not only was this kind of unilateral exclusion by Canada unforeseen in my great-grandfather's time; but it was never negotiated in our treaties. In fact the opposite is true, and we never, collectively as a Nation or as individual Mi'kmaq communities, surrendered our rights to determine who we are as a people.

I know who I am as a Mi'kmaq woman, and I know where I come from. However, I have also suffered a great deal of exclusion based on my lack of status. My history, ancestry and territory are the same as that of my family who live on reserve, except that I am barred from living on the reserve. I have come to learn many of our traditions, values and beliefs, but I have also missed out on easy access to our elders to seek clarity, inspiration and further teachings. I am a treaty descendant just like my reserve-based family, except I am prevented from accessing those rights due to my lack of status under the *Indian Act*. I have familial, social and cultural connections to my

is also referred to by Clatworthy throughout his report as “out-marriage”. If the parents of children were not married the children were considered illegitimate and, therefore, different rules applied to them under the various *Indian Acts*.

³⁴ In my own letter from INAC denying me status as an Indian dated April 9, 2009, INAC specifically refers me back to the letter they sent my father dated September 6, 1990, which explained to him that his children were not entitled to status.

traditional community and other Mi'kmaq communities, but I cannot become a member of any of these communities because I do not have status. I have done my best to ensure that my children maintain these same connections with their traditions, but they too are limited in accessing our elders' teachings. They feel hurt and shame at not being able to speak their traditional Mi'kmaq language, know all of our practices and customs or take part in them. While they have danced at pow wows when they were younger, they have never been officially allowed to register as dancers at most pow wows because they lack status as Indians. They know that on the reserve there are elders who teach children their traditional Mi'kmaq language, traditions and dances, but they are barred from taking part in some of these. My children have also experienced the same hurtful experiences and lack of access to our culture that I have. They have suffered taunting at school and hurtful comments from their teachers, just as I had when I was younger. My hurt and shame has now become their hurt and shame.

These personal experiences are made worse by the current jurisdictional debates over whether the federal or provincial government has responsibility for non-status Indians. Aside from exclusion from the *Indian Act*, band membership and our cultures, jurisdictional questions related to government responsibility has led to litigation, funding gaps, and poor socio-economic indicators for non-status Indians. I am keenly aware of the political, social and cultural background to this legal issue because my children and I, as well as my whole family, have lived it. I am passionate about this legal issue because my brothers and sisters worked very hard in partnership with other similarly situated families in New Brunswick to ensure that we were not forgotten. It has been a long, hard political struggle, and were it not for the hard work of my brothers and sisters and people like

Sharon McIvor, these issues would still be unknown.³⁵ I feel the need to address this legal issue because generations keep being negatively affected by their legislated exclusion from their individual identities as Indians and, therefore, as Mi'kmaq, as well as their communal identities via membership. I believe that we have a responsibility to fix it. We owe more to our future generations than to let this inequitable situation continue. Status or non-status, we will all be affected by the second generation cut-off rule in the *Indian Act*. If we do not act now to change it and undo the harm that has been done, there will be no status Indians left to maintain our communities, cultures and identities into the future.

My family's history and experience with the exclusionary provisions of the *Indian Act* applies equally to thousands of other families across Canada.³⁶ There are many different ways in which the *Indian Act* has discriminated against non-status Indians. My grandmother and her direct descendants, from my father, to me, and to my children, all suffer what is known as "cousins" discrimination. This means that the *Indian Act* gives lesser or no status to the descendants of Indian women who married out, versus the descendants of Indian men who married out. However, we also experience the harmful effects of the second generation cut-off rule in the *Indian Act*. This rule means that two

³⁵ *McIvor v. Canada*, [2009] BCCA 153 [*McIvor*]. Sharon McIvor started her legal case over 20 years when her application for status on behalf of herself and her children was denied. She has been successful both at trial and at the appeal level in proving that section 6 of the *Indian Act* determines status in a discriminatory manner against Indian women and their descendants. As the appeal court offered a decision that might limit the remedy available, she has recently filed an application (Friday, June 5, 2009) to have the case heard at the Supreme Court of Canada.

³⁶ *McIvor v. Canada*, [2007] 2 C.N.L.R. 72(BCSC) [*McIvor trial*]. The *McIvor* case alone will affect a large number of people. This does not include the many others that have been excluded on the basis of different kinds of discrimination, which will be discussed in more detail in Chapter 5.

successive generations of an Indian parenting with a non-Indian will result in no status for their descendants. This kind of discrimination is based on a blood quantum/descent based criteria for determining who is really an Indian. The determination is made unilaterally by Canada and is not based on history, culture, tradition or the actual identities of those that the second generation cut off rule actually excludes.

Yet, there are many more Aboriginal peoples who have suffered other types of *Indian Act* discrimination, like the double mother clause, unstated paternity, siblings discrimination, scrip, and so on.³⁷ Registration as an Indian has become a significant part of Aboriginal identity on an individual and a communal level. An individual's proof of Indian status, more often than not, equates with the individual's acceptance by others as being truly Aboriginal. Additionally, status also impacts on band membership for the majority of Indian bands in Canada.³⁸ Status also affects one's ability to be included on treaty beneficiary lists, land claims rolls, and self-government citizenship codes. Status under the *Act* is controlled solely by Canada, and affects many significant aspects of an Aboriginal individual's life. However, some band membership codes can be just as exclusionary as status under the *Act*. While some codes are more inclusive, many codes exclude people based on lack of status, improper choice of spouse, lack of residency on a reserve, and/or an inadequate blood quantum. While membership codes offer bands the opportunity to rid themselves of outdated or racist concepts of themselves as Mi'kmaq, Mohawk or Cree, for example, many of them have incorporated those concepts.

³⁷ All of these types of discrimination will be discussed in more detail in Chapter 5.

³⁸ Band membership will be discussed in more detail in Chapter 6.

The fact that non-status Indians all over Canada banded together to raise awareness about these inequities and to seek solutions to the divisions imposed upon our communities, as well as the hard work individual Aboriginal women did to raise awareness about this issue, is how the original changes to the *Indian Act (Bill C-31)* came about.³⁹ All of this political activity also led to the birth of various provincial political organisations across Canada, which were set up to protect, promote and assert the rights of non-status Indians. I grew up knowing that I was a Mi'kmaq person, but also a non-status Indian. My family made sure that I knew it was not my fault that I was not included in reserve-based activities, but the many negative consequences of that lack of status impacted me nonetheless. I was excluded from legally recognized membership in our local community, and I was legally barred from running for elective office. I could not live on the reserve, nor could I exercise our treaty rights off reserve. My family has been routinely harassed by provincial enforcement officers and but have yet to lose a case when challenged in court.⁴⁰ I was one of the lucky ones who had a politically active family that made sure that I understood that the discrimination found within the *Indian Act* was imposed upon our community, was the cause of the divisions among our people, and that we did not have to settle for this. Yet, the discriminatory provisions of the *Act* remain and more generations are being negatively impacted by them.

³⁹ *Indian Act*, R.S.C. 1985, c. I-5, as amended by R.S.C. 1985, c.2 (1st Supp.) [*Bill C-31*]. These were the controversial amendments to the *Indian Act* that remedied some of the discrimination, but not all of it.

⁴⁰ *R. v. Fowler* (1993), 134 N.B.R. (2d) 361. My two brothers in laws participated in this protest hunt and won their case. My brother Nelson was later arrested for hunting, charged and brought to court in 2008 but later had all the charges dropped.

My brothers and sisters, aunts, uncles, cousins and friends, many of whom were non-status Indians worked hard to fight for equality for us, as the children of status Indians, who were after all, really the children of Mi'kmaq people. They knew then, that differential treatment based on sex, marital status, residence or blood quantum/descent in the *Indian Act's* registration provisions was the reason for the substantial population of non-status Indians. *Bill C-31* was passed in 1985 to address the discrimination faced by women who married out under the former section 12(1)(b) of the former *Indian Act*. However, it did not address all of the inequality and discrimination and as a result, we are left with a growing population of non-status Indians who remain on the outside looking in. In 1985, the federal government tried to detach registration from membership. Even so, these remain, for the most part, tied together, both legally and practically, as Aboriginal identity and cultural belonging go hand in hand. Even the legitimacy of current and future self-government agreements is uncertain given that some are based on unconstitutional citizenship codes. Citizenship codes which merely carry on the status quo of determining entitlement through bands lists or INAC's list of status Indians will not satisfy the constitutional promises made to Aboriginal peoples.

Section 35 of the *Constitution Act, 1982*, promises to protect the distinct cultures of Aboriginal peoples so that they can survive into the future.⁴¹ However, through the unilateral control of status which is determined on a discriminatory basis (sex, marital status, blood quantum/descent), Canada has ensured the legislative extinction of Indians. The world of non-status Indians is a special one; it is unlike all other groups outside of

⁴¹ *R. v. Powley*, [2003] 2 S.C.R. 207. This case, as well as the principles derived from it, will be discussed in more detail in Chapter 4.

the *Indian Act*, despite some obvious commonalities. The three groups of Aboriginal people who currently find themselves outside of the *Indian Act* are non-status Indians, Métis and Inuit. Each of these groups has its own special relationship to the *Indian Act* and the *Constitution Acts, 1982 and 1867*.⁴² The Inuit are outside of the *Indian Act* by virtue of section 4 of the *Indian Act*.⁴³ The Métis as a group, are not specifically mentioned in the *Indian Act*, but, “scrip takers” are specifically excluded in previous *Indian Acts* and not reinstated with the *Bill C-31* amendments.⁴⁴ Litigation involving all these groups is winding its way through the courts and unless agreement can be reached on these issues, these questions of identity will be resolved by the courts instead of by the Aboriginal peoples.⁴⁵ Non-status Indians, by virtue of their “non-registration” under the *Act*, are not covered by the *Act* except in limited circumstances.⁴⁶

Similarly, section 91(24) of the *Constitution Act, 1867* provides that the federal government has jurisdiction over “Indians and lands reserved for the Indians”. The federal government’s position is that this means they have jurisdiction over status

⁴² *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11 [*Constitution Act, 1982*]. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3 [*Constitution Act, 1867*].

⁴³ *Indian Act*, *supra* note 5 at s.4.

⁴⁴ The issue of scrip will be discussed briefly in Chapter 5, but it is not the focus of this thesis.

⁴⁵ Osgoode Hall Law School, “Professor Kent McNeil on Inuit Lawsuit: 22 July 2004”, online:
 <<http://osgoode.yorku.ca/media2.nsf/83303ffe5af03ed585256ae6005379c9/1a4f10fa8d2b2ed585256eda005eabbf!OpenDocument>>. Kiviaq is an Inuit lawyer who filed a claim on July 16, 2004 with the federal court to argue that Inuit should have the same benefits as Indians. While some argue that he may be able to prove discrimination, this is not the focus of my thesis and, therefore, I will not be reviewing the issue in any greater detail.

⁴⁶ *Indian Act*, *supra* note 5 at s.4.1.

Indians, but not non-status Indians or Métis.⁴⁷ The Supreme Court of Canada had previously decided that the Inuit were included in s.91(24), but Canada amended the *Indian Act* to specifically exclude them from its application.⁴⁸ On the other hand, section 35 of the *Constitution Act, 1982*, includes Indians, Inuit and Métis, but the question is whether section 35 includes non-status Indians in the term Indian.⁴⁹ Layered on top of these legal questions of recognized legal identity and legislative authority are questions of individual identity and communal belonging, and where these concepts fit within the broader legalized definitions. Many Aboriginal people feel that they have both an individual and a communal right to define themselves and their communities based on their own cultural and inherent Aboriginal rights.⁵⁰ The federal government has assumed the authority to define Aboriginal individuals and communities by virtue of section 91(24) of the *Constitution Act, 1867*, but this authority is questionable.⁵¹ Although the relevant case law is only starting to make its way to the higher courts, it becomes obvious in reading the submissions filed in those cases that financial considerations are the main

⁴⁷ *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, [2002] F.C.J. No. 391 (QL) [*Daniels*].

⁴⁸ *Indian Act*, *supra* note 5 at s.4(1). [*Reference re Whether the term "Indians" in s.91(24) of the B.N.A. Act 1867, includes Eskimo Inhabitants of Quebec*, [1939] S.C.R. 104. [*Re Eskimo*].

⁴⁹ *Constitution Act, 1982*, *supra* note 42 at s.35.

⁵⁰ Assembly of First Nations and Indian and Northern Affairs, Joint Technical Committee, "First Nations Registration (Status) and Membership Research Report", online: AFN <<http://www.afn.ca/misc/mrp.pdf>>.

⁵¹ *McIvor*, *supra* note 35. *Daniels*, *supra* note 47. Although I would have liked to devote an entire chapter to the issue of federal jurisdiction over Aboriginal identity and membership, my limited time and space requirements mean that I will have to pursue this issue at a future date. My focus in this thesis is on how that power is exercised.

reasons why Canada maintains such a tight grip on Aboriginal identity.⁵² The federal government now appears to find itself stuck within a complex mess of costing exercises, out-dated policies, *Charter* litigation, and self-government negotiations that appear to be moving faster than the internal bureaucratic decision-makers can keep up with. It is time for Canada to get out of the business of legislating other peoples' cultures and identities and allow Aboriginal peoples and communities to rebuild their cultures.

The issue of individual identity is inherently tied to that of communal identity and belonging (band membership and Nation citizenship). While my experience has been one of rejection from communal identity because of lack of Indian status under the *Indian Act*, others have had a very different experience. For example, there are Mohawks in Kahnawake who are status Indians, but who do not meet the blood quantum set in their community's band membership code and have, therefore, been stripped of their band membership.⁵³ In the same community, there are Mohawk women who have been stripped of their band membership and their right to live in the community for marrying non-Mohawks, despite the fact that they are status Indians. These band membership rules were enacted long after *Bill C-31* came into effect; long after the international community clearly stated that this kind of exclusion was discriminatory.⁵⁴ Therefore, while non-status

⁵² I am referring to the submissions made in *McIvor* by the appellants (Canada), the respondents (McIvor) and the seven interveners. This case, and some aspects of the submissions, will be discussed in more detail throughout the rest of this thesis.

⁵³ The example of the Kahnawake Mohawks will be discussed in more detail in Chapter 3.

⁵⁴ *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981). In this case the issue related to a denial of access to Lovelace's culture by means of barring her residency rights on her reserve as she had lost her status through marriage. As a result, Canada was found to be in violation of article 27 of the

Indians experience a great deal of rejection, discrimination and lack of recognition, so too do some band members who may also be status Indians. Even band members who live off-reserve have been subjected to various forms of discrimination.

The Supreme Court of Canada in *Corbiere* noted that regardless of the fact that some band members may live off reserve, they have just as important an interest in maintaining relations with their communities as those that live on reserve.⁵⁵ It is for this reason that non-status Indians, non-band members and off-reserve band members who are often status Indians, often join together in the same political organisations to advocate for equality and recognition. The federal government has empowered and, arguably, even encouraged status Indians that live on reserve to exclude over 50% of the Aboriginal population from both full legal recognition in all its various forms and full participation in their communities and governments.⁵⁶ The exclusion of non-status Indians from legal recognition as Indians due to the second generation cut off rule is but one form of

International Covenant on Civil and Political Rights, 16 December 1966, CAN. T.S. 1976 No. 47 (entry into force 23 March 1976; in force for Canada, 19 August 1976) [ICCPR] which provides as follows: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

⁵⁵ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

⁵⁶ Congress of Aboriginal Peoples, “Justice is Equality: Post-Corbiere Report”, online: CAP <http://www.abo-peoples.org/policy/Justice_Is_Equality_PostCorbierejuly08.pdf>. I use the term “empowered” here in a comparative context, as between on and off-reserve status Indians. I do not mean to say that status Indians living on reserves are truly empowered, for several reasons. First, it assumes that Aboriginal peoples do not already have the right to govern themselves and to assert their own inherent “powers” or authorities; as I assert later in this thesis, they do. Secondly, it may also presume the legitimacy of the Crown’s position, that by virtue of section 91(24) of the *Constitution Act, 1867*, the Crown has the power and authority to assume control over these areas of Aboriginal government; I argue that they do not.

discrimination. However, this usually results in exclusion from band membership and subsequent exclusions from self-government agreements, land claims and/or treaty benefits. Even some status Indians are excluded on the basis of their type of status (6(1) or 6(2) Indians), their blood quantum or whether they live on or off-reserve.

The purpose of this thesis is to highlight some of the current legal issues with regards to the determination of individual and communal Aboriginal identity and belonging. While I have alluded to some of these issues in this introduction, these issues will be explored in more detail in the chapters that follow. Chapter 2 will undertake a review of the legislative treatment of Aboriginal peoples by colonial governments and how the definition of “Indian” and community changed over time. This legislative context is important to understand the current political relationships and divisions amongst Aboriginal peoples. I will also explain the current political affiliations amongst Aboriginal peoples and how this compares with earlier political or cultural associations and discuss how these divisions came about. The current demographic studies related to the different legal categories of Aboriginal peoples that will be reviewed in this chapter also highlight the dangers in maintaining the current legislative “status” quo. The problem is that Aboriginal identity and, in most cases, community membership is determined through an artificial “Indian” filter through which Aboriginal peoples have no control. Identity is now tied to Indian status, as legal recognition is the only accepted “currency” for Aboriginal identity today. The federal government has tried to separate status from membership, and therefore individual identity from communal identity and belonging. It appears as though Canada hopes that by separating individual identity from

communal identity, it can avoid claims that its actions adversely impact culture, while at the same time maintaining enough jurisdiction over identity to control costs.

Some may ask whether preserving an Aboriginal identity in a modern liberal democracy is even a necessary or desirable goal. Chapter 3 attempts to answer this question and to provide an analysis of the theory behind the assertion of Aboriginal identity and what that means to cultural survival. The term “Indian” lumps all the different Aboriginal individuals and Nations into one group and ignores the fact that they all have their own cultures, histories, languages, traditions, customs and practices. The question why Aboriginal identity is important helps explain why Aboriginal people just do not assimilate into the majority culture. I hope to show that the principles which underlie the majority’s liberal democracy provide the very basis upon which Aboriginal cultures can and should be protected. Access to culture in a liberal democracy is a given for the majority, but culture for Aboriginal peoples has turned into a race against the legislative extinction clock imposed by the same majority. In liberal democracies, individuals are supposed to be free from arbitrary interference from the state, but in the case of Aboriginal peoples, they have suffered both direct and arbitrary interference in every aspect of their lives, most especially their identities. Government interference with our identities prevents us from living the “good life”, i.e., the freedom to choose the path in life which we feel is best for us. Aboriginal people also have responsibilities in this regard. While it is important for Aboriginal peoples to maintain their cultural and communal boundaries as a way to reject colonization, the key must be to do so in a way that is flexible, contextual and which incorporates the various ways of being Aboriginal so as to ensure the survival of their culture for future generations. This chapter considers

the various principles which underlie Aboriginal identity and belonging, and highlights key differences between criteria, like ancestry and blood quantum, as well as the importance of modern connections to one's identity and community versus traditions which are frozen in time. This discussion is built upon by the argument that there is a positive obligation upon liberal democracies (including Canada) to take positive actions to protect both vulnerable groups within Aboriginal Nations (especially where the government caused the vulnerability) and the Nations themselves.

In Chapter 4, I argue that the Aboriginal Nations in Canada have a section 35 right to determine their own citizenship. I also argue that the current *Van der Peet* test for determining Aboriginal rights may have to be adjusted in order to accommodate this unique right because the foundation of the right is based on survival of the culture into the future. The *Constitution Act, 1982* made a constitutional promise to Aboriginal peoples to protect their distinctive cultures so that they can survive into the future. In this chapter, I also point out that there are limits on the Aboriginal right to determine their own citizenship. Governments all over the world are subject to limits on their power, and Aboriginal governments are no exception. The question considered in this chapter is what kinds of limits should be placed on such a right. The debate whether the *Charter* applies to Aboriginal peoples and their governments is considered in detail. In the *Charter* debate, there appears to be a tension between the right of Aboriginal Nations to determine their own citizenship and the right of individual Aboriginal peoples to belong to those Nations. This tension is often framed as a question of individual and group rights or Aboriginal women's rights versus those of their communities. The assumption by many has been that any viewpoint or concern raised by any particular sub-group of an

Aboriginal community or Nation that is not in keeping with the position(s) asserted by the Aboriginal leadership for that community or Nation must necessarily be in conflict with it, or opposed to it somehow, given the “communal” nature of Aboriginal rights. This chapter considers whether polarised positions cause the decision-makers to overlook the fact that the “community” of each Aboriginal Nation is made up of and contributed to by Aboriginal individuals and their own individual identities, viewpoints and interpretations of their traditions, values, beliefs, customs, their inter-relationships with others and ideas about the “good life”. This mischaracterisation of the issue has led to the discrimination claims that are reviewed in the next chapter.

In Chapter 5, I briefly review some of the claims of residual discrimination in the *Indian Act* that were not addressed by *Bill C-31*, and some new forms of discrimination that may, in fact, have been created by *Bill C-31*. Most, if not all of these types of discrimination are currently being litigated by affected individuals across the country. The first case to deal with the constitutionality of the registration provisions of the *Indian Act* was the Sharon McIvor case which was successful both at trial and appeal levels. This case is expected to be heard in the Supreme Court of Canada and will, no doubt, have a significant impact either way on the other cases that are coming behind it. In this chapter, I also review the current case law related to *Charter* discrimination claims with a view to focusing on a theoretical claim based on the my own personal situation of discriminatory exclusion from status under the *Indian Act*, based on the second generation cut-off rule. The claim raised in *McIvor* was one known as the “cousins’ rule” which is tied to my own personal situation, but is also analogous to the second generation cut-off claim that will be discussed. Before concluding this chapter, I propose interim

solutions that may address these forms of discrimination, as well as the longer term consequences of not doing so.

Chapter 6 puts all of the history, statistics, law and theory reviewed in earlier chapters into the current political context of band membership codes, self-government agreements, and citizenship codes. The Royal Commission on Aboriginal Peoples (RCAP) offered numerous recommendations related to Indian bands in Canada and how they might “reconstitute” themselves into their former traditional Nations in order to exercise their rights of self-government and jurisdiction over their citizens. While RCAP offered many good suggestions on how to address the inequities faced by those who fall inside and outside the purview of the *Indian Act*, the real issue addressed in this chapter is what to do now. Some comprehensive land claim agreements, modern treaties and self-government negotiations can take upwards of twenty years or more to finalize. Many bands have not even entered into a negotiation of this kind. The question considered in this chapter is how to address the identity issues faced by those, like non-status Indians, who are currently excluded by the Crown and their own bands from recognition and membership. Even if self-government was available for all communities in the near future, it is unlikely that these agreements would address the current inequities and discrimination found in the *Indian Act*, if current self-government agreements and federal policy related to status is any indication of what is to come. I will argue that there must also be shorter term solutions that address issues with future generations in mind. Otherwise, discrimination that is left unaddressed will find its way into the longer term solutions, like self-government agreements. All Aboriginal Nations have their own traditions, values and priorities and, as a result, it is unlikely that a pan-Aboriginal

approach to issues, like band membership or self-government citizenship, would be acceptable to many. Even so, certain principles, like those which assert, respect and protect inherent human rights, are common to all peoples. Similarly, so long as there is an *Indian Act* and registration criteria, at a minimum, it must be in keeping with the constitutional promises made to Aboriginal peoples. Finally, I argue that any system, whether maintained by the Crown, bands or self-governing Nations, will fail to meet the basic principles of fairness and equality if they rely on blood quantum, genetics, gender or race-based criteria to include or exclude people from recognition, membership, citizenship, or from partaking in the benefits and responsibilities of their heritage passed to them by their ancestors.

Finally, Chapter 7 reviews the key issues and proposed solutions to the current discrimination faced by non-status Indians and others regarding their Aboriginal identity and membership. Any solutions that are proposed in the future, either by First Nations or Canada, will have to account for the intervening history of contact, colonization, forced assimilation policies, and government control over both identity and belonging, and the Crown's role in those events. Prime Minister Stephen Harper publicly apologized on behalf of all Canadians for the loss of language and culture experienced by residential school survivors. These survivors are commencing a process of telling their stories about how they were made to feel ashamed of their cultures, their people, and their language. They tell of a loss of connection to their families, friends and home communities, as well as a loss of knowledge about their traditions, customs, practices and languages. Few would ever think to blame residential school survivors for having lost some of their culture or their connections through no fault of their own. How then could one think to

blame non-status Indians, or status Indian women for their loss of status, identity and membership that was caused by Canada. The severe harms that were suffered by Indian women and their descendants, as well as other Aboriginal peoples because of the exclusionary registration and band membership provisions of the *Indian Act*, should not be minimized. Finally, I argue that the severity and intergenerational effects of this discrimination must be acknowledged so that individuals, communities, governments, and the public can truly understand the potential consequences of their proposed solutions.

Chapter Two: Legislated Identity: Control, Division and Assimilation

As the example of my own family shows, Aboriginal peoples in Canada have been subjected to varying degrees of government control over their individual identities and interference with their communal membership ties for many generations. The ways in which individual Aboriginal peoples have been controlled, labelled and divided has only furthered Canada's assimilationist goals from the past. My children: Mitchell and Jeremy, and I, are all non-status Indians because of the various types of discrimination found in the registration provisions of the *Indian Act*. Firstly, I will argue that the *Act* discriminates on the basis of sex and/or marital status, because the *Act* prefers the descendants of Indian men who married out, over the descendants of Indian women who married out. My grandmother, Margaret, was an Indian woman who married a non-Indian man. As a result her children were only 6(2) Indians, which is a lesser status than that received by the children of Indian men who married out.

Secondly, I will argue that the *Act* discriminates against my family on the basis of blood quantum/descent, because the registration provisions incorporate what amounts to a second generation cut-off rule that is based on racist concepts of blood purity. I acknowledge that the *Act* does not specifically provide for a blood quantum to determine status, but I argue that by relying on degrees of descent, then Canada has in effect, incorporated a blood quantum limit for new status Indians. As a result, throughout this thesis, I refer to this kind of discrimination as blood quantum/descent. Canada makes the unsupported presumption that blood quantum or remoteness of descent (which I will refer to as blood quantum/descent) from an Aboriginal ancestor equates with one's level of connection to their individual and communal Aboriginal identity and culture. Therefore,

my children and I are excluded from status on the basis of the sex of our grandmother and the current blood quantum/descent rules assessed against us by Indian and Northern Affairs Canada (INAC). This lack of status also affects the ability of my children and of me to become members of our home Mi'kmaq community: Eel River Bar First Nation.¹

This lack of membership is significant for my children and I because it means that we cannot live on the reserve if we want to, nor can we participate in our band's governance activities. This lack of membership also has significant implications for our political rights. For example, we cannot run for council, vote in elections, or have a say in referendums affecting our reserve lands. We are excluded from land claims, treaty entitlements and regular access to our traditional elders and community-based mentors. We are excluded from membership because our band has a membership code which only allows status Indians to be members. However, our band is not the only one with these types of membership provisions. In fact, the majority of bands in Canada rely on the *Indian Act* status provisions to determine membership.² While the goal of Aboriginal Nations (however constructed) is to determine their own citizenship rules in self-

¹ Eel River Bar has its own membership code. Although I made several requests to receive their updated membership code, it has not yet been provided to me. Therefore, I base my claims on the original band membership that I have in my possession, and the anecdotal evidence that the code has been changed: my father was barred from membership but was then accepted later on.

² S. Clatworthy, *Reassessing the Population Impacts of Bill C-31* (Winnipeg: Four Directions Project Consultants, 2001) online: INAC <http://www.ainc-inac.gc.ca/pr/ra/rpi/rpi_e.pdf> [*Reassessing Population Impacts*]. S. Clatworthy, *Revised Population Scenarios Concerning the Population Implications of Section 6 of the Indian Act*, (Winnipeg: Four Directions Consulting Group, 1994) [*Revised Population Scenarios*]. S. Clatworthy, A. Smith, *Population Implications of the 1985 Amendments to the Indian Act: Final Report*, (Winnipeg: Four Directions Consulting Group, 1992) [*Population Implications*]. S. Clatworthy, *Bill C-31, Indian Registration and First Nations Membership*, (Winnipeg: Four Directions Consulting Group, 2001) [*Indian Registration and Membership*].

government agreements or modern treaties, practically speaking this equates to band membership in individual First Nations (bands) in the interim.³ I will explore these discrimination arguments in more detail in Chapter 5, and specifically relate the law related to discrimination to my own familial situation. This chapter, however, explores the terminology used to describe Aboriginal peoples, the legislative history of the *Indian Act*'s registration provision, and the current socio-economic conditions of Aboriginal peoples and how the *Act* may jeopardize their future.

(a) Labels and the Politics of Division

The majority of the territories in which the Mi'kmaq, Maliseet, Mohawk and other Aboriginal Nations lived and hunted, and the seas and lakes upon which they fished and traveled for trade were taken up by colonial governments in the name of settlement.⁴ The traditions, customs, practices and languages unique to each of the Aboriginal Nations in North America were degraded, treated as “inferior and unequal” and even outlawed by colonial governments.⁵ Despite the fact that Aboriginal peoples were here first, living in their own Nations according to their own laws, governments, traditions and beliefs, the

³ See generally: Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vols. 1-5 (Ottawa: Minister of Supply and Services Canada, 1996) [*RCAP Report*]. In the second volume of the *RCAP Report* [*RCAP, vol.2, part 1*] at 166, 234-235, RCAP explains that the right of self-government belongs to Aboriginal Nations as opposed to individual bands.

⁴ See generally: O. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 3rd ed. (Don Mills, ON: Oxford University Press, 2002) [*Founding Peoples*]. *RCAP Report*, *supra* note 3.

⁵ Indian and Northern Affairs Canada, “Highlights from the Report of the Royal Commission on Aboriginal Peoples: People to People, Nation to Nation”, online: INAC <<http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp>> [*RCAP Highlights*] at “Politics of Domination and Assimilation”. A. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 1999) [*Citizens Plus*]. Right Honourable Prime Minister Stephen Harper, Statements by Ministers, “Statement of Apology to Former

Crown eventually assumed some form of control over most aspects of their individual and communal lives.⁶ The majority of land, natural resources and power in Canada is currently in the control of the Canadian government or non-Aboriginal “settlers”, who have legislated ways of limiting and/or denying access to those items for Aboriginal peoples. Canada and the provincial governments have done this through their policies, legislation and various enforcement measures. These policies of assimilation and denial of access to traditional lands and resources have left Aboriginal peoples in a weakened state: “Policies of domination and assimilation battered Aboriginal institutions, sometimes to the point of collapse. Poverty, ill health and social disorganization grew worse. Aboriginal people struggled for survival as individuals, their nationhood erased from the public mind and almost forgotten by themselves.”⁷ Not only has Canada denied Aboriginal peoples their traditional lands, they have also been successful at denying them access to important aspects of their cultures and identities.⁸

In recent decades, Aboriginal peoples have started to use Canadian laws and processes to address their outstanding grievances against Canada, and to defend their rights. However, they find that they must address each issue in isolation. Therefore, people like Sharon McIvor are forced to litigate the narrow issue of “cousins discrimination” under the *Indian Act*.⁹ Yet, even if *McIvor* wins her case in the Supreme Court of Canada and Canada remedies the sex and/or marital status discrimination in the

Students of Indian Residential Schools” (11 June 2008), online: INAC <<http://www.ainc-inac.gc.ca/ai/rqpi/apo/pmsh-eng.asp>> [*Canada’s Apology*]. *RCAP Report*, *supra* note 3.

⁶ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*] at para. 30.

⁷ *RCAP Highlights*, *supra* note 5 at “Renewal and Renegotiation”.

⁸ *Ibid.* at “Politics of Domination and Assimilation”.

⁹ *McIvor v. Canada*, [2009] BCCA 153 (QL) [*McIvor*]. *McIvor v. Canada*, [2007] 2 C.N.L.R. 72 [*McIvor trial*]. *Indian Act*, R.S.C. 1985 c. I-5 [*Indian Act*].

registration provisions of the *Act*, it will not have addressed the other forms of discrimination. For example, if McIvor wins her case, my father will likely be registered as a s.6(1) Indian, as opposed to a s.6(2) Indian. This would make me either a s.6(1) or 6(2) Indian, depending on the specific remedy implemented by Canada. This will not, however, address the fact that my children will either be s.6(2) Indians (those who cannot pass status on to their children in their own right), or they will remain non-status Indians because of the second generation cut-off rule in the *Act*.¹⁰ This differential treatment between categories of status Indians is based on blood quantum/descent, which I will argue in Chapter 5, amounts to discrimination and a violation of s.15 of the *Charter*.¹¹ However, for the purposes of this chapter, this example makes the point that litigating each of the issues separately makes for a slow way to address ongoing inequities and discrimination caused by the registration and membership provisions of the *Indian Act*.

This legal process, which is the only alternative when governments do not make necessary changes, means that thousands of Aboriginal people remain excluded from recognized identity as Aboriginal peoples, and from membership in their communities. While the courts take decades to hear cases, non-status Indians do not have the same access (or any at all) to their traditional communities, to elders who pass on language and cultural practices, to their communal governments, elections, lands, treaties and necessary government benefits. As peoples who have traditionally passed their traditions, customs and practices and histories on to future generations orally, the fact of legislated exclusion from recognition as an Indian and Mi'kmaq and/or as a member of a Mi'kmaq

¹⁰ *Indian Act*, *supra* note 9 at s.6-7.

¹¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*] at s.15.

community amounts to a significant loss in cultural connection that is extremely difficult to maintain in the face of such exclusion.

The crux of the problem for Aboriginal people today is that the *Indian Act* has had a profound influence on Aboriginal identity, especially since the introduction of the registry in 1951.¹² While it is true that there are other factors which can and do influence an Aboriginal person's sense of identity, no single factor has had such a profound effect in terms of determining political, cultural, social, and even legal rights, as Canada's *Indian Acts* and related policies.¹³ While not every act was intended to define who was or was not an Indian, most of the legislation had provisions which defined Aboriginal individuals and their communities.¹⁴ The effect is still felt today, as Aboriginal people are judged by others in terms of where they fit on the "Indianness" scale, i.e., whether they have the requisite type of Indian status and/or Indian blood quantum.¹⁵

The whole concept of Indianness, as legislated by Canada, was based on the idea that there is one Indian people and that they should be civilized and/or assimilated: "No Canadian acquainted with the policies of domination and assimilation wonders why

¹² *Indian Act*, R.S.C. 1951, c.149 [*Indian Act, 1951*].

¹³ M. Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993 [*Surviving as Indians*] at 206. T. Isaac, *Pre-1868 Legislation Concerning Indians: A Selected and Indexed Collection* (Saskatoon: University of Saskatchewan Native Law Centre, 1993), S. Venne, *Indian Acts and Amendments 1868-1975: An Indexed Collection* (Saskatoon: University of Saskatchewan Native Law Centre, 1981), Z. Wilson, ed., *The Indian Acts and Amendments 1970-1993: An Indexed Collection* (Saskatoon: University of Saskatchewan Native Law Centre, 1993). I am referring to the collection of *Indian Acts* and related laws passed from the late 1800s to the present. The federal government's internal policies and interpretations of these laws also impact Aboriginal people. However, this chapter focuses primarily on the *Indian Act* and its evolution.

¹⁴ I review the historical development of the *Indian Act* in the next section of this chapter.

Aboriginal people distrust the good intentions of non-Aboriginal people and their governments today.”¹⁶ Some of the tools used by Canada to this end were residential schools and legislative enfranchisement by reducing the number of Indians over time.¹⁷ In this way, Indians would eventually be legislated out of existence and there would be no more “Indian problem”.¹⁸ The harm that these assimilation policies have done is significant: “Assimilation policies have done great damage, leaving a legacy of brokenness affecting Aboriginal individuals, families and communities. The damage has been equally serious to the spirit of Canada - the spirit of generosity and mutual accommodation in which Canadians take pride.”¹⁹

Canada has since acknowledged that its assimilationist goals and policies were wrong.²⁰ On June 11, 2008, the Prime Minister offered an apology on behalf of Canada to former students of residential schools. He stated, in part:

Two primary objectives of the residential school system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture.

¹⁵ See generally: B. Lawrence, *“Real” Indians and Others: Mixed Blood Urban Native Peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004) [*Real Indians and Others*].

¹⁶ *RCAP Highlights*, *supra* note 5 at “Policies of Domination and Assimilation”.

¹⁷ *Ibid.*

¹⁸ See: D.C. Scott, National Archives of Canada, Record Group 10, vol. 6810, file 470-2-3, vol. 7, pp. 55 (L-3) and 63 (N-3) [*Indian Problem*]. Duncan Campbell Scott was the Deputy Superintendent of Indian and Northern Affairs from 1913 to 1932. He is often cited for his quote regarding Indians: “I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.”

¹⁹ *RCAP Highlights*, *supra* note 5 at “There can be no peace or harmony unless there is justice.”

²⁰ *Canada’s Apology*, *supra* note 5.

These objectives were based on the assumption that aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as was infamously said, ‘to kill the Indian in the child’.

Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.²¹

It is hard to imagine that an official assimilation policy designed to legislatively eliminate a people would be acceptable today in a modern liberal democracy. However, the registration system that divided Aboriginal peoples and diminished their access to their cultures decades ago is still doing the same thing today. Canada’s historical practices with regards to the identification and registration of Indians were in many ways as assimilatory and destructive of Aboriginal culture and identity as were residential schools. Unfortunately, in practice, the registration of Indians still exists and so does the disappearing formula.²²

Even worse is Canada’s defence of such a system. Despite political speeches to the contrary, Canada puts forward legal positions and interpretations in cases against Aboriginal peoples which completely counter the government’s good words. For example, Canada’s official position with regard to the second generation cut-off rule in the *Indian Act* in the *McIvor* case (which was not specifically challenging that rule) is that the second generation cut-off rule is a gender-neutral scheme and that the cut-off of generations of Indians from status is not only legitimate, but *Charter* compliant as well.²³

²¹ *Ibid.*

²² I explain later the demographic impacts of the current registration provisions on Indians and how this will eventually reduce and/or eliminate their numbers over several generations.

²³ *McIvor v. Canada* (3-4 October 2008, BCCA) (Factum of the Appellant, Canada) [*McIvor-Canada Factum*] at v. Specifically, Canada introduces its position in this case with the following comments: “From 1985 forward, all persons are treated equally. No

While Canada speaks with one voice about rejecting the old views and policies based on Aboriginal cultural inferiority, assimilation policies and “killing the Indian in the child”²⁴, Canada speaks with a completely different voice in court, where its representatives strenuously defend its right to eliminate Indians; and *McIvor* is just one example.²⁵ There will be many more cases in the future, unless and until the matter of discrimination is completely addressed.

The difficult task that currently faces Aboriginal peoples is how to take back the power to define themselves according to their own historical, cultural, and social norms while also ensuring that the current *Act* is amended equitably in the meantime. Some communities may have a difficult healing path ahead of them in trying to remove the Indian label that has been imposed on them.²⁶ At the same time, Aboriginal peoples must

one gains or loses Indian status by reason of marriage. Entitlement to registration is now determined on a gender-neutral basis by the status of one’s parents. Indian status is lost after two successive generations of parenting with a non-Indian – the ‘second generation cut-off’. They further argue: “In short, Parliament created a new prospective, gender-neutral registration system and this complies with ss.15 and 28 of the *Charter*.”

²⁴ *Canada’s Apology*, *supra* note 5.

²⁵ J. Magnet, et al., “ ‘Arbitrary, Anachronistic and Harsh’: Constitutional Jurisdiction in Relation to Non-Status Indians and Metis” in J. Magnet, D. Dorey, eds., *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis, 2005). *McIvor v. Canada* (3-4 October 2008, BCCA) (Factum of the Intervener, First Nations Leadership Council) [*McIvor-FNLC Factum*] at para.9: The FNLC made arguments related to Canada’s bipolar positions with regards to Aboriginal peoples as well: “Although assimilation has been reportedly abandoned as a policy objective, continuing to narrow entitlement to status in accordance with Indian Act criteria, as opposed to Aboriginal laws, custom and tradition, continues facilitate and contribute to the ongoing assimilation of Aboriginal people into the mainstream of Canadian society.”

²⁶ *Canada’s Apology*, *supra* note 5. This difficulty results from Canada’s imposition of the Indian label and its importance with regard to status for Aboriginal peoples for so long. The Prime Minister’s words in his residential school apology can equally apply to the loss of culture, identity and communal and familial divisions caused by the status provisions in the *Indian Act*: “The government now recognizes that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.”

take back the power to define themselves culturally and legally, including the *Indian Act* definitions. Even so, the question remains as to how the legalized identity of status can be overhauled to provide fair and equitable access to registration and the tangible and intangible benefits that go with it until better arrangements are made. How did we get to this point? Which Aboriginal groups are most affected by Indian registration? What are the future demographic projections for Aboriginal peoples if nothing changes? Various historical, political and social factors led to and continue to contribute to the identity issues faced by Aboriginal peoples. The section that follows explains and discusses the current labels used to describe Aboriginal peoples and how these labels came to divide them politically and socially.

(i) Terminology

The political context is important for understanding how complex the issue of Aboriginal identity has become. The words used to describe the various groupings of Aboriginal peoples, reflects their current political and social divisions. In order to understand the politics, one must understand both the terminology used to describe Aboriginal peoples, the origins of these terms, and what they mean legally and politically. Any future legal and/or policy changes which try to find solutions to the current system must address the needs of all Aboriginal Nations and accommodate their diverse cultures and traditions. The status quo is no longer acceptable, as Aboriginal Nations like the Mi'kmaq and Mohawk are divided along factors like bloodlines or gender, for example. The legal and political uncertainties related to Indian identity issues spills out into the other Aboriginal groups, such as the Métis, who now have their own rules about whether

to accept status and non-status Indians as members.²⁷ Aboriginal Nations were not just divided socially and culturally by the legal definitions put in place by the *Indian Act*. They are now also divided politically along many of those same lines, and forming complex political groups which often overlap.²⁸

Local, provincial, regional and national political Aboriginal organizations must now work with hundreds of communities to articulate the goals and aspirations of their own constituents. The divisions have created a highly charged political atmosphere amongst Aboriginal peoples along lines that do not always represent their traditional affiliations. Even the terminology used to describe the various groupings of Aboriginal peoples is not always consistent. Therefore, one must be cognizant of the fact that many of the terms used in this thesis may have different meanings to different people and are often loaded words, in terms of their legal and/or political applications. This section starts with the definition of “aboriginal peoples” found in the *Constitution Act, 1982*, as it is likely the one with which most people are familiar.²⁹ Section 35(2) of the *Constitution Act, 1982*, defines the “aboriginal peoples of Canada” as: “In this Act, ‘aboriginal peoples

²⁷ Métis National Council, “National Definition of Métis” online: MNC <<http://www.metisnation.ca/who/definition.html>> [*Métis Definition*]. While the MNC requires that their members be distinct from other Aboriginal peoples, presumably Indians and Inuit, other Métis communities and organizations are very specific about whether or not status Indians can be part of their organization/group. See for example: Metis Settlements General Council and the Government of Alberta, “Metis Settlements Act” online: Alberta Queen’s Printer <<http://www.qp.gov.ab.ca/documents/acts/M14.cfm>> at s.75. This section provides that status Indians and Inuit who are registered in land claims cannot be members. Some notable exceptions are children who were raised in the settlement area or whose parents were settlement members.

²⁸ See Appendix “A” for an illustration of some of the current divisions caused by the many externally imposed labels.

²⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Constitution Act, 1982*].

of Canada' includes the Indian, Inuit and Métis peoples of Canada."³⁰ It does not further define the terms Indian, Inuit or Métis. Unlike the terms Inuit and Métis, the term "Indian" is also found in section 91(24) of the *Constitution Act, 1867*, which provides the federal government with the exclusive legislative authority for "Indians, and Lands reserved for the Indians."³¹ This legislation also does not define the term "Indian".

The *Indian Act* does however provide a definition of "Indian" in section 2(1) of the *Act* for the purposes of the *Indian Act* only.³² It defines an "Indian" as: "a person who pursuant to this *Act* is registered as an Indian or is entitled to be registered as an Indian."³³ Despite the fact that the 1985 amendments were supposed to address discrimination within the *Indian Act*, the current *Act* incorporates previous *Acts* in how status is determined. For example, the *McIvor* litigation deals with the residual gender discrimination found in the current *Indian Act* which affects Indian women and their descendants (i.e. those previously affected by section 12(1)(b) of the old *Act*) even though s.12(1)(b) had already been repealed.³⁴ This litigation will have an impact on who gets to be included in the term Indian within the *Indian Act*. Aboriginal people who are

³⁰ *Ibid.* at s.35(2).

³¹ *Constitution Act, 1867*, (U.K.) 30-31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No.5, [*Constitution Act, 1867*] at s. 91(24).

³² *Indian Act*, R.S.C. 1985, c.I-5, [*Indian Act*].

³³ *Ibid.* at s.2.(1).

³⁴ *McIvor*, *supra* note 9. See also: *Lynn Gehl v. Attorney General of Canada* [2002] 4 C.N.L.R. (OCA) [*Gehl*]. The Ontario Court of Appeal indicated that if Gehl wanted to bring forth a constitutional challenge to the registrations provisions of the statute, she would have to bring a separate action: one which is a statutory review of the decision of the Indian Registrar in the Ontario Supreme Court, and the other bringing the constitutional challenge to the legislation itself. At the writing of this Chapter, no trial date had been set for this matter which raises unstated paternity discrimination. This case has subsequently been consolidated with *Connie Perron et al. v. Attorney General of Canada* [2003] 3 C.N.L.R. 198 (Ont.SC) [*Perron*] such that the matters will be heard together. *Perron* raises similar discrimination issues as *McIvor*.

registered as Indians today are further subdivided into which section of the *Act* they are (or are not) registered under. For example, in everyday language, individuals are referred to as 6(1) or 6(2) Indians (reflecting the sections under which they are registered as Indians), just as commonly as one might hear the term Indian, registered Indian, or status Indian. Those Aboriginal peoples who are barred from registration (or who never applied) are called non-status Indians.³⁵ The major difference between those registered under sections 6(1) and 6(2) is the latter's inability to pass on their Indian status to their children in their own right. Even within the 6(1) category of status Indians, divisions were created amongst *Bill C-31* reinstates³⁶ who are registered under section 6(1)(c) of the *Act* and those who are registered pursuant to section 6(1)(a) (often referred to as the "acquired rights" group) and are often considered the "original group".³⁷ Section 6(1) registrants are considered to have full status, while those under section 6(2) are considered to have half status.³⁸

³⁵ Indian and Northern Affairs Canada, "Non-Status Indians" online: INAC <<http://www.ainc-inac.gc.ca/ap/insi/index-eng.asp>>. INAC has several definitions for the term "non-status Indian". The one contained in this web page states: "refers to people who identify themselves as Indians but who are not entitled to registration on the Indian Register pursuant to the Indian Act." See also: Indian and Northern Affairs Canada, "Words First: An Evolving Terminology Relating to Aboriginal Peoples in Canada" online: INAC <<http://www.ainc-inac.gc.ca/ap/pubs/wf/wf-eng.pdf>> at 10. In this web page, the term First Nations is defined as including both status and non-status Indians; the "Indian" people of Canada.

³⁶ *An Act to Amend the Indian Act*, S.C. 1985, c.27 [*Bill C-31*]. Those individuals (mostly women and their descendants) who were reinstated as Indians pursuant to the *Bill C-31* amendments to the *Indian Act* are often referred to as "Bill C-31 reinstates".

³⁷ This was the challenge made by McIvor. For a more detailed overview of McIvor's arguments at the Court of Appeal, see: *McIvor v. Canada* (3-4 October 2008) (Factum of the Respondent, Sharon McIvor) [*McIvor's Factum*] at paras. 17, 54 and 71.

³⁸ First Nations Governance, "Memorandum on Indian Status and Band Membership", online: FNG <http://www.fngovernance.org/toolkit/Institutions/Transparency_and_Fairness/Citizenshi

Another term that has been used to describe status Indians, which is more commonly used in western Canada, is “Treaty Indian”. This term is often associated with a person who is registered under the *Indian Act* and who is also affiliated with a First Nation that has a treaty with the Crown. In other parts of the country, a Treaty Indian may refer to an Aboriginal person who is affiliated with and/or descended from a First Nation which has treaties with the Crown regardless of status under the *Act*.³⁹ INAC also defines “Indians” as including status, non-status and Treaty Indians:

The term ‘Indian’ collectively describes all the indigenous people in Canada who are not Inuit or Métis. Indian people are one of three peoples recognized as Aboriginal in the Constitution Act, 1982: Indian, Inuit, and Métis. In addition, three categories apply to Indians in Canada: Status Indians, Non-Status Indians, and Treaty Indians. Some people may fit into more than one of those categories.⁴⁰

Some non-status Indians are also considered or deemed to be status Indians for certain provisions of the *Indian Act*, but are largely excluded from the major programs and

pCodes/MemoIndianStatusBandMembershipTitle.pdf> [*Memo on Indian Status*] at 3. *McIvor trial*, *supra* note at paras.256, 306.

³⁹ See: Indian and Northern Affairs Canada, “Terminology”, online: Indian and Northern Affairs Canada <[Http://www.ainc-inac.gc.ca/pr/info/tln_e.html](http://www.ainc-inac.gc.ca/pr/info/tln_e.html)> [*INAC Terminology*] at 2. On this site INAC defines a “Treaty Indian” as “A Status Indian who belongs to a First Nation that signed a treaty with the Crown.” See also: Indian and Northern Affairs Canada, “Frequently Asked Questions About Aboriginal Peoples”, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/info/info125_e.html> [*INAC FAQ*] at 2. On this site, INAC defines “Treaty Indians” in significantly different way: “Treaty Indians are Indians who are registered or affiliated with a treaty band and are descendants of Indians who signed treaties with the Crown.” Descendants are not necessarily status Indians. See also: P. Palmater, “An Empty Shell of a Treaty Promise: R. v. Marshall and the Rights of Non-Status Indians” (2000) 23 Dal. L.J. 102 [*An Empty Shell*] for a more complete discussion of Treaty beneficiary issues related to status and non-status Indians.

⁴⁰ *INAC FAQ*, *supra* note 39 at 1.

benefits.⁴¹ The Métis also have their own definitions as well as those that have been developed by the courts. In the past, many off-reserve Aboriginal organizations advocated on behalf of Métis and non-status Indians as one group, thereby giving the appearance that the two groups were one and the same.⁴² Some still use the terms Métis and non-status Indian as if they were synonymous terms, but this is not the case in reality.⁴³

Different political groups may at times, be represented by the same off-reserve Aboriginal political organizations. However, this does not mean that they are the same in terms of identities, culture or rights. INAC defines “Métis” as: “People of mixed First Nation and European ancestry who identify themselves as Métis, as distinct from First Nations people, Inuit or non-Aboriginal people. The Métis have a unique culture that draws on their diverse ancestral origins, such as Scottish, French, Ojibway and Cree.”⁴⁴

INAC further defines the term “Métis”:

The word “Métis” is French for ‘mixed blood.’ The Canadian Constitution recognizes Métis people as one of the three groups of Aboriginal people living in Canada.

⁴¹ *Indian Act*, supra note 32 at s.4.1. In situations where non-status Indians are band members, only certain sections of the *Indian Act* will apply to them.

⁴² New Brunswick Aboriginal Peoples Council, “Post-Powley Program” online: NBAPC <<http://www.nbapc.org/categories/Post%252dPowley-Program/>>. For example, the New Brunswick Aboriginal Peoples Council (NBAPC) who represents Mi’kmaq and Maliseet (status and non-status) Indians living off-reserve in New Brunswick was once known as the New Brunswick Association of Métis and Non-Status Indians (NBAMNSI). It is notable that their website does not specifically provide a position with regards to Métis other than referring to “Justice” research which indicates that no Métis community was ever established in New Brunswick. See also: Congress of Aboriginal Peoples, “About The Congress” online: CAP <<http://www.abo-peoples.org/>> [*CAP Online*]. NBAPC is an affiliate of the Congress of Aboriginal Peoples (CAP) which was formerly known as the Native Council of Canada (NCC). CAP however, represents Métis, non-status and status Indians that live off-reserve in Canada.

⁴³ C. Chartier, “Aboriginal Self-Government and the Metis Nation” in J. Hylton, *Aboriginal Self-Government in Canada* (Saskatoon: Purich, 1999) 112 [*Metis Nation*] at 113.

⁴⁴ *INAC Terminology*, supra note 39 at 3.

Historically, the term “Métis” applied to the children of French fur traders and Cree women in the Prairies, and of English and Scottish traders and Dene women in the north. Today, the term is used broadly to describe people with mixed First Nation and European ancestry who identify themselves as Métis, distinct from First Nation people, Inuit or non-Aboriginal people. Many Canadians have mixed Aboriginal and non-Aboriginal ancestry, but not all identify themselves as Métis. Note that Métis organizations in Canada have differing criteria about who qualifies as a Métis person.⁴⁵

Dickason notes in relation to the term “Métis” that “there is considerable variation in both the use of the term and in material culture; there is no nationally agreed-upon definition.”⁴⁶ The Métis National Council (MNC) defines the term as: “Métis means a person who self-identifies as Métis, is of historic Métis Nation Ancestry, is distinct from other Aboriginal Peoples and is accepted by the Métis Nation.”⁴⁷ Other Métis groups not affiliated with the MNC, such as the Métis Settlements in Alberta, define “Metis” as: a person of Aboriginal ancestry who identifies with Metis history and culture.”⁴⁸The

⁴⁵ *INAC FAQ*, *supra* note 39 at 3.

⁴⁶ *Founding Peoples*, *supra* note 4 at 352-353. Dickason notes that “half-breed”, the former term for “Metis”, was considered so pejorative to Metis peoples that it may well have affected the numbers of Metis that publicly identified themselves as such. “In 1941, before the ‘half-breed’ category was deleted from the census, 27,790 had been listed for the three Prairie Provinces, a figure that is almost certainly too low. Reluctance to identify as a half-breed may have been influenced by the pejorative connotations of the term.”

⁴⁷ Métis National Council, “Who are the Métis?” online: MNC <<http://www.metisnation.ca/who/definition.html>> [*MNC online*].

⁴⁸ *Metis Settlements Act*, *supra* note 16 at s.1(j). Metis Settlements General Council, “About Us”, online: MSGC <http://www.msgc.ca/about_us/about_us.html> [*MSGC online*]. “The Metis Settlements General Council (MSGC) is the political and administrative body for the collective interests of the Metis Settlements. The MSGC is a pro-active government that helps develop, implement, and distribute programs and services to the eight Alberta settlements. The MSGC has legislation law-making authority over membership, hunting, fishing, trapping, timber and other matters relating to land. The Metis Settlements General Council may enact laws (General Council policies) that are binding on the General Council and every Settlement. These laws (General Council Policies) are equal in status to other provincial laws.”

Supreme Court of Canada in *Powley* also provided guidance on how to identify Métis peoples for the purposes of Aboriginal rights.⁴⁹ Specifically, the Court explained: “In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance.”⁵⁰ Definitional issues as they relate to the Inuit have not been as controversial.

The term “Inuit” appears in s.35(2) of the *Constitution Act, 1982*. However, it is not defined further within that section. The term Inuit is defined by INAC as referring to:

An Aboriginal people in Northern Canada, who live in Nunavut, Northwest Territories, Northern Quebec and Northern Labrador. The word means ‘people’ in the Inuit language – Inuktitut. The singular of Inuit is Inuk.⁵¹

While the Inuit are specifically excluded from the application of the *Indian Act* by virtue of section 4, they are specifically included in the definition of “Indian” for the purposes of section 91(24) of the *Constitution Act, 1867*. The *Re Eskimo* case from the Supreme Court of Canada held that the term Eskimo was just a “type” or category of Indian. They came to this conclusion based on the historical usage of the term “Eskimo” (now Inuit) as well as the contemporary understandings at the time.⁵² For the most part, the Inuit are unaffected by the registration provisions of the *Indian Act*. However, there is often confusion between the Innu Nation and the Inuit. The Inuit Tapiriisit Kanatami (ITK) also provides clarity on issues related to the definition of “Inuit”:

⁴⁹ *R. v. Powley*, [2003] 2 S.C.R. 207 [*Powley*]. Although the Court specifically held that they were not asked to, nor were they creating a comprehensive test for who is and is not a Métis person.

⁵⁰ 30.

⁵¹ *INAC Terminology*, *supra* note 39 at 2.

- The term “Inuit” replaces the term “Eskimo”;
- Inuit are not “Indians”;
- Inuit are “Aboriginal” or “First Peoples”;
- Inuit are not “First Nations”;
- Inuit are not Innu, as the Innu are a First Nations group.⁵³

Culturally, the Inuit are divided into two related groups: (1) the Yupik in Alaska and Russia and (2) the Inupiat of Alaska and Russia and the Inuit of Canada and Greenland.⁵⁴

However, comparatively speaking, they appear to be more unified in their political aspirations and organizational structures. While the term “Aboriginal” is used to describe all Aboriginal peoples (Indian, Inuit and Métis) collectively, Inuit people sometimes feel that common references to Aboriginal refer more generically to First Nations (Indians).

There are also other, more generic terms used to describe the collective of Aboriginal groups in Canada. Dickason prefers “Amerindian” to other generic terms like “Indian” and “native” for describing the Aboriginal peoples that live in Canada:

Although the term ‘Indian’ is recognized as originating in a case of mistaken identity, it has come to be widely accepted, particularly by the Aboriginal peoples themselves. The trouble with that term, of course, is that it is also used for the people of India...In Canada, with its substantial population from India, this ambiguity is particularly obvious. Francophones have solved the problem by using ‘amerindien’, which is specific to the Americas, or ‘autochtone’, which translates as Aboriginal. Anglophones have not reached such an accord; in Canada, ‘Native’ has come to be widely used, but it is not accepted

⁵² *Reference re Whether the term “Indians” in s.91(24) of the B.N.A. Act 1867, includes Eskimo Inhabitants of Quebec*, [1939] S.C.R. 104 [*Re Eskimos*].

⁵³ Inuit Tapiriit Kanatami, “Inuit Statistical Profile: 2008” online: ITK <<http://www.itk.ca/sites/default/files/InuitStatisticalProfile2008.pdf>>.

⁵⁴ Inuit Tapiriit Kanatami, “Inuit History and Heritage” online: ITK <<http://www.itk.ca/sites/default/files/5000YearHeritage.pdf>> at 3.

in the United States on the grounds that anyone born in that country is native, regardless of racial origin; their accepted form is 'native American'. In Canada, 'Aboriginal' is becoming widely used by Indians as well as non-Indians. 'Amerindian' has not received popular acceptance in English language Canada and has even less in the United States.⁵⁵

RCAP defines "Aboriginal peoples" as the "organic, political and cultural entities that stem historically from the original peoples of North America, (not collections of individuals united by so-called racial characteristics)."⁵⁶ The terminology used to refer to the collective (such as Indian, native, Amerindian) does not reflect the special place that Aboriginal peoples or their Nations have in this country. Since the term Indian is a category which was legislatively imposed on individuals and which does not reflect the diverse cultural differences between Aboriginal Nations, such as the Mohawks and Mi'kmaq, or Maliseet, there has been some rejection of its use. There has been a return by many Aboriginal peoples to both individually and collectively refer to themselves according to their affiliations with their traditional Aboriginal Nations, clans, families and communities.⁵⁷ These traditional names more properly reflect their own languages and cultures and assert their rights to self-identify with their traditional Aboriginal Nations.

The First Nations of Canada or traditional Aboriginal Nations are those groups like the Mi'kmaq, Mohawk or Maliseet Nations, for example. RCAP describes an

⁵⁵ *Founding Peoples*, *supra* note 4 at xiv-xv.

⁵⁶ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Ministry of Supply and Services, 1996) Volume 2: *Restructuring the Relationship, Part 1 [RCAP, vol. 2, part 1]* at 107.

⁵⁷ For example, the First Nation, formerly known as Big Cove in New Brunswick, has changed their community's official name to Elsipogtog and many people there refer to themselves as Mi'kmaq versus Indian. Metepenagiag (Red Bank) and Miawpukek (Conne River) are other examples of such changes. This appears to be a growing trend for many

“Aboriginal Nation” as “a sizeable body of Aboriginal people who possess a shared sense of national identity and constitute the predominant population in a certain territory or collection of territories.”⁵⁸ Often, the term “First Nation” is used to refer to an Aboriginal Nation, but it is also frequently used to refer to an Indian band. An Indian “band” is defined in the *Indian Act, 1985*:

“band” means a body of Indians

- (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
- (b) for whose use and benefit in common, moneys are held by Her Majesty, or
- (c) declared by the Governor in Council to be a band for the purposes of this Act;⁵⁹

INAC further explains the usage of the term “First Nation” and “band”:

First Nation: A term that came into common usage in the 1970s to replace the term “Indian”, which some people found offensive. Although the term First Nation is widely used, no legal definition of it exists. Among its uses, the term “First Nations peoples” refers to the Indian peoples in Canada, both Status and non-Status. Some Indian peoples have also adopted the term “First Nation” to replace the word “band” in the name of their community.⁶⁰

While the terms First Nations and bands are often used interchangeably, the term First Nations can also have a more expansive meaning when referring to the larger Aboriginal Nations. The difference between Aboriginal Nations and bands/First Nations was highlighted by RCAP when they pointed out that there were 60 to 80 traditional

Aboriginal communities in Canada, although there doesn’t appear to be any statistical information in this regard.

⁵⁸ *Ibid.*

⁵⁹ *Indian Act, supra* note 32 at s.2. (1).

Aboriginal Nations in Canada, in comparison to over 1000 local communities, which is roughly divided among over 600 Indian bands.⁶¹

Therefore, the term “First Nation” can cause some confusion, unless it is quite clear in the context whether the user is referring to a band or an Aboriginal Nation. Some of the Aboriginal Nations in this country are still not fully respected for their diversity; as some Canadians and governments still see Mohawks, Cree and Mi’kmaq peoples as one people: Indians.⁶² Also important are the traditional names of the Aboriginal Nations. Many of the names heard today were given to the Aboriginal Nations either by Europeans or other Aboriginal Nations.⁶³ For example, the Maliseet now call themselves “Wuastukwiuk”, the Micmac are the “Mi’kmaq” and the Montagnais and Naskapi are the “Innu”.⁶⁴ There is also a tendency to put Aboriginal peoples into groupings that do not reflect their actual differences, as reflected, for instance, in the terms Aboriginal peoples and Indians. Given that these terms have different meanings depending on their context, it

⁶⁰ *INAC Terminology*, *supra* note 39 at 2.

⁶¹ *RCAP*, vol.2, part 1, *supra* note 56 at 166. “There are 60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities.” See also: Assembly of First Nations, “Description of the AFN” online: AFN <<http://www.afn.ca/article.asp?id=58>> [*AFN Description*]. AFN states that there are currently 630 bands in Canada. See also: Indian and Northern Affairs Canada, “First Nations” online: INAC <<http://www.ainc-inac.gc.ca/ap/fn/index-eng.asp>>. INAC indicates: “Currently, there are 615 First Nation communities, which represent more than 50 nations or cultural groups and 50 Aboriginal languages.”

⁶² W. Cornet, “Aboriginality: Legal Foundations, Past Trends, Future Prospects” in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation* (Markham: LexisNexis, 2003) 122 [*Aboriginality*] at 125.

⁶³ *Founding Peoples*, *supra* note 4 at xiv. “A word about Amerindian tribal classifications is necessary. Labels such as ‘Cree’, ‘Huron’, ‘Beaver’, and ‘Haida’ were imposed by Europeans and do not represent how the people termed themselves, at least aboriginally.”

⁶⁴ *Ibid.* Other names include “Nisga’a” instead of Nishga, “Gwich’in” instead of Kutchin, “Wet’suwet’en” instead of Carrier and “Tsuu T’ina” instead of Sarcee.

is understandable why, sometimes, there is confusion regarding to whom the terminology may be referring.

Terminology and definitions applicable to Aboriginal peoples cannot only cause confusion for non-Aboriginal peoples, but even within communities, there can be significant differences in how Aboriginal people self-identify or organise themselves politically. Many Aboriginal political organisations that represent and advocate on behalf of Aboriginal groups and sub-groups have been divided by years of legislation and federal policies. There is a growing movement among Aboriginal peoples toward using both traditional names for Nations and communities, as well as individually identifying by their respective Nations, communities or other traditional signifiers, such as clans, houses or other hereditary groupings. This crucial cultural, traditional and social link between individuals and their communities is not available in legislative groupings and categories, such as those found in sections 6(1) or 6(2). At the same time, it is important to understand the basic terminology impacting Aboriginal peoples, in order to fully comprehend the larger issues related to current Aboriginal political representation. Political factions may even develop within a single community around allegiances to different political organisations or representatives. It is this fragmentation of communities, which has led to the development of numerous Aboriginal political organisations that represent very specific constituencies based around these dividing lines.

(ii) Representation

There are many Aboriginal representative groups at the national, provincial, regional and local levels. Some are organized around legal divisions, while others are

based on treaties or historical associations. These divisions have served to reduce the representative numbers of Aboriginal peoples in any given group. The result has been diminished power to pressure governments on issues related to their rights. There can also be multiple provincial, regional and local organizations which compete for representation of the same or overlapping categories of constituents, and this wastes valuable resources. However, it is necessary to know the various political organizations, and who they claim to represent, in order to understand their various relationships with governments and communities, and their corresponding power or lack thereof. Legal divisions created by legislation can mean significant differences in power structures, resources and political influence. Changes in these legal definitions over time may also help explain the overlap in some of their constituencies. Even court cases have the power to affect political organizations to the extent that one case can lead to a plethora of overnight organizations brought together by the perceived power of various judicial pronouncements, the *Powley* case being the most obvious.

The main national Aboriginal political organizations are the Assembly of First Nations (AFN), the Congress of Aboriginal Peoples (CAP), the Métis National Council (MNC), the Inuit Tapiriit Kanatami (ITK) and the Native Indian Women's Association of Canada (NWAC). There are other Aboriginal organizations on the national scene that perform a variety of functions, but the five listed above are the main national organizations through which provincial and/or territorial affiliates participate in political advocacy. The AFN claims to represent the First Nations in Canada, and the views of First Nations through their leaders (chiefs).⁶⁵ It also claims to represent First Nations

⁶⁵ *AFN Description*, *supra* note 61.

citizens in Canada regardless of age, gender or residency.⁶⁶ The AFN website provides details about the First Nations' attempts to establish a national political organization after World War I (WWI) with the League of Nations (LOI).⁶⁷ This first attempt was described as unsuccessful, due mainly to government actions and lack of support. Their next attempt at an organization was after WWII, with the National American Indian Brotherhood (NAIB), which failed for the same reasons.⁶⁸ Finally, in 1961, they formed the National Indian Council (NIC) which represented Treaty and status Indians, as well as non-status Indians and Métis; the Inuit were excluded. The NIC's purpose was to provide unity among all Indian people, but due to ongoing disunity among the groups, by agreement, they broke into two separate political groups in 1968.⁶⁹ These groups became the National Indian Brotherhood (NIB) and the Native Council of Canada (NCC). In 1982, the NIB became known as the Assembly of First Nations (AFN).⁷⁰ The AFN elects its national chief every 3 years and the current national chief is Phil Fontaine. The organization also has 10 regional vice chiefs representing the Northwest Territories, Yukon, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Labrador, New Brunswick and Prince Edward Island, and Nova Scotia and Newfoundland. The chiefs from all over the country meet annually, with a view to setting "national policy and direction through resolution."⁷¹

⁶⁶ Assembly of First Nations, "What We Do" online: AFN <<http://www.afn.ca/article.asp?id=3>> [AFN online].

⁶⁷ Assembly of First Nations, "Assembly of First Nations: The Story" online: AFN <<http://www.afn.ca/article.asp?id=59>>.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *AFN online, supra* note 66.

The Congress of Aboriginal Peoples (CAP) claims to represent off-reserve Indians and Métis peoples in urban, rural and remote areas of Canada.⁷² Their definition of Indian also includes status and non-status Indians. They were officially founded in 1971 as the Native Council of Canada (NCC). The principle of the NCC was to address the lack of recognition of their constituents as Aboriginal peoples, and to challenge the exclusion of the Métis and non-status Indians from federal responsibility. The NCC changed its name to CAP in 1983 to better reflect its representation of off-reserve Indian and Métis people regardless of their status under the *Indian Act, 1985*.⁷³ CAP has nine provincial affiliates spread across the country, and who have formally applied for and been accepted as affiliates of CAP. CAP's by-laws provide that CAP can only accept one Aboriginal organization as an affiliate per province or territory.⁷⁴ Each of CAP's affiliates has its own funding from their own sources be they government or otherwise, and each has their own constitution.⁷⁵ CAP is also politically associated with the Native Women's Association of Canada (NWAC) and the Metis Settlements General Council via separate political accords.⁷⁶ These accords represent agreements to work together to represent their

⁷² *CAP online, supra* note 42.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* CAP's affiliates are as follows: New Brunswick Aboriginal Peoples Council (NBAPC), Native Council of Nova Scotia (NCNS), Native Council of Prince Edward Island (NCPEI), Federation of Newfoundland Indians (FNI), Labrador Metis Nation (LMN), Ontario Coalition of Aboriginal Peoples (OCAP), Native Alliance of Quebec (NAQ), Aboriginal Council of Manitoba (ACM), and the United Native Nations Society (B.C.) (UNNS).

⁷⁶ *MSGC online, supra* note 48. See also: Congress of Aboriginal Peoples, Native Women's Association of Canada, "Political Protocol", online: CAP <<http://www.abo-peoples.org/Communications/Events/NWAC-CAP%20Protocol.pdf>> [*CAP-NWAC Protocol*], Congress of Aboriginal Peoples, Metis Settlements General Council, "Protocol Agreement", online: CAP <<http://www.abo-peoples.org/Communications/Events/CAP-MSGC.pdf>> [*CAP-MSGC Protocol*].

constituents on matters of common concern.⁷⁷ For example, CAP and NWAC have agreed to work together to “lobby the federal government on the issue of Bill C-31”.⁷⁸ The Metis Settlements and CAP agreed to work together to share information to support the development of more effective policies for Aboriginal peoples regardless of their “geographic boundaries”.⁷⁹

The Native Women’s Association of Canada (NWAC) claims to promote the well being of First Nations and Métis Women within both First Nations and Canadian societies.⁸⁰ They were created as a non-profit organization in 1974. Their goal is to help empower women by being involved in developing and changing legislation, which affects them. They also want to involve women in the “development and delivery” of programs and services for Aboriginal women that will promote equal opportunity. They are also working towards Aboriginal unity and against racism and discrimination in society.⁸¹ NWAC indicates that it has 13 provincial and territorial affiliates across Canada. Each of these affiliates varies in terms of how they determine membership with respect to Aboriginal women. For example, the Mother of Red Nations Women’s Council of Manitoba (MORN) claims to promote, protect and support the well being of Aboriginal women and children in Manitoba.⁸² Their definition includes Aboriginal people who are status, non-status, treaty, non-treaty, on or off-reserve, with different abilities, two

⁷⁷ *Ibid.*

⁷⁸ *CAP-NWAC Protocol, supra* note 76 at 4.

⁷⁹ *CAP-MSGC Protocol, supra* note 76 at 1.

⁸⁰ Native Women’s Association of Canada, “About NWAC” online: NWAC <<http://www.nwac-hq.org/en/nwacstructure.html>> [*NWAC online*].

⁸¹ *Ibid.*

⁸² Mother of Red Nations Women’s Council of Manitoba, online: MORN <<http://morn.comnet.ca/cim/92.dhtm>>.

spirited, and transgendered.⁸³ This is in stark contrast to the Quebec Native Women's (QNW) organization which claims to represent First Nations in Quebec and Aboriginal women from urban areas.⁸⁴ In order to apply to be a member of QNW, one must provide a band number.⁸⁵ This gives the appearance that perhaps only status Indians may apply. NWAC also has provincial affiliates all across the country.⁸⁶

The members of the Métis National Council (MNC) were originally members of the NCC (now CAP). In 1983, some of the Métis members, calling themselves the Métis Nation, split from the NCC (now CAP) and formed their own organization called the MNC who now claim to represent the Métis Nation in Canada.⁸⁷ They too, have provincial affiliates, but only those that claim to represent the Métis Nation.⁸⁸ CAP and the MNC do not agree on the definition of Métis. The MNC limits membership to what they refer to as the historic "Métis Nation" or those Métis who evolved from the Red River area.⁸⁹ CAP, on the other hand, does not prescribe a definition for Métis and has

⁸³ *Ibid.*

⁸⁴ Quebec Native Women (Femmes Autochtones du Quebec), online: FAQ <<http://www.faq-qnw.org/english-main.htm>>.

⁸⁵ *Ibid.*

⁸⁶ *NWAC online, supra* note 80. NWAC's other affiliates include: Labrador Native Women's Association (LNWA), Native Women's Association of the Northwest Territories (NWANT), Yukon Aboriginal Women's Council (YAWC), New Brunswick Aboriginal Women's Council (NBAWC), Newfoundland Native Women's Association (NNWA), Nova Scotia Native Women's Society (NSNWS), Aboriginal Women's Association of Prince Edward Island (AWAPEI), Ontario Native Women's Association (ONWA), Saskatchewan Aboriginal Women's Circle Group (SAWCG), Alberta Aboriginal Women's Society (AAWS), and the British Columbia Native Women's Society (BCNWS).

⁸⁷ *MNC online, supra* note 47. See also: *Métis Nation, supra* note 43 at 113.

⁸⁸ *MNC online, supra* note 47. The affiliates of the MNC are as follows: Métis Nation of Ontario (MNO), Manitoba Metis Federation (MMF), Métis Nation Saskatchewan (MNS), Métis Nation Alberta (MNA) and the Métis Nation of British Columbia (MNBC).

⁸⁹ *Ibid.*

affiliates who welcome Métis from other parts of the country.⁹⁰ The Métis are the fastest growing political group in Canada. Especially since the *Powley* case which provided a definition of Métis people for the purposes of Aboriginal rights under s.35 of the *Constitution Act, 1982*, there are new organizations every year claiming to represent the Métis.⁹¹ These various Métis political organizations have their own definitions of what is a Métis, and not all of these definitions are the same. The “Métis Membership Chart” on page 1 of Appendix “C” provides a good sample of the Métis organizations that exist in Canada and the various criteria they use to determine their membership/citizenship.⁹² The

⁹⁰ P. Chartrand, “Defining ‘The Metis People’: The Hard Case of Canadian Aboriginal Law” in P. Chartrand, ed., *Who Are Canada’s Aboriginal People? Recognition, Definition, and Jurisdiction* (Saskatoon: Purich, 2002) 268 [*Defining Metis*] at 289-294. Chartrand provides a more detailed discussion on this political relationship between CAP and MNC with regard to Métis constituencies. It should be noted that the author’s comments are somewhat dated as he made comments in anticipation of *Powley, supra* note 49, that has since been decided in favour of the Métis defendants.

⁹¹ *Powley, supra* note 49. In *Powley*, Steve and Roddy Powley killed a moose in Sault Ste. Marie, Ontario. They tagged the moose and signed it with Steve’s name and his card from the Ontario Métis Aboriginal Association (OMAA), an affiliate of CAP. Their defense in court was that they were Métis and they had Aboriginal rights to hunt the moose. The Supreme Court of Canada agreed and set up a three part test for identifying Métis: (1) proven ancestral connection to historic Métis community; (2) self-identify as Métis and (3) accepted by Métis community. For further discussion of this case see: P. Palmater, “In My Brother’s Footsteps: Is R. v. Powley the Path to Recognized Aboriginal Identity for Non-Status Indians?” in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation* (Markham: LexisNexis, 2003) 149 [*In My Brother’s Footsteps*]. See also: *Census 2006, infra* note 197. The Census 2006 explains that Métis are the fastest growing Aboriginal group in Canada. In fact, the population of Métis has nearly doubled since 1996, whereas First Nations have only grown 29%. Numerous Métis organizations literally sprung up overnight in hopes of accessing the rights referred to in *Powley*. Appendix “B” provides an example of some of the Métis organizations that have incorporated in recent years.

⁹² Appendix “B”. This chart is a compilation of Métis political organizations in Canada that resulted from an internet search. It represents those who were online at the time of my research. It excludes Métis groups who were part of self-government agreements and/or negotiations at the time. It also excludes the large number of Métis organizations who had their organization names posted online, (like an affiliate of a larger organization) but whose site was defunct or stated that the organization was not functioning. Since the number of organizations is increasing so quickly, this chart cannot be taken as exhaustive;

Métis groups also have different ideas of what it means to be a Métis person and, therefore, their membership rules can vary significantly, depending on the group.

One group that is more consistent or unified in their definitions are the Inuit of northern Canada. The Inuit Tapiriit Kanatami (ITK) claims to represent the Inuit in the northern Canadian Arctic.⁹³ Their organization's name means "Inuit are united in Canada". They represent four Inuit regions; (1) Nunatsiavut (Labrador), (2) Nunavik (northern Quebec), (3) Nunavut and (4) the Inuvialuit region in the Northwest Territories. In the mid-1960s, the Indian and Eskimo Association was created to represent their mutual interests. While they considered this a starting point, they wanted an organization that would represent the unique interests of those who are now called Inuit. Therefore, in 1971 the Inuit Tapirisat of Canada (ITC) was created. They changed their name to ITK in 2001 as a way of dedicating themselves to Canada.⁹⁴ The ITK maintain a comprehensive web-site as well as some northern programming as a means of keeping their remote communities informed about their activities. This is extremely important in the north where communities can be spread out by hundreds, if not thousands of miles. Access to information about political activities and goals is an essential part of keeping the Inuit unified, and other mediums, such as local television and radio stations, help provide this information.

Many other Aboriginal political organizations also maintain their own web-sites, television stations (like the Aboriginal Peoples Television Network, APTN), or radio stations (like CRKZ 100.3 FM, the radio station broadcast by Six Nations of the Grand

it is meant to serve only as a sample only of the quickly growing number of Métis organizations.

⁹³ Inuit Tapiriit Kanatami, online: ITK <<http://www.itk.ca>> [*ITK online*].

River), in addition to their offices. Some of the web-sites are active, with a great deal of information about their organizations and members. Others are barely functioning, with little or no information about their newly formed groups. The quality of the information also varies with the group, and this impacts on the ability of community members to access important information, or to know what their representative organization is doing on their behalf. The AFN and ITK provide significant information about their respective organizations, their regular activities, media releases and research and other policy documents for the benefit of their membership and the public.⁹⁵ Other groups seem to have less capacity, while still others appear less than credible.⁹⁶

The fact that there are so many divisions within the Aboriginal Nations along these political lines originates from Canada's assimilatory legislation and policies, especially the *Indian Act*. Although the legislation has changed over the years, it is important to understand the development of that legislation and how it changed Aboriginal peoples, like the Mi'kmaq, Mohawk and Maliseet, into Indians. The next

⁹⁴ *Ibid.* Canada is now specifically incorporated into their name.

⁹⁵ *AFN online*, *supra* note 66, *CAP online*, *supra* note 42.

⁹⁶ East Coast First Peoples Alliance, online: ECFPA <<http://www.ecfpa.ca>> [*ECFPA online*], New Brunswick Acadian Métis Indians, online: NBAMI <http://www.nbami.com/our_people.shtml> [*NBAMI online*]. These web sites have been largely dysfunctional over the years and often had very little information about their groups other than some random comments or links to other more bizarre websites. One of the groups, which now appears to be defunct, eventually removed references to its warrior training site which contained a "manifesto" alleging everyone is against him/them, and provided a link to his/their own personal site where one could apparently purchase blood tests to prove one's native DNA. See: NBAMI online, which used to link to this site: Spiritual Guide, online: off-reserve <<http://www.off-reserve.tripod.com/corin/>>. This site linked to the following site: Native American DNA Verification Testing, online: genetree <<http://www.genetree.com/product/native-american-test.asp?source=GO-NAT-dna-native-american-broad>>.

section below provides a brief overview of how the *Indian Act* has changed over the years, and so changed the make-up of Aboriginal peoples.

(b) From Peoples to Indians

Of all the terms reviewed in the first section of this chapter; there is a term that is becoming more popular among Aboriginal peoples. Aboriginal peoples are often referred to as the “First Peoples” of this continent. This is, perhaps, because it is a term that carries more significance as they search for a name that best represents their important historical, social, traditional, cultural, political and legal connections to their varied territories in what is now Canada. There are many reasons Aboriginal peoples’ rights were included in the *Constitution Act, 1982*. The Supreme Court of Canada, in *Van der Peet*, explained that one of the most important factors contributing to the constitutional protection of Aboriginal peoples’ rights was the fact that Aboriginal peoples were here first, and living in their own organized societies:

In my view, the doctrine of Aboriginal rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.⁹⁷

Many Aboriginal traditions speak of their people being born of the land, and emphasize their attachment to the land. For example, the Ojibwe believe that their first ancestors were born of the earth.⁹⁸ The Ojibwe (or Anishanabe) believe that the Creator used a sacred Megis Shell and blew into four parts of Mother Earth, thus uniting the elements

⁹⁷ *Van der Peet*, *supra* note 6 at paras.19-20.

(earth, air, fire, and water) and creating man. Out of the original man came the Anishanabe or “The People”.⁹⁹ Then there are various academic viewpoints that largely subscribe to the Bering Strait theory which suggests that the first Aboriginal peoples simply migrated their way here from Asia thousand of years ago over a land bridge. Several key factors have led to the development of this theory: (1) bones have not been preserved well in North American soils; (2) bones have been well preserved in Russian soil; and (3) artifacts of the same date have been found on both sides of the Bering Strait.¹⁰⁰ Therefore, the assumption is that Bering Strait travel must have commenced in Asia and not vice-versa.¹⁰¹ Whether one subscribes to the Bering Strait theory or that Aboriginal peoples have, indeed, been here since time immemorial, one fact is undisputed: they were here first. They had their own languages, cultures, beliefs and governance, as well as laws and systems for trading, political alliances, access to hunting and fishing, and so forth.¹⁰² As Canada’s indigenous peoples, they have a right to their title as First Peoples; but they are more than just Canada’s First Peoples. They are also the First Nations of Canada who have struggled to survive through periods of disease, segregation and assimilation. This troubled history has also had an impact on modern definitions of Aboriginality and conceptions of communal membership.

⁹⁸ *Founding Peoples*, *supra* note 4 at 4.

⁹⁹ “Ojibwe”, online: Ojibwe <<http://www.ancestrails.org/ojibwe.html>> [*Ojibwe*] 1. See also: K. Callahan, “An Introduction to Ojibway Culture and History”, online: <<http://www.geocities.com/Athens/Acropolis/5579/ojibwa.html>> at 4.

¹⁰⁰ *Founding Peoples*, *supra* note 4 at 3-4.

¹⁰¹ *Ibid.*

¹⁰² *Van der Peet*, *supra* note 6 at para.30. *RCAP Report*, *supra* note 3. Assembly of First Nations, “Our Nations, Our Governments: Choosing Our Own Paths – Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nations Governments – Final Report – March 2005”, online: AFN <http://www.afn.ca/cmslib/general/FNG%20report_Eng%20final.pdf> [*Our Nations*].

(i) **A Troubled History**

For many years, our history in Canada has largely been based on writings, research and stories which commence with the “discovery” of Canada authored by those in the majority society. In recent decades, there has been a shift to include more information about the Aboriginal peoples who were always here. While in school I was taught Canadian history that started in the 1800s, today, my children are taught about the many contributions of Aboriginal peoples to Canadian society. While these kinds of changes have occurred, basic concepts about who we are as Canadians and how our society should work, are still largely based on the old assumptions about the proper place of Aboriginal peoples in Canadian society. For example, Non-Aboriginal Canadians who sometimes divide themselves into Francophone and Anglophone camps, have often referred to themselves as the “Founding Peoples” of Canada. It is the very reason the federation of Canada was officially structured as a bilingual country.¹⁰³ It was the federation’s contention that it was the French and the English who made Canada, as we know it today. While the federation of Canada has since “distanced” itself from the ideology of the “two founding nations or peoples”¹⁰⁴, its current policy of bilingualism and its historical underpinnings has had an effect on the identity of the country and those seeking to assert their own identity within it. There are also Canadians who still feel that Canada only came about through the industry and hard work of the settler Canadians

¹⁰³ See: Canadian Heritage, “History of Bilingualism in Canada” online: Canadian Heritage <http://www.canadianheritage.gc.ca/progs/lo-ol/biling/hist_e.cfm> at 1-3.

¹⁰⁴ S. Churchill, “Epilogue: Canada As a Post-Modern Nation State”, online: Official Languages Support Programs Branch <<http://www.canadianheritage.gc.ca/progs/lo-ol/perspectives/english/languages/epilogue.html>> at 4. I review the different ideologies regarding liberalism in a modern democratic society like Canada, and the resulting academic debate relating to Aboriginal identities, in more detail, in Chapter 3.

versus the relations, alliances, treaties and cultural contributions, Aboriginal land and natural resources and the personal and collective hardships suffered by Aboriginal peoples.¹⁰⁵

There can be no doubt that without Aboriginal peoples, the early explorers who came to this country, French and English both, would not have fared as well as they did. In fact, Aboriginal participation in European enterprises was essential to their success.¹⁰⁶

Dickason describes this economic partnership in the 1600s:

It has been estimated that by 1600 there may have been up to a thousand European ships a year engaged in commercial activities in Canada's northeastern coastal waters. Such activity would not have been possible without the cooperation and participation of the first nations of the land. When it came to penetrating the interior of the continent, Amerindians and Inuit guided the way for the European 'explorers', equipped them with the clothing and transportation facilities they needed, and provided them with food. Their contributions in economic terms alone were substantial and can probably never be properly assessed. ... In the most profound sense of the term, they are Canada's founding peoples.¹⁰⁷ (emphasis added)

The history books have undoubtedly left Aboriginal people out of the limelight,¹⁰⁸ and their rightful place in this country has been greatly under-appreciated in exchange for a debate over "racialized" legal and political rights.¹⁰⁹ Instead of a place of great honour and respect, as the First Peoples and Nations of this country, Aboriginal people are often

¹⁰⁵ See generally: T. Flanagan, "First Nations: Second Thoughts?" (Montreal: McGill-Queen's University Press, 2000) [*First Nations*]. G. Gibson, "A New Look at Canadian Indian Policy: Respect the Collective – Promote the Individual" (Vancouver: Fraser Institute, 2009) [*Canadian Indian Policy*].

¹⁰⁶ *Founding Peoples*, *supra* note 4 at xi.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* "Canadian historians have, in the past, found it much easier to ignore the earlier period; hence the blinkered view of Canada as a 'young' country."

portrayed by the media and some academics as burdens on society.¹¹⁰ Yet, the context of how Aboriginal people came to live in the currently deplorable social and economic conditions is not always provided, nor is reference made to how current injustices contribute to their ongoing conditions. From contact to present day, Aboriginal peoples have had to continually adapt to the complex relationship between their Nations and Canada, both as individuals and as collectives. They have had to do this in the context of federal control, division of their communities, and the operation of a sleuth of assimilatory laws and policies.

The Royal Commission on Aboriginal Peoples (RCAP) also provided a detailed history on Aboriginal-colonial relations, and summarized the 4 stages of this relationship between the Aboriginal and non-Aboriginal Nations from pre-contact times and covering

¹⁰⁹ *First Nations*, *supra* note 105, *Canadian Indian Policy*, *supra* note 105 and D. Gibson, “Rights shouldn’t depend on race” (Edmonton: Edmonton Journal, 2 February 2009).

¹¹⁰ *First Nations*, *supra* note 105. See also: Canadian Taxpayers Federation, “Road to Prosperity: Five Steps to Change in Aboriginal Policy” (Calgary: Canadian Taxpayers Federation, 2005), online: Canadian Taxpayers Federation <http://taxpayer.com/pdf/Road_to_Prosperty_September_2005.pdf>. Here, the Federation’s recommendations for change are all economically motivated and do not have a deeper appreciation of who Aboriginal people are, or what, besides economics are at issue. Their basis for “demanding” accountability is that “Billions of tax dollars are spent by governments each year – with little accountability – in a seemingly futile attempt to help improve the conditions for aboriginal people.” See also: J. Stackhouse, Canada’s Apartheid: Have Your Say – Reader’s Responses”, online: The Globe and Mail <<http://www.theglobeandmail.com/series/apartheid/stories/feedback20011107.html>> 3-4. This reporter asked the question whether “natives” should have a special status or whether all Canadians should have the same rights. He had written a series of articles mostly outlining the poor conditions of Aboriginal peoples. He did not introduce his question with any background, like the fact that our *Constitution* affords special recognition for Aboriginal peoples. One reader wrote: “Native have already a special status being Indian. They should merge with the general population, just as immigrants do and keep up their traditions. Right now they are looking too much in the rearview mirror all the time, talking about whaling, hunting, fishing, getting land back. This sounds depressing to anybody.” Another reader wrote: “This will go on forever, we need to say

the last 500 years.¹¹¹ Stage 1 was that of “Separate Worlds” since both groups lived on opposite sides of the vast Atlantic Ocean. The point made by RCAP was that both societies, Aboriginal and non-Aboriginal peoples alike, had organized themselves “into different social and political forms according to their traditions and the needs imposed by their environments”, and were self-governing “national groups”.¹¹² Stage 2 was “Contact and Co-operation”, which RCAP describes as the beginning of increased contact between Europeans and Aboriginal Nations and the establishment of trade and military alliances between the two groups. In this period, there was also intermarriage, mutual cultural adaptation, conflict, tolerance, respect, and large Aboriginal death tolls from diseases. Most importantly, RCAP stressed that both the European Nations and the Aboriginal Nations were “...regarded as distinct and autonomous, left to govern its own internal affairs but co-operating in areas of mutual interest and, occasionally and increasingly, linked in various trading relationships and other forms of nation-to-nation alliances.”¹¹³

The worst of the stages was the third stage referred to as “Displacement and Assimilation”, a time when non-Aboriginal people were “no longer willing to respect the distinctiveness of Aboriginal societies.”¹¹⁴ Non-Aboriginal society wanted Aboriginal people to conform to the majority society and were willing to force this upon them

no more money, same status, same rights. Looks like they will milk this issue for another 100 years. We have done as much as we can for these people it's time to cut them off.”

¹¹¹ Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 1 (Ottawa: Supply and Services Canada, 1996) [*RCAP, vol. 1*] at 36. As RCAP went into great detail about the history of Aboriginal peoples in Canada and the various stages of interaction between Aboriginal peoples and Canada. There is no need for me to reproduce that history in this chapter. I will merely provide a brief overview of some of the key issues and encourage readers to read the entire *RCAP Report, supra* note 3, if they have not done so already.

¹¹² *Ibid.* at 37.

¹¹³ *Ibid.* at 38.

through relocations, residential schools and the various *Indian Acts*, some of which outlawed cultural practices.¹¹⁵ The fourth stage, called “Negotiation and Renewal” which leads up to modern times, “is characterized by non-Aboriginal society’s admission of the manifest failure of its interventionist and assimilationist approach.”¹¹⁶ RCAP then goes on to explain the present situation:

From the perspective of Aboriginal groups, the primary objective is to gain more control over their own affairs by reducing unilateral interventions by non-Aboriginal society and regaining a relationship of mutual recognition and respect for differences. However, Aboriginal people also appear to realize that, at the same time, they must take steps to re-establish their own societies and to heal wounds caused by the many years of dominance by non-Aboriginal people.¹¹⁷

While RCAP’s overview of this history has been both supported and critiqued, it seems to represent the major changes to which Aboriginal Nations had to adjust in their relations with Canada.¹¹⁸ While the focus of this thesis is the current identity issues faced by Aboriginal peoples, this could not be accomplished without understanding the basic historical context from which modern problems have arisen. Since RCAP has already detailed the historic hardships experienced by Aboriginal peoples at the hands of non-Aboriginal peoples and governments, these need not be fully reviewed here. What is specific to this thesis in stage 3 of the relationship between Aboriginal peoples and Canada is the historical development of the *Indian Act* and its amendments in relation to

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* at 38-39.

¹¹⁷ *Ibid.* at 39.

¹¹⁸ Most Aboriginal groups supported RCAP and still cite its conclusions and recommendations. See: *Our Nations*, *supra* note 102. For a critique of the *RCAP Report*, *supra* note 3, see: *First Nations*, *supra* note 105. *Canadian Indian Policy*, *supra* note 105.

“Indian” identity. This stage has three separate and sometimes overlapping sub-stages, including federal control of Aboriginal identity and communal belonging, the division of Aboriginal individual identities from that of their families and communities, and the assimilatory laws and policies which continue to have effect on Aboriginal peoples today and may mean their ultimate legislative extinction. It is this stage that is the primary focus of the following section.

(ii) Creating Indians

Federal law and policy has focused Aboriginal identity around a legal concept of Indianness that stems directly from the legal definitions provided by Indian legislation up to and including the current *Indian Act*. The federal government has the jurisdiction to legislate with regards to Indians and their lands by virtue of section 91(24) of the *Constitution Act, 1867*, but they have also assumed the power to legislate their very identity and communal belonging rules.¹¹⁹ This control over Indianness and membership has become the primary filter through which the government, society and even some Aboriginal groups have come to view Aboriginal peoples. With regard to accessing culturally specific programs and services, access to land and natural resources, and seats at self-government negotiating tables, the real question is not whether one is Mi'kmaq, Cree or Mohawk, but whether one is an Indian, a band member and/or part of on-reserve constituency of their respective bands. Indian policy is now politely renamed Aboriginal policy, so as to be consistent with the *Constitution Act, 1982*; and, presumably, to include Métis and Inuit. But the real question is whether Aboriginal peoples meet the government's vision of an Indian, which they alone control. While Indianness is more

¹¹⁹ *Indian Act*, *supra* note 32, ss.6, 7, 11.

than just about legal definitions, the central focus of Canada's administration of First Nations is on Indian registration/status.

Although Indian registration was only introduced in 1951, definitions of who was an Indian can be found in much earlier legislation.¹²⁰ For example, section 15 of *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands* enacted in 1868, provided a definition of who would be considered "Indians belonging to the tribe" for the purposes of who could use tribal lands and property:

Firstly. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;

Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And

Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.¹²¹

In this initial definition, the criteria focused more on kinship¹²² and one's relationship to their community.¹²³ While descent from an Indian ancestor was part of the definition, it

¹²⁰ *Indian Act, 1951*, *supra* note 12 at ss.5-14.

¹²¹ *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands* (22 May 1868) [*Indian Lands Act*] at s.15.

¹²² With regard to kinship, see: Department of Anthropology, College of Arts and Sciences: The University of Alabama, "A Kinship Glossary: Symbols, Terms and Concepts", online: Kinship Glossary <<http://www.as.ua.edu/ant/Faculty/murphy/436/kinship.htm>> [*Kinship Glossary*]. "Kinship" is defined as a "Relationship based on or modeled on the culturally recognized

was possible for women to marry into this group, and, therefore, “Indian blood” was not necessary in all cases. Similarly, in *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*¹²⁴ enacted in 1869, there were various provisions which impacted on the definition of an “Indian” in certain contexts. For example, the Superintendent General of Indian Affairs had the power to decide whether “Indians” (i.e. “persons claiming to be of Indian blood” or those people “intermarried with an Indian family”) were lawfully in possession of land in certain townships.¹²⁵ This reference to who fell under the Superintendent General’s jurisdiction in the first section of the *Act* seems to fit with the previous definition in that the amount of “Indian blood” was not the focal point, and this section seemed to allow for some degree of self-identification. It also allowed traditional forms of identification and belonging to continue. For example, those Nations that regularly absorbed other members from other Nations into their own would not have been affected.¹²⁶

At the same time, it was obvious that government viewed Aboriginal peoples as a race, and therefore administered their identities on biological conceptions of race.¹²⁷ Blood quantum, the amount or percentage of “Indian blood” an individual Indian was

connection between parents and children (and extended to siblings and through parents to more distant relatives).”

¹²³ I also discuss aspects of communal citizenship and belonging in more detail later in this thesis.

¹²⁴ *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*. S.C. 1869, c.6 (32-33 Vict.) [*Gradual Enfranchisement Act, 1869*].

¹²⁵ *Ibid.* at s.1.

¹²⁶ G. Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Toronto: Oxford University Press, 1990) [*Heeding the Voices*].

alleged to have, often determined their identity and their rights as Aboriginal peoples.¹²⁸ Section 4 of the 1869 *Act* stated that no annuities were to be shared with any Indian with less than ¼ Indian blood, the presumption being that blood quantum was directly related to cultural assimilation when, in fact, the determination of Indian status by blood is not only arbitrary (as there is no evidence that blood quantum equates with level of culture, identity, or connection to community), but is applied to certain groups of people and applied to the genders differently.¹²⁹ If blood quantum was at all legitimate as a biological or even fictional measure of Indianness, it would apply equally to everyone. It is more than evident under the various *Indian Acts* that this is not the case. While Canada tries to defend its use of the following: degrees of Indian parentage, remoteness, and genealogical proximity to determine Indian status in *McIvor*,¹³⁰ it appears to be dancing around the real

¹²⁷ *Aboriginality*, *supra* note 62.

¹²⁸ *Ibid.* It is interesting to note that the Abenakis highlighted this fact at the court of appeal in *McIvor*, but the court did not fully address it: *McIvor v. Canada* (3-4 October 2008, BCCA) (Factum of the Intervener, Abenakis et al.) [*McIvor-Abenakis Factum*] at i. “When Cabinet first discussed the status rules which would become the 1985 Act, they were explicitly described as a blood quantum. The rules required that everyone registered under s.6(1) in 1985 to be deemed ‘full blood.’ They explain on page 5 that the different rights afforded male and female Indians under the *Act* caused inequities: “The result is that female ‘blood’ is never as strong as male ‘blood’ in determining the current consequences for status of pre-1985 genealogies.”

¹²⁹ S. Grammond, “Disentangling ‘Race’ and Indigenous Status: The Role of Ethnicity”, (2008) 33 *Queen’s Law Journal* 487. Grammond explained that degrees of descent, i.e. blood quantum, could not be taken as a “proxy for acculturation”: “As they now stand the rules are based exclusively on descent; they do not allow for discretionary admission based on factors such as language, place of birth, schooling and the like. Their correspondence with indigenous culture and identity is too tenuous to justify the injustices they work upon those who are deprived of status. It is arbitrary to equate blood quantum and indigenous identity or culture.” (emphasis added)

¹³⁰ *McIvor-Canada Factum*, *supra* note 23 at para. 64. “While the gender of one’s great-great-grandmother is equally immutable as it is beyond one’s control, it is not an intimately connected to the present-day applicant as one’s parents’ characteristic. The connection to one’s ancestor is too remote.”

criteria for Indian status, i.e., blood quantum/descent.¹³¹ Canada's submissions in *McIvor* are relevant in that it provides a good picture of the concepts upon which Canada bases Indian status. This is the first case challenging the constitutionality of the 1985 registration provisions and sheds light on how Canada will defend other claims of discrimination relating to status.¹³²

What Canada has enacted, in effect, is a codified blood quantum/descent formula, which it describes as: a “prospectively gender-neutral entitlement scheme based on degree of Indian parentage,” which included the section 6(2) cut-off and was specifically designed to “ensure those registered have a sufficient genealogical proximity to the historical ‘Indian’ population.”¹³³ Therefore, in the *McIvor* case, for example, Canada denies that *McIvor*'s grandchildren (Jacob Grismer's children) should be registered as Indians because: “they are descended from two generations of mixed parentage. Accordingly, they do not have sufficient genealogical connection to the historical ‘Indian’ population”.¹³⁴ This position, of course, ignores the fact that the Indian population is not frozen in time, did not only exist at a certain point in history, but has grown, evolved, adapted and changed over time, as with any cultural, ethnic, and/or national group. However, it does show that Canada is quite concerned about the blood purity or degree of ancestry/descent of applicants for status. This background is important in understanding

¹³¹ *Memorandum to Cabinet*, 10 May 1984, *Record of Cabinet decision*, 29 May 1984, *Memorandum to Cabinet*, 9 February 1984 [*Cabinet Documents*] as cited in *McIvor-Abenakis factum*, *supra* note 128. In 1984, when Cabinet was considering Bill C-47 (the predecessor to Bill C-31), the documents before it explicitly described the proposed new rules as a blood quantum. Cabinet specifically decided not to: “extend the reinstatement and first-time registration program to ‘one-quarter’ blood”.

¹³² I deal with the discrimination claims against Canada related to Indian status in more detail in Chapter 5.

¹³³ *McIvor-Canada Factum*, *supra* note 23 at para.97.

how the “descendancy” provisions of the current *Indian Act* are really blood quantum formulas carried over and adapted from previous legislation. In Chapter 5, I further explore the argument that the assignment of status which differentiates on the basis of blood quantum/descent is discrimination, as it violates the equality rights of those who are perceived to have an inadequate amount of blood/descent.

The *Indian Act* was amended in 1876, as Canada had decided that it would be “expedient to amend and consolidate the laws respecting Indians.”¹³⁵ In this way, there would be one legislative tool with which to administer and define Indians and their collectives. In addition to control over who could be considered an Indian, the federal government divided individuals based on male and female blood. Male Indian blood was legally more valuable than female Indian blood in determining Indian identity under this *Act*.¹³⁶ At the same time, the government allowed the continued infusion of non-Aboriginal “blood” by non-Aboriginal women who married in, thus making any calculation (if that is even possible) of Indian blood quantum an artificial exercise. The term “Indian” was redefined to include the following:

First. Any male person of Indian blood reputed to belong to a particular band;

Secondly. Any child of such person;

Thirdly. Any woman who is or was lawfully married to such person.¹³⁷

¹³⁴ *Ibid.* at para.103.

¹³⁵ *The Indian Act, 1876*, S.C. 1876, c.18. (39 Vict.) [*Indian Act, 1876*]. The above quote was taken from the one-line preamble.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.* at s.3.

Not only did Aboriginal women and their children have their identities hived off from that of their families and communities, but the above formula also ensured a legislative type of assimilation. The assimilation or reduction in the number of “blood” Indians was guaranteed by this formula, which was very similar to the earlier definition found in section 15 of the *Indian Lands Act, 1868*. The major difference between the two, being that the *Indian Act, 1876*, had a more detailed list of individuals that could be excluded from membership in the band. For example, the following people could be excluded:

- Illegitimate children;
- Indians who resided in foreign countries for more than 5 years;
- Indian women marrying other than an Indian or non-treaty Indian; and
- Some half-breeds.¹³⁸

Similarly, the *Indian Act, 1880*, provided the same definition of the term Indian, the only difference being one of format.¹³⁹ The exclusions were still in the *Act*; they just appeared later on in their own sections.¹⁴⁰ At that time, Indians were also referred to as treaty Indians and non-treaty Indians, the latter of which were still considered Indians, though they did not all have the same rights. This was somewhat similar to non-status Indians of

¹³⁸ *Ibid.* A “non-treaty Indian” was defined in section 4: “The term ‘non-treaty-Indian’ means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even though such person be only a temporary resident in Canada.” Section 2 defined the term “irregular band” as: “The term ‘irregular band’ means any tribe, band or body of persons of Indians blood who own no interest in any reserve or lands of which the legal title is vested in the Crown, who possess no common fund managed by the Government of Canada, or who have not had any treaty relations with the Crown.”

¹³⁹ *The Indian Act, 1880*. S.C. 1880, c.28. (43 Vict.) [*Indian Act, 1880*] s.3.

¹⁴⁰ *Ibid.* at s.10-14. The change in this *Act* was s.14(2) which provided: “The Half-breeds who are by the father’s side either wholly or partly of Indian blood now settled in the Seigniory of Caughnawaga, and who have inhabited the said Seigniory for the last twenty

today, with the exception that non-treaty Indians came under more of the provisions of the *Act* that dealt with treaty Indians. For example, section 75 of the *Act* provided that neither Indians nor non-treaty Indians were liable to be taxed for real or personal property unless any such person held property outside the reserve.¹⁴¹ Non-treaty Indians had also been defined in this *Act* as referring to people of Indian blood belonging to “irregular bands” (that is, bands without reserves or treaties), or people who follow an “Indian mode” of life even though they may only be temporarily resident in Canada.¹⁴² As explained earlier, many individual bands and members consider themselves to be Treaty Indians.

Aside from a few non-definitional amendments, one of which banned the Potlatch ceremony,¹⁴³ the next major consolidations of the *Act* were in 1886, 1906, and 1927, where the definitions of the terms Indian and non-treaty Indian stayed basically the same.¹⁴⁴ It is not until the *Indian Act, 1951*, that the definition of an Indian was substantially changed and a register was created for the first time.¹⁴⁵ They previously had band lists, but this was different from the Indian register, in that band lists recorded those individuals who were “reputed” to be members of a band, whereas the register noted only

years, are hereby confirmed in their possession and right of residence and property, but not beyond their tribal rights and usages which others of the band enjoy.”

¹⁴¹ *Indian Act, 1880*, supra note 139 at s.75. See also s.21, 23, 76-81, 85-92, 94.

¹⁴² *Ibid.* at s.4. See also s.2 for definition of “irregular band”.

¹⁴³ *An Act to further amend “The Indian Act, 1880”*. S.C. 1884, c.27. (47 Vict.) [*Indian Act, 1884*]. Section 3 of the *Act* made the celebration of, or the encouraging to celebrate the “Indian festival known as the ‘Potlatch’ or the Indian dance known as the ‘Tamanawas’ guilty of a misdemeanor and liable to imprisonment.

¹⁴⁴ *The Indian Act*. R.S.C. 1886, c.43. s.2(h) [*Indian Act, 1886*], *Indian Act*. R.S.C. 1906, c.81. s.(f) [*Indian Act, 1906*]. *Indian Act*. R.S.C. 1927, c.98. 2(d) [*Indian Act, 1927*]. The “Half-breeds” of Caughnawaga are no longer included in the membership section by the 1927 amendments.

¹⁴⁵ *Indian Act, 1951*, supra note 12.

those who would be considered “Indians” for the purposes of the *Act*. Indians were then defined as: “a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.”¹⁴⁶ This is the same definition that exists today.¹⁴⁷ In addition, “Eskimos” (now referred to as “Inuit”) were specifically excluded from the *Act*’s application and non-treaty Indians and half-breeds were no longer included in the definitions.¹⁴⁸ Further, instead of a list of those who were excluded from band membership, a “member of a band” was defined to mean “a person whose name appears on a band list or who is entitled to have his name appear on a Band List.”¹⁴⁹ The *Act* provided for an Indian Register that would be maintained by Indian Affairs and would contain both the Band lists and a General list.¹⁵⁰ The General list is different from the Band list in that one did not have to be a member of a band to be on the General list as an “Indian”. The Band List would contain the names of every person who was entitled to be registered and was also a member of a band, whereas the General List would contain the name of everyone who was entitled to be registered but not a member of a band.¹⁵¹

These new provisions had the effect of further separating the connection between individual Indians and the communities/Nations from which they came. Two separate relationships were formed in this amendment: one between the government and communities of Aboriginal peoples and one between the government and individual Indians. The Registrar alone had the power to add and delete names from both the Band

¹⁴⁶ *Ibid.* at s.2(g).

¹⁴⁷ *Indian Act, 1985, supra* note 32 at s.2.(1).

¹⁴⁸ *Indian Act, 1951, supra* note 12 at s.2, 4.(1). Section 4.(1) of the *Act* provided: “This Act does not apply to the race of aborigines commonly referred to as Eskimos.”

¹⁴⁹ *Ibid.* at s.2(j).

¹⁵⁰ *Ibid.* at s.5.

¹⁵¹ *Ibid.* at s.6.

List and the General List and the actual definition of Indian carried on the male preference for entitlement.¹⁵² This level of control served to further divide and reduce the number of Indians on the register, an outcome that reflected the original intention of Canadian policy towards Indians.¹⁵³ Section 11 detailed who was entitled to be registered as an Indian and generally included:

- (a) those who on May 26, 1874, were entitled to hold land pursuant to the Management of Indian and Ordnance Lands, 1868;
- (b) a member of a band;
- (c) the direct male descendant of (a) or (b);
- (d) the illegitimate child of male person in (a), (b) or (c);
- (e) the illegitimate child of female, not protested; and
- (f) the wife or widow of (a) – (e).¹⁵⁴

¹⁵² *Ibid.* at s.7.

¹⁵³ *Indian Problem, supra* note 18.

¹⁵⁴ *Indian Act, 1951, supra* note 12 at s.11. “Subject to section twelve, a person is entitled to be registered if that person (a) on the twenty-sixth day of May, eighteen hundred and seventy-four, 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, chapter forty-two of the statutes of 1868, as amended by section six of chapter six of the statutes of 1869, and section eight of chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, (b) is a member of a band (i) for whose use and benefit, in common, lands have been set apart or since twenty-sixth day of May, eighteen hundred and seventy-four 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 purposes of this Act, (c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b), (d) is the legitimate child of (i) a male person described in paragraph (a) or (b), or (ii) a person described in paragraph (c), (e) is the illegitimate child of a female person described in paragraph (a), (b) or (d), unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered, or (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).

Section 12(1)(b) was enacted at this time and formed part of the definition of Indians in the *Indian Act, 1951*.

This now infamous section of the previous *Act* excluded Indian women who married non-Indian men from registration as Indians. Section 12 also excluded from registration those who had received half-breed lands or scrip and their descendants, anyone who had been enfranchised, and anyone who fell under the double-mother rule (their mother and father's mother were non-registered as Indians).¹⁵⁵ The ultimate presumption in this version of the *Act* was that the child was a status Indian, unless and until a protest was made proving otherwise. This meant that it was in the best interest of unmarried Indian women to withhold the names of the fathers so that their child could partake in a common identity with the rest of their family and community and have access to the same rights, benefits and obligations. Although the *Act* was revised again in 1970, sections 11 and 12 dealing with who was entitled to be registered, and who was excluded, stayed basically the same.¹⁵⁶ It was not until the controversial *Bill C-31* amendments made in 1985 that the *Indian Act's* registration and membership provisions would substantially change the composition of Aboriginal communities again. Janet Lavell challenged this section and lost in the Supreme Court of Canada. However, Sandra Lovelace later successfully challenged section 12(1)(b), and this success led to the *Bill C-31* amendments.¹⁵⁷

¹⁵⁵ *Ibid.* at s.12.

¹⁵⁶ *Indian Act*, R.S.C. 1970, c. 1-6. s.11,12.

¹⁵⁷ *Janet Lavell v. Canada (Attorney General)*, [1974] S.C.R. 1349 [*Lavell*]. This case involved two women, Jeanette Corbiere Lavell and Yvonne Bedard, who had their appeals heard together. Lavell had been a member of the Wikwemikong Band, and Bedard was from Six Nations of the Grand River. The two challenged s.12(1)(b) of the *Indian Act, 1951*, *supra* note 12, with s.1(b) of the *Canadian Bill of Rights, 1960* (Can.)

The amendments that were to come much later in 1985 were a direct result of challenges to section 12(1)(b).¹⁵⁸ While the 1985 amendments were supposed to deal with discrimination under the *Act*, they fell far short of that objective and the generational effects of section 12(1)(b) remain. Even when amendments to the *Indian Act* were being debated, Canada had actual knowledge that they would perpetuate discrimination against Aboriginal women and their descendants through section 6(2)'s second-generation cut-off:

A memorandum to Cabinet when it was considering Bill C-47 in 1984 admitted that the exclusion of “the grandchildren of those who lost status involuntarily” could “lead to criticism that we are perpetuating in the part the very discrimination the amending legislation was intended to abolish”.¹⁵⁹

The federal government currently retains complete control over status, and defends the numerous categories of status Indians which divide communities; its own demographic experts have proven that this will lead to the eventual legislative extinction of First Nations.¹⁶⁰ Legal assimilation is guaranteed through the continued use of the *Act*.

c.44 [*Bill of Rights*] regarding equality rights of individuals before the law. They lost their case. However, Sandra Lovelace from Tobique First Nation in New Brunswick successfully challenged s.12(1)(b) at the United Nations. *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No.40 (A/36/40) at 166 (1981) [*Lovelace UN*].

¹⁵⁸ *Lovelace UN*, *supra* note 157. Here the United Nations Human Rights Committee held that Canada was in breach of article 27 of the UN General Assembly, *Optional Protocol of the International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p.171 [ICCPR], in that it prevented *Lovelace* from enjoying her Indian culture.

¹⁵⁹ *Cabinet Documents*, *supra* note 131 as cited in *McIvor-Abenakis Factum*, *supra* note 128 at para.83 (emphasis added).

¹⁶⁰ *Reassessment of Population Impacts*, *supra* note 2. *Revised Population Scenarios*, *supra* note 2. *Indian Registration and Membership*, *supra* note 2. *Populations Implications*, *supra* note 2 at viii.

Canada's position was that despite this reality, they would deal with this issue "in a decade or two when the problem is a real one".¹⁶¹

Those who are now entitled to be registered as Indians since 1985 are:

- 6.(1) Subject to section 7, a person is entitled to be registered if
- (a) that person was registered or entitled to be registered immediately prior to April 17, 1985;
 - (b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
 - (c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
 - (d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
 - (e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,
 - (i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section; or

¹⁶¹ *Cabinet Documents*, *supra* note 131 as cited in *McIvor-Abenakis Factum*, *supra* note 128 at paras. 81-83.

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

(3) For the purposes of paragraph (1)(f) and subsection 2,

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be registered under paragraph (1)(a); and

(b) a person described in paragraph (1)(c), (d), (e) or (f) or subsection 2 and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision.

7.(1) The following persons are not entitled to be registered:

(a) a person who was registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or

(b) a person who is the child of a person who was entitled to be registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and is also the child of a person who is not entitled to be registered.

(2) Paragraph (1)(a) does not apply in respect of a female person who was, at any time prior to being registered

under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.

- (3) Paragraph (1)(b) does not apply in respect of a child of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.¹⁶²

It is out of this *Act* that registered Indians in Canada came to be divided into 6(1) and 6(2) Indians, in addition to non-status Indians. In reality, many status Indians are further divided within their communities between section 6(1)(a) Indians; those who are considered to be the “original” group (i.e., full Indians or full status), and other types of Indians who are considered to be either newcomers or reinstates (also known as *Bill C-31* reinstates), who are considered half-status or half-Indians. The difference between the two basic groups is that 6(1) Indians can pass on their Indian status to their children, in their own right, regardless of their parental partners, whereas 6(2) Indians have to partner with another registered Indian in order to pass Indian status and most often, band membership on to their children. In this way, 6(1) Indians are free to choose their marital or parental partners as they wish, without restriction. Section 6(2) Indians cannot do so without severely impacting the identity, communal membership, Aboriginal and treaty rights and access to federal programs and services of their children, an outcome dictated by their status as Indians or otherwise. In addition, section 10 of the new *Act* gave Indian bands the option to assume control over their membership codes if they established written membership rules and a majority of the electors of the band give consent.¹⁶³

¹⁶² *Ibid.* at s.6, 7.

¹⁶³ *Ibid.* at s.10(1). Specifically, section 10 provides: “10.(1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band

Otherwise the membership provisions of the *Indian Act* would remain in effect. Currently, over 60% of the bands in Canada still have their membership determined by the *Indian Act*. Some of the membership rules enacted by various bands pursuant to section 10 have divided Aboriginal peoples even further into registered and non-registered Indians who are and are not band members, based on additional criteria, like whether one lives on the

gives its consent to the band's control of its own membership. (2) A band may, pursuant to the consent of a majority of the electors of the band, (a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and (b) provide for a mechanism for reviewing decisions on membership. (3) Where the council of a band makes a by-law under paragraph 81(1)(p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of full age of eighteen years. (4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force. (5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(c) immediately before the band assumed control of the Band list if that person does not subsequently cease to be entitled to have his name entered in the Band List. (6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band. (7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith (a) give notice to the band that its has control of its own membership; and (b) direct the Registrar to provide the band with a copy of the Band List maintained in the Department. (8) Where a band assumes control of its membership rules established by the band, shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band. (9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph 7(b), and , subject to section 13.2, the Department shall have no further responsibility with respect to that Band List from that date. (10) A band may at any time add or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list. (11) A Band List maintained by a band shall indicate the date in which each name was added thereto or deleted therefrom.”

reserve, marries an Indian or has the right blood quantum.¹⁶⁴ While the *Bill C-31* amendments were meant to address discrimination against Indian women under the *Indian Act, 1951*, namely section 12(1)(b), what they actually did was merely delay the enfranchisement process (loss of status) by two generations.¹⁶⁵ It also incorporated inequality between men and women as to determining status, in addition to creating the other inequities reviewed earlier.

All of this has resulted in a plethora of litigation against the federal government, alleging that there is residual discrimination in the current *Indian Act* that was never addressed by the amendments.¹⁶⁶ The different claims of discrimination include the following major forms:

- **cousins discrimination** – descendants of male Indians who married out have better status than the descendants of female Indians who married out;
- **siblings** – despite changes in the *Indian Act*, there are situations where illegitimate male Indians are often entitled to s.6(1)(a) status and illegitimate female Indians are only entitled to s.6(2) status, meaning that males are automatic band members and females may or may not have band membership;
- **unstated paternity** – while previous *Indian Acts* contained a presumption of Indian paternity for the children of unwed Indian women, the current *Indian Act* presumes non-Indian paternity for the

¹⁶⁴ *Population Implications, supra* note 2. In Chapter 6, I will review band membership codes in more detail.

¹⁶⁵ *RCAP, vol.1, supra* note 111 at 306. “Thus, the post-1985 status rules continue to discriminate as the pre-1985 rules did, except that the discriminatory effects are postponed until the subsequent generations.”

¹⁶⁶ For a discussion of this issue see: *Population Implications, supra* note 2. P. Paul, *Bill C-31: The Trojan Horse: An Analysis of the Social, Economic and Political Reaction of First Nations People as a Result of Bill C-31* (M.A. Thesis, University of New Brunswick 1990) [unpublished] [*Trojan Horse*]. *An Empty Shell, supra* note 39. *Arbitrary, Anachronistic and Harsh, supra* note 25. See also my discussion of this issue in more detail, *infra*.

children of unwed Indian women which leads to lesser or no status for these children; and

- **second generation cut-off rule** – two generations of out-marriage (parenting between Indians and non-Indians) results in children without status.¹⁶⁷

While other claims have also been made, this represents the main groupings of discrimination that can also be found in ongoing litigation claims.¹⁶⁸ *Bill C-31* has had a profound impact on the eligibility of Aboriginal peoples being registered as Indians and it has not resolved but perpetuated discrimination.¹⁶⁹ After studying the population implications of *Bill C-31*, Clatworthy concluded:

The Indian Act was amended in 1985 to remedy the unequal treatment of Indian men and women who married non-Indians. However, the amendments passed in 1985 do not create equality among Indians. Rather they create

¹⁶⁷ J. Fiske, E. George, “Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalization through Customary Law” (Ottawa: Status of Women, 2006) [*Cultural Trauma*]. Other discrimination claims include those involving illegitimate children and scrip takers. See also: Native Women’s Association of Canada, “Aboriginal Women’s Rights are Human Rights”, online: NWAC <<http://www.nwac-hq.org/documents/AboriginalWomensRightsAreHumanRights.pdf>> [*Aboriginal Women’s Rights*], W. Cornet, “First Nation Identities and Individual Equality Rights: A Discussion of Citizenship, Band Membership and Indian Status: Executive Summary Prepared for NAWA” (26 January 2003) [*First Nation identities*], *Aboriginality, supra* note 62 and M. Furi, J. Wherrett, “Indian Status and Band Membership Issues” (Ottawa: Library of Parliament, 2003), online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/bp410-e.htm>> [*Indian Status and Membership*] and Native Women’s Association of Canada, “Guide to Bill C-31: 1986: An Explanation of the 1985 Amendments to the Indian Act”, online: NWAC <<http://www.nwac-hq.org/documents/GuidetoBillC31.pdf>> [*Guide to Bill C-31*] at 23.

¹⁶⁸ *Gehl, supra* note 34; *Perron, supra* note 34; *McIvor, supra* note 9; *Brenda Pauline Sanderson v. Attorney General of Canada* (13 May 2003, Winnipeg QB) [*Sanderson*] (no date has been set for trial); *Nathan McGillivray acting as guardian ad Litem of Dakota Erin McGillivray, an infant under the age of 18 years, Diana Lynn McGillivray, Diane Lehmann-Ballantyne, and the Opaskwayak Cree Nation v. Her Majesty the Queen* (22 April 2008, FCC) [*McGillivray*] (no date has been set for trial). The different areas of discrimination caused by the *Indian Act* are discussed in more detail in Chapter 5 in relation to *Charter* equality.

¹⁶⁹ *McIvor Factum, supra* note 37 at para.27.

inequality that is gender neutral. Before 1985 the Act penalised Indian women for marrying out. After 1985 it penalises both Indian men and women who marry out by making their children unequal to other Indian children.¹⁷⁰

Clatworthy refers here to the differences between section 6(1) and 6(2) Indians generally.

However, the claim that the *Indian Act* is “gender neutral” on a go forward basis is without merit.¹⁷¹ A closer legal analysis reveals that the *Act* has arguably incorporated the discrimination created by previous versions of the *Act*:

The *Act*'s effect of perpetuating adverse treatment of women, contrary to the government's intention has been acknowledged in public reports. Although the purpose of the 1985 amendments was to eliminate discrimination, the *Act* did not achieve its goal. Instead of eliminating discrimination, the 1985 amendments transferred and incorporated the preference for male Indians and male lineage into the new regime. Section 6(1)(a) confirmed the registration entitlement of Indian men, their wives and descendants born prior to April 17, 1985, who benefitted from the patrilineal definition of Indian under prior *Indian Acts*. Section 6(1)(c) did not grant an equal entitlement to women who married out and their descendants born prior to April 17, 1985.¹⁷²

This issue of residual discrimination is dealt with in greater detail in Chapter 5.

Various types of differential treatment also occur among some First Nations bands, who have now been given the power to adopt their own membership codes many of which are based on principles embedded in the *Indian Act*. Regardless of the membership codes, the federal government still retains control over how status is determined. Clearly, without significant amendments to the *Act* and/or other solution(s), there can be no true equality in First Nations communities:

¹⁷⁰ *Population Implications*, *supra* note 2 at 54.

¹⁷¹ *McIvor-Canada Factum*, *supra* note 11 at v. “From 1985 forward, all persons are treated equally.” They further argue that: “In short, Parliament created a new prospective, gender-neutral registration system and this complies with ss.15 and 28 of the *Charter*.”

C-31 thus lays the groundwork for social inequality in First Nations communities. It establishes an ongoing distinction between two ‘classes’ of Indians, 6(1) and 6(2) registrants. In First Nations whose membership is controlled by the Act, these two classes are unequal in one important respect: the ability to transmit Indian status to their children. In time, as awareness of this distinction increases, it is likely to enter the political and social lives of the First Nations as the distinction between ‘full’ and ‘half’ Indians. C-31 is the gateway for the First Nations to a world in which some are more equal than others.¹⁷³

Pam Paul (now Pam Paul-Montour) analyzed *Bill C-31*’s social, economic and political effects within First Nations.¹⁷⁴ Paul argues that *Bill C-31* was designed to eliminate discrimination against Indian women, but what resulted was further discrimination against Indian women and their children:

Women fought against discrimination within the old Indian Act because it alienated women and their children from their families and communities and created false divisions between native people. Yet Bill C-31 has brought with it two new varieties of discrimination, one based on generation the other based on labelling. It has also brought with it a number of economic issues which have served to divide native organizations and communities. Problems attributed to Bill C-31 extend far beyond the parameters of programs and administrative confusion. The end result is that Indian women and their families are once again victims of bureaucratic structures, both by band councils and the federal government.¹⁷⁵

She goes on to review the history of *Bill C-31*, how it was implemented, and its effects on First Nations and concludes:

¹⁷² *McIvor Factum*, *supra* note 23 at para.27.

¹⁷³ *Population Implications*, *supra* note 2 at 54.

¹⁷⁴ *Trojan Horse*, *supra* note 166. See also: P. Paul, Atlantic Policy Congress of First Nations Chiefs Secretariat, *The Politics of Legislated Identity: The Effect of Section 6(2) of the Indian Act in the Atlantic Provinces* (Nova Scotia: APCFNC, 1999) [*Politics of Legislated Identity*].

¹⁷⁵ *Trojan Horse*, *supra* note 166 at 105.

Although the implementation and interpretation of Bill C-31 has divided Indian communities, there is one common unifying thread across the country. It is a commonly held view that Bill C-31 policies serve no other purpose that [sic] to further advance the federal government's crusade to assimilate native people into the mainstream Euro-Canadian society.¹⁷⁶

The Royal Commission on Aboriginal Peoples (RCAP) recognized the same problem with *Bill C-31*:

Although the current *Indian Act* contains no enfranchisement provisions, the status rules, as modified in 1985 by Bill C-31, are still highly problematic. Not only are they extremely complex, but like their historical predecessors, they appear to continue the policy of assimilation in disguised but strengthened form. This is because of the distinctions drawn between the two classes of Indians under the post-1985 rules.¹⁷⁷

They also pointed out the fact that the children of an Indian, who is registered under section 6(2) of the *Act*, are "penalized" if that parent "marries out" (i.e. partners with a non-registered person to have children).

At the same time, the children of an Indian who is registered under section 6(1) will be registered, regardless of who their other parent happens to be.¹⁷⁸ RCAP further highlighted the historical underpinnings for the federal government's self-interest in the *Act's* changing definition of "Indian":

During the 1946-48 parliamentary hearings on revising the *Indian Act*, federal officials were unable to explain whether or to what extent they planned remedial action. As it turned out, the response of federal officials dealt with the situation of these women, but also served to confirm the continuing assimilative thrust of federal Indian policy. In a letter to the joint committee examining the issues, Indian affairs

¹⁷⁶ *Ibid.* at 106.

¹⁷⁷ *RCAP, vol.1, supra* note 111, at 304.

¹⁷⁸ *Ibid.* at 305.

officials were candid regarding their motivations in the case of Indian women who married non-Indian men:

“by the alteration of the definition of Indian by the Statute of 1876 the Dominion very substantially reduced the number of people for whose welfare it was responsible and by that action passed the responsibility on to the provinces for thousands of people, who, but for the statute of 1876, would have been federal responsibility for all time.”¹⁷⁹

This historical evolution of the *Indian Act* has had a significant impact on Aboriginal identity and has changed the way many Aboriginal individuals, families, communities and Nations define themselves.¹⁸⁰ What is most disturbing about the registration provisions of the *Act* is the impact it will have on future generations of Aboriginal peoples and what that means for the internal composition and the very legal/recognized existence of Aboriginal Nations into the future. RCAP clearly warned of what is in store for Aboriginal peoples should Canada continue to use the *Indian Act* to control and define Aboriginal identity:

Thus, it can be predicted that in future there may be bands on reserves with no status Indian members. They will have effectively have been assimilated for legal purposes into provincial populations. Historical assimilation goals will have been reached, and the federal government will have been relieved of its constitutional obligation of protection, since there will no longer be any legal ‘Indians’ left to protect.¹⁸¹

This outcome stands in stark contrast to the legal position put forward by Canada in its defense of the registration provisions.

¹⁷⁹ *Ibid.* at 304.

¹⁸⁰ *McIvor-CAP Factum*, *supra* note 23 at para.5

¹⁸¹ *Ibid.* at 307.

While Canada fully acknowledges that “once there has [sic] been two consecutive generations of a person entitled to registration parenting with a non-Indian, the resulting descendants will not be entitled to registration”, it defends this formula despite the well-documented analyses (by its own expert) on how it will negatively impact Indian population numbers.¹⁸² Canada’s defense is on the basis that it wants to ensure that those people who are registered under the *Act* “are sufficiently connected to the historical population that the federal government treated with or for whom reserves were set aside.”¹⁸³ It is hard to see how the objective of ensuring that Indians are sufficiently connected to the historical population is met by a registration formula that ensures that there are no “legal” Indians left to protect. It would be hard to deny that this is anything but an advancement of historical assimilation goals. The current control, division, and assimilation that is inherent in the current and past *Indian Acts* will continue to have harmful effects on both individual and communal Aboriginal identities until major changes are incorporated into the *Act* and/or other mechanisms are created to replace it altogether. The demographic impact of the current *Indian Act* on Aboriginal Nations which negatively impacts the individual and communal identities of Aboriginal peoples also puts their future existence at risk.

¹⁸² *McIvor-Canada factum*, *supra* note 23 at para.12. *Population Implications*, *supra* note 2. *Revised Population Scenarios*, *supra* note 2. *Indian Registration and Membership*, *supra* note 2, S. Clatworthy, Four Directions Consulting Group, *Paternal Identity and Entitlement to Indian Registration: The Manitoba Context*, (Winnipeg: Four Directions Consulting Group, 2001) [*Paternal Identity and Registration*]. S. Clatworthy, *First Nation Affiliation Among Registered Indians Residing in Select Urban Areas* (Winnipeg: Four Directions Project Consultants, 2000) online: <http://www.ainc-inac.gc.ca/pr/ra/aar/aar_e.pdf> [*First Nation Affiliation*]. S. Clatworthy, *Factors Contributing to Unstated Paternity* (Winnipeg: Four Directions Project Consultants, 2003) online: <http://www.ainc-inac.gc.ca/pr/ra/uncp_e.pdf> [*Unstated Paternity*]. *Reassessing Population Impacts*, *supra* note 2.

(c) The Future of a People

Government control over the lives of Aboriginal peoples through the *Indian Act* has had a significant impact on the identities of Aboriginal people in Canada. A review of the current population figures, together with future indicators show that the continued use of the *Indian Act, 1985*, and certain membership provisions to determine Aboriginal identity in Canada, will have drastic effects on Aboriginal communities now and into the future.¹⁸⁴ These provisions impact individual Aboriginal people, as well as their home communities and their larger Aboriginal Nations. Diseases, relocations, warfare, and other colonial activities had previously reduced Aboriginal populations during contact and shortly thereafter.¹⁸⁵ What is happening now is a legislated form of population reduction which is based on the government's previous assimilation goals. The ultimate effect of the legislation has not changed since previous *Acts*, despite alleged changes in Canada's official policy position with regards to assimilation. That goal is to reduce the number of people the government must be accountable to in terms of protection, treaty obligations, land rights, self-government, and other Aboriginal rights, not to mention a whole series of culturally specific programs and services that are provided today. While Canada has taken the position that various objectives other than costs are behind their defense of the registration provisions, the historical record shows clearly that cost

¹⁸³ *McIvor-Canada Factum*, *supra* note 23 at para.12.

¹⁸⁴ *Population Implications*, *supra* note 2. *Revised Population Scenarios*, *supra* note 2. *Indian Registration and Membership*, *supra* note 2, *Paternal Identity and Registration*, *supra* note 182, *First Nation Affiliations*, *supra* note 182, *Unstated Paternity*, *supra* note 182, *Reassessing Population Implications*, *supra* note 2.

¹⁸⁵ *Founding Peoples*, *supra* note 4.

reduction is the ultimate objective in legislating Indians out of existence.¹⁸⁶ There is no “problem” that is solved or addressed by the discrimination found in the “cousins” rule, nor is any reason ever given by Canada in *McIvor* for the necessity of violating the equality rights for those impacted by “cousins” discrimination. Canada’s positions in court are countered by their own internal documents which specifically stated that the object was to figure out ‘how some form of reinstatement could be implemented at reduced cost’ and that the “final policy decision on reinstatement will be shaped by financial more than any other considerations’.”¹⁸⁷

The Aboriginal people who are most at risk right now are those who are first being legislatively excluded: the non-status Indians. But eventually, according to current demographic studies, all Indians will be legislated out of existence as will be their communities.¹⁸⁸ In some cases, as self-government agreements move forward, even those who have their status as Indians, but are non-band members, may also be excluded if

¹⁸⁶ *McIvor-Canada factum*, *supra* note 23 at para.96. Canada argued that the 1985 amendments to the *Indian Act* had four objectives: (1) remove bias from *Indian Act* registration scheme, (2) enable bands to assume greater autonomy through control of band membership, (3) preserve acquired rights, and (4) retain control over registration to ensure those registered had a “sufficient genealogical proximity” to the historical population. *McIvor trial*, *supra* note 9. *McIvor*, *supra* note 9. Neither the trial nor appeal courts accepted the last as one of the actual objectives of *Bill C-31*.

¹⁸⁷ *Cabinet Documents*, *supra* note 131. *Note to Minister*, 11 January 1985 [*Minister’s Note*] as cited in *McIvor-Abenakis factum*, *supra* note 128 at para. 109.

¹⁸⁸ *Population Implications*, *supra* note 2, *Revised Population Scenarios*, *supra* note 2, *Indian Registration and Membership*, *supra* note 2, *Paternal Identity and Registration*, *supra* note 182, *First Nation Affiliations*, *supra* note 182, *Unstated Paternity*, *supra* note 182 *Reassessing Population Implications*, *supra* note 2.

¹⁸⁸ *Founding Peoples*, *supra* note 4.

citizenship codes in self-governing Aboriginal Nations continue to be based on *Indian Act* provisions.¹⁸⁹ Clatworthy explains:

The descent rules that now govern the inheritance of Indian status appear unsatisfactory as a basis for defining citizenship in self-governing First Nations. In the long run these rules will lead to the extinction of First Nations. In the shorter term, they will involve the denial of citizenship to many children and grandchildren.¹⁹⁰

While self-government agreements are reviewed later in this thesis, it is notable that many citizenship codes are based on band membership lists.¹⁹¹ Thus, there are short term and long term implications to the current *Indian Act, 1985*, problems that must be resolved, regardless of whether the future is moving towards self-government agreements or not. If the self-government citizenship codes rely in any way on the current inequities found in the status or membership provisions of the current *Indian Act*, then those agreements are equally suspect. The forecasted population figures for status Indians reveal certain extinction for Indians if the current issues of inequality, discrimination and lack of control over Aboriginal identity by Aboriginal peoples is not addressed. That is why a closer look at these population forecasts is necessary to fully appreciate the long term effects of this legislation.

(i) Population Figures

There is no way of ever knowing with certainty how many Aboriginal people were living in North America prior to contact. Dickason has reviewed the historical data

¹⁸⁹ *Population Implications*, *supra* note 2 at viii. Clatworthy explains: “Implicit in self-government is a concept of First Nations’ citizenship. The Act and the membership codes that have been developed based on it, provide a problematic basis for this concept...”.

¹⁹⁰ *Ibid.*

¹⁹¹ A detailed review of self-government citizenship codes and enrollee lists will be provided in Chapter 6.

and estimates that the Aboriginal population could have been as high as 112.5 million for the entire hemisphere in the fifteenth century, and as high as 18 million for North America north of the Rio Grande, for the beginning of the sixteenth century. While she does not suggest that the population numbers for Aboriginal peoples were, in fact, this high, she does point out that the importation of diseases by the Europeans likely decimated as much as 93% of the Aboriginal population.¹⁹² While RCAP adds that several experts, using different methodologies, have arrived at estimates of 2 million people at contact, other figures suggested have been as low as 500,000.¹⁹³ Today, the Aboriginal population in Canada is larger and seems to be growing. The actual number of Aboriginal people in Canada is one that varies depending on which figures one uses. For example, the 2001 Census revealed that according to ancestry, Aboriginal people made up 4.5% (1,319,895) of the population.¹⁹⁴ Yet, according to identity, Aboriginal people made up only 3.3% (976,310) of the population.¹⁹⁵ In the 1990's when RCAP carried out its

¹⁹² *Founding Peoples*, *supra* note 4 at 9. See also: *RCAP*, *vol. 1*, *supra* note 111 at 13. "The diseases brought to North America by Europeans from the late 1400s onward, diseases to which the indigenous inhabitants had little resistance, had an enormous impact on Aboriginal population levels. During 200 to 300 years of contact, diseases such as smallpox, tuberculosis, influenza, scarlet fever and measles reduced the population drastically. Armed hostilities and starvation also claimed many lives."

¹⁹³ *RCAP*, *vol. 1*, *supra* note 111 at 13. "The figure of 500,000 for the indigenous population at the time of initial sustained contact with Europeans is perhaps the most widely accepted today, although many would regard it as a conservative estimate."

¹⁹⁴ Statistics Canada, "2001 Census: Aboriginal peoples of Canada", online: StatCan <<http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/canada.cfm>> [2001 Census]. Statistics Canada qualified the reliability of its data: "Undercoverage in the 2001 Census was considerably higher among Aboriginal people than among other segments of the population due to the fact that enumeration was not permitted, or was interrupted before it could be completed, on 30 Indian reserves and settlements. These geographic areas are called incompletely enumerated Indian reserves and settlements."

¹⁹⁵ Statistics Canada, "2006 Census: Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census", online: StatCan <<http://www12.statcan.ca/census-recensement/2006/as-sa/97-558/p2-eng.cfm>> [2006 Census]. In the 1996, 2001 and 2006

mandate, it chose to use the identity figures. Yet, Aboriginal identity, at least in terms of the Census, may not have anything to do with Aboriginal ancestry. In the same volume, RCAP points out that: “Recognition as ‘Indian in Canadian law often had nothing to do with whether a person was actually of Indian ancestry. Many anomalies and injustices occurred over the years in this regard.”¹⁹⁶ When speaking specifically of the *Indian Act* provisions that determine who is status and whether they are a 6(1) or 6(2) Indian, RCAP further explains that: “Nor should it be forgotten that this has very little to do with actual Indian ancestry, since the new rules are arbitrary and are built on the arbitrary distinctions that have come down through the history of the Indian Act and its predecessors.”¹⁹⁷

However, Joe Magnet, a constitutional lawyer, asserts that the Indian identity question in the Census is faulty, and, therefore, reliance on that data as opposed to the ancestry data is compromised. With regard to questions 17 (ancestry) and 18 (identity) in the 2001 Census, Magnet explains:

It seems unlikely that people would exaggerate their Aboriginality on the census form by a positive identification as Aboriginal when there are so many negative stereotypes associated with Aboriginal people and no benefit to be gained. It is possible that respondents interpret the next question (question 18), which asks about identity, as a question about Indian registration, not as an opportunity for self-identification as Aboriginal. This seems plausible given the close correlation between registration and those who respond positively to the identity question (a

Census respectively, the identified Aboriginal population increased from 2.8% of the Canadian population to 3.3% and then to 3.8%. They also noted that undercoverage of Indian reserves had dropped from 30 reserves in 2001 to 22 reserves in 2006.

¹⁹⁶ *RCAP, vol.1, supra* note 11 at 303.

¹⁹⁷ *Ibid.* at 305.

stunning 92 percent of those who respond positively to question 18 about identity are registered Indians).¹⁹⁸

Since the identity question looks like it was misunderstood to correspond to one of registration, as opposed to identifying as Aboriginal, where did that leave all the non-registered Aboriginal peoples and their opportunity to self-identify? According to Magnet, responding positively to one's Aboriginal ancestry is an act of identification as Aboriginal. He further explains:

Few non-registered people respond positively to question 18. If this is bypassing an opportunity to self-identify as Aboriginal, one would expect non-registered people to bypass other opportunities to self-identify as Aboriginal too. How then to explain why a large number of non-registered people are active in non-registered Aboriginal organizations of all kinds, which seems to be a clear act of self-identification? These behaviours make unlikely that a positive response to question 18 about identity is an accurate measure of self-identification as Aboriginal, and question 18 about identity as a query about registration.¹⁹⁹

Perhaps then, excluding the ancestry data on the assumption that it was not a form of Aboriginal self-identification may indicate inaccurate numbers with regards to the actual self-identifying population.²⁰⁰

“Aboriginal identity” was defined by Statistics Canada as “those persons who reported identifying with at least one Aboriginal group, i.e., North American Indian, Metis or Inuit, and/or those who reported being a Treaty Indian or a Registered Indian as

¹⁹⁸ J. Magnet, “Who Are the Aboriginal Peoples of Canada” in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation* (Markham: LexisNexis, 2003) 23 [*Who Are Aboriginal Peoples*] at 79.

¹⁹⁹ *Ibid.*

²⁰⁰ *RCAP, vol.1, supra* note 111 at 15. Regarding whether to use the ancestry data or the identity data, RCAP stated: “Both approaches to identifying the Aboriginal population have merit, but the Commission has relied primarily on the count of those who identify

defined by the *Indian Act* of Canada and/or who were members of an Indian Band or First Nation.”²⁰¹ Whereas “Aboriginal Ancestry/Origin” was defined as “those persons who reported at least one Aboriginal ancestor who was North American Indian, Metis or Inuit, based on the ethnic origin question.”²⁰² They further define “Registered (or Status) Indian” as “those persons who reported they were registered under the *Indian Act* of Canada. Treaty Indians are persons who are registered under the *Indian Act* and can prove descent from a Band that signed a Treaty.”²⁰³ As Magnet pointed out, there was no specific way for non-status Indians to specifically identify as such.²⁰⁴ This could very well have been part of the problem in terms of the difference in numbers between the Aboriginal identity and ancestry counts. Unfortunately, this also affected how Statistics Canada presented their statistical information as it relates to Aboriginal people. They did include the following disclaimer: “It should be noted that the Congress of Aboriginal Peoples (CAP) does not condone, sanction, or accept this document as it is not based on ancestry data.”²⁰⁵ I would add that the statistics are not organized by Aboriginal Nation or community. They are organized according to their “legalized” *Indian Act* identities. For example, there is no indication of the education levels of the Mi’kmaq Nation, or their

with their Aboriginal ancestry. It does so knowing that some portion of the 375,000 who do not do so now may well do so in the future.”

²⁰¹ Statistics Canada, “A profile of Canada’s North American Indian population with legal Indian status” (Ottawa: Statistics Canada, 2004) [*Profile of Status Indians*] at 24.

²⁰² *Ibid.*

²⁰³ *Ibid.* The term “Treaty Indian” had been added to the Census, in addition to the term Registered Indian, at the request of individuals from the Western provinces where the term is more frequently used, but has basically the same meaning as registered or Status Indian.

²⁰⁴ *Who Are Aboriginal Peoples*, *supra* note 200 at 79. After doing his own calculations on the number of probable non-status Indians in Canada (likely 457,130) based on the 2001 Census, Magnet concludes “This is probably the best available count because the census does not ask people to identify as ‘non-status Indians’.”

birth and death rates. One only sees a generic statistic for all “North American Indians with legal Indian status”, with some areas broken down by province. Even for Indian reserves, these numbers are not complete: “This Aboriginal population is not adjusted for incompletely enumerated Indian reserves in the 2001 Census.”²⁰⁶ Therefore, while they are the Census numbers we have to work with, they must be viewed with some caution.

Based on the 2001 Census, people who self-identified as Aboriginal (according to Statistics Canada’s definition) accounted for 3.3% (976,000) of the total population in Canada. The 3.3% (976,000) Aboriginal people in Canada, breaks down as follows: 51% (505,000) Status Indians; 11% (104,000) Non-Status Indians; 30% (292,000) Metis; and 5% (45,000) Inuit.²⁰⁷ Overall, the Aboriginal identity population grew by about 22% since the 1996 Census period. Of this, 10% is attributed to natural demographic growth, and the other 12% is attributed directly to “reporting changes in the Census.”²⁰⁸ The status Indian population grew by 14% over the same period (1996-2001). Some of the growth was due to demographic factors, but other likely factors included: “increased awareness of Aboriginal issues which could have resulted from numerous events, such as the Oka crisis, the Royal Commission on Aboriginal Peoples, and recent court decisions on the rights of First Nations people, as well as better census enumeration of First

²⁰⁵ *Profile of Status Indians*, *supra* note 203 at 2.

²⁰⁶ *Ibid.* at 23. “**Incompletely Enumerated Indian Reserves and Indian Settlements in the 2001 Census:** On some Indian reserves and Indian settlements in the 2001 Census, enumeration was not permitted or was interrupted before it was completed. These geographic areas (a total of 30) are called ‘incompletely enumerated Indian reserves and Indian settlements’. Data for 2001 are not available for these areas, and therefore have not been included in the charts in this document, unless otherwise specified. The estimated size of the population on these 30 reserves is about 31,000.” *Census 2006*, *supra* note 197. However, as previously noted, the number of incompletely enumerated reserves fell from 30 to 22 in the Census of 2006.

²⁰⁷ *Ibid.*

Nations.”²⁰⁹ The non-status Indian population grew by 20% over the same period for the same reasons, but Statistics Canada noted that: “long term impacts on the size of the North American Indian population without legal Indian status will result from the amendments to the *Indian Act of Canada* in 1985, known as *Bill C-31*.”²¹⁰ The Metis population had the largest growth over the period, with a 43% increase. While change in Census reporting and demographic factors impacted this growth, other factors included: “increased awareness of Metis issues coming from court cases related to Metis rights (such as the recent Powley decision by the Supreme Court), constitutional discussions occurring in the early 1990’s, as well as better census enumeration of Metis communities.”²¹¹ Inuit growth was 12%, with most of the growth (10%) due to demographic factors.²¹² It would be interesting to see how many of these newly self-identified Métis are really non-status Indians unsure of the future of their identity, or members of the newly formed Métis organizations. This information could also be used to analyze the strength of current Aboriginal Nation population bases in order to determine what may be necessary for capacity building for the future.

The statistics also reveal where status Indian and non-status populations are distributed in Canada. This too is useful in terms of distribution of resources, and can aid in determining where services like housing, education, and health need to be augmented. These population indicators can also point to locations where information, consultation

²⁰⁸ *Ibid.* at 4.

²⁰⁹ *Ibid.*

²¹⁰ Statistics Canada, “A profile of Canada’s North American Indian population without legal Indian status” (Ottawa: Statistics Canada, 2004) [*Profile of Non-Status Indians*] at 4.

²¹¹ Statistics Canada, “A profile of Canada’s Metis population” (Ottawa: Statistics Canada, 2004) [*Profile of Metis*] at 4.

and negotiation centers can be conveniently arranged for Aboriginal peoples who live on, off, or never lived near reserves. For example, The Northwest Territories (NWT) has the highest concentration of status Indians in Canada (27.5%), but Ontario has the highest population of status Indians in Canada (95,515).²¹³ Again, the NWT had the highest concentration of non-status Indians (3%), and Ontario had the highest population (36,050).²¹⁴ With the Métis, the NWT had the highest concentration (9.6%), but it was Alberta who had the highest population (66,060).²¹⁵ The highest concentrations of Inuit were found in Nunavut (84.6%), the NWT (10.5%) and Newfoundland (0.9%), whereas the largest populations were found in Nunavut (22,560), Quebec (9,535), and Newfoundland and Labrador (4,555).²¹⁶ Similarly, the city with the highest concentration of status Indians was Thunder Bay (4.6%), while Winnipeg had the largest population (19,120).²¹⁷ Winnipeg and Windsor tied for the cities with the highest concentrations of

²¹² Statistics Canada, “A profile of Canada’s Inuit population” (Ottawa: Statistics Canada, 2004) [*Profile of Inuit*] at 4.

²¹³ *Profile of Status Indians, supra* note 203 at 5. Nova Scotia’s concentration of status Indians was 1.1%, whereas New Brunswick’s was slightly larger at 1.3%. P.E.I. has the smallest concentration of the three, at 0.6%. Their total populations were 9,950, 9,235 and 780 respectively.

²¹⁴ *Profile of Non-Status Indians, supra* note 212 at 5. Nova Scotia and New Brunswick both had 3% concentration of non-status Indians, while P.E.I. only had 2%. Their total populations were 2,970, 2,255 and 255 respectively.

²¹⁵ *Profile of Metis, supra* note 213 at 5. Nova Scotia had a Metis concentration of 0.3%, New Brunswick’s was 0.6% and PEI’s was only 0.2%. Their Metis populations were 3,140, 4,295 and 220 respectively.

²¹⁶ *Profile of Inuit, supra* note 214 at 5. The next highest concentrations of Inuit were found in the Yukon (0.5%) and Quebec (0.1%), while the next highest populations were found in the NWT (3,905) and Ontario (1,380). No statistics were provided for the 3 Atlantic Provinces. However, they did note that: “The shares of Inuit found in the other provinces is less than 1%, while the total number of Inuit living in the rest of Canada is 3,145.”

²¹⁷ *Profile of Status Indians, supra* note 203 at 6. Statistics were only provided for the highest levels, and not for every city.

non-status Indians (0.6%), while Vancouver had the largest population (7,775).²¹⁸ The Métis had an extremely high concentration in the city of Prince Albert, Saskatchewan (14.9%), being nearly 1 out of every 7 residents; whereas Winnipeg had the largest population (31,395).²¹⁹ Iqaluit has the largest number of Inuit (3,010). According to the 2001 Census, “of the 27 communities in the four major Inuit regions, 17 have Inuit populations of 1,000 or more”.²²⁰

The statistics also speak to the mobility of Aboriginal people and this kind of information is necessary for service delivery and policy development by leaders of Aboriginal and non-Aboriginal governments. For example, the often cited, but misinformed “fact” that Aboriginal peoples are migrating to the cities and emptying the reserves in an “inevitable” trend toward “urbanism” has been found to be inaccurate according to some of the statistical data available.²²¹ This alleged emptying of the reserves is a myth, and the reserves have shown a small net gain.²²² That being said, there is so little land currently in the possession of Aboriginal Nations. This fact, taken together with increasing Aboriginal populations (although reducing status populations), indicates that for many, there is little choice but to live off reserve. This is so, even if the choice

²¹⁸ *Profile of Non-Status Indians*, *supra* note 212 at 6.

²¹⁹ *Profile of Metis*, *supra* note 213 at 6.

²²⁰ *Profile of Inuit*, *supra* note 214 at 6.

²²¹ A. Cairns, *Citizens Plus: Aboriginal Peoples and The Canadian State* (Vancouver: UBC Press, 1999) [*Citizens Plus*] at 185.

²²² Statistics Canada, “Overview of Education Conditions of the Aboriginal Population of Canada” (Ottawa: Statistics Canada, 2005) [*Education Statistics*] at 9. “Contrary to myth, reserves are not losing population to cities; in fact, over the last 20 years, they’re small net gainers.” That Census covered the period 1996 to 2001; but see also: *First Nation Affiliation*, *supra* note 182. In a study looking at cities with large status Indian populations living off-reserve, Clatworthy found that migration patterns for the period 1991 to 1996 did not contribute to the growth of First Nation populations in urban areas. In actual fact, the cities studied experienced net outflows back to the reserves.

was open to all Aboriginal peoples to freely make. The current figures show that over 48% of status Indians live off reserve, and 96% of non-status Indians live off reserve.²²³ It is for this kind of statistic that the ancestry data becomes more useful than the identity data. As discussed earlier, 92% of those who identified as Aboriginal were status Indians. Therefore, there are likely many more non-status Indians living both on and off reserve than the above statistics represent.²²⁴

There are many more employment, income, health indicators, education, housing, and family composition statistics that clearly show that Aboriginal peoples in Canada rank far below their fellow Canadians. This sad state of affairs for Aboriginal peoples is now considered common knowledge. It is very true that non-status Indians have the exact same concerns as status Indians, as they appear to rank at the same levels for various socio-economic indicators.²²⁵ They also have the same families, friends, communities and histories as status Indians, as they are only separated by the legal sections under the *Indian Act*, and not by any real cultural, linguistic, or territorial differences. Some non-status Indians are part of large extended families some of whom live on and off reserve, some of whom have status under different provisions of the *Act*, some of whom do not have status, some of whom have band membership and some of whom do not. Some may have connections to their family and friends on the reserve and some may not. Many are

²²³ *Profile of Status Indians*, *supra* note 203 at 7, *Profile of Non-Status Indians*, *supra* note 212 at 7.

²²⁴ *Who Are Aboriginal Peoples*, *supra* note 200 at 79. Magnet explains a different way of using the current statistical information from the 2001 Census to determine how many non-status Indians there are in Canada: "Who are the non-status Indians? This can be calculated (roughly) by subtracting the 2001 Indian ancestry population of 1,000,890 from the number of registered status Indians. According to the 2001 Census, there were 558,020 persons registered under the *Indian Act*. This leaves approximately 457,130 non-status Indians."

associated with off-reserve Aboriginal organizations that represent the interests of Aboriginal peoples living off-reserve, like non-status Indians. Despite the commonalties, there is one major difference: that is, the amount of money that is allocated for the different Aboriginal groups each year by Treasury board to improve their lives. For example, in the 2004-2005 year, Treasury Board spent 6.6 billion dollars on status Indians, \$195 million on the Inuit, and \$20 million on the Métis. Just because status Indians have the greatest allotment that does not necessarily mean that all status Indians are treated equally in terms of budgetary allotments. It has been noted by the Congress of Aboriginal Peoples that for every \$8 dollars spent for status Indians on reserve, only \$1 dollar is spent for status Indians off reserve.²²⁶ While it is not highlighted, it should not go without mention that a large portion of those budgets go to corporate bureaucracy.²²⁷ That being said, it should be highlighted that zero dollars were specifically noted for non-status

²²⁵ *Education Statistics*, *supra* note 224 at 19-20.

²²⁶ P. Brazeau, "Speaking Notes for an Address by National Chief Patrick Brazeau Congress of Aboriginal Peoples to the Meeting of the Premiers & National Aboriginal Leaders", online: Congress of Aboriginal Peoples <<http://www.abo-peoples.org/Communications/Speeches/Chief%20Brazeau%20speech%20corner%20brook%202.pdf>> [*CAP Speaking Notes*] at 3. "It is staggering to consider that for every \$8 the government spends on-reserve, only \$1 is spent on off-reserve programming and services."

²²⁷ Treasury Board of Canada Secretariat, "Aboriginal Affairs: Programs and Spending", online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/aaps-aapd/faq.aspx?Language=EN>> [*Aboriginal Spending*] at 4. Under the section dealing with "Frequently Asked Questions", one of their questions was "How much of the spending can be attributed to overhead (corporate bureaucracy)?" Their answer was as follows: "At this point in time we have not captured the corporate overhead aspect of federal government spending. Currently we are trying to establish the scope and the associated expenditures of the program and service delivery environment. Departmental overhead will be examined in future phases of work on the Aboriginal Horizontal Framework." In other words, they don't know.

Indians.²²⁸ Treasury Board's Targeted Groups were First Nations, Metis and Inuit only.²²⁹ The current control, divide and assimilate powers assumed by the federal government in its administration of Indians has a severe impact not only on individual and communal identity, as discussed earlier, but also on the practical quality of life indicators for those who are so administered, both inside and outside of the *Act*. A pattern emerges of "chronic" neglect for those who do not meet the legislative criteria set out in the *Act* for registration and/or band membership.²³⁰ This legislatively created situation has equally stark outcomes for both status and non-status Indians alike. The status Indians of today are the ones giving birth to non-status Indians.

(ii) Future Indicators

The studies reviewed in this section, which contain future indicators for diminishing populations of status Indians and band members, present a clear picture of how the various *Indian Acts* have not only divided Aboriginal Nations in Canada, but may also ensure their extinction. Not only has the legislation divided these Nations into Indian bands, challenged their diversity by defining who is and is not an "Indian"; it has

²²⁸ *Ibid.* at 1 of "First Nations Targeted Programs", at 1 of "Metis Targeted Programs", at 1 of "Inuit Targeted Programs".

²²⁹ *Ibid.* While the term "First Nations" did not appear to be defined on this particular page, the programs listed were often followed by the acronym "INAC" which means that it is a program administered by Indian Affairs, and their mandate is restricted by the *Indian Act, 1985*.

²³⁰ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 [*Lovelace*] at para.70. See also: *Daniels v. Canada (Minister of Indian Affairs and Northern Development, Attorney General of Canada)* (2002) 4 F.C. 550 [*Daniels*] at para.24. The Trial Division dismissed Canada's motion to dismiss the case on the basis that: "Given the track record of the Crown in refusing to negotiate, it could well be generations before this issue could come before the Court in some other suitable fact situation. That is in no one's interest. To urge, at this point, that the litigation is premature, when there is no prospect of negotiation, is to throw unreasonable difficulty in the way of this proceeding, for there is a real point of difficulty which requires a timely judicial decision."

also incorporated membership as another complicating layer to the already divisive and exclusionary regime. The problem is, indeed, the registration and membership provisions of the *Indian Act* and the government's total control over the system. Pam Paul described the specific concerns related to the current registration provisions of the *Indian Act, 1985*, as they affect the bands in the Atlantic region:

Without a doubt Section 6(2) of the *Indian Act* poses the greatest concern for First Nations as a whole, but in the Atlantic Provinces where the numbers are small it poses an even greater concern. As more and more people are registered under Section 6(2) more and more of the population base is lost when these people chose non-natives or non-status for partners. When these people reach childbearing age, and, if they do not partner with a status Indian person, Indian status will be lost in the next generation.²³¹

If nothing is done to fix the current problem, the numbers of non-status Indians and section 6(2) Indians will continue to increase. Together with varying rates of out-marriage, this means that the 634+ Indian bands in Canada will be legally extinct at calculable dates in the future.²³² The Whispering Pines Indian Band is currently feeling the effects of reduced populations, as an example of the kind of stark reality that other bands can expect to face in the future. This prospect is captured as follows, the Whispering Pines Band situation being the motif:

The Whispering Pines Indian Band is located about 25 miles outside of Kamloops. Since this is where the reserve is situated, our members associate the majority of time with non-status people...[M]arriages are 90% (approx.) to non-status people. For two generations already, marriages have been this way, so the chances of children from these marriages in turn marrying status Indians are very slim...

²³¹ *Politics of Legislated Identity*, *supra* note 174 at 1.

²³² *Population Implications*, *supra* note 2.

Actually the whole section in Bill C-31 on status has affected all Bands in Canada. The Bill was written to eliminate discrimination in the Indian Act. What it has really done is found a way to eliminate status Indians all together.²³³

The problem is the same (to different degrees) for all the bands across Canada in that the *Act's* registration formula, mixed with any degree of out-marriage, provides for the eventual extinction of the band. The rates of out-marriage and death of the status Indians, and birth rates amongst the different status groups, all affect the rate at which the extinction occurs. In the end, the extinction will eventually happen under this current *Act*.²³⁴

Clatworthy reviewed the different types of membership codes that each band has in place now. Taking this information in conjunction with the *Bill C-31* amendments to the *Indian Act*, he concluded that First Nations bands were looking at legal extinction scenarios. More specifically, that:

The resulting projections suggest a declining Indian Register population beginning in roughly fifty years or two generations. We anticipate that some First Nations, whose out-marriage rates are significantly higher than the national norms, would cease to exist at the end of the 100 [year] projection period.²³⁵

Though many Aboriginal Nations are looking at self-government agreements and their own citizenship codes as a way of moving forward, some of these Nations are considering using the principles embedded in the *Indian Act, 1985*, as the basis for their citizenship

²³³ *Ibid.* at the preface.

²³⁴ *Ibid.* *Revised Population Scenarios*, *supra* note 2. *Indian Registration and Membership*, *supra* note 2. *Paternal Identity and Registration*, *supra* note 182. *First Nation Affiliations*, *supra* note 182, *Unstated Paternity*, *supra* note 182. *Reassessing Population Implications*, *supra* note 2.

codes. Therefore, the *Indian Act* has the potential to continue to cause problems for First Nations long after self-government agreements have been signed. Clatworthy points out the danger:

The descent rules that now govern the inheritance of Indian status appear unsatisfactory as a basis for defining citizenship in self-governing First Nations. In the long run these rules will lead to the extinction of First Nations. In the shorter term, they will involve the denial of citizenship to many children and grandchildren...

The rules in the Act create two 'classes' of descendants with differing rights. They violate the principle of the equality of citizens...

If restrictive membership codes come to define citizenship, First Nations will author their own demise. The extinction dates that First Nations write for themselves by using these codes to define citizenship will be earlier than those provided by the Act...

Citizenship codes that follow this road will also embrace inequality as an underlying principle.²³⁶

The problem will only continue to get worse for status and non-status Indians as the effects of the *Act* will continue to shrink the population entitled to registration. The effects will begin to compound and could make the legal extinction rates even faster than previously thought. Clatworthy explains:

In addition to these factors, the process of out-marriage itself can be expected to promote further out-marriage by altering the registry [i.e. 6(1)/6(2)] mix of the population. This will occur as the effects of the Act's rules and out-marriage begin to reduce the share of the population entitled to Indian registration. Over time, the opportunity for in-marriage will shrink as fewer and fewer individuals in the community qualify for registration under the Act. This process may be particularly important in many reserve

²³⁵ *Population Implications*, *supra* note 2 at ii.

²³⁶ *Ibid.* at viii.

communities where small population size and close kinship ties already limit the number of potential marriage partners. The combined effect of the factors outlined above may well be to increase rates of out-marriage much higher and much more quickly than the models developed for this study have assumed.²³⁷

The projection period of Clatworthy's study was from 1991 to 2091 and it looked at 4 types of membership codes: (1) *Indian Act* rules; (2) blood quantum rules; (3) two-parent descent rules; and (4) one-parent descent rules. Clatworthy explains how each code or rule is applied:

One-parent rules: A one parent descent rule declares a person to be eligible for membership based on the eligibility or membership of one of that person's parents. One parent descent rules are found in 90 First Nations or 38 percent of the 236 that adopted membership codes.

Two-parent rules: A two parent descent rule establishes a person's eligibility based on the eligibility or membership of both of that person's parents. Rules of this type are found in 67 First Nations, 28 percent of the 236 with codes.

Blood Quantum Rules: A blood quantum rule establishes eligibility based on the 'amount of Indian blood' a person possesses. In effect, a blood quantum measures the number of Indian ancestors a person has and sets the criterion for membership based on an amount of ancestry. Thirty (30) First Nations (13 percent of the 236) have adopted blood quantum rules. A typical criterion is 50 percent Indian blood, a standard set by 21 of the 30, though there are examples of codes that set higher and lower criteria. The 'arithmetic' of blood quantum codes measures a person's quantum by adding the quantum of each parent and dividing by two. The child of parents who are 100 percent and 0 percent Indian is 50 percent, as is the child of two parents who are 50 percent Indian.

Indian Act rules: These rules are embodied in the Act's Sections 6(1) and 6(2) ...Forty-nine (49) First Nations, or 21 percent of the 236 that have adopted codes, implicitly

²³⁷ *Ibid.* at 36.

rely on the Indian Act rules to determine eligibility for membership. Indian Act rules also pertain to the 360 First Nations that have not adopted membership codes and whose membership is, therefore, still regulated by the Act.²³⁸

The study compared each type of membership code with current birth rates, death rates and rates of out-marriage, and determined that only the one-parent descent rule showed a significant increase in band membership in the future and then levelled off in growth. The other types of band membership codes all had small increases in band member populations and then declined significantly over time.²³⁹ For example, the current percentage of member eligible population aged 0 to 14 years in 1991 was 32.5%. In 2091, it would only be 0.4% for two-parent rule bands, 8.1% for 50% blood quantum bands, 13.7% for *Indian Act, 1985*, rule bands, and 19% for one-parent bands.²⁴⁰ Clatworthy concluded:

It should be noted that all of the membership rules with the exception of unlimited one parent descent rules, are expected to eventually result in decreases in the size of the population eligible for membership. The consequences of the rules in the long term will be the eventual elimination of the member population.²⁴¹

This begs the question of what the ultimate remedy should be. Should the solution involve amending the *Act* or replacing it with something completely different? How would amendments to the *Act* impact communities and individuals and what would this mean in terms of numbers? After all, the federal government is most concerned about cost.

²³⁸ *Ibid.* at iii.

²³⁹ *Ibid.* at v.

²⁴⁰ *Ibid.* at vi.

²⁴¹ *Ibid.* at 49.

Clatworthy updated his previous studies data in another study called *Re-Assessing the Population Impacts of Bill-C31* in 2004.²⁴² In this study, the question asked was what would happen if the rules of *Bill C-31* were applied similarly for the *Bill C-31* reinstates (those who were previously not entitled or who lost status, and then reinstated under s.6 (1) or s.6 (2)) and the pre-*Bill C-31* populations (those who were previously entitled and were thus registered under s.6 (1)) populations? For example, what would the population forecasts be for First Nations, if the *Bill C-31* amendments had applied equally as between Indian men and Indian women who married out, and their descendants. The major findings of the report are that those not entitled to registration are expected to outnumber those entitled to registration within 3 generations, and within five generations no further children born will be entitled to registration.²⁴³ If the rules were applied similarly for both groups, there would be incremental growth for two generations only.²⁴⁴ This study also looked at other scenarios and how they might affect population numbers; all of them had the same result. There would be initial growth, but as long as the *Indian Act, 1985*, stays in place, there would be an eventual decline in registrations.²⁴⁵ A further study conducted by Clatworthy, entitled *Indian Registration, Membership and Population Change in First Nations Communities* was released in 2005.²⁴⁶ This study updated the types of membership codes that bands were using, and which bands were using them. The four types of membership codes described previously were expanded and reclassified into the following seven types of band membership codes:

²⁴² *Reassessing Population Impacts*, *supra* note 2.

²⁴³ *Ibid.* at viii.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ *Indian Registration*, *supra* note 177.

- Indian Act or Act Equivalent descent rules which also extend initial membership to all registered individuals (413 First Nations);
- Act Equivalent (Limited One Parent) descent rules which restrict initial membership to those with acquired rights as of June 27, 1987 (6 First Nations);
- Unlimited One Parent descent rules which also extend initial membership to all registered individuals (72 First Nations);
- Unlimited One Parent descent rules which restrict initial membership to those with acquired rights as of June 27, 1987 (12 First Nations);
- Two Parent descent rules which restrict initial membership to those with acquired rights as of June 27, 1987 (64 First Nations);
- 50% Blood Quantum rules (22 First Nations); and
- 25% Blood Quantum rules (4 First Nations).²⁴⁷

This study looked into the usage of membership codes among First Nations bands and found that the majority of First Nations who had adopted codes were actually using them to determine membership.

Only 18 (8.5%) of the 212 First Nations with codes reported that they were not using codes to determine membership.²⁴⁸ Some of the reasons for not applying their codes

²⁴⁷ *Ibid.* at 16. Again Clatworthy reminded readers that the above codes: “are not the only criteria that influence membership. Many codes contain discretionary factors (eg. Language abilities, cultural tests, etc.). By their nature, these factors cannot be incorporated into the projections. As a rule, these factors have the potential to further restrict membership.”

²⁴⁸ *Ibid.* at 7-9. Clatworthy explains that as of December 31, 2002, there were actually 241 First Nations that had band membership codes, but one First Nation was previously identified in error and 6 First Nations in the Yukon and 2 First Nations (the Nisga’a communities) all have self-government agreements. In addition, only 212 First Nations responded to his survey for this study and thus the data is based on the 212 First Nations of the 232 that were known to have band membership codes as of December 31, 2002. At

were: no reason; never implemented; under review; legal challenges; or administrative burden to apply the rules.²⁴⁹ Instead, these First Nations were using the following to determine membership: wouldn't say; *Indian Act, 1985*; Chief and Council; moratorium on membership; or membership was based on family or community sponsorship.²⁵⁰ Clatworthy also noted that 86 (40.5%) of the 212 First Nations with codes were actively considering changes to their membership rules, and many of them reported that their changes would impact large numbers of individuals.²⁵¹ The rate of out-marriage or exogamous parenting (parenting between Indian and non-Indian) significantly affects the levels of Indian registration and membership in First Nations communities. While I have reviewed some of the future indicators of the negative effects of the current legislation, it is useful to know that the majority of First Nations have a moderate to high level of exogamous parenting within their communities:

- (1) Low = below 20% (25 FNs)
- (2) Moderately Low = between 20 to 39.9% (111 FNs)
- (3) Moderate = between 40 to 59.9% (246 FNs)
- (4) Moderately High = between 60 to 79.9% (162 FNs)
- (5) High = 80% or more (49 FNs)²⁵²

Clatworthy further explained that it is mainly Aboriginal women and children who continue to be treated unequally in their communities and even excluded from them: "At the present time, nearly all of those who lack eligibility for First Nations membership are the descendants of women who lost their registration as a consequence of the prior Indian

that time, there were a total of 609 First Nations, 19 of which had self-government agreements.

²⁴⁹ *Ibid.* at 9.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.* at 11.

²⁵² *Ibid.* at 17.

Act's rules concerning mixed marriages."²⁵³ This is hardly an acceptable consequence from an amendment that was supposedly meant to eliminate discrimination against women under the *Act*.

Whether it is the federal government enforcing discriminatory legislation, or First Nations' governments implementing discriminatory band membership codes, it has to stop in order to prevent further loss of membership in Aboriginal communities, with their ultimate impact on future citizenship numbers for self-governing Aboriginal Nations. The problem arose because the *Indian Act* created the rules of the relationship between the Crown and Aboriginal peoples for the last century; this has not yielded positive results for either the relationship or the identity of Aboriginal peoples. The *Act* has not only divided Aboriginal Nations; it has divided the peoples within those Nations into many classes of "Indians". Now, instead of the baseline population of the Mi'kmaq being comprised of the Mi'kmaq people, their heirs, and heirs forever, or the Cree, their heirs, and heirs forever, like any other Nation, the baseline populations of Aboriginal Nations are now comprised of the following:

- (1) s.6(1) individual members;
- (2) s.6(1) individual non-members;
- (3) s.6(2) individual members;
- (4) s.6(2) individual non-members;
- (5) non-registered members; and
- (6) non-registered non-members.²⁵⁴

²⁵³ *Ibid.* at 41

²⁵⁴ *Ibid.* at 19.

Within those groups, there are those who live on reserve, those who live off reserve, and those who never had or lived on a reserve depending on where they started out (i.e. Yukon Territory).

The *Indian Act, 1985*, and the registration and membership provisions thereunder affect all aspects of an Indian's life, from childhood to death, in unequal ways. *Bill C-31* was an illusion. It reinstated Indian women who had lost their status under the previous *Act*, but it reinstated them to an unequal regime that continues discrimination far into future generations. Regardless of how First Nations write their codes, the underlying base is Indian registration which is currently unequal and is guaranteed to cause internal community division. Even communities who accept non-status Indians (such as one parent codes), as members, may be faced with funding shortages, as the federal government only provides funding for status Indians.²⁵⁵ Meanwhile bands that use the other codes may face a different scenario:

Political and social systems in which the rights of various classes of members vary seem out of step with the times. They also seem inconsistent with the traditions of equality, participation and decision-making by consensus that are deeply rooted in First Nations communities. Their consequences will likely vary. Some of those communities that exclude a portion of the registered population from political participation may take on caste-like social structures. Benefits will be calculated in relation to the Indian population. However, through control of the First Nations' government, the caste of members will be able to appropriate a disproportionate share of these benefits. Conflict between those who hold power and those who do not may tear apart these communities. In communities that extend political rights beyond those covered by the Act, divisiveness may have another face: those who 'count' as

²⁵⁵ *Ibid.* at 64.

Indians may conclude that those who do not should be entitled to a lesser share.²⁵⁶

It is equally discriminatory and exclusionary for the federal government to create this system and impose it on Aboriginal Peoples, as it is for First Nations to continue to impose this type of harm on their own citizens and their future generations. The Clatworthy study could not possibly assess the affects that all the additional criteria that First Nations impose in their codes would have on present and future generations. He explains:

...many First Nations adopted additional criteria or purposes of determining membership rights. These additional criteria are quite varied and in many instances not clearly articulated within the written text of the membership codes. They range from residency requirements to a host of discretionary rules including cultural tests, acceptance by the community or by chief and council. The imprecision and discretionary nature of the additional criteria make it impossible to accurately model their consequences. It is worth noting, however, that in almost all instances, these additional criteria have the potential to further restrict rights to membership and if applied rigorously, could serve to accelerate the rate at which changes in the size and composition of the member population take place. As such, the projections presented in this chapter should be viewed in terms of the potential population eligible for membership. The actual member population could be much smaller.²⁵⁷

While he could not review all the possible impacts on band registration and membership, what is known is enough to cause concern, more so since additional criteria only hasten the process of enfranchisement and are certainly of no benefit to those who are already vulnerable from past discriminatory *Indian Act* provisions.

²⁵⁶ *Ibid.* at 63.

²⁵⁷ *Ibid.* at 53.

It is vital that each community is fully informed of what is happening, and what will happen to their friends, family, and their own children. It is also important that everyone, the currently included and the excluded, be a part of the solution. Further, the federal government will have to give up its hold on the key. First Nations were given a carrot when they were allowed to determine their own membership (only if approved by the Minister), because it does not come with any significant financial or political support. It completely undermines a community to give them the power to add people to their community, but not give them the power to grant them the legal identity that goes along with it. The association of the only available legal identity with financial budgets and access to much needed social programs, makes the separation of registration and membership all the more divisive. This is especially so when two different parties (Canada and individuals bands) are deciding on two different identities (status and membership) and the recipient has little or no say in the matter. While the federal government alleges that they balanced the rights of women with self-government, in fact, it did not do so.

An important first step in the recognition of the depth of the *Indian Act* principles that are embedded within Aboriginal membership codes, and the damage this causes to Aboriginal communities (status and non-status). Clatworthy explains: "Resulting inequities among citizen groups with respect to access to services could lead to conflicts, legal challenges and the erosion within communities."²⁵⁸ One of the most important long-term implications of continued use of unequal registration under the *Indian Act, 1985*, and exclusionary band membership codes, will be to alienate rightful members from reserve-

²⁵⁸ *Indian Registration and Membership, supra* note 2 at 64.

based political structures, which are currently the basis from which self-government negotiations emerge. Political structures that are based on inequality and exclusion will likely have “little credibility among people they exclude.”²⁵⁹ This will have a domino effect, as the provincial, regional and even national organisations that represent these bands will lose their representative authority from the growing number of people who are excluded at the community level. This will ultimately mean that “Competing organisations whose electoral processes enfranchise those excluded by First Nations’ electoral processes will grow and prosper.”²⁶⁰ There are no other alternatives for those who are excluded. They are Aboriginal peoples, such as the Mi’kmaq, Maliseet, Cree and Mohawk, and the rightful heirs to their treaties, lands and resources, who also have traditional and ancestral obligations to fulfill in that regard. They have no choice but to seek out political outlets that will advocate on their behalf, unless and until their rights and the rights of their children and future generations are protected.

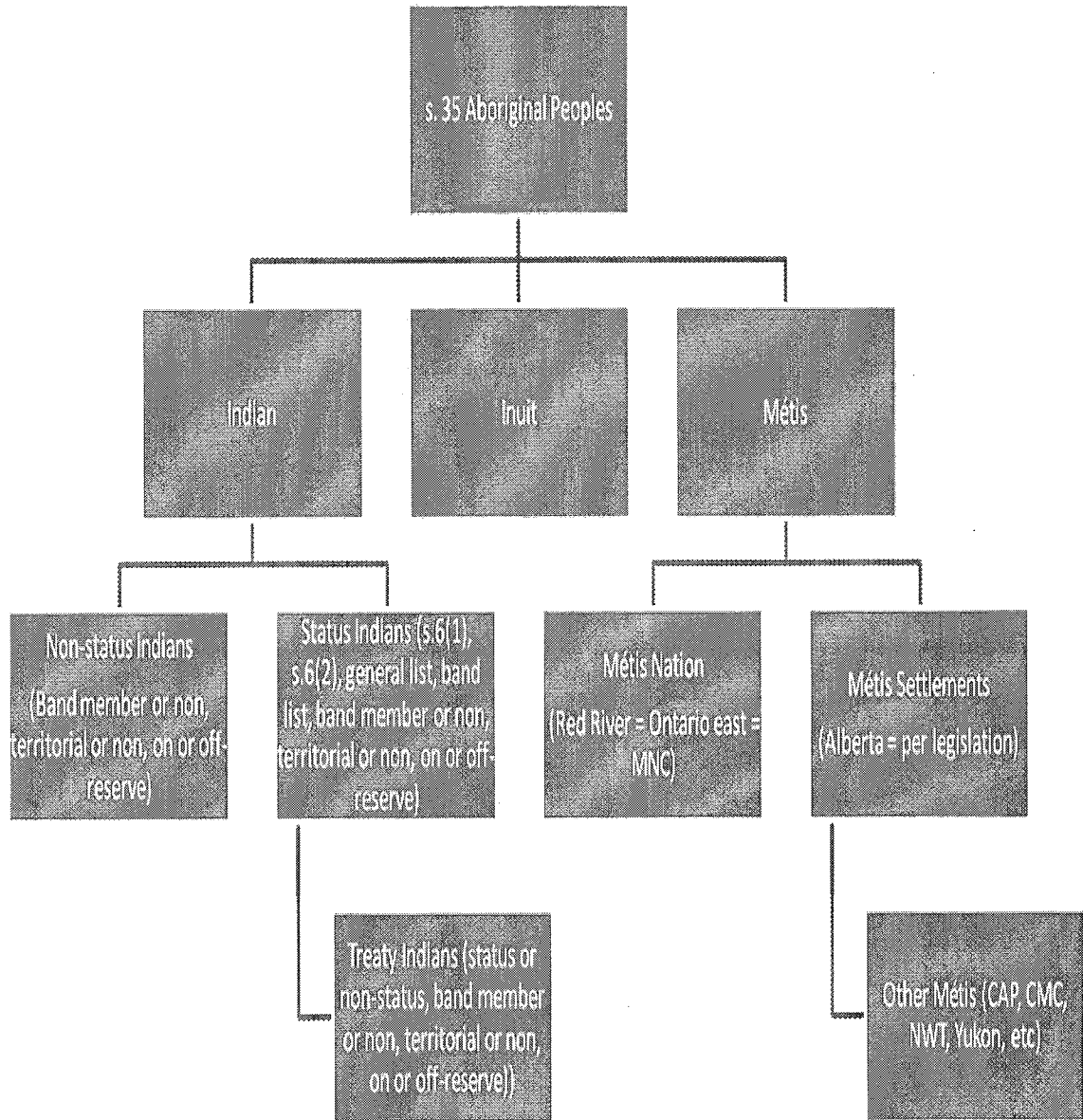
That is not to say that the off-reserve political organisations will not have their own issues from time to time. The fact is, as First Nations continue to enfranchise all of their members, they will have nowhere else to go, but to join in unity to reclaim what was wrongfully taken from them. Many status Indians that are band members today were once non-status Indian members of off-reserve Aboriginal groups fighting for their rights to be included. Now, the next generation is doing the same thing and hoping that the previous generation has not forgotten what they were fighting for simply because they became registered, and it does not concern them anyone. It concerns all Aboriginal people because the path to legislated extinction leads to the same place. These divisions will be a

²⁵⁹ *Population Implications*, *supra* note 2 at 71.

significant hurdle in future discussions with Aboriginal Nations about reconstructing their citizenship principles for the purposes of self-government and/or other self-identifying exercises. Another hurdle will be sorting out where Aboriginal identity fits within the ongoing struggle between Aboriginal rights theory and liberal theory. Is there a place for a special Aboriginal identity that can be protected and valued in a liberal democracy, and if so, what would that concept of Aboriginality have to be to work with liberalism? Or would liberalism have to accommodate Aboriginality? Or is there another alternative? These are some of the questions that I attempt to answer in the next chapter.

²⁶⁰ *Ibid.*

ABORIGINAL NATIONS DIVIDED



Métis Citizenship/Membership

APPENDIX B

(doesn't include self-government agreements)

(d/s = didn't say in the agreement either way)

Métis Organization	Self-Identify	Aboriginal Ancestry	Community Acceptance	Métis Only Ancestry	Status Indians Excluded
MNC	yes	no	yes	yes	yes
MPCBC	yes	no	yes	yes	yes
MNA	yes	no	yes	yes	yes
MNO	yes	no	yes	yes	yes
MNS	yes	*yes (but can be Inuit ancestry)	yes	no	yes (*nor Inuit?)
MMF	yes	no	yes	yes	yes
CAP	yes	yes	d/s	no	no
AAQ/NAQ	yes	yes	yes	no	no
OMAA	yes	yes	d/s	no	no
LMN	yes	yes	must be originally of Labrador	no	d/s
ACW	yes	yes	d/s	no	no
UNN	yes	yes	d/s	d/s	d/s
MSGC	yes	yes	yes	no, but must identify with culture	yes, or Inuit, but exceptions
CMC	yes	yes	yes	no	Yes
MNQ	yes	yes and no, can also be "declared"	yes	no	no
SIMN (BC)	yes	yes, with non-Ab	yes	no	d/s
CNSM	yes	yes	yes	no	yes (*or Inuit)
MNS (U.S.)	yes	yes, no, can be adopted	yes	no	no
MNNE (U.S.)	yes	yes, and non-Aboriginal	yes	no	No, can be both, if have non-native lineage also
NBAMI	no	no	no	no	no
ECFPA		s.35 Ab. Peoples		no	no
RSMIN	yes	yes	d/s	d/s	no*
Non-Org'rs	yes	yes	no	no	no

Métis Organizations - Acronyms

MNC	- Métis National Council
MPCBC	- Métis Provincial Council of British Columbia
MNA	- Métis Nation of Alberta
MNO	- Métis Nation of Ontario
MNS	- Métis Nation of Saskatchewan
MMF	- Manitoba Métis Federation
CAP	- Congress of Aboriginal Peoples
AAQ/NAQ	- Alliance Autochtone Quebec, Native Alliance of Quebec
OMAA	- Ontario Métis Aboriginal Association
LMN	- Labrador Métis Nation
ACW	- Aboriginal Council of Winnipeg
UNN	- United Native Nations (B.C.)
MSGC	- Métis Settlements General Council (Alberta)
CMC	- Canadian Métis Council
MNQ	- Métis Nation of Quebec
SIMN	- South Island Métis Nation (B.C.)
CNSM	- Confederacy of Nova Scotia Métis
RSMIN	- Red Sky Métis Independent Nation (Ont)
MNS	- Métis Nation of the South (Washington, NH, U.S.A.)
MNNE	- Métis Nation of New England (U.S.A.)
NBAMI	- New Brunswick Acadian Métis Indians
ECFPA	- East Coast First Peoples Alliance (N.B.)

Chapter 3: Aboriginal Identity and Cultural Survival

In Chapter 2, I explained that the current political and social divisions affecting Aboriginal peoples in Canada stem largely from colonial interference with their traditional ways of life and with modern legislative interference with their individual and communal identities. Furthermore, I argued that not only have federal laws and policies relating to Aboriginal peoples caused so many divisions, but the very criteria which is used to determine Indian identity would be the ultimate cause of their legislative extinction if changes are not made in the near future. This chapter takes that identity issue further. It argues that the preservation of Aboriginal identity is an important part of the cultural context in which Aboriginal people seek out the “good life”. I also argue that in modern liberal democracies like Canada, the majority has an obligation to help protect minority cultures, and specifically indigenous cultures, so that they can have the same access to their own cultural contexts as does the majority culture. However, assuming there is an obligation to protect indigenous cultures, the question becomes: what is Aboriginal identity and what are its basic components? In answering this question, I highlight some basic principles of communal identity that also impact individual identity. It is hoped that by shedding the harmful concepts of the past imposed through federal laws and policies, Aboriginal people will have equal access to the good life and their true identities.

Many Aboriginal people in Canada currently find themselves trapped in a complex struggle to search for, regain, assert and protect their Aboriginal identity, all at the same time. They are forced to do this within the context of a shameful historical

legacy of government policy designed to rid Canada of the “Indian problem”.¹ That context is marked by deeply personal struggles involving broken families divided by the *Indian Act*’s registration and band membership provisions. They receive little support from the harsh and sometimes racist society which demands that Aboriginal peoples forget the “past” and assimilate into Canadian culture.² Perhaps, worst of all is the struggle that plays out within their own minds, issues of insecurity and self-doubt as to whether they look, think or act “Indian” enough to be part of the reserve communities, now tiny remnants of what were once great Nations.³ Many have come to think of themselves as on or off-reserve, tying their identities to the federally created reserve system, instead of remembering the relationships with their traditional territories. The reserve communities themselves are crying out for relief from the injustices they have suffered, such as loss of land, stolen resources, abuses suffered at residential schools, ongoing police brutality, forced economic and political dependency, and poor socio-economic indicators that besiege their peoples. Whether on or off-reserve, status or non-status, the poor socio-economic indicators for all sub-groups of Aboriginal peoples have

¹ D.C. Scott, National Archives of Canada, Record Group 10, vol 6810, file 470-2-3, vol 7, pp. 55 (L-3) and 63 (N-3) [*Indian Problem*]. “I want to get rid of the Indian problem... Our objective is to continue until there is not a single Indian in Canada”.

² See generally: A. Cairns, *Citizens Plus: Aboriginal Peoples and The Canadian State* (Vancouver: UBC Press, 1999) [*Citizens Plus*], T. Flanagan, “First Nations: Second Thoughts?” (Montreal: McGill-Queen’s University Press, 2000) [*First Nations*], G. Gibson, “A New Look at Canadian Indian Policy: Respect the Collective – Promote the Individual” (Vancouver: Fraser Institute, 2009) [*Indian Policy*], F. Widdowson, A. Howard, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal: McGill-Queen’s University Press, 2008) [*Disrobing Aboriginal Industry*].

³ B. Lawrence, *“Real” Indians and Others: Mixed Blood Urban Native Peoples and Indigenous Nationhood*, (Lincoln: University of Nebraska Press, 2004) [*Real Indians and Others*].

proven to be virtually the same.⁴ Regardless of the current legal divisions amongst Aboriginal peoples, they share a common history, familial and communal ties, treaties, territories and cultures, such as the Mohawk or Mi'kmaq. These groups would not be divided and be suffering in isolation from one another but for the severing of ties by way of the *Indian Act's* arbitrary and divisive registration provisions that assign "Indian" identity and all the rights of belonging that go with it.

(a) Aboriginal Identity in a Liberal Democracy

There is no such thing as a generic "Aboriginal Nation" or a generic "Aboriginal person". For, each Aboriginal person is actually a descendent of, for example, the Mohawk Nation, the Mi'kmaq Nation or the Maliseet Nation. Such a person is, therefore more properly, Mohawk, Mi'kmaq or Maliseet (not including Métis and Inuit), as opposed to an "Indian", "native", or Aboriginal person. But just as Columbus mistakenly called all the indigenous peoples of the Americas "Indians", so too did the Canadian government categorize all indigenous peoples from each separate Nation into Indians, as if they were one big homogenous group. Their own unique identities, histories and cultures were ignored in order to make room for the legalized, assigned "Indian" identity that was to be equated with food, money and legal permission to enter the reserve. From this point on, control over Aboriginal identity began to slide from the indigenous peoples and their Nations to the Canadian governments and their lawmakers. This is why, today,

⁴ Statistics Canada, "A profile of Canada's North American Indian population with legal Indian status" (Ottawa: Statistics Canada, 2004) [*Profile of Status Indians*], Statistics Canada, "A profile of Canada's North American Indian population without legal Indian status" (Ottawa: Statistics Canada, 2004) [*Profile of Non-Status Indians*], Statistics Canada, "A profile of Canada's Metis population" (Ottawa: Statistics Canada, 2004) [*Profile of Metis*], Statistics Canada, "A profile of Canada's Inuit population" (Ottawa: Statistics Canada, 2004) [*Profile of Inuit*].

there are status and non-status Indians, 6(1) and 6(2) status Indians, band members and non-band members, band members with status and band members without status, on and off-reserve band members with and without 6(1) and 6(2) status, and treaty and non-treaty Indians, and Inuit who are Indians for the sake of section 91(24) of the *Constitution Act, 1867*, but not for the *Indian Act, 1985*, and those who are actually Inuit for the *Constitution Act, 1982*. Métis people face questions like whether they are Indians under the *Indian Act*, whether they are Indians for the purposes of section 91(24) of the *Constitution Act, 1867*, and how these conceptions of Indianness impact them as Métis peoples. Canada appears to take the position that all categories of status Indians fall under both *Constitution Acts* as Indians. However, non-status Indians and band members without status are often caught within the apparent jurisdictional void. There is no mention of the Aboriginal Nations in Canada's constitutions, nor is there any mention of the term "First Nations" in the *Indian Act*. Neither piece of legislation gives particular focus to the unique culture of each of the Indigenous Nations in Canada.⁵ The current focus is who is or is not an "Indian", and how the government can continue to limit the numbers of individuals who will receive the benefits and obligations of treaties, land

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [*Charter of Rights*] s.25. That being said, section 25 appears to prevent Charter rights from interfering with Aboriginal, treaty and "other" rights. See also: *Canadian Human Rights Act*, R.S.C. 2008, c. 30 [*CHRA*] at s.1.1 – 4. Similarly, the new amendments to the *CHRA* added section 1.1 which is a provision like section 25 of the *Charter of Rights*, and further provides in section 1.2 that complaints against First Nations will be interpreted such that the Commission "gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests". A further clarification on this section is that these traditions must be compatible with gender equality.

claims, self-government, programs and services and, ultimately, their culture and community.

Canadian society today is governed by a democracy, and Canadians enjoy the rights and freedoms which western liberals think are essential for individuals to live the “good life”. All humans are thought to be valued as individuals, each as an “autonomous, rational, self-interested entity, possessed with a number of unspecified natural or inherent rights”.⁶ One of these rights, which is central to western liberalism, is being free from arbitrary interference from the state.⁷ Aboriginal peoples (that is all Mohawks, Mi’kmaq and so forth) might argue that the *Indian Act* and other government policies relating to “Indians” have been quite undemocratic in that those laws and policies have arbitrarily interfered with their cultures, communities, Aboriginal and treaty rights, federal benefits and their individual identities.⁸ If such liberal democracies are supposed to provide protections for individuals from arbitrary interference from the state, then Canada’s assumption of jurisdiction over Aboriginal identity and the legislative imposition of Indian registration criteria for Aboriginal peoples would appear to be an unjustified interference with Aboriginal identities. The denial of such an important aspect of the “good life” for Aboriginal peoples is not in keeping with a modern liberal democracy. There is little hope that the discriminatory registration provisions of the *Indian Act* can be

⁶ A. Long, K. Chiste, “Indian Governments and the Canadian Charter of Rights and Freedoms” 18 *American Indian Culture and Research J.* 91 (1994) [*Indian Governments*] at 96.

⁷ *Ibid.*

⁸ See generally: P. Palmater, “An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians” (2000) 23 *Dal. L.J.* 102 [*An Empty Shell*]. See also: W. Cornet, “Aboriginality: Legal Foundations, Past Trends, Future Prospects” in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation*, (Markham: LexisNexis Canada, 2003) 121 [*Aboriginality*] at 134-136.

“saved” as being based on any kind of legitimate authority or objective.⁹ Similarly, the *Act*’s blood quantum-type definitions of Indians, its current exclusion of non-status Indians from registration (via the second generations cut-off, gender discrimination etc.) and the assignment of different types of status (and rights) among “Indians” could not withstand the high demands of liberal tolerance and respect for basic human rights.

Canada continues to assert the power to define Indians, despite “official” changes in policy positions and even formal apologies.¹⁰ The registration provisions of the *Indian Act* continue to do their job: controlling Indian identity, dividing families and communities, and forcing legalized assimilation upon current and future generations of Aboriginal peoples. Now, many Aboriginal peoples are re-discovering their identities and trying to find ways to protect their communities and future generations from future divisions and exclusions. The question of how liberal democracies can both

⁹ *McIvor v. Canada* [2009] BCCA 153 [*McIvor Appeal*] at para.31. The Court of Appeal outlined the objectives of the *Bill C-31* amendments to the *Indian Act* as explained by the Minister of Indian Affairs in 1985 when introducing the bill for second reading: “The legislation is based on certain principles, which are the cornerstones that John Diefenbaker identified. The first principle is that discrimination based on sex should be removed from the Indian Act. The second principle is that status under the Indian Act and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the Indian Act. The third principle is that no one should gain or lose their status as a result of marriage. The fourth principle is that persons who have acquired rights should not lose those rights. The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership”.

¹⁰ Right Honourable Prime Minister Stephen Harper, Statements by Ministers, “Statement of Apology to Former Students of Indian Residential Schools” (11 June 2008) , online: INAC <<http://www.ainc-inac.gc.ca/ai/rqpi/apo/pmsh-eng.asp>> [*Apology*]. Canada, “Statement of Reconciliation: Learning from the Past”, online: INAC <http://epe.lac-bac.gc.ca/100/201/301/gathering/html/1997/chg_e.html#reconciliation> [*Statement of Reconciliation*]. The Statement of Reconciliation was part of Canada’s Aboriginal Action Plan called “Gathering Strength”; a response to the Royal Commission on Aboriginal Peoples which came out in 1996.

accommodate and support the identity and communal aspirations of Aboriginal peoples raises additional questions as to why identity should matter and, if it does matter, whether it is an individual or communal identity that should be protected, or both?¹¹ What follows in this chapter is an analysis of the issues which are raised by the assertion of an Aboriginal identity within a modern liberal democracy and what that means for the future of Aboriginal identity claims in Canada.

(i) The Need to be “Different”

How many blonde-haired, blue-eyed Aboriginal people have had their Aboriginal “credentials” questioned by not just Aboriginal and non-Aboriginal people, but by friends and sometimes even family members? The same identity insecurity has been experienced by non-status Indians, Métis peoples, status Indians who have had their band membership rejected, status Indians who were once band members but now lack the requisite blood quantum to maintain membership, and status Indians who either choose to or have no choice but to live “off-reserve”.¹² This group is bigger still when one includes the *Bill C-31* reinstatementees who were rejected by friends, families and communities, the “non-traditional” Aboriginal people, the educated Aboriginal people who wanted to go back and help their communities but were rejected due to their education, and anyone who has been rejected for having spoken out against their Chief and Council. If they are not

¹¹ Chapters 4 and 5 of this thesis deal with the assertion by bands and Aboriginal Nations (like the Mohawk and Mi’kmaq) to determine the identity of their own citizens and the corresponding right of non-status Indians to both identify with and belong to their home communities.

¹² *Real Indians and Others*, *supra* note 3, G. Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Toronto: Oxford University Press, 1990) [*Heeding the Voices*], *Corbiere v. Canada* [1999] 2 S.C.R. 203 [*Corbiere*], *McIvor v. Canada* [2007] 3 C.N.L.R. 72 [*McIvor Trial*].

included, who is? Would it only include those who: (1) live on reserve; (2) are considered “traditional”; (3) have 50 to 100% “Indian” blood quantum; (4) have never had their status taken away (sometimes called the original group or the acquired rights group); (5) do not question band politics; and (6) do not want an education? If so, this represents far less than a third of the Aboriginal population. This number is a rough estimate based on the fact that statistically, over half the total Aboriginal population lives off reserve, and we would have to subtract all the *Bill C-31* reinstatementees, non-traditionalists, and so on. Many Chiefs of First Nations claim to only represent their band members on reserve, which *de facto* leaves off-reserve political organisations to represent those status band members who live off reserve, status Indians who are not band members (on the General List) who live off-reserve, and non-status Indians. This plethora of division begs the question why some Aboriginal peoples subscribe to them when they seem equally interested in preserving their identities and communities for future generations? These divisions have led to what some have described as “cultural trauma” upon Aboriginal individuals.¹³ Yet, some Aboriginal people have come to look upon themselves, judge, discriminate and exclude each other in the very same fashion that non-Aboriginal people and governments have. Is this an inevitable part of asserting and protecting Aboriginal identity in Canada, or are more complex issues at play? Even some of the Aboriginal Nations who assert their indigenous identities more strenuously than others have fallen victim to the demoralizing and colonizing powers of the *Indian Act*'s registration and

¹³ J. Fiske, E. George, “Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalization through Customary Law” (Ottawa: Status of Women Canada, 2006) [*Cultural Trauma*]. This report details the results of a study of three First Nations and the emotional, cultural and psychological impacts of the second generation cut-off rule in the *Indian Act*.

band membership provisions and struggle to find solutions from within their Nations.¹⁴ From the most populous, politically astute, sovereignty-asserting First Nations, to the smallest, more remote, rural First Nations, each is plagued by the legacy of the *Indian Act* and the government's control over their individual and communal identities.

Despite the revitalization of Aboriginal cultures and identities, assimilative forces are still working at odds with these goals. Patrick Macklem asserts that the Indigenous peoples in Canada belong to distinctive cultures that "have been and continue to be threatened by assimilative forces".¹⁵ He argues that "Indigenous difference" includes more than cultural differences between Indigenous and non-Indigenous peoples:

Aboriginal cultural difference exists by virtue of the distinctive content of the cultures in which Aboriginal people participate. Some aspects of Aboriginal cultures, including practices that Aboriginal people have engaged in before contact with Europeans as well as ways in which Aboriginal people have resisted, responded to, adapted, and incorporated non-Aboriginal ways of life into their collective identities, are unique to Aboriginal people. It is in this sense that Aboriginal cultural difference is exclusive to Aboriginal people and ...merits constitutional protection.¹⁶

The danger, as he sees it, is that by defining Aboriginal peoples solely by their cultural identities, (i.e. their practices in pre-contact times), this only serves to stereotype Aboriginal peoples, and ignores the importance of their current identities.¹⁷ For him, Aboriginal difference should be protected in the *Constitution Act, 1982*, but that difference should reflect more than just culture; it should reflect the whole of their

¹⁴ *Heeding the Voices*, *supra* note 12.

¹⁵ P. Macklem, *Indigenous Difference and the Constitution of Canada*, (Toronto: University of Toronto Press, 2001) [*Indigenous Difference*] at 47.

¹⁶ *Ibid.* at 48.

¹⁷ *Ibid.* at 54-55.

identities, which includes Aboriginal territory, sovereignty and treaties.¹⁸ He justifies why each element of Aboriginal difference should be protected: (1) international law supports the protection of Aboriginal cultural integrity within sovereign states;¹⁹ (2) Aboriginal peoples occupied and had a special relationship to the land prior to state creation;²⁰ (3) Aboriginal peoples would have continued sovereignty but for the inequality of the law at state creation;²¹ and (4) unlike immigrant minorities, Aboriginal people have hundreds of treaties with Canada and are the only groups in Canada who have the right to treat with the state.²² That being the case, the difference between Aboriginal peoples and non-Aboriginal peoples in Canada should amount to more than hunting practices and traditional ceremonies based on a certain time period.

Unfortunately, all too often, Aboriginal difference has been protected via a piecemeal approach by governments, the courts, and even local Aboriginal communities. Gerald Alfred states: “It has been said that being born Indian is being born into politics.”²³ By this, he means that the ongoing political conflict faced by Aboriginal peoples is a “necessary by-product of rejecting the legacy of unjust history and the struggle to re-integrate traditional values into the community.”²⁴ This is no less true of the political issues surrounding Aboriginal identity. Alfred believes that Aboriginal communities see the sovereignty movement as more of a means to reconstruct their

¹⁸ *Ibid.* at 75.

¹⁹ *Ibid.* at 66-69.

²⁰ *Ibid.* at 76-79.

²¹ *Ibid.* at 121.

²² *Ibid.* at 136.

²³ *Heeding the Voices*, *supra* note 12 at 1.

²⁴ *Ibid.* at 2.

Nationhood than “further integrate into the institutions of the dominant society”.²⁵ He therefore views the *Indian Act* as harmful to the identity and well-being of Mohawks: “The Indian Act is an inherently assimilationist document which seeks to co-opt Indian nationhood by placing Native peoples within Canadian society – but to be sure, by creating a lower status and maintaining racially segregated political institutions.”²⁶ While many Mohawks understand the need to replace the *Indian Act*, the negative effects of the registration provisions on Mohawk views on identity and membership mean that “this effect can’t be annulled by dismissing the Indian Act.”²⁷ Something more is required; be it community education, amendments to the *Act* and/or completely different ways of determining and protecting Aboriginal identity and communal belonging.

Yet, many other factors, outside of the control of Mohawks or any other Aboriginal peoples were at play in shaping the focus on “difference” between Aboriginal peoples and non-Aboriginal peoples. Alfred notes that between the 1950s and the 1970s anthropologists studying Aboriginal communities were very concerned with the acculturation of Aboriginal peoples, and that any kind of change in those communities automatically equated with a loss of culture. This resulted in a situation where: “Archetypal Indian and monolithic White cultures were paired off as poles between which individuals navigated in constructing their identities.”²⁸ This has led to the courts protecting only the “difference” between Aboriginal peoples and non-Aboriginal peoples, and laws and policies, such as the *Indian Act*, which deeply affect the views of Aboriginal

²⁵ *Ibid.* at 8.

²⁶ *Ibid.* at 67.

²⁷ *Ibid.* at 90.

²⁸ *Ibid.* at 70.

and non-Aboriginal peoples alike as to what and who is “Aboriginal”. The Mohawks have singled themselves out from the other Aboriginal Nations in Canada in their quest to preserve what they consider their Aboriginal difference. In their view, since Aboriginal Nations have accepted the label of “First Nations”, they “have in fact consented to being an integral element of the Canadian nation. But the Mohawks’ nationality is rooted in their distinctive concept of sovereignty.”²⁹ For the Mohawks, Canada is a “political framework” through which the Mohawk and the rest of society can work towards cooperation.

In Kahnawake, Alfred explains that there is a growing perception that the membership rules (which are currently based on blood quantum) “are somewhat inconsistent and are generally conceded to be ineffective in promoting a coherent vision of Mohawk identity and the further entrenchment of traditional values.”³⁰ At the same time, it is necessary to understand the political, social and cultural dynamics at work in a community that has been adversely affected by the *Indian Act* for so long. Unfortunately for Kahnawake, this has resulted in a focus on difference which is based on racial purity to the detriment of Mohawk culture and future generations. This is defended by the band council as a necessary means of protecting their difference: “What Kahnawake is presently involved in is not racism, not discrimination nor is it sexism. It is plain and simple survival of a distinct and unique culture that requires some very strong laws and regulations to protect the future.”³¹ Other Mohawk communities have different rules related to identity, membership and citizenship. Six Nations for example, still allows

²⁹ *Ibid.* at 104.

³⁰ *Ibid.* at 169.

³¹ *Ibid.* at 172.

INAC to determine who has the right to become a member of their community, and this is based on status under the *Indian Act*.³² Similarly, the membership section of the website for the Mohawks of the Bay of Quinte, (Tyendinaga Territory) links searchers to forms for application for Indian Status with INAC.³³ Meanwhile Akwesasne has adopted its own membership code and only grants band membership to those who were already on the membership list pre-1985, and those with two parents who are both already band members.³⁴

Contrary to an identity based on “difference”, Schouls argues that by focusing on what makes Aboriginal people different puts Aboriginal people at risk for losing the rights associated with that difference, regardless of what is included.³⁵ According to Schouls, if one equates Aboriginal identity with only cultural or political sources and highlight those differences between Aboriginal and non-Aboriginal peoples, then any sort of identity transformation that does occur within Aboriginal groups over time becomes an end to that group, as opposed to merely a change in the group.³⁶ As opposed to maintaining strict identity boundaries between Aboriginal and non-Aboriginal peoples based on race, culture or any criteria, Schouls suggests that peaceful co-existence between the two is more likely to be achieved when “political agreement, cooperation,

³² S. Clatworthy, A. Smith, *Population Implications of the 1985 Amendments to the Indian Act: Final Report*, (Winnipeg: Four Directions Consulting Group, 1992) [*Population Implications*].

³³ Mohawks of the Bay of Quinte, “Membership”, online: MBQ < http://www.mbq-tmt.org/modules.php?op=modload&name=PagEd&file=index&topic_id=0&page_id=25 >.

³⁴ Akwesasne, *Office of Vital Statistics*, online: Akwesasne <<http://www.akwesasne.ca/ovs.html>>.

³⁵ T. Schouls, *Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003) [*Aboriginal Identity*] at 119.

³⁶ *Ibid.*

and mutual cultural influence are featured as central to the relationship rather than cultural and political incompatibilities.”³⁷ That is not to say that boundaries are not important. Indeed, Schouls specifically maintains that boundaries are the “antidote to colonialism.”³⁸ Maintaining such boundaries is an exercise of the Aboriginal right to be self-defining in Canada, which Schouls considers to be a central criteria for just relations between Aboriginal Nations and Canada.³⁹ The key to these boundaries is not to lose sight of the fact that Aboriginal identity can incorporate more than one kind of identity, even within the same Aboriginal Nation, community or family. Therefore, the maintenance of the Aboriginal right to be self-defining in Canada flows all the way through to the Aboriginal individual so that members can have “control over their own lives in ways which are consistent with their own aspirations”, as opposed to being forced to follow a strict cultural, political or racial code about what a community member should or should not be.⁴⁰ Therefore, it is not the difference between Aboriginal people and non-Aboriginal people that is crucial to maintaining Aboriginal identity, as much as protecting what makes up that Aboriginal identity.

Will Kymlicka explains that the notion of “difference” in identity between citizens of a nation has been at odds with the views of most western political theorists whose ideal of citizens involves a common descent, language and culture. As history has demonstrated, many democratic nations have gone to great lengths to achieve this ideal by attempting to physically eliminate cultural minorities by way of genocide, periods of

³⁷ *Ibid.* at 129 (emphasis added).

³⁸ *Ibid.* at 131.

³⁹ *Ibid.*

⁴⁰ *Ibid.* at 120.

forced assimilation and/or segregation and large scale institutional discrimination.⁴¹ Canada has been no exception. Kymlicka notes that national minorities (like indigenous peoples in Canada) “typically wish to maintain themselves as distinct societies alongside the majority culture, and demand various forms of autonomy or self-government to ensure their survival as distinct societies.”⁴² According to Kymlicka, western democracies such as Canada and the United States are really “multi-national states” because their countries are comprised of more than one “nation”.⁴³ National minorities, such as Aboriginal Nations, are different from both immigrant minorities and social movements within national groups (like gays and lesbians) given their prior occupation, their pre-existing culture, laws and governments.

These groups have fought to retain their existence as distinct societal cultures, although not all have been accorded the language and self-government rights necessary to do so. ... Yet they have persisted, and their status as self-governing ‘domestic dependent nations’ is now more firmly recognized. The determination they have shown in maintaining their existence as distinct cultures, despite these enormous economic and political pressures, shows the value they attach to retaining their cultural membership.⁴⁴

Therefore the protection of group difference represents more than mere protections for interest groups. It involves recognition of the difference of Aboriginal peoples as a societal culture or a nation within a state and their proper accommodation within that

⁴¹ W. Kymlicka, *Multicultural Citizenship*, (New York: Oxford University Press, 1995) at 2.

⁴² *Ibid.* at 10.

⁴³ *Ibid.* at 11. See also page 18 where he defines a nation as a people or culture; that culture having an intergenerational community, having their own institutions, as occupying a specific territory and as sharing distinct languages and histories.

⁴⁴ *Ibid.* at 79. While this quote refers to the American notion of the status of Indian tribes, the unique historical and political factors which led to their status as “domestic dependent nations” are largely applicable in the Canadian context as well.

state. Aboriginal individuals benefit by their identity being recognized through recognition of the collective.⁴⁵ Both collective and individual identity impacts on each other. Debates focused on separating the two have led academics away from solutions regarding how to address the current cultural trauma experienced by Aboriginal peoples.⁴⁶

Those engaged in the Aboriginal rights debate have often characterised the issue as individual rights versus collective rights. A liberal democracy is based on the freedom and equality of the individual citizen, whereas Aboriginal rights are often characterised as group rights. Kymlicka asserts that the use of collective rights terminology as a means of protecting group difference is “misleading”. He also asserts that liberal critics of collective rights always cite apartheid for what can happen when minorities (like the whites in Africa) want protection from the majority (the blacks in Africa), but that these extreme examples are not the automatic result of protecting the identity of collectives:

However, external protections need not create such an injustice. Granting special representation rights, land claims, or language rights to a minority need not, and often does not, put it in a position to dominate other groups. On the contrary, ... such rights can be seen as putting the various groups on a more equal footing, by reducing the extent to which the smaller group is vulnerable to the larger.⁴⁷

In his view, self-government rights act as protection for their culture, whereas special representation rights within dominant political institutions protect them from having their

⁴⁵ *Ibid.* at 76. Kymlicka defines a “societal culture” as “a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language”.

⁴⁶ *Cultural Trauma*, *supra* note 13.

⁴⁷ *Multicultural Citizenship*, *supra* note 41 at 36-37.

views ignored. Protections can be negotiated for religious and cultural practices that would not be supported in the majority market. The result is putting smaller cultural groups on a more even field with dominant cultures so as to protect their identity from assimilation.⁴⁸ “Such groups are concerned with ensuring that the larger society does not deprive them of the conditions necessary for their survival...”.⁴⁹ The very survival of Aboriginal peoples and indigenous peoples around the world is dependent on the protection of their “difference”, but this difference includes more than just cultural practices; it also includes their land bases, laws and self-government.⁵⁰

The *Indian Act* and its implementation by Canada has been extremely harmful to the individual and communal identities of Aboriginal peoples. It has divided families, communities and Nations and has introduced racism, sexism, and discrimination into some modern bands’ membership processes.⁵¹ Unfortunately, it has not been only government laws and policies that have impacted Aboriginal identities. Even the study of Aboriginal peoples through anthropology, ethnology and other social sciences have labelled and categorised Aboriginal peoples in such a way as to force rigid differences between Aboriginal peoples and non-Aboriginal peoples and to emphasize the archetypal Indian to the exclusion of all others as “authentic”.⁵² Though modern social sciences have

⁴⁸ *Ibid.* at 32-33.

⁴⁹ *Ibid.* at 38.

⁵⁰ *Ibid.* at 36-45.

⁵¹ *Cultural Trauma*, *supra* note 13 at 1-8. Canada, through the *Indian Act* has not only created problems for communities but has generated conflicts between women and their communities.

⁵² T. Waters, “Biometrics in Indian Country: The Bloody fight for Authenticity”, online: Fourth World Journal < http://www.cwis.org/fwj/61/quantities_of_blood.htm > [*Biometrics in Indian Country*]. F. Lomayesva, “Indian Identity – Post Indian Reflections” 35 *Tulsa L.J.* 63 [*Indian Identity*] at 64-67. Lomayesva explains that both

moved away from this focus on difference, the fact remains that Aboriginal peoples have been significantly impacted by it.⁵³ This focus on racial difference has led to both legal and social reliance on blood quantum as a determining factor in who can be considered truly entitled to be a Mohawk, Mi'kmaq or Cree by virtue of being an Indian both in earlier periods of our history and in modern times.⁵⁴ But Aboriginal identity is not about racial measurements of blood, nor is it limited to the cultural differences between Aboriginal and non-Aboriginal peoples. Strict reliance on cultural difference means that any change that occurs over time results in the death of the community's identity.⁵⁵ Similarly, blood quantum measurements are arbitrary, and most, if not all blood formulations can result in the eventual extinction of the group. Equally important is the fact that those blood formulas do not reflect the actual ethnic make-up of modern day Aboriginal groups.⁵⁶ Instead of focusing on the difference between Aboriginal and non-

blood quantum and traditionalism are conceptual traps into which Indians fall in defining themselves. He also warns that Indian identity based on "traditionalism" creates an Indian "archetype", a type of measure against which few could satisfy.

⁵³ S. Grammond, *Identity Captured By Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities*, (Montreal: McGill-Queen's University Press, 2009) [*Identity Captured By Law*] at 9-11.

⁵⁴ *McIvor v. Canada* (3-4 October 2008) (Factum of the Intervener, The Grand Council of the Waban-aki Nation, the Band Council of the Abenakis of Odanak, and the Band Council of the Abenakis of Wolinak) [*McIvor-Waban-aki Factum*] at iv. In the *McIvor appeal*, one of the interveners, the Wabanaki and Abenaki, explained that the current *Indian Act* registration provisions were specifically described by Canada as "blood quantum" and that those registered under s.6(1) were "full blood". As the Wabanaki interveners explained: "This was a fiction, since the 6(1) group included non-Indian woman [sic] who gained Indian status through marriage, and all other beneficiaries of over 100 years of patrilineal status rules imposed on First Nations". The modern day registration provisions are inherently connected to the previous provisions based on blood.

⁵⁵ *Indigenous Difference*, *supra* note 15 at 45.

⁵⁶ See generally: *Population Implications*, *supra* note 32, *Multicultural Citizenship*, *supra* note 41 at 23, Royal Commission on Aboriginal Peoples, "Report of the Royal

Aboriginal people as the source of Aboriginal identity, perhaps the better way is to focus on the source of Aboriginal identity: ancestry, evolving culture, common history, territory, treaties and experiences.

There can be political agreements and mutual exchanges of cultural practices between Aboriginal and non-Aboriginal peoples, whereby the Aboriginal peoples would still identify with and maintain strong, vibrant Aboriginal Nations. At the same time, the maintenance of boundaries between the two groups is an important exercise, in order to both protect the right of Aboriginal peoples to be self-defining in Canada, and to ensure their survival as a people in the future.⁵⁷ That being said, those boundaries are based on common culture and history versus any perceived difference in blood between the two groups. In this way, protecting the survival of the culture and identity of Aboriginal peoples in Canada is not only a legitimate goal for Aboriginal peoples, but is also consistent with the values and goals of a modern liberal democracy. At the same time, fostering good relationships between the various citizens of Canada and between the citizens of Canada and its government are also legitimate goals. Some Canadians have asked whether Aboriginal identity is even necessary if we are all citizens? To pose the question more directly, why shouldn't Aboriginal people assimilate into Canadian culture as long as we always remember their past contributions to Canada? These are some of the questions considered by various academics in the next section. While some fall on the side of assimilation for Aboriginal peoples, others argue that Canada can recognize and

Commission on Aboriginal Peoples: Restructuring the Relationship" Vol.2, Part 1 (Ottawa: Minister of Supply and Services, 1996) [*RCAP*, vol.2] at 166.

⁵⁷ *Aboriginal Identity*, *supra* note 35 at 131.

protect the identities of Aboriginal peoples and still remain unified as a liberal democracy.

(ii) Why Not Assimilate?

In the following review of academic theory in the area of Aboriginal identity and its place in a modern liberal democracy, it becomes apparent that there is some support for assimilation. While the majority tend to support the protection of Aboriginal identity, there is sometimes a divergence of opinion on how best to accomplish this goal. Further, they also differ on how important “difference” is for protecting the identity of Aboriginal peoples, and exactly of what this difference is comprised. Some believe that the maintenance of Aboriginal difference is essential to ensure the survival of their culture. There are also those who believe that the maintenance of any kind of difference between Aboriginal peoples and non-Aboriginal peoples is not only impossible, but is harmful to Canadian society as a whole. Alan Cairns debates the value of protecting Indigenous difference within a Canadian context of equal citizens. While he asserts that Aboriginal and non-Aboriginal peoples live in “different worlds”, his solution is to focus on the commonalities between the two groups.⁵⁸ Cairns writes that believers in assimilation were “optimists” and, therefore, the focus should be on fostering a common sense of belonging between Aboriginal and non-Aboriginal peoples, as opposed to protecting the differences.⁵⁹ He criticizes the RCAP report for stressing the differences between Aboriginal and non-Aboriginal peoples, viewing them as separate nations.

⁵⁸ *Citizens Plus*, *supra* note 2 at 45.

⁵⁹ *Ibid.* at 62, 80.

On his part, Cairns sees Aboriginal claims for the protection of their identity and difference as “sporadic”, violent and “pent-up”.⁶⁰ He describes Aboriginal peoples as “penetrated societies”⁶¹ due to the high levels of intermarriage and concludes, therefore, that it should be Aboriginal peoples who accommodate and assume non-Aboriginal identities and influences.⁶² Cairns explains that Canadian society is an urban society and the survival of Aboriginal identity off a reserve in an urban setting is practically impossible. Thus, the assimilation of Aboriginal peoples and their identity is inevitable: “Several generations of off-reserve living, especially if accompanied by intermarriages, will weaken Aboriginal identity, and in some cases lead to its disappearance. This is unavoidable.”⁶³ He also sees the weakening or loss of Aboriginal identity and cultural erosion brought about by this inevitable migration to the cities as an acceptable “cost” in order to produce successful urban Aboriginal people.⁶⁴ His overall premise is that there is no support for nation to nation relations in Canada and that even the use of the term “non-aboriginal” creates a binary view of Canada as two societies.⁶⁵

Cairn’s Canada is a country with one society, one culture, and has everyone identifying as Canadian. Any other scenario, he thinks, can only harm Canada as a nation. At the same time, he maintains that Aboriginal peoples could still be viewed as “Citizens Plus”. This concept originated from the *Hawthorn Report* of 1966, which envisioned Indians living in villages, not as nations, and that those who did not make the inevitable

⁶⁰ *Ibid.* at 84-85.

⁶¹ *Ibid.* at 100.

⁶² *Ibid.* at 93-104.

⁶³ *Ibid.* at 114.

⁶⁴ *Ibid.* at 130.

⁶⁵ *Ibid.* at 145, 152.

trek to the city to become assimilated would be largely Europeanized anyway. Therefore, his idea of Aboriginality has Aboriginal people relegated to the reserve, living in Hawthorn's "villages" until they inevitably assimilate in urban centres and participate "in common ventures as Canadian citizens".⁶⁶ He argues that his plan for Aboriginal peoples to not be misunderstood or viewed as assimilation under a new guise.⁶⁷ Even so, one has to question what his definition of assimilation is, if leaving one's home territory, working in the city, giving up identity for economic benefit, and forgoing all ties to one's community and identity as Aboriginal is not assimilation.⁶⁸

While academics like Cairns like to stop short of openly supporting assimilation of Aboriginal peoples, there are others like Tom Flanagan who not only support but promote the assimilation of Aboriginal peoples.⁶⁹ Flanagan's view of Canada focuses on individualism which, he explains, is the basic premise of modern liberal democracies.⁷⁰ He contrasts this with the collective nature of nationhood claims made by Aboriginal peoples:

The third problem is that the aboriginal orthodoxy encourages aboriginal people to withdraw into themselves, into their own 'First Nations,' under their 'self-governments,' on their 'traditional lands,' within their own 'aboriginal economies.' Yet this is the wrong direction if the goal is widespread individual independence and prosperity for aboriginal people.⁷¹

⁶⁶ *Ibid.* at 211.

⁶⁷ *Ibid.* at 211.

⁶⁸ *Ibid.* at 131. He criticizes RCAP for not supporting the "acceptance of a weaker Aboriginal cultural identity as an acceptable cost of economic and other advantages of the urban environment".

⁶⁹ *First Nations*, *supra* note 2 at 196.

⁷⁰ *Ibid.* at 194.

⁷¹ *Ibid.* at 195.

His underlying assumption is that Canada's policy goal with regards to Aboriginal peoples should be based on individualism. His argument amounts to the view that there is only one way of being liberal and that this one way is based solely on individual independence and prosperity.⁷² Flanagan believes that Aboriginal people who receive benefits on the basis of who their ancestors are, coupled with the fact that these benefits are not available to others, is unfair in his view of liberalism.⁷³ He argues that once we are citizens, we should all have the same legal rights regardless of our different situations in society and who came first.⁷⁴ He does not accept that there could be any exceptions that would benefit Aboriginal peoples.⁷⁵ Flanagan has one main argument based on a popular theory of liberalism. While the theory is an important one, it is relatively unconsidered by Flanagan, in light of the current abundance of legal, political and social academic writing in this field. By not considering modern academic thought in this area, he has left a major void in his work, and this serves to undermine the one popular argument he does make. It is because of writers like him, and because of the *Indian Act* and the government's discriminatory practices towards Aboriginal peoples, that many Aboriginal peoples still fear assimilationist policies and their ongoing effects on their communities. In fact, First Nations organisations spoke out against the election of

⁷² *Ibid.* at 133.

⁷³ *Ibid.* at 22.

⁷⁴ *Ibid.* at 21. Flanagan explains: "Once we are citizens, we will both have the same legal rights, which will also be the same rights of all other citizens, both natural born and naturalized."

⁷⁵ *Ibid.* at 21.

Stephen Harper and the conservatives several years ago, not so much because of Stephen Harper, but because of his association with Flanagan.⁷⁶

Yet, in the non-Aboriginal community, there has been some support for Flanagan's views. He has close ties to the current Prime Minister, Stephen Harper, and was his campaign manager during the election.⁷⁷ He is also very closely associated with the Fraser Institute.⁷⁸ Recently, other western writers have produced works which openly support Flanagan's assimilatory views about Aboriginal Peoples. For example, a new book entitled *A New Look at Canadian Indian Policy* is, really, a review of the not-so-new assimilation and individualist views as Flanagan and Cairns.⁷⁹ The book, *Disrobing the Aboriginal Industry*, offers the same views of Flanagan regarding Aboriginal peoples. They both appear to advocate for prosperity for individual Aboriginal peoples, but any Aboriginal person who is successful is labelled an "elite" and presumed to be only looking out for their own interests and not that of their community members.⁸⁰ Both books see Aboriginal peoples as a race and their criticisms focus on what they perceive as race-based rights.⁸¹ Therefore, while at times appearing to criticise racist views of

⁷⁶ M. MacDonald, "The Man Behind Stephen Harper", (October:2004) online: The Walrus <<http://www.walrusmagazine.com/articles/the-man-behind-stephen-harper-tom-flanagan/>> .

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Indian Policy*, *supra* note 2.

⁸⁰ *Disrobing the Aboriginal Industry*, *supra* note 2.

⁸¹ *Ibid.* at 7, 161. Widdowson sees Aboriginal peoples as individuals with a different "racial ancestry", refers to them as "red" and categorizes the children of mixed marriages by their blood quantum ("three quarters"). See also: *Indian Policy*, *supra* note 2 at 20, 24, 26, 40. Gibson categorizes Aboriginal peoples as individuals who have legal rights "based on race". He also indicates that Aboriginal people will not be considered "ordinary" unless and until they no longer have "race-based" entitlements and labels their communities as "communist".

Aboriginal people, they construct their own arguments around racist concepts, stereotypes and overgeneralisations which detract from their main arguments rather than bolster them.⁸² It is no wonder then that some Aboriginal groups have reacted to this very strong assimilatory theme behind government policies which they have associated with Flanagan, and against which they have attempted to protect their communities. The Kahnawake Mohawks are one such Aboriginal group who, while attempting to protect their group from assimilation, have been criticised for implementing their own racist policies.

Kahnawake Mohawks are pursuing their nationalist political goals in an effort to protect their traditional culture and Mohawk identity. They assert their sovereignty within Canada and protect their rights in that regard. Their questionable rules, or codes with respect to membership in their community, appears to be a reaction to federal attempts at legislative assimilation through the *Indian Act*.⁸³ While some outsiders may look at the blood quantum membership provisions in Kahnawake as extreme and/or racist, Alfred explains that:

...in Kahnawake there is a consuming fear of assimilation. It is for the most part this pervasive fear of further erosion of the Mohawk culture and the loss of racial difference which drives Kahnawake's policy. The community's development of stringent, racialist membership regulations can be seen as an attempt to create bulwark against the pressures which could undermine the basis of Mohawk distinctiveness.⁸⁴

⁸² *Disrobing the Aboriginal Industry*, *supra* note 2 at 9. Widdowson describes the empowering of Aboriginal communities through devolution of powers as having resulted in "a large amount of corruption where powerful families siphon off most of the resources while the majority remain mired in poverty and social dysfunction". She does not provide any empirical evidence for these claims.

⁸³ *Heeding the Voices*, *supra* note 12 at 172.

⁸⁴ *Ibid.*

Kahnawake is by no means a homogenous or one-view-fits-all type of community, which is similar to any other Aboriginal or non-Aboriginal community. That being said, they have struggled to find a way to determine their own identity that is separate and apart from the government's legislative definitions that were never based on Mohawk culture or tradition. Unfortunately, their attempts to restore tradition within their membership criteria to counter what they viewed as the real and ongoing threat of assimilation, has led to adopting "racialist" criteria, instead.⁸⁵

The reasons for the increased reliance upon racial criteria are rooted in Euro-American governments' consistent efforts to destroy Native cultures and the resulting erosion of the tradition values once predominant in Native communities. To rely strictly on cultural criteria would imply the existence of a unified cultural community, where membership would be determined by the consciousness and manifestation of cultural knowledge within an individual. But in Kahnawake, as in many Native communities, the erosion of that unified cultural complex has destroyed the consensus which once existed on what may be considered authentic or valid elements of cultural knowledge. In absence of a framework for making culture-based determinations of membership, Indian communities in the modern era have been forced to accept raced-based criteria.⁸⁶

Many Mohawks see the issue of identity and membership the same as other Aboriginal Nations in Canada: "...the basic need of any community to create a culturally and politically appropriate boundary between its members and others."⁸⁷ They are simply seeking protections for the identity of their people. The key difference between

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* at 174.

⁸⁷ *Ibid.* at 176.

Kahnawake and other communities is the basis upon which they seek to protect their people. Conceptions of blood purity have become intermingled with traditional ones.

The Mohawks are not the only community to have reacted this way to the government's assimilationist policies. The fact that they must find protections against assimilationist laws and policies is indicative of Canada's significant role in this issue. While Canada may feel that band membership codes are outside of their area of responsibility, the fact remains that membership is itself a creation of the *Indian Act* and significant limitations are incorporated by virtue of the status provisions. Thus the government has a significant role to play in correcting these wrongs so as to permit the various Aboriginal identities (Maliseet, Cree, Ojibway, etc) to survive and thrive. Kymlicka explains that states like Canada and the United States are justified in working towards and promoting the voluntary assimilation of immigrants into the values and norms of each host country. What is not acceptable is the coerced assimilation of national minorities like Aboriginal peoples.⁸⁸ It is in this sense that some liberal theorists' appeal for a shared understanding or common citizenship within their countries is biased.⁸⁹ Their assumption is that assimilation is a viable option to achieve the ultimate goal of common citizenship among, in this case, all Canadians or Americans. According to Kymlicka, forced assimilation of national minorities will only cause further division and alienation of these groups from the nation-state, as their bonds with their culture is usually too deep

⁸⁸ *Multicultural Citizenship*, *supra* note 41 at 60-68.

⁸⁹ *Ibid.* at 66. Kymlicka explains that the appeal by some liberals for all citizens to have a "shared understanding" of citizenship is biased, as there is a difference between the coerced assimilation of national minorities and the voluntary assimilation of new immigrants to a country.

to merely give up.⁹⁰ While some liberal theorists may assert that Aboriginal peoples would not make nationalist claims if they had the same “opportunities” as immigrants, Kymlicka explains that history has proven this to be false.

Indeed, this is completely at odds with the history of Indian tribes in America or Canada. Indians have often been pressured to become “just another ethnic group”, but they have resisted that pressure and fought to protect their distinct status. As I noted earlier, Indians are indeed subject to racism, but the racism they are most concerned with is the racist denial that they are distinct peoples with their own cultures and communities.⁹¹

Therefore, assimilation is not only not an option for many Aboriginal peoples, but further attempts at assimilation will continue to alienate them from Canada and may well bring further claims of racism and discrimination, further harming the liberal goals of common citizenship.

Kymlicka also points out that the positive protection of minority rights (as opposed to the forceful assimilation of minorities) has long been an important part of the liberal tradition.⁹² He explains that while some liberals, like John Stuart Mill, argued the need for a common national identity, others like Lord Acton argued the opposite: “...the divisions between national groups and their desire for an internal life of their own serves as a check against the aggrandizement and abuse of state power.”⁹³ Part of the fear that some modern liberals have in recognizing rights for national minorities is the “nationalist” language that immigrant ethnic minorities have used in their politics, and Aboriginal groups have paid the price. Some liberals felt that immigrants made the choice

⁹⁰ *Ibid.* at 70-73.

⁹¹ *Ibid.* at 65.

⁹² *Ibid.* at 53.

⁹³ *Ibid.* at 53.

to immigrate here, so they have no valid claims for nationhood or special rights in this country. They feared that recognition of Aboriginal rights will create expectations with immigrant groups.⁹⁴ In fact, recognition of Aboriginal peoples as distinct peoples would further liberal goals of common citizenship more than would assimilation.

To some academics like Cairns, the maintenance of any kind of difference between Aboriginal peoples and non-Aboriginal peoples is harmful to the goal of citizenship in Canada.⁹⁵ Since one of the values of liberalism is individual independence, the communal values which form part of Aboriginal identity can be seen as counter to a shared Canadian identity which celebrates individualism. What is forgotten is that liberalism is based on several key concepts and does not rely solely on individualism. Canadians also celebrate and identify with their languages, cultures, common histories, and so forth, as part of their “good life”. This is no less true of the various Aboriginal Nations in Canada. Canadians also value the protections democracy offers them from arbitrary interference in their lives by the state. Aboriginal peoples are not afforded the same level of non-interference. Prosperity defined by one person may be completely different to another, but is no less a part of the “good life”. Cairns argues that since Aboriginal peoples have already intermarried with non-Aboriginal people, and have adopted what he considers to be non-Aboriginal practices, they are “penetrated” societies and, as such, assimilation and loss of Aboriginal identity is inevitable.⁹⁶

This simplification of the situation fails to analyse what is considered an Aboriginal practice, why the majority gets to decide, and why intermarriage could not

⁹⁴ *Ibid.* at 62.

⁹⁵ *Citizens Plus*, *supra* note 2 at 152-153.

⁹⁶ *Ibid.* at 100-114.

celebrate multiple identities as opposed to that of the majority which, for some reason, must erase the minority identity. If a common bond of citizenship is the issue, certainly, respect for Aboriginal identities and their rightful place in Canada would go a long way in building those bonds than would the forcible assimilation of those identities into the majority. The Mohawks are just one example of many Aboriginal communities who have experienced the damage caused to their communities by the *Indian Act* and by government interference in their traditional ways of life. While their goal is to maintain a politically and culturally appropriate boundary between Mohawks and non-Mohawks, their strong fear of assimilation has led them to implementing race-based criteria.⁹⁷ There is also support for both the Mohawks and other Aboriginal Nations in Canada who believe that assimilation is not inevitable and that they should not have to change their identities as Aboriginal peoples.⁹⁸ Voluntary assimilation may be considered acceptable with regards to immigrants to Canada, but forced assimilation for societal minority cultures like Aboriginal peoples is no longer acceptable in a modern liberal democracy.⁹⁹

The recognition of Aboriginal rights and the preservation of their identity will do more to further the bonds of common citizenship in Canada than assimilation ever would. Restitution for past harms, recognition of current rights and title and protection for their individual and communal identities form the very basis of most Aboriginal claims and grievances in Canada. Addressing the very basis of these claims could only serve to foster

⁹⁷ *Heeding the Voices*, *supra* note 12 at 90-104, 163-168.

⁹⁸ See generally: *Multicultural Citizenship*, *supra* note 41, *Indigenous Difference*, *supra* note 15 and Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) vols. 1-5 [RCAP].

⁹⁹ *Multicultural Citizenship*, *supra* note 41 at 66-73.

bonds between Canada and Aboriginal peoples. Is the issue really one of loss of identity or about different standards between majority and minority cultures? Are Aboriginal people bound to assimilate into the majority culture, or is their culture naturally evolving and adapting to different circumstances over time? The majority culture in Canada has been allowed to grow, evolve, adapt and change over time. Why then is the choice for Aboriginal peoples one between freezing their cultures at an arbitrary point in time, or assimilation? The imposition of this choice upon Aboriginal peoples certainly does not foster bonds of citizenship. But their claims can be addressed and this could only be helpful.

(iii) Is Cultural Change Forbidden for Aboriginal Peoples?

These and other questions must be answered before any judgment is made about the fate of Aboriginal identity. It would appear that upon further inquiry, that some academics and policy makers have fused the two concepts of cultural evolution and assimilation into one when it comes to Aboriginal peoples. Meanwhile cultures all over the world have undergone tremendous changes but have remained recognized for the culture they represent. Japanese culture today is not what it was a thousand years ago, but it is Japanese culture nonetheless. The same can be said for many cultures around the world. The question of assimilation and disappearance only seems to arise in reference to an indigenous culture within a nation-state, like the Aboriginal Nations of Canada, Indian tribes in the United States, or the Maori in New Zealand. How can this policy still be applicable to Aboriginal peoples when Canadian courts have specifically rejected the “frozen rights” approach in dealing with Aboriginal peoples and their rights?

The Supreme Court of Canada has specifically held that Aboriginal peoples' rights can be exercised in modern forms and do not have to be exercised as they were in pre-contact times.¹⁰⁰ Why then must the identity of Aboriginal peoples be frozen in time when their rights don't have to be? Unfortunately, Aboriginal peoples seem to be fighting the long established cultural stereotype that to be an "Indian" one has to look, act and think like an "Indian". This, in turn, means they must be different from non-Indians. Macklem, however, argues that Aboriginal culture includes not only pre-contact practices but also the many ways in which Aboriginal peoples have "resisted, responded to, adapted, and incorporated non-Aboriginal ways of life into their collective identities".¹⁰¹ He further explains that all cultures transform significantly over time and that Aboriginal

¹⁰⁰ *R. v. Sparrow* [1990] 1 S.C.R. 1075 [*Sparrow*] at para.27. "Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," supra, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected". *R. v. Van der Peet* [1996] 2 S.C.R. 507 [*Van der Peet*] at para.132. "The rights of aboriginal people constitutionally protected in s. 35(1) are those in existence at the time of the enactment of the Constitution Act, 1982. However, the manner in which they were regulated in 1982 is irrelevant to the definition of aboriginal rights because they must be assessed in their contemporary form; aboriginal rights are not frozen in time". *Mitchell v. Canada (Minister of National Revenue - M.N.R.)* [2001] 1 S.C.R. 911 [*Mitchell*] at para.13. "Once an aboriginal right is established, the issue is whether the act which gave rise to the case at bar is an expression of that right. Aboriginal rights are not frozen in their pre-contact form: ancestral rights may find modern expression. The question is whether the impugned act represents the modern... exercise of an ancestral practice, custom or tradition". *R. v. Sappier, R. v. Gray* [2006] 2 S.C.R. 686 [*Sappier and Gray*] at para.23. "Second, it is also necessary to identify the pre-contact practice upon which the claim is founded in order to consider how it might have evolved to its present-day form. This Court has long recognized that aboriginal rights are not frozen in their pre-contact form, and that ancestral rights may find modern expression".

¹⁰¹ *Indigenous Difference*, supra note 15 at 48.

peoples, while maintaining their own unique world views and cultural traits, are no exception.

... Aboriginal cultures undergo dramatic transformations in response to internal and external circumstances and developments. A frozen rights approach ignores the dynamic nature of cultural identity and the fact that cultures undergo deep transformations over time. It risks stereotyping Aboriginal people in terms of historical differences with non-Aboriginal people that may or may not have existed in the distant past and profoundly under-describes important aspects of contemporary Aboriginal cultural identities.¹⁰²

To limit Aboriginal people to pre-contact cultural practices not only unfairly locks them in a cultural time box not forced on other cultures, but sentences them to cultural death when change occurs over time. This is felt even more so on Aboriginal peoples in Canada, given that they are already facing legislative extinction through the registration provisions of the *Indian Act*; any sort of cultural extinction serves as a final act of extinction forced by the majority.

Schouls argues that Aboriginal communities can and do legitimately change their perceptions of community identity over time, and so do the individual Aboriginal peoples within those communities.¹⁰³ One can still be Aboriginal and also participate in the various social, political and economic aspects of Canadian society without disappearing or losing one's Aboriginal culture or identity.¹⁰⁴ "Aboriginal structures should be seen, not as ends, but as community identity in process, made by ongoing choices of individual

¹⁰² *Ibid.* at 169-170.

¹⁰³ *Aboriginal Identity*, *supra* note 35 at 160.

¹⁰⁴ *Ibid.* at 166. "Aboriginal identity can change without disappearing; it can blend modern Western values and practices with values and practices that symbolize Aboriginal community differences".

Aboriginal peoples.”¹⁰⁵ Aboriginal communities have no less of a right to change their identities over time than do other societal cultures. Moreover, it is not for non-Aboriginal people to decide if an Aboriginal group is “too assimilated” or “too small” to constitute an Aboriginal group any longer.

While national minorities may have the right to maintain themselves as a distinct society, they are certainly under no duty to do so. However, I believe that the decision about whether to integrate must be up to the members of the minority themselves. It is not for people outside the group to decide if and when the societal culture is too thin to warrant maintaining.¹⁰⁶

Furthermore, change in cultures works both ways. Not only can Aboriginal people adopt non-Aboriginal cultural traits, but they can also regain, relearn and reconnect with their traditions, customs, practices and languages and rebuild their Nations.¹⁰⁷ According to Kymlicka, it is not only natural for Aboriginal cultures to change over time as a result of its members’ views and preferences, but that this cultural evolution does not have to mean assimilation. “The process of modernization does not change the fact that these nations still form separate societal cultures, with their own institutions, using their own languages.”¹⁰⁸ New ways of living (be it forced or adopted) like reserve-living, does not change the fact that Mohawks are still Mohawks; and in the same vein, off-reserve living (be it forced or by choice) should not change the fact that Mohawks are still Mohawks. This would also follow for status Indians and non-status Indians as well. They are all varied forms of being Mohawk, Mi’kmaq, Cree, etc.

¹⁰⁵ *Ibid.* at 172. (emphasis added).

¹⁰⁶ *Multicultural Citizenship*, *supra* note 41 at 100.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at 103.

Change is not a new part of Aboriginal cultures in Canada. It is doubtful that any culture has ever existed without changing. Sometimes change itself is a significant part of a culture.¹⁰⁹ Therefore, cultural change should not now be highlighted as a justification for its termination or assimilation. For example, the identity of the Kahnawake Mohawks has been shaped by the struggle to balance preservation of their traditions with externally imposed changes.¹¹⁰ Yet, traditional Iroquois political development was based on a pattern of continual change, in that they regularly formed new political alliances and created new political groups on a regular basis.

Traditional pattern of Iroquois political development revolved around the continual formation of new political units. The basis of Iroquois governance was complete consensus on every issue or decision brought before the community as a whole. Failure to achieve consensus had a paralysing effect on governance. Political disputes traditionally played themselves out as polarizing arguments, and the problem was resolved through the fractionalization of larger units and the formation of smaller, more homogeneous communities, usually on the village level. Duality of interest was in fact common even among the pre-contact Mohawk.¹¹¹

Changes within the membership structure of their Nation were also part of their traditional practices as they regularly accepted and integrated outsiders into their communities.¹¹² Today, Mohawks at Kahnawake are so fearful of change, given the policies of assimilation and the government desire to rid Canada of the “Indian problem”,

¹⁰⁹ *Heeding the Voices*, *supra* note 12 at 41. The Mohawks have a long history of cultural change whereby communities who parted ways politically also had the option to part ways as a community and form separate groups. They were no less Mohawk for doing so back then and the fact of their prohibition from doing so now under the Indian Act should not make them any less Mohawk.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* at 41.

¹¹² *Ibid.* at 163.

that many in the community agree that a membership policy is necessary to “safeguard the rights of Mohawks over non-Mohawks within Kahnawake, and to perpetuate Kahnawake as a distinctly Mohawk community in the face of continuing pressure to assimilate politically and culturally into non-Native society.”¹¹³ Mohawks are not the only Aboriginal Nations feeling and reacting to this pressure, as many bands have adopted band membership codes which attempt to prevent assimilation.¹¹⁴ Therefore, while change can be both natural and desirable in cultures, some change is unwanted when community members fear that it will lead to assimilation and the loss of their culture. The difference between the two seems to be whether the change is coerced, the type of change being advanced and whether the Aboriginal group in question suffers any detriment by the majority culture as a result.

The key to the survival of an Aboriginal identity and culture therefore is the acceptance by majority and minority cultures alike, that both identity and culture can adapt, change and evolve and still maintain important connections with the past.¹¹⁵ Unfortunately, just as peoples can and do adopt positive changes to their cultures, many of the negative, externally imposed aspects of Aboriginal identity from the past may also be retained by individual Aboriginal peoples. Aboriginal cultures, as with other indigenous cultures, have learned to deal with externally imposed change the best way they could, given the limitations imposed upon them. For example, while many Aboriginal peoples reject the division of their communities and families according to the

¹¹³ *Ibid.* at 171.

¹¹⁴ I review various band membership codes in Chapter 6. Some codes incorporate a specific blood quantum similar to that of the Mohawks at Kahnawake, while others have other restrictive criteria.

¹¹⁵ M. Minow, “Identities” (1991) 3 Yale J.L. Hum. 97 at 116.

registration criteria under the *Indian Act*, there are also those who rely on that registration as the basis of their identity, and view others from that lens as well. Yet, whether they share the same views as other community members, or whether they accept or reject other aspects of identity (like registration), they, as Aboriginal peoples, still remain part of the shared identity of their respective Aboriginal Nations.

The fact of varied and multiple Aboriginal identities is a reality which is hardly different from other societal cultures whose individuals have varied identities that grow along with their majority cultures. “Certainly the culture of Indian societies, like that of other societies, has grown and changed over time. The evolution of tribal cultures reflects, in part, the need of Indians to survive by adapting to changing circumstances that have been, for the most part, externally imposed.”¹¹⁶ These externally imposed influences can be direct, such as registration under the *Indian Act*, or it can be indirect, such as the common identity shared among Aboriginal peoples in Canada and, indeed, among indigenous peoples around the world through the abuses they have suffered at the hands of their home nation-states. Niezen explains that “...the most significant sources of indigenous identity are broken promises, intolerance, and efforts to eliminate cultural distinctiveness or the very people that represent that difference.”¹¹⁷ These negative effects on Aboriginal identity must be acknowledged so that future attempts at addressing identity and membership issues within communities can begin the process of keeping what changes they feel are good for the community and leaving behind those externally imposed changes that do not benefit their culture.

¹¹⁶ *Indian Governments*, *supra* note 6 at 103.

¹¹⁷ R. Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity*, (Berkeley: University of California Press, 2003) [*Origins of Indigenism*] at 91.

Therefore, change can be a two-edged sword for Aboriginal cultures that have not had complete control over the kinds of changes forced upon them. What is important is to understand that change does not have to mean assimilation or loss of culture. Aboriginal peoples can and should change what they want without it affecting their identity as Aboriginal peoples in whatever Aboriginal Nation they belong, and just as importantly, without affecting how they are viewed and treated by the majority culture. Thus, cultural change does not have to mean inevitable assimilation for Aboriginal peoples. The very fact that Aboriginal peoples have fought so hard to resist assimilation and maintain their identities and cultures stands as testament to their ability to survive. There are many negative aspects of Aboriginal identity that have been imposed on their communities, like status hierarchies, stringent band membership codes and the reduction of their traditional territories to small reserves where people are divided into on and off reserve categories. Since identity is a process, Aboriginal peoples have the power to identify these negative aspects that were imposed on them, acknowledge their impacts on the community and individuals, and make informed decisions about their future citizenship processes.

In the meantime, since Aboriginal identity has changed and evolved, it is time that those changes were applied for the benefit of all members of the communities. Both individuals and communities have an interest in ensuring that these identities which form a critical part of their cultures are maintained for future generations. Mohawk and Mi'kmaq people have maintained their identities in the face of both internal and external changes and pressures. The preservation of their identities is obviously important to Aboriginal peoples. However, in order to answer some of the critiques of the proponents

of assimilation, this next section speaks to why Aboriginal identity is so important to both individuals and communities alike.

(iv) Why Is Aboriginal Identity So Important?

The next question often asked is why Aboriginal identity is so important. Given the current reality that Canadians live in a liberal democracy where equality of citizens is of primary importance, should an Aboriginal identity publicly matter? Amy Guttman argues that most people need a “secure cultural context to give meaning and guidance to their choices in life.”¹¹⁸ In this way, a secure cultural context and the identity that is derived from it would be considered a “primary good” in a liberal democracy. Guttman explains that full public recognition of equal citizens in a liberal democracy can only occur when there are two forms of respect: “(1) respect for the unique identities of each individual, regardless of gender, race, or ethnicity, and (2) respect for those activities, practices, and ways of viewing the world that are particularly valued by, or associated with, members of disadvantaged groups, including...Native Americans...”¹¹⁹ This requires more than our governments and institutions refraining from racism or discrimination; it requires them to act positively to “...recognize the particular cultural identities of those they represent.”¹²⁰ A lack of recognition of Aboriginal identity actually causes harm to Aboriginal individuals and communities, and the negative and divisive labels imposed by the *Indian Act* has further compounded that harm. Charles Taylor explains that both non-recognition and misrecognition can cause serious harm to others:

¹¹⁸ A. Guttman, ed., *Multiculturalism: Examining the Politics of Recognition*, (Princeton: Princeton University Press, 1994) [*Multiculturalism*] at 5.

¹¹⁹ *Ibid.* at 8.

¹²⁰ *Ibid.* at 12.

The thesis is that our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of living.¹²¹

Therefore, equal recognition amounts to more than formal equality, as liberals themselves are situated within their own cultural context, representing the majority power in Canada. Equal recognition means that Aboriginal identity must also be recognized to avoid inflicting further harm on Aboriginal peoples, many of whom have already internalized these negative majority views:

Equal recognition is not just the appropriate mode for a healthy democratic society. Its refusal can inflict damage on those who are denied it. ... The projection of an inferior or demeaning image on another can actually distort and oppress, to the extent that the image is internalized.¹²²

The images created by Canada of different kinds of status and non-status Indians with differing sets of rights project inferior and demeaning images of categories of Aboriginal peoples. This has had a negative effect on Aboriginal identities.¹²³ These legal divisions have been internalized by Aboriginal peoples and are reflected in current political, social

¹²¹ C. Taylor, "The Politics of Recognition" in A. Guttman, ed., *Multiculturalism: Examining the Politics of Recognition*, (Princeton: Princeton University Press, 1994) 25 [*Politics of Recognition*] at 25.

¹²² *Ibid.* at 36.

¹²³ See generally: *Aboriginality*, *supra* note 8, *Population Implications*, *supra* note 32, *Real Indians and Others*, *supra* note 3, *RCAP*, *supra* note 98.

and communal structures.¹²⁴ Further attempts at assimilation will not foster bonds, but runs the risk of further alienating and dividing Aboriginal peoples from Canada.¹²⁵

The issue whether or not to value and protect identity is often characterised as a choice between integration and separation for the particular cultural group seeking recognition. In other words, liberal democratic governments may ask themselves whether they should be neutral with regards to the identity of a minority group, or whether they should accommodate that group. Martha Minow argues that “Government neutrality may be the best way to assure equality, yet governmental neutrality may also freeze in place the past consequences of difference.”¹²⁶ While both aspects may have their difficulties, assimilation (integration) causes the most damage to the cultures and identities of Aboriginal peoples.

Acknowledging and organizing around difference can perpetuate it, but so can assimilation. Separation may permit the assertion of minority group identity as a strength but not change the majority’s larger power. Integration, however, offers no solution unless the majority itself changes by sharing power, accepting members of the minority as equal participants and resisting the temptation to attribute as personal inadequacies the legacy of disadvantage experienced by the group.¹²⁷

According to Minow, a negative label can be so harmful that it should properly be understood as a deprivation of liberty.¹²⁸ The failure to acknowledge difference can leave

¹²⁴ See Chapter 2 for a detailed discussion of these divisions and how they have manifested in Aboriginal life today.

¹²⁵ *Multicultural Citizenship*, *supra* note 41 at 73.

¹²⁶ M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law*, (New York: Cornell University Press, 1990) [*Making All the Difference*] at 20.

¹²⁷ *Ibid.* at 25.

¹²⁸ *Ibid.* at 30.

children “scarred by silent nonrecognition and implicit rejection.”¹²⁹ This kind of harm affects them in all aspects of life: “...when their identities are devalued in the society, children know it, and that message damages their self-esteem and ability to succeed.”¹³⁰ It is no wonder then, that Aboriginal peoples occupy the lowest ends of the socio-economic indicators.¹³¹ No Aboriginal group is without the additional identity crisis that exists because of the *Indian Act*. Aboriginal peoples are labelled by whether or not they are inside or outside the *Act*, whether they are status or not, whether they live on an *Indian Act* reserve or not, whether or not they have membership and which level of status they have. All of this was externally imposed and has nothing to do with Aboriginal culture, history, treaties, language, families and ties to their territories. Yet, these externally imposed labels have torn at the hearts and minds of Aboriginal peoples for decades and have twisted ideas about what it means to be Mohawk, Mi’kmaq or Cree into a battle over the recognition associated with being a 6(1) or 6(2) Indian or a band member.

The government’s use of Indian registration to determine who can and cannot live on a reserve and have access to housing, education and other federal programs and services necessary to ensure a basic quality of life for Aboriginal peoples has shifted the focus of identity from one of culture to that of economic and physical survival. What has happened through these externally imposed divisions is that identity has become stratified and Mohawks or Mi’kmaq within one community are so divided that they see one level of status as somehow better or worse than another. Yet, cultural membership (not government registration) is important to societal groups and many cultural theorists

¹²⁹ *Ibid.* at 29.

¹³⁰ *Ibid.* at 27.

¹³¹ These socio-economic indicators are discussed in greater detail in Chapter 2.

believe that "... it is in the best interests of every person to be fully integrated in a cultural group."¹³² This is something that cannot be achieved by dividing Aboriginal peoples within their own Nations (Mohawk, Mi'kmaq, Cree) into status and non-status, and the other layers of division that accompany those labels. Taylor even argues that people cannot truly be free individuals unless their identities are recognized.¹³³

Guttman argues further that: "Reciprocal respect may depend on public recognition of the value of some cultural particularities that are not universally valued, such as the particular language, history, and customs that help constitute the context of choice for people who identify with that culture."¹³⁴ Cultural membership and the "good" of identity recognition is so important then, that liberal democracies should publicly recognize the identities of Aboriginal peoples even if some of the cultural practices are not those which would be valued by all Canadians, or are sometimes criticised by liberals who desire all citizens to be the same. Guttman further argues that not only is cultural membership important to maintain for societal cultures and important to have recognized by liberal democracies, but it actually threatens equal freedom and civic equality when that is not done. "Because a culture can cease to exist as a consequence of systematic injustices committed against the people who identify with it, the people who identify with the culture may have a group right for the culture to survive. Far from threatening human rights, this group right is derivative of human rights to equal freedom and civic

¹³² A. Guttman, *Identity in Democracy*, (Princeton: Princeton University Press, 2003) at 42.

¹³³ *Ibid.*

¹³⁴ *Ibid.* at 43.

equality.”¹³⁵ Aboriginal people have a right to exist, both in terms of legal recognition and protection as well as culturally within their nation-states. Anything less causes real harm to Aboriginal communities and individuals and does not respect the liberal values of tolerance and the need for everyone to access what makes the “good life” for them.

Liberal democracies should, therefore, publicly recognize and protect Aboriginal identities. Otherwise, non-recognition or misrecognition will lead to further discrimination of sub-groups of Aboriginal peoples. Similarly, modern liberal cultures can hardly spread the virtues of liberal democracies globally if they are at the same time, seen to be depriving the liberty of the minority indigenous populations within their borders. Publicly recognizing Aboriginal identities does more than avoid these kinds of harms; it also provides a “good”, namely cultural membership in which people find their context for living. Aboriginal peoples have further justifications for the public recognition and support of their identities in their long history of abuse at the hands of government laws and policies. “Fighting the legacy of historical injustices against members of disadvantaged groups may mean supporting their culture or honouring their political rights as a group to support their own culture to the extent that it is threatened with extinction as a consequence of injustices.”¹³⁶ Many Aboriginal cultures have been damaged by Canada’s assimilation policies like residential schools and registration under the *Indian Act*. Aboriginal people have suffered discriminatory government actions which resulted in the loss of their traditional lands, natural resources and traditional livelihoods. Now, despite claims by the federal government to have abandoned the discriminatory

¹³⁵ *Ibid.* at 77.

¹³⁶ *Ibid.* at 78.

ways of the past, the *Indian Act's* registration and band membership provisions are forcing the legislative extinction of Aboriginal peoples regardless of their Aboriginal Nation of origin.¹³⁷ Kymlicka argues that not only should liberal democracies recognize Aboriginal cultural identities, but that these societal cultures must be protected from extinction: "The survival of a culture is not guaranteed, and, where it is threatened with debasement or decay, we must act to protect it. Cultures are valuable, not in and of themselves, but because it is only through having access to a societal culture that people have access to a range of meaningful options."¹³⁸ This is especially true where the majority culture has had a hand in trying to eliminate the minority culture, as is the case with Aboriginal peoples in Canada. Aboriginal peoples are very concerned about preserving their cultures, traditions and languages and Canada has a responsibility to try to undo some of the damage it has done.¹³⁹

The many reasons why Aboriginal identity is so important stems from the fact that everyone needs a secure cultural context in which to live their lives. A secure cultural context is so important that it is part of the good life that liberals advance for individuals. Full respect for equal citizens involves more than mere respect for the identity of individuals regardless of their race, religion, and so forth. It also requires respect for the practices and identities of disadvantaged groups like Aboriginal peoples. Withholding this kind of respect results in the non-recognition of identity which, in itself, is a serious harm akin to oppression. Negative labels often result from non-recognition and this kind

¹³⁷ *Apology*, *supra* note 10.

¹³⁸ *Multicultural Citizenship*, *supra* note 41 at 83.

¹³⁹ AFN-INAC Joint Technical Working Group, "First Nations Registration (Status) and Membership Research Report", online: AFN <<http://www.afn.ca/misc/mrp.pdf>> [*AFN-INAC Status Report*].

of deprivation of liberty means that individuals are not truly free. To be truly free, Aboriginal identity must be recognized in a positive light. There is even an obligation on the part of the majority (Canada) to protect the identities and cultures of the minority (Aboriginal Nations) from extinction, since the majority has had a hand in trying to eliminate them. Therefore, Canada has an obligation to ensure that it removes not only the negative label from non-status Indians, but that they take positive steps to correct the current divisions and protect the culture and identities of Aboriginal peoples in partnership with them.

(b) Aboriginal Identity in Aboriginal Communities

The concepts relating to Aboriginal identity in liberal democracies, as debated by liberal and other theorists, highlight some of the difficulties faced by Aboriginal peoples in their political and legal claims for recognition and protection. The competing forces (and fears) of assimilation and natural cultural change, together with the desire to protect indigenous difference, makes the protection of Aboriginal identity and culture even more of a challenge. The challenges faced at the theoretical level are not as daunting as the complex political and social realities faced by Aboriginal individuals within their communities. The issue whether someone has enough “Indian blood” to be called an “Indian” is central to numerous family and community debates about Aboriginal identity, communal identity, registration, and band membership. The need for Aboriginal communities to maintain boundaries necessitates excluding people. But who gets

excluded, for what reasons, and who gets to decide, all impact on whether the community feels distinct or divided.¹⁴⁰

Similarly, individual community members can sometimes be so focused on ensuring their own individual inclusion that the fate of future generations can be forgotten in the trade-offs that are made for present day benefits.¹⁴¹ One of the issues facing Aboriginal communities right now relates to how much weight individual factors or criteria, like Aboriginal tradition, Indian status or blood quantum, should play in the acceptance of once excluded members who seek to rejoin their communities of origin, or those who wish to join for the first time. These issues are debated amongst Aboriginal youth, adults, leaders and elders alike.¹⁴² The future of Aboriginal Nations and Aboriginal identity in Canada depends on the just resolution of these issues. What follows is a review of the current academic debate in this area.

¹⁴⁰ *Aboriginal Identity*, *supra* note 35 at 131. J. Borrows, “‘Landed’ Citizenship: Narratives of Aboriginal Political Participation” in W. Kymlicka, W. Norman, *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) 326 [*Landed Citizenship*] at 339.

¹⁴¹ The socio-economic situation of many Aboriginal peoples is so poor that they require urgent attention to their needs. That being the case, sometimes in the interest of taking care of immediate needs (like status for themselves so they can access programs and services) they may not have as much of a focus on the needs of future generations or the impact of their present-day decisions on the community as a whole.

¹⁴² Assembly of First Nations, “Policy Update: Elections & Leadership Selection and First Nations Citizenship, Membership and Registration (Status)”, online: AFN <<http://www.afn.ca/misc/Policy-Updates.pdf>> [*Citizenship Update*] at 1. Recently, the Assembly of First Nations announced that they would be embarking on longer term research and consultation with regards to the issues of First Nations citizenship, band membership and registration under the *Indian Act* as well as current elections and leadership processes. It is their intention to develop frameworks, develop information tools, and continue lobbying and research activities in these areas. In their words: “It is clear...that the status quo is not working and we need to point to a direction forward for policy and legislative change”.

(i) **Ancestry vs. Blood**

Perhaps the feature of Aboriginal identity which is most referred to in discussions about citizenship or membership in Aboriginal Nations is Aboriginal ancestry. Aboriginal People are often referred to as the “First Peoples” of this country, as their ancestors were here prior to the settlement and assertion of sovereignty by Europeans and the establishment of Canada as a state. Modern day communities of Aboriginal peoples are the descendants of the original indigenous peoples of this continent. It is their ancestors who protected and maintained their traditions, laws, values, belief systems, languages and practices which make up their rich cultures. Thus, the importance of ancestry and the links between current communities with their ancestral ones cannot be overlooked. Today, the difference or distinctness of Aboriginal Nations is inherently linked to their ancestry, and is often asserted as one of the main components of “Aboriginality” or Aboriginal identity in Canada.¹⁴³

At the same time, there are those who confuse the concept of ancestry with that of blood purity (otherwise referred to as blood quantum) in terms of identifying Aboriginality. While most studies, reports, courts and academics agree that the concept of blood quantum for determining identity is racist, discriminatory, and serves no useful purpose in maintaining Aboriginal difference, the fact remains that this outdated method of determining membership or identity has been planted and remains firmly rooted in the minds of some Aboriginal peoples.¹⁴⁴ It is important to establish that strict and sole

¹⁴³ *Aboriginal Identity*, *supra* note 35 at 120-122.

¹⁴⁴ See for example: *RCAP*, *supra* note 98, *AFN-INAC Status Report*, *supra* note 139, *Landed Citizenship*, *supra* note 140 at 326, *Heeding the Voices*, *supra* note 12, *R. v. Powley* [2003] 2 S.C.R. 207 [*Powley*].

reliance on ancestry as determinative of Aboriginal identity can result in membership codes that have the same exclusionary effects as blood quantum.¹⁴⁵ Neither of these issues are simple, and require further discussion in the context of Aboriginal peoples' identity and their ongoing struggles with the determination of citizenship and membership.

Aboriginal ancestry is a source of pride for most Aboriginal peoples, be they Mohawk or Mi'kmaq, status or non-status, on or off-reserve. In fact, their particular ancestry is part of what sets them apart from immigrant minorities who make their own claims for recognition. The Supreme Court of Canada in *R. v. Van der Peet* cited the fact that Aboriginal people were "here first" as the main reason they are unique as compared to minority, ethnic or interest groups in Canada.¹⁴⁶ The court held:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.¹⁴⁷

Thus, the fact that modern Aboriginal peoples are descended from the Aboriginal peoples that were here at contact is considered important by courts for determining Aboriginal rights. Aboriginal Peoples are different from minority, ethnic or interest groups because, with the exception of population numbers that make both Aboriginal peoples and ethnic

¹⁴⁵ *Landed Citizenship*, *supra* note 140 at 339-340.

¹⁴⁶ *Van der Peet*, *supra* note 100.

¹⁴⁷ *Ibid.* at para. 30.

minorities numerical “minorities”, Aboriginal peoples are significantly different in their social, cultural, historical, political and legal histories. Aboriginal Peoples are indigenous to this continent; they have special relationships with the land, have constitutionally protected rights based on their claims to the land; and its resources; and they are the only cultural/political group within Canada, who can treat (conclude treaties) with Canada.¹⁴⁸ These are claims that immigrant ethnic minorities and interest groups cannot make.¹⁴⁹

The Supreme Court of Canada, in *Powley*, later clarified that ancestry was not about blood quantum, but could be acquired through birth, adoption or other means.¹⁵⁰ It specifically refrained from further defining “ancestry”, but offered the following guidance:

Second, the claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum “blood quantum”, but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means. Like the trial judge, we would abstain from further defining this requirement in the absence of more extensive argument by the parties in a case where this issue is determinative. In this case, the Powleys' Métis ancestry is not disputed.¹⁵¹

Other sources can be found for defining the term “ancestry”. For example, various census agencies have their own definitions of ancestry for the purposes of counting the population of their target areas. The United States Census defines it as: “Ancestry refers

¹⁴⁸ *Indigenous Difference*, *supra* note 15 at 9, 48.

¹⁴⁹ Any reference to Aboriginal Nations as “national minorities” or “cultural societies” are references to terms used by authors cited in this thesis and is not meant to equate Aboriginal peoples with other minorities.

¹⁵⁰ *Powley*, *supra* note 144 at para.32.

¹⁵¹ *Ibid.*

to a person's ethnic origin or descent, "roots", or heritage, or the place of birth of the person or the person's parents or ancestor before their arrival to the United States."¹⁵²

Statistics Canada defines ancestry as follows: "Origin or ancestry attempts to determine the roots or ethnic background of a person."¹⁵³ Ancestry has emerged as an important feature of Aboriginality as it relates directly to their distinctness as a group in Canada.¹⁵⁴

As commonly understood, ancestry refers to the fact that one has descended from a particular Aboriginal Nation or culture; which signifies a link to common history, ancestors (or previous generations of families), territory, traditions, customs, beliefs and culture. It is this ancestral claim, versus the generic claim for minority recognition as an ethnic group, that has been recognized (although in limited form) as supporting various legal rights and separates them from the claims advanced by interest groups, minorities and ethnic groups.¹⁵⁵ The more difficult issue is how to ensure that the concept of ancestry is not misconstrued so as to reinforce the notion of blood purity or quantum and to ensure that it is not the sole basis upon which to define Aboriginality. Although ancestry speaks of familial connections to past and future generations, there is no

¹⁵² Ancestry, "Ancestry – What is your ancestry and what does the word mean?", online: Ancestry <<http://amberskyline.com/treasuremaps/ancestry.html>>.

¹⁵³ Statistics Canada, "Ethnicity", online: Statistics Canada <<http://www.statcan.ca/english/concepts/definitions/ethnicity.htm>>.

¹⁵⁴ See generally *Van der Peet*, *supra* note 100 at paras. 19-20. Specifically, the court held: "The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that **they are rights held by aboriginal people because they are aboriginal**. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights" (emphasis added).

¹⁵⁵ *Ibid.*

requirement as to how Aboriginal peoples' concepts of family and communal ties must be determined. The ancestral connection between Aboriginal peoples spans generations and connects the present individuals with the past ancestors as well as with the future generations. This kind of connection between generations is an important part of life in Aboriginal communities and can be a great source of pride for Aboriginal peoples. The problem with ancestry is that some Aboriginal groups have come to pinpoint direct descent by birth as the only means to share in a common identity as Aboriginal peoples and, at times, rely on ancestry as the sole indicator of Aboriginality culture. This focus on ancestry as defined by blood or birth connections can have the same effects as reliance on blood quantum for determining Aboriginal identity and belonging.¹⁵⁶

Flanagan does not support the public recognition of Aboriginal identity, and therefore, is opposed to the special legal and constitutional status currently possessed by Aboriginal peoples in Canada. In his view, Aboriginal rights are not based on the fact that Aboriginal people were here first and had their own laws and identities, but categorizes them as a race and denounces "race-based" rights.¹⁵⁷ He dismisses the importance of ancestry for Aboriginal Peoples and the fact that they were here first. At the same time, he states: "Admittedly, temporal priority is one of the great ordering principles of human society...".¹⁵⁸ He explains the importance of such proverbs as "First come, first served" (and the rules of temporal priority) as being the very basis of our modern legal system,

¹⁵⁶ In Chapter 6, I review several band membership codes which include blood quantum as part of their criteria, as well as those who incorporate a blood quantum rule through the use of restrictive ancestry provisions.

¹⁵⁷ *First Nations*, *supra* note 2.

¹⁵⁸ *Ibid.* at 20.

but argues that these rules should not apply to Aboriginal people.¹⁵⁹ He also noted that if he were to come upon a trout pool where someone else was already fishing, he would not think of casting his fishing rod into that pool; he would go and find an unoccupied pool from which to fish.¹⁶⁰ It is interesting that he would use that particular example since he criticizes Chief Justice Lamer in *Van der Peet* for supporting Aboriginal rights to fish based on the fact that Aboriginal people were “here first”.¹⁶¹

Flanagan further explains the importance of temporal priority to human society and notes how people react when it is violated. Yet, he states that temporal priority must not be followed blindly and inflexibly.¹⁶² Apparently, this is how he justifies extending a fishing courtesy to his fellow trout fishermen, but not advocating the same courtesy, if not right, to Aboriginal people, who were here first, fishing on their traditional territories and from their traditional fishing “pools”, as their ancestors have done since time immemorial. Thus, the rules apply to non-Aboriginal people but not to Aboriginal people who have an ancestral claim which is prior to and stronger in law than that of non-Aboriginal people.

Flanagan also does not approve of Aboriginal people receiving benefits on the basis of “who their ancestors are” since these benefits are not available to other Canadians.¹⁶³ He asserts that: “Indians did not do anything to achieve their status except be born, and no one else can do anything to join them in that status because no action can

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.* Flanagan states: “His statement offers no reason why ancestral priority requires creation of a special legal regime.”

¹⁶² *Ibid.*

¹⁶³ *Ibid.* at 21.

affect one's ancestry."¹⁶⁴ Flanagan's point has some merit if in fact Aboriginal identity and communal belonging are determined solely on the basis of ancestry defined as descent by birth. The current *Indian Act* determines status solely on the basis of descent and by one's actual cultural connections.¹⁶⁵ There is a difference between registration as an Indian and individual membership in bands for roughly 40% of the bands in Canada.¹⁶⁶ However, Flanagan oversimplifies the actual situation in Aboriginal communities, as some communities allow people to be adopted as children or adults, by way of traditional adoption, in order to become band members.¹⁶⁷ In addition, memberships are sometimes transferred from one *Indian Act* band to another due to marriages, adoptions or children with mixed band memberships.¹⁶⁸ He also does not apply his logic equally to the Canadian situation. Many Canadians have not done anything to become Canadian other than be born, and that does not make them any less

¹⁶⁴ *Ibid.* at 22.

¹⁶⁵ *Indian Act*, R.S.C. 1985 c. I-5 [*Indian Act*] at s.6-7.

¹⁶⁶ For a complete overview of the impact of *Bill C-31*, status and band membership codes on the demography of Aboriginal peoples see: *Population Implications*, *supra* note 32. S. Clatworthy, *Revised Population Scenarios Concerning the Population Implications of Section 6 of the Indian Act*, (Winnipeg: Four Directions Consulting Group, 1994) [*Revised Population Scenarios*]. S. Clatworthy, Four Directions Consulting Group, *Bill C-31, Indian Registration and First Nations Membership*, (Winnipeg: Four Directions Consulting Group, 2001) [*Registration and Membership*]. S. Clatworthy, *Reassessing the Population Impacts of Bill C-31* (Winnipeg: Four Directions Project Consultants, 2001) online: <http://www.ainc-inac.gc.ca/pr/ra/rpi/rpi_e.pdf> (date accessed: 7 August 2005) [*Reassessing Population Impacts*]. The other 60% of bands do not have band membership codes and, therefore, rely on the *Indian Act* to determine their members. Some have adopted codes, but their codes rely on the *Indian Act* as their criteria for membership.

¹⁶⁷ Adoption Council of Canada, "Adoptions", online: <<http://www.adoption.ca/news/041231gloss.htm>>. In this online resource, "traditional" or "custom" adoptions are defined as a "Form of adoption specific to Aboriginal peoples, taking place within the Aboriginal community and recognizing traditional customs." I will also be reviewing some of the band membership codes later on in Chapter 6.

¹⁶⁸ *First Nations*, *supra* note 2 at 22.

Canadian. He does not seem to question the right of Canada as a nation to make birth one of its criteria for citizenship.

Flanagan does not argue that a Canadian should feel shame because their children can be Canadians through right of birth, but that someone from another country may not have the same right to be a Canadian. Citizenship in a nation is not automatic for those who come there anew.¹⁶⁹ If ancestry is both a source of pride and a source of rights for citizens of democratic Nations, (since birth in the Nation often accompanies automatic citizenship), why would Aboriginal Nations be the exception? Furthermore, Canadians enjoy the privilege of transportable rights within their country and often outside their country, whereas many Aboriginal people in Canada lose their rights within their own country, their own province and within their cities once they leave their reserves. Some citizens of Aboriginal Nations cannot take their benefits with them when they move off a reserve or participate in local band governance while living off reserve.¹⁷⁰ It is this lack of objective comparison that leaves Flanagan's assessment of the situation wanting. Flanagan does not see Canada co-existing with Aboriginal Nations or communities who base their citizenship on ancestry or anything else for that matter. He simply advocates assimilation.¹⁷¹

Flanagan's views about Aboriginal peoples are relatively unsupported by research and empirical evidence. Cairns, in contrast, appears to be sympathetic to Aboriginal peoples, addresses some of the current literature, and argues for Aboriginal people to be

¹⁶⁹ Citizenship and Immigration Canada, "Applying for Citizenship", online: CIC <<http://www.cic.gc.ca/english/citizenship/index.asp>>.

¹⁷⁰ See generally: *Corbiere*, *supra* note 12 and *An Empty Shell*, *supra* note 8.

¹⁷¹ *First Nations*, *supra* note 2 at 196. "Call it assimilation, call it integration, call it adaptation, call it whatever you want: it has to happen".

something more than Flanagan's equal citizens: "Citizens Plus". Another key difference is that Flanagan does not give any weight to Aboriginal ancestry, but emphasizes the fact that non-Aboriginal people cannot join Aboriginal governments "at will" as proof that they are racial communities.¹⁷² Cairns is more concerned with how the non-citizens of the Aboriginal governments will be treated.¹⁷³ But he believes that a democratic liberal society depends on the "fraternity" of its citizens.¹⁷⁴ His goal is to "nourish" the "commonalities" between the two, and to let the differences fall by the wayside.¹⁷⁵ The biggest difference between Flanagan's assimilation plan and Cairns' is that any Aboriginal people left clinging to their ancestry and history would remain in their "Indian villages" so as not to impede the assimilation or "success" of those who moved to urban areas and have, therefore, forgotten about their ancestry.

What is forgotten here is that ancestry is very significant to many Aboriginal peoples. Ancestry viewed as the totality of familial, communal, historical and territorial ties to their peoples is preferred to a concept which focuses solely on direct descent by birth. Forgetting about one's Aboriginal ancestry would mean forgetting about one's parents, grandparents, community, territory and history. The assumption made by those, like Cairns and Flanagan, is that in order to partake of the "modern" world of jobs, grocery shopping and entertainment, one must forfeit their identity as an Aboriginal person. That is not the case in reality. Aboriginal peoples may well face more discrimination off reserve than on, but that does not require signing over their identity

¹⁷² *Ibid.* at 21-22.

¹⁷³ *Citizens Plus*, *supra* note 2 at 141. Cairns states: "The treatment of non-citizens by Native governments will inevitably be a concern of Canadians elsewhere."

¹⁷⁴ *Ibid.* at 153.

¹⁷⁵ *Ibid.* at 45.

and ties to ancestry (as broadly defined) at the reserve boundary in exchange for a work pass. Macklem's references to indigenous difference, as discussed earlier, comprise more than one aspect of Aboriginality. In his view, indigenous difference is not racial; it is comprised of culture, territory, treaties and sovereignty. As a result, he argued that constitutional protection should extend to all those aspects of indigenous difference.¹⁷⁶

Macklem explained how ancestry and the fact that Aboriginal people occupied the continent prior to the creation of Canada as a state is a key part of Aboriginal identity deserving of constitutional protection. The ancestral connection between Aboriginal peoples and the land also forms a major component of Aboriginal identity.¹⁷⁷ He argues that participation in cultural practices generates a "shared sense of continuity with the past" and this provides a clear link between ancestry and identity.¹⁷⁸

At the same time, Macklem warns against defining Aboriginal identity solely in terms of the past, and that ancestral factors can contribute to Aboriginal identity, but not be the entire basis of it, otherwise these identities would be frozen in time.¹⁷⁹ He further stresses that Aboriginal cultures, like all cultures: "...undergo dramatic transformations in response to internal and external circumstances and developments."¹⁸⁰ He goes on to argue that the constitutional protection of Aboriginal identity does not mean that Aboriginal peoples cannot also have allegiances to their fellow citizens, be Canadians and, at the same time remember, assert, and protect their Aboriginal ancestry and identity. Instead, they can have many allegiances and maintain their identity: "Accordingly, I refer

¹⁷⁶ *Indigenous Difference*, *supra* note 15 at 75.

¹⁷⁷ *Ibid.* at 71-75.

¹⁷⁸ *Ibid.* at 71-72.

¹⁷⁹ *Ibid.* at 54-55.

¹⁸⁰ *Ibid.* at 169-70.

to cultural identity as an active web of interlocking and intersecting allegiances among individuals and communities.”¹⁸¹ He further argues that were it not for the discriminatory events of the past that did not respect the democratic principles espoused by liberals, Aboriginal people would not be forced to choose between their ancestral identities and Canadian ones.

If Aboriginal nations had been treated as formal equals in the distribution of sovereignty effected by European expansion, their sovereignty would have been respected. It was not and, as a result, allegiances of Aboriginal people became multi-dimensional. The multi-dimensionality of Aboriginal allegiances is in fact partly a function of the denial of formal equality and, as such, should not be used as a weapon to force Aboriginal people to choose between two unpalatable scenarios.¹⁸²

Aboriginal people were forced by events in history to intermingle with non-Aboriginal people, adapt to non-aboriginal cultural practices and still find a way to maintain their own culture and distinctness as a people. As a result, Aboriginal people retained their uniqueness but also incorporated non-aboriginal practices and allegiances.¹⁸³ All this happened against the will of Aboriginal people and the fact that Aboriginal people now have multiple allegiances and have adapted their cultures should not now be held against them.¹⁸⁴

Macklem’s views on protecting indigenous difference are supported by others who think that identity is an important aspect of the good life. John Borrows, for example, raises the problem of Aboriginal peoples qualifying for various citizenship

¹⁸¹ *Ibid.* at 53, 124.

¹⁸² *Ibid.* at 125.

¹⁸³ *Ibid.* at 53.

¹⁸⁴ *Ibid.* at 125.

rights within mainstream Canadian society, but are, at the same time, excluded from citizenship rights within their own Aboriginal communities.¹⁸⁵ He considers the arguments raised by some Aboriginal peoples that they must protect and restrict citizenship based on factors like ethnicity in order to ensure the survival of the group, and is critical of this view:

While I think restrictions on Aboriginal citizenship are necessary to maintain the social and political integrity of the group, I must admit that I am troubled by ideas of Aboriginal citizenship that may depend on blood or genealogy to support group membership. Scientifically, there is nothing about blood or descent alone that makes an Aboriginal person substantially different from any other person. While often not intended by those who advocate such criteria, exclusion from citizenship on the basis of blood or ancestry can lead to racism and more subtle forms of discrimination that destroy human dignity.¹⁸⁶

Borrows does not approve of citizenship rules which are based on racial criteria.

However, he does acknowledge that some criteria are necessary to “protect and nurture” Aboriginal communities.¹⁸⁷ Therefore, Macklem and Borrows both agree that borders are necessary in order to protect Aboriginal cultures. But they diverge on how to construct those borders. Where Macklem would place a heavier emphasis on ancestry and kin-ship, Borrows feels that Aboriginal peoples are much more than kin-ship groups:

They have social, political, legal, economic, and spiritual ideologies and institutions that are transmitted through their cultural systems. These systems do not depend exclusively on ethnicity and can be learned and adopted by others with some effort. Therefore, Aboriginal peoples could consider implementing laws consistent with these traditions to extend

¹⁸⁵ *Landed Citizenship*, *supra* note 140 at 339.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.* at 339-340.

citizenship in Aboriginal communities to non-Aboriginal people.¹⁸⁸

Aboriginal identity can be respectful of, and incorporate ancestral ties but it cannot forget the other half of the equation: that Aboriginal identity and culture is evolving and Aboriginal peoples should be able to embrace those changes without losing their Aboriginality.¹⁸⁹

The social realities that Aboriginal peoples face today are that they live with and among other Canadians, often intermarry, and/or have other social relationships which often result in children from those mixed marriages and relationships.¹⁹⁰ This has been the case for centuries. Consequently, there are no Aboriginal groups in Canada that are made up of completely “pure” Aboriginal peoples (even if there were a test to determine such a status).¹⁹¹ This fact, however, does not in any way detract from their distinct status as Aboriginal peoples (Mohawk, Mi’kmaq, Cree, etc). The Report of the Royal Commission on Aboriginal Peoples (RCAP) acknowledged this fact:

Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change their internal composition.¹⁹²

¹⁸⁸ *Ibid.* at 340.

¹⁸⁹ *Ibid.* at 329. “After all this is our country. Aboriginal people have a right and a legal obligation as a prior but ongoing indigenous citizenship to participate in its changes”.

¹⁹⁰ *RCAP, vol. 2, supra* note 56 at 177. *Landed Citizenship, supra* note 140 at 330. Borrows reminds readers that one in every two Aboriginal people marries a non-Aboriginal person.

¹⁹¹ *Identity Captured by Law, supra* note 53 at 7-8. “Intermarriage between different populations have always existed, and there are no “pure” populations”.

¹⁹² *Ibid.* at 177.

Often, fears of assimilation are really fears about loss of blood purity (and vice versa), and the reaction of some Aboriginal groups has been to reinstate blood quantum as a band membership criterion and moratoriums on mixed-marriages in an effort to stave off dilution.¹⁹³ The Mohawks are an example of a great nation of Aboriginal peoples who were traditionally very powerful and so confident about their identity as Mohawks that they regularly absorbed other smaller Aboriginal nations and even non-Aboriginal peoples into their own.¹⁹⁴ Today, because of the complexities created by the registration and membership provisions in the *Indian Act*, many Mohawks see the modern-day absorption/incorporation of non-Mohawks as assimilation, as opposed to viewing it as an expansion of their great Nation.¹⁹⁵ As a result, one particular community has instituted a moratorium on mixed marriages, the adoption of non-natives into Mohawk families, and added a minimum requirement of 50% blood quantum for obtaining band membership and reserve residency rights.¹⁹⁶ Yet there is a growing recognition by more and more Mohawks that: "...blood quantum can lead in only one direction, and that is down... With a blood quantum requirement of 50 percent, we are all just two generations away from extinction."¹⁹⁷ This issue is not unique to Mohawk communities. The issue of blood quantum and its impact on the purity of Aboriginal identity has impacted many Aboriginal communities struggling with how to devise band membership codes to protect

¹⁹³ *Heeding the Voices*, *supra* note 12 at 73-75.

¹⁹⁴ *Ibid.* at 35-41.

¹⁹⁵ *Ibid.* at 35-49, 163-164.

¹⁹⁶ E.J. Dickson-Gilmore, "Iati-Onkwehonwe: Blood Quantum, Membership and the Politics of Exclusion in Kahnawake" (1999) 3 *Citizenship Studies* (No.1) 27 [*Exclusion in Kahnawake*] at 36-37.

¹⁹⁷ *Ibid.* at 39.

their identities. The question that must be asked is whether blood quantum will achieve the goal of cultural preservation, or whether it will cause more harm than good in the end.

Kymlicka does not believe that blood quantum is a legitimate criterion for determining the membership of societal cultures like indigenous nations. “These incorporated cultures, which I call ‘national minorities’, typically wish to maintain themselves as distinct societies alongside the majority culture, and demand various forms of autonomy or self-government to ensure their survival as distinct societies.”¹⁹⁸ While ancestry may be an important aspect of the distinctness of societal cultures, Kymlicka cautions against this being misunderstood as a requirement for individual members to have to meet blood quantum descent minimums.¹⁹⁹ He notes that there are high rates of intermarriage between indigenous groups and North American populations and as a result: “American Indians who are of solely Indian descent, is also constantly shrinking, and will soon be a minority in each case.”²⁰⁰ He explains that national minorities are more properly understood as “cultural groups”, as opposed to racial or descent groups. He criticizes the Afrikaners in South Africa and their practice of excluding the children of mixed marriages from their neighbourhoods and organizations. In his view, this is an example of a national group defining itself in terms of blood/descent: “Such descent-based approaches to national membership have obvious racist overtones, and are manifestly unjust.”²⁰¹

¹⁹⁸ *Multicultural Citizenship*, *supra* note 41 at 10.

¹⁹⁹ *Ibid.* at 23.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.* at 23.

The same unjust situation is created here in Canada by the federal government which imposes a registration and membership regime under the *Indian Act* to exclude children of mixed marriages from registration and, often, membership based solely on descent criteria.²⁰² Even some *Indian Act* bands that have assumed control of their own membership codes exclude children of mixed marriages through the use of blood quantum rules or strict descent provisions.²⁰³ These exclusive membership and registration provisions, whether enacted by Canada or by the bands themselves which resemble those of the Afrikaners, are both “racist” and “unjust”.²⁰⁴ Aboriginal groups can still embrace their ancestry (as broadly defined) as part of their identity, so long as they do not incorporate blood measurements to ensure the purity of their culture and identity.

The desire of a national minority to survive as a culturally distinct society is not necessarily a desire for cultural purity, but simply for the right to maintain one’s membership in a distinct culture, and to continue developing that culture in the same (impure) way that the members of majority cultures are able to develop theirs. The desire to develop and enrich one’s culture is consistent with, and indeed promoted by, interactions with other cultures, so long as this interaction is not conducted in circumstances of serious inequality in power.

²⁰² I refer here to the children of mixed marriages who form the second-generation cut-off group, which are largely the descendants of women, but will soon include larger percentages of male descendants.

²⁰³ *Population Implications*, *supra* note 32. See this report for a detailed review and discussion of the population implications of the registration rules of the *Indian Act* and also of the bands who have assumed control of their membership codes and who have established membership criteria based on descent rules that are more restrictive than those rules found in the *Indian Act*.

²⁰⁴ *Landed Citizenship*, *supra* note 140 at 340. Although not intended by bands, the result can still be racist and exclusionary.

So, the unavoidable, and indeed desirable, fact of cultural interchange does not undermine the claim that there are distinct societal cultures.²⁰⁵

Arbitrary measurements of blood are completely unnecessary to ensure the survival of the identities and cultures of Aboriginal peoples in Canada. In fact, they may end up doing more harm than good to both individual Aboriginal peoples and their communities. Reducing the numbers of Aboriginal citizens cannot be allowed to continue for the sake of preserving the idea of “purity” in their identity.²⁰⁶

In the United States, there are numerous Aboriginal peoples struggling to assert their identity through the recognition of their tribes.²⁰⁷ The Mashpee are a recent example of a tribe that has met all the criteria to become officially recognized in the United States.²⁰⁸ They fought very hard to win their recognition as tribal peoples and the corresponding rights that went with that legal recognition. They viewed the fact of their intermarriage with blacks and whites who lived in their traditional territories as their Nation’s ability to absorb outsiders, as opposed to any kind of assimilation into non-

²⁰⁵ *Multicultural Citizenship*, *supra* note 41 at 105.

²⁰⁶ *Population Implications*, *supra* note 32, *Reassessing Population Implications*, *supra* note 166.

²⁰⁷ K. Clark, “The Blood Quantum and Indian Identification” (2004) 2 Dartmouth College Undergrad. J.L. 40 [*Blood Quantum*], R. Barsh, “Who Is ‘Indigenous’? A Survey of State Practice” in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation* (Markham: LexisNexis, 2003) 93 [*Who is Indigenous*] at 95. See also: E.M. Garrouette, *Real Indians: Identity and the Survival of Native America* (Los Angeles: University of California Press, 2003) [*Real Indians*] for further details about Indian and tribal recognition and membership in the United States.

²⁰⁸ Bureau of Indian Affairs, “Summary Under the Criteria and Evidence for the Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc: Prepared in response to a petition submitted to the Assistant Secretary – Indian Affairs for Federal acknowledgment that this group exists as an Indian tribe”, online: Mashpee Wampanoag Tribe <http://www.mashpeewampanoagtribe.com/mashpee_final_determination.pdf> [*Mashpee Criteria*].

Aboriginal society.²⁰⁹ They were not concerned with blood quantum measurements or cut-offs dates. Blood quantum formulas, while meant to promote the biological preservation of Aboriginal identity, offers no more protection for Aboriginal identity in reality than would a blood transfusion from a pure blood Mi'kmaq to a non-Aboriginal person. Yet it has remained a powerful source of identity for many. Blood quantum remains a primary source of identification for the government and the tribes alike.²¹⁰ Over 33 pieces of federal legislation list criteria for determining Indian identity for the purposes of programs and services in the United States.²¹¹ The *Indian Reorganisation Act of 1934* provided that Indians had to have at least 50% blood quantum. Even today where American courts have struck down the use of blood quantum, the Bureau of Indian Affairs still finds ways to use it “informally and secretly”.²¹² Other tribes have also been negatively affected by the strong bias of governments, the public, and many tribes, to use blood quantum to legitimize or authenticate the Aboriginality of its citizens.²¹³

²⁰⁹ *Identities*, *supra* note 115 at 114.

²¹⁰ *Blood Quantum*, *supra* note 207. *Real Indians*, *supra* note 207.

²¹¹ *Blood Quantum*, *supra* note 207 at 40. “Aside from explicit federal use, blood quanta have crept into eligibility criteria through many other channels. Even in instances where the courts have struck down use of blood quanta, the BIA often uses them informally and secretly. According to Margo Brownell, an attorney for Maslon Edelman Borman & Brand, LLP who regularly represents tribes seeking federal recognition, ‘[i]n its eagerness to apply the blood quantum, the BIA has time and again proceeded without formally publishing its certification procedures...it has repeatedly exceeded its administrative authority by imposing a blood quantum where the authorizing statute provided for a different, and often more generous, definition of Indian.’”

²¹² *Ibid.*

²¹³ Indian Country Today, “Freedmen Descendants Struggle to Maintain Their Cherokee Identity”, online: Indian Country Today <<http://www.indiancountry.com/content.cfm?id=1096414754>>.

Blood quantum relies on a biological concept of race and, is more often than not, highly exclusionary.²¹⁴ This concept does not even originate in Aboriginal cultures, but from “nineteenth-century European bio-genetic models”.²¹⁵ In fact, the Indian agents who enforced blood quantum rules among Aboriginal Nations were operating under long discredited theories: “...most of the tribal rolls used to determine blood quantum were compiled... 150 years ago. The Indian agents performing the count operated under the same archaic assumptions about biology and culture that produced now-discredited fields such as eugenics and phrenology.”²¹⁶ Eugenics was a social philosophy based on the idea that human traits could be improved through various kinds of intervention in order to produce a healthier, more intelligent society. Eugenics led to forced sterilization, selective breeding, in vitro fertilizations, and also served as one of the “justifications” for the holocaust.²¹⁷ Phrenology is now considered a defunct field of study that involved determining an individual’s personality traits by reading the bumps and fissures on their skull. It was popular in the 19th century and was used by some scientists to promote the superiority of the “Aryan Nation”.²¹⁸

²¹⁴ *Landed Citizenship*, *supra* note 140 at 339-340, *Multicultural Citizenship*, *supra* note 41 at 23, 104, *RCAP*, *vol.2*, *supra* note 56 at 166, 168, 176-177, 237-238.

²¹⁵ *Blood Quantum*, *supra* note 207 at 41.

²¹⁶ *Ibid.* (citing Hector Tobar)

²¹⁷ Wikipedia, “Eugenics”, online: Wikipedia < <http://en.wikipedia.org/wiki/Eugenics>>, “What is Eugenics Anyway?”, online: < <http://www.ourfounder.com/jleroy/eugenics.htm>>. See also: Vermont Eugenics, “What is Eugenics? Eugenics Project”, online: <<http://www.uvm.edu/~eugenics/whatisf.html>> which explains that Sir Francis Galton began the study of Eugenics in 1880.

²¹⁸ Wikipedia, “Phrenology”, online: Wikipedia < <http://www.ourfounder.com/jleroy/eugenics.htm>>. See also: “Phrenology”, online” < <http://skepdic.com/phren.html>>.

Even worse for Aboriginal peoples was the fact that phrenologists gathered thousands of Aboriginal skulls from men, women and children in order to study them.²¹⁹ Bonita Lawrence explained that “Native American skulls were examined with a view to determining whether degrees of ‘racial mixing’ could be measured”²²⁰:

In 1868...the Surgeon General issued an order to Army medical doctors to procure as many Indian crania as possible. Under the order, 4,000 crania were obtained from the dead bodies of Native Americans. Indian men, women, and children, often those killed on a battlefield or massacre sites, were beheaded and their crania taken to the Army Medical Museum. There, doctors measured the crania, using pseudo-scientific assumptions to prove the intellectual and moral inferiority of Indians. These studies were used until the 1920s by federal officials as a measure of racial purity to determine who was and who was not a full-blood Indian... Tribal enrolment lists from the early twentieth century based on such racist biology continue to be the legal documents used to determine heirs in awarding land claim compensation.²²¹

It is from this type of pseudo-scientific background that blood quantum came to be used as the criterion by which to determine the “purity” of Aboriginal peoples. Do Aboriginal peoples want to define themselves in a way which reflects out-dated racist beliefs about blood and Aboriginality? Clark argues that:

Use of the blood quantum assumes that race is a fundamentally genetic characteristic that determines a person’s identity, positing Indian blood as the mark of “Indianness.” Worse, by measuring “racial purity”, the blood quantum gives racism the appearance of scientific precision. The historic racist postulation that blood “polluted” with any amount of blood from another race is thereby “contaminated”, is the same mindset that governs use of the blood quantum. Once an

²¹⁹ *Real Indians and Others*, *supra* note 3 at 40.

²²⁰ *Ibid.* at 40.

²²¹ *Ibid.* at 40-41.

individual has less than one-half or one-quarter Indian blood, he or she is not racially pure enough to be an Indian.²²²

She further explains that biological conceptions of identity is what makes racism possible in the first place and does not advance the political and cultural aims of Aboriginal peoples. Her solution is to eliminate the focus on blood:

The bigger problem with this biological conception of Indian identity, however, is that it is inherently racist. Racism is “belief that race accounts for differences in human character or ability and that a particular race is superior to others.” A necessary component of racism is, then, the idea that race fundamentally accounts for physical appearance, ability, and character. When racism is understood as rooted in biological difference, the blood quantum is not only racist, but it makes racism possible in the first place. Without the blood quantum as a measure of race, discrimination based on racial identification would not be possible.²²³

Therefore, if certain Aboriginal groups eliminated the focus on blood as an indicator of Aboriginal identity, then they would be able to reduce the claims by critics that they have “race-based” rights or that they or their governments are inherently racist in nature and should not be protected. In that case, academics like Flanagan, Gibson and Widdowson would have little on which to base their claims against Aboriginal peoples.

Overall, blood quantum is not just dangerous because it is racist; it is also dangerous because it results in the legislated or codified extinction of Aboriginal peoples within only a few generations. Some bands contribute to this process or accelerate it by their own restrictive codes. It also furthers Canada’s goals, which, although publicly rejected, still seem to be a core part of the *Indian Act*: “The strategy

²²² *Blood Quantum*, *supra* note 207 at 41.

²²³ *Ibid.*

is divide-and-conquer, count-and-reduce, define-and-eliminate.”²²⁴ Aboriginal people of the past have struggled for centuries against assimilation in the interests of current generations. The rejection of these anachronistic methods of determining identity will go a long way towards ensuring the continued preservation of Aboriginal identity for future generations.

There are serious ramifications for Aboriginal Nations who, when permitted the choice, opt for using blood quantum and/or the second generation cut-off in the *Indian Act* to determine who is and is not an Indian for the purposes of determining either current band membership and/or current or future Aboriginal citizenship under self-government arrangements. As discussed in chapter 2, demographic studies show that the current rules that govern status under the *Indian Act* and membership explain the future consequences for Aboriginal peoples who draft codes on this basis.²²⁵ One particular study concluded that if restrictive membership codes are used to determine “citizenship”, “First Nations will author their own demise.”²²⁶ This is of great concern to most Aboriginal Nations who are struggling to reassert their inherent rights to self-government and rebuild the wealth and vitality of their Nations.

Under the current *Indian Act*, bands have the option to assume jurisdiction over their own membership codes.²²⁷ Bands that do not opt for designing their own codes have their membership determined for them by INAC pursuant to the *Indian Act* rules.²²⁸ Some bands that have adopted their own codes chose to use varying degrees of blood quantum.

²²⁴ *Ibid.* at 42.

²²⁵ *Population Implications*, *supra* note 32 at viii.

²²⁶ *Ibid.*

²²⁷ *Indian Act*, *supra* note 165 at s.10.

²²⁸ *Ibid.* at s.11.

as membership criteria.²²⁹ Clatworthy warns: “The extinction dates that First Nations write for themselves by using these codes to define citizenship will be earlier than those provided by the Act.”²³⁰ It appears that legislative extinction and a reduction in corresponding obligations to Aboriginal peoples are several of the federal government’s priorities, but should Aboriginal peoples take actions that have the same results?²³¹ The words of the Deputy Superintendent General of Indian Affairs, Duncan Campbell Scott, from the presentation of the 1969 “White Paper”: “Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question.”²³² While the federal government has since changed its public

²²⁹ *Heeding the Voices*, *supra* note 12 at 169. The Mohawk of Kahnawake are one such example. Their blood quantum limit is 50% and any less disqualifies a person from Mohawk membership.

²³⁰ *Population Implications*, *supra* note 32 at viii.

²³¹ L. Gilbert, *Entitlement to Indian Status and Membership Codes in Canada*, (Toronto: Thomson Canada, 1996) [*Entitlement to Indian Status*] at 12. “The *Indian Act* or similar legislation as it relates to entitlement or more simply put ‘who is an Indian’ has been amended repeatedly for more than one hundred and fifty years. Many of these amendments were bold attempts at reducing the aboriginal population of a province or the whole country.” See the author’s corresponding note #3: “Throughout this text, the author argues that the current *Indian Act* continues with that tradition. Subsection 6(2) of the present *Indian Act* is a case in point which many observers consider to be a draconian attempt by Parliament to limit the number of Indians in Canada. It is often referred to as the second generation cut-off rule. Subsection 6(2) is simply a new technique for an old habit of Ottawa’s: it was often called purging or correcting band lists...”. See also: *McIvor v. Canada*, (3-4 October 2008, BCCA) (Factum of the Intervener, T’sou-ke Nation) [*McIvor-T’sou-ke Factum*] at para.49. “...an additional legislative objective underlies the status rules: controlling federal costs associated with the Indian act regime”.

²³² Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol.1 (Ottawa: Minister of Supply and Services Canada, 1996) [*RCAP, vol.1*] at 183. RCAP cites excerpts from the speech presenting the 1969 White Paper that are relevant to discussions about the legacy of the *Indian Act* and federal policy today. The White Paper is cited as: Canada, *Statement of the Government of Canada on Indian Policy* presented to the First Session of the Twenty – eighth Parliament by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development (Ottawa: Department of Indian Affairs and Northern Development, 1969) [*White Paper*].

statements about how it views the assimilation of Aboriginal people, the discriminatory and assimilationist registration and membership provisions of the *Indian Act*, nevertheless, remain.²³³

It is true that there is great debate, even amongst Aboriginal groups, as to whether the *Indian Act* should be dismantled or revised, but very few believe the *Act* should remain as it is. Canada cannot use political controversy to allow discriminatory legislation that provides extinction dates for Indians to remain. The *McIvor Appeal* is only the first of several cases that are challenging the registration provisions of the *Indian Act*.²³⁴ Canada has been given a clear message in this appeal alone, that it needs to revise the *Act*.²³⁵ Further appeals and litigation will only draw out the process and ensure that Aboriginal peoples continue to be excluded from registration as Indians and being accepted as band members. It took Sharon McIvor 20 years to finally get an appeal judgment. Our elders will not be around to take advantage of her case or other cases that are settled in 20 more years. If the standard in majority Canadian politics was to avoid dealing with every issue that is surrounded by political controversy or debate, then Canadians would not make progress on any issue, and very few, if any laws would ever change. Just as eugenics and phrenology have been debunked, so too, must the use of

Although summarizing the aim of both the Department of Indian Affairs and the government as a whole in 1969, this comment fits the effects of the *Indian Act* registration and membership provisions today.

²³³ *Statement of Reconciliation*, supra note 10, *Apology*, supra note 10, *McIvor Appeal*, supra note 9 at para.161. The Court of Appeal held that section 6(1)(a) and (c) of the *Indian Act* were discriminatory, violated section 15 of the *Charter of Rights* and were of no force and effect.

²³⁴ *McIvor Appeal*, supra note 9.

²³⁵ *Ibid.* at para.160-161. I would add that it is not for Parliament alone to make decisions on how best to address the inequality in this legislation as it affects the identities of hundreds of thousands of Aboriginal peoples.

blood quantum and arbitrary definitions designed to slowly reduce the number of Indians in Canada, be discontinued.

The difference between ancestry (broadly defined) and blood quantum is that ancestry can incorporate familial and communal ties as well as a shared history and culture, whereas blood quantum focuses on concepts of racial purity which have no bearing on culture. There are no “pure” blood Aboriginal people or communities, but that does not mean that there are no longer distinct societal cultures deserving of recognition, respect and protection. Assimilation fears have led some bands to institute blood quantum codes which accelerate the extinction process for their communities. The exclusion of mixed-blood people from societal cultures like Aboriginal communities is not only racist, it is unjust. Cultural interchange and mixed-marriages can happen within communities without fundamentally changing the identity of Aboriginal peoples. Identity comes from shared ancestry, culture, history, territory, familial and communal ties, not blood or physical characteristics and not from blood, hair or cranial measurements.

(ii) Inclusion vs. Exclusion

Shared identities result from common connections with past, present and future generations through common history, familial and communal connections and other cultural traits like languages, traditions, customs and practices. These shared identities amongst Aboriginal groups have been largely complimented by the inclusionary, traditional nature of most Aboriginal Nations.²³⁶ Inclusion was not so much a concept or practice which was singled out and practised in its own right, but was naturally

²³⁶ This is in sharp contrast to the current band membership situation that exists with *Indian Act* bands, which have divided traditional Aboriginal Nations.

incorporated in the practices, traditions and belief systems of many Aboriginal Nations.²³⁷ This could mean including other nations to join in social events and even membership, but also meant the larger inclusion of ancestors in the celebrations and ceremonies of the present, as well as making considerations for future generations in discussions about hunting territories and treaty negotiations.²³⁸ Inclusion also meant incorporating women and children and the old and infirm into society in meaningful ways that ensured they were both provided for, honoured and respected. This often led to wider consultations on political decisions or the choosing of leaders.²³⁹ Inclusion also meant that prisoners of war often came to be accepted as members of the Aboriginal Nation in which they came to live, and so too were some Europeans who intermarried with Aboriginal peoples.²⁴⁰

Today, the concept of inclusion has been replaced by exclusion, in reaction to competition for dwindling resources from Canada. The fact that inclusion of rightful citizens could help rebuild Aboriginal Nations in Canada to their former numbers and encourage stronger governments has been lost to the long, reserve housing waiting lists,

²³⁷ *AFN-INAC Status Report*, *supra* note 139 at 3-4, *Heeding the Voices*, *supra* note 12 at 36-49.

²³⁸ *Ibid.* The Mohawks traditionally included even captives (Aboriginal and non-Aboriginal) and entire Nations as citizens within their own Nations.

²³⁹ *Ibid.* See also: O. Dickason, *Canada's First Nation's: A History of Founding Peoples from Earliest Times*, 3rd ed. (Toronto: Oxford University Press, 2002) [*Canada's First Nations*].

²⁴⁰ *Heeding the Voices*, *supra* note 12 at 163: "Kahnawake as a community had traditionally been extremely receptive to the integration of outsiders. Mission records from the early period of the community's history confirm that Mohawks at Kahnawake had continued the traditional Iroquois practice of adopting and assimilating captives, resulting in a diverse racial mixture within the Mohawk community. Even into the modern era, Kahnawake Mohawks accepted many non-native people through marriage and among those residents who came to enjoy community membership and later formal recognition of this membership through inclusion as status Indians when the Indian Act system was implemented in Kahnawake during the 20th century."

sub-standard programs and services and cycles of dependency.²⁴¹ Including women and children back into the Aboriginal Nations would help remedy past injustices which have resulted in reduced population numbers caused by various government policies and actions: small pox infected blankets, scalping laws, warfare, Indian legislation and residential schools.²⁴² It can also help to correct the arbitrary and discriminatory exclusions and deletions brought about by the various *Indian Acts*' registration and membership provisions over the years. Including family members who have been excluded from both family and community could help bring about an immediate connection to the Nation, the local community and culture. Only a healthy, flourishing citizenship base can help ensure a rich cultural heritage for future generations of Aboriginal peoples. Rightful citizens should not be excluded from their Aboriginal Nations simply because residential schools, Indian agents and the *Indian Act* were successful in applying divisive policies with the aim to extinguish their identity and their rights. Similarly the children of the mixed marriages or mixed-relationships are,

²⁴¹ C. Helin, *Dances with Dependency: Out of Poverty Through Self-Reliance* (Woodland Hills, California: Ravencrest Publishing, 2008) 2nd ed. [*Dances with Dependency*].

²⁴² *Canada's First Nations*, *supra* note 239. See this book for a general history of how First Nation's peoples were treated in Canada, how their population numbers were reduced by various means, their cultural backgrounds, some anthropological perspectives and their current political struggles. See page 159 where Dickason explains the tactics of the British Commander-in-Chief, Jeffrey Amherst (1717-97), against Aboriginal peoples in Canada: "...he urged that every method be used against them, including that notorious recommendation about distributing smallpox-infected blankets in their encampments; he also advocated the use of drugs." See also page 136 where Dickason explains the orders of the Governor of Halifax, Edward Cornwallis (1713-76): "...he issued a proclamation commanding the settlers 'to Annoy, distress, take or destroy the Savages commonly called Mic-macks, wherever they are found'. During this period both the French and English paid bounties for scalps at escalating rates, no questions asked." See page 317-318 that speaks to a brief history of the residential schools, the hurt they left behind and the lawsuits that followed against the churches and federal government for the harm inflicted on the Aboriginal people forced to attend.

nevertheless, still the children of the Aboriginal parent and, thus, connected to their Nations. They have no less of a connection to their ancestors and future generations than do non-mixed children. There is, therefore, a tension between traditional concepts of inclusion, and modern-day pressures which result in policies of exclusion in reserve-based communities.

Flanagan sees future plans for Aboriginal self-government as exclusionary. He argues that because non-Aboriginal people will not have the right to join Aboriginal governments at will, Aboriginal governments constructed through the self-government process are exclusionary.²⁴³ He argues that: "...aboriginal governments would be based on a closed racial principle, whereas Canada's other governments are based on open individual and territorial principles."²⁴⁴ Flanagan is referring to the provincial governments whose borders are open as between Canadians citizens. The situation is very different when Canada's borders are compared to non-citizens from other countries who are seeking to come and go as they please within Canada. The only exclusionary part about Aboriginal citizenship that Flanagan seems to be concerned about is the fact that Flanagan and other non-Aboriginal Canadians may not belong to these Aboriginal Nations. This is hardly different from non-Canadian citizens not automatically gaining citizenship as they please.²⁴⁵ He does not, however, seem to advocate for non-citizens of

²⁴³ *First Nations*, *supra* note 2 at 22.

²⁴⁴ *Ibid.* at 194.

²⁴⁵ There will always be negative examples to point out in any group in society, and Aboriginal Peoples are no exception. The few negative examples cannot be used as a basis for discounting the whole group or the validity of accommodating their Nations within Canada. I am advocating a better way to determine Aboriginal citizenship that is inclusive of all rightful members in principle, and whose process reflects the diversity of each Nation so as to avoid the one size fits all approach.

Canada to be automatically included. More importantly, Flanagan does not advocate on behalf of non-status Indian women and children who have a legitimate ancestral, historical and cultural connection to their communities, to be reintegrated into their communities. It would seem that prior to Flanagan (a non-Aboriginal person) being able to claim injustice at being excluded from Aboriginal Nations, status and non-status women and children (actual Aboriginal people) who have been denied membership should be protected. No less would be required of Canada if the issue was between citizens of Canada who had been wrongly excluded from citizenship, versus foreigners who were newly applying for citizenship. He also does not address the fact that the *Indian Act* imposes limitations on who can be considered an Indian, a situation over which Aboriginal peoples do not currently have control. The same is true for the majority of bands whose membership is controlled by INAC. It would seem that when considering the validity of self-government regimes, these are far more important issues than Flanagan's own exclusion from Aboriginal Nations.

Kymlicka supports both the need to establish borders and to protect the right of Aboriginal peoples to take part in their cultures. He argues that Aboriginal culture can be both exclusionary (of non-Aboriginal peoples) in order to protect the culture, and inclusionary (of Aboriginal peoples) in providing them access to their societal cultures.²⁴⁶ The two concepts are not incompatible, and the fact that non-Aboriginal people cannot participate in Aboriginal communities at will does not mean that Aboriginal peoples and their rights should not be protected. But Kymlicka explains also that all Aboriginal

²⁴⁶ *Multicultural Citizenship*, *supra* note 41 at 35-44.

peoples have a right to access their own specific culture(s).²⁴⁷ He argues that supporting the rights of national minorities is consistent with and actually promotes individual freedom, which is an essential element of liberalism.²⁴⁸ He further explains: “For meaningful individual choice to be possible, individuals need not only access to information, the capacity to reflectively evaluate it, and the freedom of expression and association. They also need access to a societal culture.”²⁴⁹ Even the majority of liberals are not in favour of having their own borders open to anyone from any country at any time, as their own national community would be “overrun by settlers from other cultures”.²⁵⁰

Kymlicka further argues that liberals are protective of their borders in order to ensure their own safety and survival as distinct cultures. Liberals “have generally accepted – indeed, simply taken for granted – that the sort of freedom and equality which matters most to people is freedom and equality within one’s societal culture.”²⁵¹ This freedom or ideal of liberalism has not been extended to Aboriginal peoples. Aboriginal peoples have not been free within the majority culture to maintain and protect their cultures. Kymlicka’s point is that national minorities, (like Aboriginal peoples) are societal cultures and they value their cultures no less than Canadians or Americans value their larger majority cultures, and both cultures can be accommodated in a modern liberal

²⁴⁷ Many Aboriginal peoples in Canada share multiple cultural backgrounds. For example, children may have parents each from a different Aboriginal Nation or community.

²⁴⁸ *Multicultural Citizenship*, *supra* note 41 at 75.

²⁴⁹ *Ibid.* at 84.

²⁵⁰ *Ibid.* at 93.

²⁵¹ *Ibid.*

democracy.²⁵² Failure to recognize these rights, he argues, “will create tragic new cases of groups which are denied the sort of cultural context of choice that supports individual autonomy.”²⁵³

Therefore, with regards to the concepts of inclusion and exclusion, it is important to highlight exactly which groups are most affected. Flanagan shows little concern for the rights of Aboriginal peoples who are excluded from their own communities, but he is quite concerned that non-Aboriginal people cannot be included. Kymlicka, on the other hand, argues that it is necessary for a societal culture to exclude other cultures in order to protect its own, and that those who belong to that culture have a right to be included. Cairns’ arguments tend to support Flanagan’s in that he believes that Aboriginal governments are not now, nor are they intended to be in the future, inclusionary in their membership composition.²⁵⁴ He argues that urban Aboriginal peoples should not be part of the third order of Aboriginal government, as envisioned by RCAP, and, therefore, are excluded from participation in Aboriginal government. He would agree with Flanagan that Aboriginal governments are exclusionary in the sense that non-aboriginal people cannot join “at will”. On the other hand, he agrees with RCAP that Aboriginal Nations should be inclusive communities, which would include status and non-status Indians as members.

²⁵² *Ibid.* at 76. Kymlicka defines a societal culture as: “a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language”.

²⁵³ *Ibid.* at 101.

²⁵⁴ *Citizens Plus*, *supra* note 2 at 110. Although he considers RCAP’s vision regarding inclusionary citizenship to be positive.

Nations are generously defined by the Commission. They are intended to be encompassing, inclusive communities that will bridge for Indians the status/non-status divide created by the federal policy. Also, in selected policy areas the Commission sees possibilities of extending the landed nation's jurisdiction to off-reserve urban members of the nation, although this raises major questions of feasibility. This generous definition of the Aboriginal nation and its citizenship is one of the most positive features of the Report. It is intended not only to enhance policy capacity by increasing population size, but also to reach out to the broader conceptions of nation and community that were fragmented by the Indian Act's fostering of more than 600 band governments with small populations.²⁵⁵

Yet, at other times, Cairns seems to be conflicted over whether he feels RCAP's proposed criteria for citizenship in Aboriginal governments/Nations is inclusionary or exclusionary and whether this is a good thing or a bad thing, given his views on inevitable assimilation and successful urban Aboriginal peoples.

His conflict is more apparent than real and reflects an ineffective attempt to hide his premise that assimilation of Aboriginal people is inevitable and indeed desirable. The exclusion of off-reserve peoples from Aboriginal governments does not appear to be a major concern in his analysis of the future of Aboriginal governments, as he thinks that Aboriginal peoples moving off reserve to urban centers is both inevitable and a desirable goal to work towards even if it means the weakening of Aboriginal identity, and results in cultural erosion.²⁵⁶ It would appear principles of inclusion and exclusion with regards to the internal composition of Aboriginal communities are somewhat irrelevant for Cairns,

²⁵⁵ *Ibid.* at 142.

²⁵⁶ *Ibid.* at 130.

as he sees Aboriginal people simply assimilating into the majority society and partaking in common ventures with Canadians.

Kymlicka argues for inclusive citizenship for national minorities like Aboriginal peoples.²⁵⁷ He thinks that it is culture that truly determines a people, as opposed to race or descent. He fully supports the self-governing efforts of Aboriginal peoples, so long as they do not suppress the liberty of their own members.²⁵⁸ Kymlicka's concept of inclusion means that the exclusion of the children of mixed marriages and relationships would be considered inherently racist and unjust, and could not, therefore, be supported in a liberal society. He also makes the point that more often than not, it is the dominant society that insists on a blood quantum or cultural standard that invokes a sense of "purity", and which serves to exclude all those who do not meet that ancient standard:

Indeed, it is often the majority cultures which has insisted on the 'purity' of minority cultures. For example, some governments have argued that land claims should only be given to indigenous groups which have maintained their 'authentic culture'. The Brazilian government has tried to reinterpret Indian land rights so that they only apply to 'real Indians' – that is, those who have not adopted any of the conveniences or products of the industrialized world. The (intentional) result is that ultimately there will 'be virtually no holders of Indian rights and coveted lands would become available'.²⁵⁹

This is an important insight as the very same situation occurs in Canada.

Canada, through the *Indian Act's* registration provisions, through land claim/treaty beneficiary rules and self-government citizenship codes, applies the concept of purity to Aboriginal peoples, with the knowledge that their descent-based (or blood

²⁵⁷ *Multicultural Citizenship*, *supra* note 41 at 23.

²⁵⁸ *Ibid.* at 75.

²⁵⁹ *Ibid.* at 104.

quantum-based) rules will eventually lead to the extinction of these communities or, at a minimum, reduce federal costs.²⁶⁰ Reserve lands are considered Crown lands and, where there is no legally recognized owner, the lands escheat to the Crown.²⁶¹ Kymlicka asserts that a sense of inclusion for Aboriginal peoples is more than just about the people they choose to include; it is also about their culture and their ability to incorporate in whole or in part, aspects from other cultures and yet remain a distinct people: “That we learn in this way from other cultures, or that we borrow words from other languages, does not mean that we do not still belong to separate societal cultures, or speak different languages.”²⁶² If Aboriginal cultures are to survive into the future, thrive within their cultures and preserve their rights (including their treaties and territories, for example), they must be inclusive of all their citizens.

²⁶⁰ *McIvor v. Canada* (3-4 October 2008, BCCA) (Factum of the Appellant, Canada) [*McIvor-Canada Factum*] at para.12. In this factum, the Crown argues that the objective behind the second-generation cut-off provisions of the *Indian Act* is to ensure that: “those registered are sufficiently connected to the historical population that the federal government treated with or for whom reserves are set aside”. Self-Government codes often contain descent-based provisions with regard to their citizenship criteria and some even include a quantum such as one quarter, for example. I discuss the citizenship codes later in Chapter 6. See also: Indian and Northern Affairs Canada, “Guidelines for Federal Negotiators: Membership/Citizenship in Self-Government Agreements” (Ottawa: INAC, 2003) obtained via Access to Information Request [*Guidelines for Federal Negotiators*] at 2, 18-19. “Federal policy also requires that the determination of Indian status remain the role preserve of the federal government”. “Canada has an interest in ensuring an acceptable degree of federal control over self-government costs”. “One of the key challenges for the federal government, therefore, will be to negotiate financial arrangements that do not result in spiralling costs”.

²⁶¹ There are various pieces of legislation in Canada that speak to provincial versus federal interests regarding escheat of lands. For example, *Escheat Act*, R.S.B.C. 1996, c-120. Section 1 provides: “If land in British Columbia escheats to the government because the person last seised or entitled to it dies intestate and without lawful heirs, or forfeits to the government, the Attorney General may take possession of the land in the name of the government”.

²⁶² *Multicultural Citizenship*, *supra* note 41 at 103.

Despite numerous references to, and support for, Kymlicka's theories on the rights of national minorities and inclusive membership practices, Macklem's focus is on protecting the rights of Aboriginal Nations to determine their own citizenship by whatever means they choose. This could mean a stringent process of exclusion through *Indian Act*, band membership or blood quantum rules so long as this could be justified or linked to their traditions and practices.²⁶³ This is in contrast to Kymlicka's theory of societal inclusion.²⁶⁴ Macklem agrees with Kymlicka that Aboriginal culture ought to be allowed to evolve and adapt over time and incorporate elements of other cultures into their own and still remain distinct peoples.²⁶⁵ He also agrees that laws are necessary to distinguish between Aboriginal and non-Aboriginal people in order to protect the interests associated with indigenous difference and, thus, a certain measure of exclusion is necessary as against non-Aboriginal people. He refers to this as "external protection" and explains that it is necessary because: "It empowers an Aboriginal community against threats posed to its difference by the larger society in which it is located."²⁶⁶

Where Kymlicka and Macklem diverge in opinion is in terms of "internal restrictions" and exclusionary membership criteria as a means of achieving "protection" from the larger community. Macklem defends both internal restrictions and the use of exclusionary principles to maintain Aboriginal governments. In contrast, Kymlicka focuses on external protections, and see limitations on internal protections in the interest

²⁶³ *Indigenous Difference*, *supra* note 15 at 220-232.

²⁶⁴ *Multicultural Citizenship*, *supra* note 41 at 10.

²⁶⁵ *Indigenous Difference*, *supra* note 15 at 48.

²⁶⁶ *Ibid.* at 225.

of liberalism.²⁶⁷ Macklem's form of protection sounds more like the "Trojan Horse" that the once celebrated 1985 revisions to the *Bill C-31* amendments to the *Indian Act* turned out to be.²⁶⁸ Where some Aboriginal peoples used to look at *Bill C-31* and celebrate the fact that it at least reinstated those Aboriginal women who had been wrongfully disenfranchised, many now criticize *Bill C-31* for its residual discrimination and second generation cut-off rules that will reduce the populations of First Nations over time, and significantly impact the identity of both individuals and communities.²⁶⁹ Macklem takes

²⁶⁷ *Multicultural Citizenship*, *supra* note 41 at 152-172.

²⁶⁸ *Indian Act*, R.S.C. 1985, c. I-5, as am. By R.S.C. 1985, c.32 (1st Supp.), s.4 [*Bill C-31*]. This legislation is commonly referred to as "Bill C-31". P. Paul, *Politics of Legislated Identity: The Effect of Section 6(2) of the Indian Act in the Atlantic Provinces*, (Amherst: Atlantic Policy Congress, 1999) [*Legislated Identity*]. On the introductory page, quoting Ray Jones from the B.C. Regional Report in 1990: "If Bill C-31 is the Trojan horse for assimilation, Section 6(2) is the weaponry carried by its warriors."

²⁶⁹ Assembly of First Nations, "AFN Praises Sharon McIvor on October 6th, First Nations Women's Day", online: AFN <<http://www.afn.ca/article.asp?id=4244>>. "Thousands of First Nations women and their children do not have the legal right to vote in band elections or to own or inherit property on reserve because of a clause in the Indian Act that continues to discriminate against First Nations women by removing their ability to pass Indian Status onto their children". The AFN goes on to explain: "'This is not only a First Nations issue, and it is not only a woman's issue. It's an issue of fairness and human rights that I believe all Canadians care about. Our preference always is to negotiate rather than litigate to achieve resolution. However, by choosing litigation the federal government denies our peoples the full expression of our fundamental human rights,' said AFN National Chief Phil Fontaine". Native Women's Association of Canada, "Preliminary Impacts & Concerns Flowing From the Implementation of Bill C-31: August 10, 1988", online: NWAC <<http://www.nwac-hq.org/en/documents/PreliminaryImpactsfromImplementationofBillC-31.pdf>> at 12-14. "There is much evidence - both documented and oral - which indicates that the implementation period of Bill C-31 has been fraught with confusion, conflict and an onerous hardship for Aboriginal people across the country. Despite the federal government's valiant attempts to rectify certain injustices perpetrated by earlier Indian Acts, the revisions have succeeded mainly in adding to the gulf between "Status" Indians and their other Aboriginal brothers and sisters". NWAC goes on to explain: "A third difficulty noted by provincial/territorial representatives deals with the effect the proliferation of status categories under the new Act, has had on the Aboriginal population. Over the decades, some communities have become so entrenched in "Indian

the opposite view. He criticizes *Bill-C-31* because it increased the population of First Nations. For him, *Bill C-31*: “dramatically threatens interests associated with indigenous difference”²⁷⁰ because it was too inclusive.

He speaks negatively of *Bill C-31* returnees as though they have some ill intent towards their home communities and governments, or are inherently different from other community members simply by virtue of the fact that they have been reinstated by *Bill C-31*. He also speaks of the potential ill effects of *Bill C-31* as the possibility that off-reserve members might get to vote or run for office and control the outcome of band elections.²⁷¹ His views are reminiscent of male politicians who did not want women to vote: “Exacerbating Bill C-31’s effects in reserve communities is that if they are entitled to vote and run for office, off-reserve members could theoretically control the outcome of band council elections.”²⁷² It is as if there is something alien about the women who were

Act thinking" that they have allowed the recent categorical division of Indian status to further divide them. That is not to say that the "pre C-31" era was void of any such divisions, yet it is evident that with the existence of an increased number of categories, artificial differences amongst Aboriginal people have become stronger and more varied, even amongst families". Congress of Aboriginal Peoples, "CAP Constituency Table", online: CAP <<http://www.abo-peoples.org/about/table.html>>. "The 60 entries in the table represent those populations of CAP constituents who, although they are unquestionably Aboriginal people within the meaning of Section 35 of the Constitution Act 1982, have been deprived of access to rights and/or benefits, which they would naturally enjoy except [sic] that they have been denied or interefered [sic] with by Federal legislation -- chiefly the Indian Act". A second table also demonstrates divisions created by *Bill C-31*.

²⁷⁰ *Indigenous Difference*, *supra* note 15 at 229-230.

²⁷¹ *Ibid.* at 230.

²⁷² *Ibid.* See also: Arguments Against Women’s Suffrage, “Debate on the ‘Conciliation’ Bill, to enfranchise about 1 million voters, 28 March 1912”, online: Arguments Against Women’s Suffrage <[http://www.johndclare.net/women_debate_1912.htm#Mr Harold Baker](http://www.johndclare.net/women_debate_1912.htm#Mr%20Harold%20Baker)> at para. 1. Harold Baker, opposing the Bill expressed his concerns: “The question is not the enfranchisement of any particular class, but the enfranchisement of politically inert masses who take no interest in politics and do not desire to do so...”. He further explained that it would be inherently dangerous to allow those women who did want to

once status Indians and community members and who have been reinstated under the *Indian Act*, that makes them so inherently different that they are not worthy of being included in or participating in the affairs of their communities. No mention is made of male Indians who married out. The only difference between the two is that Aboriginal women were forcibly disenfranchised, and the men were not. Neither group is any more “Indian” than the other, or has any more or less of a cultural tie to their identities, history, land and culture than the other. Aboriginal women and their descendants who have been wrongfully excluded for so long, through no fault of their own, should not continue to be excluded from the politics and governance of their communities because of unsubstantiated and irrational fears of negative political change. Macklem would exclude not only *Bill C-31* Indians, but also off-reserve Indians.²⁷³ If Aboriginal communities accepted Macklem’s exclusive forms of internal protection, they would only be left with approximately 25 % of the registered Indians in Canada, since 50% live off reserve and, by Macklem’s own rough estimates, another 50% of those were *Bill C-31* returnees.²⁷⁴

Most Aboriginal cultures had customs and traditions in relation to the determination of citizenship which were more inclusive and flexible than what is in place

participate in politics, do so as: “... the influence of women in legislation is practically unlimited”. Both men from a century ago and Macklem warn of impending disruption in community politics should the disenfranchised be enfranchised. Given that *Bill C-31* reinstates were largely women, it is hard to see a difference between the two positions.

²⁷³ *Indigenous Difference*, *supra* note 15 at 226-231. Although he allows for possible protections for individuals his indication that the *Charter of Rights* could have some role on external protections for Aboriginal communities, he also advocates limiting the use of the *Charter of Rights* with regards to internal protections, like membership rules.

²⁷⁴ *Ibid.* at 229-230.

today.²⁷⁵ These traditional Aboriginal Nations had open, flexible means of determining who could be incorporated into the Nations, in addition to increase in citizenship due to natural population growth.²⁷⁶ Government interference with traditional ways of life, forced dependence on federal program funds, and chronic underfunding have caused some bands to resort to exclusionary rules of membership to make the money stretch for those still included. Aboriginal Nations have a right to establish boundaries between themselves and others, but there is a corresponding right of Aboriginal peoples to partake in their Nation's identities and cultures.²⁷⁷

Boundaries are a necessity in order to preserve a societal culture, and often majority cultures have so taken their cultures for granted that they forget that they would not want their own country's borders left completely open. Inclusion is more than just ensuring that children of mixed relationships are included in their communities. It also means that Aboriginal communities should be free to include new cultural traits and adopt new practices and still maintain their status as distinct societal cultures. While there is an apparent tension between the right of Aboriginal communities to establish those

²⁷⁵ *AFN-INAC Status Report*, *supra* note 139 at 3-4. "Long before European contact, First Nations had their own systems for identifying the citizens of their nations. These systems were and are diverse, comprised of clan systems, matrilineal (mother-based) and patrilineal (father-based) kinship systems, hereditary systems, and included provisions for marriages and traditional adoptions. While each nation had established its own methods for recognizing and acquiring citizenship, available research indicates that there was a commonality across all nations in that the acquisition of citizenship was flexible and could be gained through a number of ways, including through birth, marriage, adoption and residency. In addition, citizenship recognition was based on self-identification and gender-neutral kinship and community ties".

²⁷⁶ *Ibid.* See generally: *Heeding the Voices*, *supra* note 12.

²⁷⁷ I discuss both the right of Aboriginal Nations to determine their citizenship and the corresponding right of individual Aboriginal peoples to belong to those communities in much more detail in the two chapters that follow.

boundaries and the right to belong to one's culture, that tension is relieved by the application of substantive equality with the removal of "unjust" principles which rely on blood and/or purity as their base. These bases are unsupportable in a modern liberal democracy and are contrary to Aboriginal traditions which have evolved over time.

(iii) Future vs. Present Generations

Ancestry (broadly defined) and inclusiveness are important principles in determining citizenship for Aboriginal Nations. Not only do they ensure a connection to the past and re-embrace members who have been wrongfully excluded in the present; they also ensure a future for generations to come. In the chapters that follow, I argue that not only do Aboriginal Nations have a right to determine their citizens, but that individual Aboriginal people have a right to identify with and belong to their Nations and to fully enjoy the rights, privileges and responsibilities of their cultures.²⁷⁸ The ability to pass on that identity and all the rights and responsibilities that go with it, belong to Aboriginal people as part of their societal culture. They have the right to pass on their identity and culture as Mohawks, Mi'kmaq and Cree to their children, their children's children and their heirs, forever. The right to call one's child a Mi'kmaq is "a human cultural right that comes with the birth of a child and the internal workings of one's culture."²⁷⁹ No liberal democratic society should allow a government to impose or condone an identification system which contains a formula that provides for the legislated extinction of a people against their will. Aboriginal people have long prided themselves on their sense of responsibility toward their future generations, and often speak of their children seven

²⁷⁸ Chapter 4 deals with the Aboriginal right to determine citizenship and Chapter 5 deals with the right of individual Aboriginal peoples to belong to their Nations.

²⁷⁹ *An Empty Shell*, *supra* note 8 at 105.

generations into the future. This important part of Aboriginal culture is hard to reconcile with the fact that some Aboriginal leaders support the *Indian Act* provisions which, if used to determine citizenship in Aboriginal Nations, will lead to the eventual extinction of Aboriginal Nations.²⁸⁰ Their future generations depend on them to ensure that they do not trade short term gains for future extinction:

It is telling when the statistics bear out “extinction dates” as opposed to population rates or increases. There is no such extinction date set for non-Aboriginal society, apart from worldwide disaster. This is a serious wake up call for Aboriginal peoples with a view to preserving their families, their cultures and their communities. Membership or citizenship codes are indeed an essential part of self-government agreements, but what must be kept in mind are the real implications of how they design each of their codes. Only the most inclusive codes will protect Aboriginal nations from certain extinction.²⁸¹

In the end, it will be up to Aboriginal Nations to fight for the survival of their future generations. Regardless of Canada’s moral and, arguably, legal obligations to rectify the damage it has caused to Aboriginal peoples and their communities, Aboriginal peoples are the ones with the ultimate responsibility for their future generations. Canada defends its jurisdiction over Indian identity through registration, and relies on advisors like Flanagan, who promote assimilation. Therefore, the risks of leaving issues of identity and

²⁸⁰ See *Population Implications*, *supra* note 32. This assertion of extinction is based on the Clatworthy study that discussed *Bill C-31* and the current rates of out-marriage. I have also assumed that we would not legalize systems that, for instance, violate our basic rights, freedoms and liberties, and start issuing moratoriums on who one can and cannot marry in an effort to prevent one’s own legal and/or cultural extinction. See *Heeding the Voices*, *supra* note 12 at 165-171. This community instituted by consensus, membership criteria which includes a 50% blood quantum and moratorium on marrying non-Mohawks, else one ceases to be a member and loses all one’s rights.

²⁸¹ *An Empty Shell*, *supra* note 8 at 118.

belonging to the federal sphere of jurisdiction (versus that of an Aboriginal Nation) are too high.

Flanagan is not concerned about the future generations of Aboriginal peoples. On the contrary, his main premise is that assimilation, in whatever form, simply has to happen.²⁸² He equates living off reserve with being caught in an inevitable trap of integration, and he pleads with Canadians to let integration continue without allowing off-reserve Aboriginal people to participate in current or new Aboriginal governmental activities. He argues: “The most important consideration that we can give those already outside the reserve system is to avoid setting up obstacles to their gradual integration into the larger society, which is of necessity a slow process.”²⁸³ He further pleads: “Let social processes proceed without creating new political entities and administrative systems to reinforce the separateness of those who are already well on the way to integration.”²⁸⁴ In this way, there will be no future generations for Flanagan to worry about and those that do exist will be assimilated. While he comments that “The challenge for self-government is to ‘civilize’ aboriginal communities”, it is obvious that his main concern is how to speed up assimilation.²⁸⁵ He does not want a future generation of Aboriginal peoples who have strong Aboriginal identities and who belong to close-knit communities that value and protect their cultures. His remedy for the present generation is to remove as many government bottlenecks as possible, in order to facilitate the complete and speedy assimilation of Aboriginal peoples. In this way, there will be no divergence of interest

²⁸² *First Nations, supra* note 2 at 196.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.* at 198.

between present and future generations of Aboriginal peoples if they all disappear into Canadian society.

Kymlicka points out that the majority culture will always have its language and societal culture supports, but fairness and justice require that the same benefits and opportunities be given to national minorities.²⁸⁶ He argues that true equality does not require identical treatment, as asserted by Flanagan, but rather different treatment in order to accommodate different needs.²⁸⁷ While Flanagan asserts that Aboriginal People are passively assimilating, and have been for decades, and that all Canada has to do to remedy the current “Indian problem” is let assimilation happen, this is neither historically correct nor morally acceptable in a modern liberal democracy. Kymlicka argues that national minorities, like Aboriginal peoples, have fought hard against assimilation and have not sat by and let assimilation happen, either for the present or future generations. Therefore, the rights and interests of those future generations ought to matter just as much in any discussion about the protection of Aboriginal identity and culture, as would the interests of the present generation.

Cairns takes a view similar to Flanagan, although he tries to soften the message somewhat.²⁸⁸ While Cairns appears to make the case for an evolving definition of Aboriginality that would, in fact, guarantee a spot for future generations,²⁸⁹ he reverts to his position that Canada is an urban society and Aboriginal people will inevitably migrate

²⁸⁶ *Multicultural Citizenship*, *supra* note 41 at 113.

²⁸⁷ *Ibid.*

²⁸⁸ *Citizens Plus*, *supra* note 2.

²⁸⁹ *Ibid.* at 104.

to the urban centers and lose their identities.²⁹⁰ He writes as though Aboriginal societies are the only cultures that have been affected by, and have adopted traits from other cultures; but this, simply, is not the case. On the one hand, he says that Aboriginal people have been “penetrated” (eerily similar phrasing to archaic eugenics or blood quantum language). On the other hand, and then he praises their success in the urban centers and the loss of their identity. While Cairns insists that he is not advocating assimilation, one does not have to read very far between the lines to see that this is, indeed, what he is promoting:

- If living on reserve = Aboriginal identity;
- And living off reserve = loss of Aboriginal identity;
- And loss of Aboriginal identity = assimilation;
- And moving off reserve is inevitable,
- Then assimilation and loss of identity are inevitable.

Kymlicka, on the other hand, explains that the aspirations of Aboriginal peoples for self-government and autonomy are the means by which to ensure their survival as distinct societies for future generations.²⁹¹ He supports a concept of Aboriginal citizenship which incorporates the principle of protecting future generations.²⁹²

²⁹⁰ *Ibid.* at 114.

²⁹¹ *Multicultural Citizenship*, *supra* note 41 at 10.

²⁹² *Ibid.* at 36-38.

Nickel describes the negative effects the loss of one's culture and the inability to pass that culture on to future generations has on national minorities.²⁹³ He points out that:

First, some members of the minority group will be physically and mentally harmed by the loss of their culture. Some will find the wholesale destruction of their culture and religion so terrible that they will go crazy, become sick, kill themselves or succumb to alcoholism. As Kymlicka emphasizes, severe harm is often caused by the rapid loss of one's culture. Second, the members of this minority group will be unable to transfer to their children and grandchildren their culture, way of life and religion. This is a frustration of a widespread and deep human desire, will have the effect of greatly weakening the bonds between parents and children and is a very substantial infringement of liberty. Many of these parents will feel that they lost their children, even though those children are still alive.²⁹⁴

These are the very same harms that have been experienced by Aboriginal peoples on and off reserve in Canada, and indeed, by indigenous peoples around the world. He also explains that in addition to suffering these harms, they also struggle with learning a new culture:

Third, the members of this minority group will be forced to do something extremely difficult and costly, namely, learn rapidly to function within the language and culture of the majority group. Finally, members of this group will feel that something of great value has been destroyed and lost, namely, their culture, language and religion. The development of a distinctive culture, language and religion is a major achievement of thousands of contributors over many generations, and its destruction will seem to many to be

²⁹³ J. Nickel, "The Value of Cultural Belonging: Expanding Kymlicka's Theory" (1995) 33/4 *Dialogue* 635 [*Cultural Belonging*] at 637.

²⁹⁴ *Ibid.* at 639-640.

comparable to the destruction of a great city, cathedral or work of art.²⁹⁵

Kymlicka agrees and adds that national minorities have a right to maintain themselves as distinct societies for the benefit of future generations. At the same time, he acknowledges the right of individual members to decide if they want to integrate into the larger society. He maintains that at all times, this decision remains with the individual and group, not with the self-interested larger society.²⁹⁶ “It is not for people outside the group to decide if and when the societal culture is too thin to warrant maintaining.”²⁹⁷ He explains: “For one thing, majority cultures would have a perverse incentive to destroy the societal culture of national minorities, and then cite that destruction as a justification for compelling assimilation.”²⁹⁸ Aboriginal identity and belonging is as important to the future generations as it is to the present.

Macklem also argues for a future with Aboriginal people in Canada, but his formula for getting there only protects a privileged class of Aboriginal people in the present. He does not offer suggestions for determining citizenship in Aboriginal Nations that respects and protects the rights of future generations to exist, but only what will protect present communities. Macklem initially argues that the relation between culture and identity is temporal:

First, participation in cultural practices generates a shared sense of continuity with the past. Second, the reproduction of the options

²⁹⁵ *Ibid.*

²⁹⁶ *Multicultural Citizenship, supra* note 41 at 100.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

produced by cultural participation bequeaths their availability to future generations.²⁹⁹

He thinks too that Canadian sovereignty should be less “absolutist” and allow for Aboriginal people to “maintain and reproduce distinct Aboriginal identities.”³⁰⁰ Yet, when it comes to rebuilding Aboriginal Nations and undoing the harm that has been done by virtue of the *Indian Act*, he criticizes the increases in band membership and sees these increases as threats to “band” control.³⁰¹

The real issue for Macklem appears to be the preservation of band authorities and current political structures on reserves, as opposed to the viability of Aboriginal identity and culture into the future for the benefit of both the local community and the larger Nation. The existence of future generations of Aboriginal peoples depends on whether Aboriginal Nations can rebuild and sustain their numbers, as these peoples are not likely to survive repeated attempts to reduce and limit their numbers.³⁰² At best, Macklem could be said to support the existence of future generations and citizens of Aboriginal Nations for a limited class of “Indians” defined by the current *Indian Act* regime and controlled by local *Indian Act* bands. Unfortunately, as Mohawks, Mi’kmaq and many other Aboriginal Nations explain, the externally imposed, generic “Indian” label may be a legal hurdle against which they must struggle, but it does not reflect their Mohawk or Mi’kmaq identity, culture or “indigenous difference”.

The tension between present and future generations often plays out in terms of who makes decisions about who is in and who is out of the community. The present

²⁹⁹ *Indigenous Difference*, *supra* note 15 at 71-72.

³⁰⁰ *Ibid.* at 180.

³⁰¹ *Ibid.* at 230.

³⁰² *An Empty Shell*, *supra* note 8 at 118.

generation would, no doubt, like to ensure that citizenship decisions respect their culture and identity, and are also made fairly and in the best interests of individuals and communities. Decisions about Aboriginal citizenship made by present generations will affect future generations and will determine whether these societal cultures will survive into the future. Present generations have to concern themselves with what laws pertain to citizenship decisions, what processes are used and who would comprise the group, council, board, committee or organizational set up to make the decisions. The starting premise is that Aboriginal Nations have the right to determine who their citizens are by way of inherent Aboriginal rights. Aboriginal peoples had specific traditions and rules relating to the inner workings of their Nations. They had been self-governing for centuries prior to contact, and the identities and cultures upon which these governments were based, should be respected.

At the same time, it must be recognized that individual members of those societies also have rights; one of those rights is to participate in their culture, and benefit from community membership and the rich identities of their ancestors. Social conditions have changed from pre-contact times, and intermarriage with non-Aboriginal people is a fact of life in present day Canada. The children of those mixed marriages and relationships present citizenship issues that must be reconsidered in light of these new social conditions, and in recognition of the fact that no culture can, in reality, remain frozen in time. That being said, there are as many views on who should and should not be an Aboriginal person/citizen.³⁰³ It is vital that present generations do not sell out the rights of

³⁰³ While I would passionately argue that the use of blood quantum to determine Aboriginal citizenship serves only to ensure our extinction as a people, there are other

future generations for immediate benefits, or that one privileged group (status or on-reserve Indians) have a monopoly on the decision-making process over who gets to be counted in the citizenship process. Having a committee of on-reserve members to decide whether off-reserve individuals can be members is not representative of the views of those off-reserve. Avoiding a biased process lessens the chances of a few individuals developing a self-serving process to maintain the status quo, especially given that the status quo was created by past legislative and policy inequities regarding Indians.³⁰⁴ This carves out a space for potential reliance on the *Charter of Rights* to protect vulnerable sub-groups of Aboriginal peoples in Aboriginal communities, should their own constitutions and/or codes not address these concerns.³⁰⁵

Aboriginal groups who have chosen blood quantum as a means by which to protect their Aboriginal Nation from intrusion by the larger society. See *Heeding the Voices*, *supra* note 12.

³⁰⁴ *Sawridge Band v. Canada* [2003] 4 F.C. 748 [*Sawridge*]. Walter Twinn and his family sought to exclude *Bill C-31* reinstates from rejoining the band as members by taking control of their membership codes and developing rules that would ensure they would be excluded. This would ensure that the resources belonging to the reserve would be divided among a smaller number of members. This litigation has been ongoing for many years. There are numerous motions, appeals and hearings in the case. The Walter Twinn litigation is a prime example of what can happen if a fair system is not developed to ensure that those who are already in don't get to be the ones making the decisions about who else gets to be "in". This case not only hurts the members of that particular First Nation, but also serves as an extreme example of what can happen when power is left to a few self-interested individuals and allowed to operate in that manner under the current *Indian Act*. Unfortunately, this one sour example is wrongly used by people like Flanagan as examples of why all Aboriginal Nations wouldn't work in a liberal democracy. Flanagan presented no evidence that all First Nations operate in this manner or desire to do so.

³⁰⁵ I review the academic literature on the *Charter* and its applicability to Aboriginal communities in Chapter 5.

Flanagan doubts whether Indian bands will ever coalesce into the larger Aboriginal Nations as recommended by RCAP.³⁰⁶ He notes the current political conflicts between status, non-status, Métis and Inuit, and cites this as an impediment to reconstructing Indian bands into their former Nations.³⁰⁷ That being said, he looks at the current leadership structure with regards to how decision making in local communities, and expresses a negative, stereotypical view of Aboriginal leaders: “The problem is not that Indian leaders are especially venal, although many are.”³⁰⁸ This negative view is not substantiated by empirical evidence to support his claims, but his stereotype of Aboriginal leaders is applied throughout his book. For example, he stereotypes even election candidates, those who are interested in local community governance, but who have not yet been elected: “These kin-sponsored candidates are motivated by the prospect of economic gain for themselves and their relatives.”³⁰⁹ Flanagan never really gets to the question of how citizenship for Aboriginal Nations would be determined because, as stated above, his only concern is to “civilize” Aboriginal communities by ensuring their assimilation.³¹⁰ Cairns would get to the very same result as Flanagan, in that he does not see Aboriginal Nations as the goal for Canada and Aboriginal peoples, but promotes assimilation as the means to best achieve harmony in Canada.³¹¹ Although Cairns does not espouse the same views as Flanagan about the moral character of Aboriginal leaders

³⁰⁶ *First Nations*, *supra* note 2 at 79.

³⁰⁷ *Ibid.* at 84.

³⁰⁸ *Ibid.* at 94.

³⁰⁹ *Ibid.* at 98.

³¹⁰ *Ibid.* at 198.

³¹¹ *Citizens Plus*, *supra* note 2.

or hopefuls, he insists that the *Charter* must apply to any Aboriginal band or government activities.³¹² He does not see this as an option for bands.

Kymlicka explains that Indian bands argue against the application of the *Charter* to their self-government activities, not because they want to oppress their members, but because they have different ways of expressing democracy, such as by means of consensual decision making.³¹³ He also points out that Aboriginal leaders are eager to be accountable; just not to their oppressors.³¹⁴ However, in the Charlottetown Accord negotiations, the Assembly of First Nations expressly agreed to make self-government subject to the *Charter* and RCAP ultimately agreed that this should be the case.³¹⁵ Kymlicka explains that Aboriginal leaders are willing to be held accountable for fairness in their decision-making, but only to international human rights tribunals.³¹⁶ He also defends the rights of these national minorities to determine who can acquire citizenship in their Nations: “most liberal theorists accept without question that the world is, and will remain, composed of separate states, each of which is assumed to have the right to determine who can enter its borders and acquire citizenship.”³¹⁷ In answer to Flanagan and Cairns who would argue that Aboriginal Nations are exclusionary groups based on

³¹² *Ibid.* See also: *First Nations*, *supra* note 2.

³¹³ *Multicultural Citizenship*, *supra* note 41 at 39.

³¹⁴ *Ibid.* at 40. “What they object to is the claim that their self-governing decisions should be subject to the federal courts of the dominant society – courts which, historically, have accepted and legitimized the colonization and dispossession of Indian peoples and lands.”

³¹⁵ *RCAP*, vol. 2, *supra* note 56 at 227-234. RCAP also agreed that this application of the *Charter of Rights* would be subject to the notwithstanding clause exercisable by self-governing Aboriginal Nations.

³¹⁶ *Ibid.* at 40.

³¹⁷ *Ibid.* at 124.

racial principles that other people are not free to join “at will”, Kymlicka points out that other liberal democratic states are not so “free” with their borders either.

In fact, however, these rights are typically reserved for citizens. And not everyone can become a citizen, even if they are willing to swear allegiance to liberal principles. On the contrary, there are millions of people who want to gain citizenship in various liberal democracies, but who are refused....These people are refused the right to enter and participate in the state because they were not born into the right group.³¹⁸

If a citizenship policy which is based on protection of borders is acceptable for the majority society, why would it not be applicable to the minority societal cultures, like Aboriginal Nations? Kymlicka answers this question:

Citizenship, therefore, is an inherently group-differentiated notion. Unless one is willing to accept either a single world-government or completely open borders between states – and very few liberal theorists have endorsed either of these – then distributing rights and benefits on the basis of citizenship is to treat people differentially on the basis of their group membership.³¹⁹

Therefore, the fact that Aboriginal Nations would limit citizenship to their own members is not an inherently unfair process. In fact, there are many ways in which people become members of bands and some of these principles may be extracted to determine future citizenship rights under self-government agreements to maintain and protect cultures and identities. Kymlicka argues that this is a justified process both for democratic states and Aboriginal Nations:

Liberal theorists invariably limit citizenship to the members of a particular group, rather than all persons who desire it. The most

³¹⁸ *Ibid.*

³¹⁹ *Ibid.* at 124-125.

plausible reason for this – namely, to recognize and protect our membership in distinct cultures – is also a reason for allowing group-differentiated citizenship within a state.³²⁰

He argues that liberals are in no position to question Aboriginal groups about their citizenship criteria, and if they do, it is up to them to substantiate the issues:

So long as liberals believe in separate states with restricted citizenship, the burden of proof lies as much with opponents of group-differentiated rights as with their defenders.³²¹

Therefore, Kymlicka would argue that it is both just and fair for Aboriginal Nations to develop a process that decides on questions of citizenship to protect their distinctness as a people, and to ensure the survival of their cultures into the future. He further points out that a liberal conception of minority rights will not tolerate the Aboriginal Nation placing internal restrictions on the basic civil or political liberties of its members.³²² At the same time, there is a difference between coercively imposing liberalism on Aboriginal peoples, versus the genuine offering of incentives to Aboriginal groups for making liberal reforms.³²³ He also cautions that there is often a political context to the apparent illiberal views expressed by Aboriginal leaders, versus the way they actually treat their members, which, he asserts, is often as liberal as the majority.³²⁴

Macklem agrees that Aboriginal societies need to protect their identities, while Kymlicka's point is that while Aboriginal people have legitimate interests in determining who is and is not a citizen of their nations, they must also do so in a manner which is fair

³²⁰ *Ibid.* at 125.

³²¹ *Ibid.* at 126.

³²² *Ibid.* at 152.

³²³ *Ibid.* at 168.

³²⁴ *Ibid.* at 171.

and just to their citizens.³²⁵ Guttman explains that while identity groups, such as Aboriginal peoples, have the right to protect their identities, the group becomes “suspect” when they put their group interests above the pursuit of justice for all.³²⁶ Specifically, she explains that: “Democratic governments can justifiably defend the survival of many cultures out of fairness to their citizens and their valued cultural identities and attachments, as long as this defense does not elevate a group right to survival above the basic rights of individuals.”³²⁷ Therefore, in the situation of Aboriginal peoples, all groups must be included in the decision-making aspect of who is or is not an Aboriginal citizen in a particular Aboriginal Nation. Democracies are not neutral. There are many different groups each pursuing their own interests and, therefore, status Indians (the currently included group) should not be the sole group to decide if non-status Indians or *Bill C-31* women (the excluded group) get to be part of their Aboriginal Nations. The sensitive decisions about communal belonging should be made with everyone at the discussion table. This is especially true when there is disagreement: “When a case is hard, however, and there is reasonable disagreement among affected parties about how democratic principles should be interpreted and applied, there is also a special need to move beyond basic substantive principles and call for deliberation within an inclusive a group as possible of the people who are significantly affected by the decision.”³²⁸

³²⁵ *Ibid.* at 225. “A law that distinguishes between Aboriginal people and non-Aboriginal people to protect interests associated with indigenous difference provides what Will Kymlicka has termed ‘external protection.’ It empowers an Aboriginal community against threats posed to its difference by the larger society in which it is located”.

³²⁶ *Identity in Democracy*, *supra* note 130 at 3.

³²⁷ *Ibid.* at 78.

³²⁸ *Ibid.* at 28-29.

Although the band governance system that has been set up under the *Indian Act* relies on a “majority rule” concept for most of its decision-making functions, this is not necessarily the best way to proceed for Aboriginal peoples, and may even be a misunderstanding of what true democracy is really about. For those decision-makers who would fall back on the idea of majority rule as “the” pillar of democracy and suggest that status Indians or band members (the majority on many reserves) should be the sole groups to decide the fate of all Aboriginal citizens, Guttman explains that democracy cannot be boiled down to majority rule. “First, because majority rule is not a principle by itself. It is a procedure that cannot possibly define a defensible democratic politics, since majority rule can be used by oligarchic decision makers.”³²⁹ Something more is required to protect both the Aboriginal community’s interest in protecting their identity from government interference and society’s cultural influences, and the interests of the minority groups (like non-status Indians, off-reserve band members and Aboriginal women in general) within the Aboriginal community. Guttman explains that limiting the power of Aboriginal Nations does not deny them their rights to self-government; it merely denies them absolute authority which she believes, no nation, Aboriginal or otherwise, should have.³³⁰ This is an important point that is often lost in discussions about self-government and what external rules should and should not apply.

Thus, Aboriginal Nations can protect their communal rights and identities while ensuring that individuals are afforded the same access to identity and belonging and the protection of their rights.

³²⁹ *Ibid.*

³³⁰ *Ibid.* at 54.

A history of broken treaties and atrocities suffered at the hands of the United States government supports a large degree of sovereign authority for Native American tribes – like other indigenous groups that have suffered egregious injustices – to protect their members against oppression and their culture against illegitimate intrusions. The political authority of a group, however, does not justify the oppression of individuals within the group, when peaceful, legally legitimate ways of protecting basic rights are available.³³¹

Guttman agrees with Taylor that the right to cultural survival of Aboriginal peoples cannot come at the expense of violating basic human rights. Furthermore, there are positive democratic obligations to protect all individuals and sub-groups within Aboriginal Nations.³³² “There is no democratic obligation to support cultural authorities that make claims on behalf of other people while depriving them of the conditions of civic equality and equal freedom. Quite the contrary, there is a democratic obligation to deny group rights to cultures that are incompatible with civic equality.”³³³ These individuals and sub-groups could have many different interests, as well as interests in common to that of the larger Aboriginal Nation, and could include women and children and off-reserve populations. Aboriginal Nations must, therefore, find ways of making citizenship decisions that accord basic human rights to individuals and sub-groups associated with the Aboriginal Nation.

How can a fair system of decision-making be established when many *Indian Act* bands now do to their minorities what colonial governments did to Aboriginal peoples? “The majority presumes that anyone who differs from them is inferior and thereby creates

³³¹ *Ibid.* at 53-54.

³³² *Ibid.* at 62.

³³³ *Ibid.*

an environment that tells minority children they are inferior.”³³⁴ Minow explains that negative labels given to others cause such harm, that it should be recognized as a deprivation of liberty.³³⁵ What compounds the injury is when others deposit the problem of difference on those perceived to be different.³³⁶ In the case of Aboriginal Nations and the determination of citizenship, those who are currently excluded are the ones made to justify their reasons for demanding inclusion and left to seek their own remedies for their exclusion. This is regardless of whether individual women were once band members and were involuntarily enfranchised, or whether individuals are living off reserve because of a lack of availability of housing on reserve. “Individual efforts to think differently about difference will be curbed or stymied by existing institutionalized patterns of thought.”³³⁷

The government’s categorization of Aboriginal peoples into different types of status Indians and band members is now part of the status quo, and has been imposed on Aboriginal peoples for so long that even many Aboriginal people have adopted status as an identity, and this status quo is hard to overturn. Minow explains: “Assumptions that the status quo is natural, good, and uncoerced make proposed changes seem to violate the commitment to neutrality, predictability, and freedom.”³³⁸ The result is government being able to effectively freeze in place “past consequences of difference” (different types of status and band membership) and leave non-status Indians and others to find the solutions.³³⁹ It is difficult for any group to answer Canada’s rigid demands for certainty,

³³⁴ *Making All the Difference*, *supra* note 126 at 39.

³³⁵ *Ibid.* at 30.

³³⁶ *Ibid.* at 93.

³³⁷ *Ibid.* at 80.

³³⁸ *Ibid.* at 70.

³³⁹ *Ibid.* at 21.

and even more so for disempowered groups like Aboriginal women and off-reserve populations. The negative effects of the *Indian Act* have impacted so many generations for so long that attempts at finding neutrality within identity discussions is difficult at best.³⁴⁰

Schouls argues that when significant shifts in identity occurs, such as that with Aboriginal peoples, it is “imperative that all Aboriginal persons with an interest in the matter have access to relatively equal amounts of power so that they can influence the process that leads to a new community identity outcome.”³⁴¹ He also explained the findings of RCAP on the issue: “As the identity of modern Aboriginal Nations lies in their collective community life, it is simply inconceivable from the perspective of RCAP that anyone with a legitimate stake in that collective life be barred from participating.”³⁴² Given that this is the case, it is even more important that the Aboriginal groups who will make decisions about who is and is not included in their Nations be representative of all groups in Aboriginal society, which reflects their culture, as opposed to the institutionalized majority who only reflects government’s ideas about who is an Indian for the sake of programs and services. As Schouls points out: “What matters here is not so much the character of the outcome as the fact that all points of view should be represented through an open dialogue in the arrival of the outcome.”³⁴³ This cannot happen if only one relatively privileged group of Aboriginal peoples makes the decisions about identity and communal belonging for the rest.

³⁴⁰ *Ibid.* at 75.

³⁴¹ *Aboriginal Identity*, *supra* note 35 at 160.

³⁴² *Ibid.* at 159.

³⁴³ *Ibid.* at 162.

Schouls further argues that every individual must “imprint” their identity on the community and that they cannot be truly free without this opportunity. “For an Aboriginal person to be free, each must have a guaranteed voice in the community and an equal opportunity to be heard so that each can play a part in community decision-making processes.”³⁴⁴ Further, it is arguable that the current denial by Canada and some bands of identity and belonging to disempowered Aboriginal sub-groups like Aboriginal women and off reserve populations (which include large numbers of non-status Indians) is a denial of freedom. The fair determination of who is and is not a citizen of an Aboriginal community demands the inclusion of all those with an interest to be heard and to have an opportunity to participate in the decision-making process. The present generations must protect the future generations and not let present-day challenges privilege the currently included groups to the exclusion of everyone else. Aboriginal peoples may not have created these divisions, but they can’t sit back and acquiesce to them to the detriment of their children and future generations.

Aboriginal peoples have a right to pass on their cultures and identities to their children and their children’s children for many future generations to come. This also means that the present generation has responsibilities to those future generations. Past generations of Aboriginal peoples fought hard against the assimilation attempts made by Canada so that future generations could enjoy their cultures and identities. Therefore, the present generation has an obligation to not use status under the *Indian Act*, blood quantum rules or any other code that would hasten the extinction of their communities. The preservation of culture is imperative not just for the sake of culture itself, but for the

³⁴⁴ *Ibid.*

physical, mental and emotional well-being of Aboriginal peoples.³⁴⁵ It is absolutely imperative that the present generation of Aboriginal peoples not privilege themselves to the eventual exclusion of their future generations, and to avoid this fate for their children. The present generation must take into account present circumstances, such as the fact of mixed-marriages and relationships and the children that result, in order to plan for the survival of their communities. This does not mean that they cannot look to the past for guidance, but they cannot ignore the reality of cultural interchange. If they do, then many more children of mixed-marriages will be excluded and whole communities will eventually become extinct. This, in effect, is what Canada is currently advocating.³⁴⁶ The identity of modern day Aboriginal peoples is linked so tightly with that of their communities that RCAP felt that an Aboriginal Nation could not take part in self-government agreements if they did not constitute their citizenship rolls in an inclusive manner.³⁴⁷ In this way, the present generation preserves the future generation by respecting the past, thus completing the circle.

³⁴⁵ *Cultural Belonging*, *supra* note 293 at 637. M. Chandler, C. Lalonde, “Cultural Continuity as a Protective Factor Against Suicide in First Nations Youth” in Government of Canada, *Hope or Heartbreak: Aboriginal Youth and Canada’s Future*, (Ottawa: Policy Research Initiative, 2008) Vol.10, No.1, online: Government of Canada <http://www.policyresearch.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf> 68 [*Cultural Continuity*] at 69. “In the absence of a sense of personal and cultural continuity, our ongoing studies show that life is easily cheapened, and the possibility of suicide becomes a live option”.

³⁴⁶ *McIvor-Canada Factum*, *supra* note 260 at para.12. Canada explains the effects of the second-generation cut-off rule: “The effect is that once there has been two consecutive generations of a person entitled to registration parenting with a non-Indian, the resulting descendants will not be entitled to registration”. They view this as necessary so as to ensure that there is a sufficient “genealogical proximity” between Aboriginal populations today and those historical populations.

³⁴⁷ *RCAP*, vol.2 *supra* note 56 at 183.

(iv) **Connection vs. Tradition**

This matter of who gets to decide who is in and who is out often raises questions of the importance of Aboriginal tradition in making these determinations. Sometimes there is a divide between those who believe that only those who follow “traditional” ways should be accepted as Aboriginal, versus those who believe that traditions can evolve to fit with modern ways of expressing Aboriginality. What is often lost in the debate over the importance of traditional aspects of Aboriginal identity is the connection that Aboriginal people have to their culture, their territories and their communities, which often includes respect for tradition. Is it more important that an individual hunts with traditional weapons after having completed all the traditional ceremonies in order to be a Mi’kmaq citizen, or must they have a connection to the Mi’kmaq community through family, common history, and shared territory, while still maintaining a modern day method to perform the Mi’kmaq practice of hunting? These are not easy questions and, in the end, there does not appear to be any reason why an Aboriginal citizen must choose between any one criterion to determine their identity and their belonging. Any number of criterion can be useful, but the sole reliance on one criteria, be it ancestry, residency or tradition, inevitably leads to arbitrary exclusions of people who would otherwise identify as Mohawk, Mi’kmaq or Maliseet, for example. Other possible criteria like status, blood or language, can also arbitrarily exclude people from communal belonging. Since the blood quantum criterion can lead to the extinction of the group, and since reliance on the *Indian Act’s* status provisions has the same effect, some look to tradition as the solution.

Tradition is very important for Aboriginal peoples as it connects the present and future generations with past generations with a view to carrying on the practices of their

ancestors. It has also been recognized that no culture can be forced to live as though it has been frozen at some random point in time, so that all of its practices and traditions cannot change, evolve and become relevant for present generations. That being the case, can tradition be rightfully asserted as the sole criterion to definitively determine who is and who is not an Aboriginal citizen? If so, who determines what constitutes tradition and at what point in time is the tradition to be identified? More importantly, will this traditional criterion apply to everyone, or just those currently excluded from the community who now seek inclusion? Does it matter that external forces were responsible for the loss of language and traditional knowledge in many communities through no fault of individuals? Or perhaps connections like ancestry, history and loyalty, family and communal relations, which can and often do include traditional elements, would be more relevant in modern times where Aboriginal Nations need to rebuild their Nations? The strength of a Nation can often be measured by the strength of its citizens. Both individual Aboriginal peoples and their communities need healing from the divisive policies and laws of the last few centuries so as to have a better future for their children.

Aboriginal identity should be flexible enough to adapt to modern day circumstances, while maintaining connections to Aboriginal culture and community. This can and often does include traditions, customs and practices of the particular Aboriginal group. However, a singular focus on tradition mandates that someone be the arbiter of what constitutes valid tradition, and who meets or fails the tradition test. It can also freeze Aboriginal identity in a certain time period, preventing the evolution of traditional practices and identities. Schouls argues that Aboriginal identity should not be determined from rigid traditional criteria, as doing so actually jeopardizes Aboriginal identity.

The identification approach suggests that individual Aboriginal identity should not be regarded in a deterministic fashion, originating from traditional cultural or political attributes. Rather, Aboriginal identity is more properly understood as a relational phenomenon; one acquires it by virtue of one's connections to others through ancestry, shared historical memories and territories, and shared commitment to one another in community over time. This approach, in other words, lends flexibility to Aboriginal identity; it can be shaped to meet challenges posed by new circumstances without jeopardizing the integrity of Aboriginal identity itself.³⁴⁸

Therefore, in order for Aboriginal communities to properly exercise their right to be self-defining, they must allow flexibility in their definitions so as to be inclusive of Aboriginal people living in today's world, as opposed to pre-contact times.³⁴⁹

It is this struggle between perceptions about Aboriginal identity of the past with modern day expressions of Aboriginal identity that cause angst in some communities. These differences in perspective have been labelled as a debate between individual versus collective rights. This essentially pits modern day expressions of individual Aboriginal identity against what is viewed as communally held traditions. However, not all academics view the debate in this light. Schouls explains that the issue is really more of a "demand for individual political inclusion at the Aboriginal community level" than an individual versus collective issue.³⁵⁰ He further explains that "...rights to community inclusion are important because healthy individual identity is understood to be the outcome of individuals possessing power to influence the course of relations that they consider integral to their self-image."³⁵¹ Schouls argues that multiple expressions of Aboriginal identity must be granted equal status and influence in the development of the

³⁴⁸ *Aboriginal Identity*, *supra* note 35 at 154.

³⁴⁹ *Ibid.*, at 155.

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.* at 155-156.

community's identity. He uses the example of the current Aboriginal leadership who insist that Aboriginal individuals comply with "their" images of what traditional Aboriginal identity should be, as an example of why Aboriginal identity must be constructed in more expansive terms.

Obviously, Canada's laws and policies have interfered with Aboriginal conceptions of who they are and how those determinations should be made. Yet, the fact remains that the current Aboriginal leadership, now aware of the devastating effects of the *Indian Act* and its policies, cannot use the power held under the *Act* to exclude rightful members and to determine Aboriginal identity in a stringent manner.³⁵² Borrows agrees and argues that:

While colonialism is at the root of our learned actions today, First Nations men must take some measure of responsibility for their conduct and attitudes. It is no longer enough to say "the Indian Act made us do it." Positive acceptance of responsibility is an important step in healing the divisions that have occurred.³⁵³

Now that Aboriginal Nations and their local communities are aware of the damage that Indian Act divisions have caused, they now have to take steps to remedy the damage independent of any additional remedies that is owed to them by Canada. The same can be said for band membership criteria that rely on blood. It is no more acceptable to replace

³⁵² *AFN-INAC Status Report*, *supra* note 139 at 7. "As a result of the inadequate financial resources to accommodate reinstated individuals, many Bands had difficulties in accepting new members and in providing them access to on-reserve programs and services. These pressures, coupled with the socio-cultural implications of classes of Indians created by the 1985 reforms [i.e. 6(1) and 6(2)], contributed to community conflict, which continues to challenge community cohesion even in the present".

³⁵³ J. Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics", in D. Scheidemen, K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 169 [*Contemporary Traditional Equality*] at 183.

the divisions of the *Indian Act* with new divisions brought about by identity rules constructed solely around traditional criteria. Tradition can remain a central feature in membership rules, but those traditions should not be frozen in time or relied on as the sole indicator of identity.³⁵⁴ Individuals with the least amount of traditional knowledge will likely be those who have already been excluded from their communities by virtue of the *Indian Act* and have been denied the opportunity to access their traditions and customs.³⁵⁵ Traditions can be learned and community connections re-forged, but the rebuilding of extinct communities would be much harder to accomplish.

These roadblocks to Nation-building and healing for individual Aboriginal citizens are significant hurdles especially at the community level. Contrary to Flanagan's earlier suggestions that roadblocks be removed so that Aboriginal people can assimilate, Schouls argues the opposite: "Perhaps more pertinently, for those possessing identity and wishing to re-establish community affiliation, no communal roadblocks should be placed in their way, since these individuals often did not lose those affiliations through any choice of their own."³⁵⁶ These roadblocks are described as reserve-based communities, the *Indian Act*, Indian status, and blood quantum rules used in band membership codes.³⁵⁷ The result of using these kinds of narrow definitions is what Schouls calls "a descending

³⁵⁴ A strict reliance on tradition could exclude almost entire communities who have converted to Christianity and no longer practice their traditions.

³⁵⁵ E. Asante, "Negotiating Identity: Aboriginal Women and the Politics of Self-Government" (2005) 25 *Can. Jour. Native Stud.* 1 [*Negotiating Identity*] at 21-25. The "...degree to which an Aboriginal woman has inculcated Aboriginal culture and language increased if she lived on an Indian Reserve than if she did not live on a Reserve." Also: "Those who still lived on Reserves had the opportunity to interact with and learn traditional culture from their families, neighbours and the elders."

³⁵⁶ *Aboriginal Identity*, *supra* note 35 at 158.

³⁵⁷ *Ibid.* at 158-159.

scale of legal identity security.”³⁵⁸ These definitions may give absolute certainty in the mind of the user as to who is an “Indian”, for example, but it also leads from full to half to non-Indian status before the first generation has had a chance to even think about the ramifications of using these definitions. Schouls acknowledges that there will be conflict in the community and that this is a natural part of community life.

What he is opposed to are “dictatorially imposed” views about what the Aboriginal identity should or should not be for that community, regardless of whether they are based on tradition or not.

As my discussion of RCAP’s hearings demonstrates, Aboriginal persons regularly disagree with one another about what makes for an Aboriginal way of life. Cultural and political images of community identity are regularly contested, often in the name of values of equality and freedom from domination that relational pluralism champions. It is unfair, therefore, that certain Aboriginal persons should be allowed to impose their preferred view of an Aboriginal way of life on those who may disagree with it simply in the name of cultural survival based on the purported moral superiority of traditional cultural principles and values.³⁵⁹

He refuses to accept the idea that traditional practices and modern ways of life cannot be reconciled. He believes that one can be Aboriginal and still participate in many other social settings in Canada. Further, he argues that adherence to a strict traditional code is not the only criterion for determining and expressing Aboriginality either as individuals or as communities.³⁶⁰ He also agrees with Borrows who argues that: “Aboriginal peoples simply must develop a more ‘fluid notion of what it means to be Aboriginal’ in order to incorporate the developing reality of ‘intercultural education, urbanization, politics, and

³⁵⁸ *Ibid.* at 159.

³⁵⁹ *Ibid.* at 162.

³⁶⁰ *Ibid.* at 162-167.

intermarriage’.”³⁶¹ Borrows points out the fact that most Aboriginal communities had oral traditions. “In communities with oral traditions, time is dynamic and includes both past and present understandings of events.”³⁶² Therefore, even reliance on tradition does not preclude their modern day exercise in forms that have adapted, changed and evolved with their cultures. Modern forms of Aboriginal identity can and do reflect both past and present influences. “At the same time, it must be recognized that understandings of tradition itself change by enveloping new concepts.”³⁶³

Unfortunately, issues like scarce resources, a history of economic dependence, and a lack of power, have resulted in many Aboriginal communities asserting traditional criteria in an attempt to limit the numbers of band members that will have to share in those resources or power.³⁶⁴ All of this is not to say that tradition has no place in preserving Aboriginal identity, or that it should be discounted in a modern world. The point is that tradition evolves with time and adapts to changing circumstances and, thus, tradition must be considered as only one of many other criteria that can contribute to a modern understanding of Aboriginal identity and belonging. Just as tradition evolves, so too must Aboriginal identity be allowed to do the same. Maintaining this connection between the past and the present together with other changes that will occur in the future is in itself completing the traditional circle between generations. Therefore, the focus for Aboriginal identity and communal belonging should be based on these intergenerational

³⁶¹ *Ibid.* at 165.

³⁶² *Contemporary Traditional Equality*, *supra* note 353 at 174.

³⁶³ *Ibid.* at 175.

³⁶⁴ *Ibid.* at 177. “Some people within First Nations communities resented returning members as competitors for scarce resources...”. See also: *AFN-INAC Status Report*, *supra* note 139 at 7.

connections and changes, as opposed to specific traditional practices frozen at certain points in time. The connections that Aboriginal peoples have to their Nations can take many forms, from common ancestry, history, family, territory, and treaties, to similar political goals. This can also include a commitment to preserve traditional practices and languages, versus using them as screening tools. Individual Aboriginal identity is connected to the identity of the Aboriginal Nation, and both depend on the other for their future survival. Aboriginal Nations, like other indigenous and non-indigenous Nations in the world, have strong bonds that are not based on race or blood, but on all the other connections that ensure survival (social, economic, political, legal, spiritual, familial ties and communal bonds of loyalty). These are the elements of a sustainable culture, whereas reliance on criterion like blood threatens the existence of these cultures in the future.

Asante explains that the self-government goals envisioned by Aboriginal peoples in Canada should not incorporate racist elements, and that Aboriginal peoples should not reconstitute their Nations on race or blood, and that success would require much deeper connections:

Their bond would be those of culture and identity, not blood – their unity would come from their shared history and their strong sense of themselves as people. This means that Aboriginal nations would be political communities comprising people of mixed background and heritage. While membership in Aboriginal nations would not be defined by “race”, the above summary illuminates that the RCAP report is nonetheless solidly predicated in identity – ethnic identity: Aboriginal identity.³⁶⁵

Asante explains that political organisations representing identity groups often find it easier to focus on one aspect of identity, such as race. The effect of this singular focus is

³⁶⁵ *Negotiating Identity*, *supra* note 355 at 3.

that all other social categories of identity are excluded.³⁶⁶ Instead of focusing on race or tradition, many other connections could be highlighted to show the bonds between Aboriginal individuals and their communities. While boundaries are necessary to differentiate between Mi'kmaq and Mohawk and Aboriginal and non-Aboriginal persons, it is important to focus more on important connections in contrast to any singular trait as a marker of identity. What is most important is the connection of the Aboriginal person to their community as opposed to the desire for absolute certainty that is often sought through blood quantum usage, tests of traditional knowledge or the imposition of Indian status. Minow argues that the real intent of these stringent rules is to end the debate in favour of certainty: "Sometimes legal rules are designed to close off discussion – to cut off some inquiries based on the view that certainty may be more important than truth or even more important than fairness."³⁶⁷ The cost of absolute certainty is far outweighed by the benefit of communities living in harmony sharing a common identity.

A focus on connections can help those Aboriginal Nations that wish to highlight tradition as part of their identities. Most Aboriginal communities are now bands created under the *Indian Act*. Contemporary Indian governments (bands) are no longer traditional in nature but have been forced to conduct their affairs according to the *Indian Act*. Long agrees that Indian governments are no longer "non-western" in nature because of decades of forced acculturation.³⁶⁸ That is not to say, however, that tradition is no longer an important part of their communal identity. In fact, Long explains that there has been a resurgence of traditionalism in many Aboriginal communities. At the same time, he

³⁶⁶ *Ibid.* at 13-14.

³⁶⁷ *Identities*, *supra* note 115 at 116.

³⁶⁸ *Indian Governments*, *supra* note 6 at 102-111.

recognizes that these communities and their traditions and cultures have changed over time. “Certainly the culture of Indian societies, like that of other societies, has grown and changed over time. The evolution of tribal cultures reflects, in part, the need of Indians to survive by adapting to changing circumstances that have been, for the most part, externally imposed.”³⁶⁹ Just as it would not be fair for non-Aboriginal governments to use cultural adaptation against Aboriginal communities to say that they were no longer Aboriginal and/or deny them their Aboriginal rights, it is equally unfair for Aboriginal communities to use loss of language, culture or tradition against their own members to deny them their rights and identity. It is not the fault of the Mi’kmaq that the federal government organized them into *Indian Act* bands and, thus, they do not now operate as traditional governments. Their inherent right to self-government is now less powerful as a result. Similarly, it is not the fault of non-status Indians that Canada has created a discriminatory system which divides individuals from their communities. Their right to belong to their communities is no less powerful than it was pre-*Indian Act*.

The government has divided communities and attempted to sever important individual and communal connections to tradition, history, territory, treaties and ancestors. It is important for Aboriginal communities to undo the harm that has been done and rebuild their Nations, but not through divisive membership and citizenship criteria. Lomayesva explains that the problem with current Indian identity is that it was a term created outside the context of each Aboriginal Nations’ traditions, and did not exist prior to Columbus’s arrival. He argues that Aboriginal identity must discard outdated references to blood and traditional beliefs and focus on connections: “I suggest that the

³⁶⁹ *Ibid.* at 103.

term Indian cannot be defined by reference to any set standards based upon blood or cultural belief. It must be understood to describe a type of connection between an individual and tribal community. Thus, to be Indian is to possess a type of connection between oneself and a tribal community.”³⁷⁰ To define Aboriginal identity solely in reference to traditionalism “creates a standard of identity centered upon an archetype of what an Indian should be.”³⁷¹ Linking Aboriginal identity strictly to traditionalism has the same effect as blood quantum and leads to discussions about whether an Aboriginal community or individual is “pure” or conversely, whether they are “contaminated”.³⁷²

Lomayesva explains that anthropology created these concepts and that “Implicit in this line of thought is that the greater tribal cultures are influenced by contemporary western society the less pure (or more contaminated) they are. It is not difficult to make the next step, and conclude that a contaminated culture is less Indian. It is this lesson which on some level has been accepted by American Indians themselves.”³⁷³ According to Lomayesva, traditional criteria can hurt rather than help protect Aboriginal identity. “Terms like traditional do not aid to understand the underlying nature of the Indian. The diverse and changing nature poses substantial problems in identifying a consistent definition of Indian identity.”³⁷⁴ Aboriginal communities which base their identity around blood or rigid traditional criteria will remain small and easily fragmented as opposed to those that base their communal identities on the ancestral, historical, familial and

³⁷⁰ *Indian Identity*, supra note 52 at 64.

³⁷¹ *Ibid.* at 65.

³⁷² Remember Cairns’ usage of the word “penetrated” for Aboriginal communities who have intermarried and adopted modern ways of living. This is similar language as is found in the archaic and debunked studies of phrenology and eugenics.

³⁷³ *Indian Identity*, supra note 52 at 66.

³⁷⁴ *Ibid.* at 67.

territorial connections that form the basis of their Aboriginal Nations. These latter Nations will find a much wider basis of support and will find the effort of Nation rebuilding much easier.³⁷⁵

Just as no culture should be frozen in time, Aboriginal peoples should not rely on traditions taken from a specific time period to exclude members from citizenship in their Nations. Rigid applications of traditional criteria can have the same exclusionary effects as the status provisions under the *Indian Act*, except that traditional criteria would be more subjectively applied. Multiple expressions of Aboriginal identity must be granted equal status within Aboriginal communities in order for those communities to be both just and have a chance at surviving into the future. There should be no roadblocks placed before those Aboriginal individuals who wish to reconnect with their identity and their communities, especially where their prior exclusion has been the result of government or band interference. Traditional practices and beliefs can be reconciled with modern day practices and realities. To do otherwise freezes traditions and creates a standard archetype “Indian” that very few could ever hope to meet. Traditional archetypes also import the concepts of purity, and rigid adherence to frozen traditional concepts means death for the community if change occurs (and change always occurs). Whereas reliance on strict traditional criteria can easily fragment a community, reliance on the connections individuals have with their community provides more opportunity for common identities. Traditional practices can be learned and respected by current and new citizens so long as they are not dictatorially imposed or used to harm people. Important communal connections can be made through common history, ancestry, familial ties, territories and

³⁷⁵ *Blood Quantum*, *supra* note 207 at 42.

even treaties. These connections allow for a wider base of support and make Nation-rebuilding much easier. More importantly, the inclusion of Aboriginal citizens through varied connections helps ensure the survival of their identities and cultures for future generations.

The responsibility to protect Aboriginal identity and culture for present and future generations is a significant task. Excluding someone from their family, local community or Nation can have devastating effects on both individuals and Nations. Nickel spoke of those who resort to suicide or self-destructive acts like alcoholism when separated from their communities.³⁷⁶ The decades of separated communities and family members have resulted in serious negative social indicators referred to in RCAP. Aboriginal people who participated in RCAP included families, communities and leaders, and their stories spoke of the devastating consequences of colonial rule and attempts at assimilation.

Unfortunately, Aboriginal people have been governed by the *Indian Act* and the policies imposed by the federal government for so long that many have internalized these divisions. It is no longer the federal government who has to stand out in front and exclude the off-reserve or the non-status Indians; now many Aboriginal communities themselves are the ones doing the excluding. Canada has made many Aboriginal individuals and communities so dependent on financial transfers for the basic necessities of life that, often, the focus can shift from seeking justice from Canada with regards to treaty, land and governance rights, to protecting today's resources.³⁷⁷ While this situation is reality

³⁷⁶ *Cultural Belonging*, *supra* note 293 at 639.

³⁷⁷ *Dances with Dependency*, *supra* note 241 at 108. "We have seen how the Department of Indian and Northern Affairs Canada (INAC) assumed the detailed administration and control of Aboriginal lives and assets. In doing this, they often actively promoted welfare

and brought about by a sad history of government interference in every aspect of Aboriginal life, it cannot serve as a reason to further erode Aboriginal identity.

Aboriginal identity is important to Aboriginal peoples, and their participation in their culture as a necessary context for their lives is so important that it is considered one of the “goods” of the liberal good life. The Aboriginal identity to be protected can incorporate aspects of historical practices and traditions, as well as modern ways of living, such that identity is not simply what is different, but what is important to Aboriginal people’s identity. Past attempts at imposed assimilation of Aboriginal peoples were not only counter to western liberal views of toleration and equality, but were racist, discriminatory and brought great harms to the Aboriginal Nations of Canada.

Assimilation of Aboriginal peoples can no longer be considered a valid policy position in a modern liberal democracy.³⁷⁸ Cultural change cannot be equated with inevitable assimilation and the end of Aboriginal identity and culture, when that standard is not imposed on any other culture. Aboriginal cultures are entitled to grow, evolve and adapt to changing circumstances, like any other society in the world, and still maintain their identity as Aboriginal peoples. This includes the intermarriage of Aboriginal peoples with non-Aboriginal peoples and the mixed-heritage children who come from those relationships. Blood quantum imposed on children of mixed-marriages and relationships are arbitrary and racist, and evolve not from Aboriginal traditions and practices, but from now debunked western sciences of eugenics and phrenology that insist on the purity of races. It is ancestry, common history, familial and communal ties, traditions and culture

dependency. This has been done despite their fiduciary obligation in relation to First Nation (i.e. their legally enforceable duty to act in the best Aboriginal interests)”.³⁷⁸

³⁷⁸ Excepting of course, the personal decisions made by Aboriginal people to assimilate.

that form Aboriginal identity. It is by being inclusionary, that Aboriginal Nations would rebuild and protect their future generations. Exclusionary practices are often discriminatory and only lead to their extinction in the end. The present generation has a responsibility to assert and protect the identity and culture of their Nations for the benefit for future generations and not make citizenship rules that effectively cut off future generations. While tradition can be an important link to the past and with ancestors, rigidly applied traditional criteria that exclude other connective factors can have the same devastating effects as relying on blood quantum or status under the *Indian Act*.

Connections to the community through common history, familial ties, territory and culture have more relevance in determining Aboriginal identity, rebuilding Aboriginal Nations and protecting future generations, than any one subjective criterion. Aboriginal people have changed and will continue to change as their cultures and identities adapt to modern circumstances. While many changes maintain links to past traditions and customs, some changes have incorporated the negative effects of colonialism. It is imperative that Aboriginal Nations and local communities do not cut off their citizens in an effort to keep up with government policies or economic incentives. Changes should be incorporated because they are in keeping with the cultures of various Aboriginal Nations, and not because there is a present-day economic pressure to do otherwise. Else, currently excluded members will have no choice but to ensure their inclusion in other ways, like litigation and both domestic and international human rights claims.

Building on the arguments that Aboriginal identity is an important part of the good life for Aboriginal peoples, the next chapter takes this idea further and argues that

Aboriginal Nations have a constitutional right to be self-defining and therefore, to determine who can be citizens in their Nations. The jurisdiction of Canada to make these critical decisions for Aboriginal Nations is also challenged. In considering the extent of the right of Aboriginal Nations to determine their own citizenship criteria, the *Charter* is also considered for its general applicability to Aboriginal peoples, and in terms of whether it has anything to offer Aboriginal peoples in protecting their identities. As criteria which determine individual Aboriginal identity can also influence whether or not these individuals can become members of their home communities and/or citizens in their Nation's self-government arrangements, the claims are significant to individuals and communities and should, therefore, be considered carefully.

Chapter Four: The Aboriginal Right to Determine Citizenship

The theoretical arguments pursued in Chapter 3 suggested that Aboriginal peoples need a cultural context to access the good life, which is so important in a liberal democracy like Canada. Maintaining a distinct identity and culture can be difficult for minority cultures, like Aboriginal peoples, as the majority culture is reinforced in every aspect of public life. I argued then that majority cultures have an obligation to protect the cultures of Aboriginal peoples so that they can pass on their identities to future generations. This chapter carries that argument forward in the context of the various rights and obligations implicated by this issue. Specifically, I argue that Aboriginal Nations have a right to be self-defining, and as a result, they have the right to determine who can be citizens in their Nations. This constitutionally protected right is supported by the constitutional promise that Canada will protect their cultures for the benefit of their future generations. Finally, I argue that while this right is a core element of Aboriginal jurisdiction, like other rights in Canada, this right can be limited by the rights of others. As a result, the question of the applicability of the *Charter* is also addressed.

Legal issues related to Aboriginal identity and belonging for both status and non-status Indians alike, represent a growing trend in Aboriginal litigation and may be so for some time, unless workable solutions can be negotiated. It is from a lack of good faith negotiations and the Crown's "winner take all" approach that litigation has seemed to replace negotiation in many instances.¹ Unfortunately, litigation addresses singular issues

¹ S. Imai, "Aboriginal Rights: Disincentives to Negotiate: Mitchell v. M.N.R.'s Potential Effect on Dispute Resolution" (2002) 22 Windsor Y.B. Access Just. 309 (QL) [*Disincentives to Negotiate*] at 3. Imai calls for a more collaborative relationship between the Crown and Aboriginal peoples that is based on good faith and give and take. He argues that: "While judicial support for negotiated settlements is very strong, court

outside the context of the “whole” from which the litigation itself originated. While litigation may resolve a singular issue, like whether the Maliseet have a right to harvest timber, it does not settle the underlying issues of title to land, other harvesting rights or other treaty rights.² Similarly, the *McIvor* case could finally end in victory at the Supreme Court of Canada for Aboriginal peoples or for Canada, but it will not have resolved the underlying cause of the litigation: the problem of Crown control over Aboriginal identity and belonging and the constitutional promise to Aboriginal peoples to protect their identities and cultures.³ Nor will the *McIvor* case resolve all the litigation making its way through the courts on related issues of discrimination under the *Indian Act* regarding the determination of status and/or band membership.⁴

decisions have not always helped to create appropriate conditions for productive negotiations. Some decisions have had the effect of discouraging the parties from returning to the negotiating table or have encouraged negotiations over the wrong issues”. At page 7 Imai explains how they adopt a “winner take all” strategy and wait for litigation to resolve their mutual issues, instead of negotiating.

² *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 [*Marshall and Bernard*].

³ *Sharon Donna McIvor and Charles Jacob Grismer v. The Registrar, Indian and Northern Affairs Canada and the Attorney General of Canada* [2009] BCCA 153 [*McIvor Appeal*]. I discuss the content of the constitutional promise to Aboriginal peoples later in this chapter.

⁴ *Brenda Pauline Sanderson v. The Attorney General of Canada* [Re-Re-Re-Amended Statement of Claim] (Winnipeg Queen’s Bench, File No. CI 03-01-32940) [*Sanderson*], *Nathan McGillivray acting as Guardian ad Litem of Dakota Erin McGillivray, an infant under the age of 18 years, Diana Lynn McGillivray, Diane Lehmann-Ballantyne, and The Opaskwayak Cree Nation v. Her Majesty the Queen* [Re (x5) Amended Statement of Claim] (Fed. Ct. File No. T-1975-93) [*McGillivray*], *Sawridge Band v. Canada*, [1995] 4

(a) Aboriginal Rights in Canada

Aboriginal rights litigation itself has evolved significantly since earlier cases like *Sparrow*, and has presented more challenges for Aboriginal peoples to overcome.⁵

Although *Sparrow* set out the test for determining Aboriginal rights, it was adjusted in the *Van der Peet* trilogy, and then again in *Sappier and Gray*.⁶ Those decisions should also be looked at in the context of other significant cases relating to treaty rights and Aboriginal title, like *Marshall 1, 2* and *Delgamuukw*.⁷ Aboriginal rights litigation is constantly shifting and adjusting to new tests, and interpretations of old tests. For example, the Supreme Court of Canada, in *Powley*, amended the *Van der Peet* “integral to distinctive culture” test for Aboriginal rights specifically to suit the situation of Métis

C.N.L.R. 121 (FCTD) [*Sawridge*]. These are just a few of the cases currently before the courts.

⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*]. When I speak about Aboriginal rights cases, unless otherwise noted I am referring solely to Aboriginal rights in general and not treaty rights. See also: A. Zalewski, “From Sparrow to Van der Peet: The Evolution of a Definition of Aboriginal Rights” (1997) 55 U.T. Fac. L. Rev. 435 [*Sparrow to Van der Peet*], L. Dufraimont, “From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada” (2000) 58 U.T. Fac. L. Rev. 1 [*Justifiable Infringement*], J. McEvoy, “Aboriginal Activities and Aboriginal Rights: A Comment on *R. v. Sappier*; *R. v. Gray*” (2007) 6:2 Indigenous L.J. 1 [*Aboriginal Activities*].

⁶ *Sparrow*, *supra* note 5. *R. v. Van Der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*], *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*], *R. v. NTC Smokehouse*, [1996] 2 S.C.R. 672 [*Smokehouse*]. These three cases are often referred to as the “*Van der Peet* trilogy” as the decisions from the Supreme Court of Canada came out at the same time. *R. v. Sappier*; *R. v. Gray*, [2006] 2 S.C.R. 686 [*Sappier and Gray*].

⁷ *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall 1*], *R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall 2*], *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*]. Other cases have equally important contributions to the law in this area: *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 [*Mitchell*] and *R. v. Adams*, [1996] 3 S.C.R. 101 [*Adams*] and *R. v. Coté*, [1996] 3 S.C.R. 139 [*Coté*]. Just as the *Van der Peet* trilogy refers to three cases, *Adams* and *Coté* are often referred to together.

peoples.⁸ Given that the law is constantly evolving in this area, it is hard to predict with any degree of certainty how a claim of Aboriginal right to a new activity, tradition, custom, or law will be received at the Supreme Court of Canada.⁹ This is especially so for non-gathering type claims related to self-government, like identity and citizenship/membership rights.¹⁰ The Supreme Court of Canada has only provided glimpses of its position on these issues in cases like *Pamajewon*, *Corbiere* and *Lovelace*.¹¹ That makes Aboriginal rights claims to determine citizenship somewhat uncertain. Do they fall under an Aboriginal right to self-government? Are they separate Aboriginal rights, or something else altogether?

Aboriginal identity and communal belonging (i.e., citizenship/membership) are important issues for Aboriginal peoples. They impact the social, cultural and even physical health and well-being of individuals and communities.¹² Most, if not all First

⁸ *R. v. Powley*, [2003] 2 S.C.R. 207 [*Powley*]. *Van der Peet*, *supra* note 6 at para. 46. I discuss the *Van der Peet* “integral to distinctive culture” test later in this chapter. The Court defined the test as follows: “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right”.

⁹ The *Van der Peet* sets out the test for activities, i.e. practices that are integral to a culture. However, certain rights may be more properly described as power or jurisdiction within the realm of self-government. For example, some might question whether the right to determine citizenship is an activity or a power within the right of self-government. For purposes of this chapter, the right to determine citizenship is considered within the Aboriginal rights legal context, versus a head of jurisdiction that might be negotiated within a self-government agreement, for example.

¹⁰ By non-gathering-related claims, I refer to practices, customs or traditions that do not fall within the usual hunting, fishing activities or the gathering of wood categories, for example.

¹¹ *R. v. Pamajewon*, [1996] 2 S.C.R. 821 [*Pamajewon*], *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*], *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 [*Lovelace*]. These cases deal (in part) with self-government, political rights (elections) and identity and discrimination, respectively.

¹² M. Chandler, C. Lalonde, “Cultural Continuity as a Protective Factor Against Suicide in First Nations Youth” in Government of Canada, *Hope or Heartbreak: Aboriginal*

Nations bands in Canada assert an Aboriginal right to determine the membership of their communities.¹³ These claims can stem from their rights under section 10 of the *Indian Act*, by virtue of their inherent right to govern themselves and, therefore, their identity and/or a basic Aboriginal right to determine citizenship.¹⁴ At this point, it is necessary to point out the potential difference between the right of an Indian band to determine band membership (which is partly covered by the *Indian Act*), and an Aboriginal right of an Aboriginal Nation to determine citizenship. While some First Nations may assert that

Youth and Canada's Future, (Ottawa: Policy Research Initiative, 2008) Vol.10, No.1, online: Government of Canada <http://www.policyresearch.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf> 68 [Cultural Continuity] at 69, J. Nickel, "The Value of Cultural Belonging: Expanding Kymlicka's Theory" (1995) 33/4 *Dialogue* 635 [Cultural Belonging] at 637, J. Fiske, E. George, "Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalization through Customary Law" (Ottawa: Status of Women Canada, 2006) [Cultural Trauma]. These sources speak to the emotional, cultural and psychological impacts of the lack of access to one's culture, like that brought about by the second generation cut-off rule in the *Indian Act*.

¹³Assembly of First Nations, "Elections and Leadership Selection and First Nations Citizenship, Membership and Registration (Status)", online: AFN <<http://www.afn.ca/misc/Policy-Updates.pdf>> [First Nations Citizenship] at 3. The AFN spoke with representatives of First Nations and individuals across the country who gave their opinions on the current state of identity and membership for Aboriginal peoples: "Participants were unanimous in the assertion that Canada could no longer define who legally was entitled to belong to a community or Nation, and that mechanisms needed to be in place to find members "lost" through generations of discriminatory legislation, policies and practices". They further spoke of: "... re-establishing First Nations' models for determining who does, and does not, belong to their community and re-affirmed that it is up to Nations to decide how best to protect their people. The group shared a sense of urgency and the opinion that it has taken too long to sort out this issue and recommended that work be accelerated and tools be put into place to assist First Nations in developing their own models". See also: Assembly of First Nations and Indian and Northern Affairs Canada, "First Nations Registration (Status) and Membership Research Report", online: AFN <<http://www.afn.ca/misc/mrp.pdf>> [Status and Membership Report] at 1-8. This report speaks of the right of Aboriginal "Nations" to determine their own "citizenship" but they frequently go back and forth between that and the right of First Nations (bands) to determine membership.

¹⁴ *Indian Act*, R.S.C. 1985, c.I-5 [Indian Act] at s.10. Section 10 of the *Indian Act* allows band to assume control of their own band membership subject to conditions.

they have an Aboriginal right to determine membership in their local communities (bands), this chapter looks at the potential legal claim by the larger Aboriginal Nations (Mohawk, Mi'kmaq, Maliseet, etc.), to assert an Aboriginal right to determine citizenship.¹⁵ As far as many First Nations are concerned, effective government can only occur when they have control over issues that are part of the core of their governance, like citizenship codes.¹⁶ It is also arguable that the treaties between Aboriginal Nations and Canada were intended to protect not only the rights of the original Aboriginal signatories, but also their future generations.¹⁷ For example, many treaties included language that specifically protected the rights of “their heirs and the heirs of their heirs forever”.¹⁸

¹⁵ Chapter 7 looks at band membership codes and the issues that arise with regards to membership at the community level. That chapter also looks at how self-government citizenship is determined and what effect band membership rules have on self-government citizenship codes.

¹⁶ Assembly of First Nations, “Our Nations Our Governments: Choosing Our Own Paths: Report of the Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nations Governments: Executive Summary” online: AFN <<http://www.afn.ca/cmslib/general/Executive-Summary.pdf>> [*Our Nations Summary*] at 5. AFN emphasized that their constituent communities no longer wanted to rely on “external” recognition, like the *Indian Act*, but wanted effective government for their people through control of their institutions, like their constitutions and citizenship codes. See also: Congress of Aboriginal Peoples, “Speaking Notes for Congress of Aboriginal Peoples National Chief Patrick Brazeau to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, Bill C-292 – An Act to Implement the Kelowna Accord” (Ottawa: CAP, 2006) online: CAP <<http://www.abo-peoples.org/Communications/Speeches/Kelowna%20Standing%20Committee.pdf>> [*CAP C-292 Speech*] at 4, 7. CAP also seeks the elimination of the *Indian Act* (external recognition) in favour of Nation-recognition legislation that could create codes which would be more inclusive of all Aboriginal peoples including “off-reserve, non-status and Metis”.

¹⁷ For a detailed discussion of this argument see: P. Palmater, “An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians” (2000) 23 Dal. L.J. 102 [*An Empty Shell*].

¹⁸ See for example: Treaty or Articles of Peace and Friendship Renewed, 1752 [*Treaty of 1752*]. The relevant portion of the Treaty stated who the parties to the Treaty were and provided that it was between His Majesty in the old territories of Nova Scotia (also called Acadie) and “Major Jean Baptiste Cope chief Sachem of the Tribe of Mick Mack Indians,

Aboriginal people may assert that given that their treaty rights are constitutionally protected, that their successive generations of heirs and the right to determine who those heirs are, are also protected.¹⁹ Although this thesis does not address treaty rights, the common thread in all of these various arguments is the rejection by Aboriginal peoples of external control over who they are as a people and how they will relate to their local communities and their larger Aboriginal Nations.

Aboriginal rights in Canada are protected by section 35 of the *Constitution Act, 1982*.²⁰ Section 35(1) of the *Act* provides that the “existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”.²¹ That section goes on to define Aboriginal peoples as including “Indian, Inuit and Métis”, and clarifies that Aboriginal rights are “guaranteed equally to male and female persons”.²² An important point about section 35 is that while it protects Aboriginal rights, it is not the source of those rights.²³ The Supreme Court of Canada in *Van der Peet*, cited *Calder* with approval when it held: “In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal

inhabiting the eastern Coast of the said Province, and Andrew Hadley Martin, Gabriel Martin and Francis Jeremiah members & Delegates of the Said Tribe, for themselves and their said Tribe and their heirs and the heirs of their heirs forever.” (emphasis added)

¹⁹ *An Empty Shell*, *supra* note 15. There is insufficient time and space to deal with the particular law related to treaties and the various claims that could be made by Aboriginal peoples on the basis of those treaties.

²⁰ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Constitution Act, 1982*] at s.35.

²¹ *Ibid.* at s.35(1).

²² *Ibid.* at s.35(2), (4).

²³ *Calder et al v. Attorney-General of British Columbia*, [1973] S.C.R. 313 [*Calder*] at para.328. The Supreme Court of Canada held: “Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries”. *Van der Peet*, *supra* note 6 at para.28.

rights existed and were recognized under the common law”.²⁴ The Court went on to explain that “The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights”.²⁵ It provided the basis for why Aboriginal rights are protected in the constitution:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.²⁶

The Court in *Van der Peet* also explained the meaning of constitutional protection for Aboriginal rights:

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.²⁷

This is the basis or underlying reason why Aboriginal rights are protected, but how that plays out in litigation is the basis of an ever-evolving test for determining whether a specific Aboriginal right exists.

²⁴ *Van der Peet*, *supra* note 6 at para.28.

²⁵ *Ibid.* at para.5.

²⁶ *Ibid.* at para.30.

(i) The “Integral to Distinctive Culture” Test

Any analysis of Aboriginal rights usually starts with the *Sparrow* case, as it was the case where the Supreme Court of Canada would: “explore for the first time the scope of s.35 (1) of the Constitution Act, 1982, and to indicate its strength as a promise to the Aboriginal peoples of Canada.”²⁸ The appellant in this case was a member of the Musqueam Indian Band. He was charged under the *Fisheries Act* for having a drift net longer than what is permitted under the Musqueam Band’s “Indian food fishing licence”.²⁹ The appellant admitted the facts but defended his actions on the basis that he had exercised his Aboriginal right to fish and that the net restrictions were a violation of that right. He argued that since his Aboriginal rights were protected under s.35 (1), the net length restrictions were invalid.³⁰ Prior to setting out the test for determining Aboriginal rights, the Court addressed some interpretive issues within its analysis of section 35(1) for use in future Aboriginal rights cases. Firstly, Chief Justice Dickson and Justice LaForest explained that the word “existing” in s.35 (1) meant that only those rights which were in existence when the *Constitution Act, 1982*, came into effect would be protected.³¹ The Court further explained that “existing aboriginal rights cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations.”³²

²⁷ *Ibid.* at para.31.

²⁸ *Sparrow*, *supra* note 5 at para.1.

²⁹ *Ibid.* at para. 3.

³⁰ *Ibid.*

³¹ *Ibid.* at para.23. The Court further clarified that: “...extinguished rights are not revived by the Constitution Act, 1982”.

³² *Ibid.* at paras.24-27. More specifically the Court cited with approval academic commentary and explained that the word “‘existing’ means ‘unextinguished’ rather than exercisable at a certain time in history.”

Despite Canada's assertion that its obligations towards Aboriginal peoples were only political in nature, the Court confirmed that the significance of section 35 was to provide Aboriginal peoples with constitutional protection against the Crown's legislative powers.³³

Similarly, the "recognition and affirmation" of Aboriginal rights means that the power to legislate with regard to "Indians" pursuant to section 91(24) of the *Constitution Act, 1867*, is a limited power, such that the Crown's power must be reconciled with its obligations towards Aboriginal peoples.³⁴ Other interpretive principles to be used in applying section 35 include:

- (1) the government must act in a trust-like capacity towards Aboriginal peoples; a fiduciary, which is not adversarial in nature;³⁵
- (2) treaties and statutes relating to Indians should be liberally construed and doubtful expressions are to be resolved in favour of the Indians;³⁶

³³ *Ibid.* at para.53. The Court explained that: "It is clear then, that s.35 (1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s.35 (1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power".

³⁴ *Ibid.* at para.62. "Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle... and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada...".

³⁵ *Ibid.* at para.59.

³⁶ *Ibid.* at para.57.

(3) the honour of the Crown is always at stake in its dealings with Aboriginal peoples and no appearance of sharp dealings will be sanctioned;³⁷

(4) section 35 of the *Constitution Act, 1982* itself must be construed in a “purposive”, “liberal” and “generous” way.³⁸

This results in a priority for Aboriginal rights over rights which are not constitutionally protected.³⁹ The test for Aboriginal rights asked first, whether the legislation interferes with an existing (not extinguished) Aboriginal right; the onus being on the Aboriginal claimant to prove the existence of the right.⁴⁰ If the answer is yes, then that constitutes a prima facie infringement. The kinds of questions asked to determine a prima facie infringement are whether the limitation is “unreasonable”, whether the limitation imposes “undue hardship” or whether the limitation denies the rights holders “their preferred means” of exercising their Aboriginal rights.⁴¹ Should the infringement be found, the burden then shifts to the Crown to answer a two part justification test.⁴² First, is there a valid legislative objective and if so, then the Crown’s fiduciary relationship with Aboriginal peoples becomes the focus.⁴³ The questions then to be asked in the second part

³⁷ *Ibid.* at para.58.

³⁸ *Ibid.* at para.56.

³⁹ *Ibid.* at para. 78. “If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equaled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing”.

⁴⁰ *Ibid.* at para.68.

⁴¹ *Ibid.* at para.70.

⁴² *Ibid.* at 71-75.

⁴³ *Ibid.* at para.75. “That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified”.

of the justification analysis could include: whether there has been any consultation with the affected Aboriginal group on the matter of conservation; whether there has been as little infringement as possible of the Aboriginal right in question; and whether fair compensation has been offered in situations of expropriation.⁴⁴ This was the test for Aboriginal rights until the Supreme Court of Canada decisions were rendered in the *Van der Peet* trilogy.

The *Van der Peet* trilogy of decisions included *Van der Peet*, *Gladstone* and *Smokehouse*.⁴⁵ In *Van der Peet*, the Court explained that the trilogy of cases would address issues that were left unresolved in *Sparrow*, namely, how the specific Aboriginal rights which are protected within section 35 would be “defined”.⁴⁶ Chief Justice Lamer (as he then was) explained that: “Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible.”⁴⁷ The Court further clarified that these rights are protected for Aboriginal peoples because they are Aboriginal and that these rights are equally as important as other constitutional rights.⁴⁸

The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal...The Court must define the scope of s.35

⁴⁴ *Ibid.* at para.82.

⁴⁵ *Van der Peet*, *supra* note 6, *Gladstone*, *supra* note 5, *Smokehouse*, *supra* note 5.

⁴⁶ *Van der Peet*, *supra* note 6 at para.1.

⁴⁷ *Ibid.* at para.3.

⁴⁸ *Ibid.* at paras.17-21. At paras.17-18-19, the Court explained: “Section 35(1), it is true, recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal”. The Court went on to explain that “Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal”.

(1) in a way which captures both the aboriginal and the rights in aboriginal rights.⁴⁹

It was upon that basis that the Court explained the test: "...in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."⁵⁰ The factors that must be taken into account in the "Application of the Integral to Distinctive Culture Test"⁵¹ are as follows:

- (1) "Courts must take into account the perspective of aboriginal peoples themselves"⁵²
- (2) "Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right"⁵³
- (3) "In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question"⁵⁴

⁴⁹ *Ibid.* at para.20.

⁵⁰ *Ibid.* at para. 46. However, an important clarification was made by the Court in *Delagmuukw*, *supra* note 7 at para.126. The Court characterized the "integral to distinctive culture" test as including not only Aboriginal practices but also their "laws".

⁵¹ *Van der Peet*, *supra* note 6 at para. 48.

⁵² *Ibid.* at para. 49. The Court did go on to state in para. 49 that the Aboriginal perspective "must be framed in terms cognizable to the Canadian legal and constitutional structure."

⁵³ *Ibid.* at para. 51. At para. 53, the Court went on to specify: "To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right." Furthermore, the Court explained that: "Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, tradition or custom that existed prior to contact, and should vary its characterization of the claim accordingly."

⁵⁴ *Ibid.* at para. 55. The Court explained in para. 56 that it could not look at items that were true of "every human society", that were "incidental or occasional". In other words, would the culture "be fundamentally altered" if it did not have this tradition, custom or practice? (para.59)

- (4) “The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the traditions, customs and practices that existed prior to contact.”⁵⁵
- (5) “Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims”⁵⁶
- (6) “Claims to aboriginal rights must be adjudicated on a specific rather than general basis”⁵⁷
- (7) “For a practice, tradition or custom to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists”⁵⁸
- (8) “The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct”⁵⁹

⁵⁵ *Ibid.* at para. 60. The relevant time period for determining whether a right is integral is “the period prior to contact between aboriginal and European societies.” At the same time, they do not need to “accomplish the next to impossible task of producing conclusive evidence from pre-contact times” about their practices. (para. 62). It can be post-contact evidence so long as it demonstrates which aspects of the practices originate in “pre-contact” times. Also important is that the Court in para. 63 took no position on whether a practice could disappear.

⁵⁶ *Ibid.* at para. 68. The Court emphasized that courts must not “undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards...”

⁵⁷ *Ibid.* at para. 69. “Aboriginal rights are not general and universal; their scope and content must be determined on a case by case basis.”

⁵⁸ *Ibid.* at para. 70. “Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.”

⁵⁹ *Ibid.* at para. 71. The practices must be “distinctive”, meaning that it makes the culture what it is. This is different from being “distinct” which means “unique” or that no other culture would have that practice.

(9) “The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence”⁶⁰ and

(10) “Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples”⁶¹

In *Van der Peet*, the Sto:lo were unable to prove that the practice of exchanging fish for money or goods was an Aboriginal right.⁶² Whereas in *Gladstone*, the matter of whether the Heiltsuk had an Aboriginal right to sell herring spawn on kelp was sent back to trial.⁶³

Assuming that an Aboriginal group could prove they were exercising an Aboriginal right based on the above considerations, the burden of proof would shift to the Crown to prove that the right had been extinguished and, if not, whether the Crown had infringed that right, and finally, whether the infringement was justified.⁶⁴ After the *Van der Peet* trilogy, the basic *Sparrow* test remained, albeit, the first part relating to the identification of the actual Aboriginal right has been substantially clarified or expanded.

⁶⁰ *Ibid.* at para. 73. A practice is protected if it was integral prior to the arrival of Europeans, it continued afterwards, or it adapted in response to their arrival. The only practice that will not be saved is one that arose solely in response to European influences.

⁶¹ *Ibid.* at para. 74. “Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land.”

⁶² *Ibid.* at para.91.

⁶³ *Gladstone*, *supra* note 6 at paras.1, 85-86.

⁶⁴ *Ibid.* at para. 30. The Court further explained the concept of extinguishment: “While to extinguish an aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of aboriginal rights, it must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme.” In this case, an Order-in-Council which was designed to ensure conservation and protect the Indian food fishery, did not amount to an extinguishment of an Indian commercial fishery, simply because it did not expressly protect it. (para.36)

A key difference between *Sparrow* and the *Van der Peet* trilogy is the Court's treatment of Aboriginal rights as depending on whether they were categorized as food, social and ceremonial rights, or whether they were considered commercial rights. In *Sparrow*, the Indian food fishery was recognized as the first priority after conservation.⁶⁵ However, in *Gladstone*, the Aboriginal right was categorized as a commercial right and was, therefore, assigned a lesser priority.⁶⁶ Specifically, it was described as: "something less than

⁶⁵ *Sparrow*, *supra* note 5 at para.78. "The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing".

⁶⁶ *Gladstone*, *supra* note 6 at para.24. "The actions of the appellants, like the actions of the members of the Sheshaht and Opetchesaht bands in N.T.C. Smokehouse, appear to be best characterized as the commercial exploitation of herring spawn on kelp. By contrast, the regulations under which the appellants were charged, like the regulations at issue in N.T.C. Smokehouse, prohibit all sale or trade in herring spawn on kelp without a Category J licence, appear, therefore, to be best characterized as aimed at the exchange of herring spawn on kelp for money or other goods, regardless of whether the extent or scale of that sale or trade could reasonably be characterized as commercial in nature". The Court went on to explain the different priority allocated to commercial Aboriginal rights at para.62: "Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated

exclusivity but which nonetheless gives priority to the aboriginal right.”⁶⁷ While the clarifications made in the *Van der Peet* trilogy still form the basis of the test for defining Aboriginal rights, the Supreme Court of Canada in *Sappier and Gray* made some important clarifications to it.⁶⁸

The case of *Sappier and Gray* involved three friends: two members of the Maliseet Nation (at the Woodstock First Nation) and one member of the Mi’kmaq Nation (at the Papineau First Nation).⁶⁹ The Court found that all three Aboriginal claimants had proven their Aboriginal right to harvest wood for domestic purposes on Crown lands. However, exercise of the right was restricted to lands traditionally harvested by members of the Woodstock and Papineau First Nations.⁷⁰ In considering the claim, the Court made some clarifications about the *Van der Peet* test for defining Aboriginal rights. For example, how the resource was “harvested, extracted and utilized” by an Aboriginal group was considered necessary in order to understand the “aboriginal” aspect of Aboriginal rights.⁷¹ The Court also reworded the right from that of “harvesting wood” to

the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery”.

⁶⁷ *Ibid.* at para. 63. At para. 64 the Court also provided a non-exhaustive list of questions to be considered as to whether the government considered the Aboriginal right as a priority. Some of these related to compensation and consultation, as well as : “whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licensed fees, for example)”, and also “the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population” and “how important the fishery is to the economic and material well-being of the band in question”.

⁶⁸ *Sappier and Gray*, *supra* note 6.

⁶⁹ *Ibid.* at paras.1, 7-8.

⁷⁰ *Ibid.* at para.72.

⁷¹ *Ibid.* at para. 22.

the right to “harvest wood for domestic uses as a member of the aboriginal community”.⁷² Another important clarification in *Sappier and Gray* related to previous descriptions of the test for defining Aboriginal rights which has led to confusion in the lower courts. Specifically, the use of concepts such as “core identity” and “defining feature” to describe the integral aspect of traditions, customs and practices was described by the Court as having created “artificial barriers to the recognition and affirmation of aboriginal rights” and should be discarded.⁷³ They also cited the appeal decision with approval and warned that: “...courts should be cautious in considering whether the particular aboriginal culture would have been fundamentally altered had the gathering activity in question not been pursued”.⁷⁴ Similarly, the Court went on to emphasize that Aboriginal rights must be permitted to evolve and take on modern forms otherwise they would become “utterly useless”.⁷⁵ Other clarifications were as follows:

- (1) “it is also necessary to identify the pre-contact practice upon which the claim is founded in order to consider how it might have evolved to its present-day form”⁷⁶
- (2) “The right to harvest wood for domestic uses is a communal one”⁷⁷

⁷² *Ibid.* at para. 24. The use of the word “domestic” in this case means that the Aboriginal right has no “commercial dimension.”

⁷³ *Ibid.* at paras. 40-41.

⁷⁴ *Ibid.* at para.41.

⁷⁵ *Ibid.* at para. 49.

⁷⁶ *Ibid.* at para.23.

⁷⁷ *Ibid.* at para.26. “Section 35 recognizes and affirms existing aboriginal and treaty rights in order to assist in ensuring the continued existence of these particular aboriginal societies. The exercise of the aboriginal right to harvest wood for domestic uses must be tied to this purpose. The right to harvest (which is distinct from the right to make personal use of the harvested product even though they are related) is not one to be exercised by any member of the aboriginal community independently of the aboriginal society it is

- (3) “courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available”⁷⁸
- (4) “the jurisprudence weighs in favour of protecting the traditional means of survival of an aboriginal community”⁷⁹ and
- (5) “It is that aboriginal specificity which the notion of a “distinctive culture” seeks to capture. However, it is clear that ‘Aboriginality means more than interesting cultural practices and anthropological curiosities worthy only of a museum’”⁸⁰.

While there are many other cases that inform an Aboriginal rights analysis that have not been mentioned here, these are the main principles with which one can assess a possible Aboriginal right to determine citizenship. That being said, there has been much written about the *Van der Peet* test and its practical impact on the ability of Aboriginal peoples to meet those tests. The following section reviews some of the academic interpretations of the test and how it may be amended to bring it more in line with the purpose of constitutional protection for Aboriginal rights.

(ii) Evolving Interpretations

The above framework provides a legal basis with which an Aboriginal Nation might assert an Aboriginal right to determine its own citizenship. As seen in the above review of Aboriginal rights cases, the tests and considerations which courts take into account can and do change, depending on the type of rights being adjudicated and the

meant to preserve. It is a right that assists the society in maintaining its distinctive character”.

⁷⁸ *Ibid.* at para.33.

⁷⁹ *Ibid.* at para.38.

⁸⁰ *Ibid.* at para.42.

specific facts of each case. Therefore, while Aboriginal claimants can use the integral to distinctive culture test as a guide to frame their claims, they should not be constrained to advance necessary adjustments to the test in order to address special circumstances. This was done by the Supreme Court of Canada itself when it had to address commercial rights versus food, social and ceremonial rights, and again when it had to address Métis rights versus those of First Nations.⁸¹ While the Court insists that each Aboriginal group/Nation must prove the existence of its right, given the time and space limitations of this thesis, I make my arguments using the general qualities and rights of Aboriginal Nations, recognizing, of course, that every Aboriginal Nation has its own unique cultures, traditions, laws, customs and histories.⁸² I also use the basic test set out in *Van der Peet* and modified somewhat in *Powley* and *Sappier and Gray*, as this remains the current legal test for the determining the existence and scope of Aboriginal rights. Whether using the basic integral to culture test or modified versions of the test, Aboriginal Nations should be able to demonstrate their Aboriginal right to determine citizenship, which flows

⁸¹ *Gladstone*, *supra* note 6. *Powley*, *supra* note 8. However, the Supreme Court of Canada dismissed an application for leave to appeal from the Newfoundland Court of Appeal in *Newfoundland (Minister of Government Services and Land) v. Drew* [2006] S.C.C.A. No. 481, File No. 31750 [*Drew*] on appeal from *Newfoundland (Minister of Government Services and Land) v. Drew* [2006] N.J. No. 270 [*Drew Appeal*]. In *Drew*, several Mi'kmaq individuals (who were also members of the Miawpukek Band), constructed a hunting cabin on provincial crown land that later became the Bay du Nord Wilderness reserve. The applicants raised the defence (in part) of Aboriginal rights. In *Drew Appeal*, the court held that since Mi'kmaq did not inhabit the province of Newfoundland prior to contact, they could not establish Aboriginal rights. The Court of Appeal had specifically held that: "The trial judge did not err in considering and applying the Van der Peet pre-European contact test. He committed no palpable and overriding error in finding that the Mi'kmaq were not in Newfoundland at the date of European contact". For a detailed discussion of this and related cases, see: D. Reid, S. Hickman, "Aboriginal Rights and the Atlantic Canada Petroleum Industry" (2007) 30 Dal. L.J. 383.

⁸² There are also basic rights common in each Aboriginal Nation, which is no different from all societies in the world having common human rights.

not only from their inherent right to self-government, but also from the Canadian constitutional promise to ensure the survival of Aboriginal cultures.

The *Van der Peet* test has been criticized. In fact, the weight of academic authority seems to suggest that the ‘integral to distinctive culture test’ severely limited the original test set out in *Sparrow* and, as a result, may even violate the *Constitution Act, 1982*. While time and space limitations prevent a full review of the literature in this area, consideration of some of the key criticisms is important for any analysis of future Aboriginal rights claims. For example, Dufraimont argues that Aboriginal rights cannot be assessed separately from the test for justification, and that the test for justification has gone from the stringent test in *Sparrow* to an “absurd extreme” in *Delgamuukw* which allows nearly any public interest to trump Aboriginal rights.⁸³ In *Delgamuukw*, the Court indicated that some of the public interest areas that would justify an infringement of Aboriginal title include: agriculture, forestry, mining, hydroelectric power, economic development, settlement and conservation.⁸⁴ Dufraimont explains that the test for justification has been relaxed so much so that “the constitutional guarantee of Aboriginal rights in s. 35(1) is compromised”.⁸⁵ She cites with approval McLachlin J., who argued in *Van der Peet* that no court has the ability to diminish the substance of Aboriginal rights in this way.⁸⁶

How, without amending the Constitution, can the Crown cut down the aboriginal right? The exercise of the rights guaranteed by s. 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the

⁸³ *Justifiable Infringement*, *supra* note 5 at paras. 1-12.

⁸⁴ *Delgamuukw*, *supra* note 7 at para.165.

⁸⁵ *Justifiable Infringement*, *supra* note 5 at para 1.

⁸⁶ *Ibid.* at para.15.

right from aboriginals to non-aboriginals would be to diminish the substance of the right that s.35(1) of the Constitutional Act 1982 guarantees to the aboriginal people. This no court can do.⁸⁷

She also argues that this concept of reconciliation is hardly different from those of the past which caused so many historical injustices for Aboriginal peoples.⁸⁸

Seen in its historical context, this redefinition of reconciliation has been both regressive and catastrophic. Consider the fact that, in the nineteenth and early twentieth centuries, subordinating Aboriginal rights to larger social demands was the very idea underlying a historical government strategy of “development relocation”. Pursuant to this policy, governments in the nineteenth and early twentieth centuries dispossessed Aboriginal communities of their lands and “relocated” them to less valuable lands to make way for non-Aboriginal economic development.⁸⁹

Dufraimont is not the only one who is critical of the test for Aboriginal rights as it has evolved since *Sparrow*. McNeil also argues that the justification test originally set out in *Sparrow* and later refined by *Van der Peet* and *Delgamuukw* amounts to a violation of the *Constitution Act, 1982*.⁹⁰

McNeil thinks that this violation stems from the use of public interest objectives to justify infringement on Aboriginal rights.⁹¹ Also critical of the evolution of the test in cases subsequent to *Sparrow*, he argues the test for infringement has been so relaxed that it now allows for the interests of private third parties (e.g., large corporations) that do not have similar constitutional rights, to violate Aboriginal rights.⁹²

⁸⁷ *Van der Peet*, *supra* note 6 at para. 315 as cited by Dufraimont in *Justifiable Infringement*, *supra* note 5 at para.15.

⁸⁸ *Justifiable Infringement*, *supra* note 80 at para.23.

⁸⁹ *Ibid.*

⁹⁰ K. McNeil, “Defining Aboriginal Title in the 90’s: Has the Supreme Court Got it Right?”, (Toronto: Robarts Centre for Canadian Studies, 1998) [*Defining Aboriginal Title*] at 19.

⁹¹ *Ibid.*

⁹² *Ibid.* at 20.

Development of forestry and mining are two more examples Lamer C.J. gave of objectives that would justify infringing Aboriginal title. Now we all know who, for the most part, engages in these kinds of resource development today – large, usually multinational, corporations. So what the Chief Justice appears to have envisaged here is government-authorized intrusion onto Aboriginal lands to serve the economic interests of large corporations.⁹³

He also cites with approval Justice Vickers' lengthy decision in *Tsilhqot'in* which criticized British Columbia and Canada's "impoverished" views about Aboriginal title.⁹⁴

Although speaking specifically about Aboriginal title, McNeil's views are equally applicable to other Aboriginal rights:

Some people may balk at the cost of compensating aboriginal titleholders for past wrongs. But compensation is generally paid to property owners when their lands and resources are taken by governments, even when this is lawfully done for public purposes under statutory authority. It would be highly discriminatory for aboriginal titleholders to be treated less favourably, especially when their lands were taken in violation of the Canadian Constitution. Given that these wrongs were committed by governments acting on behalf of Canadians and B.C. residents, we should all bear the costs.⁹⁵

While he may have been critical of *Delgamuukw* and other cases for their limitation on the infringement of Aboriginal rights, he prefers the mixed Aboriginal-common law approach taken in *Delgamuukw* for establishing the right, versus the strictly common law approach taken later in *Marshall* and *Bernard*.⁹⁶ After reviewing the cases which have come from the Supreme Court of Canada on Aboriginal rights, McNeil argues that the

⁹³ *Ibid.*

⁹⁴ K. McNeil, "We must pay to reconcile aboriginal and private property" (2008) 27 *Lawyers Weekly* no. 45 [*Reconcile*] at 1 (QL). *Tsilhqot'in Nation v. British Columbia* [2008] 1 C.N.L.R. 112 [*Tsilhqot'in*].

⁹⁵ *Reconcile*, *supra* note 91 at 3.

⁹⁶ K. McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 *Sask. L.Rev.* 282 [*Aboriginal Title*] (QL) at paras.44-45. *R. v. Marshall*, *R. v. Bernard*, [2005] 2 S.C.R. 220 [*Marshall and Bernard*].

views of the current Chief Justice, McLachlin, are preferable to those of the former Chief Justice, Lamer.⁹⁷ For example, McNeil reviewed the former Chief Justice, Lamer's approach to Aboriginal rights:

... Aboriginal rights, even though they are constitutionally protected, might have to give way to the interests of other Canadians in order to achieve vague goals like "economic and regional fairness." Moreover, in determining whether allocation of a resource in a way that infringes Aboriginal rights is justified, courts can take account of historical, non-Aboriginal use of the resource. In other words, past violations of Aboriginal rights by non-Aboriginal persons apparently can be used to justify continuing infringements of those rights today. The reason why this is permissible appears to be that "successful attainment" of reconciliation "may well depend" on this kind of balancing of rights and interests. In this context, reconciliation appears to relate more to the maintenance of established economic interests than to the protection of constitutional rights.⁹⁸

McNeil then explained that he was in agreement with the current Chief Justice

McLachlin's own criticism of the test that was advanced by Chief Justice Lamer:

With all due respect, I find McLachlin J.'s critique of Chief Justice Lamer's conception of reconciliation and of his approach to justification to be right on the mark. As conceived by the Chief Justice, reconciliation does not involve resolution of conflicts between Aboriginal and non-Aboriginal interests by means of negotiations and mutually acceptable agreements. Instead, he used it primarily to justify unilateral governmental infringement of Aboriginal rights for the benefit of other Canadians. I think McLachlin J. correctly portrayed this as an unconstitutional attempt to achieve "social harmony" or "societal peace."⁹⁹

⁹⁷ K. McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 *Indigenous L.J.* 1 [*Reconciliation and the Supreme Court*].

⁹⁸ *Ibid.* at para.10. (footnote removed)

⁹⁹ *Ibid.* at para.18. He went on to ask: "But if social harmony and peace depend on violation of the constitutional rights of the Aboriginal peoples, what does this say about Canadian society? Are non-Aboriginal Canadians really so mean-spirited? Would we accept violation of our constitutional rights because respect for them might threaten social harmony? Would we not seek to achieve social harmony and peace in ways that did not involve violation of fundamental rights?"

Other academics, like Zalewski, have agreed with McNeil's assessment of the test. She also feels that the current definition of Aboriginal rights is somewhat ambiguous.¹⁰⁰

Zalewski argues that the "invisible politics" that truly drive the courts is the need to accommodate non-Aboriginal interests.¹⁰¹ She further argues that while the courts have indicated that Aboriginal perspective is important in assessing Aboriginal rights; this perspective must be framed within Canadian legal terms.¹⁰² An unbalanced weighing of the common law over Aboriginal laws and perspective fails to provide a balanced definition of Aboriginal rights:

The Van der Peet Court did not recognize the problems created by the couching of Aboriginal perspective in the common law. Instead of taking special care to accommodate the Aboriginal perspective, the Court actually rejected an approach suggested by Lambert J.A. at the B.C. Court of Appeal that would have allowed for the accommodation of the Aboriginal perspective in the definition of Aboriginal rights through the use of a social significance analysis. ... Thus, following Sparrow's path, Van der Peet, while ostensibly proclaiming the value of the Aboriginal perspective, fails to use that perspective to help in the authentic definition of Aboriginal rights. Cases subsequent to Van der Peet have fallen into the same trap.¹⁰³

The Supreme Court of Canada has, in Zalewski's opinion, modified the test in *Sparrow* so much so, that subsequent cases have adopted the very frozen rights approach they claimed to have rejected.¹⁰⁴ Her solution is to recommend that courts rely on Aboriginal

¹⁰⁰ A. Zalewski, "From Sparrow to Van der Peet: The Evolution of a Definition of Aboriginal Rights" (1997) 55 U.T. Fac. L. Rev. 435 [*Evolution of Aboriginal Rights*] at para. 1.

¹⁰¹ *Ibid.* at para. 16.

¹⁰² *Ibid.* at para. 18.

¹⁰³ *Ibid.* at para. 24.

¹⁰⁴ *Ibid.* at para. 34. "Although both judgments claimed to reject the frozen rights approach, it may be more accurate to state that they rejected a "frozen practices" approach. Actually rejecting a frozen rights approach would require the Court to admit that a right could be exercised through the use of different practices, as the circumstances of the people who possess the right change. The only modernization allowed under Van

laws and perspectives to better inform the definition of Aboriginal rights.¹⁰⁵ Although academics like Borrows and McNeil would not necessarily agree that Aboriginal and non-Aboriginal rights are incompatible, they would agree with Zalewski's assessment of the Supreme Court of Canada's ever-evolving legal test for Aboriginal rights that increasingly limits the definition of rights, and increases the allowable infringements.¹⁰⁶

Borrows and Rotman, for example, argue that the very essence of Aboriginal rights is the bridge between two cultures.¹⁰⁷ Therefore, the *sui generis* nature of those rights demand that equal weight be placed on both Aboriginal and common law perspectives in order to achieve true reconciliation.¹⁰⁸ In their view, Aboriginal rights are not only *sui generis* because they are held by Aboriginal peoples, but also because they are based on Aboriginal laws, customs and practices.¹⁰⁹ Their constitutional protection is to ensure the physical and cultural survival of Aboriginal peoples. "Clearly, if Aboriginal rights exist to secure physical and cultural survival, they cannot be ascertained exclusively by reference to pre-contact 'Aboriginality'. There are far more relevant aspects to the determination of Aboriginal rights."¹¹⁰ They go on to further explain that:

der Peet, however, is the modernization of a single practice; no real evolution is allowed with respect to the right itself. In other words, the rejection of frozen rights is literally incompatible with Van der Peet's narrow practices focus."

¹⁰⁵ *Ibid.* at para.45.

¹⁰⁶ J. Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 U.B.C. L. Rev. 285 (QL) [*Aboriginal Governance*]. K. McNeil, "Aboriginal Rights: Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government" (2003) 22 Windsor Y.B. Access Just. 329 (QL) [*Aboriginal Rights*].

¹⁰⁷ J. Borrows, L. Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36 Alta. L. Rev. 9 (QL) [*Sui Generis Nature of Aboriginal Rights*] at 3.

¹⁰⁸ *Ibid.* at 9.

¹⁰⁹ *Ibid.* at 15.

¹¹⁰ *Ibid.* at 16.

Aboriginal rights have two primary components, a theoretical and a material element. The theoretical element is a constant, and concerns the underlying purpose for the right in question – namely the contemporary cultural and physical survival of Aboriginal societies. Meanwhile, the material element of the right involves its practice, which is fact and site-specific. Therefore, under the sui generis formulation, rights which are integral to the distinctive cultures of Aboriginal societies are, simultaneously, universal and fact and site-specific.¹¹¹

Therefore, in a case which deals with commercial fishing rights, Borrows and Rotman would argue that the question should be whether the sale of fish to Europeans is necessary for the cultural and physical survival of the Aboriginal group in question. They cite with approval, McNeil, who argued that Aboriginal peoples are being denied the opportunity to “...develop contemporary ways of life within their own communities on the basis of their Aboriginal rights”.¹¹² Further, if this legal approach continues, then the result will be “the disappearance of the Aboriginal cultures which make those communities distinct, as the Aboriginal peoples will be obliged to assimilate into the dominant Canadian culture which surrounds them in order to survive”.¹¹³ This cannot be in keeping with the constitutional promise to Aboriginal peoples to protect their cultural survival. In effect, continued reliance on these limiting definitions of Aboriginal rights and the justifications for their infringement will themselves be breaches of yet another promise to Aboriginal peoples and may end in their disappearance.

¹¹¹ *Ibid.*

¹¹² *Ibid.* at 17. They cite: K. McNeil, “The Meaning of Aboriginal Title” in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 135 [*Meaning of Aboriginal Title*] at 152.

¹¹³ *Ibid.*

Slattery also criticizes the case law on Aboriginal rights, but takes a slightly different approach to their definition.¹¹⁴ He argues that in addition to Aboriginal rights that are held by specific First Nations living in specific territories, there are also Aboriginal rights which should be considered universal.¹¹⁵ For example, Slattery argues that a base of “generic” Aboriginal rights underpins the range of distinct rights belonging to each Aboriginal group or Nation.¹¹⁶ He analyzes the test laid out in *Van der Peet* and explains that it makes several assumptions: (1) that “aboriginal rights are shaped entirely by factors particular to each indigenous group – that they are specific rather than generic rights”¹¹⁷; (2) that the test “looks exclusively to conditions prevailing in the remote past”¹¹⁸; and (3) that the test “makes no reference whatever to the extensive relations that developed between indigenous peoples and incoming Europeans in the post-contact period, or to the legal principles that informed those relations”.¹¹⁹ The result being that the Court has rejected the notion that Aboriginal rights make up “a range of abstract legal categories with normative underpinnings”, and instead, has reduced them to an “exercise in historical ethnography”.¹²⁰ Similarly, by focusing on the pre-contact era, the test

¹¹⁴ See for example: B. Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000) 79 Can. Bar. Rev. 196, B. Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada” (1996) 34 Osgoode Hall L.J. 101, B. Slattery, “First Nations and the Constitution: A Question of Trust” (1992) 71 Can. Bar. Rev. 261. Prof. Brian Slattery has written numerous articles on the subject of Aboriginal rights. Unfortunately, time and space limitations prevent an in-depth analysis of all of his writings.

¹¹⁵ B. Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 Supreme Court Law Review 595, online: Osgoode <<http://osgoode.yorku.ca/osgmedia.nsf/research/slattery-brian>> [*Generative Structure of Aboriginal Rights*] at 1.

¹¹⁶ *Ibid.* at 1-5.

¹¹⁷ *Ibid.* at 2.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* at 3.

¹²⁰ *Ibid.* at 2.

excludes activities that became central to the lives of Aboriginal peoples, and does not allow Aboriginal peoples to meet modern needs.¹²¹ Despite the fact that the Court described Aboriginal rights as being grounded in “intersocietal law”, the test is based on pre-contact times when there was no intersocietal relations between Aboriginal peoples and Europeans.¹²² Therefore, the *Van der Peet* test does not adequately address the key foundational basis of Aboriginal rights that would allow findings to be relevant to Aboriginal communities in today’s era. Although a frozen rights approach was specifically rejected by the Court, it appears as if this is the effect of what they have done.

Slattery points out, however, that subsequent decisions from the Supreme Court of Canada have modified the approach taken in *Van der Peet*. He uses *Delgamuukw* as an example to demonstrate that the Court treated Aboriginal title (an Aboriginal right) as a uniform right, the parameters of which do not vary from group to group on the basis of their historic ways of life.¹²³ He then reassesses the right described in *Van der Peet* by using the principles held in *Delgamuukw*, and concludes that *Van der Peet* stands for the generic right of Aboriginal peoples “to maintain and develop the central elements of their ancestral culture”.¹²⁴ The only thing that varies from group to group is the specific elements of their cultures which are central to that group, but all groups share the generic

¹²¹ *Ibid.* at 3.

¹²² *Ibid.*

¹²³ *Ibid.* at 3-4.

¹²⁴ *Ibid.* at 4-5.

right of “cultural integrity”.¹²⁵ Those specific Aboriginal rights are “concrete instances of generic rights”.¹²⁶

Just as all generic rights give birth to specific rights, all specific rights are the offspring of generic rights. There are no “orphan” specific rights. In effect, generic rights provide the fundamental normative structure governing specific rights. This structure determines the existence of specific rights, their basic scope and their potential for evolution.¹²⁷

Therefore, using the example of Aboriginal title, Slattery argues that all Aboriginal groups have a right to their ancestral territory; the only issues to be addressed are the location and scope of title for each group.¹²⁸ As a result, generic Aboriginal rights are not unlike those rights held by provinces in the constitution; i.e., no matter how big or small, rich or poor the province, they have the same rights and powers.¹²⁹ He further cites *Sappier and Gray* as standing for “intermediate generic rights of livelihood” which was characterized by the Court in somewhat general terms to allow its evolution over time.¹³⁰ While he acknowledged that the Court finally understood the dual dimensions of Aboriginal rights (historical and normative), they still have a way to go before they address it completely.¹³¹

¹²⁵ *Ibid.* at 5. Other rights Slattery describes as generic Aboriginal rights include: the right to an ancestral territory, cultural integrity, treaty making, the right to customary law, honourable treatment by the Crown and the right of self-government.

¹²⁶ *Ibid.* at 9.

¹²⁷ *Ibid.* at 10.

¹²⁸ *Ibid.* at 8-9.

¹²⁹ *Ibid.* at 8.

¹³⁰ *Ibid.* at 17.

¹³¹ *Ibid.* “The point to be drawn from this analysis is simple. The assessment of claims to aboriginal rights has two complementary dimensions: historic and normative. A court has to consider not only the historical evidence mounted to support the specific claim, but also the underlying rationale of the generic right invoked. While the Supreme Court has finally acknowledged the normative dimensions of the question, it still has some distance to go yet”.

Slattery also addressed the issue of the date at which Aboriginal rights should be assessed. He argues that Aboriginal rights could only have come into existence when the Crown gained sovereignty over Aboriginal peoples because before that time, pre-sovereignty relations were governed by treaties and international law.¹³² Certain rights, like the right of cultural continuity, demonstrate the problem with current tests:

As with other generic rights, the abstract right comes into existence at the time of sovereignty, and the same holds true of the intermediate generic rights that shelter under its auspices, relating to such subjects as language, religion and livelihood. What, then, of the specific rights that occupy the bottom tier in the pyramid? In principle these cannot date from a period *earlier* than the time of sovereignty, because Anglo-Canadian law (as distinct from international law or indigenous law) did not apply prior to that date. So, presumably they must arise at the time of sovereignty or at some later period, depending on the precise nature of the right in question.¹³³

Although the Court in *Delgamuukw* amended the date to be used to assess Aboriginal title from *Van der Peet*'s pre-contact era to when the Crown asserted sovereignty, Slattery argues that the same logic should apply to generic Aboriginal rights.¹³⁴ He also emphasizes that the Court's findings in *Delgamuukw* regarding the difficulty in pointing to a precise date of contact when assessing Aboriginal title as one of the reasons to use the date of sovereignty, applies equally to Aboriginal rights.¹³⁵ Therefore, the date for assessment, the normative underpinnings and the categorization of Aboriginal rights reviewed in *Van der Peet*, have all been modified in subsequent cases to some extent, and

¹³² *Ibid.* at 17.

¹³³ *Ibid.* at 19.

¹³⁴ *Ibid.* at 20. Using the right of cultural integrity as an example, Slattery explains: "For example, the right of cultural continuity does not *itself* arise from aboriginal cultures, nor is the scope of the abstract right shaped by traditional aboriginal practices. The right arises from an intersocietal body of law governing relations between the Crown and aboriginal peoples. As such, it comes into existence at the point of sovereignty, just like aboriginal title".

require further modification to make the test for Aboriginal rights relevant in modern times.¹³⁶

Other academics would agree with Slattery that there are certain rights which are held by all Aboriginal peoples. For example, Macklem argues that self-government is an inherent right belonging to all Aboriginal Nations, and that the constitution may also provide for other generic rights, like a positive right for Aboriginal peoples to receive social and economic benefits.¹³⁷ Similarly, Borrows argues that not only has Aboriginal sovereignty survived the imposition of Crown sovereignty, but that the two are compatible and do not displace the Aboriginal right to be self-governing.¹³⁸ Other generic rights, like the right to negotiate and enter into treaties with the Crown, lend support for this view.¹³⁹ McNeil would agree and argue that not only do Aboriginal Nations have a right to be self-governing, but that this right is essential to the preservation of their cultures as it makes their societies distinctive.¹⁴⁰ Specific rights, like the right of First Nations to determine their own membership, are important aspects of the exercise of the

¹³⁵ *Ibid.* at 21.

¹³⁶ *Ibid.* at 22. Slattery uses the *Powley* case and the Métis as an example of problems that can arise by using pre-contact dates for First Nations. “The group of mixed aboriginal-European descent is credited with an aboriginal right that is denied to their Indian neighbours, despite the fact that both groups were engaged in the fur trade at the time of effective control, and both are the descendants of an Indian nation that did not trade in furs at the time of contact. A similar problem arises in dealing with claims to aboriginal title advanced by the two groups, because at the time of sovereignty, the Indian group may well have occupied lands that, by the time of effective control, were occupied by the Métis. What these conundrums show is the need for uniform critical dates for all aboriginal peoples, at least in the context of livelihood rights and aboriginal title”.

¹³⁷ P. Macklem, “Aboriginal Rights and State Obligations” (1997) 36 *Alta. L. Rev.* 97, P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [*Indigenous Difference*].

¹³⁸ *Aboriginal Governance*, *supra* note 106 at 11.

¹³⁹ *Ibid.* at 6.

¹⁴⁰ *Aboriginal Rights*, *supra* note 106 at 11-17.

right of self-government.¹⁴¹ Pfefferle would agree with these sentiments and argue that: “Contrary to the policy enforced by the Indian Act, Aboriginal peoples have a right to define those members of the larger communities that collectively hold those rights”.¹⁴²

Failure to recognize this right could lead to the loss of the communities themselves:

But the power to control their destinies as Aboriginal peoples, to maintain control over their self-definition, must be fundamental, for otherwise we could imagine a people being constructed by another. If Aboriginal communities lose the power to control their self-definition they lose themselves – they effectively become “another”.¹⁴³

Therefore, the generic Aboriginal right of cultural integrity could include a specific Aboriginal right for Aboriginal Nations in Canada to determine their own citizenship. Although this right is assessed on the basis of Aboriginal Nations, the modern evolution of the right might also be exercisable by local communities in terms of their membership codes.¹⁴⁴

Aboriginal Nations have a constitutional right to protect their identities, distinctive cultures and existence as societies.¹⁴⁵ The Court in *Powley* explained that: “The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities”.¹⁴⁶ This can be no less true for the Aboriginal Nations who were the original occupiers of Canada. How each Aboriginal Nation

¹⁴¹ *Ibid.* at 12.

¹⁴² B. Pfefferle, “The Indefensibility of Post-Colonial Aboriginal Rights” (2007) 70 Sask. L.Rev. 393 (QL) [*Indefensibility of Aboriginal Rights*] at para.42.

¹⁴³ G. Christie, “Law, Theory and Aboriginal Peoples” (2003) Indigenous L.J. 67 at 98 as cited in *Indefensibility of Aboriginal Rights*, *supra* note 142 at para. 42.

¹⁴⁴ For the purposes of this thesis, the Aboriginal rights mentioned are assumed to be applicable to the larger Aboriginal Nations. That does not mean that local bands would not have a right to exercise similar rights, but in some areas, there are major differences between the larger Nations and local communities. Further discussion of band membership codes and self-government codes can be found in Chapter 6.

¹⁴⁵ *Powley*, *supra* note 8 at para.13.

traditionally welcomed their citizens into the world, named them, celebrated their unions or what the traditional responsibilities were of each citizen are matters for each particular Aboriginal Nation to determine. But the starting premise has to be that each Aboriginal Nation has the basic right to exist, the promise of which is now a constitutional protection. Given the specific colonial history of forced assimilation and societal messages about Aboriginal peoples as “disappearing races”, their constitutional protection is even more important.¹⁴⁷ Whether addressed at the generic or specific level, the test for assessing Aboriginal rights must evolve to reflect a more workable application of the principle of the evolutionary nature of the constitution, the organic nature of the Aboriginal groups asserting their rights and the very purpose of section 35 rights – which is to protect the survival of Aboriginal identities and distinctive cultures.¹⁴⁸

¹⁴⁶ *Ibid.*

¹⁴⁷ J. Tully, “A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada” in C. Cook, J. Lindau, eds., *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective*, (Quebec: McGill Queen’s University Press, 2000) 39 [*Just Relationship*] at 43-44. Tully explained that: “... they have been treated as disappearing races who could be marginalized and left to die out; and they have been treated as burdens on the Crown who could be off-loaded and assimilated to Canadian citizenship by extinguishing or superceding their Aboriginal and treaty rights”.

¹⁴⁸ C. Bell, M. Asch, “Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation” in M. Asch, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, (Vancouver: UBC Press, 1998) 38 [*Challenging Assumptions*] at 40. “Indeed the practice of distinguishing precedents has been recognized by Chief Justice Dickson of the Supreme Court of Canada (as he then was) as one which preserves formal adherence to the doctrine of *stare decisis* and at the same time allows a court to escape ‘the folly of perpetuating into eternity, principles unsuited to modern circumstances’”. See also: *Reference re Succession of Quebec*, [1998] 2 S.C.R. 217 [*Reference re Quebec*] at para.52. “Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a “living tree”, to invoke the famous description in *Edwards v. Attorney-General for Canada*”. *Just Relations*, *supra* note 147 at 54. “As we have learned over the last sixty years, cultures are interdependent, overlapping, and internally complex. Cultures exist in dynamic processes of interaction, negotiation,

(iii) Making the Case

The right of an Aboriginal Nation to be self-defining and, therefore, to determine their own citizenship is a unique right that has not yet been considered by the Supreme Court of Canada. I argue that the nature of the right to determine citizenship is so profoundly different in character from a right to hunt moose, for example, that the current legal tests for determining Aboriginal rights may have to be adjusted. The unique nature of this right and/or the underlying basis for Aboriginal rights will have to be taken into account at an earlier stage of the test, such that courts will have the proper theoretical context in which to assess individual cases. The analysis that follows proceeds on the assumption that there are several ways in which a particular Aboriginal Nation might frame their claim, and this is not meant to limit those possibilities. The Supreme Court of Canada has, on several occasions, emphasized the fact that courts must take into account the perspective of the Aboriginal peoples themselves. In the case of the right to determine citizenship, this would be similar in each Aboriginal Nation.¹⁴⁹ The only matter that might vary would be how citizenship was determined in each Nation. In Canada, the

internal challenge, and reinterpretation and transformation.” The Royal Commission on Aboriginal Peoples, “Report of the Royal Commission on Aboriginal Peoples: Gathering Strength” (Ottawa: Minister of Supply and Services, 1996), vol.3 [RCAP, vol.3] at 111.

¹⁴⁹*Delgamuukw*, supra note 7 at para.82. “In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain ‘the Canadian legal and constitutional structure’”. *Van der Peet*, supra note 6 at para. 49. “In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right”. *Sparrow*, supra note 5 at para.69. “While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised”.

political representatives of First Nations have repeatedly asserted their right to determine their own citizenship.¹⁵⁰ The messages heard by the Assembly of First Nations from Aboriginal people across the country relates to their inherent right to self-government. The consensus revolves around citizenship: “First Nations citizenship was one of the most often mentioned core functions”¹⁵¹, that “Citizenship is connected to the issue of proper recognition of First Nations”¹⁵², and that “First Nations have to be in control of their membership/citizenship and electoral rules in order to start rebuilding their governments”.¹⁵³ Even the Royal Commission on Aboriginal Peoples (RCAP) recommended that one of the main or core “spheres” of Aboriginal jurisdiction for Aboriginal self-government would be Aboriginal control over their own “citizenship and membership”.¹⁵⁴ Similarly, the Court in *Powley* held that Métis peoples had the right to determine who their own people were, and they were, in fact, encouraged to continue to develop their own citizenship rules.¹⁵⁵ Whether as a part of the larger inherent right of self-government, or as a stand-alone right, the Aboriginal right to determine citizenship is

¹⁵⁰ *Our Nations Summary*, *supra* note 16 at p.5. See also Assembly of First Nations “Our Nations Our Governments: Choosing Our Own Paths: Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nations Governments: Final Report”, online: AFN

<http://www.afn.ca/cmslib/general/FNG%20report_Eng%20final.pdf> [*Our Nations Report*] at p. 21. “Identifying core functions of First Nations governments involves defining who we are as a people (each First Nation)”. See generally: *First Nations Citizenship*, *supra* note 13, *Status and Membership Report*, *supra* note 13, Native Women’s Association of Canada, “A First Nations Citizenship Code: 1986”, online: NWAC <<http://www.nwac-hq.org/en/documents/AFirstNationsCitizenshipCode.pdf>> [*NWAC Citizenship Code*] at p. 4.

¹⁵¹ *Our Nations Report*, *supra* note 150 at p.23.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Ministry of Supply and Services, 1996) Volume 2: *Restructuring the Relationship*, Part 1 [*RCAP, vol.2, part 1*] at p. 217.

obviously a key aspect to maintaining the distinctive cultures of both the Métis and First Nations.¹⁵⁶

In order to apply *Van der Peet's* integral to distinctive culture test, the nature of the claim being made must be specified: the right of an Aboriginal Nation to determine its own citizenship rules. Aboriginal Nations would be defined as those traditional nations, like the Mohawk and Mi'kmaq, which are currently divided into local communities or *Indian Act* bands. Citizenship would refer to the legal, political, social and cultural rules that provide for the communal recognition of individual belonging in the larger Aboriginal Nation. This may also mean that the modern day exercise of the right includes the right of *Indian Act* bands to determine their own band membership, but for now, the right is assessed as one belonging to the larger Aboriginal Nation. This right could also be categorized as a generic right held by all Aboriginal Nations as part of the protections afforded to them by section 35 of the *Constitution Act, 1982*, to ensure "their survival as distinctive communities".¹⁵⁷ Formulating the right as a generic right, if successful, would allow the numerous Aboriginal Nations to rely on one court ruling or one agreement with Canada, versus numerous individual ones. The preference of most Aboriginal peoples and the courts is for Aboriginal Nations and Canada to negotiate the details about how this right might be exercised by individual bands, larger Aboriginal Nations, and/or other Aboriginal representative groups. This right is not like an Aboriginal right to fish, where

¹⁵⁵ *Powley*, *supra* note 8.

¹⁵⁶ Some might argue that Aboriginal Nations also have the right to determine their own citizenship as part of their sovereignty. However, the Supreme Court of Canada's decision in *Mitchell*, *supra* note 7, made some troublesome findings with regards to the incompatibility of Aboriginal sovereignty with that of the Crown's, which seems to go against the weight of current academic literature. This important claim, however, is not discussed in this work.

some Aboriginal Nations may have once relied on hunting buffalo instead of fishing salmon.¹⁵⁸ What is for certain is that the government “regulation” which is interfering with, at least, some aspects of the Aboriginal right to determine membership, is the *Indian Act* which determines status as well as band membership for most bands. Federal policies designed around those limitations (e.g., rights enforcement, social programs and funding, negotiation positions for land claims, etc), also affect the Aboriginal right to effectively and freely choose citizens without undue economic, legal, social and/or political consequences.

There can be no question of the “significance” to Aboriginal Nations of the practice of determining their own citizens. Whether or not someone can call themselves a Mi’kmaq person and pass that identity to future generations is an essential part of their identity as individuals. Equally important to both individuals and communities is the right to belong to the collective known as the Mi’kmaq and partake in the rights, benefits and responsibilities of being a citizen of that Nation. On a practical level, this would also include membership in local band communities, unless and until there are other arrangements – like self-government agreements or modern treaties, for example. Some other Aboriginal rights reflect practices that have varying degrees of impact on Aboriginal identity, like hunting for moose, gathering blueberries, or fishing eels. Although the loss of these practices would impact on the identity and culture of the

¹⁵⁷ Powley, *supra* note 8 at para.13.

¹⁵⁸ For clarity, I am not suggesting that certain Aboriginal Nations would not have a right to fish salmon. I argue in this thesis that Aboriginal rights must evolve with the people who hold those rights, and while some Nations may not have fished pre-contact, they may have traded their goods for fish post-contact and/or developed their economies to include fish. Unless courts continue to insist on freezing Aboriginal rights in time, modern rights

specific Aboriginal group, Mi'kmaq people would still maintain their identities as Mi'kmaq people and as part of the natural evolution and adaptation that occurs within cultures. However, without the right of the Mi'kmaq Nation to determine their own citizenship rules, this would have a significant impact on their identities and cultures. As stated earlier, they would become less Mi'kmaq and more of a fictional entity created by Canada to suit its own policy or funding purposes. It is critical, then, that an Aboriginal Nation has control over how to identify individuals and how citizenship in the larger Nation is determined. Otherwise, Aboriginal people would be left with the very situation that exists now: Canada determines individual and communal identity which results in divided Aboriginal communities, broken families and generations of children without a legally recognized identity or the ability to belong to their communities and partake in their cultures.¹⁵⁹ Canada has committed to a new future without assimilation as its goal, and to do otherwise would be a breach of that promise as well as the constitutional promise to Aboriginal peoples to ensure their cultural survival.¹⁶⁰

could include a much broader array of activities and practices than were noted in pre-contact times.

¹⁵⁹ *Indefensibility of Aboriginal Rights*, *supra* note 142 at para. 3. "The legislative definitions of 'Aboriginality' have created a fragmentation and a rights-based approach that has left Aboriginal communities and interpersonal relationships within these communities in ruins".

¹⁶⁰ Canada, "Statement of Apology to former students of Indian Residential Schools", online: INAC <<http://www.ainc-inac.gc.ca/ai/rqpi/apo/pmsh-eng.asp>> [*Canada's Apology*]. Prime Minister Stephen Harper promised on behalf of all Canada to abandon assimilation as a policy of Canada. "Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country". He also recognized the harm that can result from such policies: "The government now recognizes that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language".

The future that naturally results from that scenario is one with extinction dates for legally recognized Indians and whole bands. This could result in empty treaty promises, Aboriginal lands escheating to the Crown, and further cultural trauma and social disharmony within Aboriginal communities. This Aboriginal right is so integral to the very existence of Aboriginal peoples that it cannot properly be compared to other Aboriginal rights litigated to date, with the exception of the inherent right to self-government which has not been fully litigated.¹⁶¹ Aboriginal identity and culture is what makes each Nation “distinctive”.¹⁶² In Aboriginal Nations, people often have the same cultural, historical, linguistic and social ties, whereas larger Nation-states like Canada can be made up of people from varied historical, linguistic and cultural backgrounds. In Canada’s situation, the populations of Aboriginal Nations are much smaller than the population of the surrounding majority. Therefore, it is even more important that their Aboriginal right to determine citizenship be protected amidst the strong influences of the majority. In *Powley*, the Court recognized the Aboriginal right of the Métis to decide for themselves who they were as Métis peoples; i.e., determining their own citizenship, and considered this a key aspect of their survival as a people.¹⁶³ This should be no less true of the Aboriginal right to determine citizenship for Aboriginal Nations who have pre-dated

¹⁶¹ By this I am not advocating litigation to resolve these issues, as neither the right to determine citizenship nor the inherent right to self-government are proper subjects for litigation. They should be negotiated instead.

¹⁶² *Aboriginal Rights*, *supra* note 106 at 17. McNeil argues that the right to self-government (which includes the right to determine citizenship) is, of all rights, the one that makes the Aboriginal society truly what it is.

¹⁶³ *Powley*, *supra* note 8 at para. 20-34. The test for Métis identity includes “self-definition” by the individual Métis person and power by the community over membership/citizenship. The Court did not foresee a new set of regulations by the federal or provincial governments to determine Métis identity or a new *Métis Act*. The Court held that it was the Métis who would determine rules for their own people.

the Métis peoples in terms of their occupation here (time immemorial versus several hundred years).¹⁶⁴

The current practice of bands determining their own band membership and other Aboriginal groups determining their own citizenship in self-government agreements, modern treaties, and/or traditionally within local communities, has continuity with practices relating to pre-contact practices of determining citizenship. Canada may have infringed this right through its imposition of the *Indian Act*, but Canada has also recognized that Aboriginal peoples have an “inherent” right to self-government, and that the determination of citizenship is within the jurisdiction of Aboriginal Nations to determine.¹⁶⁵ Canada considers “membership” to be an internal matter for Aboriginal Nations, and that it is not only properly within their sphere of jurisdiction, but it is “integral” to the maintenance of their distinct cultures.¹⁶⁶ Thus, while Canada has interfered with the right of Aboriginal peoples to determine citizenship through its laws, regulations and policies, this fact alone will not defeat the chain of “continuity” between the past and current practices of Aboriginal Nations.¹⁶⁷ The Court in *Van der Peet* explained:

¹⁶⁴ *Generative Structure of Aboriginal Rights*, *supra* note 115 at 22. Slattery describes the hypothetical situation of assessing an Aboriginal right to trade in furs by First Nations and Métis and argued that the date for determining rights must not result in unfairness to First Nations where: “The group of mixed aboriginal-European descent is credited with an aboriginal right that is denied their Indian neighbours”.

¹⁶⁵ Indian and Northern Affairs Canada, “Federal Guide: Aboriginal Self-Government: The Government of Canada’s Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government” (Ottawa: Minister of Public Works and Government Services, 1995), online: INAC <<http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/sg/sg-eng.asp#PartI>> [*Inherent Right Policy*].

¹⁶⁶ *Ibid.* at Part I: Scope of Negotiations.

¹⁶⁷ *Van der Peet*, *supra* note 6 at para.65.

I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, traditions and customs, and those, which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, tradition or custom which existed prior to contact, but then resumed the practice, tradition or custom at a later date. Such an interruption will not preclude the establishment of an aboriginal right.¹⁶⁸

The fact that this right has been regulated in part by Canada does not affect the definition of the right or its continuity with past practices.¹⁶⁹ Many factors point to the continuity of the Aboriginal right to determine citizenship: (1) the significant history of Aboriginal Nations determining their own citizenship (thousands of years) versus the limited time in which Canada has regulated that right (a hundred or so); (2) the fact that Canada has acknowledged both the inherent right of Aboriginal peoples to be self-governing as a protected constitutional right and jurisdiction of Aboriginal peoples to determine their own citizenship; and (3) the fact that many First Nations (bands) partake in determining their own membership, while others have either developed their own self-government citizenship codes or are in related treaty negotiations. It cannot be properly argued that the right to determine citizenship lacks continuity with past practices and, in fact, its non-recognition may be a breach of the inherent right to self-government, in addition to a

¹⁶⁸ *Ibid.*

¹⁶⁹ *Van der Peet*, *supra* note 6 at paras. 60-68. At para.65: "Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, *infra*, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right". *Sparrow*, *supra* note 5 at paras. 23-27, 36.

breach of Canada's constitutional promise to ensure the cultural survival of Aboriginal peoples.¹⁷⁰

Another key aspect of continuity in assessing Aboriginal rights claims is the determination by the Supreme Court of Canada that Aboriginal rights are able to evolve into modern forms and should not be "frozen" in time.¹⁷¹ Citing with approval both *Sparrow* and *Van der Peet*, the Supreme Court of Canada in *Sappier and Gray* explained:

In *Sparrow*, Dickson, C.J. explained that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". Citing Professor Slattery, he stated that "the word 'existing' suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'".

...L'Heureux-Dube J. in dissent in *Van der Peet* emphasized that "aboriginal rights must be permitted to

¹⁷⁰ *Aboriginal Rights*, *supra* note 106 at 7-8. McNeil makes the argument that the band governance provisions of the *Indian Act* may not necessarily have infringed the Aboriginal right to self-government, as the provisions did not make Aboriginal government illegal, or even prevent it from functioning in addition to band governments. By way of analogy, the same could be said for band membership provisions and the traditional forms of determining citizenship. At page 13, he explains that: "...one could regard the taking away of a First Nation's right to determine its own membership (if in fact that happened) as an infringement of its broader right of self-government rather than an extinguishment of the narrower right to determine membership".

¹⁷¹ See for example: *Sparrow*, *supra* note 5 at para.27. "Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate 'frozen rights' must be rejected". *Van der Peet*, *supra* note 6 at para.64. "The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow*... that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a 'frozen rights' approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights". *Sappier and Gray*, *supra* note 6 at para.49.

maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live".¹⁷²

With regard to the right to determine membership, an evolution of the practice would include the ability to decide who has status and band membership (as an interim measure), and who has citizenship rights within the larger Nation. As these communities have evolved over time due to intermarriage, their ability to include the children of mixed relationships should also be recognized as part of that right. By way of analogy, the Court, in *Sappier and Gray*, rejected the Crown's argument that the building of wooden homes in modern times by Aboriginal people was not a logical evolution of building wigwams in pre-contact times.

If aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless. Surely the Crown cannot be suggesting that the respondents, all of whom live on a reserve, would be limited to building wigwams. If such were the case, the doctrine of aboriginal rights would truly be limited to recognizing and affirming a narrow subset of "anthropological curiosities", and our notion of aboriginality would be reduced to a small number of outdated stereotypes. The cultures of the aboriginal peoples who occupied the lands now forming Canada prior to the arrival of the Europeans, and who did so while living in organized societies with their own distinctive ways of life, cannot be reduced to wigwams, baskets and canoes.¹⁷³

The generic or specific right to determine Aboriginal citizenship should be recognized for all Aboriginal Nations as an evolution or continuance of pre-contact practices.¹⁷⁴ This, of course, does not mean that the way in which Aboriginal Nations will determine citizenship will be generic or one-size fits all. The "how" of the right should be left to

¹⁷² *Sappier and Gray*, *supra* note 6 at para.49.

¹⁷³ *Ibid.*

¹⁷⁴ *Van der Peet*, *supra* note 6 at para.64.

each Nation to determine for themselves. While the right may have taken on many different adaptations by the now politically divided Aboriginal groups in Canada as a result of the Canada's laws and regulations, the right still has continuity with past practices, and demonstrates the ability of Aboriginal people to maintain their identities in the face of assimilationist policies.¹⁷⁵

Several aspects of the *Van der Peet* test relate to the evidence necessary to prove the right and the apparent requirement that Aboriginal rights be adjudicated on a Nation by Nation basis. However, as argued by Slattery, generic rights should not have to be litigated by each Aboriginal Nation.¹⁷⁶ Slattery used the example of Aboriginal title to explain the concept of generic rights, and to point out how the Court changed its own conception of how Aboriginal rights are to be determined.

The crucial point to note is that *Delgamuukw* treats aboriginal title as a uniform right, whose dimensions do not vary significantly from group to group according to their historic patterns of life. Aboriginal title is not a specific right of the kind envisaged in *Van der Peet*, or even a bundle of specific rights. It is a *generic right* – a right of a standardized character that takes the same basic form wherever it occurs. The fundamental contours of the right are determined by the common law rather than the distinctive circumstances of each group”.¹⁷⁷

Therefore, generic Aboriginal rights could cover the Aboriginal right to determine citizenship either as a generic right in itself that applies to all Aboriginal Nations, or a right that is generic to all Aboriginal Nations by virtue of the generic nature of the larger rights from which it may originate, i.e., the generic right to self-government, the generic

¹⁷⁵ *Sui Generis Nature of Aboriginal Rights*, *supra* note 107 at 12. “If they can survive as peoples through explicit policies of assimilation, racism, and cultural genocide, surely they will not be overwhelmed by securing a place in the common law where a greater departure from constraints can be made”.

¹⁷⁶ *Generative Structure of Aboriginal Rights*, *supra* note 79.

¹⁷⁷ *Ibid.* at 4.

right to customary laws, and/or the generic right to cultural integrity. As a result, the Supreme Court of Canada should recognize this key difference in the nature of Aboriginal rights and assess them accordingly. Otherwise, an amendment to the current test will be required to accommodate the unique nature of the Aboriginal right to determine citizenship. Similarly pre-contact evidence of how the generic right to determine citizenship was practiced and the corresponding social, political and legal effects of those practices within Aboriginal communities may not be readily available for all Aboriginal Nations. The documentary evidence that would be available would be imbued with the inherent biases of European historians, anthropologists, ethnographers and missionaries, and less reflective of past and current Aboriginal perspectives. Further, constitutional rights are too important to be left to a legal battle between historical experts or ethnographers in criminal courts.¹⁷⁸

The Supreme Court of Canada has also recognized the evidentiary difficulties that may arise, given the fact that Aboriginal Nations did not keep written records, and have allowed for some flexibility and accommodation when reviewing the evidence before it.¹⁷⁹ The Court, in *Sappier and Gray*, emphasized that the main purpose of section 35 is to protect the “cultural security and continuity” of Aboriginal Nations so that future generations may exist and thrive into the future.¹⁸⁰ This purpose informs all aspects of the *Van der Peet* test and is even more important when the right being considered is the right to determine citizenship. The Court explained:

Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security

¹⁷⁸ *Generative Structure of Aboriginal Rights*, *supra* note 115 at 2.

¹⁷⁹ *Van der Peet*, *supra* note 6 at para. 68.

¹⁸⁰ *Sappier and Gray*, *supra* note 6 at para. 33.

and continuity for the particular aboriginal society. This object gives context to the analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available.¹⁸¹

Therefore, given that the purpose is to ensure the cultural security and continuity of Aboriginal Nations, in the case of generic Aboriginal rights (like the Aboriginal right to determine citizenship), the evidentiary burden should not be placed on each separate Nation to prove that it has this right, as the essential elements of the right would be the same. Indeed, the Supreme Court of Canada in *Corbiere* held that its decision would not apply only to the Batchewana Indian Band bringing the claim, but that it would apply to all bands across the country.¹⁸² Thus, there is Supreme Court precedent for making substantive rulings concerning Aboriginal identity, culture, and community participation applicable on a generic basis.

The Court in *Van der Peet* also emphasized that practices, customs or traditions, had to be of “independent significance” to the Aboriginal culture in which it exists, meaning that incidental rights could not “piggyback” on “integral” rights. Similarly, the requirement in *Van der Peet* that an Aboriginal right be distinct has also been addressed in *Sappier and Gray*.¹⁸³ Specifically, the Court cited with approval John Borrows and held that: “The use of the word “distinctive” as a qualifier is meant to incorporate an

¹⁸¹ *Ibid.* (emphasis added)

¹⁸² *Corbiere*, *supra* note 11 at paras. 22-24.

¹⁸³ *Van der Peet*, *supra* note 6 at para.55. “To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the

element of aboriginal specificity. However, "distinctive" does not mean 'distinct', and the notion of aboriginality must not be reduced to 'racialized stereotypes of Aboriginal peoples'.¹⁸⁴ Thus, the Aboriginal right to determine citizenship should be recognized because it affirms and protects Aboriginality, as much if not more than other Aboriginal practices. Just as Aboriginal rights cannot be reduced to "racialized stereotypes of Aboriginal peoples", so too is the exercise of the right limited not to citizenship codes, customs and practices that do racialize Aboriginal peoples, like blood quantum codes, for example. Similarly, rigid traditional codes based on pre-contact interpretations of what "tradition" is, or codes based on the racist and assimilatory provisions of the *Indian Act*, are also examples of prohibited exercises of the Aboriginal right to determine citizenship. Therefore, this part of the *Van der Peet* test must be understood in this context, or must be amended to ensure the continued existence of Aboriginal identities and cultures.

Although the Court in *Van Der Peet* also held that the influence of European culture is only relevant if the Aboriginal custom is integral because of that influence, the Court later on amended its theories in this regard in order to accommodate the Métis in *Powley*.¹⁸⁵ In *Powley*, the Court explained that it was necessary to amend the *Van der Peet* test to accommodate the post-contact nature of Métis and their rights: "...we uphold the basic elements of the *Van der Peet* test... and apply these to the respondents' claim. However, we modify certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between

culture of the society distinctive -- that it was one of the things that truly made the society what it was". *Sappier and Gray*, *supra* note 5 at para.35-45.

¹⁸⁴ *Ibid.* at para.45.

¹⁸⁵ *Van der Peet*, *supra* note 6 at para. 73. *Powley*, *supra* note 8 at para. 14.

Indian claims and Métis claims”.¹⁸⁶ Specifically, the Court explained that the only way that Métis peoples could survive is through constitutional protection:

The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.¹⁸⁷

However, this principle also applies to “other aboriginal communities” in Canada.

Therefore, if the Court required an amendment to the basic *Van der Peet* test to ensure the survival of Métis cultures, then it should also ensure that appropriate amendments or accommodations are made for Aboriginal rights which serve to protect the identities and cultures of Aboriginal Nations (Mohawk, Mi’kmaq, etc.), who predated the Métis by thousands of years (and some would argue, since time immemorial). It would not be an equitable interpretation of section 35 to recognize the post-contact development and evolution of the Métis, but not allow for the same cultural evolution of Aboriginal Nations. To do otherwise would not only freeze their identities and cultures at an arbitrary point in time, but would also lead to their eventual demise even as they continue to evolve, adapt and change, while their rights, practices, identities and cultures which are part of those changes are not protected. This can only lead to further divisions in ever-changing communities where doctors, lawyers, teachers, managers, and business people are categorized as non-Aboriginal, and only the most traditional people who engage in pre-contact practices qualify as “Aboriginal”.

¹⁸⁶ *Powley*, *supra* note 8 at para.14.

¹⁸⁷ *Ibid.* at para.17. (emphasis added)

The issue may seem straight forward in *Van der Peet* where the Court had to assess a specific practice (fishing), but when the right is more generic (citizenship), the *Van der Peet* test is not as easily applicable. That being said, even if the test were applied as it reads in *Van der Peet*, with the clarifications made in *Delgamuukw*, *Powley* and *Sappier and Gray*, the Aboriginal Nations would still be able to prove the existence of their right to determine citizenship, as they were here living on the land in organized societies, with their own governments, laws, customs and traditions, long before the Europeans arrived. The key would be for the Court to remember how the right is to be determined: i.e., taking into account the Aboriginal perspective which includes their own laws as well as their customs, traditions and practices. The Supreme Court of Canada has cited with approval Australia's *Mabo* case, specifically as a basis for assessing the existence of Aboriginal rights from an Aboriginal perspective.¹⁸⁸ In *Mabo*, the High Court of Australia held that Aboriginal title was based on the "traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory".¹⁸⁹ Further, that "The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs."¹⁹⁰ Aboriginal Nations in Canada were making decisions about their citizens according to those very laws, customs and traditions and continued to do so upon the arrival of Europeans.¹⁹¹ Neither was their right to determine their own citizenship ever negotiated away under any treaty-making or land

¹⁸⁸ *Sparrow to Van der Peet*, *supra* note 5 at 12. *Mabo v. State of Queensland (No.2)* (1992) 175 C.L.R. 1 [*Mabo*]. The Supreme Court of Canada cited *Mabo* with approval in *Delgamuukw*, *supra* note 7 for example.

¹⁸⁹ *Mabo*, *supra* note 188 at 58 as cited in *Sparrow to Van der Peet*, *supra* note 5 at 12.

¹⁹⁰ *Ibid.*

surrender process.¹⁹² In fact, academics like Borrows have argued that Aboriginal laws are not only compatible with Crown sovereignty, but that Crown sovereignty may well depend on the recognition of those laws.

In fact, it is possible to argue that Aboriginal sovereignty is not only compatible with Crown sovereignty but also necessary for Crown sovereignty to exist. For example, there are strong arguments that the Crown can only receive the right to occupy Aboriginal lands and exercise accompanying privileges by receiving them through treaty. This is the ultimate in compatibility; Crown sovereignty is subsequent to and dependent upon Aboriginal sovereignty under our law's formulation. With an exercise of Aboriginal sovereignty legitimating or perfecting Crown sovereignty in a certain area, assertions of Crown sovereignty always remain less than honorable or complete.¹⁹³

Thus, so long as the Supreme Court of Canada remembers to include and give equal weight to the Aboriginal perspective in their assessment of Aboriginal rights, which includes judicial consideration of Aboriginal laws, practices, traditions and customs, the Aboriginal right to determine citizenship would be constitutionally protected.

¹⁹¹ See generally: *Our Nations Summary*, *supra* note 14. *Our Nations Report*, *supra* note 105, *First Nations Citizenship*, *supra* note 11, *Status and Membership Report*, *supra* note 11.

¹⁹² Nova Scotia, "The Evolution of Parliamentary Democracy in Nova Scotia: 1752 Treaty or Articles of Peace and Friendship Renewed: 22 November 1752", online: Democracy 250 <http://timeline.democracy250.ca/library/pdf/0032_1752-11-22_Treaty.pdf> [*Treaty of 1752*]. Canadian Native Nations, "Maritimes Treaties", online: <<http://www.kstrom.net/isk/maps/novascotiatreaties.html#micmac>> [*Maritime Treaties*]. *Sappier and Gray*, *supra* note 5 at para.62. In fact, some of the treaties (especially in the Atlantic provinces), specifically ensured that the rights of the treaty signatories as well as their "heirs and the heirs of their heirs forever" were protected. Although discussing a different treaty, the Court in *Sappier and Gray* left open the question whether the Treaty of 1725 and its ratification in 1726 were valid Treaties in the Atlantic region. The point really is that the treaty-making process did not do anything to extinguish the right of Aboriginal peoples to determine their own citizenship in their Nations. There is nothing that prevents a treaty right to determine Aboriginal citizenship, but only seems to support one. However, the role of treaties and the possible rights protected by them is worthy of its own study, a task that is beyond the scope of this thesis.

¹⁹³ *Aboriginal Governance*, *supra* note 106 at 11.

In assessing Aboriginal rights, the Court in *Van der Peet* also suggested that land tenure should not be the sole focus of inquiry. Instead, the focus should be on the relationship between Aboriginal peoples and the land:

In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.¹⁹⁴

This relationship would include Aboriginal laws about how it is to be used and by whom. Therefore, by not focusing solely on land, citizenship rules can be protected for those communities that do not have reserves, that have been removed from their traditional territories, or that are now spread over several different territories. Land usage may not even be a factor for certain rights, like the right to determine citizenship which is more about the preservation of identity and culture, versus using resources from the land. This allows those living on and off reserve and those on or off territory to partake in their identities, cultures and communal governments without having to check their rights at artificial borders. Unlike rights like hunting and fishing that require a land base to exercise, citizenship requires only the Aboriginal collectivity and individuals who wish to belong together. Furthermore, Aboriginal citizens were always citizens of their particular Aboriginal Nations, regardless if they ventured to and from their traditional territories to hunt, fish, gather, make war or trade. The fact is, when they returned to their camps, wigwams, or seasonal shelters, they were still Mi'kmaq, Maliseet and Mohawk. As was also explained in *Powley*, Aboriginal collectivities require constitutional protection to

¹⁹⁴ *Van der Peet*, *supra* note 5 at para. 74.

maintain their identities and cultures among Canada's majority population. Whether or not they have land bases, Aboriginal Nations' rights to determine their own citizenship are protected within section 35, and should be respected. The alternatives are bleak, as the *Indian Act* is a good example of how external forces can cause the destruction of identities, the loss of culture, and the promotion of divisions within families and communities when the right to determine citizenship is not respected.¹⁹⁵ Canada's track record in this regard is shameful and needs immediate rectification.

There is little doubt that Canada has interfered with the right to determine Aboriginal citizenship by virtue of the registration and membership provisions of the *Indian Act*, and this has resulted in a form of regulation of that right. However, as explained in *Sparrow*, regulation is not enough to prove extinguishment of the right.¹⁹⁶ A "clear and plain" intention on the part of Canada is required to extinguish the right.¹⁹⁷ Specifically, the Court in *Sparrow* held:

There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.¹⁹⁸

The Crown tried unsuccessfully to argue that because the fishery had been so heavily regulated, this ought to amount to the extinguishment of the right to fish. In *Delgamuukw* and *Gladstone*, similar arguments regarding extinguishment of Aboriginal rights were

¹⁹⁵ See generally: *Indefensibility of Aboriginal Rights*, *supra* note 142.

¹⁹⁶ *Sparrow*, *supra* note 5 at paras.37-38.

¹⁹⁷ *Ibid.* at para.37.

¹⁹⁸ *Ibid.* at para.38.

raised by the Crown, which were also rejected by the Supreme Court of Canada.¹⁹⁹ More recently in *Sappier and Gray*, the Court reaffirmed its earlier holdings in those two cases, and affirmed that: “A clear intent is necessary in order to extinguish aboriginal rights.”²⁰⁰

They went on to explain:

Following this Court’s decision in *Sparrow*, the regulation of Crown timber through a licensing scheme does not meet the high standard of demonstrating a clear intent to extinguish the aboriginal right to harvest wood for domestic uses. As Lamer C.J. explained in *Delgamuukw*, at para. 180, “[I]n *Sparrow*, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been ‘necessarily inconsistent’ with the continued exercise of aboriginal rights, they could not extinguish those rights.”²⁰¹

Therefore, the interference with Aboriginal peoples’ identities and communal belonging has occurred through regulation under the *Indian Act*. What makes the Indian Act different from other types of regulation, is that while the Act may have interfered with

¹⁹⁹ *Delgamuukw*, *supra* note 7 at paras.179-183. *Gladstone*, *supra* note 6 at paras.34-36. In *Gladstone*, the Supreme Court of Canada specifically held: “None of these regulations, when viewed individually or as a whole, can be said to express a clear and plain intention to extinguish the aboriginal rights of the Heiltsuk Band. While to extinguish an aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of aboriginal rights, it must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme. In this instance, the regulations and legislation regulating the herring spawn on kelp fishery prior to 1982 do not demonstrate any consistent intention on the part of the Crown. At various times prior to 1982 aboriginal peoples have been entirely prohibited from harvesting herring spawn on kelp, allowed to harvest herring spawn on kelp for food only, allowed to harvest herring spawn on kelp for sale with the written permission of the regional director and allowed to take herring roe pursuant to a licence granted under the Pacific Fishery Registration and Licensing Regulations. Such a varying regulatory scheme cannot be said to express a clear and plain intention to eliminate the aboriginal rights of the appellants and of the Heiltsuk Band. As in *Sparrow*, the Crown has only demonstrated that it controlled the fisheries, not that it has acted so as to delineate the extent of aboriginal rights” (emphasis added).

²⁰⁰ *Sappier and Gray*, *supra* note 6 at para. 57.

Aboriginal identity, it also acknowledged their identities as distinct from other Canadians. Further, the various regulations in place over time have relied on different criteria for the determination of Aboriginal identity and for different purposes. Far from extinguishing the right of Aboriginal peoples to determine their own identities, the *Indian Act*, may, in fact, be evidence that Aboriginal peoples have distinct identities in need of protection. Even the debates leading up to the *Bill C-31* amendments (referred to in Chapter 2 and later in Chapter 5), show that Canada felt that their regulation of band membership had been a “historic wrong”. The status and band membership provisions may have temporarily interfered with Aboriginal Nations’ rights to determine their own citizenship, but it did not extinguish those rights or change the nature of that right. Further, it could be argued that the status provisions were meant to determine who could access federal programs and services for federally created bands which had nothing to do with determining who was and was not a citizen of a traditional Aboriginal Nation. Although status and membership have become significant aspects of Aboriginal identity for many Aboriginal peoples, the intent of the legislation was not clear and plain enough to extinguish the Aboriginal right to determine citizenship. One might even argue that it was solely an exercise in cost reduction.

Having substantiated the right, and considered the issue of extinguishment, it is important to remember that Aboriginal rights are not absolute. While Aboriginal rights can and do evolve, the exercise of the right cannot be done in a way that is inconsistent with the original Aboriginal right to determine citizenship. The Court in *Delgamuukw* held that: “...lands subject to aboriginal title cannot be put to such uses as may be

²⁰¹ *Ibid.* at para. 60. (emphasis added)

irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together give rise to aboriginal title in the first place”.²⁰² The key to assessing the exercise of the right is the factor of a “substantial connection” between the people and the right.

I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be the internal limits on uses which land that is subject to aboriginal title may be put, i.e., uses which are inconsistent with continued use by future generations of aboriginals.²⁰³

Therefore, Aboriginal Nations could not exercise their Aboriginal right to determine citizenship today, in ways that are incompatible with the exercise of that right by future generations or the very reason behind the protection of the right. For example, the basis of determining a Nation’s own citizenship is to protect identity and culture for future

²⁰² *Delgamuukw*, *supra* note 7 at para. 128. The full quote is as follows: “Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. As discussed below, one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group’s distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot)”.

generations. If a Nation enacts codes, rules or laws which ensure their extinction in the future, then this would be inconsistent with the nature of the right itself, which is to protect the identity and culture of the group for the benefit of current and future generations. It would also be inconsistent with the purpose of the right being constitutionally protected, i.e., to protect the cultural security and continuity of the Aboriginal group.²⁰⁴

As important as protecting practices, traditions and customs, is ensuring their availability to future generations. Therefore modern circumstances, including the fact that: many Aboriginal children come from unions of Aboriginal and non-Aboriginal peoples, and from unions between Aboriginal peoples from different Aboriginal Nations, and there are also citizens who have varied living arrangements (on or off-reserve, on or off-territory), means that traditional practices must evolve, to accommodate these realities. For example, a citizenship code designed or implemented by an Aboriginal Nation that would lead to the eventual extinction of its society would be inconsistent or irreconcilable with the Nation's right to determine citizenship. This is because the code would thus ensure their disappearance as a recognized people as opposed to ensuring their continued existence. Furthermore, as explained previously, those kinds of codes would be inconsistent with the very objective of s.35 protection of Aboriginal rights, namely cultural security and continuity.²⁰⁵ While the Court in *Delgamuukw* clarified that the

²⁰³ *Ibid.* at para.154.

²⁰⁴ *Sappier and Gray, supra* note 6 at para. 33. *Powley, supra* note 7 at paras.13, 17. The Court also indicated that the purpose of section 35 with regard to the Métis and other Aboriginal communities was to “enhance their survival as distinctive communities,” and that they and other Aboriginal cultures could only survive with this constitutional protection.

²⁰⁵ *Ibid.*

limitation on an Aboriginal right was not one that “restricts that use of the land to those activities that have traditionally been carried out on it”²⁰⁶, it does mean that modern exercises cannot be inconsistent with the right. Therefore, the right to determine citizenship could evolve to adapt to modern circumstances, such as to include the children produced from out-marriage/relationship situations - like non-status Indians and those children adopted from other Aboriginal Nations. The key to the s.35 analysis of Aboriginal rights is ensuring the survival of Aboriginal Nations. Therefore, because the reliance on the *Indian Act*, blood quantum rules, or even rigid traditional rules exercised in modern times can lead to the extinction of Aboriginal Nations, they cannot be considered as practices to be protected under s.35.²⁰⁷

The practical side of cultural survival and the protection of Aboriginal societies is that Aboriginal Nations must protect their current generations through actions like determining their own citizenship in codes, customs, traditions and ceremonies, self-government agreements, treaties, etc. In some instances, this may be a matter of a band reconstituting its “membership” in an inclusive manner to ensure all of its rightful members are included as an interim measure, until larger issues of citizenship are determined. Other individual bands may decide to work together as a Nation, while still

²⁰⁶ *Delgamuukw*, *supra* note 7 at para. 132.

²⁰⁷ *Ibid.* at para. 131: “If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.” While some Aboriginal Nations might argue that they, therefore, have a right to “surrender” their Aboriginal right to determine its own citizenship and, therefore, also surrender their right to “survive” as a distinct culture into the future, it is unlikely that they would do so as a tactic to avoid having to enroll non-status Indians on their citizenship rolls. In addition, there would be some question as to who would be entitled to vote in such a “referendum” to surrender those rights and on whose behalf they could do so. This too would counter the purpose of s.35 as explained earlier. I address these issues in more detail in the last chapter.

others may join with currently unrecognized bands and off-reserve groups to work as Nations on citizenship issues. This citizenship process may cross provincial boundaries and will ultimately end up including those currently labeled as non-status Indians, off-reserve, *Bill C-31* reinstatementees, and perhaps some of those who had previously called themselves Métis.²⁰⁸ The Aboriginal right to determine citizenship is universally held by all Aboriginal Nations and, if used properly, could be a valuable tool to resist external assimilative pressures, overcome the damage done by the *Indian Act*, and protect Aboriginal societies and cultures for the benefit of future generations. At the same time, it will force the federal government to deal with the *Indian Act* and its discriminatory status provisions to give back identity, culture and citizenship to Aboriginal Nations where it belongs.

(b) Powerful Rights and Limits on Power

Aboriginal rights in Canada are part of a quickly evolving and complex area of the law.²⁰⁹ The Supreme Court of Canada has provided a basic test for the determination of Aboriginal rights, and has incorporated amendments to the test where necessary. Although Aboriginal rights are protected in the *Constitution Act, 1982*, the Court has held that Aboriginal rights are not absolute.²¹⁰ Further, those rights must be interpreted in reference to both Canadian common law and Aboriginal perspectives.²¹¹ Another

²⁰⁸ I discuss citizenship codes and possible solutions for the future in Chapter 6.

²⁰⁹ *Delgamuukw*, *supra* note 7 at para.159.

²¹⁰ *Sparrow*, *supra* note 5 at para.62. “Rights that are recognized and affirmed are not absolute”.

²¹¹ *Delgamuukw*, *supra* note 7 at para.112. Although speaking specifically about Aboriginal title in that case, the Court did refer to other Aboriginal rights: “However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it

restriction on Aboriginal rights from the jurisprudence is the inability of Aboriginal peoples to exercise Aboriginal rights in ways that may harm the public or themselves.²¹²

Just as Aboriginal peoples may be subject to various limits on their rights, so too is Canada. Canada has the power under section 91(24) of the *Constitution Act, 1867* to legislate with regards to Aboriginal peoples.²¹³ However, this does not give Canada a right to make for Aboriginal peoples, rules that which are harmful to them or that are inconsistent with Canada's fiduciary duty towards them.²¹⁴ The Court in *Sparrow* explained that section 35 incorporated restraint on Canada's power to legislate:

Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such

must be understood by reference to both common law and aboriginal perspectives". *Van der Peet, supra* note 6 at para. 49. "The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system".

²¹² *Sparrow, supra* note 5 at para. 71. "Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial".

²¹³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No.5 [*Constitution Act, 1867*] at s.91(24).

²¹⁴ *Sparrow, supra* note 5 at para. 62, 67, 75. In paragraph 67, the Court explained that: "The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1)". The Court further held at paragraph 75 that: "The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified".

scrutiny is in keeping with the liberal interpretive principle... and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada...²¹⁵

Not only are Aboriginal Nations prevented from providing for the extinction of their people through an Aboriginal right to determine citizenship. Canada too has no right to ensure their extinction by virtue of the exercise of its legislative powers under section 92(24) of the *Constitution Act, 1867*.

These types of limits and responsibilities apply to the Crown as well as Aboriginal peoples.²¹⁶ Aboriginal rights are powerful rights, but as with any power there must be limits. Aboriginal rights which exist within the context of traditional, domestic and international laws are limited in some instances. Just as no government in the world has unlimited power, so too must Aboriginal governments be subject to limits on power in the interests of their citizens. This does not mean that where laws conflict, Aboriginal laws must always give way; in fact they should not. It does mean, however, that the relationship between these laws and others must be the subject of an ongoing and ever-evolving relationship of give and take between Aboriginal peoples, the Crown and the international community. What is important now for Aboriginal governments is to ensure that their communities do not get the short end of the stick in that process of negotiation. In other words, the process of reconciliation between Canada and Aboriginal peoples goes both ways. Just as it would no longer be appropriate for one Aboriginal group to

²¹⁵ *Sparrow*, *supra* note 5 at para.62.

²¹⁶ *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 [*Haida*] at paras.57-59. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550 [*Taku*]. Although Canada has the primary jurisdiction over Aboriginal peoples pursuant to section 91(24), the provinces share in the fiduciary duty towards Aboriginal peoples, especially in areas which directly involve the provinces, like land matters.

make war with another over territory, Aboriginal peoples cannot use outdated racist assumptions about their citizens to preserve them. Reliance on section 35 rights means that there are inherent limits on their power, including not being able to exercise their rights in ways that are inconsistent with the right itself, and which would harm their citizens, create significant danger to others, or violate international human rights laws. One of the issues facing Aboriginal governments today is the demand by Canada that the *Charter* apply to their governments and all agreements between themselves and Canada.²¹⁷

This hotly debated issue of whether the *Charter* applies to Aboriginal governments and, therefore, limits the exercise of Aboriginal rights, has supporters on both sides.²¹⁸ One limit on the application of the *Charter* is that the rights contained therein apply as between individuals and governments, and do not apply between private parties unless those actions were carried out at the direction of, or on behalf of the government.²¹⁹ Section 32 specifically provides that the *Charter* applies to the federal, provincial and territorial governments and legislatures.²²⁰ Yet, it is silent on whether it specifically applies to Aboriginal governments and, if so, which forms (bands, organisations, self-governing or Treaty Nations). It was drafted without consultation with Aboriginal peoples, whose collective opposition to its constitutional entrenchment led to

²¹⁷ While there are arguably other reasonable limits on the exercise of Aboriginal rights, for the purposes of this thesis, I only briefly review the issue of the *Charter*'s application.

²¹⁸ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [*Charter*].

²¹⁹ T. Isaac, "Individual versus Collective Rights: Aboriginal People and the Significance of *Thomas v. Norris*: Case Comment" (1992) 21 *Ma. L.J.* 618 [*Individual versus Collective Rights*].

²²⁰ *Charter*, *supra* note 218 at s.32.

the creation of section 25 of the *Charter*.²²¹ Section 25 provides that the rights contained in the *Charter* will not “abrogate or derogate” from Aboriginal rights, treaty rights or other rights.²²² The *Charter* also provides many other rights of both general and limited application. For example, section 7 provides everyone with the right to life, liberty and security of person.²²³ On the other hand, certain rights such as those which provide everyone in the New Brunswick legislature with the right to work in both French and/or English are of limited application; i.e., these rights apply only in New Brunswick.²²⁴ Among the rights of general application, one of the more controversial ones, as far as Aboriginal peoples and their rights are concerned, has been section 15, the equality right (anti-discrimination). Some Aboriginal Peoples fear that non-Aboriginal people will use section 15’s anti-discrimination provision against Aboriginal Peoples and their governments to argue that there should not be any “Aboriginal” governments.²²⁵ Since its entrenchment, the *Charter* has continued to create much controversy among Aboriginal peoples as to its applicability to Aboriginal peoples and their governments in Canada.

(i) Does the *Charter* Apply to Aboriginal Peoples?

This controversy over the *Charter*’s applicability to Aboriginal peoples has led to various groups taking “positions” on the matter. The Report of the Royal Commission on Aboriginal Peoples (RCAP) reviewed the matter of the *Charter*’s applicability to Aboriginal peoples. RCAP concluded that since Aboriginal peoples enjoy *Charter*

²²¹ B. Morse, “Twenty Years of Charter Protection: The Status of Aboriginal Peoples under the Canadian Charter of Rights and Freedoms” in *The Symposium: 20 Years Under the Charter*, (2002) 21 Windsor Y.B. Access Just. 385 [*Charter Protection*] at 386.

²²² *Charter*, *supra* note 218 at s.25.

²²³ *Ibid.* at s.7

²²⁴ *Ibid.* at s.16.

²²⁵ *Charter Protection*, *supra* note 221 at 386.

protections in their relations with federal, provincial and territorial governments, they also must have the same protections with their own governments. Despite the fact that section 32(1) of the *Charter* does not specifically mention the applicability of the *Charter* to Aboriginal governments, RCAP, nonetheless, concluded that it would not make sense for it not to be applicable.

...it would be highly anomalous if Canadian citizens enjoyed the protection of the Charter in their relations with every government in Canada except for Aboriginal governments. The general provisions of the Charter are designed to provide a uniform level of protection for individuals in exercising their basic rights and freedoms within Canada.²²⁶

This reasoning is not unlike that used to repeal section 67 of the *Canadian Human Rights Act* (CHRA).²²⁷ International human rights groups as well as Aboriginal women's and off-reserve groups had long advocated for this change to the *CHRA*.²²⁸ Previously,

²²⁶ RCAP, vol.2, part 1, *supra* note 154 at 227.

²²⁷ *Canadian Human Rights Act*, R.S., 2008, c.30 [CHRA] at ss. 1.1-4 of the *Related Provisions*.

²²⁸ Congress of Aboriginal Peoples, "Human Rights Commission on the Right Track", online: CAP <http://www.abo-peoples.org/media/current/PR_HumanRightsCom_Jan28_08.html>. "It seems the Congress of Aboriginal Peoples is not alone in its unending call to repeal section 67 of the Canadian Human Rights Act and grant the most basic of rights protection mechanisms to First Nations peoples living under the *Indian Act*". Canadian Human Rights Commission, "Still a Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the *Canadian Human Rights Act*: January 2008" online: CHRC <http://www.chrc-ccdp.ca/pdf/report_still_matter_of_rights_en.pdf>. Native Women's Association of Canada, "Aboriginal Women's Rights are Human Rights" online: NWAC <<http://www.nwac-hq.org/documents/AboriginalWomensRightsAreHumanRights.pdf>> at p.19-23. NWAC explains that one of the results of non-application of the *CHRA* to Aboriginal peoples is the "invidious effect of section 67 in protecting from examination the systemic racism of the Act". Human Rights Committee, "Concluding Observations of the Human Rights Committee: Canada: 2/11/2005" online: Treaty Council <http://www.treatycouncil.org/PDFs/Concluding_observations_Canada_HRC.pdf> at para.22. "The Committee notes with concern that the Canadian Human Rights Act cannot affect any provision of the *Indian Act* or any provision made under or pursuant to that

individuals could not bring claims of discrimination against their bands or the federal government with regard to a band's *Indian Act* activities. Although this has now changed with the repeal of section 67, the *CHRA* provides that claims cannot be brought against bands for three years.²²⁹ Therefore, access to those human rights protections is still some time away for many Aboriginal peoples. The new changes mean that while "due regard" will be given to Aboriginal laws and customs and that nothing in the *CHRA* will "abrogate or derogate" from Aboriginal and treaty rights protected in section 35 of the *Constitution Act, 1982*, they still must be interpreted so that the rights contained therein align with the principle of gender equity.²³⁰

RCAP reviewed the similar non-derogation clause in the *Charter* and concluded that while section 25 does offer protections to Aboriginal and treaty rights, it does not exclude the application of the *Charter* to Aboriginal peoples and their governments.²³¹ The Commissioners felt that Aboriginal peoples are entitled to enjoy the protections of the *Charter* no matter where they live, and that Aboriginal governments occupy the same position relative to the *Charter* as do the federal and provincial governments.²³² In other words, if Aboriginal governments are to be considered a third order of government, then

Act, thus allowing discrimination to be practiced as long as it can be justified under the Indian Act. It is concerned that the discriminatory effects of the Indian Act against Aboriginal women and their children in matters of reserve membership has still not been remedied, and that the issue of matrimonial real property on reserve lands has still not been properly addressed. While stressing the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them and welcoming the initiatives taken to that end, the Committee observes that balancing collective and individual interests on reserves to the sole detriment of women is not compatible with the Covenant".

²²⁹ *CHRA*, *supra* note 227 at s.3 of the *Related Provisions*.

²³⁰ *Ibid.* at s.1.2 of the *Related Provisions*.

²³¹ *RCAP*, vol.2, part 1, *supra* note 154 at 229.

²³² *Ibid.* at 230.

similar laws will apply to their powers as are applied to the federal and provincial levels of government. RCAP pointed out that while Aboriginal governments would have the use of the *Charter*'s notwithstanding clause, only Aboriginal Nations, not local Aboriginal communities, could use it.²³³ Similar to the interpretive provisions in the *CHRA*, RCAP argued that while the *Charter* applies to Aboriginal peoples and governments, "the Charter must be given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of Aboriginal peoples."²³⁴

The controversy over the *Charter*'s applicability was fuelled again in the same year by new government policy involving Aboriginal peoples. In 1996, Minister Irwin of Indian and Northern Affairs Canada (INAC), announced the federal government's new policy on Aboriginal self-government. It was known as the "Inherent Right Policy" and stated that the government of Canada recognized that the inherent right of Aboriginal peoples to self-government was a protected Aboriginal right under section 35(1) of the *Constitution Act, 1982*.²³⁵ The federal government's position with regard to self-government arrangements clearly that the *Charter* would apply:

The Government is committed to the principle that the *Canadian Charter of Rights and Freedoms* should bind all governments in Canada, so that Aboriginal peoples and non-Aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the Charter. Self-government agreements, including treaties, will, therefore, have to provide that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and institutions in relation to all matters within their respective jurisdictions and authorities.²³⁶

²³³ *Ibid.* at 231.

²³⁴ *Ibid.* at 234.

²³⁵ *Inherent Right Policy*, *supra* note 163. "The recognition of the Inherent Right of Self-Government under section 35 of the Canadian Constitution has been the cornerstone of our government's Aboriginal policy since our election in 1993."

²³⁶ *Ibid.* at 2.

Specifically with regard to the interpretation of section 25, the federal government explained that the *Charter* is about balancing rights:

The Charter itself already contains a provision (section 25) directing that it must be interpreted in a manner that respects Aboriginal and treaty rights, which would include, under the federal approach, the inherent right. The Charter is thus designed to ensure a sensitive balance between individual rights and freedoms, and the unique values and traditions of Aboriginal peoples in Canada.²³⁷

While Aboriginal peoples had long called for the federal government to officially recognize the inherent right of Aboriginal peoples to self-government; the details of the policy were not well received. This, notwithstanding that the *Charlottetown Accord* agreed to by all parties (including the Aboriginal representatives) would have expressly applied the *Charter* to self-government agreements.²³⁸ However, many First Nations are still opposed to the application of the Charter to their governments.²³⁹

In their recent policy document “Framework for the Recognition and Implementation of First Nation Governments”, the AFN stated that the “...current Federal Inherent Right Policy is obstructive of recognition” of the inherent right to self-

²³⁷ *Ibid.*

²³⁸ Canadian Encyclopedia, “The Charlottetown Accord”, online: The Canadian Encyclopedia <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1SEC831507>> [*Charlottetown Accord*] at IV. Section 4 of the Accord dealt with the First Peoples. Section 43 provided as follows: “Canadian Charter of Rights and Freedoms should apply immediately to governments of Aboriginal peoples. A technical change should be made to the English text of Sections 3, 4 and 5 of the Canadian Charter of Rights and Freedoms to ensure that it corresponds to the French text. The legislative bodies of Aboriginal peoples should have access to section 33 of the Constitution Act, 1982 (the notwithstanding clause) under conditions that are appropriate to the circumstances of Aboriginal peoples and their legislative bodies”. The Accord would have expressly protected self-government as a section 35 right which would have included the jurisdiction of Aboriginal governments over “languages, cultures, economies, identities, institutions and traditions”.

government.²⁴⁰ They argued that the "...policy must be repealed and replaced".²⁴¹ Many First Nations were opposed to constitutionally entrenching the *Charter* back in the 1980s because they feared that the *Charter*'s orientation towards individual rights would threaten Aboriginal culture and treaty rights.²⁴² The AFN's resistance to accepting the guarantees in the *Charter* flowed over into the equality guarantee that is now found in section 35(4) of the *Constitution Act, 1982*. During the 1983 constitutional conference, the AFN was the only national Aboriginal organisation not in agreement with the adoption of the equality guarantee as part of Aboriginal rights. While the AFN eventually gave in, in exchange for the promise that government would not interfere with their citizenship, the AFN's position was as follows:

We would like to make it clear that we agree with the women who spoke so forcefully this morning that they have been treated unjustly. The discrimination they suffered was forced upon us through a system imposed upon us by white colonial government through the Indian Act. It was not the result of our traditional laws, and in fact it would not have occurred under our traditional laws. We must make it perfectly clear why we feel so strongly that we must control our own citizenship. The AFN maintains that 'equality' does already exist with the traditional 'citizenship code' of all First Nations people.²⁴³

While the AFN may have given in to accepting section 35(4) of the *Constitution Act, 1982*, they continue to resist application of the *Charter* to self-government

²³⁹ *Charter Protection*, *supra* note 221 at 386.

²⁴⁰ Assembly of First Nations, "Proposed Framework to Advance the Recognition and Implementation of First Nation Governments" (Ottawa: AFN, 2005) [*Implementation Framework*] 13.

²⁴¹ *Ibid.*

²⁴² *Charter Protection*, *supra* note 221 at 386.

²⁴³ J. Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics" in D. Scheidermen, K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 173-174 [*Traditional Equality*].

arrangements. In the end, it would appear that First Nations are still not in control of their citizenship issues, nor have many been able to prevent or resolve discrimination and inequality issues with regards to status and membership in their communities.

The Native Women's Association of Canada (NWAC) and many Aboriginal women in Canada have taken a position opposite to that of the AFN. They feel that the *Charter* should apply not only to self-government arrangements, but also to First Nation band councils.²⁴⁴ In the 1990s, NWAC released a document which explained their position regarding the federal government's negotiations on self-government, referred to as the "Canada Package". In its review and analysis of the various options being proposed, NWAC stated clearly that it wanted protections for Aboriginal women, and that the *Charter* should apply.²⁴⁵ It argued that should recognition of the inherent right of self-government fall outside the *Charter* and section 35 of the *Constitution Act*, then they specifically wanted the *Charter* guarantees, including section 15 equality rights, to apply to ALL Aboriginal peoples.²⁴⁶ In its paper on "Matriarchy and the Canadian Charter", NWAC restated its position that: "The Canadian Charter of Rights and Freedoms must apply to all agreements negotiated pertaining to self-government and self-determination."²⁴⁷

Politically, the off-reserve Aboriginal peoples of Canada have been represented by separate organisations for quite some time, and while they are often made up of large

²⁴⁴ Native Women's Association of Canada, "Aboriginal Women, Self-Government, and the Canadian Charter of Rights and Freedoms" (Ottawa: NWAC, 1991) [*Aboriginal Women and the Charter*].

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.* at 7.

percentages of Aboriginal women, their organisations have, nonetheless, remained a separate political voice. The Congress of Aboriginal Peoples (CAP) has always supported the applicability of the *Charter* to Aboriginal peoples, and even supported NWAC during the constitutional talks when NWAC was excluded.²⁴⁸ While NWAC pursued its litigation against the federal government for excluding its organisation from the talks, CAP (then the Native Council of Canada) tried unsuccessfully to bring about an agreement amongst the parties and to acquire a seat at the constitutional table for NWAC.²⁴⁹ CAP's current constituents are status Indians who live off-reserve (often those who are excluded from band membership), as well as Métis and non-status Indians, all of whom receive less than equal treatment from the federal and provincial governments regarding programs, services and access to negotiating tables.²⁵⁰ This is likely why this organisation and its affiliates support the application of the *Charter* for the protection it might offer its constituency. Just as Aboriginal political organisations differ in their views on the *Charter's* application to Aboriginal peoples, so too have the views Aboriginal and non-Aboriginal academics.

²⁴⁷ Native Women's Association of Canada, "Matriarchy and the Canadian Charter", online: NWAC <<http://www.nwac-hq.org/en/documents/MatriarchyandtheCanadianCharter.pdf>> at 8.

²⁴⁸ *Traditional Equality*, *supra* note 243 at 172-175.

²⁴⁹ *Ibid.*

²⁵⁰ *Harry Daniels et al. v. Canada (Minister of Indian Affairs and Northern Development)*, [2008] F.C.J. No. 1025 (Docket T-2172-99) (F.C.T.D.) [*Daniels*]. This case is brought by the Congress of Aboriginal Peoples and others seeking a declaration (in part) that Canada has a fiduciary duty to negotiate with them and also to clarify that Métis and Non-Status Indians are considered "Indians" in section 91(24). Congress of Aboriginal Peoples, "Where Does All the Money Go?: Report on Proactive Disclosure of Grants and Contributions for Aboriginal Peoples, 2006-2007", online: CAP <

(ii) Those Opposed

A very brief survey of the literature on the issue of the Charter's applicability to Aboriginal peoples and their governments revealed that of eighteen articles and books, thirteen authors argue that the *Charter* does or should apply, and five think the *Charter* does not or should not apply.²⁵¹ The academic debate on this point raises important moral, legal, and political considerations. In addressing the question of the *Charter's* applicability to Aboriginal peoples, I am referring to its potential applicability to all Aboriginal peoples - individual Aboriginal peoples (status and non-status Indians); First Nations (bands); Aboriginal Nations under self-government agreements or modern treaties; and traditional Aboriginal Nations who may assert self-governing authority. I am also specifically referring to the relationship between individual Aboriginal peoples and federal, provincial and Aboriginal governments as well as between Aboriginal Nations and federal and provincial governments. I am not speaking solely about the reconstituted Aboriginal Nations some hope will materialize in the future, nor am I limiting the question of applicability to First Nation band councils and their on-reserve members. Therefore, the applicability of the *Charter* has a larger potential impact than is considered in many of the articles reviewed for the purposes of this review.

Kent McNeil is in the group of academics who argue that the *Charter* should not apply to Aboriginal governments in Canada.²⁵² He qualifies that he is not putting forward

http://www.abo-peoples.org/policy/GC0607_TC_E.html> [*Where Does All the Money Go*].

²⁵¹ My review of the literature on this topic, by necessity, does not cover every book, article, and commentary written on it.

²⁵² K. McNeil, "Aboriginal Governments and the Charter: Lessons from the United States" (2002) 17 *Canadian Journal of Law and Society* 73 [*Aboriginal Governments and the Charter*].

a legal argument, i.e., as to whether the *Charter* applies to Aboriginal governments as a matter of Canadian constitutional law.²⁵³ He also limits his definition of “Aboriginal governments” to traditional governments, i.e., Indian, Inuit and Métis peoples with inherent rights.²⁵⁴ His argument, therefore, is a normative one: whether the *Charter* “should” apply to traditional Aboriginal governments and his clear position is that it should not.²⁵⁵ McNeil does not agree with those who feel that the *Charter* would protect Aboriginal culture and tradition. He thinks there is a danger in applying the *Charter* without first analysing how its application might impact the culture and identities of Aboriginal peoples.²⁵⁶ He also thinks there is lack of discussion of the problems created by Canada’s individualism imposed by the *Charter* on Aboriginal governments, and that the lack of Aboriginal courts to help interpret Aboriginal culture exacerbates this problem.²⁵⁷ Finally, McNeil asserts that Aboriginal women in Canada have less to be concerned about, as compared with their counterparts in the United States, since the Aboriginal right to self-government which is protected in section 35(1) of the *Constitution Act, 1982*, is limited by section 35(4).²⁵⁸ Boldt and Long agree with McNeil:

Our thesis is that western-liberal tradition embodied in the Canadian Charter of Rights and Freedoms, which conceives of human rights in terms of the individual, poses yet another

²⁵³ *Ibid.* at 74.

²⁵⁴ *Ibid.* at 73-74.

²⁵⁵ See also: K. Wilkins, “...But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government” (1999) 1 U.T.L.J. 58. [*But We Need The Eggs*]. Wilkins is not in agreement with other academics or RCAP that the *Charter* does or should apply to self-governing Aboriginal peoples. At page 78, Wilkins argues along similar lines as McNeil, that the *Charter* was designed upon European values and did not take into account Aboriginal values and traditions.

²⁵⁶ *Aboriginal Governments and the Charter*, *supra* note 252 at 100.

²⁵⁷ *Ibid.* at 101-102.

²⁵⁸ *Ibid.* 103.

serious threat to the cultural identity of native Indians in Canada.²⁵⁹

They explain that in the western liberal tradition, the individual is considered “morally prior”, whereas in tribal life, the individual’s self-interest is intertwined with tribal survival. They also explain that Aboriginal and western societies have different worldviews:

We want to stress here that in our discussion of traditional customs relating to group rights we do not propose that Indians are currently uniformly and consistently practising these traditions. However, contemporary Indians have embraced these traditions as their charter myth and as fundamental to their version of the “good society”, much as western democratic societies have adopted equality and individual rights as their charter myth and version of the “good society”.²⁶⁰

Rejection of the *Charter* is more than mere theoretical disagreement for Boldt and Long; it is based on a history of attempted assimilation of Aboriginal peoples through various means, some of which were legislative.

It is with this history in mind that Boldt and Long argue, with regard to the *Charter*’s imposition on Aboriginal peoples, that Aboriginal peoples have reason to distrust the government.²⁶¹ They also highlight that while the Canadian government argues that the *Charter* would improve the quality of life of Aboriginal peoples, the government used the very same justifications to legislate “racist” acts and policies with

²⁵⁹ M. Boldt, J.A. Long, “Tribal Philosophies and the Canadian Charter of Rights and Freedoms” in M. Boldt, J.A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 165 [*Tribal Philosophies*].

²⁶⁰ *Ibid.* at 169.

²⁶¹ *Ibid.* at 172.

regards to Aboriginal peoples in the past.²⁶² While they do not dispute that Aboriginal peoples want protections from the larger society, they argue that Aboriginal peoples want protections as collectives and not as individuals.²⁶³ They further argue that since the Canadian government did not create the *Charter* by consent of the Aboriginal people in Canada, the *Charter* should not apply.²⁶⁴ Mary-Ellen Turpel also questions the “cultural authority” of the *Charter*’s application to Aboriginal peoples, though she recognizes that no society is purely individualistic or collectivist.²⁶⁵ Turpel questions the extent to which the majority in Canada has taken into account the differences between themselves and the Aboriginal peoples when creating their laws.²⁶⁶ In her view: “The denial of difference is a political tool of cultural hegemony.”²⁶⁷ She feels that there would be no real change for Aboriginal peoples in Canada if the *Charter* and the *Constitution Act, 1982*, were to replace the *Indian Act* as the “supervisors” of Aboriginal peoples.²⁶⁸

Long and Chiste agree that Aboriginal communities should be “exempt” from the *Charter*, as political and cultural transformation has been limited in Aboriginal communities. They further explain that while both Aboriginal peoples and western traditions support equality of individuals, the strength of the concept being proposed (*Charter*) depends a great deal on its origin; i.e., whether Canada is imposing laws on

²⁶² *Ibid.* at 174.

²⁶³ *Ibid.* at 172.

²⁶⁴ *Ibid.* at 177.

²⁶⁵ M.E. Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-90) 6 CHRYB 3 [*Aboriginal Peoples and the Charter*] at 4, 16.

²⁶⁶ However, in a subsequent article that Turpel jointly wrote with Peter Hogg (referred to below), she appears to support the application of the *Charter*, or at least argues that the courts would determine whether the *Charter* applies to Aboriginal peoples.

²⁶⁷ *Ibid.* at 25.

²⁶⁸ *Ibid.* at 42.

Aboriginal peoples, or whether it originates from a particular Aboriginal community's own culture and traditions.²⁶⁹ These academics feel strongly that the *Charter* should not be applied to Aboriginal peoples and their governments because the *Charter* is not based on Aboriginal consent and it does not reflect Aboriginal culture and traditions. As well, given the long history of assimilationist policies, Aboriginal peoples have good reason not to trust Canada in this regard. Though these and other academics are opposed to the application of the *Charter*, others feel that some form of protection is necessary.

(iii) An Alternative to the *Charter*?

Assuming that these authors are right and the *Charter* doesn't apply, then is there a void in terms of equality for Aboriginal peoples? Turpel suggests that the solution is in the development of "community codes" that would deal with the most pressing problems in Aboriginal communities.²⁷⁰ She feels these codes would avert the further "imposition of the human rights paradigm on Aboriginal communities."²⁷¹ McNeil on the other hand, suggests that the solution lies in Aboriginal justice systems.²⁷² He feels that separate Aboriginal justice systems should be implemented here in Canada so that Aboriginal people would not have to rely on Canadian courts to interpret Aboriginal culture.²⁷³ Boldt and Long suggest leaving Aboriginal cultures as they are and promoting systems which protect human dignity (i.e., respecting collectivities) versus systems that focus on

²⁶⁹ A. Long, K.B. Chiste, "Indian Governments and the Canadian Charter of Rights and Freedoms" (1994) 14 *Amer. Ind. Culture and Res J.* 91 [*Indian Governments and the Charter*] at 112.

²⁷⁰ *Aboriginal Peoples and the Charter*, *supra* note 265 at 44.

²⁷¹ *Ibid.*

²⁷² *Aboriginal Governments and the Charter*, *supra* note 252 at 103.

²⁷³ *Ibid.*

individual rights.²⁷⁴ Long and Chiste combine these concepts and argue that: “the welfare of Indian peoples will be better served if First Nations have the option of re-establishing traditional social systems and political structures or reforming present ones to reflect their own culturally relevant standards.”²⁷⁵ Their solution represents a combination of Canadian ideas with Aboriginal culture: “On balance, Indian nations will best be served by allowing them the option of creating special Indian charters as an alternative to the Canadian charter.”²⁷⁶ While the issue of the *Charter* is an important one to Aboriginal peoples, Long and Chiste argue that: “In fact, the reconstruction of ‘community’ seems to us the most urgent task facing contemporary Indian leaders.”²⁷⁷ Therefore, alternatives to the application of the Canadian *Charter* include leaving the issue of rights up to the Aboriginal groups to manage, setting up Aboriginal courts or drafting Aboriginal charters instead.

Turpel argued in her previous article that the *Charter* should not apply to Aboriginal peoples because it lacked cultural authority.²⁷⁸ However, in an article with Hogg several years later, she argues that courts would likely interpret the *Charter* to apply to Aboriginal governments.²⁷⁹ However, Hogg and Turpel both argue that Aboriginal charters are the solution.²⁸⁰ They think that section 25 of the *Charter* does not provide blanket immunity for Aboriginal governments against the *Charter*’s application,

²⁷⁴ *Tribal Philosophies*, *supra* note 259 at 178.

²⁷⁵ *Indian Governments and the Charter*, *supra* note 269 at 114.

²⁷⁶ *Ibid.* at 113.

²⁷⁷ *Ibid.* at 115.

²⁷⁸ *Aboriginal Peoples and the Charter*, *supra* note 265.

²⁷⁹ P. Hogg, M. Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues” (1995) 74 *Can. Bar. Rev.* 187 [*Implementing Aboriginal Self-Government*] at 215.

²⁸⁰ *Ibid.*

but is meant as a direction for courts to defer to some Aboriginal activities.²⁸¹ These Aboriginal charters would not displace the Canadian *Charter* (at least not without constitutional amendment), but would exist alongside it.²⁸² RCAP also considered the issue of Aboriginal charters. RCAP's position with regard to Aboriginal charters was clearly that they could not replace the current *Charter*.

Where an Aboriginal nation enacts its own charter of rights and responsibilities, private individuals will benefit from its provisions in addition to those of the Canadian Charter. An Aboriginal charter will supplement the Canadian Charter but not displace it.²⁸³

According to RCAP, the *Charter* applies with or without supplemental Aboriginal charters. They also point out that the *Charter* offers uniform protections for Aboriginal peoples and non-Aboriginal peoples regardless of where they live or with whose government they associate, and that this can only be to their benefit.²⁸⁴

(iv) The Supporters

Patrick Macklem, in his book *Indigenous Difference*, agrees with these authors that the *Charter* does pose a risk to the “vitality of indigenous difference.”²⁸⁵ He argues that the *Charter* “enables litigants to constitutionally interrogate the rich complexity of Aboriginal societies according to a rigid analytic grid of individual right and state obligation.”²⁸⁶ He feels that Aboriginal communities that have cultures and traditions which are different from western traditions should not be dismantled through *Charter* litigation simply because Aboriginal practices appear different from Western norms of

²⁸¹ *Ibid.*

²⁸² *Ibid.* at 216.

²⁸³ *RCAP, vol.2, part 1, supra* note 154 at 233.

²⁸⁴ *Ibid.*

²⁸⁵ *Indigenous Difference, supra* note 137 at 195.

individualism.²⁸⁷ At the same time, Macklem argues that Aboriginal peoples need the

Charter's protections:

A blanket exemption from the Charter would enable Aboriginal governments to ride roughshod over interests associated with Charter rights without necessarily furthering interests associated with indigenous difference. In contrast to a blanket exemption, applying the Charter enables the judiciary to develop a much more calibrated approach.²⁸⁸

Macklem's compromise, then, is that although the *Charter's* application to Aboriginal peoples could interfere with indigenous difference, this risk could be minimised by directing judges to give deference to Aboriginal cultures and traditions.²⁸⁹ This stands in contrast to McNeil's vision of Aboriginal courts doing the interpretation. John Borrows, on the other hand, believes that the debate over the *Charter's* applicability actually hurts the pursuit of self-government for Aboriginal peoples.²⁹⁰

Borrows argues that more attention needs to be given to reconciling these differences of viewpoints regarding the *Charter's* applicability, and that: "By creating a conversation between rights and tradition, the *Charter* presents First Nations with an

²⁸⁶ *Ibid.* at 195.

²⁸⁷ *Ibid.* See also: L.N. Chartrand, "Re-Conceptualizing Equality: A Place for Indigenous Political Identity" (2001) 19 Windsor Yearbook of Access to Justice 243 [*Re-Conceptualizing Equality*]. Chartrand agrees that while the *Charter* is a "powerful ally" for Aboriginal equality in Canada, it does have limits. On page 251-253, Chartrand explains that since the *Charter* is so individualistic, it does not provide protections for collectivities from the discrimination of other collectivities and, therefore, Aboriginal peoples are forced to look for international solutions.

²⁸⁸ *Ibid.* at 209.

²⁸⁹ See also: A. Cairns, *First Nations and the Canadian State: In Search of Coexistence* (Georgetown, Ontario: McGill-Queen's University Press, 2005) [*Coexistence*] at 45-47. Cairns thinks this approach is a reasonable balance and argues that while the *Charter* should apply to Aboriginal peoples and their governments, section 25 provides an opportunity for judges to take into account Aboriginal cultural values.

²⁹⁰ *Traditional Equality*, *supra* note 243 at 170-171.

opportunity to recapture the strength of principles which were often eroded through government interference.”²⁹¹ Borrows’ message is one of practicality. He believes that Aboriginal peoples cannot ignore the world they live in and, therefore, must use Canadian tools to advance Aboriginal interests: “We require a measure of our oppressors’ cooperation to disentangle ourselves from the web of enslavement.”²⁹² He suggests that while some Aboriginal people may find it offensive to use the words, concepts and institutions of the non-Aboriginal majority, it may be necessary in order to carve out a place for Aboriginal peoples within Canada where they can enjoy their traditions, customs and practices.²⁹³ Therefore, why not selectively use these tools when it is to an Aboriginal group’s benefit? At the same time, he points out those Aboriginal traditions, which are very important to Aboriginal peoples, are dynamic and, thus, change over time, incorporating both “past and present understandings and events.”²⁹⁴ As a result, some Aboriginal cultures have adapted to embrace non-Aboriginal concepts which are similar to their own. Equality, as a concept, is something that may have a non-Aboriginal “name” but has similar concepts in Aboriginal traditions. The important part for Borrows is the acceptance of responsibility by Aboriginal men for how they treat Aboriginal women.²⁹⁵ He argues that self-government is such an important goal that Aboriginal people should refocus their attention on the similarities found between the *Charter* and their traditional

²⁹¹ *Ibid.* at 170.

²⁹² *Ibid.* at 171.

²⁹³ *Ibid. Sui Generis Nature of Aboriginal Rights*, *supra* note 107 at 11-12. This issue is extensively debated amongst academics and is not repeated here in any detail.

²⁹⁴ *Traditional Equality*, *supra* note 243 at 174.

²⁹⁵ *Ibid.* at 183. He also argues that all Aboriginal men are not the same and should not be painted with the same brush in this regard.

values.²⁹⁶ This way, the non-Aboriginal denouncers of self-government could not hold up examples of gender discrimination in Aboriginal communities, for example, as a reason for not supporting Aboriginal self-government.²⁹⁷

While colonialism is at the root of our learned actions today, First Nations men must take some measure of responsibility for their conduct and attitudes. It is no longer enough to say “the Indian Act made us do it.” Positive acceptance of responsibility is an important step in healing the divisions that have occurred.²⁹⁸

Many Aboriginal women would agree with Borrow's position and feel that the *Charter* was not only a victory for Aboriginal women when it was enacted, but also provides necessary equality protections for Aboriginal women today.²⁹⁹ Certainly, NWAC advocated the application of the *Charter* on a consistent basis. It feels that the value of its applicability to Aboriginal peoples is lost in the artificial debate between individual versus communal rights.³⁰⁰

²⁹⁶ *Ibid.* at 170.

²⁹⁷ *Ibid.* at 183.

²⁹⁸ *Ibid.* at 183.

²⁹⁹ T. Nahanee, “Aboriginal Women and Self-Government” in M.A. Jackson, N.K. Bancks, eds., *Ten Years Later: The Charter and Equality for Women* (Vancouver: Simon Fraser University, 1996) 27 at 28. See also: S. McIvor, “Self-Government and Aboriginal Women” in M.A. Jackson, N.K. Bancks, eds., *Ten Years Later: The Charter and Equality for Women* (Vancouver: Simon Fraser University, 1996) 77 at 84. “...the Canadian Charter of Rights and Freedoms has been invaluable to aboriginal women because they can no longer be banished from their communities based on whom they marry. Much more work needs to be done under the guise of the Charter to ensure that there is a level playing field for women in civil, political and property rights.”

³⁰⁰ *Sharon Donna McIvor and Jacob Grismer v. Canada (The Registrar, of Indian and Northern Affairs Canada, Attorney General)* (2009) BCCA 153, online: <<http://www.courts.gov.bc.ca/jdb-txt/CA/09/01/2009BCCA0153.htm>> [*McIvor Appeal*]. See: *McIvor v. Canada* (3-4 October 2008 BCCA) (Factum of the Intervenor, Native Women's Association of Canada) [*McIvor-NWAC Factum*] at paras.45-46. NWAC argued that the framing of discrimination of Aboriginal women by their communities as an individual versus communal rights issue is “artificial and inappropriate” and that the *Charter* and constitutional protections for Aboriginal peoples “support an argument that

(c) Is the Tension More Apparent Than Real?

The question of who is affected by whether or not the *Charter* applies is an important one. Each of the authors reviewed above, limited their work by focusing on one Aboriginal group or another, and offered their reasons for doing so. That being the case, it is important to point out the limits on the current “debate” about *Charter* applicability to Aboriginal peoples. First, none of these authors seemed to take issue with the fact that the *Charter* applies to individual Aboriginal peoples in their dealings with federal, provincial and territorial governments. In fact, some of them confirmed its application to Aboriginal peoples.³⁰¹ Logically, as Canadian citizens, Aboriginal peoples would also enjoy the rights, benefits and protections that other Canadians would enjoy, in addition to the rights and protections they might also enjoy as Aboriginal peoples. Being Canadian citizens, individual Aboriginal peoples could avail themselves of the *Charter* in their dealings with Canadian governments and, have in fact, done so successfully.³⁰² Most of the academics reviewed above feel that the *Charter* did apply to individual Aboriginal peoples in their dealings with governments. If that is the case, then practically speaking, to whom does the *Charter* not apply?

the issue here is not individual rights versus group rights. Rather, we are looking as the rights of a group (Aboriginal peoples) and a sub-group within that group (Aboriginal women)”.

³⁰¹ *Indian Governments and the Charter*, *supra* note 269 at 114. See also: *RCAP*, vol. 2, part 1, *supra* note 154 at 226.

³⁰² See the previous section of this chapter for a review of the *Charter* law affecting Aboriginal peoples, namely, *Cobiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*] and *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 [*Lovelace*]. For more recent case law, see: *McIvor Appeal*, *supra* note 298.

(i) **To Whom Doesn't the *Charter* Apply?**

The terms “Aboriginal people” and “Aboriginal government” can be defined very differently depending on one’s perspective. Therefore, when academics argue that the Charter does not apply, it helps to know to whom they refer. For example, they all appear to agree that the *Charter* applies to individual Aboriginal peoples in their dealings with government. But who are these governments? With regards to First Nations (bands), it is fairly clear that the *Charter* applies to them in their administration of the *Indian Act*, and in their dealings with the Aboriginal peoples who live under their jurisdictions, namely, band members. In *Scrimbitt*, the band attempted to use “custom law” to deny voting rights to its band members who had been reinstated under the *Bill C-31* amendments to the *Indian Act*.³⁰³ The band’s defence included the fact that other bands in Saskatchewan had similar voting regulations, and also that it was their traditional custom to exclude *Bill C-31* people. The Court rejected these arguments and held that the: “Bill was intended to remedy longstanding discriminatory treatment of Aboriginal women who married non-status Indians. Sakimay’s Bill C-31 policy reinstates that treatment and thwarts Parliament’s effort to remedy it.”³⁰⁴ The Court further held that the refusal by the band to allow *Scrimbitt* to vote was discrimination on the basis of sex and marital status and thus violated section 15 of the *Charter*.³⁰⁵ Though the band tried to argue that economic hardship would follow, the court did not consider the *Charter* breach to be justifiable under section 1.³⁰⁶ Similarly, there was no question that the *Charter* applied to the Six Nations band in *Henderson*. In this case, the only issue, after proving discrimination, was

³⁰³ *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 C.N.L.R. 205 [*Scrimbitt*].

³⁰⁴ *Ibid.* at 221.

³⁰⁵ *Ibid.* at 222.

whether or not the band's actions were justifiable.³⁰⁷ The band in this case had enacted a by-law prohibiting non-band member spouses from residing on the reserve.³⁰⁸ Henderson felt she had a right to live on the reserve with her husband who was a band member. The court reviewed the decision of the trial court which dismissed the band's by-law prosecution against the non-band member. Although they found that excluding non-band member spouses of band members was discriminatory, they agreed with the band that the influx of people on the reserve would cause financial hardship to the band.³⁰⁹ Since the *Indian Act* provides that only Indians can enjoy the use of reserve lands, the court found that the by-law excluding non-band members was saved under s.1.³¹⁰ In this case, the *Charter* applied to the Six Nations band. It also confirmed that individual band members and non-band members could avail themselves of the *Charter's* protections when dealing with the band. The only question here was whether the by-law could be saved under section 1 of the *Charter*, and it was.

Henderson dealt with an *Indian Act* band. However, there are now self-governing communities that may or may not be under the *Indian Act*. It would appear that the *Charter* applies to these self-governing Aboriginal communities as well. The federal government's *Inherent Right* policy provides that the *Charter* will apply to all of these types of agreements. This, of course, is just federal policy and subject to negotiation, but the federal government appears to be fairly firm in this regard, as it has remained part of the policy. While there has not been much in the way of litigation on this particular point,

³⁰⁶ *Ibid.* at 226.

³⁰⁷ *Six Nations of the Grand River Band v. Henderson*, [1997] 1 C.N.L.R. 202 [Henderson].

³⁰⁸ *Ibid.* at 1-4.

³⁰⁹ *Ibid.*

the federal court in *Paul Michael Charlie* made comments on this issue.³¹¹ The court, in this case, seemed to indicate that the *Charter* applies to self-government agreements because the power of self-government comes from non-Aboriginal governments through negotiations as opposed to being “inherent”.³¹² Citing *Wilkins* with approval, it accepts that: “...the Charter will govern the exercise by Aboriginal governments of most, if not all self-government powers that originate from the federal, provincial or territorial governments.”³¹³ This position assumes that the powers of self-government “originate” from federal, provincial and/or territorial governments.

This conclusion might easily be reached by a casual onlooker who sees a First Nation taking on the roles and responsibilities that a federal or provincial government once held. However, it is necessary to go further when analysing this particular situation, and to look at the basis of the right of self-government, versus the type of power being exercised. For those self-governing First Nations who negotiated their agreements pursuant to the federal *Inherent Right Policy*, it matters less that they are exercising a power or powers once held by federal and provincial governments, and more that they are exercising their “Inherent” powers.³¹⁴ Thus, the powers exercised under self-government agreements are less about power devolutions or transfers from elsewhere, but about the resumption or continuance of powers by Aboriginal peoples exercising self-government. RCAP stated that while unilateral self-government may be possible, their preference was for negotiated agreements, and that Aboriginal charters would be in addition to and not

³¹⁰ *Ibid.*

³¹¹ *Paul Michael Charlie v. Vuntut Gwitchin Development Corporation*, [2002] F.C.J. No. 547 (F.C.T.D.) [*Paul Michael Charlie*].

³¹² *Ibid.* at paras. 30-34 citing *But We Need the Eggs*, *supra* note 255.

³¹³ *Ibid.* at para.32.

replace Canada's *Charter*.³¹⁵ Although it may still be argued that the *Charter* would not simply transfer along with the devolved powers from governments without an express agreement to that effect, it is unlikely that Aboriginal governments or any government can contract out of the constitution's applicability.³¹⁶ Even if that were possible (given the federal negotiating position), or even desirable (given the constitutional protections for Aboriginal peoples in the constitution), practically speaking, it is unlikely that the courts would interpret Aboriginal reserves and territories as "*Charter-free*" zones.³¹⁷ Therefore,

³¹⁴ *Inherent Right Policy*, *supra* note 163.

³¹⁵ RCAP, vol.2, part 1, *supra* note 154 at 184-236.

³¹⁶ A proper comparison between the claims of Quebec and those of Aboriginal peoples goes beyond the scope of this work. Although the province of Quebec has made similar claims as Aboriginal peoples with regards to the *Charter*, it still applies to them. For a further discussion on Aboriginal and linguistic minority claims, especially as they relate to identity, see: S. Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities*, (Montreal: McGill-Queen's University Press, 2009).

³¹⁷ Six Nations, *Iroquois Caucus*, online:

<http://www.sixnations.ca/BCUpdateOct2007.pdf> > [*Iroquois Caucus*]. The Iroquois Caucus consists of "The Elected Councils of the seven Iroquois communities of Kanehsatá:ke, Kahnawà:ke, Akwesásne, Six Nations of the Grand River, Oneida of the Thames, Tyendinaga and Wahta". Y.D. Belanger, *Gambling with the Future: The Evolution of Aboriginal Gaming in Canada*, (Saskatoon: Purich Publishing, 2006). Kahnawa'ke Gaming Commission, online:<<http://www.kahnawake.com/gamingcommission/>>. *Mitchell*, *supra* note 7. One might cite the Aboriginal communities who partake in the Iroquois Caucus as an example of an Aboriginal group that is large and politically independent enough to both assert and act on the claim. For example, the Kahnawake Mohawks in Quebec wanted to negotiate gaming opportunities for their First Nation. When that was refused, they asserted their sovereignty over gaming in their community and decided to enact laws regarding gaming, develop a licensing scheme and created a large online gaming system in (or at least associated with) their community. While the federal and provincial governments informed the Mohawks that they could not engage in these activities, the Mohawks asserted and acted on their sovereignty and many years later, are still the only Aboriginal online gaming Commission in Canada. Similarly, the Iroquois Caucus has worked together on issues affecting their sovereignty, such as the border crossing, issue and discussed the creation of their own passports. That being said, the Supreme Court of Canada's decision in *Mitchell* contained comments about the incompatibility of Aboriginal sovereignty with Crown sovereignty that may create additional hurdles for Aboriginal

if the *Charter* applies to everyone, and even as the *CHRA* has been amended to allow Aboriginal people the benefit of human rights protections, why the controversy?

(ii) Are We Asking the Wrong Questions?

Thus far, the questions related to the *Charter* have centered on whether it applies to First Nation bands, self-governing or self-determining Aboriginal Nations, and Aboriginal individuals, and if so, to what extent? Some authors have looked at the legal question of whether it applies as a matter of constitutional law, while others have looked at whether the *Charter* “should” apply as a matter of principle. Perhaps, the debate about the *Charter*’s applicability still continues because the focus has not been in the right place. The tension between the individual’s right to belong to their Nation and the Nation’s right to determine its own citizenship is often played out with reference to *Charter* rights. The leaders, politicians and authors reviewed earlier, spoke about the incompatibility between the individual rights focus of the *Charter* and the communal rights focus of Aboriginal traditions. Other authors spoke of the significant difference between Aboriginal traditional values and the European values found in the *Charter*. Still others argued that the *Charter* is imposed on Aboriginal peoples and, therefore, lacks the cultural relevance necessary to legitimize it. Given the advanced education, legal expertise, power and reputation behind these learned opinions, it would appear that the debate is doomed to continue until a decision by Supreme Court of Canada on the matter. But, is this tension more apparent than real?

Nations trying to assert sovereignty versus exercise their rights of self-government within a Canadian context. The sovereignty issue is not reviewed here in any more detail, as this would be a different line of argument from the focus of this thesis.

Perhaps the question of the *Charter*'s applicability would become moot, if the focus or question being asked were to shift in a different direction. At one end of the spectrum, there are the educated traditionalists and academics who debate the virtues of the *Charter* and focus on how it came to be. Their focus is in the past: how the *Charter* was created; what the intentions of its creators were; and the language used to build each section of the document; as well as the theory behind the rights contained in it. This group does not generally assess the *Charter* for its potential value for Aboriginal peoples. For example, Turpel argued that the *Charter* lacked "cultural authority" and Boldt and Long argued that the *Charter* threatened native identity because it comes from a liberal, individualistic point of view. In the middle, there are those Aboriginal leaders, academics and others in positions of power (often male), who focus on the *Charter* itself, its specific provisions and its relationship to Aboriginal power, whether in the form of bands, Nations, or self-government. This group's concerns focus on the current power structure and how the *Charter* would affect that structure and those in positions of power. For example, earlier, it was noted that the AFN opposed the equality protections for Aboriginal women despite acknowledging their history of exclusion during the constitutional talks. Macklem spoke out strongly against the *Bill C-31* reinstatements having taken away the power of bands to decide for themselves who they wanted to include/exclude, and criticized the *Charter* strongly for this. But what if the focus were to shift from the history of how and why the *Charter* was created and how it affects current power structures, to one which emphasised the effects of its application?³¹⁸ This would

³¹⁸ In writing this section, I am very aware of the many significant contributions that Aboriginal leaders, politicians, traditionalists, and academics of all backgrounds have made to Aboriginal and non-Aboriginal society. This is not meant in any way to detract

mean that different questions had to be answered, such as: What if vulnerable groups in Aboriginal society were empowered to have a voice in this ongoing debate?

There is another aspect of the debate that has been largely ignored. This involves some of the most vulnerable groups in many societies, such as Aboriginal women and children, many of whom have been excluded from status, reserve residency, band membership, voting and/or running for office in First Nation elections, participation in cultural and traditional activities, access to programs and services such as housing, health care and education, and equal shares in land claims and treaty benefits. They are denied the right to their Aboriginal identities and inclusion in their communities and cultures and have been excluded from the negotiation tables. Meanwhile, mostly male political leaders claim to speak on their behalf, even as academics argue the theoretical underpinnings of why the *Charter* does or does not apply, and some traditionalists rationalize including or excluding seven more generations of their own people under the guise of their interpretation of Aboriginal traditions. Perhaps the focus of this *Charter* debate should be less about how it was created or how it affects the current power structure under the *Indian Act*, and more on what the end result is for Aboriginal peoples; being careful to define Aboriginal peoples, as including their women and children.³¹⁹

There is certainly no question that most would agree that the *Indian Act* is an outdated, even racist piece of legislation that cries out to be substantially amended in the

from the hard work that they have done or continue to do. I am also aware of the fact that I too, must be included in the group of those who have higher education and, therefore, have a particular view on the matter. First and foremost, I am one of those Aboriginal women with children who are denied status, reserve residency, political rights and social benefits, and can speak to the current inequalities from first-hand experience.

³¹⁹ Aboriginal women and children include those who have lost status and/or those who cannot register under the current *Indian Act* provisions.

interim, and/or replaced in the long term. Yet, despite how despicable the *Indian Act* is, and how divisive its status and membership provisions are, many bands continue to use it to exclude women and children from membership in their communities for a whole host of reasons. Therefore, even if the *Charter* came about in a manner that was not inclusive of Aboriginal peoples in its drafting, or contains rights and protections that Aboriginal Nations did not design themselves in negotiation with Canada, one could argue that the *Indian Act* is a much more offensive piece of legislation, though First Nations continue to use it to exclude their own people. The *Charter* is, at least, designed to offer protections to all peoples in Canada, Aboriginal and non-Aboriginal alike. Further, it offers specific consideration for Aboriginal, treaty and other rights. It could be used to offer protections that would be useful for both communities and individuals. This does not, in any way, prevent Aboriginal communities from drafting their own systems and codes to offer higher or traditionally-specific protections for their communities and individuals. It does mean, however, that the minimal human rights protections offered in the *Charter* would be available to all Aboriginal peoples.

Again, it does not mean that every First Nation (band) or self-governing Aboriginal Nation must adopt its own Charter or create one that reads exactly like Canada's *Charter*. Perhaps, Aboriginal communities may enact their own traditional codes which offer better protections for Mohawks, Mi'kmaq or Cree for use in their bands, their self-government agreements, or other treaty or land claim arrangements. However it is done, the point is that there cannot be a void in the law where Aboriginal peoples, especially Aboriginal women and children without status and/or band membership, go unprotected and excluded from the enjoyment of basic rights and

freedoms in Canada, the provinces, territories, bands, or their traditional Nations. Just as Aboriginal and treaty rights evolve and are now protected in the constitution, so too must the basic human rights of Aboriginal peoples be protected.

Why then is the issue of *Charter* protection for Aboriginal peoples so controversial? Is it all about individuals when Aboriginal women and children seek their rightful place in their communities? By excluding them, Aboriginal communities will bring about their own extinction – through legislation, membership codes, or even self-government codes. The *Charter* offers protections to vulnerable Aboriginal peoples from the legacy of assimilation policies and current financial interests that may lead to exclusion. If it is possible to use one objectionable document (the *Indian Act*) to bring about negative divisions within communities by excluding unregistered Aboriginal peoples from their home communities, why is it so hard to imagine using another allegedly objectionable document (the *Charter*), to create positive outcomes, like including rightful citizens back into their communities? As objectionable documents go, it is arguable that the *Indian Act* far outweighs the *Charter* in terms of what it has done to Aboriginal peoples. Certainly, the future of many Aboriginal Nations depends far more on the inclusion of their unregistered women and children than it does preserving the current male power structures.

I further believe that protecting current and future generations under the *Charter*, unless and until Aboriginal Nations use their self-government agreements to enact their own laws to provide for those minimum protections, accords Aboriginal peoples with laws that reflect both Aboriginal legal traditions and Canadian ones. Aboriginal traditions, customs, laws and codes are carried forward by successive generations in order

to maintain the integrity of each Aboriginal Nation, i.e., to ensure the Nation's existence into the future. Focusing the question about the *Charter's* applicability on the end result, namely, the survival of Aboriginal identity and culture means that it is the effect of the *Charter* on the culture that is important, as opposed to its historical creation. If the *Charter* has the effect of eliminating discrimination under the *Indian Act*, reinstating the currently excluded, like thousands of Aboriginal women and children, and then, someday, ridding the *Act* of the discriminatory section 6(2) cut-off and, thereby, saving those Nations from extinction, then I would argue that this focus on the end result overcomes the theoretical dilemmas engaged by focusing on its creation or on how it affects current power structures. The discussion of the *Charter* should focus on the end result and its impact on future generations of Aboriginal peoples, especially in terms of how it could empower the vulnerable and enhance the survival of their identity and culture through citizenship in their Nations, and reconnections with their communities, and all that these entail. From this end of the spectrum, the debate would look less about individual versus community, traditional versus European values, or imposition versus consensus, and more about responsibility to future generations versus the immediate wants of the present generation. The focus on the end result of the *Charter's* application, from the viewpoint of the most vulnerable in Aboriginal society, changes the question of the debate to what the future generations of our Aboriginal Nations would want. Canada's constitutional promise to Aboriginal peoples includes ensuring their cultural survival, and the *Charter* is part of that promise. It is doubtful that Aboriginal identity and culture could be adequately protected without the *Charter's* application.³²⁰

³²⁰ And most certainly not without similar protections incorporated into current and future

In *Delgamuukw*, the Supreme Court of Canada held that the relationship of the Aboriginal community to their land applied to the future and the past.³²¹ In that regard, the Court held that this special relationship “should not be prevented from continuing into the future.”³²² They further explained: “As a result, uses of lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.”³²³ The disappearing formula provided under the *Indian Act* is a violation of the right of Aboriginal Nations to determine their own citizenship, because the right is not only based on practices from the past, but also looks to preserve those cultures into the future. The *Indian Act* ensures that there is no future for these Nations and thus threatens the Aboriginal right of the Nations to determine their own citizenship, and their ability to preserve their cultures into the future. First Nations (bands) are currently forced to deal with rigid legal and policy constraints placed upon them by the federal government through the *Indian Act*, and its various regulations and policies. Aboriginal communities are often divided between those who assert their Aboriginal rights to belong, versus those who use the *Indian Act* to limit membership in an effort to maintain vital programs and services. This division caused by the *Indian Act* and continually reinforced by INAC, makes the practical assertion of the Aboriginal right to determine citizenship in an Aboriginal Nation difficult, as it fails to deal with the applicability (or not) of the *Indian*

self-government agreements and modern treaties for every Aboriginal Nation or community in Canada.

³²¹ *Delgamuukw*, supra note 7 at para. 127.

³²² *Ibid.*

³²³ *Ibid.*

Act's registration provisions, band membership codes, election codes, and residency provisions.³²⁴

Even so, some bands have adopted their own membership codes which are more stringent and exclusionary than the *Indian Act*. This too is inconsistent with an Aboriginal right to determine citizenship. Further, it violates the Aboriginal citizens' rights to be a part of their Nation(s) and local communities. It arbitrarily prevents them from enjoying the rights, benefits and responsibilities of citizenship, and prevents them from passing that to future generations. Herein lies the apparent tension in the Aboriginal rights argument: the right of the Nation to determine citizenship and exist into the future, and the right of the citizen to be part of the Nation and to have their children be a part of the Nation.

In the following chapter, I explore this tension further, and argue that this tension is superficial because one right is that of the Nation to make a collective decision regarding identity, whereas the other right is that of an individual to belong to a collectivity and to share in its identity. Actually, the Aboriginal right to decide, and to belong, have more commonalities than they do differences. Though an Aboriginal Nation has many communal rights, it is, very often, individuals who actually exercise those rights. Specifically with regard to the right to determine citizenship, the underlying constitutional basis of this right is to protect the Nation's identity and culture and ensure their existence for future generations. This is the very reason Aboriginal individuals would want to exercise their right to belong to an Aboriginal Nation in order to be a part

³²⁴ Congress of Aboriginal Peoples, "Justice is Equality: Post-Corbiere Report", online: CAP <http://www.abo-peoples.org/policy/Justice_Is_Equality_PostCorbiereJuly08.pdf> [*Justice is Equality*]. This report analyses the inter-play between election codes, status, membership and residency.

of its unique culture and to protect the right for future generations (their children, and their children's children, and so on).

Following this line of reasoning, I argue in Chapter 5 that the unfair exclusion of individuals (like non-status Indians) from their Nations, on the basis of lack of status because of the second generation cut-off rule, amounts to discrimination on the basis of blood quantum/descent. I review some of the other claims of discrimination fostered by the *Indian Act's* registration provisions, and note that even if claims like sex discrimination were remedied tomorrow, it still would not address the discrimination based on blood quantum/descent. The right of Aboriginal Nations to protect the culture and identity of their people for future generations is the same as the individual's right to belong and, thereby, to secure their own identity and culture and that of their families and communities into the future. The only difference is how it is exercised: by the community (the right to determine citizenship), or by the individual (the right to belong). Seen this way, the right relates less to individuals and collectives, and deals more with the joint responsibility on the part of the community and the individual to protect their culture and identity for their future generations. Just as there is a balance in the exercise and protection of rights under the *Charter*, so too must constitutionally protected rights be balanced with each other. The *Charter* is a vital component of keeping Canada's constitutional promise to protect the identity and culture of Aboriginal peoples into the future. Section 25 of the *Charter* provides the proper balance for consideration and inclusion of Aboriginal laws, and for recognition of the duality of Aboriginal citizenship rights for individuals and communities. Section 15 provides the balancing mechanism

necessary to protect both the rights of the individual citizens and their Nations. Chapter 5 advances these thoughts.

Chapter Five: *Charter* Equality for Non-Status Indians: The Right to Belong

As discussed in previous chapters, part of the constitutional promise made to Aboriginal peoples by Canada was the protection of their cultures and identities far into the future. The current Indian registration and band membership provisions of the *Indian Act* stand in stark contrast to this promise. The *Indian Act* has imposed a scheme of registration upon individuals which gives them different status with differing rights. This divides families, communities and Nations based on race-based and sexist criteria. This legislation has divided Aboriginal Nations into local communities which are often at the lowest ends of the socio-economic indicators in Canada. These local communities (bands) have been further divided into those that live on and off reserve and those that may or may not have band membership. Most, if not, all of these divisions are directly caused by the discriminatory status regime in the *Indian Act*. The divisions within Aboriginal communities now find form in the political representation of Aboriginal peoples as well. These legal, social, and political divisions can be overwhelming for communities and even more so for individuals who are directly impacted by the negative effects of these divisions. The federal, provincial and even local band governments attach different legal, social, economic, political and cultural rights to the various classes and sub-classes of Aboriginal peoples with little or no input from the individuals it impacts. On top of this, registration will continue to cause significant population declines for Aboriginal peoples until there are no legally recognized Aboriginal people left. This result is a breach of our constitutional promise to Aboriginal peoples.

In the meantime, non-status Indians, and in particular women, appear to be the ones who have taken the lead in asserting their identities and rights in relation to

communal belonging for the benefit of status and non-status Indians alike. Jeanette Vivian Corbiere Lavell was one of the first non-status Indian women to challenge these legislated divisions in the pre-*Charter* era.¹ Although she was ultimately unsuccessful in the Supreme Court of Canada, she helped lead the way for other non-status Indian women to take the issue further.² Sandra Lovelace, another non-status Indian woman, followed in Lavell's footsteps and went straight to the international forum to have her grievance heard.³ She successfully challenged the provisions of the previous *Indian Act* which led to the *Bill C-31* amendments to the *Indian Act*.⁴ While marrying out no longer results in the

¹ *Lavell v. Canada (Attorney General); Isaac v. Bedard* (1974) S.C.R. 1349 [*Lavell*]. This case involved two separate appeals that were heard together. Ms. Lavell was from the Wikwemikong Band and Yvonne Bedard was from Six Nations of the Grand River. The Court held that the *Canadian Bill of Rights*, 1960, (Can.) c.44 [*Bill of Rights*] ensured equality in enforcement of the law versus in the law itself. "In my view the meaning to be given to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that the phrase "equality before the law" is to be construed in light of the law existing in Canada at that time."

² *Ibid.* The Court held: "1. That the Bill of Rights is not effective to render inoperative legislation, such as s. 12(1)(b) of the Indian Act, passed by the Parliament of Canada in discharge of its constitutional function under s. 91(24) of the B.N.A. Act, to specify how and by whom Crown lands reserved for Indians are to be used; 2. that the Bill of Rights does not require federal legislation to be declared inoperative unless it offends against one of the rights specifically guaranteed by section 1, but where legislation is found to be discriminatory, this affords an added reason for rendering it ineffective; 3. that equality before the law under the Bill of Rights means equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary courts of the land, and no such inequality is necessarily entailed in the construction and application of s. 12(1)(b)."

³ *Sandra Lovelace v. Canada*, Communication No. 24/1977 (6 June 1983), U.N. Doc. Supp. No. 40 (A/38/40) [*Lovelace*].

⁴ *International Covenant on Civil and Political Rights*, 16 December 1966, CAN. T.S. 1976 No. 47 (entry into force 23 March 1976; in force for Canada, 19 August 1976) [*ICCPR*] at Article 27 which provides as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." (emphasis added) In *Lovelace UN*, *supra* note 4, Sandra Lovelace was an Indian woman from Tobique First Nation in New Brunswick who had married a non-Indian man. As a

loss of status to Indian women, it does have more severe consequences for the descendants of Indian women who previously lost their status, than it does for the descendants of Indian men. This residual or ongoing discrimination under the current *Indian Act* has led to numerous legal challenges by other non-status women. For example, Sharon McIvor, who was a non-status Indian for much of her life, commenced a discrimination case against Canada over twenty years ago.⁵ Both courts at the trial and appeal levels of *McIvor* have found that the registration provisions of the *Indian Act* discriminate against Indian women and their descendants and, therefore, violated s.15 of the *Charter*.⁶ However, the recent appeal court issued a suspended declaration of invalidity of s.6 of the *Indian Act*, and gave the Parliament of Canada 12 months to make the necessary changes to the *Act*.⁷ Recently, Canada indicated that it would not seek leave to appeal to the Supreme Court of Canada (SCC), as it agreed with the findings of the

result, she lost her status and the right to live on the reserve. The United Nations Human Rights Committee did note that Indian men who married out did not lose their status, but since Lovelace's marriage took place prior to the ICCPR coming into force, they could not examine the sex discrimination aspect of the case. They did, however, find that Canada was in violation of article 27 of the ICCPR (the right of minority cultures to practice their cultures) by continuing to deny Lovelace the right to live on the reserve, the only place where she could practice her culture. At para.15 it held: "However, in the opinion of the Committee the right of Sandra Lovelace to access her native culture and language "in community with the other members" of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists." They concluded at para.17 that: "Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to."

⁵ *McIvor v. Canada (Registrar of Indian and Northern Affairs)* (2009) BCCA 153 [McIvor].

⁶ *Ibid. McIvor v. Canada (Registrar, Indian and Northern Affairs)*, [2007] 3 C.N.L.R. 72 [McIvor trial]. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [Charter] at s.15.

court of appeal. However, McIvor subsequently filed for leave and it is unknown at this point whether the SCC will hear the matter.⁸ Other non-status Indian women have also brought their claims before the courts, including Lynn Gehl, Connie Perron, and Brenda Sanderson.⁹ These are just a few of the non-status Indian women who have been challenging discrimination under the *Indian Act* for the benefit of their descendants.

While times have changed and support for these non-status women has increased since *Bill C-31* days, many First Nations and other Aboriginal groups still have a long way to go in showing support for these women and, ultimately, their own future generations. The 2003 Annual Report of the Assembly of Manitoba Chiefs explained the consequences of ongoing discrimination against Aboriginal women:

First Nations women and their children are still being subjected to discrimination when it comes to exercising their treaty and inherent rights particularly with relation to Bill C-31 as discrimination against the female gender lines is still contained within the legislation. As

⁷ *McIvor*, *supra* note 5 at para. 161.

⁸ Indian and Northern Affairs Canada, “Government of Canada to Amend Indian Act in Wake of Landmark BC Ruling”, online: INAC <<http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2009/nr000000339-eng.asp>>. CTV News, “Feds to Change Discriminatory Indian Act Rules”, online: CTV <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20090602/indian_act_090602/20090602>. Globe and Mail, “Indian Status Case Going to the Supreme Court”, online: Globe and Mail <<http://www.theglobeandmail.com/news/politics/mcivor-plans-to-take-indian-status-case-to-supreme-court/article1168979/>>. I will also discuss this case in more detail later on in this chapter.

⁹ *Gehl v. Canada*, [2002] 4 C.N.L.R. 115 (Ont. CA), [2002] 4 C.N.L.R. 108 (Ont. Sup. Ct. Jus.) [*Gehl*]. Gehl has since amended her claim to include a constitutional challenge to the *Indian Act* registration scheme as per the judgement on appeal. *Perron v. Canada (Attorney General)*, [2003] 3 C.N.L.R. 198 [*Perron*]. As per the court’s decision, Connie Perron has amended her pleadings to include the constitutional challenge to the registration provisions of the *Indian Act*, while certain other portions of the claim were struck down. *Sanderson v. Canada*, [2003] M.J. No. 87 (Man. CA) [*Sanderson*]. Brenda Sanderson has also amended her pleadings. See: *Sanderson v. Canada* (Winnipeg Queen’s Bench, 31 August 2007, File No. CI 03-01-32940) (Re-Re-Re Amended Statement of Claim of the plaintiff, Brenda Pauline Sanderson) [*Sanderson*].

such, the number of First Nations children registered under section 6.2 continues to increase.

First Nations women are finding that 18 years after their rights were supposedly restored, most are still being denied the full benefits of their First Nations identity. Our children and grandchildren are still suffering the effects of having decades of our history and culture wiped out by the federal government who decides what level of 'status Indian' we are or aren't.

This has huge impacts particularly because the First Nations population is rapidly increasing and more and more of our women are unable to pass on their status to their children. It is feared that within generations to come there will be no 'Status Indians' in Canada.¹⁰

Despite the fact that this residual discrimination has been publicly recognized by Canada in various forums, and that Aboriginal organizations have consistently called for the elimination of this discrimination, the *Act* has not been amended since 1985.¹¹ Sadly, many First Nations (bands) have also not stepped up to pressure Canada to undo the harm that it has done in tearing apart their communities and excluding so many of the

¹⁰ Turtle Island Native Network News, "Assembly of Manitoba Chiefs: Women's' Issues: Annual Report August 2003: Bill C-31", online: Turtle Island <<http://turtleisland.org/news/news-c31.htm>> [*AMC Report, 2003*].

¹¹ AFN-INAC Joint Technical Working Group, "First Nations Registration (Status) and Membership Research Report: July 2008", online: AFN <<http://www.afn.ca/misc/mrp.pdf>> [*AFN-INAC Status Report*] at 6. "Despite efforts to eliminate inequities through Bill C-31, the effects of past discrimination remain and the 1985 amendments precipitated new forms of legislative inequities. The amendments resulted in a complicated array of categories of "Indians" and restrictions on registration, and residual gender-based discrimination all of which have been significant sources of grievance and increased litigation against the federal Crown." See also: Indian and Northern Affairs Canada, "Government of Canada to Amend Indian Act in Wake of Landmark BC Ruling", online: INAC <<http://www.aicn-inac.gc.ca/ai/mr/nr/m-a2009/nr000000339-eng.asp>> [*INAC's Comment on McIvor*]. " 'After careful consideration and review of the decision, we will proceed with the necessary legislative amendments,' said Minister Strahl. 'This Government has taken many actions over the years to ensure Aboriginal people enjoy the same rights, protections, and equality as other Canadians. Proceeding with those amendments as ordered by the Court is another step in that direction' ." CTV News, "Feds to Change Discriminatory Indian Act Rules", online: CTV <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20090602/indian_act_090602/2

descendants of Indian women from their communities. Non-status Indian women have led the charge to eliminate discrimination in their communities caused by the *Indian Act*, and it appears that they are also the ones on the front lines of the challenge today. I am also one of those non-status Indian women who would like to contribute by finding ways to resolve these complex issues in a way which gives priority to the Aboriginal perspective and the right of our future generations to partake in their cultures. This chapter was included in this thesis to bring further light to the specific discrimination issues faced by so many Aboriginal women and their descendants so that we as individuals can finally find a way back home to our families, communities and Nations.

(a) *Indian Act* Inequality

The Government of Canada had several objectives in mind when it proposed *Bill C-31* as an amendment to the *Indian Act*. The British Columbia Court of Appeal, in *McIvor*, summarized those objectives as: (1) the removal of sex discrimination from the *Indian Act*; (2) the restoration of Indian status and band membership to those who had lost it due to the former *Act*'s discriminatory provisions; (3) the removal of any provisions which conferred/removed status by marriage; (4) the preservation of acquired rights (non-Indian women who gained status through marriage to an Indian and their children); and (5) to give bands the option to determine their own membership.¹² The trial judge also noted in *McIvor*, that Canada had recognized the discrimination experienced by Aboriginal women under the *Indian Act* as an "historic wrong".¹³ Specifically, the trial court noted Minister Crombie's remarks: "I am asking Hon. Members to consider legislation which

0090602> [CTV Story re Strahl]. Minister Strahl stated that he agreed with the British Columbia Court of Appeal that the registration provisions violate equality rights.

¹² *McIvor*, *supra* note 5 at para.123.

will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities."¹⁴ Although the removal of sexual discrimination from the *Indian Act* was one of Canada's main objectives in advancing *Bill C-31*, cases like *McIvor* demonstrate that residual discrimination remains within the *Act*. However, the type of discrimination addressed in the *McIvor* case is one of several types of discrimination currently found in the *Indian Act*.

(i) Residual Discrimination

While there are, no doubt, many more claims of discrimination under the *Indian Act* that can be addressed in this thesis, several of the major claims include: (1) cousins discrimination; (2) second generation cut-off; (3) unstated paternity; and (4) siblings discrimination; and (5) scrip. The first type of discrimination claim is referred to as "cousins" discrimination because it relates to the inequity of Indian status between cousins within the same family based solely on whether they are descendants of reinstated Indian women or Indian men.¹⁵ Manitoba's *Aboriginal Justice Inquiry* is a formal report which recognized this kind of discrimination experienced by Aboriginal women and their

¹³ *McIvor trial*, *supra* note 6 at para.73.

¹⁴ *Ibid.* Minister Crombie was Minister of Indian and Northern Affairs Canada during Prime Minister Mulroney's government.

¹⁵ *McIvor v. Canada* (3-4 October 2008, BCCA) (Factum of the Intervener, The Grand Council of The Waban-aki Nation, The Band Council of the Abenakis of Odanak, and The Band Council of the Abenakis of Wolinak) [*McIvor-Abenakis Factum*] at para.3. "The rule at issue in this appeal – known as the 'cousins rule' – ensures that: a. every woman who lost her status upon marriage to a non-Indian and regained it in 1985 will have her children registered under s.6(2) and her grandchildren will not be registered without another Indian parent in addition to her child; b. the children of an Indian man married before 1985 will be registered under s.6(1) even if he married a non-Indian and his grandchildren will have s.6(2) status even if the grandchild's other parent is a non-

descendants under the *Indian Act*.¹⁶ The inquiry was created in response to the murder of Helen Betty Osborne, which resulted in a conviction of only one of the men present at her murder, and the death of J.J. Harper (former executive director of the Island Lake Tribal Council), after an encounter with Winnipeg police.¹⁷ While the inquiry looked at justice issues for Aboriginal peoples generally, they specifically addressed the historical roots of some of these inequities. The report explained that it was not just the justice system that has failed Aboriginal peoples:

justice also has been denied to them. For more than a century the rights of Aboriginal people have been ignored and eroded. The result of this denial has been injustice of the most profound kind. Poverty and powerlessness have been the Canadian legacy to a people who once governed their own affairs in full self-sufficiency.¹⁸

Specifically with regards to discrimination against Aboriginal women under the *Indian Act*, the inquiry explained that: “The continuing discrimination enters the picture in terms of the differential treatment between the sexes regarding the children of status Indians. This is an extremely convoluted registration scheme in which the discrimination is not readily apparent on the surface. It requires an examination of how the Act treats people to detect the fundamental unfairness.”¹⁹ While Canada argues that the current *Indian Act* treats everyone equally on a go forward basis, the present-day determination of status is based on previous versions of the *Indian Act* which were discriminatory and, therefore,

Indian: Fifth Report, A.R., vol.37, pp.7063-64; DIAND Summary Report to Parliament, A.R., vol.38, p.7219.”

¹⁶ Aboriginal Justice Implementation Commission, *The Report of the Aboriginal Justice Inquiry of Manitoba* (November 1999), online: AJIC <<http://www.ajic.mb.ca/volume.html>> [*Aboriginal Justice Inquiry*].

¹⁷ *Ibid.* at Chap.1. (there are no page numbers).

¹⁸ *Ibid.*

¹⁹ *Ibid.* at Chap.5. They also explained that: “Despite the amendments intended to remove discrimination, the *Indian Act* today still contains clear forms of sexual discrimination—as well as the seeds of eventual termination of Indian status altogether.”

bring the previous discriminatory provisions forward into the current *Act*.²⁰ The *Aboriginal Justice Inquiry* provided the following example, which explains how “cousins” discrimination comes about:

Joan and John, a brother and sister, were both registered Indians. Joan married a Metis man before 1985 so she lost her Indian status under section 12(1)(b) of the former Act. John married a white woman before 1985 and she automatically became a status Indian. Both John and Joan have had children over the years. Joan is now eligible to regain her status under section 6(1)(c) and her children will qualify under section 6(2). They are treated as having only one eligible parent, their mother, although both parents are Aboriginal. John’s children gained status at birth as both parents were Indians legally, even though only one was an Aboriginal person.

Joan’s children can pass on status to their offspring only if they also marry registered Indians. If they marry unregistered Aboriginal people or non-Aboriginal people, then no status will pass to their children. All John’s grandchildren will be status Indians, regardless of who his children marry. Thus, entitlement to registration for the second generation has nothing to do with racial or cultural characteristics. The Act has eliminated the discrimination faced by those who lost status, but has passed it on to the next generation. Similar results flow from distinctions regarding how illegitimate children are treated under the amendments.²¹

²⁰ *Ibid.* at Chap. 5. *McIvor*, *supra* note 5. W. Cornet, “Aboriginality: Legal Foundations, Past Trends, Future Prospects” in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation* (Markham: LexisNexis Canada, 2003) [*Aboriginality*]. W. Cornet, “First Nation Identities and Individual Equality Rights: A Discussion of Citizenship, Band Membership and Indian Status: Executive Summary Prepared for NAWA” (26 January 2003) [*First Nation Identities*]. J. Fiske, W. Cornet et al., “First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports” (Ottawa: Status of Women Canada, 2001), online: NAHO
<http://www.naho.ca/english/pdf/re_other_orgs_women_governance.pdf#page=123> [*First Nations Women*].

²¹ *Aboriginal Justice Inquiry*, *supra* note 16 at Chap.5.

The *Manitoba Justice Inquiry* considered this form of discrimination to be “improper and probably illegal forms of sexual discrimination,” and recommends that it be eliminated.²²

The *McIvor* case, which will be discussed in more detail at the end of this chapter, is an example of cousins discrimination. While the second generation cut-off type of discrimination affects the plaintiffs in *McIvor* more so than male Indians, that type of discrimination itself was not specifically argued at trial.²³

Another type of discrimination is known as the second generation cut-off rule and is explained by Furi and Wherrett: “The most important target of criticism is the “second generation cut-off rule” that results in the loss of Indian status after two successive generations of parenting by non-Indians. People registered under section 6(2) have fewer rights than those registered under section 6(1), because they cannot pass on status to their child unless the child’s other parent is also a registered Indian.”²⁴ As noted in the above cousins discrimination claim, the second generation cut-off applies to the descendants of reinstated Indian women, at least one generation earlier than it does to the descendants of Indian men. The second generation cut-off rule is also responsible for the continued decline in the registration of 6(1) Indians, and will eventually result in the elimination of all status Indians.²⁵ This type of discrimination is described by the *Aboriginal Justice*

²² *Ibid.*

²³ *McIvor*, *supra* note 5 at para.43. “The plaintiffs do not challenge the Second Generation Cut-off, per se. They say, however, that it is discriminatory to assign s.6(2) status to persons born prior to April 17, 1985.”

²⁴ M. Furi, J. Wherrett, Parliamentary Information and Research Service, Library of Parliament, “Indian Status and Band Membership Issues” (February 2003), online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/bp410-e.htm#bcontinuingtx>> [*Indian Status Issues*] at “Continuing Inequities in Legislation”.

²⁵ See generally: S. Clatworthy, “Bill C-31, Indian Registration and First Nations Membership” (Winnipeg: Four Directions Consulting Group, 2001) [*Indian Registration and Membership*]. S. Clatworthy, “Reassessing the Population Impacts of Bill C-31”

Inquiry as a “defacto ‘one-quarter blood’ rule” that will “threaten the very existence of First Nations in the not too distant future.”²⁶ As will be discussed in greater detail in Chapter 6 of this thesis, the second generation cut-off rule also negatively affects band membership status for many Aboriginal peoples. Fiske and George argue that: “The patrilineal provisions and the privileging of individuals with two registered parents stand in direct contradiction to the matrilineal principles of identity and membership.”²⁷ Furthermore, this kind of discrimination is compounded when there are more women than men who comprise the section 6(2) category.²⁸ Unfortunately, even s.6(1) status Indian women can be negatively impacted by the second generation cut-off rule regardless of the fact that the father of their children may be a status Indian. This form of discrimination is known as unstated paternity.²⁹

(Winnipeg: Four Directions Project Consultants, 2001) online: INAC <http://www.ainc-inac.gc.ca/pr/ra/rpi/rpi_e.pdf> [*Reassessing Population Impacts*]. S. Clatworthy, “Revised Population Scenarios Concerning the Population Implications of Section 6 of the Indian Act” (Winnipeg: Four Directions Consulting Group, 1994) [*Revised Population Scenarios*]. S. Clatworthy, A. Smith, “Population Implications of the 1985 Amendments to the Indian Act: Final Report” (Winnipeg: Four Directions Consulting Group, 1992) [*Population Implications*].

²⁶ *Aboriginal Justice Inquiry*, *supra* note 16 at Chap.5.

²⁷ J. Fiske, E. George, “Final Report: Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalization through Customary Law” (Paper presented to the Bill C-31 and First Nation Membership Pre-Conference Workshop, March 2006) [unpublished] [*Cultural Trauma*] at 1.

²⁸ M.J. Cannon, “First Nations Citizenship, Bill C-31, and the Accommodation of Sex Discrimination Policy” (Paper presented to the Bill C-31 and First Nation Membership Pre-Conference Workshop, March 2006) [unpublished] [*First Nations Citizenship*] at 13-14.

²⁹ S. Clatworthy, “Factors Contributing to Unstated Paternity” (Winnipeg: Four Directions Project Consultants, 2003) online: INAC <http://www.ainc-inac.gc.ca/pr/ra/uncp_e.pdf> [*Unstated Paternity*]. S. Clatworthy, “Paternal Identity and Entitlement to Indian Registration: The Manitoba Context” (Winnipeg: Four Directions Consulting Group, 2001) [*Paternal Identity*].

Unstated paternity discrimination is not obvious from the registration provisions of the *Indian Act*, but is affected more by how the Registrar at Indian and Northern Affairs Canada (INAC) chooses to process applications for registration as an Indian. Unstated paternity discrimination is described by the Native Women's Association of Canada (NWAC) as follows:

In order for a child to be registered as a Status Indian, the birth certificate must be signed by the mother and the father; that is, the eligibility of both parents to Indian Status must be demonstrated by providing their names. If the mother does not provide the name of the father for the birth certificate, then the assumption made by the government is that the father is not entitled to be registered. This obviously has a great impact on the potential eligibility for registration of the child, because the child will not have Indian Status if the child's mother is registered under 6 (2). Non-reporting of paternity or non-acknowledgement of paternity by Indian and Northern Affairs Canada (INAC) of a registered Indian father will result in the loss of benefits and entitlements to either the child or the child's subsequent children.³⁰

The reasons an Aboriginal woman might choose not to disclose the identity of the father of her children often relate to the safety of herself and her children. One cannot assume, however, that she in fact knows the name of the father or has access to him. NWAC explained that the issue is far more complex than simply one of disclosure:

There are a number of reasons why a woman would register a birth without stating the name of the father. Issues related to personal safety, violence, or abuse may provide a reason for a woman deciding to disassociate herself with a former partner or spouse. Issues associated with a lack of privacy in small communities may provide another reason for a woman to prefer not to state the paternity of the child. Other mothers may wish to avoid custody or access claims on the part of the father: leaving the paternity unstated forms a partial protection against such actions by a biological father who may be

³⁰ Native Women's Association of Canada, "Aboriginal Women and Unstated Paternity: An Issue Paper: Prepared for the National Aboriginal Women's Summit" (20-22 June 2007), online: NWAC <<http://www.nwac-hq.org/en/documents/nwac-paternity.pdf>> [*Aboriginal Women and Unstated Paternity*] at 2.

unstable, abusive or engaged in unhealthy behaviours. Finally, many Aboriginal people argue that decisions related to the registration of the child for Indian Status properly belong to the mother and should not be influenced or driven by external legislative processes.³¹

On the other hand, there are Aboriginal women who do name the father, but due to INAC's administrative requirements, the child is still not registered. Mann explains that: "Unacknowledged paternity can be said to arise where the mother names the father but not in accordance with the requirements of provincial vital statistics or INAC policy, thereby causing paternity to be considered unstated."³² It is estimated that approximately 50% of unstated paternity cases result from administrative issues.³³

Unstated paternity discrimination results in the inability of Indian women to register their children with the same Indian status as they have, or not at all in some cases.³⁴ This negatively affects the number of Aboriginal people who can be registered as Indians and often who can be considered band members.³⁵ The situation of "unrecognized" or "unstated" paternity is a form of discrimination that affects Aboriginal women regardless of their own status because, ultimately, it is the status of the baby that is affected by their failure to report the name of the father. This means that hundreds of children descended from Indian mothers will either become "lesser" status Indians under

³¹ *Ibid.*

³² M. Mann, "Indian Registration: Unrecognized and Unstated Paternity" (Paper presented to the Bill C-31 and First Nation Membership Pre-Conference Workshop, March 2006) [unpublished] [*Unrecognized and Unstated Paternity*] at v. "Approximately 50 percent of unstated paternity cases are considered to be unintentional, while the other 50 percent are deemed intentional on the part of the mother." On page vi, one of the recommendations is to allow mothers to file an affidavit stating that the father is a registered Indian, but not have to name the father, where the mother has been abused, raped or the pregnancy is a result of incest.

³³ *Ibid.*

³⁴ *Ibid.* at 15. See also: *Unstated Paternity*, *supra* note 29.

³⁵ *Unrecognized and Unstated Paternity*, *supra* note 32 at v.

s.6(2), or will go unregistered and join the ever increasing group of non-status Indians. These numbers are high, for as many as 37,300 children born to section 6(1) registered mothers between 1985 and 1999 were recorded as having unstated fathers.³⁶ It is also estimated that as many as 13,000 babies with unstated fathers were born to section 6(2) mothers.³⁷ At least, 37,300 children are non-status Indians, due simply to paperwork, but yet will be treated differently from their status Indian brothers, sisters, nieces, nephews, friends and community members. This burden in differential treatment is born largely on the shoulders of Aboriginal women, who comprise the larger number of single parent households. Mann explains:

Indian women are more adversely affected by non-registration and non-membership than men because they are usually the primary caregivers of children. Without proper registration status and membership for themselves and/or their children, they cannot access schools, post-secondary education, other benefits for the children, adequate housing to accommodate the family, nor can they inherit band property.³⁸

Furthermore, while the requirements as to who can be registered as an Indian is specifically prescribed in section 6 of the *Indian Act, 1985*, the “evidentiary and administrative requirements for proof of paternity are established entirely as a matter of INAC policy.”³⁹ Thus, not only must non-status and status Indian women fight discriminatory laws, they must also find a way to combat INAC’s discriminatory policies

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.* at preface.

³⁹ *Ibid.* at 6. Mann cited the Standing Committee on Aboriginal Affairs and Northern Development (1988) “There is no provision in the amended Act that stipulates particular evidentiary requirements at the initial application stage for entitlement to registration or band membership.”

which disproportionately affect them and their descendants. The *McGillivray* case will deal with this issue as part of their discrimination claim against Canada.⁴⁰

"Siblings" discrimination is similar to cousins discrimination in that it involves unequal treatment as between males and females and their descendants.⁴¹ Furi and Wherrett explain how siblings discrimination occurs:

Children of unmarried non-Indian women and Indian men are also treated differently according to gender. Male lineage criteria in the legislation prior to 1985 permitted the registration of all such male children born before 1985. After the passage of Bill C-31, however, female children born to Indian men and non-Indian women between 4 September 1951 and 17 April 1985 became eligible for registration only as the children of one Indian parent.

The application of the amendments has also led to a situation in which members of the same family may be registered in different categories. One example could occur in a family that enfranchised, and in which the mother is a non-Indian. Under Bill C-31, a child born prior to the family's enfranchisement is eligible for registration under section 6(1), while a child born after enfranchisement is eligible only under section 6(2), since one parent is not an Indian. This affects the ability to pass on status, because the latter child will be able to pass on status to his or her children only if their other parent is a status Indian.⁴²

⁴⁰ *Nathan McGillivray et al. v. Her Majesty the Queen*, (File No. T-1975-93) (Re 5x Amended Statement of Claim of the Plaintiff) [*McGillivray*] at para.10. "An application for recognition of Dakota Erin McGillivray in the Indian Register as a member of the OCN, registration number #3150211802, was made on April 18, 1981. Her mother, Diana Lynn McGillivray, did not elect to have the identity of Dakota Erin McGillivray's father disclosed, and therefore his name did not appear on the child's Certificate of Birth, dated February 2nd, 1990 or on the application, because to do so would be incompatible with her human dignity and come at an unacceptable personal price."

⁴¹ Quebec Native Women Inc, "Brief: Subject: Changes to the Proposed Indian Act and the Administration of the Indian Act" (29 September 2000), online: QNW <http://www.faq-qnw.org/indian_act/Brief_indian_act_2000.pdf> [*Changes to Proposed Indian Act*].

⁴² *Indian Status Issues*, *supra* note 24 at "Continuing Inequities in Legislation". See also: W. Moss, E. Gardner-O'Toole, "Aboriginal People: History of Discriminatory Laws" (Ottawa: Library of Parliament, November 1991), online: <[http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm#INTRODUCTION\(txt\)](http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm#INTRODUCTION(txt))> [*Discriminatory Laws*].

With this kind of discrimination, not only are the descendants of males and females treated differently, but the status assigned to a brother and sister is different, based solely on their sex. This difference in registration status also affects band membership status. NWAC explained how the law may have changed but it has left behind the same discriminatory effects:

In 1983, the Supreme Court of Canada ruled in the case of *MARTIN* vs. *CHAPMAN*, that the "illegitimate" *male* child of a status male parent and a non-status female parent would have status and membership, under old section 11(1)(c). However, the "illegitimate" *female* child was not entitled to be registered.

This sub-section has been repealed under Bill C-31, but its legal effects still persist. The separation of status and band membership in the new Act means that the female child is still treated differently.

If a male child had status under old section 11, he will be registered under new section 6(1) and therefore has an automatic entitlement to band membership. His sister, however, will now gain status, but under new section 6(2). She will therefore have only a 'conditional' entitlement to band membership."⁴³

Band membership is equally as important as registration in many regards and some Aboriginal women and their descendants continue to be excluded. While the *Act* may have reinstated some of them with status, it also allowed for bands to opt to exclude some of those women and children.

It is important to note that a band that takes control of membership can either include or exclude all those 'conditionally' entitled. Again though, it is important to keep in mind *when* the band assumes control. If this is *before* June 28, 1987, the band can validly exclude all the conditionally entitled. *After* June 28, 1987, the band may not exclude anyone who, immediately before that date, was entitled to band membership under subsections (1) and (2) of section 11.⁴⁴

⁴³ Native Women's Association of Canada, "Guide to Bill C-31: 1986: An Explanation of the 1985 Amendments to the Indian Act", online: NWAC <<http://www.nwac-hq.org/documents/GuidetoBillC31.pdf>> [*Guide to Bill C-31*] at 23.

⁴⁴ *Ibid.* at 20.

In this way, Aboriginal women still do not have true equality with their male counterparts under the *Indian Act*, or with some band membership codes.

Although sexual discrimination and blood quantum/descent are the major forms of residual and new discrimination in the *Indian Act*, other claims of discrimination can be equally exclusionary. The claim involving Métis scrip takers is based not on sex *per se*, but on the legal determination of individual identities as Métis versus Indian, based on the financial choices made by their ancestors. The Congress of Aboriginal Peoples (CAP) explains: “The old Indian Act excluded Indians who had taken half-breed scrip and also excluded their descendants. Bill C-31 ends this denial for the future but it does not give any right to these people now to apply for registered status unless they are entitled for some other reason.”⁴⁵ Unlike Indian women who had their status taken from them, descendants of scrip takers have not been reinstated:

Persons who received or were allotted 'half-breed lands or money scrip', were excluded from status under old section 12(1)(a), as were their descendants. While C-31 has repealed this section, it did not specifically reinstate these persons. To gain status, they must qualify under one of the categories of new section 6.⁴⁶

Canada uses the choice that Aboriginal peoples made between treaty monies or scrip monies in the past as a legal determination of their identities as either Métis or Indian, without any consultation with these individuals. Add to this the fact that many Indian women who married Métis persons, non-status Indians or non-Aboriginal persons would not have known that they would lose their status as Indians. Assuming that an Indian

⁴⁵ Congress of Aboriginal Peoples, “Indian Act – Bill C-31 – Part II”, online: CAP <<http://www.abo-peoples.org/programs/C-31/c-31-2.html>> [*Indian Act – Part II*].

⁴⁶ *Guide to Bill C-31*, *supra* note 43 at 14.

woman knew she would lose her status if she married a non-Indian, she may have felt that the apparent choice between treaty monies and scrip monies was not really a choice at all. If this were the case and a Cree woman took scrip monies as a result, does this make her and her descendants all Métis people even if she and her entire family still identified with and lived as Cree? Further, does this mean that her descendants must be forever labelled as Métis and excluded from registration under the *Indian Act*, regardless of their actual cultural identities simply because one of their parents chose the only available pot of money to support their families? I doubt that there were information sessions held by Canada to fully inform individual Indian women about the legal implications of taking scrip money over treaty money in relation to their identities and that of their future descendants.

Of course, this situation works in reverse as well. Teillet explained the *Indian Act's* interference in the self-identity of Indians and Métis:

Historically, Métis individuals could choose to take treaty and under the 1886 *Indian Act* they would have been considered 'non-treaty Indians' which the Act defined as a person of Indian blood who either belonged to an irregular band or followed the Indian mode of life, even if only temporarily resident in Canada. If a Métis individual chose to take scrip he or she was not considered legally to be an Indian. If a Métis individual chose to take treaty, he or she would be entered on the band pay list and, on the creation of the *Indian Act* Registry after 1951, all such individuals were henceforth considered in law to be 'status Indians'.⁴⁷

The claims of discrimination by these scrip takers are based on the fact that some of them were always and continue to be members of their communities and/or citizens in their larger Aboriginal Nations, but have been refused the legal identity of Indian and are denied

⁴⁷ J. Teillet, "Métis Law Summary 2004", online: Métis Nation <<http://www.metisnation.ca/rights/download/MLS-2004.pdf>> [*Métis Law*] at 5.

the same benefits, rights and responsibilities as their family members. As early as 1988, the Standing Committee on Aboriginal Affairs and Northern Development's *C-31 Fifth Report* also noted the discrimination claims of Métis scrip takers.⁴⁸ However, the issue has still not been addressed. Legal challenges to the registration provisions of the *Indian Act* may involve a combination of any of the above discrimination claims, as many Aboriginal families contain multiple ethnicities and multiple members from different Aboriginal Nations. In fact, Aboriginal peoples are among the most ethnically diverse groups in Canada.⁴⁹ It should come as no surprise then, that they would have mixed heritages and children from mixed unions. The question is how much can the issue of mixed heritages affect their legal identity under the *Indian Act*?

(ii) Other Inequities

Although there are currently formal claims for discrimination advancing through the courts, the discrimination experienced by Aboriginal women and their descendants continues in other less obvious ways. For example, many Aboriginal women who lost status under the previous *Indian Act* and regained it pursuant to the *Bill C-31* amendments are often considered as outsiders because they are reinstates and, are sometimes

⁴⁸ Canada, House of Commons, *Fifth Report of the Standing Committee on Aboriginal Affairs and Northern Development on consideration of the implementation of the Act to Amend the Indian Act as passed by the House of Commons on June 12, 1985, Minutes of Proceedings and Evidence of the Standing Committee on Aboriginal Affairs and Northern Development*, 2nd sess. 33rd Parl., issue no. 46 [SCAAND Report on C-31].

⁴⁹ Statistics Canada, "Canada's Ethnocultural Mosaic, 2006 Census: National Picture", online: StatCan <<http://www12.statcan.ca/english/census06/analysis/ethnicorigin/increased.cfm> > [Canada's Ethnocultural Mosaic] at "Aboriginal Ancestries. "People with Aboriginal ancestry were more likely than the total population to report multiple origins. In 2006, 62.4% of people with Aboriginal ancestry also reported other origins, compared with 41.4% of the total population of Canada."

negatively referred to as “Bill C-31ers”.⁵⁰ In fact one of the concerns raised by some First Nations during the *Bill C-31* consultations was that they feared that allowing these women and their descendants back into the communities would somehow threaten their cultures.⁵¹ What these First Nations forgot was that most of these Aboriginal women grew up in their communities and were only excluded because of the discriminatory legislation, and not by any personal desire to abandon their communities or their cultures. Yet, the label of *Bill C-31* reinstatee can act as a bar to communal acceptance and reserve residency. Marrying a non-Aboriginal man did not change who these Aboriginal women were as people, their culture, or their common history with their communities. Even if some changes occurred, there would be no more changes than would have occurred with the many Aboriginal men who married non-Aboriginal women and had children with them. Somehow even now despite the recognition that the exclusion of Aboriginal women and their descendants from status based on marriage to a non-Indian was discriminatory, they still face residual discrimination in the *Indian Act*, and some even experience exclusion from band membership.

Aboriginal women and their descendants comprise the largest percentage of those with s.6(2) status. This is the inferior or “half-status” that prevents Aboriginal peoples from passing their status on to their children in their own right (i.e. without having to

⁵⁰ B. Lawrence, *“Real” Indians and Others: Mixed Blood Urban Native Peoples and Indigenous Nationhood*, (Lincoln, NE: University of Nebraska Press, 2004) [*Real Indians and Others*] at 69. See generally: P. Paul, Atlantic Policy Congress of First Nation Chiefs Secretariat, *The Politics of Legislated Identity: The Effect of Section 6(2) of the Indian Act in the Atlantic Provinces* (Nova Scotia: APCFNC, 1999) [*Legislated Identity*].

⁵¹ *McIvor*, *supra* note 5 at para.129. “The legislation resulted in a significant increase in the number of people entitled to Indian status in Canada. There were widespread concerns that the influx might overwhelm resources available to bands, and that it might serve to dilute the cultural integrity of existing First Nations groups.”

partner with another status Indian). Today, there is a movement by these reinstated women to seek compensation for the many years they were without status and, consequently, did not have access to the same rights, benefits, and obligations as their male counterparts.⁵² Although Aboriginal women and their descendants suffer a disproportionate level of discrimination, they are not alone in their experience of being arbitrarily excluded from the *Indian Act*. In fact, many Aboriginal peoples have never been registered under the *Indian Act*, and whole families have been excluded from registration and band membership as a result. Magnet reviewed some of the arbitrary ways in which Aboriginal people have been arbitrarily excluded from registration under the *Indian Act*:

As we shall see, there are a number of arbitrary reasons that Aboriginal peoples may or may not have status under the *Indian Act*. In some cases, Aboriginal peoples or their communities were simply left off band lists, when the band lists were created or substantially revised in the 1940's (band lists largely determine Indian status). In other cases, people lost their Indian status when government "enfranchised" them by force under a policy intended to assimilate Canada's Aboriginal people. In the most notorious example, Indian women lost their status when they married a non-status person. Some, but not all of these women and their children, had their status returned in 1985 by Bill C-31.⁵³

⁵² Congress of Aboriginal Peoples, "2005 Resolutions: Congress of Aboriginal Peoples' Annual General Assembly" (Ottawa: CAP, 2005), online: CAP <<http://www.abo-peoples.org/Res2005.pdf>> [*CAP 2005 Resolutions*] at Resolution 2005-19. Congress of Aboriginal Peoples, "CAP 2006 Resolutions: Congress of Aboriginal Peoples' Annual General Assembly" (Ottawa: CAP, 2006) [*CAP 2006 Resolutions*] at Resolution 2006-02.

⁵³ J. Magnet, et al., "'Arbitrary, Anachronistic and Harsh': Constitutional Jurisdiction in Relation to Non-Status Indians and Metis" in J. Magnet, D. Dorey, eds., *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis, 2005) [*Arbitrary, Anachronistic and Harsh*], at 171.

Through no fault of their own, many Aboriginal peoples have been involuntarily excluded from their communities.

Many of these excluded Aboriginal people (unlike *Bill C-31* reinstatementees), never had their names entered on band lists and, therefore, were never registered. Alternatively, they may have once had their names on a band list, but since these lists were updated, revised and purged so many times over the years, the result was that hundreds of names were deliberately left off the band lists in an effort to reduce the number of legally recognized Aboriginal people (i.e. status Indians).⁵⁴ There is currently no process set up by INAC to review these claims and adjust the status Indian register, nor are there any programs to assist bands in correcting their band membership lists. The fewer number of registered Indians meant that fewer benefits were due to be paid by the federal government.⁵⁵ Magnet used the Atlantic region as an example and explained how band lists were woefully inaccurate, incomplete and eventually affected the registration status of countless Aboriginal persons.⁵⁶ In 1948 when Indian Affairs was instructed to revise the band lists, they relied on two Indian agents in Nova Scotia located on the Eskasoni and Shubenacadie reserves.⁵⁷ However, over 50% of Aboriginal people lived on the 30 other reserves in the province, and many Aboriginal people lived off reserve altogether.⁵⁸ Magnet explains the haphazard approach that was used to identify Indians in the Atlantic region:

⁵⁴ L. Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (Toronto: Thomson Canada, 1996) [*Entitlement to Indian Status*] at 12.

⁵⁵ *Arbitrary, Anachronistic and Harsh*, *supra* note 53 at 179.

⁵⁶ *Ibid.* at 179-180.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

Once the revised lists were completed by the Indian Agents, they were posted at the two Indian Agencies and distributed to various chiefs and band councils. It does not appear that the lists were posted anywhere else in the province other than the Eskasoni and Shubenacadie reserves. Rather, the process relied on word-of-mouth and the expectation that individuals would check to ensure that their names were on the revised lists. Whether an individual appeared on the revised list depended, in many respects, on luck. The Indians living on the Eskasoni and Shubenacadie reserves had a much better chance of being included on the revised list than those living on the other reserves on the province or those living and working in Halifax, Truro or Sydney.⁵⁹

He goes on to argue that in light of the constitutional requirements for analogous enumeration requirements in minority language communities, simply posting band lists in 2 out of 30 reserves is far from sufficient to identify the true numbers of Indians in Nova Scotia.⁶⁰

Despite Canada's stated intention to rid the *Indian Act* of sexual discrimination, many independent investigations and reports have concluded that: "Criteria establishing Indian status did not eliminate sexist discrimination, but merely deferred it from one generation of women to their descendents"⁶¹ and that: "Despite the amendments intended to remove discrimination, the *Indian Act* today still contains clear forms of sexual discrimination – as well as the seeds of the eventual termination of Indian status

⁵⁹ *Ibid.* at 179-180.

⁶⁰ *Ibid.* Magnet used the case of: *Mahe v. Alberta*, [1990] S.C.R. 342 [*Mahe*] as an analogy when he assessed the actions of the Indian Agents. In this case, the Supreme Court of Canada required that even the "potential" adherents to minority language communities must be counted with regard to section 23 of the *Charter*. This section deals with the language rights of minority communities.

⁶¹ *Cultural Trauma*, *supra* note 27 at 1.

altogether.”⁶² The “eventual termination of Indian status” being referred to here is what is commonly known as legislated extinction of Aboriginal peoples through the registration provisions of the *Indian Act*.⁶³ Since the federal government only recognizes status Indians as rights-bearers and the only ones who can occupy and use reserve lands, the loss of that status by future generations will make Aboriginal peoples, for all legal and political purposes, extinct.⁶⁴ This also has serious implications for band membership. Band membership as determined under the *Indian Act* is limited to status Indians only, and this applies to approximately 60% of the bands in Canada.⁶⁵ For the bands that determine their own membership, s.6(2) Indians and non-status Indians can be excluded from membership.⁶⁶ Cannon explains that “There are three broad ‘leftovers’ where discrimination is concerned, namely that which surrounds hierarchies of Indian status, unstated paternity and the legitimization of patriarchy through band membership codes.”⁶⁷ Cannon explains that legitimizing patriarchy through band membership codes occurs as follows:

Band membership provisions did not prevent the exclusion of the descendants of Indian women who had “married out”. Having gained only “provisional” membership under

⁶² Aboriginal *Justice Inquiry*, *supra* note 16 at section entitled “The *Indian Act*” of Chapter 5 entitled “Aboriginal and Treaty Rights”.

⁶³ *Legislated Identity*, *supra* note 50. P. Paul, *Bill C-31: The Trojan Horse: An Analysis of the Social, Economic and Political Reaction of First Nations People as a Result of Bill C-31* (M.A. Thesis, University of New Brunswick 1990) [unpublished] [*Trojan Horse*]. P. Palmater, “An Empty Shell of a Treaty Promise: R. v. Marshall and the Rights of Non-Status Indians” (2000) 23 Dal. L.J. 102 [*An Empty Shell*].

⁶⁴ *Ibid.*

⁶⁵ See: *Indian Registration and Membership*, *supra* note 25 for an analysis of band membership provisions. I discuss band membership in more detail in chapter 6.

⁶⁶ In some cases, even s.6(1) Indians could be excluded from band membership, depending on whether certain codes are strictly applied. Some of these issues will be addressed in the following chapter.

⁶⁷ *First Nations Citizenship*, *supra* note 28 at 13.

section 6(2) of Bill C-31, the descendants of First Nations women who had “married out” could be – and always depending on the final code adopted – excluded from the status collective.⁶⁸

The failure to remedy the discrimination in the *Indian Act* by the 1985 amendments has allowed band membership provisions enacted thereunder to “create and sustain” human rights issues.⁶⁹

The human rights issues, to which Cannon refers, relate specifically to band membership. In some cases: “...band membership codes have enabled the further exclusion of Indigenous women. In short, the inability of women to transmit band membership automatically to first generation descendants could constitute continued sex discrimination under the auspices – and ordainment – of the Canadian state.”⁷⁰ Therefore, status under the *Indian Act* affects more than the identity, rights and benefits of individuals in their relationship with Canada. It can also affect communal belonging and access to culture. Cannon asserts his identity as Haudenosaunee, before his identity as a status Indian. In theory, then, “This suggests that the Indian Act can never define who a person is, especially if they remember that nation and culture to which they belong.”⁷¹ However, he agrees with Lawrence that it would be naive to think that one could now ignore the ramifications of the *Indian Act* on conceptions of Aboriginality.⁷²

[W]hen legislation is introduced that controls a group’s identity – once created and established, it cannot simply be undone. You cannot put the genie back in the bottle again – you have to deal with it. It is one thing to recognize that Indian Act categories are artificial – or even that they have

⁶⁸ *Ibid.* at 16.

⁶⁹ *Ibid.* at 17.

⁷⁰ *Ibid.* at 17-18.

⁷¹ *Ibid.* at 21.

⁷² *Real Indians and Others*, *supra* note 50 at 230.

been internalized – as if these divisions can be overcome simply by denying their importance. Legal categories, however, shape peoples' lives. They set the terms that individuals and communities must utilize, even in resisting these categories.⁷³

That is why, though many Aboriginal people know who they are deep inside, they are still labelled legally and politically, with the effect that their rights are determined by this label. While all of these claims are very important to resolving the historic and current inequalities resulting from the *Indian Act*, time and space limitations mandate that I limit my focus to one specific *Charter* claim: second generation cut-off discrimination. This kind of discrimination disproportionately affects reinstated Aboriginal women and their descendants, as compared to their male counterparts, and further results in the expansion of the non-status Indian population. It also acts as a bar to band membership in some communities, making the preservation of culture and identity all the more difficult. All Aboriginal peoples in First Nations will eventually be affected by the second generation cut-off rule, either directly in their own families, or indirectly through their extended families, close friends, local communities, and Aboriginal Nations. The question is whether status Indians and their leaders alike are going to stand behind non-status Indians and join their ongoing struggle to protect their shared identities, cultures and ways of life, for the benefit of future generations.

(b) *Charter* Equality

In the meantime, it seems that Aboriginal women and their descendants will be the ones to protect the cultures and identities of Aboriginal peoples in Canada through various legal challenges. Many of these people are either the descendants of reinstated

⁷³ *Ibid.*

Aboriginal women and/or non-status Indians. As a result, the issue has been portrayed by Canada and others as a struggle between First Nations and Aboriginal women or status Indians versus non-status Indians. Unfortunately, even the political representatives of these groups have let themselves fall into this trap and have argued their identity claims from very polarized positions. It does not serve any Aboriginal groups' interests to allow their valid claims to be framed in divisive terms. The issue of equality and fairness for Aboriginal Nations starts with the preservation of their identity and cultures which has both individual and communal aspects. Aboriginal Nations cannot claim to speak of communal rights in a truly holistic way without including women and children and without considering individual rights and identities. Courts, academics, and politicians sometimes concentrate on singular issues outside of their social or cultural contexts. However, Aboriginal cultures and ways of life cannot be divided and sub-divided without their true meanings being lost. The example of an Aboriginal right to determine citizenship is a case in point, because while I contend, as argued in Chapter 4, that this right exists, it does not exist in isolation from other rights and responsibilities of Aboriginal peoples and communities. The assertion of an Aboriginal right by Aboriginal Nations to determine citizenship is limited by the corresponding right of Aboriginal peoples to belong to their communities and partake in the benefits and responsibilities of their cultures. While I would never advocate that the parties involved address *Indian Act* registration issues, like second generation cut-off discrimination, as one-off issues, time and space are limited in this thesis, and I will, therefore, attempt to assess this discrimination claim within as much of the relevant context as possible.

In this section, I review the *Indian Act*, the *Charter*, relevant and analogous case law, academic literature, and government material in support of my argument that the second generation cut-off rule in the *Indian Act* is discriminatory and violates the *Charter's* section 15 equality rights for non-status Indians. This rule is arbitrary and does not relate to the actual cultures and identities of Aboriginal peoples. The second generation cut-off rule affects Aboriginal women and their descendants disproportionately, as compared to their male counterparts, and will eventually lead to the legislative extinction of Indians in Canada to the detriment of all Aboriginal Nations. This form of discrimination and its negative results are a violation of the right to equality as provided in section 15 of the *Charter* and the constitutional promise in section 35 to protect the cultures and identities of Aboriginal peoples in Canada so that they may survive into the future.⁷⁴ Since the federal government bases most of its Aboriginal policies on the *Indian Act* and those who qualify for status, non-status Indians suffer harm for being excluded from such registration. Not only does Canada wield an incredible amount of power over Aboriginal Peoples, but it also has the power to remedy much of the discrimination that remains within the *Indian Act*. Canada has the power to make amendments to the various registration provisions of the *Indian Act*, and/or can exempt

⁷⁴ *Charter*, *supra* note 6 at s.15. Section 15 provides: “(1) Equality before and under law and equal protection and benefit of law – Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Affirmative action programs – Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 *Constitution Act, 1982*]. Section 35(1) provides:

groups from these provisions. Canada has, in fact, remedied the lack of registration status for large groups of non-status Aboriginal peoples when it suited its political purposes, but refuses to do so now on a larger scale to remedy ongoing discrimination.⁷⁵

As noted in the *McIvor* case, one of Canada's primary motivations, if not its sole motivation behind amending the registration provisions of the *Indian Acts* over the years, was to reduce the number of people (i.e. Indians) for which it was legally and financially responsible.⁷⁶ While, on the one hand, Canada has distanced itself from the racist, assimilatory policies of the past, the fact remains that it has not amended the discriminatory registration provisions in the *Indian Act* whose design was based on those racist policies and views.⁷⁷ The federal government stated in its 1998 *Statement of Reconciliation* that:

“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

⁷⁵ The situation with the Innu, the Mi'kmaq at Miawpukek and the Federation of Newfoundland Indians (FNI) all located in Newfoundland/Labrador, will be discussed later in this chapter.

⁷⁶ *Entitlement to Indian Status*, *supra* note 54 at 12. “The Indian Act or similar legislation as it relates to entitlement or more simply put “who is an Indian” has been amended repeatedly for more than one hundred and fifty years. Many of these amendments were bold attempts at reducing the aboriginal population of a province or the whole country. Many of the amendments changed the way the government defines an Indian.” Gilbert goes on to explain in footnote #3: “Throughout this text, the author argues that the current *Indian Act* continues with that tradition. Subsection 6(2) of the present *Indian Act* is a case in point which many observers consider to be a draconian attempt by Parliament to limit the number of Indians in Canada. It is often referred to as the second generation cut-off rule. Subsection 6(2) is simply a new technique for an old habit of Ottawa's: it was often called purging or correcting band lists...”. See also: *Real Indians and Others*, *supra* note 50 at 45-81.

⁷⁷ Indian and Northern Affairs Canada, “Statement of Reconciliation” (7 January 1998), online: INAC <http://www.ainc-inac.gc.ca/gs/rec_html> . Canada apologized for the assimilatory basis upon which it based its policies in the past. However, the registration provisions which were based on these same views remain in force. See *Real Indians and Others*, *supra* note 50 at 51. “From the perspective of the colonial administration, the 1869 legislation had two primary goals – to remove as many individuals as possible from

As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.⁷⁸

Canada acknowledged that the *Indian Act* has negatively impacted the identity of Aboriginal peoples. It also stated that the “policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country.” It offered its “profound regret for past actions” and seeks to find ways that Aboriginal people can participate in all aspects of Canadian life in a way which “preserves and enhances the collective identities of Aboriginal communities, and allows them to evolve and flourish in the future.”⁷⁹

The *Indian Act* was one of their tools of assimilation that still exists today. The registration provisions ensure that status Indians continue to diminish in number in each generation. Yet, even recently, Canada apologized for basing its policies and actions on assimilatory views from the past. Specifically, Canada’s apology included the following statement:

Two primary objectives of the residential school system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture.

Indianness and, as part of this process, to enforce Indianness as being solely a state of ‘racial purity’ by removing those children designated as ‘half-breed’ from Indian communities.”

⁷⁸ *Ibid.* at 1. (emphasis added)

⁷⁹ *Ibid.* at 2.

These objectives were based on the assumption that aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as was infamously said, “to kill the Indian in the child”.

Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.⁸⁰

Yet the residual discrimination in the registration provisions of the *Indian Act*, in particular the second generation cut-off rule has been recognized by academics, politicians, and independent bodies as discrimination that must be addressed.

The second generation cut-off rule is incompatible with an evolving and flourishing identity for Aboriginal communities. The *Indian Act* arrests their identity in legislation that is based on out-dated, racist principles that should no longer be a part of our relationship with Aboriginal peoples. Furthermore, the *Act* takes the individual and communal identities of Aboriginal peoples out of their hands and keeps it in the hands of the government. The “Indian” identity, as provided under the *Indian Act*, is not about Aboriginal communities and their collective identities; it is about budgets and reducing the number of Indians. These two incompatible policy lines must be resolved, or the inequality between Aboriginal peoples will continue to divide families and promote disharmony in local communities, many of which already suffer from severe social dysfunction.

(i) The Legal Test for Discrimination

I have argued in the previous chapter that Aboriginal Nations have the right to determine their own citizenship, and that this may also translate into the right of local communities to determine their own membership. However, as with all rights, this right is

⁸⁰ Right Honourable Prime Minister Stephen Harper, Government of Canada, “Statements by Ministers: Statement of Apology to former students of Indian Residential Schools”,

tempered, in this instance specifically, by the right of Aboriginal peoples to belong to their communities and have equal access to their cultures. There are many different groups of Aboriginal peoples who are currently excluded from status under the *Indian Act* which has been acknowledged to have evolved as an important aspect of identity for many Aboriginal peoples. There are also groups who may or may not have status, but who lack band membership. One of these groups has been wrongly excluded from registration under the *Act* as Indians by virtue of the second generation cut-off rule discrimination. As explained earlier in this chapter, the second generation cut-off rule means that two successive generations of parenting with a non-Aboriginal person will result in children without status as Indians under the *Indian Act*. In order to assess a hypothetical claim of discrimination, I first review the law as it relates to section 15 *Charter* equality claims. I then review the issues that would be reviewed in future claims of discrimination because of the second generation cut-off rule before looking at possible remedies and upcoming related cases.

The law relating to discrimination claims has been evolving since section 15 was included in the *Charter*.⁸¹ For some time, the legal test outlined in the *Andrews* case was considered the definitive test for assessing section 15 equality claims.⁸² The subsequent clarifications that were made to this test in *Law* seemed to cause more confusion than clarity for all parties.⁸³ However, the Supreme Court of Canada in *Kapp* clarified that the

(11 June 2008) online: INAC <<http://www.ainc-inac.gc.ca/ai/rqpi/apo/pmsh-eng.asp>> [*Canada's Apology*].

⁸¹ *Charter*, *supra* note 6 at s.15.

⁸² *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews*].

⁸³ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*].

legal test for section 15 equality is really the test as originally provided in *Andrews*.⁸⁴ Without rejecting *Law* outright, the Court did distance itself, somewhat, from the human dignity aspect of the test.⁸⁵ More recently in the *Ermineskin* case, the Court specifically relied on the equality test as set out in *Andrews* and “as restated in *Kapp*” to determine whether discrimination had occurred.⁸⁶ Therefore, before reviewing the specific claim of second generation cut-off discrimination, a brief review of the legal test applicable to section 15 equality claims is necessary.

The issue in *Andrews* was that the *BC Barristers Act* differentiated between citizens of Canada and non-citizens with regards to admission to the practice of law within the province of British Columbia.⁸⁷ Justice McIntyre, who dissented in part respecting s.1 only, explained that equality was a comparative concept, and that not every difference in treatment between individuals in the law will result in inequality and, conversely, that identical treatment may itself result in inequality.⁸⁸ However, the Court also felt that consideration had to be given to the law itself, and not just the situation of individuals.⁸⁹ True equality in the *Charter* meant that individuals have the right to equality under the law, equality before the law, equal protection of the law, and equal benefit of the law.⁹⁰ Specifically, the Court held that: “The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human

⁸⁴ *R. v. Kapp*, [2008] 2 S.C.R. 483 [*Kapp*].

⁸⁵ *Ibid.* at paras. 21-24.

⁸⁶ *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. 9 (QL) [*Ermineskin*].

⁸⁷ *Andrews*, *supra* note 82 at para.2. The act referred to in this case was the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26.

⁸⁸ *Andrews*, *supra* note 82 at para. 25.

⁸⁹ *Ibid.* at para. 30.

⁹⁰ *Ibid.* at para. 33.

beings equally deserving of concern, respect and consideration.”⁹¹ Just as important was the explanation that the purpose of section 15 was not to eliminate all distinctions from society for, if that were the case, sections dealing with multicultural heritage, freedom of religion, and Aboriginal rights, would not be included in the *Charter*.⁹² As a result, the Court in *Andrews* provided the following definition of discrimination:

a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group not imposed upon others, or withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.⁹³

Based on these considerations, the following test for discrimination was provided: (1) whether the law imposes a differential treatment between the claimant and others; (2) whether an enumerated or analogous ground was the basis for the differential treatment; and (3) whether the law has a discriminatory purpose or effect.⁹⁴

From that analysis of discrimination, the Court in *Andrews* explained that special consideration had to be given to the relationship between section 15 and section 1 of the *Charter*, which reads as follows: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁹⁵ Given the similarity in purposes, they found that the principles which are regularly

⁹¹ *Ibid.* at para. 34.

⁹² *Ibid.*

⁹³ *Ibid.* at para. 37.

⁹⁴ *Ibid.* at para. 46. See also: *Law*, *supra* note 83 at para. 23 which summarises the test laid out in *Andrews*, *supra* note 82.

⁹⁵ *Charter*, *supra* note 6 at s.1.

applied under the *Human Rights Act* are “equally” applicable to *Charter* discrimination analysis.⁹⁶ While the key grounds of discrimination are specifically listed in section 15, those enumerated grounds were not intended to be exhaustive, and future cases may expand this list.⁹⁷ With regards to the burden of proof in each case, the initial burden lies with the claimant to demonstrate that an infringement has occurred. Then, the burden of proof will shift to the Crown to justify the infringement pursuant to section 1. While the court felt that there was no single test under section 1, it cited *Oakes* with approval and added that the object of the assessment was for the Court to balance many factors and avoid rigid or inflexible standards of assessment.⁹⁸ Therefore, the first question to ask in the justification stage is whether the limitation is a legitimate exercise of legislative power to achieve desirable social objectives. The second stage involves a proportionality test where the Court looks at the nature of the right, the extent of the infringement, the relation between the limit and the legislation’s objective, the importance of the right to the individual/group, and the broader social impact of the law and its alternatives.⁹⁹ Justice Wilson (writing for the majority), also commented that public policy was the jurisdiction of legislatures. The role of the courts is to ensure that the application of public policy by legislatures is done in a way which is sustainable under the *Charter*.¹⁰⁰ As a result, an infringement of s.15 was found and the Court further held that it was not justifiable pursuant to s.1.¹⁰¹

⁹⁶ *Andrews, supra* note 82 at para. 38.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* at paras. 50-52. *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

⁹⁹ *Andrews, supra* note 82 at para. 51.

¹⁰⁰ *Ibid.* at para. 59.

¹⁰¹ *Ibid.* at para.

Justice Wilson further explained that she was in complete agreement with the reasons of Justice McIntyre with regards to how he interpreted s.15, and how s.15 and s.1 interact, and that the only difference of opinion was as to the application of s.1 to this case.¹⁰² The Court was unanimous that the requisite discrimination claim had been made out, and that the only issue in this case was whether the restriction was reasonable pursuant to section 1.¹⁰³ Justice Wilson explained that:

a rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class. I agree with him also that it discriminates against them on the ground of their personal characteristics, i.e. their non-citizen status. I believe, therefore, that they are entitled to the protection of s.15.¹⁰⁴

Having found an infringement of section 15, the question then was whether the restriction in the *Barristers Act* constituted a “reasonable limit” which could be “demonstrably justified in a free and democratic society” pursuant to section 1 of the *Charter*.¹⁰⁵ In answering this question, Justice Wilson relied on the *Oakes* test. The standard of proof for this test is the civil standard; i.e., proof on a balance of probabilities.¹⁰⁶ The test itself has two essential steps. The first is whether the particular legislative provision is based on a “pressing and substantial” objective.¹⁰⁷ The standard is high in this part of the justification test so that trivial legislative objectives do not trump constitutionally protected rights and freedoms.¹⁰⁸ The second step requires the Crown to demonstrate that the limitation is reasonably and demonstrably justified by satisfying a proportionality test. This part of the

¹⁰² *Ibid.* at para. 1.

¹⁰³ *Ibid.* at paras. 2-4.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* at para.8.

¹⁰⁶ *Oakes*, *supra* note 98 at para. 67.

¹⁰⁷ *Ibid.* as cited in *Andrews*, *supra* note 82 at paras. 8-10.

test requires that: (1) the limitation must be rationally connected to the objective; (2) the limitation must impair the right as minimally as possible; and (3) the effects of the limitation must not encroach on individual or group rights so severely that the legislative objective is outweighed by the “abridgement of rights”.¹⁰⁹ The more “deleterious” the effects of the legislation, the more important the legislative objective will have to be in order to survive this part of the test.¹¹⁰ However, given that s.15 was designed to protect groups who suffer from “social, political and legal disadvantage”, the government’s burden of justifying discrimination is an onerous one.¹¹¹ As a result, the Court found that the requirement of citizenship was not effective in achieving the objective of ensuring that lawyers were familiar with Canadian institutions, and was not even rationally connected to that objective since “Citizenship does not ensure familiarity with Canadian institutions and customs.”¹¹² The second objective of ensuring a commitment to Canadian society was also found to have failed the justification test. Therefore, the Court found that the citizenship requirement was an infringement of s.15 of the *Charter* and could not be justified pursuant to s.1.¹¹³

The subsequent *Law* case revisited the test laid out in *Andrews*. The Court noted that the general approach that had been adopted in *Andrews* was applied in subsequent cases of the Court.¹¹⁴ The issue in *Law* was the constitutionality of several sections of the

¹⁰⁸ *Oakes*, *supra* note 98 at pp. 138-139.

¹⁰⁹ *R. v. Edward Books and Art Ltd.*, [1986] 2 S.C.R. 713 [*Edward Books*] at p.768 as cited in *Andrews*, *supra* note 82 at para.11.

¹¹⁰ *Oakes*, *supra* note 98 at paras. 69-71.

¹¹¹ *Andrews*, *supra* note 82 at para. 10.

¹¹² *Ibid.* at para. 12.

¹¹³ *Ibid.* at para. 17.

¹¹⁴ *Law*, *supra* note 83 at para. 31. The Court referred to numerous cases some of which included: *Egan v. Canada*, [1995] 2 S.C.R. 513 [*Egan*], *Benner v. Canada (Secretary of*

Canada Pension Plan which draws distinctions on the basis age with regards to survivor benefits.¹¹⁵ Justice Iacobucci in *Law* explained the evolution of the cases and noted the following principle: “a flexible and nuanced analysis under s.15(1) is preferable because it permits evolution and adaptation of equality analysis over time in order to accommodate new or different understandings of equality as well as new issues raised by varying fact situations. Such an approach also accords far better with the strong remedial purpose of s.15, permitting the realization of that purpose.”¹¹⁶ The Court explained that since the decision in *Andrews* had been delivered, there had been some differences of opinion among the members of the Supreme Court of Canada as to the interpretation of s.15. As a result, the Court in *Law* attempted to provide basic principles that were to act more like “points of reference” versus a rigid test.¹¹⁷ Justice Iacobucci summarised the test in *Andrews* as (1) whether the law imposes a differential treatment between the claimant and others; (2) whether an enumerated or analogous ground was the basis for the differential treatment; and (3) whether the law has a discriminatory purpose or effect.¹¹⁸ He also explained that: “Each of the elements of the approach to s. 15 articulated by the Court in *Andrews* and confirmed in later cases has developed and been enriched by the subsequent jurisprudence.”¹¹⁹

Justice Iacobucci then explained that the proper approach to analysing a claim of discrimination involved a “synthesis” of the decisions subsequent to *Andrews*, and

State), [1997] 1 S.C.R. 358 [*Benner*], *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [*Eaton*], and *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*].

¹¹⁵ *Law*, *supra* note 83 at para.1. *Canada Pension Plan*, R.S.C., 1985, c. C-8.

¹¹⁶ *Ibid.* at para. 3.

¹¹⁷ *Ibid.* at para.6

¹¹⁸ *Ibid.* at para. 23.

¹¹⁹ *Ibid.* at para. 35.

provided a three part test. First, does the law “(a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?”¹²⁰ If the answer is yes, then there will be differential treatment and the claimant can move to the next part of the test. The second part of the test asks whether the claimant was “subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?”¹²¹ The final part asks whether this differential treatment discriminated “in a substantive sense, bringing into play the purpose of s.15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s.15(1).”¹²² The Court then went on to explain that the purpose of s.15(1) is to prevent the violation of human dignity and freedom through disadvantage and stereotyping.¹²³ Human dignity relates to self-worth and self-respect and is harmed when an individual or group is subject to unfair treatment based on their personal characteristics that have little to do with their actual needs, capacities or merits.¹²⁴

However, the recent *Kapp* decision from the Supreme Court of Canada clearly indicated that the original *Andrews* decision contained the “template” regarding

¹²⁰ *Ibid.* at para.39.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.* at para. 51.

¹²⁴ *Ibid.* at para. 53.

substantive equality.¹²⁵ In *Kapp*, mostly non-Aboriginal commercial fishers asserted that their equality rights were violated on the basis of race, when a communal fishing license was granted to three bands allowing them to fish for salmon in the Fraser River for a twenty-four hour period when others could not.¹²⁶ Although the Court found that there was a distinction made on the basis of race, since the communal licenses were designed to ameliorate the conditions of a disadvantaged group (Aboriginal bands), this fit within the ambit of s.15(2), and there could be no claim of discrimination.¹²⁷ In analysing this case, the Court applauded the decision in *Law* for unifying the s.15 case law since *Andrews*, but also noted several problems with it.¹²⁸ While agreeing with the Court in *Law* that human dignity is the basis of s.15 protection, Chief Justice McLachlin and Justice Abella, writing for the majority, also found that human dignity as a legal test has become “an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.”¹²⁹

¹²⁵ *Kapp*, *supra* note 84 at para. 14. “Nearly 20 years have passed since the Court handed down its first s.15 decision in the case of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. *Andrews* set the template for this Court’s commitment to substantive equality – a template which subsequent decisions have enriched but never abandoned.”

¹²⁶ *Ibid.* at paras. 1-2.

¹²⁷ *Ibid.* at para. 3. “We have concluded that where a program makes a distinction on one of the grounds enumerated under s.15 or an analogous ground but has as its objective the amelioration of the conditions of a disadvantaged group, s.15’s guarantee of substantive equality is furthered, and the claim of discrimination must fail.” Justice Bastarache, although concurring in the result, relied on s. 25 of the *Charter* and not s.15(2).

¹²⁸ *Ibid.* at paras. 19-21.

¹²⁹ *Ibid.* at para. 22.

Additionally, the Court in *Kapp* felt that the test in *Law* has allowed formalism and the artificial comparator analysis to “resurface”.¹³⁰

Previously in *Law*, Justice Iacobucci (writing for the Court) had provided a list of contextual factors that would help determine whether or not s.15(1) had been infringed.¹³¹ These factors included: (1) a pre-existing disadvantage; (2) the correspondence (or lack thereof) between the ground(s) on which the claim is based and the actual needs, capacities and circumstances of the claimant; (3) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and (4) the nature of the interest affected.¹³² The Court in *Kapp*, however, held that the factors cited

¹³⁰ *Ibid.* The “artificial comparator analysis” focussed on “treating likes alike” in the analysis of whether discrimination had occurred.

¹³¹ *Law*, *supra* note 83 at para.88.

¹³² *Ibid.* at para.89. Justice Iacobucci further defined the contextual factors as follows: “(A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of “discrete and insular minorities” should always be a central consideration. Although the claimant’s association with a historically more advantaged or disadvantaged group or groups is not per se determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed. (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. Although the mere fact that the impugned legislation takes into account the claimant’s traits or circumstances will not necessarily be sufficient to defeat a s. 15(1) claim, it will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant’s actual situation in a manner that respects his or her value as a human being or member of Canadian society, and less difficult to do so where the law fails to take into account the claimant’s actual situation. (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the Charter will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member of society. and (D) The nature and scope of the interest affected by the impugned law. The more severe and localized the consequences of the legislation for the affected

in *Law* should not be read literally, but rather as a way to focus on the central concern of s.15 which had been previously identified in *Andrews* as “combating discrimination, defined in terms of perpetuating disadvantage and stereotyping.”¹³³ This “central purpose” applies to both s.15(1) and s.15(2):

The central purpose of combating discrimination, as discussed, underlies both s.15(1) and s.15(2). Under s.15(1), the focus is on preventing governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s.15(2), the focus is on enabling governments to pro-actively combat existing discrimination through affirmative measures.¹³⁴

The majority of the Court focused specifically on how to interpret s.15(2) and did not elaborate further on the test for a s.15(1) analysis.

The Court in *Kapp* cited Justice Iacobucci in the *Lovelace* decision where he explained that there were two possible approaches to the interpretation of s.15(2).¹³⁵ The first way was that the Court could read s.15(2) as an interpretive aid to s.15(1).¹³⁶ The second way was to read s.15(2) as an “exception or exemption” from the operation of s.15(1).¹³⁷ In *Lovelace*, the Court ultimately applied s.15(2) as an interpretive aid to s.15(1) and found against the claimants.¹³⁸ However, the Court in *Kapp* suggested that a third option was possible and that “if the government can demonstrate that an impugned program meets the criteria of s.15(2), it may be unnecessary to conduct a s.15(1) analysis

group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1).”

¹³³ *Kapp*, *supra* note 84 at para. 24.

¹³⁴ *Ibid.* at para. 25.

¹³⁵ *Ibid.* at para.35.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

at all.”¹³⁹ They went on to clarify that s.15(2) “supports a full expression of equality, rather than derogating from it.”¹⁴⁰ Therefore, the test for discrimination as explained by the Court in *Kapp* requires first, that the claimant demonstrate that a distinction has been made on an enumerated or analogous ground. Then it will be open to the government to show that the impugned law, program, or activity, is ameliorative. In order to show that a law meets the purpose of s.15(2), the government would have to demonstrate: (a) that the program has a remedial or ameliorative purpose; and (b) that the program targets a disadvantaged group which is identified by an enumerated or analogous ground.¹⁴¹ However, if the government cannot meet this part of the test, then the law will “receive full scrutiny under s.15(1) to determine whether its impact is discriminatory.”¹⁴²

The next case from the Supreme Court of Canada which dealt with s.15 (in part) was *Ermineskin*.¹⁴³ In this case, several bands argued that if ss.61 and 68 of the *Indian Act* are interpreted so as to prevent Canada from investing their royalties, this would be a violation of their equality rights in s.15 of the *Charter*.¹⁴⁴ The Court in *Ermineskin* then explained that the equality test for s.15 had already been laid out in *Andrews* and restated in *Kapp*: “The analysis, as established in *Andrews*, consists of two questions: first does the law create a distinction based on an enumerated or analogous ground; and second,

¹³⁸ *Ibid.* The *Lovelace* case will be discussed in a little more detail in the next section of this chapter.

¹³⁹ *Ibid.* at para. 37.

¹⁴⁰ *Ibid.* The Court cited P. Hogg, *Constitutional Law of Canada* (5th ed. Supp. 2007), vol.2, at 55-53 [*Constitutional Law*] with approval: “Under a substantive definition of equality, different treatment in the service of equity for disadvantaged groups is an expression of equality, not as exception to it.”

¹⁴¹ *Kapp*, *supra* note 84 at para. 41.

¹⁴² *Ibid.* at para. 37.

¹⁴³ *Ermineskin*, *supra* note 86.

¹⁴⁴ *Ibid.* at para. 185.

does the distinction create a disadvantage by perpetuating prejudice or stereotyping.”¹⁴⁵ If so, then it will be open to the government to show whether or not the program is ameliorative and fits within the s.15(2) analysis. If not, the full scrutiny of the case would be required and the government would have to justify the distinction. Therefore, at least for now, the tests for s.15(1) and s.15(2) have been clarified for future cases. The *Andrews* test, and not the amended test provided in *Law*, will be the one to follow for future discrimination claims. Thus, any legal claims brought to the courts that argue that the second generation cut-off rule found within the *Indian Act*'s registration provisions are discriminatory, will have to meet the *Andrews* test.

(ii) Making the Case

Given the above discussion regarding the appropriate test to follow when analysing an equality claim, I utilize my own personal circumstances as an example case. I also compare my case to that of *McIvor*'s, highlight some of the key differences between the two, and indicate why my case should be treated separately. I also refer to two specific cases from the SCC, namely *Lovelace* and *Corbiere*, which impact the assessment of my claim. I argue that *Lovelace* is problematic, and therefore, less applicable to my claim than *Corbiere*, which provides a good deal of insight into how to construct the claim. I commence the s.15(1) analysis by choosing the appropriate comparator group. From there, I move on to the differential treatment between myself and the comparator group, as well as the enumerated or analogous grounds upon which the claim is based. The claim of discrimination will then be made out prior to speaking to whether it is justifiable as per s.1.

¹⁴⁵ *Ibid.* at para.188.

One issue that should be addressed before embarking on the s.15(1) analysis, is the possibility that Canada would claim that a s.15(1) analysis need not be completed, as status under the *Indian Act* is an ameliorative program and, as such, need only meet the criteria for a s.15(2) analysis. In *Kapp*, the Court explained that not all discrimination claims would receive the full scrutiny of a s.15(1) analysis. Specifically, the Court explained that: “once the s.15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional.”¹⁴⁶ If the government fails to show that its program fits within s.15(2), by showing that the program has an ameliorative or remedial purpose, and that the program targets a disadvantaged group, then the claim would receive a full s.15(1) analysis.¹⁴⁷ The court in *Hislop* specifically held that remedial legislation does not “immunize” it from Charter review.¹⁴⁸ Similarly, the Court in *Brooks* explained that: “In Canada, as I have noted, discrimination does not depend on a finding of invidious intent. A further consideration militating against the application of the concept of underinclusiveness in this context, stems, in my view, from the effects of so-called “underinclusion”. Underinclusion may be simply a backhanded way of permitting discrimination.”¹⁴⁹ The Court in *Law* also cited *Vriend* with approval: “Underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination.”¹⁵⁰ Finally, the Court in *Egan* held:

¹⁴⁶ *Kapp*, *supra* note 84 at para.40.

¹⁴⁷ *Ibid.* at para.41.

¹⁴⁸ *Hislop*, *supra* note 214 at para.39

¹⁴⁹ *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 [*Brooks*] at para.34.

¹⁵⁰ *Law*, *supra* note 81 at para 72.

The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them Such legislation would clearly infringe s. 15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits.¹⁵¹

The significant difference between the *Kapp* case and my case is that in *Kapp*, the challenge was one alleging reverse discrimination as between mostly non-Aboriginal fishers and Aboriginal ones. In that case, limiting the analysis to s.15(2) was appropriate. However, my case involves one of underinclusive legislation and, therefore, limiting the analysis to s.15(2) would not be appropriate; a full s.15(1) analysis is required. The analysis of my claim proceeds on that basis.

Similarly, there are other arguments that have been raised by Canada in other contexts, such as *McIvor*, that would not apply to my specific fact scenario. For example, in *McIvor*, Canada argued that addressing residual sex discrimination as between the descendants of Indian women who married out and the descendants of Indian men who married out would be a prohibited retrospective or retroactive application of the *Charter*.¹⁵² Both the trial court and the court of appeal rejected Canada's arguments in this regard, and held that *McIvor*'s claim was one which alleged ongoing discrimination.¹⁵³ Regardless of the decisions in *McIvor*, the arguments relating to retrospectivity and retroactivity of the *Charter* would not apply to a claim challenging the second generation cut-off rule.¹⁵⁴ The

¹⁵¹ *Egan*, *supra* note 111 at para.161.

¹⁵² *McIvor*, *supra* note 5 at paras. 47-62. *McIvor*, *trial*, *supra* note 6 at paras. 144-158.

¹⁵³ *McIvor*, *supra* note 5 at para.62. *McIvor* *trial*, *supra* note 6 at para.158.

¹⁵⁴ E. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) 56 Can. Bar Rev. 264 at 268-69 as cited in *Benner*, *supra* note 114 at para.39. The Court cited with approval this definition of retroactive and retrospective applications of the *Charter*: "A retroactive statute is one that operates as of a time prior to its enactment. A retrospective

second generation cut-off rule found in ss. 6(1) and 6(2), was only enacted in 1985 and, therefore, any discrimination claims resulting from those provisions are on a go-forward basis; they do not involve issues of retrospectivity or retroactivity of the *Charter*.¹⁵⁵ Thus, as this aspect of the *McIvor* case is not relevant with regard to the second generation cut-off rule, I do not address it within my s.15(1) analysis.

In Chapter 1, I introduced some of my family history with a view to explaining how I came to choose my thesis topic on Aboriginal identity. The following briefly summarizes that history. I am a first generation non-status Indian whose parents are a non-Indian (my mother, Erma Creighton), and a s.6(2) status Indian (my father, Frank Palmater). My father was only a s.6(2) Indian because my grandmother (Margaret Jerome) was deemed to be a s.6(1)(c) Indian – i.e., a woman who was an Indian, but then lost her status as an Indian upon marriage to a non-Indian (my grandfather William Jerome), and was subsequently reinstated after the *Bill C-31* amendments to the *Indian Act*. My two children, Mitchell and Jeremy Palmater would then be second generation non-status Indians. Like in the *McIvor* case, had my Aboriginal grandparent been a male, then, my father, and myself, would have been 6(1) Indians, making my children 6(2) Indians. However, as I argue in this chapter, but for the ongoing blood quantum/descent discrimination in the *Indian Act*, my children and I would also have Indian status. In other words, even if Canada were to fix all the sex discrimination in the *Act*, my children and I

statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.”

¹⁵⁵ *Ibid.*

would still be negatively affected by the second generation cut-off rule, which is discrimination on the basis of blood quantum/descent, i.e., a gender-neutral second generation cut-off rule is still discrimination on the basis of blood.

It is important, at this stage, that I review the basic outline of the *McIvor* discrimination claim so that both the similarities and the differences with my claim are clearly identified before I get into the details of my own claim. *McIvor* is an important case since it is the first case that challenges the s.6 registration provisions making it to the court of appeal, and may soon reach the Supreme Court of Canada.¹⁵⁶ The legal principles and political history which form the basis of the decisions in *McIvor* may also apply in a case like mine. Sharon *McIvor* is a s.6(1)(c) Indian (like my grandmother), and her son, Jacob Grismer, is a s.6(2) Indian (like my father). Therefore, Jacob's children and any future grandchildren are or would be non-status Indians (like myself and my children).¹⁵⁷ *McIvor* and her son challenge the constitutional validity of ss.6(1) and 6(2) of the *Indian Act*, arguing that it discriminates on the basis of marital status and sex.¹⁵⁸ While the trial court addressed both marital status and sex discrimination, the appeal court focused on sex discrimination only.¹⁵⁹ "The sex discrimination claim in this case, on the other hand,

¹⁵⁶ Globe and Mail, "Indian Status Case Going to the Supreme Court", online: Globe and Mail <<http://www.theglobeandmail.com/news/politics/mcivor-plans-to-take-indian-status-case-to-supreme-court/article1168979/>>. Leave to appeal to the Supreme Court of Canada was sought by *McIvor* on Friday, June 5, 2009.

¹⁵⁷ Please refer to the chart in Appendix "C" for a detailed comparison between the discrimination claim in *McIvor* and my own claim.

¹⁵⁸ *McIvor*, *supra* note 5 at para.1.

¹⁵⁹ *Ibid.* at para.87. "The plaintiffs say that the differential treatment in this case is based on sex (an enumerated ground) and on marital status (an analogous ground). I think that the case is properly analyzed as one of discrimination on the basis of sex. That is the basis on which it was argued in this Court. While the pre-1985 legislation did contain provisions that distinguished situations based on the marital status of a child's mother, the background of such distinctions is historically complicated. I am not at all convinced that

is relatively straight forward. Mr Grismer says that if his Indian parent were his father, his children would be entitled to Indian status. As it is his mother that is an Indian, they are not.”¹⁶⁰ The comparator group chosen by the claimants and accepted at trial was also accepted by the appeal court: people like Grismer born pre-1985 to Indian women who married out with people born pre-1985 to Indian men who married out.¹⁶¹

The claim related to both McIvor’s ability to transmit status to her grandchildren, and Grismer’s ability to transmit status to his children. The court found that both claimants were treated disadvantageously based on sex. With regards to Grismer, the court held: “I am of the view that the ability to transmit Indian status to his children is a benefit to Mr. Grismer himself, and not solely a benefit to his children.”¹⁶² With regard to McIvor, the court also held: “Similarly, I am of the view that the ability to transmit Indian status to her grandchildren through Mr. Grismer is a benefit to Ms. McIvor. I am, therefore, of the view that she can also demonstrate that the legislation accords her disadvantageous treatment on the basis of sex.”¹⁶³ The 1985 amendments to the registration provisions of the *Act* were found to be underinclusive legislation which

the evidentiary basis for an analysis of such distinctions has been fully presented in this case, nor that sufficient argument has been directed toward that ground.”

¹⁶⁰ *Ibid.* at para.88.

¹⁶¹ *Ibid.* at paras.75-82. The court explained at para.77 that: “In this case, Mr. Grismer wishes to compare his group (people born prior to April 17, 1985 of Indian women who were married to non-Indian men) with people born prior to April 17, 1985 of Indian men who were married to non-Indian women. That comparator group was accepted by the trial judge.” The court went on to explain in para.78 that: “On the face of it, the comparator group to which Mr. Grismer belongs, is the most logical one. It is the group that is in all ways identical to the group to which Mr. Grismer belongs, except for the sex of the parent who had Indian status.” As a result, the court held at para.82: “Accordingly, the trial judge was, in my view, correct in accepting the comparator group proposed by the plaintiffs.”

¹⁶² *Ibid.* at para.91.

¹⁶³ *Ibid.* at para.92.

included, as its objectives, to remove sex discrimination and preserve vested rights.¹⁶⁴

Although the court found that there was a rational connection between the legislation and those objectives, it failed the minimal impairment test because:

The 1985 legislation did not merely preserve the rights of the comparator group. As I have previously indicated, members of the comparator group were able, prior to 1985, to confer only limited Indian status on their children. Such children (who would have fallen under the Double Mother Rule) were given status as Indians only up until the age of 21. Under the 1985 legislation, persons who fell into the comparator group were given Indian status under s.6(1). Their children had s.6(2) for life, and the ability to transmit status to their own children as long as they married persons who had at least one Indian parent.¹⁶⁵

Therefore, the 1985 legislation had the effect of putting Grismer (and those like him) at a further disadvantage *vis-a-vis* the comparator group, than they were prior to the enactment.¹⁶⁶ The court concluded that since the legislation could not be saved by s.1, then that ss.6(1) and 6(2) violated the *Charter*. Therefore, the court gave a suspended declaration of invalidity for a period of 1 year to allow Parliament time to amend the legislation.¹⁶⁷

This appeal decision varies somewhat from the decision at trial. While the key aspects of the s.15(1) analysis were similar (comparator group, differential treatment, grounds, discrimination, and lack of justifiability), key differences within the judgments led to different remedies. The trial decision contained a great deal of legislative history and discussion about the political context leading up to the 1985 amendments.¹⁶⁸ Also different between the two decisions was the focus the trial court put on the significance of

¹⁶⁴ *Ibid.* at para.123.

¹⁶⁵ *Ibid.* at para.137.

¹⁶⁶ *Ibid.* at para. 140.

¹⁶⁷ *Ibid.* at paras.151-161.

Indian status to those included and excluded.¹⁶⁹ “The absence or loss of status resulted in a form of banishment from the Aboriginal community.”¹⁷⁰ The court went on to explain that: “the concept of Indian, has come to exist as a cultural identity alongside traditional concepts. The concept of Indian has become and continues to be imbued with significance in relation to identity that extends far beyond entitlement to particular programs.”¹⁷¹ Although the appeal court accepted that status as an Indian had both the tangible (e.g. programs) and intangible benefits (culture), it also felt that the evidence with regards to intangible benefits was overstated.¹⁷² Specifically, it considered the inability of Grismer to transmit status to his children not to be an “extraordinary prejudice”.¹⁷³ The appeal court also found that while the legislation perpetuated historical discrimination against Indian women, it only did so in a “small way” and that their disadvantages were only “limited” in nature.¹⁷⁴ Finally, the appeal court seemed to limit those who feel the effects of exclusion from status and the ability to bring discrimination claims, to three generations, and specifically questioned whether a claimant five generations removed (from the Indian woman who married out) could make such a claim.¹⁷⁵ Thus, the appeal court seems to have minimized both the significance of the benefit at issue, and the level of discrimination at issue. As a result, the appeal court would see a much more limited remedy than that offered by the trial judge.¹⁷⁶

¹⁶⁸ *McIvor trial, supra* note 6 at paras. 1-87.

¹⁶⁹ *Ibid.* at paras.123-143.

¹⁷⁰ *Ibid.* at para.126.

¹⁷¹ *Ibid.* at para.133.

¹⁷² *Ibid.* at para.71.

¹⁷³ *McIvor, supra* note 5 at para.145

¹⁷⁴ *Ibid.* at paras.111-112.

¹⁷⁵ *Ibid.* at para.97.

¹⁷⁶ *Ibid.* at paras.151-154.

However, even if Sharon McIvor is successful at the Supreme Court of Canada (SCC) in proving cousins discrimination (discrimination on the basis of sex), and the SCC provides a remedy which fully equalizes entitlement to registration between male and female Indians, that result will still not address second generation cut-off discrimination that produces non-status Indians. It may put off the creation of non-status Indians for one or more generations, but it will not prevent it entirely. Even assuming the residual sex discrimination is remedied, and the second generation cut-off rule ultimately becomes gender neutral (i.e., the same exclusion for two generations of parenting with a non-Aboriginal person irrespective of the sex of the Aboriginal parent), there is still exclusion based on blood quantum/descent. This is the reason I have chosen to focus on the second generation cut-off rule. I argue that Canada has no more of a right to differentiate between individuals based on blood quantum/descent, than it has to differentiate between men and women in determining Indian status. What makes focusing on the second generation cut-off rule even more important to me is the fact that Canada and the courts have come to assume that so long as blood quantum/descent rules are applied in a gender-neutral way, there can be no claim for discrimination. This is evident in Canada's submissions in *McIvor*, as well as the recent appeal decision in *McIvor*.¹⁷⁷ My goal is to challenge these discriminatory assumptions and highlight the significance of the harms suffered by those who are excluded from status.

Another case relevant to my s.15(1) analysis is *Lovelace*.¹⁷⁸ In *Lovelace*, the Supreme Court of Canada (SCC) reviewed the claims of different groups of Aboriginal

¹⁷⁷ *McIvor v. Canada* (3-4 October 2008, BCCA) (Factum of the Appellant, Canada) [*McIvor-Canada factum*]. at para.12. See also: *McIvor*, *supra* note 5 at para.130.

¹⁷⁸ *Lovelace v. Ontario*, [2001] 1 S.C.R. 950 [*Lovelace*].

peoples who were excluded from an Ontario Casino project called “Casino Rama”, which was designed to include First Nations in the provincial gaming system.¹⁷⁹ These Aboriginal groups included status Indians who lived off-reserve, Métis, and non-status Indians. They alleged that their exclusion from the Casino Rama project amounted to a violation of their equality rights pursuant to s.15 of the *Charter*.¹⁸⁰ The Court found against these groups in a way which only seemed to highlight differential treatment between status and non-status Indians. For example, the Court allowed the Ontario government to rely on the discriminatory provisions of the *Indian Act* to exclude non-status Indians from the benefits designed for First Nations.¹⁸¹ Specifically, the Court noted that even if collectivities of non-status Indians applied for band status, their chance of success would be minimal based on the current federal policies which the Court felt were “onerous”.¹⁸² “Specifically, an applicant First Nation community must be comprised entirely of registered Indians and since the federal government will not provide any “new” funding, the applicant community must persuade a recognized band to share its funding and land base.”¹⁸³ Most notable was the Court’s recognition of the impact that the *Indian Act* has on bands:

even if the appellant communities could somehow qualify for band status, they would then be forced to abandon their

¹⁷⁹ *Ibid.* In this case, the Ontario provincial government limited access to the negotiation of a casino project and ultimately the sharing of its revenue to First Nations bands only and excluded Aboriginal groups who represented off-reserve status Indians, non-status Indians and Métis. This was found by the Court to be a legitimate exercise of provincial spending power which was a targeted ameliorative program directed at the community development, health, education, economic development and cultural development of First Nation bands only.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.* at para.15.

¹⁸³ *Ibid.*

traditional forms of government, which have played a vital role in their survival as distinct communities, and replace them with Indian Act band councils. It is the view of the appellants that the Indian Act system of local governance promotes corruption and divisions between community members, and fails to recognize the key role of Elders in community governance. The traditional forms of government, on the other hand, promote harmony, tolerance, respect, and accountable, democratic local government. It is questionable whether the appellant communities could bring themselves to adopt the Indian Act system, even if it were an option for them.¹⁸⁴

What the Aboriginal claimants had been trying to demonstrate was that they were excluded from the benefit of this program on discriminatory grounds, i.e., their discriminatory exclusion from the *Indian Act*. By not dealing with their discriminatory exclusion from the *Indian Act*, the Court was able to see the issue as one between different sub-groups of Aboriginal people. As a result, they were able to support an ameliorative program that supported one of those sub-groups, instead of recognizing that the only reason there are sub-groups is because of the discrimination induced by the *Indian Act*.

The Court accepted Ontario's "rationale" for excluding the non-status Indians from the benefits of Casino Rama precisely because they were not status Indians:

1. First Nations [bands] are a clearly identified group under the Indian Act. Extension beyond this group raises complex questions about who is aboriginal or Métis. These questions have been the subject of extensive debate and have yet to be satisfactorily resolved.
2. First Nations bands are recognized as governments with an attendant accountability to their members [under the Indian Act]. The Indian Act provides for the establishment and maintenance of membership lists, the management of moneys for the use and benefit of Indians

¹⁸⁴ *Ibid.*

and bands, the election of Chiefs and councillors, the management and use of reserve lands and the power of band councils to make by-laws.

3. Virtually all First Nations bands have reserves. As a result of the constitutional division of powers, some residents of reserves do not have [access to] the same level of programs and services received by the rest of Ontarians.

4. The First Nations bands have from the very early stage indicated an interest in the casino business and have been involved throughout the process. ...¹⁸⁵

Even the province of Ontario justifies the exclusion of non-recognized Aboriginal groups with a circular argument in number 4: they were not included because they were not part of the process. They were not part of the process because they did not have formal recognition as “Indian bands” and/or “Indians” under the *Indian Act*. In essence, they were excluded because they are an excluded group. Yet the Court held that: “There is no dispute as to the appellants’ aboriginality or their self-identification as either Métis or First Nations”. This is essentially missing the point of the discrimination claim and the very grounds upon which it was made.¹⁸⁶

The SCC found no discrimination on the basis that the Ontario government’s policy corresponded to the different needs, capacities, and circumstances of the target sub-group of Aboriginal peoples, i.e., the community’s different relations to land and governance. Pothier argues that the Court came to this conclusion because it did not do a full and proper analysis of the ground of discrimination that led to these differences in

¹⁸⁵ *Ibid.* at para. 35.

¹⁸⁶ D. Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 *Can. J. Women & L.* 37 [*Real People’s Real Experiences*].

treatment today.¹⁸⁷ In reconsidering these *Charter* cases, the Court in *Kapp* left it open to challenge the result in *Lovelace*. Specifically, the Court in *Kapp* explained that the central purpose of combating discrimination was to “prevent” governments from making distinctions on enumerated or analogous grounds and avoid the perpetuation of group disadvantage through stereotyping.¹⁸⁸ Section 15(2) allows governments to proactively combat discrimination not perpetuate it under the guise of ameliorative legislation.¹⁸⁹ These cases often involve complex layers of discrimination that cannot be addressed by only dealing with the surface layer. These cases involving non-status Indians not only involve a discriminatory denial of a benefit, they also involve a discriminatory denial from the very comparator group itself. A discrimination claim by non-status Indians will often involve a consideration of these two inter-related aspects. Therefore, based on the clarifications in *Kapp*, it is unlikely that a future court would allow a government to make distinctions on enumerated grounds which only serve to further disadvantage a group that is already disadvantaged by being discriminatorily excluded from the group with the benefit (the comparator group), under the guise of combating another type of discrimination affecting the claimant group.

Further, it is arguable that the Court in *Lovelace* has, in effect, condoned the discriminatory treatment of non-status Indians by allowing their “non-recognition” to be

¹⁸⁷ *Ibid.* at 52-54. “What is missing in Justice Iacobucci’s ensuing analysis is any critical assessment of the source of the appellant communities’ ‘very different relations with respect to the land, government, and gaming.’ Those relations are what were properly the focus of the grounds aspect of the case – the aspect that Justice Iacobucci’s judgment overlooked.” Pothier goes on to explain that: “Yet, it should have been central to the understanding of the significance of the grounds of discrimination in this case.” Finally, she points out that: “Justice Iacobucci missed the point that the very distinctions he relied upon were the essence of the grounds analysis that the appellants were raising.”

¹⁸⁸ *Kapp*, *supra* note 84 at para.25.

used as rationalization for further exclusion. This, then, perpetuates the stereotype that non-status Indians are somehow less Aboriginal, because they are not registered under the *Indian Act* either as individuals or as bands, without asking why they are not included in the *Act*. The reasons they are “chronically ignored” by federal and provincial governments is Canada’s failure to give legal recognition to non-status Indians and unrecognized bands. It seems nonsensical, then, to use the fact of their exclusion, which has caused significant harm in and of itself, as a further means of excluding the very subgroup of First Nations that would be in the First Nations group but for their discriminatory exclusion from the *Indian Act*. *Corbiere* on the other hand, is much more in line with the claim I am making, and is far less problematic than *Lovelace* in terms of how to construct a s.15(1) analysis.

Corbiere is also an analogous case for non-status Indians.¹⁹⁰ In *Corbiere*, non-resident members of the Batchewana Band sought a declaration that section 77(1) of the *Indian Act*, (which prevented off-reserve band members from voting in band elections), violated their equality rights under s.15(1) of the *Charter*.¹⁹¹ That section of the *Act* specifically provided that only band members who were “ordinarily resident” on the reserve could vote in band elections.¹⁹² The Court held that the exclusion of off-reserve band members infringed their equality rights under section 15(1) and could not be saved

¹⁸⁹ *Ibid.*

¹⁹⁰ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*].

¹⁹¹ *Ibid.*

¹⁹² *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*] at s.77.(1). “A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.” (emphasis added).

under section 1.¹⁹³ This distinction between on and off-reserve band members was considered not to be a legitimate distinction when it came to matters of governance of the band and thus was not based on “merit”. This distinction was based solely on race and residency. Aboriginality-residence was found to be a personal characteristic that could only be changed, if at all, at great expense.¹⁹⁴ The off-reserve band members were considered to be part of a discrete and insular minority who had experienced disadvantage and prejudice at the hands of the non-Aboriginal majority.¹⁹⁵ The Court also denied the government’s defence of administrative and financial burden as a justification for the complete denial of constitutionally protected rights.¹⁹⁶ It specifically held that:

Change to any administrative scheme so it accords with equality rights will always entail financial costs and administrative inconvenience. The refusal to come up with new, different, or creative ways of designing such a system, and to find cost-effective ways to respect equality rights cannot constitute a minimal impairment of these rights. Though the government argues that these costs should not be imposed on small communities such as the Batchewana Band, the possible failure, in the future, of the government to provide Aboriginal communities with additional resources necessary to implement a regime that would ensure respect for equality rights cannot justify a violation of constitutional rights in its legislation.¹⁹⁷

The same principles would apply to my own case regarding the registration of non-status Indians. Finally, the Court concluded that “The offending legislation in *Corbiere* could not be saved under section 1, because the Court found that the section did not impair the

¹⁹³ *Corbiere*, *supra* note 190 at para. 126.

¹⁹⁴ *Ibid.* at para. 19.

¹⁹⁵ *Ibid.* at para. 62.

¹⁹⁶ *Ibid.* at para.104.

¹⁹⁷ *Ibid.*

right “minimally”.¹⁹⁸ As a result, the Court issued a suspended declaration of invalidity for eighteen months to give Parliament time to amend the legislation.¹⁹⁹

Corbiere is closely analogous to the claim that I raise and, therefore, my treatment of *Corbiere* is captured within the context of my own example discrimination claim. Other SCC cases relating to the *Charter* are also useful in the analysis of my claim and will be so incorporated. The first step in analyzing my s.15(1) claim is to determine the characteristics of both the claimant group and the comparator group. In *Hodge*, the SCC explained how to do this: “The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*.”²⁰⁰ In *McIvor*, the appeal court explained the choice of a comparator group in the following way:

It is clear that the claimant under s.15 is entitled, in the first instance, to choose the group with which he or she wishes to be compared. This is partly a function of the nature of the equality inquiry. The right to equality is not a right to be treated as well as one particular comparator group. Rather, it is *prima facie*, a right to be treated as well as the members of all appropriate comparator groups. It is, therefore, no defence to a s.15 claim that some particular comparator group is treated no better than the group to which the claimant belongs. On the other hand, all that the claimant need show, in order to pass the first stage of analysis of a s.15 claim, is that there is at least one appropriate comparator group which is afforded better treatment than the one to which he or she belongs.²⁰¹

¹⁹⁸ *Ibid.* at para. 21.

¹⁹⁹ *Ibid.* at para.24.

²⁰⁰ *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357 [*Hodge*] at para. 23.

²⁰¹ *McIvor*, *supra* note 4 at para.76

Therefore, in choosing my own comparator group, it would not defeat my case if I could be compared to other groups receiving better benefit than my group.

I am the child of a s.6(2) Indian parent and a non-Indian parent. As a result, I am a non-status Indian. My children are also non-status Indians, because they are the children of a first generation non-status Indian parent and a non-Indian parent. We lack status under the *Act*, and the ability to transmit that status to our children in our own right (without the necessity of parenting with another Indian) because of the one quarter blood quantum/descent rule contained in the second generation cut-off in ss.6(1) and 6.(2) of the *Indian Act*. Our comparator group are s.6(1) status Indians who are deemed to be full-blood Indians and have both status and the ability to transmit status to their children in their own right. The comparator group and mine identify as Aboriginal, have common connections with our home communities and our histories, traditions, and territories. We all belong to families who have both familial and communal connections to our Indian ancestors. My group and the comparator group are the same in every respect, but for the fictional legislative blood allocation to myself and my children, which is not an accurate determinate of Indianness. Moreover, the one quarter blood quantum/descent rule does not have any relationship to the individual merits of those in my group, including identity, culture and communal connections. As a result, the *Act* denies us both status and the ability to transmit that status to our children in our own right, along with their corresponding tangible and intangible benefits, in contrast to the comparator group (s.6(1)

status Indians) who have status, and can transmit that status to their children in their own right, and can access all of the tangible and intangible benefits that go with that status.²⁰²

Those tangible and intangible benefits may vary slightly depending on the members of the group or the Aboriginal Nations and local communities with which they are associated, but they are generally the same. The trial judge in *McIvor* noted the following as some of the tangible benefits which are tied to status:

- (1) For the majority of bands, status equates with band membership;
- (2) Entitlement to live on reserve;
- (3) Access to federal programs and services targeted for status Indians;
- (4) Expenditures of Indian monies;
- (5) Use and benefit of reserve lands, such as in specific allotments and the ability to inherit and bequest lands in a reserve;
- (6) Exemption from taxation for lands and property on the reserve; and
- (7) Specific entitlements to uninsured health benefits and post-secondary education funding.²⁰³

The court also highlighted some of the intangible benefits attached to status:

- (1) Being accepted by one's Aboriginal community as a "real" Indian;
- (2) Ability to participate in traditional ceremonies and gatherings;
- (3) Ability to participate in traditional hunting, fishing and harvesting practices;
- (4) Sense of cultural identity and self-worth; and

²⁰² I would clarify however, that s.6(1) status Indians cannot pass on their specific type of status (s.6(1) status) in their own right, and can only pass on s.6(2) status which may also affect their access to the full range of benefits.

²⁰³ *McIvor trial*, *supra* note 6 at para.123-125.

- (5) Access to and participation in community in order to learn traditional languages and heritage.²⁰⁴

These are the very same tangible and intangible benefits that are applicable in my case. As a non-status Indian, I did not have the benefit of post-secondary education funding like status Indians. I have struggled to pay for over 16 years of university and continue to struggle to pay my debts in relation thereto. My older brothers and sisters, who are in the same group as I am, missed out on the opportunity to have higher education because they could not obtain the credit to fund it. My children are looking at the same uncertain educational future. All of us have been excluded from participation in our home community's governance activities, cultural activities, and traditional teachings, and learning our traditional language. All of these benefits, together with the pride of having and being able to transmit our identities to our future generations, can significantly impact our quality of life, happiness and sense of security and freedom to pursue our goals in life: i.e. the good life.

With regard to the s.15(1) analysis, the Court in *Corbiere* explained that "The first step is to determine whether the impugned law makes a distinction that denies equal benefit or imposes an unequal burden. The *Indian Act's* exclusion of off-reserve band members from voting privileges on band governance satisfies this requirement."²⁰⁵ With regards to my case, I would argue that the second generation cut-off rule denies non-status Indians, like me and my children, the equal benefit of having status, and the ability to transmit that status to our children in their own right, as granted to s.6(1) Indians. This denial of status and the right to transmit status results in the denial of the equal access to

²⁰⁴ *Ibid.* at paras.126-143

the tangible and intangible benefits noted above, which are also granted to status Indians, especially s.6(1) status Indians. Clearly, there is a distinction in entitlements based on whether one has status or not.

One of the most significant ways in which the *Indian Act* distinguishes between status and non-status Indians is in relation to band membership. The majority of bands in Canada do not have their own membership codes, including my own home community, Eel River Bar.²⁰⁶ Pursuant to sections 11 to 13 of the *Act*, only status Indians can be band members in bands without their own codes.²⁰⁷ Similarly, of the bands that do control their own membership, some continue to rely on *Indian Act* based rules to determine their membership.²⁰⁸ Therefore, in the majority of cases, band membership is limited to status Indians and, as a result, access to programs and services delivered by the bands to band members, more often than not, means that those band services are limited to status Indians.²⁰⁹ My children and I are barred from band membership in our home community because of our lack of status. As such, we are also barred from enjoying the tangible and intangible benefits that accrue to those with status and membership.

The inequality caused by the status distinctions in the *Indian Act* has long been recognized by researchers and academics, as well as human rights and Aboriginal

²⁰⁵ *Corbiere*, *supra* note 190 at para. 4.

²⁰⁶ *Indian Registration and Membership*, *supra* note 25 at 6. For a more detailed discussion on band membership codes in general, or about my home community's code, see Chapter 6.

²⁰⁷ *Indian Act*, *supra* note 192 at ss.11-13.

²⁰⁸ *Indian Registration and Membership*, *supra* note 25 at 31.

²⁰⁹ See generally: *Reassessing Population Impacts*, *supra* note 25. *Populations Implications*, *supra* note 25.

organisations.²¹⁰ Clatworthy explains that the current set of *Indian Act* rules relating to status and band membership provisions entrenches inequality by creating distinctions between citizens.²¹¹ I would add that the registration and membership system not only creates a system of distinctions between Aboriginal peoples within the same families and communities (section 6(1) and 6(2) Indians), but it also completely excludes many of those who would, arguably, otherwise be citizens (non-status Indians). A reasonable person in the same situation, with the same history, culture, language, ancestors, connections to the land, and traditions would, undoubtedly, find the inability to transmit this form of legally recognized identity and its accompanying rights, benefits and access to community, based solely on their perceived blood quantum levels or proximity of descent from a full-blood or full status ancestor, as a gross violation of their equality rights. Though the *Lovelace* case was problematic in other areas, the Court did make some observations that are applicable to my claim.

²¹⁰ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vols. 1-5 (Ottawa: Minister of Supply and Services Canada, 1996) [RCAP Report]. *An Empty Shell*, *supra* note 63. *Arbitrary, Anachronistic and Harsh*, *supra* note 53. *Population Implications*, *supra* note 25. *Aboriginality*, *supra* note 18. *First Nation Identities*, *supra* note 20. A. Sterritt, “Racialization of Poverty: Indigenous Women, the Indian Act and Systemic Oppression: Reasons for Resistance” (Vancouver: Vancouver’s Status of Women’s Racialization of Poverty Project, 2007), online: VSW <http://www.vsw.ca/Documents/IndigenousWomen_DEC2007FINAL.pdf> [Racialization of Poverty]. Human Rights Committee, “Concluding Observations of the Human Rights Committee: Canada: 2/11/2005”, online: Treaty Council <http://www.treatycouncil.org/PDFs/Concluding_observations_Canada_HRC.pdf>.[HRC Report]. M. Cannon, “Revisiting Histories of Gender-Based Exclusion and the New Politics of Indian Identity” (Vancouver: National Centre for First Nations Governance, 2008), online: <<http://www.oise.utoronto.ca/depts/sese/PDF/NCFNGPublication%20english%20mcannon.pdf>> [Gender-Based Exclusion].

²¹¹ *Indian Registration and Membership*, *supra* note 25 at 15.

Justice Iacobucci in *Lovelace* found the submissions of the non-status Indian claimants relating to their unique set of disadvantages caused by the arbitrary distinctions between status and non-status Indians to be “clearly supported in the findings of the Royal Commission on Aboriginal Peoples” which he cited with approval.²¹²

a number of speakers pointed to inequities between groups of Aboriginal people. Registered (or status) Indians living on-reserve (sometimes also those living off-reserve) and Inuit living in the Northwest Territories have access to federal health and social programs that are unavailable to others. Since federal programs and services, with all their faults, typically are the only ones adapted to Aboriginal needs, they have long been a source of envy to non-status and urban Indians...²¹³

RCAP was highly critical of the distinction made between status and non-status Indians, and the arbitrary means in which they are divided. They felt that these distinctions ought to be replaced so that all Aboriginal peoples would be treated equally:

Equity, as we use the term, also means equity among Aboriginal peoples. The arbitrary regulations and distinctions that have created unequal health and social service provision depending on a person’s status as an Indian, Metis or Inuit (and among First Nations, depending on residence on- or off-reserve) must be replaced with rules of access that give an equal chance for physical and social health to all Aboriginal peoples.²¹⁴

The distinctions between status and non-status Indians are arbitrary, as they are based on racist conceptions of blood purity that hold that people with less blood or less proximity to their full-blooded or full-status ancestor is less Indian. This racist presumption, based

²¹² *Lovelace*, *supra* note 178 at para. 70.

²¹³ Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol.3 (Ottawa: Supply and Services Canada, 1996) [*RCAP*, vol.3] at 204 as cited in *Lovelace*, *supra* note 178 at para.70.

²¹⁴ *Ibid.* at 225.

on outdated views about Aboriginal peoples, does not reflect the actual circumstances within Aboriginal families and communities, nor is it based on any credible evidence.²¹⁵

This conclusion necessarily leads to a discussion about the grounds of discrimination upon which I make my claim. The first question to be addressed is whether the law creates a distinction between the claimant and others based on an enumerated or analogous ground. In other words, I must show that ss. 6(1) and 6(2) of the *Indian Act* create a distinction between those in the claimant group (me and my children as non-status Indians), and those in the comparator group (status Indians generally, and s.6(1) status Indians especially), on an enumerated or analogous ground. As the *McIvor* case deals specifically with the residual sex discrimination fostered by the *Indian Act*, I have chosen to deal with an analogous ground of discrimination that I call blood quantum/descent, and which is found in the second generation cut-off rule in ss. 6(1) and 6(2) of the *Act*. This proposed analogous ground is based on Canada's determination of status (and membership in many cases), based on an individual's perceived blood quantum, or their proximity/remoteness of descent from what is often referred to as their full-blooded or full-status ancestors.²¹⁶ This ground also relates to racial conceptions of identity which may also fall under the enumerated ground of race. Similarly, given that the second generation cut-off rule currently applies disproportionately to Indian women and their descendants than it does to Indian men and their descendants, one could also argue discrimination based on sex, marital status, or family status. For the purposes of this chapter, however, I focus on the analogous ground I call blood quantum/descent.

²¹⁵ *McIvor trial*, *supra* note 6 at para.314.

²¹⁶ *McIvor-Canada factum*, *supra* note 177 at para. 12.

In Pothier's article, *Real People's Real Experiences*, she argues that skipping the analysis related to the enumerated or analogous ground upon which a claim is made may be the very reason some Aboriginal claimants have been unsuccessful in their discrimination claims before the Supreme Court of Canada.²¹⁷ She explains that the Court in *Lovelace* "took the short cut of assuming, without deciding, that a prohibited ground of discrimination had been established. Skipping the grounds step provides a useful indication of what can happen when grounds are de-emphasized."²¹⁸ In finding that there was no discrimination against the non-status Indian groups because non-status Indians had different relationships to land, government and gaming than did status Indians, Justice Iacobucci overlooked the very cause of those different relations.²¹⁹ If I am to avoid a repeat of what happened in *Lovelace*, I will have to expand upon how I choose blood quantum/descent as an analogous ground. Therefore, what follows is an explanation of how I choose blood quantum/descent as an analogous ground, and why it is important to my claim of discrimination.

Corbiere is a useful guide for determining how to establish an analogous ground, such as the one I propose in my claim. The Court provided the following criteria to establish an analogous ground:

What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 - - race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable

²¹⁷ *Real People's Real Experiences*, *supra* note 186 at 52-54.

²¹⁸ *Ibid.* at 52.

²¹⁹ *Ibid.* at 54.

cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.²²⁰

However, despite these guidelines, even the Supreme Court of Canada has yet to wrap its mind around the underlying racist concepts influencing the determinations of Aboriginality. Therefore, the proposal of this new analogous ground is not based on legal precedent, *per se*. The Court in *Corbiere* also clarified that what might not be a ground for one group in society may still be found to be a ground for Aboriginal peoples:

Two brief comments on this new analogous ground are warranted. First, reserve status should not be confused with residence. The ordinary "residence" decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex. Thus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground. Second, we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.

²²⁰ *Corbiere*, *supra* note 190 at para.13.

Therefore, I will argue that blood/quantum descent should be an analogous ground to that of race, in that it perpetuates racist stereotypes about Aboriginal people based on a physical characteristic (blood), which is no less objectionable than had the characteristic been the height of their cheekbones or the colour of their skin.²²¹ Similarly, the fact that blood quantum/descent may only affect a sub-set of Aboriginal peoples would not act as an impediment to its recognition. Finally, a future finding that the analogous ground of Indian blood quantum/descent is a species of the enumerated ground of race would not lessen its recognition as an analogous ground.

²²¹ *Constable Darrel Bruno v. Canada (Attorney General, Royal Canadian Mounted Police Grievance Reviewer)* (2006) FC 462 [*Bruno*]. This case is particularly disturbing in regards to the use of physical characteristics to determine Aboriginality. This case involved a Treaty 6 Indian who was a member of the Samson Cree First Nation who could speak Cree and lived in the reserve. He challenges the RCMP's Aboriginal Policing Program which was open to promotable Aboriginal constables. He later found out that another individual had been promoted instead. Bruno objected to their promotion on the basis that this individual had only found out that he might be Aboriginal three weeks previous and had, therefore, purchased a Métis card for \$10.00 and self-identified on the job competition. Bruno argued that this person did not look Aboriginal or have any knowledge of Aboriginal customs and, therefore, the RCMP should have excluded him on the basis that he failed to meet the criteria set out in the RCMP's Diversity Branch statement on how to assess Aboriginal identity for promotional purposes. The memo which outlined the criteria, provided as follows: "This memorandum recommended that a candidate should satisfy two of three criteria to establish Aboriginal identity: 1. look Aboriginal; 2. prove Aboriginal ancestry with documentation; and 3. demonstrate aboriginal identity, including a knowledge of Aboriginal language and culture." Therefore, one had to, at least, have either had to have the stereotypical physical characteristics of an Aboriginal person, or be able to prove they had Aboriginal blood, in addition to the cultural criteria. The most objectionable aspect of these criteria is how they are applied. For example, in order to assess whether someone looked Aboriginal, the following was the test: "This is a very subjective measure, but in most cases reasonable, informed people would come to a consensus." Similarly, the latter two criteria could be met by showing that the applicant grew up on a reserve. I would argue that only uninformed people would sit around and try to judge whether an applicant looks Aboriginal and debate the physical characteristics of an applicant back and forth until the decision-makers (likely non-Aboriginal people) determined Aboriginal identity. Bruno's challenge was upheld, in part, because the individual who had been promoted did not have "distinctively native features".

Past *Indian Act* provisions were based on descent from male Indian blood lines in the determination of status or Indianness.²²² While specific reference to the word “blood” was later removed from the *Indian Act*, genealogical descent continued to be the basis of both the registration of Indians, and their ability to transmit status to their children.²²³ In fact, Canada acknowledged that genealogical considerations were also factored into the *Bill C-31* amendments.²²⁴ Despite the fact that the word “blood” no longer appeared in the *Act* as criteria for identifying Indians, government documents referred to by legislators, specifically described the second generation cut-off rule as being a one quarter blood descent formula.²²⁵ Cornet also explains that the descent-based provisions in the current *Indian Act* result in race-based criteria: “While the Indian status entitlement system does not rely on outward physical characteristics, its almost exclusive reliance on strict descent-based criteria arguably constitutes a form of race classification.”²²⁶

This form of race classification and its focus on exclusion impacts status and non-status Indians in a discriminatory way:

High levels of arbitrariness characterize systems of race classification. With its focus on individual descent histories

²²² *Real Indians and Others*, *supra* note 50 at 50-52.

²²³ *Ibid.* at 78-80.

²²⁴ *McIvor-Canada factum*, *supra* note 177 at para.12 Conceptions of blood purity underlies Canada’s arguments throughout. For example, in paragraph 64 Canada argues that descent from a great-great grandparent is too “remote”. This remoteness is based on terms of blood quantum/descent and relates little to actual cultural connection.

²²⁵ *Memorandum to Cabinet* (10 May 1984), *Record of Cabinet Decision* (29 May 1984), *Memorandum to Cabinet* (9 February 1984), as cited in *McIvor-Abenakis Factum*, *supra* note 15 at paras. 4-9. Cabinet decided not to extend reinstatement/registration to those they considered “one-quarter blood”. *Real Indians and Others*, *supra* note 50 at 55. Lawrence refers to the gender-biased application of a de facto blood quantum in the registration provisions of the *Indian Act* as “bleeding off” Indian women and their children. On pages 78-79 Lawrence explains that Canada also specifically imposes blood quantum in the same manner in land claims agreements.

²²⁶ *First Nation Identities*, *supra* note 20 at 15.

and its exclusion of relationship criteria (e.g. relationship of individuals to families or to communities) the current Indian Act creates an objective but rigid and arbitrary standard of “Indianness” – one that is to be determined by federal law alone and applied on a national basis to a diverse group of nations or peoples. This approach unfortunately implies the existence of some trait or characteristics that make “Indians” inherently different from those deemed to be “not Indian”. The current system offers a strict binary choice between the categories – “Indian” and “not Indian” based solely on the circumstances of a person’s parentage. Within the category of “Indian”, two subcategories have been created which in turn imply the existence of “degrees of Indianness”...²²⁷

Cornet further supports her argument that the *Indian Act* reinforces the term “Indian” as a racial category and separates the term from Aboriginal concepts of identity in the following ways:

- by specifically referring to “Inuit” as a “race” excluded from the definition of “Indian” in section 4(1);
- by relying strictly on descent-based criteria to determine eligibility for persons born after 1985;
- by creating subcategories of “Indianness” – “6(1) Indians” and “6(2) Indians” in common parlance today – with different capacities to transmit Indian status;
- by establishing a system that leads over time to an escalating separation of Indian status from connectedness to the group identity of “band” or First Nation; and
- by separating the determination of “Indian” identity from connection to First Nation land rights.²²⁸

The effect of the blood quantum/descent requirements in s. 6 of the *Act* is that Aboriginal people are forced to take blood quantum/descent and status into account when considering their marital and/or parenting partners. While this is a serious concern for

²²⁷ *Ibid.* at 15-16.

s.6(1) Indians since they have to worry about whether they will be able to transmit full or half status, this is more of an immediate concern for s.6(2) Indians and non-status Indians, as neither can transmit any type of status in their own right. The government simply has no business telling Aboriginal people who they must and must not have children with, in order for the entire family to have their Aboriginal identities recognized and their right to belong to their communities protected.²²⁹ This is what makes blood quantum/descent a suspect ground for federal decision-making.

Canada openly argues through its defence of the second generation cut-off rule, that blood quantum/descent is and should be the sole determinant in establishing Indian identity and therefore Aboriginality. This is no different from freezing the biology of Aboriginal peoples in time, in order to preserve the purity of their identity. It will not be, until the Supreme Court of Canada looks beneath the surface of our skin and beyond fictional measurements of blood, that they will be able to finally see that Aboriginal peoples are still here, have always been here, and always will be here, and that Canada has no right to reduce our identity through arbitrary, racist exercises in biology. Just as an employer's pre-occupation with normalcy can result in discrimination against those employees with disabilities on the basis that they are perceived to be unable to fulfill job requirements, so too can the pre-occupation with blood purity result in discrimination against non-status Indians on the perceived notion that they have less Aboriginal blood

²²⁸ *Ibid.* at 16.

²²⁹ *McIvor-Canada Factum*, *supra* note 177 at para.12. "To ensure that those registered are sufficiently connected to the historical population that the federal government treated with or for whom reserves were set aside, there are descent provisions in ss.6(1)(f) and 6(2) that result in a second generation cut-off. The effect is that once there has been two consecutive generations of a person entitled to registration parenting with a non-Indian, the resulting descendants will not be entitled to registration."

and are therefore less Aboriginal.²³⁰ If Canada does not see how openly discriminatory it is, I fear that the courts, which have based their laws, interpretations and analyses on accepted social norms, will not be able to see it either. No one would think for a minute (except maybe Aryan Nation type groups) to create a formula to determine who is truly of the “white” people, based on blood lineage, hair and eye colour or the gender of their parents. However, that is essentially what Canada does in the *Indian Act* through its blood quantum formulas that require “proximity” of descent in order to be considered an Indian, i.e., part of the “historical” group of Aboriginal peoples with whom the Crown treated. Canada never explains what makes the historical group Aboriginal. It only asserts that the farther in blood or descent that one gets from this group, necessarily, this disentitles such a person to claim to be Aboriginal. In considering registration under the *Act*, few have asked how this norm was created, why it remains the norm, or what gave Canada the right to enforce this norm.

The underlying assumptions about racial blood purity and the strength of male blood versus female blood in determining Indian identity and therefore Aboriginality, are not only inextricably intertwined. They have also formed the basis of social, cultural, political and legal understandings about Aboriginal peoples for so long that they have become accepted even by some Aboriginal peoples. Partly, Canada’s many years of assimilatory laws, programs and policies have promoted this view of Indian identity. Now that assimilation is no longer considered an acceptable policy basis for laws and programs related to Aboriginal peoples, there has not been a corresponding move by Canada to undo the racist assumptions upon which such assimilation policies were based, at least in

²³⁰ *Real People’s Real Experiences*, *supra* note 186 at 48.

so far as the *Indian Act's* registration provisions are concerned. Historical accounts tell how colonial governments felt that the less blood quantum that an Indian had, the more salvageable he/she was in terms of civilizing.²³¹ We no longer think like that, or do we? The very fact that Canada can, on the one hand, distance itself from assimilation policies related to residential schools, but on the other hand, stand in court and feel completely justified in arguing that Indians lose their right to be called Indians because their legislatively-determined blood purity reduces with each generation of those who had married out. Is this not assimilation in another form?

The Government of Canada explains that Canada's special relationship with Aboriginal peoples today must be linked to the historical groups of Aboriginal peoples.²³² However, it is Canada that has determined that this link cannot carry on past a fictional notion of one quarter blood quantum. In essence, Canada appears to be using blood quantum/descent to put an expiry date on its relationship with Aboriginal peoples, despite its constitutional promise to Aboriginal peoples to ensure the survival of their cultures. While Canada may feel it has a vested interest in doing so, no court which is mindful of the equality rights in the *Charter*, and the numerous other obligations Canada has, should allow Canada to base its policies on racist, blood-based views about Aboriginal peoples, even if it means that both Canada and the courts will have to rethink the basis upon which they assess Aboriginal claims of all kinds.²³³ Pothier argues that it is only through a

²³¹ *Real Indians and Others*, *supra* note 50. E. Garoutte, *Real Indians: Identity and the Survival of Native America* (Los Angeles: University of California Press, 2003) [*Real Indians*].

²³² *Ibid.*

²³³ I refer to the honour of the crown, fiduciary duties and other similar responsibilities Canada has towards Aboriginal peoples, like treaty commitments, for example.

thorough analysis of the grounds of discrimination (both enumerated and analogous), that the court is able to consider the history and context of the discrimination that is being claimed.²³⁴ She argues that when courts offer judgments which appear distant or disconnected from the lives of the claimants, it is not because issues like sexual orientation are truly disconnected from the lives of lesbians and gay men, but that sexual orientation “has for so long either been constrained by, or invisible to, the law.”²³⁵

Pothier further explains that the grounds of discrimination at issue in any particular case are not merely constructs of the law, but “they reflect a political and social reality to which the law has, belatedly, given recognition.”²³⁶ This is especially true of analogous grounds that were not specifically enumerated, but were later recognized by a court as a form of discrimination. Her argument that “protections against disability discrimination has everything to do with countering stereotypical *perceptions* of ability based on an able-bodied frame of reference”,²³⁷ is equally applicable to the current ground of blood quantum/descent that, I argue, should be recognized as an analogous ground. Specifically with regards to the enumerated ground of race, the ground to which I argue blood quantum/descent is analogous, protections against race discrimination in Aboriginal cases has everything to do with countering stereotypical “perceptions” about what makes an Aboriginal person, from a non-Aboriginal person’s viewpoint. Although cases like *Sappier and Gray* have stated that Aboriginal practices should not be reduced to “anthropological curiosities” or “racialized aboriginal stereotypes”, the identities of

Unfortunately, time and space limitations prevent an analysis of these duties in the context of *Indian Act* registration.

²³⁴ *Real People’s Real Experiences*, supra note 186 at 40.

²³⁵ *Ibid.*

²³⁶ *Ibid.* at 41.

Aboriginal peoples are still limited to stereotypical views about what makes an Aboriginal person Aboriginal.²³⁸ Blood quantum/descent-based discrimination does that very thing.

In *Corbiere*, the court found discrimination on the basis that s.77(1) of the *Act* treated off-reserve band members in a stereotypical way, i.e., that off-reserve band members have less interest in their community, simply because of where they live.

Taking all this into account, it is clear that the s. 77(1) disenfranchisement is discriminatory. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.²³⁹

This is no less true for non-status Indians. The second generation cut-off rule in ss. 6(1) and 6(2) of the *Act* excludes non-status Indians from status (and in many cases membership) on the arbitrary basis of a personal characteristic. To use the words of *Corbiere*, it reaches the cultural identity of non-status Indians in a stereotypical way. It

²³⁷ *Ibid.* at 48.

²³⁸ *R. v. Sappier, R. v. Gray*, [2006] 2 S.C.R. 686 [*Sappier and Gray*] at para.46. “But it would be a mistake to reduce the entire pre-contact distinctive Maliseet culture to canoe-building and basket-making. To hold otherwise would be to fall in the trap of reducing an entire people's culture to specific anthropological curiosities and, potentially, racialized aboriginal stereotypes. Instead, the Court must first inquire into the way of life of the Maliseet and Mi'kmaq, pre-contact. Yet, the court specifically held at para.45, that what makes Aboriginal culture is still based in pre-contact times: “What is meant by “culture” is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits.” (emphasis added)

²³⁹ *Corbiere*, *supra* note 190 at para.18.

presumes that Aboriginal people can and should be identified by a fictional notion of blood quantum/descent, and that those with a deemed blood allotment of one quarter or less are somehow less Aboriginal than those with higher blood quanta and, therefore, less capable of passing on their identity and culture to their children. The effect is that non-status Indians are arbitrarily cut off from accessing their identities, cultures, and communities and all the rights, benefits and responsibilities that go with it. The second generation cut-off rule treats non-status Indians as less deserving than status Indians who share the same identities, cultures, traditions, territories, treaties, languages and families as status Indians. This results in the denial of substantive equality for non-status Indians.

The Court in *Corbiere* went on to explain that the denial of voting rights to off-reserve band members by virtue of s.77(1) of the *Indian Act*, also served to perpetuate the historical disadvantage of off-reserve band members who have important interests in band governance.²⁴⁰ The fact of their residency off reserve was not enough to totally exclude them from the governance of their communities:

They are co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land. The band council represents them as band members to the community at large, in negotiations with the government, and within Aboriginal organizations. Although there are some matters of purely local interest, which do not as directly affect the interests of off-reserve band members, the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off-reserve.²⁴¹

Non-status Indians are equally concerned about the governance activities in their communities as it affects their parents, grandparents, and extended families, as well as

²⁴⁰ *Corbiere*, *supra* note 190 at para.17

their future generations. The *RCAP Report* also noted that Aboriginal people who live off reserve still want to maintain their identities:

Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal peoples in cities.²⁴²

This identity is tied in part to the individual's connections to their traditional territories, which is a large part of their identities. In *RCAP*, the Commission explained that for many Aboriginal peoples, cultural identity is tied to a land base:

Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable.... Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.²⁴³

Maintaining an Aboriginal identity is no less of an "essential and self-validating pursuit" for non-status Indians as it is for other off-reserve Aboriginal peoples. In fact, it may be more of a concern for non-status Indians who must face additional hurdles and sometimes complete barriers to maintaining their identities as a result s.6 of the *Act*.

In Canada, there is a two-tiered identity system for Aboriginal peoples: one where some Indians (s.6(1) Indians *equals* those considered to have full-blood) and have the right to transmit their legal and cultural identities to their children, and one where some Indians (s.6(2) Indians *equals* those considered as half-bloods; and non-status Indians

²⁴¹ *Ibid.*

²⁴² Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 1. (Ottawa: Supply and Services Canada, 1996) [*RCAP, vol.1*] at 521.

equals those considered as one quarter blood or less) and cannot transmit their identities. This presumption is the basis for the current *Indian Act* registration provisions.²⁴⁴ This basis for registration suggests that those who have children with non-status Indians, Métis, Inuit or non-Aboriginal partners are less worthy to call their children Aboriginal and have them be part of their home communities, despite their common histories, cultures, languages, ancestors, ties to the land, traditions and families, simply on the basis of blood quantum/descent. The distinction between the two types of Indians and between status and non-status Indians is based, in part, on prejudicial stereotypes that Indians with lesser status or lesser blood quantum are not being equally capable of transmitting their identity and culture to their children. It is also based on the racist stereotype that the children of mixed marriages are somehow further removed from their Aboriginal cultures because of fictional notions about lack of blood purity. Both of these negative and hurtful stereotypes are not based on empirical realities.²⁴⁵

²⁴³ *Ibid.* at 525.

²⁴⁴ This refers to the right of s.6(1) Indians to transmit status to their children in their own right, i.e. without having to partner with another status Indian. Section 6(2) Indians do not have this same right.

²⁴⁵ *McIvor trial*, *supra* note 6 at paras. 313-314. “In any event, to the extent that the defendants are suggesting that those previously excluded on discriminatory grounds have a more remote cultural proximity to the original population, there is simply no evidence in support of this assertion. In fact, the only evidence on this point, the direct evidence of Sharon McIvor is that she and Jacob Grismer continue to have a strong and direct cultural identity with the original Aboriginal population.” The court went on to explain: “But even if there had been evidence that the new population was more culturally removed from the original Indian population, their cultural removal would be entirely the result of historic sex discrimination. In other words in advancing this new purpose, the government is attempting to rely upon an invidious effect of its previous discrimination. Consequently, even if there were any evidentiary basis for the claim, and there is none, the purpose is in fact a discriminatory purpose and therefore could not justify perpetuating discrimination under section 1.” *McIvor*, *supra* note 5 at para.112. “The limited disadvantages that women face under the legislation are not preserved in order to, in some way, ameliorate

Mann cited with approval the 1988 Standing Committee on Aboriginal Affairs and Northern Development's *SCAAND Report on C-31* which noted the "new and continued inequities flowing from federal control of the definition of 'Indian' and the more limited but still continuing control of the federal government over band membership".²⁴⁶ This report critiqued the continued exclusion of non-status Indians and their descendants from the ability to register as Indians, which correspondingly results in their exclusion from communal rights and federal benefits.²⁴⁷ Cannon argues that Canada has taken no responsibility for the inequality between status and non-status Indians created by the *Indian Act*:

The *Indian Act* requires that some Indians – notably the descendants of Indian women who lost (and later acquired) status – be concerned about the "race" of those that they marry. It has created inequality for these individuals, and it exonerates the state from taking responsibility for status Indians.²⁴⁸

In other words, Canada has enacted legislation which forces Aboriginal peoples to measure the blood quantum of their parenting partners or risk losing status, while at the same time, absolving itself of all responsibility for having forced the choice to begin with. Given that the non-status Indians have already been recognized as a historically disadvantaged group in *Lovelace*, their exclusion from registration only serves to perpetuate this disadvantage. The second generation cut-off rule treats non-status Indians as though they and their descendants are less deserving of equal concern and respect.

their position, or to assist more disadvantaged groups. None of the distinctions is designed to take into account actual differences in culture, ability, or merit."

²⁴⁶ *SCAAND Report on C-31*, *supra* note 48 at 40. See also: *Unrecognized and Unstated Paternity*, *supra* note 32.

²⁴⁷ *SCAAND Report on C-31*, *supra* note 48 at 40.

²⁴⁸ *First Nations Citizenship*, *supra* note 28 at 20.

Similar to the claim of sex discrimination in *McIvor*'s case, the continued exclusion of non-status Indians from registration makes "those who are affected by it legitimately feel that they are not equal to their peers in self-respect, self-worth and membership in their communities."²⁴⁹ Moreover, this type of discrimination on the basis of blood quantum/descent is not justifiable under s.1 of the *Charter*.²⁵⁰

Section 1 of the *Charter* provides that: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."²⁵¹ Having demonstrated that ss.6(1) and 6(2) of the *Indian Act* discriminate on the analogous ground of blood quantum/descent, Canada would then have to answer whether the second generation cut-off is based on a "pressing and substantial" objective and that it is reasonably and demonstrably justified. As reviewed at the beginning of this chapter, Canada would demonstrate this through a proportionality test: (1) the limitation must be rationally connected to the objective; (2) the limitation must impair the right as minimally as possible; and (3) the effects of the limitation must not encroach on individual or group rights so severely that the legislative objective is outweighed by the abridgement of rights. In *Corbiere*, the Court determined that the restriction on voting was rationally connected to the aim of the legislation, which they determined to be giving "a voice in the affairs of the reserve only to persons most directly affected by the decisions of the band council."²⁵² However, the restriction on voting which excluded all off-reserve band members, did not pass the second part of the justification test since it

²⁴⁹ *McIvor trial*, *supra* note 6 at para.259.

²⁵⁰ *Charter*, *supra* note 6 at s.1.

²⁵¹ *Ibid.*

was not shown that s.77 (1) of the *Indian Act, 1985* impaired the s.15 equality rights of the claimants “minimally”. Since no evidence, argument or authority was provided in support of the claims that it would be too difficult and too expensive to accommodate off-reserve band members, the Court denied the use of administrative difficulty and cost as a justification to completely deny a constitutional right.²⁵³

With regards to my claim, I would argue that the second generation cut-off rule does not meet any of the parts of the justification test. The second generation cut-off rule was not, in any way, rationally connected to the objectives of the *Bill C-31* legislation. The appeal court in *McIvor* noted that the objectives were as follows: (1) removal of sex discrimination from the *Act*; (2) restoration of status to those who had lost it as a result of the sex discrimination; (3) removal of provisions which conferred or removed status by marriage; (4) the preservation of acquired rights; and (5) allowing bands to assume jurisdiction over their membership codes.²⁵⁴ None of these objectives relate to a corresponding need on the part of federal government or Indian bands to exclude certain Indians and reduce the Indian population through a rule based on diminishing blood quantum. However, Canada had argued an additional objective in *McIvor*: “In the context of these significant changes, retain registration as a means of continuing the federal government’s relationship with individuals with sufficient genealogical proximity to the historical population with whom the Crown treated or for whom reserves were set aside.”²⁵⁵

²⁵² *Corbiere, supra* note 190 at para 21.

²⁵³ *Ibid.* at para. 21.

²⁵⁴ *McIvor, supra* note 5 para124. “The extensive legislative history presented in this case clearly establishes that these were, indeed, the objectives of the 1985 legislation.”

²⁵⁵ *McIvor-Canada factum, supra* note 177 at para.96.

The trial judge in *McIvor* did not accept this as one of the objectives of *Bill C-31* and explained that: “Lack of historical connection was not raised by the Minister as a justification for discrimination.”²⁵⁶ In dispensing with this issue, the trial judge held:

In any event, to the extent that the defendants are suggesting that those previously excluded on discriminatory grounds have a more remote cultural proximity to the original population, there is simply no evidence in support of this assertion. In fact, the only evidence on this point, the direct evidence of Sharon McIvor is that she and Jacob Grismer continue to have a strong and direct cultural identity with the original Aboriginal population.

But even if there had been evidence that the new population was more culturally removed from the original Indian population, their cultural removal would be entirely the result of historic sex discrimination. In other words in advancing this new purpose, the government is attempting to rely upon the invidious effect of its previous discrimination. Consequently, even if there were any evidentiary basis for the claim, and there is none, the purpose is in fact a discriminatory purpose and therefore could not justify perpetuating discrimination under section 1.²⁵⁷

The appeal court in *McIvor* also did not list this consideration as one of the objectives of the legislation when it was enacted in 1985.²⁵⁸ Therefore, the legislative objectives do not have a rational connection to the second generation cut-off rule as they were designed primarily to address the sex discrimination. I agree with both courts in *McIvor* that the historical objective was never really an objective. Even if I were wrong about the historical connection not being an objective, the second generation cut-off rule certainly cannot be said to impair the rights of non-status Indians minimally.

If Canada wanted to ensure that those who were registered had sufficient connections to historic Aboriginal communities, it could have used any variety of

²⁵⁶ *McIvor trial*, *supra* note 6 at para.312.

²⁵⁷ *Ibid.* at paras.313-314

methods to accomplish this. For example, they could have implemented a one-parent rule.²⁵⁹ There was nothing in the elimination of sex discrimination and protecting vested rights that required imposing a one quarter blood quantum rule that would not only completely exclude non-status Indians from their identities, cultures, communities and benefits, and but also ensures that the very existence of the historic Aboriginal communities would be jeopardized. Similarly, the discriminatory effects of the second generation cut-off rule are so out of proportion to the legislative objectives to eliminate sex discrimination and protect vested rights as to fail the justification test. Gender-neutral blood quantum rules are still discriminatory. As the Supreme Court of Canada explained in *Egan*: “it would be strange, indeed, to permit the government to justify a discriminatory distinction on the basis of presumptions which are, themselves, discriminatory.”²⁶⁰ There were simply too many options available to Canada to remedy sex discrimination that it did not have to create new discrimination on the basis of blood quantum/descent. What is worse is that the second generation cut-off rule amounts to a substantive breach of the constitutional promise to protect Aboriginal identities and cultures, a promise which was made before the *Bill C-31* amendments.

(c) Remedying Inequality for Non-Status Indians

Once discrimination has been proven to be unjustified, the only issue that remains is the appropriate remedy. While there may be a difference of views as to how to remedy the situation, there appears to be a general consensus among many Aboriginal leaders,

²⁵⁸ *McIvor*, *supra* note 5 para.123. Only five objectives were accepted by the appeal court and the historical connection objective was not one of them.

²⁵⁹ I will be discussing the possible remedies in the last section of this chapter. Chapter 6 also addresses longer term remedies.

²⁶⁰ *Egan*, *supra* note 114 at 569.

individuals and academics that the status quo is unacceptable.²⁶¹ In the end, the only entity that stands to truly gain from a continued disappearance of legally recognised Indians is the federal government:

The state is absolved from any fiduciary obligation to these grandchildren since the Department of Indian [sic] and Northern Development (DIAND) does not claim responsibility for non-status Indians. The *Indian Act* quite simply works to reduce the number of status Indians in Canada, the state's responsibility toward them, and ultimately, the reserve lands belonging to them.

The legal assimilation to which I am drawing attention is often left hidden from public discourse. When it is raised, it is often within the ideological context of discussions about fiscal conservatism, limiting the number of status Indians in Canada, accountability, or government overspending.²⁶²

Clatworthy concluded that the “Rules governing Indian registration and First Nations membership are likely to increase and entrench inequality in many First Nations by creating new distinctions among citizens.”²⁶³ These racially constructed rules were imposed upon Aboriginal peoples by Canada, and Saul ponders whether those racist attitudes of previous decades still remain but under a different guise.²⁶⁴

The arbitrary nature of section 6 of the *Indian Act* attracts the most amount of criticism and highlights the need for strong remedial action by the courts, if Canada chooses either not to act, or does not fully address all the inequities contained within the registration provisions. Cornet argues that the arbitrary nature of the *Indian Act's*

²⁶¹ See generally: *An Empty Shell*, *supra* note 63. *Real Indians and Others*, *supra* note 50. *Legislated Identity*, *supra* note 50. *Arbitrary, Anachronistic and Harsh*, *supra* note 53. *Aboriginal Justice Inquiry*, *supra* note 16. *RCAP Report*, *supra* note 210.

²⁶² *First Nations Citizenship*, *supra* note 28 at 20.

²⁶³ S. Clatworthy, “Registration and Membership: Implications for First Nations Communities” (Paper presented to the Bill C-31 and First Nation Membership Pre-Conference Workshop, March 2006) [unpublished] [*Registration and Membership*] at 15.

registration and membership provisions results in significant negative effects on the human dignity of individuals.

Collectively, federal and First Nation laws have created numerous different legal classes of people of First Nation descent. This complexity can result in arbitrariness with negative effects on human dignity, personal autonomy and self-esteem. Legal categories that rely strictly on descent-based criteria for determining Indian status, band membership or First Nation citizenship reflect a western legal approach of either/or classification and involve a high risk of arbitrariness. Arbitrariness in turn can lead to discriminatory results inconsistent with Charter equality values and international human rights norms (as well as traditional First Nation cultural values).²⁶⁵

The arbitrariness of such laws not only leads to discrimination which is inconsistent with the *Charter*; but Cornet goes on to explain that the impact of such laws on Aboriginal identity at the community level disproportionately affects those who are not legally recognized as Indians.

There are concerns that federal law and many membership laws passed under the authority of the *Indian Act* negatively affect the rights of individuals to control their own personal identities, and to assert the cultural identity with which they feel most comfortable. Difficulties often arise when individuals discover that the law does not accommodate their self-perception of cultural identity, whether that law is federal or First Nation in source.²⁶⁶

²⁶⁴ J. Saul, *A Fair Country* (Toronto: Penguin Groups, 2008) at 3-7.

²⁶⁵ W. Cornet, "Indian Status, Band Membership, First Nation Citizenship, Kinship, Gender & Race: Reconsidering the Role of Federal Law" (Paper presented to the Bill C-31 and First Nation Membership Pre-Conference Workshop, March 2006) [unpublished] [*Indian Status and Membership*] at 3.

²⁶⁶ *Ibid.* at 3.

Cornet points out that the *Indian Act's* arbitrary registration criteria and First Nation's rigid membership rules are based largely on "descent criteria".²⁶⁷ Descent criteria do not take into account familial and communal relationships, shared culture, history or identity. It is this arithmetic of blood lines that promotes racist views about Aboriginal identity and results in the arbitrary exclusion of individuals from their communities. As Magnet explains, the results of these rules are "arbitrary, anachronistic and harsh".²⁶⁸ These arbitrary results are what demands that the law be scrutinized according to the test for equality as laid out above.

(i) Remedies

Substantial remedies are required in order to address the long-standing historical discrimination against non-status Indians. Their exclusion from registration has not only resulted in exclusion from community membership and a wide variety of benefits, but it also ensures that they lack the requisite political power to access the various negotiation tables that affect their rights. The Court in *Corbiere* found that off-reserve band members had just as much interest in issues like land claims and self-government as did those on-reserve members:

²⁶⁷ *Ibid.* at 6. "Arbitrariness in definitions of Indian status and membership/citizenship has long been a concern of many First Nations women activists and organizations – whether the discrimination is based on sex, descent, marital or family status. It is of course true that aboriginal rights by definition are rights attached to persons connected to the indigenous peoples in control of their territories prior to European colonization and this necessarily involves descent criteria to determine entitlement. However, the rigid descent rules that now typify Indian status entitlement and most band membership rules are a relatively recent development. This rigidity has the unfortunate consequence of perpetuating colonial notions of race and also fails to respond to the needs of 'biracial' or 'multiracial' children."

²⁶⁸ *Real Indians and Others*, *supra* note 50 at 80. *Arbitrary, Anachronistic and Harsh*, *supra* note 53.

representation of Aboriginal peoples in processes such as land claims and self-government negotiations often takes place through the structure of Indian Act bands. The need for an interest in this representation is shared by all band members, whether they live on- or off-reserve. Therefore, although in some ways, voting for band council and chief relates to functions affecting reserve members more directly than others, in other ways it affects all band members. Since interests are affected that are unrelated to the basis upon which the differential treatment is made (off-reserve residence status), considering the principle of respect for human dignity and substantive equality, this is an important indicator that the differential treatment is discriminatory.²⁶⁹

The same can be said of non-status Indians who are “chronically ignored” by governments and denied access to community governance structures that would allow them to change their status in life.²⁷⁰ The Court in *Lovelace* recognized that the serious nature of the exclusion of non-status Indians from Indian Act registration hinted at the “potentially discriminatory or arbitrary nature of the exclusionary provisions of the Indian Act”.²⁷¹ The Court also explained that that the continued exclusion of non-status Indians from the *Act* made these non-recognized Aboriginal groups particularly vulnerable:

- (i) a vulnerability to cultural assimilation, (ii) a compromised ability to protect their relationship with traditional homelands; (iii) a lack of access to culturally-specific health, educational, and social service programs

²⁶⁹ *Corbiere*, *supra* note 190 at para. 78.

²⁷⁰ *Lovelace*, *supra* note 178 at para. 70. “the two appellant groups face a unique set of disadvantages. Although the two appellant groups emphasize their respective cultural and historical distinctness as Métis and First Nations peoples, both appellant groups submit that these particular disadvantages can be traced to their non-participation in, or exclusion from, the Indian Act. These disadvantages include: (i) a vulnerability to cultural assimilation, (ii) a compromised ability to protect their relationship with traditional homelands; (iii) a lack of access to culturally-specific health, educational, and social service programs, and (iv) a chronic pattern of being ignored by both federal and provincial governments. These submissions were clearly supported in the findings of the Report of the Royal Commission on Aboriginal Peoples” (emphasis added).

²⁷¹ *Ibid.* at para. 73.

and (iv) a chronic pattern of being ignored by both federal and provincial governments.²⁷²

The minority in *Corbiere* (concurring in the result) also felt that: “This history shows that Aboriginal policy, in the past, has often led to the denial of status and the severing of connections between band members and the band. It helps show why the interest in feeling and maintaining a sense of belonging to the band free from barriers imposed by Parliament is an important one for all band members...”.²⁷³ The delay in providing a remedy for non-status means that there are several generations of non-status Indians that have suffered these harms and highlights the need to remedy the discrimination on a priority basis.

There are many possibilities for remedying the current inequality faced by non-status Indians. Should a court find that s.6 of the *Indian Act* violates s.15 of the *Charter* and cannot be saved by s.1,²⁷⁴ the Court has various options pursuant to s.52 of the *Constitution Act, 1982*.²⁷⁵ These remedies were specifically addressed in *Schachter*:

A court has flexibility in determining what course of action to take following a violation of the Charter which does not survive s. 1 scrutiny. Section 52 of the Constitution Act, 1982 mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the Charter extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose

²⁷² *Ibid.* at para. 70.

²⁷³ *Ibid.* at para. 89.

²⁷⁴ *Charter, supra* note 6 at s.1. “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

²⁷⁵ *Constitution Act, 1982, supra* note 74 at s.52(1). “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

[Charter] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.²⁷⁶

In summary then, a court may strike down an offending provision, read down or into a provision, or sever it. The Court in *Schachter* also explained that all of these remedies can be in combination with an order from a court suspending the court's order to allow the legislature time to amend the offending provision.²⁷⁷

A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public... or otherwise threatens the rule of law... It may also be appropriate in cases of underinclusiveness as opposed to overbreadth.²⁷⁸

The remedies chosen in Aboriginal cases tend to favour suspensions of orders, so as to allow Parliament time to amend legislation and/or to allow the government time to consult with the Aboriginal group(s) affected.²⁷⁹

The remedy in *Corbiere* was to declare the words "ordinarily resident on reserve" in section 77(1) of the *Indian Act, 1985*, inconsistent with section 15(1) of the *Charter*

²⁷⁶ *Schachter v. Canada*, [1992] 2 S.C.R. 679 [*Schachter*] at para.25.

²⁷⁷ *Ibid.* at para 79.

²⁷⁸ *Ibid.* The Court went on to explain that: "For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits".

²⁷⁹ *Corbiere*, *supra* note 190 at para. 126. The Supreme Court of Canada suspended its declaration of invalidity for 18 months. *McIvor*, *supra* note 5 at para. 166. The BCCA suspended its judgment for 12 months.

pursuant to section 52(1) of the *Constitution Act, 1982*.²⁸⁰ They suspended their declaration of invalidity for a period of eighteen months in order to allow the government time to amend the legislation. During that time period, INAC changed its policy to allow off-reserve voting and provided training to its staff, to First Nations, and also provided some funding to assist bands in making the changes to their election procedures.²⁸¹ With regards to the registration provisions of the *Indian Act*, and an equality claim by non-status Indians, a Court could strike out s. 6 entirely and give the federal government specific instructions on how to best amend the *Act*, and/or it could declare that the Government must reinstate non-status Indians similar to what it had to do under *Bill C-31*, and then give the government a certain time frame in which to amend the legislation accordingly. In addition, there are some unregistered bands that could be registered under the current provisions of the *Indian Act* in order to alleviate some of their social, economic and political difficulties immediately. The kinds of remedies that will be proposed are well within the realm of possibility and, indeed, are practical solutions being currently put into use on a regular basis by the federal government currently with other formerly non-status groups.

²⁸⁰ *Constitution Act, 1982 supra* note 74 at s.52.(1). “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.”

²⁸¹ Indian and Northern Affairs Canada, “News Release: Minister of Indian Affairs Announces Amended Voting Regulations – First Nation Members Residing Off Reserve Now Have Right to Participate in Indian Act Band Elections and Referendums” <http://www.ainc-inac.gc.ca/nr/prs/s-d2000/2-00168_e.html> [*Amended Voting Regs*] at 1. See also: Indian and Northern Affairs Canada, “Questions and Answers: November 20, 2000 Amendment to the Indian Band Election Regulations and the Indian Referendum Regulations” <http://www.ainc-inac.gc.ca/nr/prs/s-d2000/00168bkd_e.html> [*Band Elections*] at 8.

Federal and provincial governments both have created various excuses in order to delay remedying injustices for Aboriginal peoples, and especially those regarding the rights of off-reserve status Indians, non-status Indians, and Métis people. For example, in *Powley*, the provincial government argued that it would be too hard to determine who individual Métis people are, and so they denied them their hunting rights. The Court rejected this defence and held that: “The development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority. That said, the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.”²⁸² Another defence has been that of cost. Governments often argue that the cost of respecting a constitutional right would be prohibitive or should result in a justification of the breach of those rights. In *Corbiere*, the Supreme Court of Canada was faced with a defence by the Canadian government that cost would be too high to include the off-reserve band members in band elections. The Court rejected this and found that there was no authority that supported the breach of the off reserve band members’ *Charter* equality rights based on cost or administrative difficulty:

The appellants argue that there are important difficulties and costs involved in maintaining an electoral list of off-reserve band members and in setting up a system of governance balancing the rights of on-reserve and off-reserve band members. But they present no evidence of efforts deployed or schemes considered and costed, and no argument or authority in support of the conclusion that costs and administrative convenience could justify a complete denial of the constitutional right. Under these circumstances, we must conclude that the violation has not been shown to be demonstrably justified.²⁸³

²⁸² *R. v. Powley*, [2003] 2 S.C.R. 207 at para. 49.

²⁸³ *Corbiere*, *supra* note 190 at para.21.

These same principles hold true for non-status Indians as well. Canada already has a significant amount of experience reinstating and registering for the first time thousands of previously excluded Indians during the *Bill C-31* amendments. They certainly could not argue administrative difficulty because registration is based on application.

Therefore, a remedy in this regard is well within practical reality and previous experience of going through a massive reinstatement process with *Bill C-31*. Canada reinstated thousands of individuals within a relatively short period of time and would, no doubt, have the training, experience and demographic information with which to implement a host of remedies for non-status Indians. For example, Canada has solicited numerous studies on the demographic indicators and future trends of status Indians both in terms of registration under the *Indian Act* and band membership.²⁸⁴ Given the *McIvor* case and other related ones working their way through the court system, Canada already has information on approximately how many non-status Indians currently exist, how many will exist at certain points in the future, and how many would be registered under different registration scenarios.²⁸⁵ The only real indeterminate issue is how many non-status Indians will actually apply to be registered. There is little doubt that Canada likely has a better idea of the overall demographic implications and potential costs of reinstating non-status Indians than would most Aboriginal communities. However, only individual

²⁸⁴ See generally: *Population Implications*, *supra* note 25. *Reassessment of Population Impacts*, *supra* note 25. S. Clatworthy, Four Directions Consulting Group, “Implications of First Nations Demography: Final Report” (Winnipeg: INAC, 2004) [*First Nations Demography*], S. Clatworthy, Four Directions Consulting Group, “Indian Registration, Membership and Population Change in First Nation Communities” (Winnipeg: INAC, 2005) [*Registration and Membership Change*].

²⁸⁵ *Ibid.* *McIvor trial*, *supra* note 6. *Population Implications*, *supra* note 25. *Revised Population Scenarios*, *supra* note 25.

non-status Indians, their parents, grandparents, extended families and communities truly know the devastating effects of denial of registration to non-status Indians.

Magnet argues that cost is the major reason non-status Indians continue to be arbitrarily excluded from registration under the *Indian Act*, despite the federal jurisdiction and power and responsibility to amend this legislation. He argues that the primary reason is the federal government's fear of the increased costs associated with adding people to the Indian register.²⁸⁶ Magnet refers to the government's "public face" regarding non-status Indians and cites Prime Minister Martin's promises in his speech from the throne in October 2004 to:

...tackle head on the particular problems faced by the increasing number of urban Aboriginal people and by the Metis. We will not allow ourselves to be caught up in jurisdictional wrangling, passing the buck and bypassing their needs.²⁸⁷

Magnet then goes on to point out the government's "private face" recognizes the problems faced by non-status Indians, yet it is not willing to make the budgetary expenditures to alleviate their suffering:

In private, Ottawa recognizes that non-status Aboriginal people face urgent pressing problems that are basically the same as status Aboriginal people. A 1976 Cabinet memo notes that the "special problems and needs of all classes of native people are similar (recognition, cultural security, socio-economic needs, participation, self-determination)" and that "the Indian Act which defines Indian people...is in some-ways arbitrary, anachronistic and harsh."²⁸⁸

However, he also notes that despite their private acknowledgment of the problems, their public response is often quite different:

²⁸⁶ *Arbitrary, Anachronistic and Harsh*, *supra* note 53 at 175.

²⁸⁷ *Ibid.* at 174.

The Cabinet memo concludes that in a period of “expenditure restraint” it would not be “desirable to extend Indian status, or rights of access to Indian programs, to large additional groups of people.” In short, in private, government has decided that while the situation of non-status Aboriginal people is urgent and that Ottawa’s response is arbitrary, anachronistic and harsh, the Federal Government will not spend to address these inequalities.²⁸⁹

Canada continues, today to argue that cost is not their main motivation in maintaining the second generation cut-off rule. However, their own internal documents betray that position. For example, a secret memo from the Associate Deputy Minister, Drummie, which was addressed to Minister of Indian Affairs, Crombie, specifically stated that the cost of reinstatement was “alarming” and expressed the need to find less costly forms of reinstatement.²⁹⁰ Specifically, the Memorandum to Cabinet concluded: “It seems evident from the comments...regarding the financial consequences of the recommended option that Cabinet’s final policy decision on reinstatement will be shaped by financial more than any other consideration.”²⁹¹

It is doubtful that financial considerations would be sufficient to deny non-status Indians constitutional equality. How a program is funded is a secondary consideration to the protection of the substantive *Charter* right itself. Furthermore, it has long been recognized that courts can fashion remedies to address the right at issue even if one of the effects has a budgetary impact of government spending.²⁹² The Supreme Court of Canada

²⁸⁸ *Ibid.* at 175.

²⁸⁹ *Ibid.* at 175.

²⁹⁰ Associate Deputy Minister Drummie, “Removing Discrimination from the Indian Act: January 11, 1985” as cited by the First Nations Leadership Council (FNLC) in *McIvor v. Canada*, (Vancouver: Court of Appeal of British Columbia, July 4, 2008) (Factum of the Intervener, First Nations Leadership Council) [*McIvor-FNLC Factum*].

²⁹¹ *Ibid.*

²⁹² *Schachter*, *supra* note 275 at para.63.

in *Schachter* explained that the issue is whether or not the budgetary impact changes the nature of the legislation significantly from what it was:

Any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. Striking down or severance may well lead to an expenditure of money... It has also been pointed out that a wide variety of court orders have had the effect of causing expenditures... In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.²⁹³

It is doubtful that the registration of non-status Indians, or in other words the removal of the second generation cut-off rule, would have the effect of changing the *Indian Act* substantially from what it is. It would still be legislation that determines the beneficiaries of federal programs and services dedicated for Aboriginal peoples, or more specifically, “Indians”. The benefits, rights and obligations which flow there from the *Act* would still be reserved for Indians; it is just that Canada would not be able to exclude Indians on discriminatory grounds. What cannot be allowed to happen is for Canada to do indirectly what it cannot do directly: i.e. equality with a vengeance.²⁹⁴ For example, assuming that *McIvor* wins her gender equality claim and the descendants of Indian women are registered, Canada cannot then decide that Indian status under the *Act* no longer has any tangible benefits associated with it, or reduces the benefits such that these newly

²⁹³ *Ibid.* at para 63.

²⁹⁴ *Ibid.* at para. 41. “Perhaps in some cases s. 15 does simply require relative equality and is just as satisfied with equal graveyards as equal vineyards, as it has sometimes been put. Yet the nullification of benefits to single mothers does not sit well with the overall purpose of s. 15 of the Charter and for s. 15 to have such a result clearly amounts to ‘equality with a vengeance,’ as LEAF, one of the interveners in this case, has suggested. While s. 15 may not absolutely require that benefits be available to single mothers, surely

registered Indians are excluded from the benefit at issue. It would be one thing for Canada to reduce some of the benefits within a program to accommodate unexpected increases in usage if it meant that Canada would be in a financial crisis, but it is quite another to eliminate a necessary program. Then Indian women and their descendants (in *McIvor's* case), or non-status Indians (in my example), would be left with hollow victories. Canada would be hard pressed to demonstrate that the addition of non-status Indians as a remedy to the second-generation cut-off rule would be financially unsupportable, despite the vast wealth held by Canada and originally obtained from the ancestors of non-status Indians.

Various remedies have also been suggested by the affected parties outside of a litigation context. For example, the Native Women's Association of Canada (NWAC) has been calling for the repeal of s.6(2) for many years, as it is the section which results in the second generation cut-off.²⁹⁵ They further recommend that "Amendments should be made to the Indian Act which would remove all discrimination, present and historical, against Aboriginal women and their children."²⁹⁶ The Assembly of First Nations (AFN) also feels that the current *Act's* residual discrimination against Indian women and their descendants has caused significant harm in their communities and that the second generation cut off rule has only led to increased litigation by Aboriginal peoples to address this discrimination.²⁹⁷ The AFN reported on the conclusions of First Nations focus groups

it at least encourages such action to relieve the disadvantaged position of persons in those circumstances." (emphasis added)

²⁹⁵ Native Women's Association of Canada, "Aboriginal Women's Rights are Human Rights", online: NWAC <<http://www.nwac-hq.org/documents/AboriginalWomensRightsAreHumanRights.pdf>> [*Aboriginal Women's Rights*] at 29.

²⁹⁶ *Ibid.* They also recommend that the CHRA apply to all band councils including their membership codes.

²⁹⁷ *AFN-INAC Status Report*, *supra* note 11 at 6-7.

across the country which recommended that First Nations have control over both status and membership and that any racist criteria, such as blood quantum, be rejected.²⁹⁸ The Aboriginal Justice Inquiry categorized the second generation cut off rule as a *de facto* one quarter blood rule that threatens the survival of First Nations.²⁹⁹ They specifically recommended that: “The *Indian Act* be amended to remove the two generation rule” and that “The category of so-called ‘non-status Indians’ or ‘unregistered’ Indians should disappear.”³⁰⁰ There are many more reports and studies that make similar recommendations which are too numerous to list here. The point is that the discrimination caused by the second generation cut-off rule is well recognized, and it is time that the *Act* be amended to remedy it. I also agree with the above recommendations that Canada should repeal s.6(2) (and/or amend s.6 generally), and acknowledge the right of First Nations to determine their own identity both on an individual basis as Indians, and on a communal basis as members/citizens. Despite Canada’s authority under s.91(24) to legislate with regards to Indians and their lands, this authority does not extend to defining a people in Canada’s best interests.

At the same time, amendments to the *Act* regarding registration cannot come without adequate resources, an implementation plan, public and community education and capacity building within the local Aboriginal communities and Aboriginal political organisations that may be assisting them in their efforts. Registration under the *Indian Act* and subsequent band membership is not being promoted here as a substitution for citizenship under future self-government agreements, but given that many Aboriginal

²⁹⁸ *Ibid.* at 14.

²⁹⁹ *Aboriginal Justice Inquiry*, *supra* note 16 at Chapter 5.

³⁰⁰ *Ibid.*

communities are decades away from that stage, it is imperative that inequities among current and future members be dealt with now. Registration of non-status Indians would be an interim solution but a necessary step forward for individuals, communities and Nations. Since some Aboriginal groups base their citizenship rolls in self-government agreements on their former band lists, which in many cases are determined by the *Indian Act*, it is necessary to amend the *Act* to avoid further discrimination even within self-government citizenship lists. The federal government also keeps a separate list of who is and is not a status Indian, regardless of the self-governing status of Aboriginal groups, and regardless of the fact that these groups have their own citizenship and beneficiary criteria.³⁰¹ Therefore, it is important that the *Act* be amended to eliminate the discrimination in the interim, but also so that it prevents discrimination in the longer term should it be relied on for self-government citizenship regimes, or even after self-government regimes have been negotiated. Unless and until there is a day when there is no more *Indian Act*, and no more federal legislation that identifies and assigns rights and benefits to Aboriginal peoples based on federal criteria, it is imperative that the non-status Indians currently excluded by the second generation cut-off rule are registered.

While some might question the ability of Canada to reinstate or register non-status Indians, I would refer them to the *Indian Act* itself. The federal government has the

³⁰¹ See: Indian and Northern Affairs Canada, "Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon" (29 May 1993) online: INAC <http://www.ainc-inac.gc.ca/pr/agr/umb/umb3_e.html> [*Yukon Indian Eligibility*]. Section 3.2.4 of the "Eligibility and Enrollment" criteria under the "Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians And the Government of the Yukon" which was dated May 29th, 1993 provides that citizenship under the self-government agreement does not confer any rights or benefits under the *Indian Act*. INAC

power, pursuant to section 17(1) of the *Indian Act, 1985*, to constitute new bands.

Pursuant to section 6(1)(b), anyone who is a member of a band that was declared on or after 1985 to be a band, is also entitled to be registered as an Indian.³⁰² With regard to the new bands, section 17(3) provides that no one can protest the deletion from or addition to the new band list, which is possible for other bands under section 14.2 of the *Act*.³⁰³

Therefore, those who belong to the new bands would appear to have some protection from protests. Thus, one possible avenue for groups who are not currently registered under the *Act* as bands, and who may have some members who are not registered under the *Act* as Indians, is to seek such registration under the *Indian Act* as a remedy. The Innu communities in Newfoundland and Labrador are excellent examples of the power of the federal government to turn Aboriginal people into status Indians by the stroke of a pen, should it choose to wield its power that way.³⁰⁴ This was also done with Miawpukek

continues to maintain its registration list, despite the fact that the Yukon self-governing Nation(s) maintain their own citizenship/beneficiaries list.

³⁰² *Indian Act, supra* note 192 at s.17.(1). “**Minister may constitute new bands** – The Minister may, whenever he considers it desirable, (a) amalgamate bands that, by a vote of a majority of their electors, request to be amalgamated; and (b) constitute new bands and establish Band Lists with respect thereto from existing Band Lists, or from the Indian Register, if requested to do so by persons proposing to form the new bands.” With regard to registration, section 6(1)(b) provides: “**Persons entitled to be registered** – Subject to section 7, a person is entitled to be registered if (b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act.”

³⁰³ *Ibid.* at s.17.(3). Section 17.(3) provides: “**No protest** – No protest may be made under section 14.2 in respect of the deletion from or addition to a Band List consequent on the exercise by the Minister of any of the Minister’s powers under subsection (1).” Section 14.2 provides: “Protests – A protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years after the inclusion or addition, or omission or deletion, as the case may be, by notice in writing to the Registrar, containing a brief statement of the grounds therefor.”

³⁰⁴ Indian and Northern Affairs Canada, “Labrador Innu - Chronology of Events”, online: INAC <<http://www.ainc-inac.gc.ca/ai/scr/at/irp/coe-eng.asp>> [*Innu Chronology*]. Indian

(formerly Conne River), and will soon be completed with the Federation of Newfoundland Indians (who will then be the Qalipu Mi'kmaq First Nation band).³⁰⁵

(iii) Modern Examples

The Innu in Newfoundland and Labrador are now registered as two separate bands, and many of their members are now registered under the *Indian Act* as Indians. They offer another example of a group who was not always under the *Indian Act*. However, the Innu of Labrador were not always in favour of registration under the *Indian Act*. The report to the Canadian Human Rights Commission in 1993 concerning the Innu (*Innu Report 1993*) explained that the Innu had applied for registration as early as 1977 as a means of being treated like other bands in Canada, but the federal government did not proceed with their claim.³⁰⁶ The government of Newfoundland and Labrador was opposed to their claim at the time, although clear reasons were not provided.³⁰⁷ When the federal government decided that they were in favour of registering the Innu in the late 1980's, the

and Northern Affairs Canada, "Backgrounder: Labrador Innu Registration and Band Creation", online: INAC <<http://www.ainc-inac.gc.ca/ai/scr/at/irp/bkg-eng.asp>> [*Innu Registration*].

³⁰⁵ M. Hanrahan, "The Lasting Breach: The Omission of Aboriginal People From the Terms of Union Between Newfoundland and Canada and its Ongoing Impacts" (Newfoundland: Royal Commission on Renewing and Strengthening Our Place in Canada, 2003), online: Nfld <<http://www.exec.gov.nl.ca/royalcomm/research/pdf/Hanrahan.pdf>> [*Lasting Breach*] at 16. Miawpukek were registered as a band in 1984 and received their reserve two years later. Miawpukek, "About Miawpukek", online: Miawpukek <<http://www.mfngov.ca/about.html>>. Qalipu, "Agreement in Principle: for the Recognition of the Qalipu Mi'kmaq First Nation Band", online: FNI <<http://qalipu.com/message.html>> [*FNI Registration*].

³⁰⁶ D. McRae, *Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission*, (Ottawa: CHRC, 1993) online: CHRC <<http://www.chrc-ccdp.ca/pdf/innureport1993.pdf>> [*Innu Report 1993*] at 19.

³⁰⁷ *Ibid.* at 20. This report noted that the Mi'kmaq of Conne River (what is now called "Miawpukek") also had their application in at the same time and this may have affected the federal government's position in this regard.

Innu had “allegedly” decided they were against it, although there is no evidence of any meetings or discussions held in this regard.³⁰⁸

The *Innu Report 1993*, concluded in part, that the Government of Canada should formally acknowledge its constitutional responsibility toward the Innu, enter into self-government negotiations with them, and not require registration of the Innu under the *Indian Act, 1985*, before said negotiations.³⁰⁹ Specifically, the report concluded:

But this should not involve any requirement that the Innu be formally placed under the Indian Act. To require the Innu to be so registered would be to elevate form over substance. It would be nothing more than a symbolic act of subordination – to legislation that the Canadian Human Rights Commission itself has described as “outdated and paternalistic”. There is no reason why the federal government could not act directly without imposing the process of registration under the Indian Act on the Innu.³¹⁰

A newer report to the Canadian Human Rights Commission in 2002 (*Innu Report 2002*), explained that the federal government initially “appeared to be in agreement with the approach recommended in the Report.”³¹¹ The approach was to treat the Innu as though they were status Indians who lived on reserves and land claims and self-government would also be negotiated.³¹² In the end, the federal government was not prepared to grant the Innu all of the “benefits” and withheld the tax exempt status to which status Indians living on reserve were entitled.³¹³ This complicating factor, together with their desire to

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.* at 58-59.

³¹⁰ *Ibid.* at 58.

³¹¹ C. Backhouse, D. McRae, *Report to the Canadian Human Rights Commission on the Treatment of the Innu of Labrador by the Government of Canada* (Ottawa: CHRC, 2002), online: CHRC <<http://www.chrc-ccdp.ca/pdf/reports/InnuReport2002.pdf>> [*Innu Report 2002*] at 19.

³¹² *Ibid.* at 19-20.

³¹³ *Ibid.* at 20.

enact by-laws for the betterment of their communities, led the Innu to hold a referendum on the matter of registration in order to achieve “equivalency” to status Indians in the interim until they reviewed these issues in any future self-government agreement(s).³¹⁴

The question put to Innu community members in March of 1999 was as follows:

In the interim until Innu rights and Innu government agreements are in place, I am in favour of the leadership of the Innu Nation and of the band councils taking whatever actions they determine as necessary to ensure equivalency of programs and services including taxation exemption. I also agree that as a last resort this mandate includes registration under the *Indian Act* and taking a reserve.³¹⁵

However, the federal government had a very different perspective with regard to the registration of the Innu:

Some officials, particularly within DIAND, felt that registration was being driven by a few Innu who wanted the personal benefit of tax exemption, a benefit that officials considered to be of marginal value to many low-income Innu. Others felt that applying the provisions of the Indian Act to a further group of Aboriginal people was regressive, and might set a precedent that would be seized upon by other groups wishing to be registered as well. They considered it contrary to the general policy of DIAND to create new relationships with Aboriginal people that did not move away from the “outdated and paternalistic” strictures of the *Indian Act*.³¹⁶

Threats of protests by the Innu over government delays and, finally, social crisis in the Innu communities intervened to override DIAND’s hesitations about registration. In November of 2000, the Government of Canada committed to register the Innu as “Indians” under the *Indian Act* and declare two groups of Innu as “bands”.³¹⁷ In June

³¹⁴ *Ibid.* at 21.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Innu Chronology*, *supra* note 303 at 3.

2001, the Cabinet formally approved their registration. By November of 2002, two Order-in-Councils (OICs) were passed declaring the Mushuau and Sheshatshiu Innu to be bands, who the founding members would be, and that those not yet registered would be treated as though they were Indians.³¹⁸ The Governor in Council used section 6(1)(b) of the *Indian Act* to “declare” the Innu as “Indians”. The effect of this Order would be that INAC could provide benefits and services to the Innu until such time as they were all registered as Indians under the *Act*. A separate OIC was issued to make their lands reserve lands.³¹⁹ As of June 2005, INAC reported that although they had commenced Innu registration in November of 2002, it was not complete as they were waiting for the two Innu First Nations to forward the required documentation.³²⁰

The Innu Nation is an excellent example of what Canada is capable of doing in terms of rectifying deficiencies in legally recognized Indian status for large groups of people. The Innu are an Aboriginal group who originally did not want to be registered as Indians under the *Indian Act*, nor did they want their communities to become bands. What they wanted was for the federal government to negotiate self-government with them and also provide them with programs and services and treat them “equivalent” to how they treated status Indians. While many attempts were made by the Innu to negotiate such an arrangement, in the end, the federal government would not give them what they wanted

³¹⁸ Mushuau Innu First Nation Band Order, P.C. 2002-1948, SOR/2002-415, C. Gaz. 2002. vol. 136, No.25. [*Mushuau Innu OIC*], Sheshatshiu Innu First Nation Band Order, P.C. 2002-1947, SOR/2002-424, C. Gaz. 2002. vol. 136. No.25 [*Sheshatshiu Innu OIC*]. The date of both OICs was November 21st, 2002.

³¹⁹ *Ibid.*

³²⁰ E-mail from Pamela Palmater to Nora Conn, INAC dated July 14, 2005 asking questions related to Innu registration [*Palmater e-mail re Innu*]. See also: E-mail from Nora Conn, INAC to Pamela Palmater dated July 19, 2005 answering questions related to Innu registration, [*Conn e-mail re Innu*].

without registering them under the *Indian Act*.³²¹ If that is going to continue to be the position of the federal government, then the federal government, in fairness to all non-status Indians and non-status bands, must amend the *Indian Act* and register them accordingly to address the inequality between status and non-status Indians. For some non-status bands, registration is possible now, like the FNI, and no amendment of the *Indian Act* is necessary to address their inequality issues. Unfortunately, governments have many excuses for not remedying an obvious situation of inequality due to cost or administration reasons.

What the federal government did with the Innu in terms of registration also demonstrates what is both legally and reasonably possible in terms of remedying the interim socio-economic needs of a non-status Indian group, while at the same time remedying the discriminatory exclusion of a non-status Indian group from registration under the *Act*, unless and until such time as self-government agreements replace *Indian Act* administration. The choice the federal government made to register the Innu highlights the fact that the federal government is simply choosing not to remedy the offending provisions of the *Act* for both non-status Indian band and individuals as a whole. It simply picks and chooses individual groups for whom to wave the magic “status” wand.³²² While communities should not have to be registered as Indians before

³²¹ *Innu Chronology*, *supra* note 303.

³²² This commentary is meant to make a point in support of registering those non-status Indians who wish to be registered in the interim while waiting for self-government agreements. It is not meant as a negative commentary on the registration of the Innu. If the Innu agreed to have their communities registered, based on full and informed consent for their members, then that is the path they chose in preparation for self-government negotiations. I use their situation only as an example of the government’s power to effect a variety of remedies, including those which have large financial implications.

they can negotiate their own self-government, it appears as though that is the base criteria for even getting to the negotiating table to discuss self-government.

Thus, the registration process has created both status and non-status Indians in the communities, and depending on how long self-government negotiations take, several generations of *Indian Act* registration provisions, together with even a small rate of out-marriage, will mean declining numbers of status Indians for the Innu as well. There is a strong possibility, as with other Aboriginal Nations or bands, that they may use their status Indian band list to determine who will become citizens of their self-governing Nation when they finally negotiate their agreement. The only question at that time will be whether they reclaim all their members who were excluded by virtue of the operation of the *Indian Act* and/or their membership codes. This is why it is so important that changes are made to the *Act*, and that large groups of people are not just simply reinstated as was the case under *Bill C-31*. The goal is not to provide status relief for one more generation, and pass on the discrimination for the future generations. The goal is to eliminate the discrimination once and for all, such that if registration under the *Act* must be used, be it short term, medium term, or even longer term (as some bands use band lists for their self-government agreements), then neither the government nor Aboriginal peoples will base the identity and rights of Aboriginal peoples on discriminatory grounds in violation of the equality rights under the *Charter*.

The registration of non-status Indians would require an amendment to the legislation, the registering of the children of status Indians already identified, and/or a series of band amalgamations and new band formations. Innu registration and new band formation is a significant precedent in Atlantic Canada for registering a large number of

Aboriginal individuals in order to give them access to programs and services, while simultaneously negotiating larger self-government for their larger Aboriginal Nation. While INAC was hesitant to agree to this step for the Innu because of its precedential value, nevertheless, they proceeded, having had the benefit of all the resources the federal government brings to bear on these sorts of issues, from legal experts at Justice Canada, to INAC experts to independent experts. There can be no level playing field when it comes to Aboriginal peoples trying to negotiate issues with the federal government. Despite the hesitancy expressed by a few INAC officials to the Canadian Human Rights Commission about registering the Innu, in reality, this was not something new. Registering the Innu and creating new bands for them was not a novel idea, as that is clearly what had been done for the Mi'kmaq of Conne River (now the First Nation band called "Miawpukek").³²³ In 1984 the band was registered under the *Indian Act* as a "band", and in 1987, a reserve was created.³²⁴ Miawpukek First Nation is located 224 km south of Gander in Newfoundland at Conne River. They have about 2300 band members, 1500 of whom, live off-reserve. The band and INAC are currently "engaged in an innovative pre-negotiations process designed to facilitate movement toward a self-

³²³ See: Indian and Northern Affairs Canada, *Backgrounder: Miawpukek First Nation Land Transfer Agreement* (Ottawa: INAC, 2005), online: INAC <http://www.ainc-inac.gc.ca/nr/prs/j-a2005/02634bbk_e.html> [*Miawpukek Backgrounder*], Indian and Northern Affairs Canada, "News Release: Self-Government Framework Agreement and Land Transfer Agreement For Miawpukek First Nation" (Ottawa: INAC, 2005), online: INAC <http://www.ainc-inac.gc.ca/nr/prs/j-a2005/2-02634_e.html> [*Miawpukek News*], *Miawpukek Band Order*, P.C. 1989-2206, SOR/89-533, 2 November 1989, online: Department of Justice Canada <<http://lois.justice.gc.ca/en/I-5/SOR-89-533/139499.html>> [*Miawpukek OIC*].

³²⁴ *Miawpukek Backgrounder*, *supra* note 322 at 1. While the reserve is commonly referred to as "Miawpukek", the official name is "Aosamiaji'jij Miawpukek Mi'kmawey Mawi'omi Reserve which actually means "too small Conne River Reserve".

government regime for the community of Conne River.”³²⁵ There appears to be little reason why other unregistered bands, representing non-status Indians and, sometimes, status Indians, could not also be registered in similar processes to Conne River.³²⁶

Similarly, the Federation of Newfoundland Indians (FNI) is in the process of negotiations with INAC to be declared a band under the *Indian Act*, but without a reserve, otherwise known as a “landless band”.³²⁷ The goal is to have their members registered under the *Indian Act* as “Indians”, and through future self-government negotiations, ultimately gain their own lands.³²⁸ The FNI is recognised as the representative

³²⁵ *Miawpukek News*, *supra* note 322.

³²⁶ Ardoch Algonquin First Nation, “Past Newsletters: Jan/Feb 2004”, online: AAFNA <<http://www.aafna.ca/newsletters.html>> [*Ardoch Newsletters*]. Ardoch Algonquin First Nation (AAFNA) located in Ontario is an example of another band that is not registered under the *Indian Act*. They are a “confederation of Algonquin families” located in the Madawaska, Mississippi, Tay and Rideau watersheds, but traditionally they used to summer in the Ottawa River area. See also: Ardoch Algonquin First Nation, “Purpose and Objectives”, online: AAFNA <<http://www.aafna.ca/mission.html>> [*Ardoch Purpose*]. Their purpose and objective is to maintain their community, culture, language, and traditions, while also asserting its “political presence” to “preserve Algonquin jurisdiction” in areas such as land, resources, economy and Aboriginal rights and title.

³²⁷ Indian and Northern Affairs Canada, “News Release: Preliminary Negotiations Begin Between Canada, The Federation of Newfoundland Indians and Newfoundland and Labrador” (Corner Brook, NL: INAC, 2003), online: INAC <http://www.ainc-inac.gc.ca/nr/prs/s-d2003/2-02439_e.html> [*INAC-FNI Negotiations*], Indian and Northern Affairs Canada, News Release: Talks With First Nation Groups in Newfoundland Take Important Step Forward (St. John’s, NL&Lab, 2005), online: INAC <http://www.ainc-inac.gc.ca/nr/prs/s-d2005/2-02744_e.html> [*INAC Negotiator*], Federation of Newfoundland Indians, “Registration & Recognition for Mi’kmaq of Newfoundland” (St. George’s NL: FNI, 2006), online: FNI <<http://www.fni.nf.ca/news/Negotiations%20Newletter.pdf>> [*FNI Newsletter*]. (Please note that the spelling errors in the words within the online address are of the host and not my error).

³²⁸ *FNI Newsletter*, *supra* note 326 at 1. In this information newsletter, the President of the FNI, Brendan Sheppard updates his members on the process of the negotiations. He explained on page 1: “To this end, there is no guarantee that negotiations will result in a successful conclusion (i.e. status and recognition), however we are closer now than ever before in the history of this organization. The Federal Government has certainly

organisation of non-status Indians in Newfoundland by the federal government and is provided operational funding on that basis.³²⁹ When the FNI first started out in 1972, it was the Native Association of Newfoundland & Labrador, and also represented the Innu and Inuit groups of Labrador, as well as the Mi'kmaq from Conne River. Both Innu and Mi'kmaq groups are now registered under the *Indian Act* as bands and their members are registered as Indians.³³⁰ The Native Association of Newfoundland & Labrador later changed its name when the Innu and Inuit separated from the group in 1975. The Mi'kmaq of Conne River did not separate until 1982.³³¹ Therefore, as the Mi'kmaq in

maintained their promise to work with the FNI to settle this issue outside of court and negotiations are proceeding well.”

³²⁹ Canadian Heritage, “News Release: Government of Canada Supports Federation of Newfoundland Indians” (Corner Brook, NL: Canadian Heritage, 2005), online: Canadian Heritage

<http://www.pch.gc.ca/newsroom/index_e.cfm?fuseaction=displayDocument&DocIDCd=5N0292> [*Heritage Funds FNI*]. This release announced funding for the FNI and explained: “The FNI is recognized as the representative organization of the Non-status Indian population of Newfoundland. Founded in 1972 and made up of nine member Band Councils, the FNI promotes Aboriginal culture and language and addresses issues such as childcare, justice, health, housing, and status-recognition.”

³³⁰ Nunatsiavut Government, “Labrador Inuit Land Claims Agreement” online: Nunatsiavut Government <http://www.nunatsiavut.com/en/lilca_overview.php>. Indian and Northern Affairs Canada, “General Briefing Note on the Comprehensive Land Claims Policy of Canada and the Status of Claims: May 2006” online: INAC <http://www.ainc-inac.gc.ca/ps/clm/gbn/gbn_e.pdf> [*Nunatsiavut*]. The Inuit in Newfoundland and Labrador celebrated the beginning of the Nunatsiavut Government, formerly the Labrador Inuit Association on December 1st, 2005. They describe themselves as a “regional ethnic government” with the same rights and responsibilities as other governments. They have their own constitution that was approved by referendum on April 15, 2002. Their own form of government is consistent with their land claims agreement which was filed in 1977, ratified by the Inuit in 2004, and was passed into Newfoundland law in 2004, was given royal assent in 2005 and came into effect in December 1st, 2005.

³³¹ E-mail from Pam Palmater to Brendan Sheppard (FNI) dated October 25, 2005 asking questions related to the past names for the FNI and reasons for the change. [*Palmater-FNI e-mail*]. E-mail from Brendan Sheppard (FNI) to Pam Palmater dated October 28, 2005 answering questions related to FNI’s name and reasons for change. [*Sheppard-Palmater e-mail*]. These e-mails are in my possession.

Conne River became registered as Indians, and so too did the Innu, it became increasingly difficult to see why the FNI members would be so arbitrarily excluded. The *Innu Report 2002* looked at those facts as between the Innu and the Mi'kmaq at Conne River (now Miawpukek) and concluded the same thing:

The saga leading to registration is an unfortunate one that does not reflect well on the Government. The Innu were offered registration. The offer was subsequently withdrawn and then re-offered. The Innu were told they were getting equivalency without registration, but then told equivalency only applied to programs and services and not to taxation. They were then told they could get taxation exemption if they became registered. When a parallel was drawn with Conne River, the Innu were told that they were different from the Aboriginal inhabitants of Conne River, although an internal government memorandum provided to the Innu under an Access to Information Act request appears to indicate that the only real difference between the Innu and the Mik'maqs of Conne River was that whereas [sic] the Mik'maqs had sued the Government, the Innu had not.³³²

It would appear that as it concerns the FNI, the federal government still required that organisation to sue the federal government before it would take action to remedy the inequity among the FNI's non-status membership.³³³

In 1989, the Federation of Newfoundland Indians launched a Federal Court Action, pleading breach of fiduciary duty and breach of *Charter* equality rights for their non-status members. Justice Canada initially wanted to move forward with a "test" case, despite INAC wanting to negotiate out of court. In 1997, the Canadian Human Rights Commission recommended that INAC proceed with a recognition process and, after some difficulty and another review of the matter by an INAC special representative,

³³² *Innu Report 2002*, *supra* note 310 at 23.

³³³ Federation of Newfoundland Indians, "Timeline" online: Mi'kmaq Celebration <<http://www.mikmaqcelebration.com/english/timeline.htm>> [*FNI Timeline*].

Honourable Marc Lalonde in 2002, it was recommended that FNI be made a landless band. INAC agreed to move forward with negotiations to register FNI as a landless band under the *Indian Act*, and register its members as Indians if the FNI put its litigation in abeyance. That is where they are today.³³⁴

There is no difference between a non-status Indian Mi'kmaq person who lives in Newfoundland, and one who lives in New Brunswick, Nova Scotia, or Prince Edward Island, as far as registration is concerned. As recognised legal Indian bands, the Mi'kmaq at Conne River (Miawpukek), the Innu and the FNI would have the infrastructure, funding and political recognition to build capacity and negotiate self-government agreements at some point in the future. We know that self-government and comprehensive land claims are the general direction in which Aboriginal Nations are headed. The federal government has a policy of forcing all "Indian" groups to be registered before they will recognize them or proceed to discuss self-government options. Their policy with regards to the Inuit is different, as those living in the Nunavut government region or the Nunasiavut government region were not required to become registered under the *Indian Act* either to access rights and benefits, or to negotiate their land claims and self-government agreements. The Canadian Human Rights Commission stated that the federal government should not force Aboriginal groups to be registered in order to access the same rights and benefits as "Status" Indians, but that has not changed government policy in this regard. All that it lacks is the political will, and what seems to motivate this will is, unfortunately, litigation. Yet, we have seen since *Bill C-31*, although an incomplete attempt, that the extension of registration is well within the realm of

³³⁴ *Ibid.* at 1-4.

realistic possibilities for remedies to correct the discrimination against non-status Indians under the *Indian Act*. There is no reason why it cannot be implemented in the short/medium term, as a remedy for breach of the *Charter* equality right for non-status Indians. However, an amendment to the registration provisions of the *Act* would require a corresponding amendment to the membership provisions so that individuals would not be excluded from band membership. Other related issues, like ensuring that the children of those who reject registration for political or other reasons, are not disentitled because of their parents' decision in this regard, are some of the associated issues that would have to be addressed in the application of the *Act* by the Registrar's office.

Unless and until such time as self-government agreements deal with citizenship, it is most likely that the *Indian Act* or some amended version of it will be around for a while. Most Aboriginal Nations do not currently have self-government agreements, and those agreements often take decades to negotiate. In addition, this method provides a degree of "certainty" that everyone is or will be involved in the negotiation process; i.e., ensures that the "Indians" who are negotiating, include all the rightful members of the Aboriginal Nation. This has to include both status and non-status Indians, regardless whether they live on or off reserve if communities and Nations are going to be truly representative of their people. A change to the *Act* now avoids any unfair reliance on the *Act* for band membership codes, as well for the self-government citizenship process when determining the citizenship criteria for their charter groups (the initial group that forms the Nation/community) and new applicants. Should a band or Nation decide to utilize the

Indian Act, Registrar's list or band lists for any reason, the discrimination or inequities would already have been resolved.³³⁵

While there would be various options that could be explored to amend the discrimination against non-status Indians caused by the second generation cut-off rule, perhaps if all parties looked at *Indian Act* amendments as only transitional in nature, then more holistic solutions could be sought at the modern treaty and/or self-government level. In this way, the "perfect" amendment to the registration provisions would not be required to address blood quantum/descent discrimination. Canada would, no doubt, desire an amendment which provides objective criteria for establishing status, so that it could have a definite way of knowing who does and does not qualify for programs and services. Similarly, bands would have an interest in knowing who is qualified for membership and other band activities and programs. While Canada may feel that it should be the one to determine status, bands may also feel that just like membership, the determination of Indian identity should be in the hands of Indians. That being said, I think a compromise could be arranged as an interim measure to address everyone's concerns all around. A priority (along with sufficient funding) could be made with regards to building capacity within Aboriginal Nations and their local communities to move towards self-government. I think, firstly, all the remaining discrimination contained in the *Act* would have to be addressed, both sex and blood. At the same time, Canada could offer amendments to the registration provisions which determine status (and band membership in most cases), on the basis of a one-parent rule. This would ensure that individuals have both a familial and

³³⁵ For those who already have self-government agreements in place, and who may have relied on any of the discriminatory provisions of the *Indian Act, 1985*, to start the charter

communal connection with the Aboriginal Nation, and at the same time, ensure that Canada is unable to reduce the number of those to whom it is responsible.

Given that Aboriginal identity, membership and citizenship are properly within the jurisdictions of the Aboriginal Nations themselves, the incentive exist to negotiate their own codes within the context of modern treaties or self-government agreements. Canada might raise the concern that a one-parent rule is too inclusive, but it would have to remember that the large numbers of those who are currently excluded is on account of discriminatory legislation. Similarly, if Canada or the bands had concerns about those being registered as having no connections to their home communities, this would also act as an incentive to consult with their communities and to come up with codes that properly reflect the rights of all their citizens. One must also remember that a one-parent code would offer a chance for some who have been excluded to reconnect with their communities. Not extending registration on the basis that there are weak connections would be akin to excluding those who have few connections because they were wrongly excluded. Canada and the bands have to realize that in addition to remedying the discrimination in the *Act*, some reparation also has to be done. In other words, no one will be able to use the history of assimilation and discrimination against non-status Indians as the reason for continuing to exclude them. A significant mind shift is required of all parties, keeping in mind this is a transitional phase from Indians to Aboriginal citizens. Some growing pains will be involved.

At the same time, my suggestions regarding amendments to the *Act* are not meant to imply that status is required for legitimacy, or that status should be the recognized

group of citizens, or relied on the Registrar's or former band's lists, there will no doubt be

identity of Aboriginal citizens. To the contrary, even the Canadian Human Rights Commission (CHRC) feels that Aboriginal people should not have to be registered as status Indians in order to “qualify” to negotiate self-government.³³⁶ However, the significant impact of status on Aboriginal identity cannot be denied. Registration is the link to their Aboriginal identity and communities that has been denied to them by the federal government, and not by any tradition or cultural imperative. Bonita Lawrence surveyed urban Aboriginal peoples living in Toronto about their feelings on their Aboriginality, and that of others, and how status, or lack thereof, matters in Aboriginal communities today.³³⁷ For example, “while many of the individuals interviewed were quick to preface their comments about status with ‘of course, a card does not make me an Indian,’ each also made some reference to the manner in which their sense of their native identity *had* been reinforced by this legal recognition of Indian status.”³³⁸ Though Aboriginal people resist labels imposed on them by government, the years of government legislation, policy, and the use of resources to divide Aboriginal peoples has left many with internal damage to their own identities. Lawrence explains:

Indeed many of the discussions about status with the participants revealed that while the contemporary generation of urban mixed-bloods may have relatively easily adopted the rhetoric of rejecting government classifications, Indian status as a category determining Indianness still has tremendous resonance for most urban Native people. For example, some of the nonstatus or Metis participants described how, as they were growing up, an invisible barrier existed in their minds between themselves and status Indians. They might be of Native heritage, and consider themselves to be Native people, but they could not

residual inequality issues for excluded individuals.

³³⁶ *Innu Report 1993*, *supra* note 305 at 58.

³³⁷ *Real Indians and Others*, *supra* note 50.

³³⁸ *Ibid.* at 219.

consider themselves to be ‘real Indians,’ because this category was only for status Indians.³³⁹

The participants in Lawrence’s study also revealed a deep understanding of the responsibility that the federal government had with regard to this situation: “Most were highly aware of the power of the government to regulate identity – in fact, they felt that status Indians were more Indian than those without status, *because* of the entire apparatus of government recognition of Indianness...”³⁴⁰

Despite this recognition, non-status Indian peoples still want to be put on an equal level with their status Indian brothers, sisters, aunts, uncles, cousins and community members. They still want Mi’kmaq, Cree, Ojibway, and Maliseet identity to be equal, even if it is legislated by or in partnership with the federal government in the interim. There is no reason why this inequality cannot be rectified and all non-status Indian peoples registered as a remedy to the current *Charter* inequality. Should some non-status Indians choose not to maintain or rekindle political and cultural relations with their Aboriginal Nations, their off-reserve political organizations could continue to represent their interests as RCAP had envisioned in a “community of interest” or perhaps a modern-day off-reserve, but traditional, territorially-based Aboriginal community.³⁴¹ The point is

³³⁹ *Ibid.* at 219-220.

³⁴⁰ *Ibid.* at 220.

³⁴¹ Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol.2, Part 1 (Ottawa: Supply and Services Canada, 1996) [*RCAP*, vol. 2, part 1] at 272. RCAP explained their view of an “Aboriginal Community of Interest Government”: “The community of interest model of Aboriginal government is an Aboriginal-exclusive form of government of a group of Aboriginal people who associate voluntarily. It does not operate on the basis of the inherent right of self-government, but rather has self-governing authority delegated by an Aboriginal nation government or by federal or provincial governments.” RCAP further explained: “The community of interest model of Aboriginal government deals with aspects of lands and territory, citizenship, jurisdiction, forms of internal organization, and the relationship with other Aboriginal governments.”

that registration under the *Indian Act, 1985*, would be an interim remedy, and either the registration provisions would have to be permanently altered or completely phased out in exchange for self-determining agreements. In any case, simply adding one generation of non-status Indians under the current *Indian Act* would only bring about legal extinction for their future generations. This outcome would simply be delayed for a few generations, just as the case was with *Bill C-31*. That being said, there would no doubt be some non-status Indian groups who would never want to fall under the *Indian Act, 1985* and would rather wait for self-government agreements to be negotiated. In that instance, there is no reason why the federal government could not negotiate with Aboriginal peoples outside of the *Indian Act, 1985*, as noted by the CHRC. So far, it has just been their political preference not to do so.³⁴²

It appears that despite endless opportunities to consult about these needed changes, Canada finds a way to sidestep the issue. For example, when Canada had an opportunity to hear concerns related to status and band membership during their series of national consultations regarding the *First Nations Governance Act*, they specifically chose not to.³⁴³ These consultations were set up in order to hear suggestions about

³⁴² *Innu Chronology*, supra note 303. *Innu Registration*, supra note 303. The federal government chose to register the Innu communities as “Indians” under the *Indian Act* with the aim of providing them funding, through Indian Affairs, for programs and services and negotiating future self-government agreements with them as *Indian Act* bands. It is notable that in *Innu Registration*, INAC portrays the registration of the Innu as something that the Innu wanted and something that would be an essential part of their healing. Whereas in *Innu Chronology* it is apparent that the Innu adamantly rejected registration for years and even protested when the government continued to make the suggestion. Then, when the Innu are at their weakest with high levels of suicides and gasoline sniffing, the federal and provincial governments decide that registration will be the way to work with the Innu. See also: *FNI Registration*, supra note 304.

³⁴³ See M. Hurley, “Legislative Summary: Bill C-7: The First Nations Governance Act”, online: Library of Parliament

potential changes to the *Indian Act, 1985*, and concerns about what was not working under that legislative structure. Canada refused to hear community concerns related to the registration and membership provisions of the *Act*.³⁴⁴ However, more recently, Canada has partnered with the AFN to identify issues related to registration.³⁴⁵ Yet, NWAC was not involved in this initial process, nor was CAP, both of whom would have larger numbers of individuals affected by discrimination related to registration. Given that the federal government is the one who imposes the rigid registration criteria before negotiations, they cannot, in good faith, sit back and say they have no part in the identity and membership issues of Aboriginal peoples. Within the current political and legal framework, federal legal recognition appears to be the necessary tool to truly advance Aboriginal political agendas for Aboriginal “Indian” people, status, non-status, on and off-reserve, members and non-members. Sometimes this can be done piecemeal through the courts, but that is a long, expensive journey and only deals with one, often, fact-specific issue at a time.

<http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c7&source=library_prb&Parl=37&Ses=2> [*Summary of FNGA*].

³⁴⁴ See generally Joint Ministerial Advisory Committee, “Recommendations and Legislative Options to The Honourable Robert Nault, P.C., M.P., Minister of Indian Affairs and Northern Development: Final Report” (Ottawa: Indian and Northern Affairs Canada, 2002) online: <http://www.ainc-inac.gc.ca/ps/lts/fng/prev/JMACFR_M802_e.html> [*JMAC FNG Report*]. Band membership and Indian status was considered one of the “related governance matters that fall outside the scope of the current initiative that should be considered for future rounds of the reform” despite the fact that they recognized that: “An aboriginal nation should be able to define its own citizenship as part of its inherent self-government powers.” They also acknowledged the fact that many people expressed their objections to the second-generation cut-off rules in the *Indian Act* and how some gained status and not band membership. They concluded that: “Both of these issues raise *Charter* equality issues.” Despite these serious identity, equality and inherent rights issues, it was placed as a last priority over other changes which would essentially keep the *Indian Act* band and registration system in place.

Thus, until all Aboriginal groups have self-government agreements with fair citizenship criteria, amendments to the *Indian Act* are necessary to bring justice and equality to non-status Indians excluded by the second generation cut off rule. Status affects not only an individual's legal recognition and acceptance, but in the majority of cases, it also affects their acceptance as community members. It would be difficult to point to any other legislation that has such a comprehensive impact over one's quality of life and their ability to live (or not) the good life. The next chapter reviews band membership codes in Canada and analyze their contributions to communal identities, and as to whether they promote or hinder individual identities. The issues raised by these codes are a preview to what can be expected in future citizenship codes and may even represent the criteria applied in current self-government agreements. Extinction formulas for band membership and self-government citizenship will continue to impact Aboriginal peoples no less than extinction formulas for Indian status. If race-based definitions of Aboriginal people are not specifically rejected by Canada and Aboriginal peoples, there is no future for Aboriginal peoples in Canada, and we will have lost what our ancestors fought so hard to protect for our subsequent generations: our identity.

³⁴⁵ *INAC-AFN Status Report*, *supra* note 6.

MCIVOR COMPARISON CHART APPENDIX C
Male Indians vs. Female Indians (McIvor) vs. Palmater Family

Indian Act, 1951

<p>- Male Indians - pre-1985 - married out - had children - had status per s.11</p> <p>Children = status Indians per s.11</p> <p>*Grandchildren (born of marriage after Sept. 4, 1951) = had status until age 21 (double mother clause - s.12(1)(a)(iv)), unless not 21 or OIC pre-85 then no loss of status</p> <p>Great grandchildren = non-Indians (per s.10 if father lost status), if father not lose status pre-85, then they are Indians</p> <p>Great great grandchildren = non-Indians (assuming born post-85)</p>	<p>- Female Indians (Sharon McIvor) - pre-1985 - married out - had children - lost status per s.12(1)(b)</p> <p>Children (Jacob Grismer) = non-Indian per s.12(1)(a)(iii)</p> <p>Grandchildren (Jacob's children) = non-Indians</p> <p>Great grandchildren = non-Indians</p> <p>Great great grandchildren = non-Indians (assuming born post-85)</p>	<p>- Female Indians (Margaret Jerome) - pre-1985 - married out - had children = lost status per s.12(1)(b)</p> <p>Children (Frank Palmater) = non-Indian per s.12(1)(a)(iii)</p> <p>Grandchildren (Pam Palmater) = non-Indian</p> <p>Great Grandchildren (Mitchell & Jeremy) = non-Indians</p> <p>Great great grandchildren (Mitchell and Jeremy's will be born post-85) = non-Indians</p>
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INDIAN ACT, 1985

- Male Indians
- pre-1985
- married out
- had children
- 1985 = status per s.6(1)(a)

Children = s.6(1)(a) Indians

Grandchildren = s.6(1)(a) (for those who never lost status) and s.6(1)(c) for those who lost status due to s.12(1)(a)(iv)

Great grandchildren = s.6(1)(a) if had status pre-85 and never lost it, s.6(1)(c) if had & lost status or s.6(2) Indians if father had lost status and was reinstated per s.6(1)(c)

Great great grandchildren = s.6(2) Indians born post-85 assuming father has status per ss.6(1)(a) or (c), if father is s.6(2), then no status

- Female Indians (Sharon McIvor)
- pre-1985
- married out
- had children
- status reinstated as per s.6(1)(c)

Children (Jacob Grismer) = registered for first time as s.6(2) Indian

Grandchildren (Jacob's children) = Non-Indians

Great grandchildren (Jacob's grandchildren) = non-Indians

Great great grandchildren = non-Indians

- Female Indians (Margaret Jerome)
- pre-1985
- married out
- had children
- status reinstated as per s.6(1)(c)

Children (Frank Palmater) = registered for first time as s.6(2) Indian

Grandchildren (Pam Palmate) = Non-Indian

Great grandchildren (Mitchell & Jeremy) = non-Indians

Mitchell and Jeremy's children = non-Indians

British Columbia Supreme Court Ruling – Possible Remedy

- Male Indians
- Pre-1985
- married out
- had children
- s.6(1)(a) Indians

Children = s.6(1)(a) Indians

Grandchildren = s.6(1)(a) for those who never lost status and s.6(1)(c) for those who lost status due to s.12(1)(a)(iv)

Great grandchildren = s.6(1)(a) if had status pre-85 and never lost it, s.6(1)(c) if had & lost status or s.6(2) Indians if father had lost status and was reinstated per s.6(1)(c)

Great great grandchildren = s.6(2) Indians born post-85 assuming father has status per s.6(1)(a) or (c), if father is s.6(2), then no status

- Female Indians (Sharon McIvor)
- pre-1985
- married out
- had children
- s.6(1)(a) Indian

Children (Jacob Grismer) - go from s.6(2) to s.6(1)(a) Indian

Grandchildren (Jacob's children) if born pre-1985 = go from non-Indian to s.6(1)(a) Indians, if post-85, then s.6(2)

Great grandchildren if born pre-1985 = s.6(1)(a) Indians, if born post-85 = s.6(2)

Great great grandchildren (born post-85) = s.6(2) Indians or non-Indians if parent was s.6(2)

- Female Indians (Margaret Jerome) - pre-1985
- married out
- had children
- s.6(1)(a) Indian

Children (Frank Palmater) = go from s.6(2) to s.6(1)(a) Indian

Grandchildren (Pam Palmater) born pre-1985 = go from non-Indian to s.6(1)(a) Indian

Great grandchildren, (Mitchell & Jeremy) born post-1985 = go from non-Indians to s.6(2) Indians

Great great grandchildren = non-Indians (born post-85)

British Columbia Court of Appeal Ruling

- Male Indians
- pre-1985
- married out
- had children
- now s.6(1)(a) Indian

Children = s.6(1)(a) Indians

Grandchildren = s.6(1)(a) [for those who never lost status] and s.6(1)(c) for those who lost status due to s.12(1)(a) [iv]

Great grandchildren = s.6(1)(a) if had status pre-85 and never lost it, s.6(1)(c) if had & lost status or s.6(2) Indians if father had lost status and was reinstated per s.6(1)(c)

Great great grandchildren = s.6(2) Indians born post-85 assuming father has status per ss.6(1)(a) or (c), if father is s.6(2), then no status

- Female Indians (Sharon McIvor)
- pre-1985
- married out
- had children
- now s.6(1)(c) Indian

Children (Jacob Grismer) = s.6(1)(c) Indian

Grandchildren (Jacob's children) = s.6(2) Indians regardless of when born

Great grandchildren = non-Indians

Great great grandchildren = non-Indians

- Female Indians (Margaret Jerome)
- pre-1985
- married out
- had children
- now s.6(1)(c) Indian

Children (Frank Palmater) = s.6(1)(c) Indian

Grandchildren (Pam Palmater) = s.6(2) Indian

Great grandchildren (Mitchell & Jeremy) = non-Indians

Great great grandchildren (Mitchell & Jeremy's children) = non-Indians

My Suggested Remedy to Address Sex Discrimination in Indian Act per McIvor

- Male Indians
- pre-1985
- married out
- had children
- s.6(1)(a) Indians

Children = s.6(1)(a) Indians

Grandchildren = s.6(1)(a) for those who never lost status) and s.6(1)(c) for those who lost status due to s.12(1)(a)(iv)

Great grandchildren = s.6(1)(a) if had status pre-85 and never lost it, s.6(1)(c) if had & lost status or s.6(2) Indians if father had lost status and was reinstated per s.6(1)(c)

Great great grandchildren = s.6(2) Indians born post-85, assuming father has status per s.6(1)(a) or (c), if father is 6(2) then no status

- Female Indians (Sharon McIvor)
- pre-1985
- married out
- had children
- s.6(1)(a) Indian

Children (Jacob Grismer) = s.6(1)(a) Indian

Grandchildren (Jacob's children if born pre-85) = s.6(1)(a) Indians

Great grandchildren (if born post-85) = s.6(2) Indians (or of Double mother descendants registered at this generation, then equalize status in descendants of 12(1)(b)

Great great grandchildren = non-Indians (or if Double mother descendants registered at this generation, then equalize status in descendants of 12(1)(b)

- Female Indians (Margaret Jerome)
- pre-1985
- married out
- had children
- s.6(1)(a) Indian

Children (Frank Palmater) = s.6(1)(a) Indian

Grandchildren (Pam Palmater born pre-85) = s.6(1)(a) Indian

Great grandchildren (Mitchell & Jeremy born post-85) = s.6(2) Indians (or status depending on how equalization with males works out)

Great great grandchildren (Mitchell & Jeremy's children) = non-Indians (or status, depending on how equalization with males works out)

**My Suggested Remedy to Address Second Generation Cut-Off Discrimination in
Indian Act**

- Male Indians
- pre-1985
- married out
- had children
- = s.6 Indian

Children = s.6 Indians

Grandchildren = s.6
Indians

Great grandchildren =
s.6 Indians

Great great
grandchildren = s.6
Indians

- Female Indians
(Sharon McIvor)
- pre-1985
- married out
- had children
- s.6 Indian

Children (Jacob
Grismer) = s.6 Indian

Grandchildren
(Jacob's children) =
s.6 Indians

Great grandchildren =
s.6 Indians

Great great
grandchildren = s.6
Indians

- Female Indians
(Margaret Jerome)
- pre-1985
- married out
- had children
- s.6 Indian

Children (Frank
Palmater) = s.6 Indian

Grandchildren (Pam
Palmater) = s.6 Indian

Great grandchildren
(Mitchell & Jeremy) =
s.6 Indians

Great great
grandchildren
(Mitchell & Jeremy's
children) = s.6 Indians

NOTES: **Chart #1 – Indian Act, 1951**

- These charts are designed as generational comparisons between comparator groups (as held in *McIvor trial*, at para.217 and accepted in *McIvor, appeal* at para.82). These are identical in every way but for their sex as male and female Indians;
- Each generation of status Indian (male or female) in these charts is presumed to have married a non-Indian;
- The rules as they relate to illegitimate children are not reflected in these charts, as the rules relating to illegitimate children were different under past *Indian Acts*;
- Similarly, the rules and claims related to unstated paternity, siblings or scrip are not reflected here;
- Please note that with the second generation of male children from male Indians who married out, their loss of status, or retention of status, depended on several factors:
 - (1) males who turned 21 pre-85 should have lost their status due to the double mother rule (s.12(1)(a)(iv) and, therefore, would be reinstated per s.6(1)(c) in 1985;
 - (2) the wives and/or children of double mother males pre-85 also lost status due to s.10;
 - (3) those males who did not turn 21 pre-85, did not lose their status and, therefore, were considered s.6(1)(a) Indians in 1985. This would be the same for any children or grandchildren they may have had pre-85;
 - (4) males who turned 21 pre-85 may still have been exempt from the double mother rule if their band had requested and received the OIC exemption and, therefore, would not have lost status and would now be registered per s.6(1)(a);
 - (5) males who did not lose status (including their wives and children) for any reason (they were under 21 pre-85, their band had OIC exemption, or they were never taken off the list pre-85), were registered under s.6(1)(a);
- Basically, any exemption from double mother rule for male Indians meant continual status for themselves, their wives and their children for unlimited generations up to 1985.

Chart #2 – Indian Act, 1985

- There were no s.6(2) Indians pre-1985, as ss.6(1) and 6(2) came about in the *Bill C-31* amendments to the *Indian Act* in 1985;
- In other words, the second generation cut-off rule is not enacted until 1985.

Chart #3 – BCSC Ruling – Possible Legislative Remedy

- This chart represents a possible legislative remedy resulting from the decision in the BCSC;
- The remedy that I am suggesting is not the actual remedy suggested in *McIvor, trial*;
- A variety of remedies are possible from this decision that could expand upon what I have suggested, or change it in other ways to address other types of discrimination;
- This remedy suggests that anyone born pre-85, who is a descendent of an Indian woman who married out pre-85, would be reinstated as a s.6(1)(a); the same as those in the vest rights group;
- The number of generations to be reinstated would depend on the factual circumstances of the Indian woman who married out, i.e., how many generations of children they did have pre-85;
- *McIvor, trial*, para.351 – declaration that “the 1985 Act is of no force and effect insofar, and only insofar, as it authorises the differential treatment of Indian men and Indian women born prior to April 17, 1985, and matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status.” (see: para.9(a) in *McIvor, supplementary reasons*) (emphasis added).

Chart #4 – BCCA Ruling – Possible Legislative Remedy

- This chart represents a possible legislative remedy resulting from the decision in the BCSC;
- The remedy I am suggesting is *not* the actual remedy suggested in *McIvor appeal*;
- A variety of remedies are possible from this decision that could expand upon what I have suggested, or change it in various ways to address other types of discrimination;
- *McIvor, appeal* at para.151 – BCCA commented that the trial decision went too far in suggesting that the decision applied to anyone born pre-85 who had a female Indian ancestor who married out;
- BCCA explained that the possible remedies in their mind would be much “narrower” in scope;
- The maximum number of generations the BCCA felt could sustain a claim of discrimination were the 3 involved in *McIvor* – Sharon, her son Jacob, and Jacob’s children;
- The BCCA suggested that people who were 5 generations removed from the Indian women who married out might not have a claim;
- This remedy essentially extends status to one more generation in keeping the BCCA’s concerns *re* standing, and how many generations could make a claim.

Chart #5 – My Remedy to Address Sex Discrimination in *McIvor*

- The chart represents my suggested remedy to address the residual sex discrimination in the *Indian Act, 1985*;
- This possible remedy **ONLY** deals with the discrimination claim as raised in *McIvor*, as other Indian women will have different family scenarios and different claims (like unstated paternity, or claims regarding illegitimate children, for example);
- Also, the last two generations of descendants of female Indians who married out may have status depending on whether there are double mother descendants who are registered (as s.6(1)(a),(c) or 6(2)) at this generational level, as this would be one of the only ways to equalize the distribution of status.

Chart #6 – My Suggested Remedy to Address Second Generation Cut-off

- There should be no difference in the kind of status held by Indians;
- This amounts to a one-parent rule which can also be found in some band membership codes;
- This formula is the only one that will not result in the legislated extinction of Indians;
- This formula is based on familial, communal connection, and does not involve any blood quantum/descent restrictions;
- As status is granted through an application process, one can assume that not all those eligible will actually apply;
- However, the refusal of one's parent(s) to register for political or other reasons should NOT disentitle those who would otherwise be entitled because of the choice of their parent(s);
- While some would receive status for the first time, many would already have status, and so this would not mean that all registrations would equate to an increase in the number of registered Indians.
- One of the most important changes that would be required to the *Indian Act* as a result of changes to its registration provisions would be to ensure that the membership provisions of the *Act* are also amended, so that this newly registered group will have equal access to band membership as other status Indians.

Chapter Six: Band Membership vs. Self-Government Citizenship: More “Status” Quo or is There Room for Aboriginal Identity?

In the previous two chapters, the argument was advanced that while Aboriginal Nations have the right to determine their own citizenship, this right must be balanced against the right of individuals to belong to their Nations. For bands to now arbitrarily exclude non-status Indians from band membership on the basis of blood quantum or status is as discriminatory as Canada’s exclusion of non-status Indians from status on the basis of the second generation cut-off rule (which I argued was blood quantum/descent discrimination). The *McIvor* case also highlights other areas of discrimination that are currently being litigated, such as the ongoing differential treatment between the descendants of male Indians versus those of female Indians. Not only do the various types of discrimination fostered by the registration provisions of the *Indian Act* offend the equality provisions of the *Charter*, they also complicate band membership codes which more often than not rely on those registration provisions to determine band membership. Even self-government agreements that have already been signed are impacted by status and band membership rules and arguably continue to incorporate racist conceptions of Aboriginality that, in some respects, that make them little better than the *Indian Act*. Unless and until the issue of blood quantum/descent discrimination within both the status regime and many band membership codes, as well as the severity of the harms suffered by the excluded (like non-status Indians) are both acknowledged and remedied, self-government citizenship codes will be little more than a perpetuation of the “status quo.”

Canada is only now coming to grips with the severe harm that results from the loss of identity, culture and language which resulted from residential schools which were

part of Canada's assimilation policy for Aboriginal peoples. These same harms, caused by the registration provisions of the *Indian Act* and by many band membership codes, are equal in severity and impact despite their different origins. Some attention has been given to status under the *Indian Act* in recent years in academic literature, public media, and through ongoing litigation. While these are positive signs that there may be a shift in ideology in the future, the assimilatory and damaging effects of some band membership codes and self-government citizenship codes cannot be overlooked. As new codes are being contemplated, it is important to acknowledge the hidden inherent dangers so as to avoid codes which echo the divisive Indian registration provisions.

This chapter reviews a selection of band membership codes and how they impact Aboriginality in terms of communal belonging or exclusion. Self-government agreements are assessed to determine whether current codes are models for the future, or whether they simply incorporate the status mentality and blood purity conceptions of Aboriginal identity that have been imposed on Aboriginal peoples.

(a) Band Membership

Band membership in Canada is a complex legal, political, cultural and social issue affecting Aboriginal peoples from the eastern shores of Atlantic Canada to the northern areas of Quebec and Ontario, and as far west as British Columbia. Specifically, the issue whether a person is a member of a band affects mostly "Indians"; i.e., those who are the descendants of First Nations or *Indian Act* bands, status and non-status alike. The most notable exceptions to the application of the current band membership rules under the *Indian Act* are the Métis and the Inuit. The Métis in Canada either belong to various

provincial and national Métis organisations or to the Métis Settlements in Alberta.¹ The Inuit in the northern parts of Canada were never placed on reserves as they were specifically excluded from the application of the *Indian Act* pursuant to section 4(1).² However, the Inuit were not immune to colonial interference with their identities, and suffered their own particular identity issues not addressed in this thesis.³ Aboriginal Nations (e.g. Mi'kmaq, Mohawk, and Cree) on the other hand, have not had full control over their own Nations' citizenship or their local community membership for quite some

¹ See: Appendix "A" to this thesis for a list of various Métis organisations and their membership criteria. The following link provides information related to the Métis Settlements in Alberta and their various governance structures: Alberta, *Métis Settlements Act*, R.S.A. 2000, c. M-14. Page 74 speaks about their membership criteria. For example, section 74(1) specifically provides that in order to qualify as a Métis Settlement member, you must be a Métis, 18 years old, previous Settlement member and lived in Alberta for 5 years. Pursuant to section 75(1), registered (status) Indians or Inuk who are part of land claims are not entitled to become Métis members. Section 75(2) provide exceptions to that rule, and allow Indians and Inuk as Métis members who lived a substantial portion of their lives in the settlement area or both of whose parents did.

² *Indian Act*, R.S.C. 1985, c.I-5 [*Indian Act*] at s.4 which provides: "A reference in this Act to an Indian does not include any person of the race of Aborigines commonly referred to as Inuit." A more detailed discussion about this case and the Inuit can be found in Chapter 2.

³ V. Alia, *Names, Numbers, and Northern Policy: Inuit, Project Surname, and the Politics of Identity* (Halifax, Fernwood Publishing, 1994) [*Project Surname*]. See also: A. Marcus, *Relocating Eden: The Image and Politics of Inuit Exile in the Canadian Arctic* (Hanover, NH: University Press of New England, 1995). Unfortunately, due to time and space limitations I am unable to fully canvass the identity issues faced by the Inuit. At page 25 in *Project Surname*, Alia describes how the names and identities of the Inuit were also controlled by colonial governments through the issuance of clay discs that had to be worn around their necks. These discs provided names and serial numbers that effectively changed their traditional names and negatively impacted their traditions around naming which was a key part of their identities. Although Chapter 2 provides a more detailed discussion on the Inuit, time and space limitations prohibit me from reviewing their particular identity issues.

time. Aboriginal Nations have been divided into bands and even band membership codes are creatures of the *Indian Act*. This, of course, has had an impact on individual Aboriginal identity as well. Colonial governments took Aboriginal Nations and reorganized them into smaller localized “bands”. This meant that one Nation could be divided into as many as 13 bands or more.⁴ Local issues became the sole focus as far as the administration of the *Indian Act* was concerned, as it was much easier for colonial governments to manage “Indian Affairs” in individual, fragmented communities, than it was to deal with larger, more powerful Nations. This also fit better into the divide-and-conquer policies of earlier governments.⁵

⁴ See: Cape Breton University, “Mi’kmaq Reserves”, online: Cape Breton University <<http://mrc.uccb.ns.ca/reserves.html>>. This site provides the contact information for all 13 Mi’kmaq bands in Nova Scotia. There are also 9 Mi’kmaq bands in New Brunswick, 1 in Newfoundland, 2 in Prince Edward Island and 2 in Quebec and 1 in Maine, USA.

⁵ The colonial governments’ policies related to indigenous peoples around the world, including Canada, has often been referred to as one of divide-and-conquer, Aboriginal peoples have been divided within their Nations into bands, within their bands into on and off reserve, member and non-member and within groups of individuals into status and non-status, which often means Mi’kmaq or not Mi’kmaq. Most recently, the Chair of the Standing Senate Committee on Aboriginal Peoples stated that the government’s division of Aboriginal Nations into hundreds of bands was a form of divide-and-conquer. See: Standing Senate Committee on Aboriginal Peoples, “Proceedings of the Standing Senate Committee on Aboriginal Peoples”, Issue 3, Evidence (Ottawa, 31 March 2009), online: <http://www.parl.gc.ca/40/2/parlbus/commbus/senate/com-e/abor-e/03eva-e.htm?Language=E&Parl=40&Ses=2&comm_id=1> [SSCAP]. Bill Henderson, the legal expert giving evidence at the SSCAP, noted that not only was this tactic of divide-and-conquer used for military purposes, but that it was also employed politically. He agreed with the Chair that Aboriginal Nations were specifically divided up into smaller bands so that “they could be more effectively controlled”. Henderson gave a specific example of this in recent times: “You find it as recently as the 1980s where the Lubicon Cree were effectively demonstrating and bringing forward their claims, and a separate band was created for the purpose of signing an agreement with them. **Divide and conquer has always been there.**” (emphasis added)

Similarly, on an individual level, identification came to be based on registration (status) and band membership under the *Indian Act*, as opposed to the former cultural, social, familial and political affiliations with a particular Aboriginal Nation. Many Aboriginal individuals now speak of themselves as status and non-status Indians as opposed to Mi'kmaq or Maliseet peoples. The band membership codes that are currently in place have caused many divisions and inequities amongst their members and non-members.⁶ As discussed in the previous chapter, this federal system of Indian identification based on blood lines and gender was initially designed to assimilate Indian people. Indian status and band membership became tied to reserve residency rights and access to INAC's programs and services, which caused much inequality and division

⁶ See: British Columbia, Kitamaat Band, *Kitamaat Band Membership Laws*, (Ottawa: Indian and Northern Affairs Canada, 2007) at 4 (preamble). (**Note:** This band membership code, as with all the others referred to and reviewed for this thesis, were obtained in 2007 from Indian and Northern Affairs Canada (INAC), via an Access to Information and Privacy request. This request provided an electronic copy of all the band membership codes ever submitted to INAC, but does not include any amended codes that the bands chose not to submit. For the purposes of this thesis, all the codes will be cited by the Access to Information date versus the actual date they may have been submitted or created, which is unknown.) This band even included their concerns regarding the divisions and discrimination caused by the *Indian Act* into the preamble of their membership code: It has long been a contention of the Haisla People that the overt discriminatory clauses of the *Indian Act* did not consider the varying customs, languages and preferences amongst Indian communities across Canada, and as a consequence, led to the simplistic definitions of a 'status Indian' versus 'non status'. This was a cause of much tribulation and grief to the community, but has not been totally accepted even under the legalistic scrutiny of the Department of Indian Affairs". It is interesting to note that they define a "Haisla" person in section A.(a) as "an individual who is of Haisla descent whether it be through marriage (or another permanent relationship), birth or adoption. They also have a membership code which is very inclusive being a one parent code, allowing adoptions and not excluding applications on the basis of residency.

amongst families, friends and community members.⁷ Even with the various *Indian Act* amendments that were made over time and the adoption of self-administered band membership codes, which were separate from the individual registration (status) system, many inequalities remain. Aboriginal Nations, now divided into bands, have no control over any aspect of the federal rights and benefits that accrue to individuals with membership or registration (status). This situation remains today as bands struggle with bleak membership numbers for the future and even scarcer resources.⁸ Bands must consider the future implications of limited band membership and citizenship criteria in their treaty, land claim and self-government negotiations. While self-government agreements and treaty negotiations seem to offer some hope for change, the complex issues of identity and membership based on racist assumptions of the past, have yet to be resolved for the majority of Aboriginal groups.

(i) Nations Divided

Prior to the 1985 amendments, Indian registration (status) and band membership were basically one and the same. Previously, in order to become a band member, one had to be registered as an Indian under the *Indian Act*. After the 1985 *Bill C-31* amendments,

⁷ J. Borrows, “Seven Generations, Seven Teachings: Ending the Indian Act” (British Columbia: National Centre for First Nations Governance, 2008), online: NCFNG <http://www.fngovernance.org/research/john_borrows.pdf> [*Seven Generations*] at 1-3.

⁸ S. Clatworthy, Four Directions Consulting Group, “Implications of First Nations Demography: Final Report” (Ottawa: INAC, 2004), online: INAC <http://www.ainc-inac.gc.ca/pr/ra/execs/imp_e.pdf> [*First Nations Demography*] at i. “a majority of First Nations appear to be at risk of disqualifying large numbers of future generations from band membership. This issue may become significant for some First Nations over the next 10-15 years.” As discussed in Chapter 2, this is despite the fact that Aboriginal peoples have higher birth rates than the Canadian population.

this was no longer necessarily the case.⁹ The bands now had the option, pursuant to section 10 of the revised *Indian Act*, to make their own band membership codes, which could differ greatly from the requirements necessary for individual Indians to obtain registration (status) under the *Act*. While previously registration and membership were one and the same, there is now an even more complex registration system that causes numerous divisions within the local band communities.¹⁰ While the intention of the *Bill C-31* amendment was to alleviate the gender discrimination found in the old *Indian Act, 1951*, it did not remedy all of the discrimination. Further, I argued in Chapter 5 that the new *Indian Act* actually created additional discriminatory distinctions based on an analogous ground I call blood quantum/descent. The bands, in assuming jurisdiction over their band membership codes, were left with the fall-out of these inequities.¹¹ Bands had to decide how they wanted to deal with the effects of the second generation cut-off rule found in s.6 in terms of their membership codes.¹² A significant problem was created by INAC when it decided to use the registered Indian population for determining the financial allocations to the bands for their federal programs and services, despite the fact that band membership is no longer necessarily tied to registration.¹³ Therefore, if the bands were to create codes that allowed any non-status Indians or non-Aboriginal people to become members, they would not be federally funded for them. One might argue that

⁹ *Indian Act*, R.S.C. 1985, c. I-5, as am. By R.S.C. 1985, c.2 (1st Supp.) [*Bill C-31*].

¹⁰ *Indian Act*, *supra* note 2 at ss.6-11.

¹¹ I argued in Chapter 5 that the *Indian Act* actually created a new form of discrimination called blood quantum/descent.

¹² *Indian Act*, *supra* note 2 at s.6,7.

¹³ S. Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities" (Ottawa: INAC, 2005), online: INAC <http://www.ainc-inac.gc.ca/pr/ra/rmp/rmp_e.pdf> [*Indian Registration and Membership*] at 2.

INAC used federal funding to ensure that bands would continue with the assimilation goals previously enforced by Canada through the *Indian Act* and related policies.

However, it is still necessary to review the membership codes to see where the bands may be contributing to their own legislative extinction.

Indian Act bands in Canada received their current legislative authority to assume control over their own band membership from section 10 of the *Indian Act*. However, this section does not provide the criteria with which they must formulate their codes:

A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.¹⁴

As of 2002, 241 of the 614 First Nations (bands) in Canada were identified as having approved band membership codes.¹⁵ For those bands that do not have their own band membership codes, the regular *Indian Act* provisions with regards to membership apply. This is the situation for the majority of bands in Canada and was in large part, a reaction by the bands to the costs associated with welcoming back new members without first

¹⁴ *Indian Act*, *supra* note 2 at s.10.

¹⁵ *Indian Registration and Membership*, *supra* note 13 at 7. Indian and Northern Affairs Canada, "First Nations", online: INAC <http://www.ainc-inac.gc.ca/ks/pdf/fnpc_e.pdf>. INAC indicates that there are 614 First Nations in Canada. See also: Assembly of First Nations, "History", online: Assembly of First Nations <<http://www.afn.ca/article.asp?id=58>>. This site explains that there are over 630 First Nations in Canada.

having received the necessary funding from INAC.¹⁶ Section 8 and 9 of the *Act* provide the basis for departmental power to maintain band membership lists:

8. There shall be maintained in accordance with this Act for each band a Band list in which shall be entered the name of every person who is a member of that band.

9. (1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

(4) A Band List maintained in the Department shall indicate the date on which each name was added thereto or deleted there from.

(5) The name of a person who is entitled to have his name entered in a Band List maintained in the Department is not required to be entered therein unless an application for entry therein is made to the Registrar.¹⁷

The bands who have opted to take control over their own membership codes under section 10 of the *Act*, must also maintain their own membership lists which are distinct

¹⁶ P. Macklem, *Indigenous Difference and the Constitution of Canada*, (Toronto: University of Toronto Press, 2001) [*Indigenous Difference*] at 230. Macklem explains that despite federal promises to First Nations to the contrary, the federal government did not increase funding for social needs and only made modest housing allowances for new members after the enactment of *Bill C-31*.

¹⁷ *Indian Act*, *supra* note 2 at ss.8, 9.

from the Indian Register maintained by INAC.¹⁸ INAC's departmental Band Lists contains the names of those individuals who meet registration requirements and who are affiliated with a certain band.¹⁹ INAC maintains two separate lists of Indians: (1) those status Indians who are affiliated with bands go on the Band List, which is maintained by the bands if they have their own membership codes, and if not, then members will be included on the lists maintained by INAC; and (2) those status Indians who are not affiliated with a band (i.e., they have status but no band membership) are recorded under a list known as the General List.²⁰ Section 11 of the *Act* prescribes the membership rules for the membership lists which are maintained by INAC:

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

(a) the name of that person was entered in the Band List for that band, or that person was entitled to have it entered in the Band List for that band, immediately prior to April 17, 1985;

(b) that person is entitled to be registered under paragraph 6(1)(b) as a member of that band;

(c) that person is entitled to be registered under paragraph 6(1)(c) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

¹⁸ *Ibid.* at s.10(1). "A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership."

¹⁹ *Indian Registration and Membership*, *supra* note 13 at 1. "This is also the case for those First Nations that have established self-government arrangements."

²⁰ R. Soonias, "Membership – Indian Status" Saskatchewan Indian (1978) vol.8, no.2 at 2. See also: Indian and Northern Affairs Canada, "The Indian Register", online: INAC <http://www.ainc-inac.gc.ca/pr/info/tir_e.html>.

(d) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.²¹

Two years after the *Bill C-31* amendments came into effect, section 11(2) regarding additional membership rules for departmental Band Lists also came into effect. This section applied to bands that did not take control over their own membership and allowed INAC to include other registered Indians, not previously included, on the departmental Band Lists as band members. Section 11.(2)(a) and (b) provide in part as follows:

11. (2) (a) if that person is entitled to be registered under paragraph 6(1)(d) or (e) and ceased to be a member of that band by reason of the circumstances set out in that paragraph;
or

(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 entered 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.²²

Essentially, these provisions meant that anyone who was registered as an Indian prior to 1985 [those referred to in s.6(1)(a)] and anyone registered as an Indian under sections 6(1)(b)-(f) and section 6(2) could be included on the departmental Band Lists. As indicated earlier, these *Indian Act* provisions regarding membership are in effect for the majority of bands in Canada. Even for those bands that have decided to adopt their own

²¹ *Indian Act*, *supra* note 2 at s.11. (1) (a)-(d).

²² *Ibid.* at s.11. (2) (a)-(b). Section 11 (2) provided as follows: “Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band...”

band membership codes, some of them have simply adopted the *Indian Act* provisions on band membership as their membership code or enacted *Indian Act* equivalent codes.²³

Clatworthy notes that at least 377 of the 609 bands studied (62% of total bands) determine their membership according to the *Indian Act* rules (i.e. s. 6 registration provisions).²⁴ Another 58 bands (10%) apply their own codes which are the equivalent of the *Indian Act* rules.²⁵ Therefore, the current registration provisions under s. 6 of the *Act* impact on more than just individual identity. For the majority of bands in Canada, s.6 of the *Act* provides the basis of communal membership and inclusion. Clatworthy provided a list of the population sub-groups that have now been created by the *Bill C-31* amendments which each band could possibly contain depending on their particular band membership code or lack thereof:

- (1) s.6(1) registered (status) members;
- (2) s.6(1) registered (status) non-members;
- (3) s.6(2) registered (status) members;
- (4) s.6(2) registered (status) non-members;
- (5) non-registered (non-status) members;
- (6) non-registered (non-status) non-members.²⁶

With each of these categories comes a different set of rights, and/or access to federal, provincial and/or band programs and services, as well as differing levels of community acceptance of the individuals so impacted. As explained in Chapter 5, membership in a

²³ *Indian Registration and Membership*, *supra* note 13 at 11-12.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.* at 19.

band also means communal recognition of one's identity and entitles the individual to legal, political, social and cultural rights like the right to vote for leadership (depending on whether you live on or of off-reserve), the right to live on reserve, the right to participate in cultural activities and access certain band administered programs and services.²⁷ The majority of the Court in *Corbiere* explained that these sorts of intangible rights are as important to band members who live on reserve as they are to those off-reserve.²⁸

Off-reserve band members have important interests in band governance which the distinction denies. They are co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land. The band council represents them as band members to the community at large, in negotiations with the government, and within Aboriginal organizations. Although there are some matters of purely local interest, which do not as directly affect the interests of off-reserve band members, the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the

²⁷ *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 [*Corbiere*]. Congress of Aboriginal Peoples, "Justice is Equality: Post-Corbière Report", online: Congress of Aboriginal Peoples <http://www.cap-nao.com/Justice_Is_Equality_PostCorbiereJuly08.pdf> [*Justice is Equality*] at 9. "CAP's research has revealed that a substantial number of Band Councils have not made a reasonable effort to recognize and guarantee voting rights to their off-reserve members in their Custom Election Codes." On page 16, CAP goes on to explain that: "...a majority of Custom Codes have unjustified voting clauses on the basis of residence." See also: *Indian Registration and Membership*, *supra* note 13 at 2 regarding membership providing political rights. See also: M. Furi, J. Wherrett, "Indian Status and Band Membership Issues" (Ottawa: Parliamentary Research Branch, 2003) (revised), online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/bp410-e.htm>> [*Status and Membership*] at 7. The authors explain: "Membership is very important, because it may bring rights to live on reserve, participate in band elections and referendums, own property on reserve, and share in band assets. It also provides individuals with an opportunity to live near their families, within their own culture."

²⁸ *Corbiere*, *supra* note 27 at para.17.

merits of their situation, but simply because they live off-reserve.²⁹

Other categories of band members, like status versus non-status, or those individuals who are excluded from band membership but are arguably rightful members, all have similar interests in their home communities. As discussed in Chapter 5, registration also means that individuals are entitled to the same types of intangible and tangible benefits noted above.³⁰ The separation of band membership and Indian status not only fragments the populations of individual bands into further classes of Indians, but it also breaks down who is entitled to what, in terms of their programs and services, political and cultural rights and individual identity and well-being.³¹ All of this impacts on the health and wellbeing of each local community and their larger Aboriginal Nation as a whole.

Despite the fact that Aboriginal Nations in Canada had always been self-determining and consistently rejected the imposition of the *Indian Act*, the majority of bands (roughly 72%) still allow their band membership codes to be determined by s. 6 of the *Indian Act, 1985*.³² Even those that have chosen to assume control over their band membership codes have not necessarily loosened the membership criteria or addressed

²⁹ *Ibid.*

³⁰ *Indian Registration and Membership*, *supra* note 13 at 2. See also: Indian and Northern Affairs Canada, “Frequently Asked Questions About Aboriginal People”, online: INAC <http://www.ainc-inac.gc.ca/pr/info/info125_e.html> [*INAC FAQ*]. INAC provides as follows on their website: “Do Status Indians have special immigration benefits to the United States (US)? Yes. Status Indians from Canada are permitted to move to the US without going through the normal immigration process. At the border crossing, they must present satisfactory documentation showing that they have at least 50 percent Indian ancestry. The types of documents requested may include any number of the following: a letter from the band office confirming 50 percent Indian ancestry; **a Certificate of Indian Status card**; a birth certificate; photo identification; and if the person is Haudenosaunee, a Haudenosaunee Iroquois Confederacy identification card” (emphasis added).

³¹ *Indian Registration and Band Membership*, *supra* note 13 at 2.

³² *Ibid.* at 11-12.

the discrimination which is arguably incorporated through reliance on the *Act*. For example, there are some bands that have two-parent descent rules (64 bands) or use 50% blood quantum to restrict their membership (22 bands).³³ Unlike Aboriginal citizenship from pre-colonial days, membership in most bands today is not automatically granted upon birth, but through an application process. Therefore, individuals are required to “apply” to become members just like they do under the *Indian Act*. Considerations like what process will be used to determine membership is distinct from the actual criteria itself, but can have an effect on the actual number of members. It can also impact how “membership” is viewed; i.e. whether it is viewed as membership, no different than membership in any organisation, or whether it is viewed as citizenship; a right that passes from generation to generation within a People or Nation.³⁴

The fact of such tight colonial control over local community membership and Indian registration for such a long period has interfered with the natural evolution of individual, communal and national Aboriginal identity, membership and citizenship. This need to control Indian numbers in order to limit legal and financial obligations appears to have been passed down from federal agents and government policy makers to many band administrators and Aboriginal leaders. While some First Nations do not subscribe to these views, other First Nations, like the Sawridge band, have taken that concept to the extreme and have developed highly exclusionary band membership rules.³⁵ Now the focus of

³³ *Ibid.* at 16.

³⁴ *Ibid.* at 15. “Some individuals, who meet all of the conditions necessary to become members, may not apply to become members for many reasons.”

³⁵ *Sawridge Band v. Canada*, [1997] F.C.J. No. 794 (FCA), [1995] 4 C.N.L.R. 121 (FCTD) [*Sawridge*]. Native Council of Canada, “Comment: Bill C-31”, online: NCC <<http://www.ammsa.com/classroom/CLASS1C-31.html>> [*Comment on Bill C-31*]. The

many band leaders is to ensure there is enough land, housing and resources to address the needs of their members, which overshadows concerns related to whether their national identity is protected, whether their community and/or Aboriginal Nation will survive as a collective into the future. In the past, one could assume that the bigger the Nation, the stronger the Nation. However, the more recent dynamic of relying on federal funds for every aspect of community life means that the more band members without Indian status reduces the funding available to bands to provide for basic necessities.³⁶ Aboriginal Nations did not become great Nations because of federal government funding, and while the federal government has a great deal of debt repayment to do, the basis of band membership and citizenship in Aboriginal Nations should not be based on the federal government's financial priorities.³⁷

One might not expect (at least from a Nationhood perspective) that bands from the same Aboriginal Nation would have completely different band membership codes given that they share the same history, culture, traditions and practices. However, colonial interference with Aboriginal governance and traditions has had a significant impact on every aspect of Aboriginal life. The *Indian Act* especially, has affected more than

NCC explains that the Sawridge band, which is worth between \$14 and \$100 million dollars, is fighting the reinstatement of Indian women to their band membership list. This litigation was commenced by Chief Walter Twinn who claimed the case was about where to draw the line and who does the drawing while at the same time indicating that it was not sexist or racist. The Chief's wife, Catherine Twinn was also their legal counsel and stated that they did not want off-reserve people to be band members as they could possibly "unite" and would have the power to vote. *Status and Membership*, *supra* note 27 at "Cases". Two other Alberta bands, namely Sarcee and Ermineskin also challenged *Bill C-31*.

³⁶ See generally: C. Helin, *Dances with Dependency: Out of Poverty Through Self-Reliance*, 2nd ed. (Woodland Hills, California: Ravencrest Publishing, 2008).

³⁷ *Ibid.*

individual identity, it also impacts on the identity of national, regional and local communities. Further, extended families can have family members who are status and non-status Indians, and band members and non-band members, depending on factors like sex and blood quantum/descent, which are arguably discriminatory ways of identifying individuals and communities.³⁸ While some bands allow the adoption of non-Indian children as members and allow the registration of non-Indian spouses as band members, there is no consistency among bands in this regard. Additionally, very few bands actually incorporate non-status Indians as members. The current rates of exogamous parenting (parenting between Indians and non-Indians also referred to as out-parenting) also have a major effect on band membership and registration numbers. For example, as of 2002, the rates of exogamous parenting among bands in Canada were as follows:

- (1) Low = below 20% (25 bands)
- (2) Moderately Low = between 20 – 39.9% (111 bands)
- (3) Moderate = between 40 – 59.9 % (246 bands)
- (4) Moderately high = between 60 – 79.9% (162 bands)
- (5) High = 80% or more (49 bands)³⁹

Therefore, based on the above numbers, the majority of bands in Canada (457 bands or 77%) have moderate to high rates of parenting with non-Indians. Of these bands,

³⁸ There remains residual gender discrimination under the *Indian Act* that was not remedied by *Bill C-31*, as discussed in Chapter 5.

³⁹ *Indian Registration and Membership*, *supra* note 13 at 17. Clatworthy studied 609 First Nations. He also noted that 19 First Nations have their own rules under self-government arrangements at the time in 2002 that were not included in his statistics. Some of the First Nations had approved codes and some did not. He also advised that while some were following their codes, some were not. For the purposes of the above statistics, he refers to 593 First Nations.

approximately 47,700 individuals or 6.6% of the population either had no membership, no registration or neither registration nor membership.⁴⁰ This group was also found to be more likely to live off reserve than on reserve; and made up less than 2% of the overall on-reserve population.⁴¹ This reality, taken together with the fact that a majority of bands also use *Indian Act* rules for their membership codes, means that the second generation cut-off rule discussed in Chapter 5 either is impacting or will impact the majority of bands right in the near future. Loss of communal membership and legally recognized individual identities as Indians is, therefore, a significant issue facing Aboriginal peoples that cannot wait another twenty to thirty years to be addressed.

Within the next 75 years, it is expected that non-members are expected to grow from the 2002 level of 44,000 individuals to 456,000 individuals.⁴² Clatworthy also found in his study that: “The high rates of exogamous parenting which characterize off-reserve populations are expected to result in very rapid growth in the population that lacks eligibility for membership.”⁴³ He further concluded that: “The vast majority of those lacking eligibility for membership are also projected to lack entitlement to Indian registration”.⁴⁴ The people that make up the majority of this group are the descendants of those women who have previously suffered discrimination under the *Indian Act*:

At the present time, nearly all of those who lack eligibility for First Nations membership are the descendants of women who lost their registration as a consequence of the prior Indian Act’s rules concerning mixed marriages. Over the course of the next (and future) generation(s), the non-eligible population

⁴⁰ *Ibid.* at 21-22.

⁴¹ *Ibid.* at 22-23.

⁴² *Ibid.* at 26.

⁴³ *Ibid.* at 30.

⁴⁴ *Ibid.*

is expected to grow rapidly and include many individuals who are the descendants of original members.”⁴⁵

The residual discrimination under the *Act* continues to “cut-off” present and future generations and may well lead to similar patterns in the future if not addressed now. This, coupled with the second generation cut-off rule, means that large numbers of non-Indians are created who have to live off-reserve, which may even impact the rates of out-marriage and, thus, the creation of additional people without status or membership. It is easy to see how such a formula, which was originally designed to assimilate Aboriginal peoples, will continue to fulfill its purpose if not addressed.⁴⁶

The current band membership codes contain a mix of criteria based on *Indian Act* registration criteria and/or on out-dated racial criteria based on notions of blood purity (blood quantum/descent). Some band membership codes also contain residency requirements which disentitle anyone who has not or does not live on a reserve. Requirements related to occupation, health and financial status which are not applied equally to those that are already members may further disadvantage applicants for membership who suffer the same poor socio-economic statistics as those that live on reserve. Even the cultural and language requirements can be largely out the control of the applicants if they have lived away from the reserve and their extended families due to the discriminatory provisions of the *Indian Act* and/or from discriminatory band membership

⁴⁵ *Ibid.* at 41.

⁴⁶ As explained earlier, though Canada has distanced itself from the assimilatory views and policies of decades ago, it has not yet amended the registration provisions to address the ongoing assimilatory effects of the *Act*.

provisions.⁴⁷ It is for these reasons that a review of the band membership codes are necessary to see whether they address and remedy the kinds of discrimination that is found in the *Indian Act's* registration provisions, or whether they incorporate and promote them. An analysis of several band membership codes will show that unfortunately, their criteria can be the same as, or worse than the *Indian Act's* own membership code.

(ii) Band Membership Codes

The Band membership codes to be reviewed in this section are those which were provided by INAC upon an Access to Information Request.⁴⁸ They are the codes that were originally submitted to INAC after the 1985 amendments to the *Indian Act*. Section 10 of the *Act* allowed the bands to assume control of their membership codes, but they were under no requirement to do so. If they did assume control over their membership, they were required to provide proof that their codes were assented to by a majority of the electors of the band, and to submit a copy of their code to INAC. However, there was no requirement that the bands send updated codes or provide copies of their amendments. Therefore, the codes which are accessible publicly through INAC and which are referred to in this chapter may well have been rescinded, amended, or may not be used at all. Stewart Clatworthy, who attempted an updated study of the codes, found that not all of

⁴⁷ E. Asante, "Negotiating Identity: Aboriginal Women and the Politics of Self-Government" (2005) 25 Can. J. N. Stud. (Issue 1) 1 [*Negotiating Identity*] at 5, 16. Asante argues that the degree to which Aboriginal peoples can access their culture and identify with Aboriginal identity is related to socio-economic factors like whether or not they live on reserve, their level of education and income levels.

⁴⁸ This Access to Information and Privacy (ATIP) request was made several times over the last 5 years and the final request which was made in 2007 resulted in the receipt of the band membership codes for those bands that originally submitted codes to INAC.

the bands were still using their membership codes, that not all of the codes had been approved by INAC, and that not all of the bands had responded to his requests for updated information.⁴⁹ He also notes that while most bands reported that they are still using their membership codes to determine membership in their communities, some bands are not. Some bands have a moratorium on new members, some do not follow their codes and/ or some bands simply let Chief and Council decide who gets to be a member.⁵⁰ Therefore, while this section refers to various band codes and their possible impact on individuals, the actual impacts will depend in large part on whether the codes are updated, whether the codes are actually used, whether or not the bands adhere to each aspect of the code uniformly and/or how each criterion is interpreted. Despite these issues, the membership codes are illustrative of the general priorities with regard to what many bands consider important to include in membership. These criteria can have significant impacts on individuals as well as on the futures of the communities. They are also (more often than not) the starting points for the citizenship rolls in self-government agreements and are, therefore, well worth reviewing as self-government agreements are often touted as the solution to status and membership issues.

All of the band membership codes analysed in this chapter was reviewed for several key themes. Each was reviewed to see if it was possible for their code to allow non-status Indians and/or descendants to become members, whether the band considered culture, customs or traditional criteria to be important; whether applicants were afforded a

⁴⁹ *Indian Registration and Membership*, *supra* note 13 at 7-15. Clatworthy notes that there exist 70 sets of non-approved band membership rules, 8 of which are currently under review by INAC.

⁵⁰ *Ibid.* at 9.

probationary period to learn the customs; whether blood quantum or degree of blood was a factor; whether residency was required; and whether they allowed non-Aboriginal people to become members in any capacity, through adoption or marriage, for example. This chapter does not undertake a review of each possible criterion, but instead, compares the population demographics and rates of out-marriage with the code itself to determine whether and how soon a band has determined its own legislative extinction. I have compared selected band codes with that of the example band codes selected by Clatworthy. The example band codes represent certain key features, like what kind of code they use and their rates of out-marriage, for example.⁵¹ By providing detailed information on several example bands, the rest of the band codes in Canada were ranked according to which example band they most closely matched in Clatworthy's study.⁵²

Clatworthy noted that there were four general types of band membership codes.⁵³ He also explained that 236 bands had their own particular codes and that 360 bands remained under the *Indian Act* provisions for determining membership.⁵⁴ The four different types of band membership codes or rules are as follows:

⁵¹ This chapter was laid out this way because of how Clatworthy presented his demographic data related to band membership. He selected certain bands as representative of certain criteria, population levels and rates for out-marriage for example. Then he compared other bands in Canada against those selected example bands.

⁵² S. Clatworthy, A. Smith, "Population Implications of the 1985 Amendments to the Indian Act: Final Report", (Ottawa: Assembly of First Nations, 1992) [*Population Implications*].

⁵³ *Ibid.* at iii.

⁵⁴ *Ibid.* The statistics and analysis that Clatworthy used in this report are reflective of the codes I reviewed for the purposes of this Chapter. Through Access to Information at INAC, I was only able to obtain the original band membership codes that Clatworthy worked with and not any of the amended or modern codes that may exist now.

One-parent rules: A one parent descent rule declares a person to be eligible for membership based on the eligibility or membership of one of that person's parents. One parent descent rules are found in 90 First Nations or 38 percent of the 236 that adopted membership codes.

Two-parent rules: A two parent descent rule establishes a person's eligibility based on the eligibility or membership of both of that person's parents. Rules of this type are found in 67 First Nations, 28 percent of the 236 with codes.

Blood quantum rules: A blood quantum rule establishes eligibility based on the "amount of Indian blood" a person possesses. In effect, a blood quantum measures the number of Indian ancestors a person has and sets a criterion for membership based on an amount of ancestry. Thirty (30) First Nations (13 percent of the 236) have adopted blood quantum rules. A typical criterion is 50 percent Indian blood, a standard set by 21 of the 30, though there are examples of codes that set higher and lower criteria. The "arithmetic" of blood quantum codes measures a person's quantum by adding the quantum of each parent and dividing by 2. The child of parents who are 100 percent and 0 percent Indian is 50 percent, as is the child of two parents who are 50% Indian.

Indian Act rules: These rules are embodied in the Act's Sections 6(1) and 6(2) ... Forty-nine (49) First Nations, or 21 percent of the 236 that have adopted codes, implicitly rely on the Indian Act rules to determine eligibility for membership. Indian Act rules also pertain to the 360 First Nations that have not adopted membership codes and whose membership is, therefore, still regulated by the Act.⁵⁵

⁵⁵ *Population Implications, supra* note 52 at iii. In Clatworthy's *Indian Registration and Membership, supra* note 13 at 16, he updated his previous studies on band membership codes by contacting First Nations to see if they were using their codes and/or whether they had updated or amended their codes. As a result, he found that there were now seven band membership code or rule sub-groups, as compared to the four main groups he noted previously. These seven new sub-groups are as follows: (1) Indian Act or Act Equivalent descent rules which also extend initial membership to all registered individuals (413) First Nations; (2) Act Equivalent (Limited One Parent) descent rules which restrict initial membership to those with acquired rights as of June 27, 1987 (6 First Nations); (3) Unlimited One Parent descent rules which also extend initial membership to all registered individuals (72 First Nations); (4) Unlimited One Parent descent rules which restrict

In the Atlantic region, there are very few bands with their own band membership codes that allowed anyone other than a registered Indian to become a member. In every region in Canada, one can find examples of the above types of codes; some of which have additional criteria such as residency requirements or cultural knowledge. So while one First Nation may have adopted a one-parent code that allows for the possibility of a non-status Indian to become a member in theory, in practice, if they not have enough traditional knowledge or they do not live on the reserve, they could still be excluded from membership. There is no way of knowing how bands interpret and apply their codes without full disclosure of their membership activities. The next section reviews an example of each of the four generic types of codes, a sampling of bands that use these codes, and what this means for those bands.

The St. Basile band (formerly known as the Edmunston band, but now the Madawaska Maliseet First Nation) in northern New Brunswick, is part of the larger Maliseet Nation that occupies parts of New Brunswick. Their band membership code allows the descendents of their “original” members to apply to be considered as members.⁵⁶ Their code contains what is known as a one-parent descent rule, but does not guarantee that the applicant having only one parent who is a band member will be granted membership status in that community. It appears to mean that while they are not barred

initial membership to those with acquired rights as of June 27, 1987 (12 First Nations); (5) Two Parent descent rules which restrict initial membership to those with acquired rights as of June 27, 1987 (64 First Nations); (6) 50% Blood Quantum rules (22 First Nations); and (7) 25% Blood Quantum rules (4 First Nations) (quoted except for the numbers).

⁵⁶ New Brunswick, St. Basile Band, *St. Basile Indian Reserve Membership Code and Rules* (Ottawa: INAC, 2007) [*St. Basile Membership Code*] at ss.5-8.

outright from applying, as is the case in the majority of Atlantic bands, they could still be barred due to additional criteria. The St. Basile band membership code provides in part, as follows:

5. Original members:

The following persons are entitled to membership in the St. Basile Indian Band.

- a) **The original members:** all persons entered or entitled to be entered on the Band list of the St. Basile Indian Band immediately prior to April 17th, 1985. Persons born on or after April 17th, 1985 of natural parents who were or are both original members are also deemed to be the original members of the St. Basile Indian Band.
- b) **Restored members:** all persons entitled to have their name entered on the Band list immediately prior to the establishment of the Membership Code by virtue of the amendments to the Indian Act given Royal Assent on June 28, 1985.
- c) Person, other than those entitled under clause 5(a), born on or after April 17th, 1985 of natural parents who were or are both members.

6. Descendant members:

The following persons may apply for membership in the St. Basile Indian Band.

- a) **Descendant members:** all persons born of a parent who was or is entered on the Band List shall upon application be considered for membership by the Membership Committee.
- b) **Adopted members:** any children under the age of 18 may be considered for adoption by the St. Basile Indian Band upon application to the Membership Committee.

7. Criteria for Membership:

All applicants for membership as descendant or adopted members must satisfy the following conditions: that the applicant is a person of Indian blood, and is a descendant of a member of the St. Basile Indian Band.

8. The Membership Committee shall also consider:

- a) If the applicant is an adult,
 - i) whether the applicant is knowledgeable, loyal, and follows a way of life consistent with the community of the St. Basile Indian Band and has evidenced such ties to the community by his/her familiarity of the language, customs, and history of the Band, and
 - ii) whether the applicant agrees to a probation of five (5) years duration to acquire the knowledge of the way of life of the community.

AND whether or not the applicant is an adult.

- b) the degree of Band blood of the applicant, and
- c) how long the applicant has lived amongst the St. Basile Indian Band, and,
- d) the social and cultural ties of the applicant to the St. Basile Indian Band.⁵⁷

This code tends to read the same as Canada's submissions in *McIvor*; i.e., they characterize Aboriginal peoples as a historical group, and that everyone else who came afterwards is either a new group (like restored or reinstated people) or are their descendants.⁵⁸ This view sees Aboriginal peoples as having only existed at some arbitrarily frozen point in time. Any current Aboriginal peoples are only the watered-down descendants of that group and not the actual Aboriginal group itself. This restrictive view not only allows Canada to limit how many generations of descendants can be considered Indian, but membership codes which are framed in this way, like

⁵⁷ *Ibid.* at ss.5-8.

⁵⁸ *McIvor v. Canada* (3-4 October 2008, BCCA) (Factum of the Appellant, Canada) [*McIvor-Canada factum*]. Canada's submissions in *McIvor* are reviewed in greater detail in Chapter 5.

Madawaska's, arguably incorporate this type of backdoor assimilation to their own detriment.

In terms of the actual membership process, the code provides that individual applicants must submit their applications for membership in the band to the membership committee. This committee is made up of 8 people, being 2 representatives from each of the four "original" families as defined in section 3. (2) of the Code.⁵⁹ This membership committee reviews the information submitted by each applicant and makes a recommendation to the Chief and Council of the Band on whether to accept or reject the application. It is only a majority of Council that can accept or reject an application for membership and any applicants who are denied membership and who want a review of that decision must apply to the Band Tribunal. The Band Tribunal itself is also made up of a Committee comprised of the four "original" families. This focus leads one to wonder what will become of the community when the original families have all departed. Will they no longer be a historical Aboriginal group?

This code differentiates between different types of members; i.e. "original", "restored", "descendant" and "adopted" members. Each category specifically details how each person came about their membership, for example, whether they always had membership or whether they are a newcomer (so to speak). Secondly, the criteria applied to each of the membership categories, is quite different. Specifically, the original and restored members are entitled to have their names entered on the Band Membership list

⁵⁹ *St. Basile Membership Code, supra* note 56 at s.3.(2) which defines the original families as: "Bernard, Cimon, Francis and Wallace, as was recorded in 1952 by the Government." How ironic that the band would use a government document from as late as 1952 to determine who they are as a people.

as of right, whereas the two categories of descendant members, the descendant and adopted members, must not only apply for membership, but they must also meet additional criteria not required of the original and restored members. For example, the two categories of descendant members must show that they have Indian blood and are descendants of a member of the St. Basile Indian Band. This is not required of the original or restored members and allows non-Aboriginal and non-registered women who married registered Indian men to gain Indian status and band membership regardless of the fact that they were not Aboriginal and did not have “Indian blood”. According to these rules, these women and their children would be members as of right in the band, but the descendants of Aboriginal band members (band members with Indian blood) would have to prove they have Indian blood. The only children that appear to be able to be band members on a go forward basis are those with Indian blood and not those non-Aboriginal children who were legally or traditionally adopted by band members. It is thus apparent that the blood/descent criteria is applied selectively and only to certain types of members (i.e. those outside of the historical group).

An additional part of the application process for potential members to Madawaska would be to demonstrate their knowledge and loyalty with regard to the “ways of life of the Band”.⁶⁰ Sometimes Nations can be divided into several bands and, therefore, it is not clear in some of these codes if they are referring specifically to local practices or those of the larger Nation, although in most cases, it is likely a combination of the two. On one hand, this type of criterion could be viewed as a means of protecting and promoting the culture and traditions of their local community. On the other hand, however, the code

⁶⁰ *Ibid.*

does not provide for how the membership committee would determine whether one has met the standard of being familiar enough with the language, customs and history of the band to merit membership, and whether intervening factors such as residential schools, previous *Indian Act* discrimination, lack of housing on reserve, and assimilationist policies against Aboriginal peoples in general, would be considered in weighing the factors in an applicant's qualifications. One aspect of this code that could be useful is that it allows for a 5 year probation period for applicants to obtain the required knowledge.⁶¹ The only unclear part of this probationary period is whether there is a residency requirement tied to it, as one of the criteria speaks to how long the applicant has lived among the band. A question which might be raised by "new" members is whether the original and restored members are also all loyal and know the ways of the band, and whether the additional criteria imposed upon "new" members are fair and just in light of the lack of similar requirements for "original" or "restored" members. Do all the original

⁶¹ That being said, it is hoped that codes similar to this one could adopt specific exceptions or allowances for individuals who cannot meet certain requirements due to their different learning abilities or other physical or mental abilities which may differ from other residents. For example, learning the basics of a language may be achievable by one person, but may or may not be for a child with Downe's Syndrome. Other criterion could be similarly problematic if applied without regard to personal context. For example, one cannot expect a single mother who works two jobs, raises five children, and cares for elderly parents to have an equal amount of time to dedicate to band activities as other residents might. In fact, her dedication to the community might be expressed as the caring for her family who are community members, and whose health and well-being is vital to the community as a whole and for future generations. Further, the concept of a "learning period" to become a member sounds like an apprenticeship, or religious conversion, that seems to imply that the applicants are not already Mi'kmaq or Mohawk and, therefore, must somehow change who they are to so become. It would be important that membership rules apply to all members and not just new applicants. Otherwise, the double standard imposed would raise doubt as to how vital those rules are in determining identity, if they would apply to some, but not all members.

and restored members know the language and the customs of the band? If not, one must consider the issue of the fairness of having different criteria for different member categories.

Another issue that might affect how Madawaska views its membership numbers is the extremely high out-marriage rate in their community.⁶² Their out-marriage rate was measured in 1992 as being 93.5%, one of the highest out-marriage rates for all the bands in Canada.⁶³ Their *Bill C-31* population at the time (those who were restored under the 1985 amendments and whose children were immediately impacted by the second generation cut-off rule) was 42%.⁶⁴ This is also a high number and can affect the number of people in the future who can have both registration and membership. According to Clatworthy's analysis of bands with similar membership codes, St. Basile is most like the Sheshaht Band (now known as the Tseshahht First Nation) in terms of population forecasts.⁶⁵ While initially their registered Indian population should increase for the first 60 years to about 73% larger than its current level; the same population is expected to gradually decrease to about 50% larger than its current level, based on the Tseshahht

⁶² S. Clatworthy, "Reassessing the Population Impacts of Bill C-31" (Winnipeg: Four Directions Project Consultants, 2001) online: INAC <http://www.ainc-inac.gc.ca/pr/ra/rpi/rpi_e.pdf> [*Reassessing Population Impacts*] at 6. "Out-marriage" is the term used to describe parenting between Indians and non-Indians. It will be used in the same context throughout this thesis.

⁶³ *Populations Implications*, *supra* note 52 at 94.

⁶⁴ *Ibid.*

⁶⁵ Tseshahht First Nations, "We Are the Tseshahht", online: <<http://www.tseshahht.com/?page=1>> [*Tseshahht*]. The Tseshahht First Nation is one of 14 Nations that are part of the Nuu-chah-nulth Tribal Council. Their band is located on West Vancouver Island in British Columbia. I refer to the band's name according to the source cited.

comparison.⁶⁶ The membership population, on the other hand, will increase at first and then level off.⁶⁷ However, these forecasts for Tseshaht are based on their low out-marriage rates and their one-parent descent rule used by the example Sheshaht First Nation. These projections also do not reflect the further restrictions that might be imposed by the subjective membership criteria. Although the St. Basile band can be generally compared to the Sheshaht Band in terms of population forecasts due to the type of membership code they have, St. Basile's significantly higher rate of out-marriage and their own additional membership criteria mean that they are likely to have a lower registered Indian population and much lower membership numbers than their closest comparison, the Sheshaht band. This is significant both for the future of the community

⁶⁶ *Population Implications*, *supra* note 52 at 104. Clatworthy uses the Sheshaht First Nation as an example of where the Edmunston band (St. Basile) population trends are headed. He explains: "...the population entitled to registration is expected to grow throughout the initial 60 years of the projection period and reach a level of roughly 73 percent higher than at present. Gradual declines in the registered population would occur after the year 2051 such that by the end of the period (i.e. year 2091), the registered population would be reduced to a level roughly 50 percent larger than the current registered population." This forecast is for bands like the Sheshaht First Nation. The significant difference between Sheshaht and St. Basile is that Sheshaht only has an outmarriage rate of 21%, whereas St. Basile's is over 93%. The outmarriage rate would significantly impact the registered Indian population and any membership population based on a registered Indian population.

⁶⁷ *Ibid.* Clatworthy explains "In contrast with the population entitled to registration, the population eligible for membership in Sheshaht would experience growth throughout most of the projection time frame and eventually stabilize at a level roughly 2.2 times larger in size than at present." According to the chart on page 105 provided in the study, it appears that the increase in membership eventually levels off.

as a whole, which currently has barely more than 230 registered Indians associated with their band, whereas the Sheshaht have over 679 registered Indians.⁶⁸

The Eel River Band (now referred to as Eel River Bar First Nation) in northern New Brunswick has a band membership code that literally lays out the formula for its own official extinction within a few generations. As explained in Chapter 1, this is the band from which my family descends and my father, Frank Palmater, was a member. This band is also part of the larger Mi'kmaq Nation that occupies New Brunswick, Nova Scotia, Prince Edward, Newfoundland, Quebec and parts of the United States. While I would have liked to do a detailed analysis on the Eel River's current code and their membership processes, repeated requests for this information were unsuccessful.⁶⁹ Their code is an example of a two-parent membership rule and comprises one page only, the relevant portions of which are as follows:

3) Each of the following persons shall have the right to have his or her name entered in the Band List.

⁶⁸Indian and Northern Affairs Canada, "Registered Population: Madawaska Maliseet", online: INAC

<http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_GeneralInformation.asp?BAND_NUMBER=6&BAND_NAME=Madawaska+Maliseet+First+Nation>. INAC indicates that St. Basile has only 122 registered Indians on reserve, and 113 registered Indians off reserve. Given that they do not have large numbers to start with, restrictive band membership criteria could severely hamper future community growth. See also: Indian and Northern Affairs Canada, "Registered Population: Tseshahht", online: INAC <http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_GeneralInformation.asp?BAND_NUMBER=665&BAND_NAME=Tseshahht>.

⁶⁹ One of the main reasons I would like to have included more detailed information is that I have used myself and my familial background as an example of the second generation cut-off discrimination in Chapter 5. A full analysis of Eel River Bar would have completed the membership aspect of my personal example. However, I can say anecdotally that I am not a member and my father was only accepted as a member shortly before his death, as he was a s.6(2) Indian.

- a) the name of that person was entered in the Band List for that Band, or that person was entitled to have his name entered in the Band List for that Band, immediately [sic] prior to April 17, 1985;
- b) that person is entitled to be registered under paragraph 6(1)(b) as a member of that Band;
- c) that person is entitled to be registered under paragraph 6(1)(c) and ceased to be a member of that Band by reason of the circumstances set out in that paragraph; or
- d) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band list or, if no Longer Living, were at the time of death entitled to have their names entered in the Band List.⁷⁰

The code does not state who shall make the decisions regarding membership, nor does it provide an appeal or review mechanism for applicants. In this code, in order to be a member, one basically had to be a registered Indian and band member prior to the *Bill C-31* amendments in 1985, or both one's parents had to be or were entitled to be band members (i.e. the two-parent rule). This band has no other criteria, such as cultural knowledge, residency or language. One could argue that though they do not specifically reference blood quantum, they have incorporated blood quantum/descent through its adoption of the *Indian Act* provisions. In effect, the code would bar all s. 6(2) registered Indians from applying for membership, because section 6(2) Indians are registered by the fact that only one of their parents is a section 6(1) Indian and a band member. With only one parent as a band member, they would automatically be excluded as members, even if they lived in the reserve or spoke the language or have substantial familial, social and

⁷⁰ New Brunswick, Eel River Band, *Eel River Band Membership Rules*, (Ottawa: INAC, 2007) [*Eel River Membership Code*].

historical ties to the community.⁷¹ If this was still Eel River's code, then my father would have been barred from membership as a s.6(2) Indian, as would I as a non-status Indian. While one incentive for the band to have this kind of criteria is that they would be able to keep membership numbers low and, therefore, have fewer members for which to provide programs and services, the significant downside is that the future population projections for this community are extremely grim.

Eel River Bar had an outmarriage rate of 54.7 % in 1992, and had a *Bill C-31* population of 19.1%.⁷² Clatworthy noted that Eel River Bar is most similar in population forecasts to that of the Golden Lake Band.⁷³ Therefore, as with Golden Lake Band, Eel River Bar can expect only modest growth in its registered Indian population in the first 25 years of the projection period (1991 to 2016), which would be followed by "very rapid declines in the size of the population."⁷⁴ By the end of the projection period, the registered Indian population would be reduced to about 40% of its current level.⁷⁵ The population entitled to membership is expected to decline for the entire projection period (1991 – 2091), such that within 50 years the band's population would be reduced to 50% of the current level and, at the end of the period, it would have reduced to only 5% of the current level. One has to wonder whether the benefits of denying people like my father and I membership are far out-weighted by the possibility of Eel River not existing in the

⁷¹ As with all these codes, it is not known how they are enforced in reality. For example, in Eel River Bar it is not known if a single mom who was also a band member could register her child if she did not acknowledge the name of the father.

⁷² *Population Implications, supra* note 13 at 83.

⁷³ *Ibid.*

⁷⁴ *Ibid.* at 120.

⁷⁵ *Ibid.*

future. Even these grim figures are made worse by the fact that the Golden Lake Band only has an out-marriage rate of 32% for those living on reserve, whereas Eel River Bar's is over 54%.⁷⁶ The Golden Lake First Nation (now Algonquins of Pikwakanagan) have an on reserve registered population of 408 and off reserve population of 1574, whereas Eel River Bar's current population is only 319 registered Indians on reserve and 281 off reserve.⁷⁷ The base level populations where each band starts from also affects how quickly their populations can diminish by virtue of the *Indian Act* registration provisions or their own band membership codes, such as is the case with the extremely restrictive two-parent descent codes.⁷⁸ Eel River band, already a very tiny community, cannot afford to exclude significant numbers of potential members if it wishes to continue as a community for seven generations into the future. Given that this is my home band, I

⁷⁶ *Ibid.* The outmarriage rate for Golden Lake's off-reserve population is over 65%.

⁷⁷ Indian and Northern Affairs Canada, "Registered Indian Population: Eel River Bar First Nation", online: INAC

<http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_GeneralInformation.asp?BAND_NUMBER=8&BAND_NAME=Eel+River+Bar+First+Nation>. See also: Indian and Northern Affairs Canada, "Registered Indian Population: Algonquians of Pikwakanagan", online: INAC

<http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_GeneralInformation.asp?BAND_NUMBER=163&BAND_NAME=Algonquins+of+Pikwakanagan>.

⁷⁸ It is the author's understanding that Eel River Bar First Nation has since amended its membership code, but INAC indicates that it does not have a copy of any codes other than the original codes provided through the Access to Information request. The band has not provided copies of the amended code, despite verbal and written requests for the same. The code does not appear to be available in public format – such as on a band-hosted web-site or other Aboriginal organisation(s)'s web-site(s). Therefore, I am unable to verify that these amendments exist, except anecdotally that my father, who was a section 6(2) registered Indian, was eventually entitled to become a band member when the band allegedly amended their band membership codes. To the best of my knowledge, I am still not entitled to become a member of my home community at Eel River Bar band.

would hope that bringing knowledge of this urgent situation to the community would encourage them to amend their code for the benefit of our children's children.

The Parry Island band (now known as Wasauksing First Nation) is located on Georgian Bay in Ontario and is comprised of the Ojibway, Odawa and Pottawatami peoples.⁷⁹ Within their band membership code, the Parry Island band assert their inherent right to determine the citizenship of their own First Nation, and explain that the purpose of their code is to both preserve their cultural and political integrity and to ensure that “future generations will continue to enjoy the rights and obligations” of citizenship.⁸⁰ At first glance, their code seems to be based on sound considerations. However, upon further reading, their band membership code specifically uses a blood quantum rule to determine “citizenship”.⁸¹ The blood quantum detailed below ranges from 50% and 65% to 75%:

Citizenship in the Parry Island First Nation

4. Persons who were citizens, or were entitled to be citizens, of the Parry Island First Nation immediately before the adoption of this Code shall continue to be, or be entitled to be, citizens.

5. a) A person born before April 17, 1990, and who is not covered by section 4 above, is entitled to become a citizen of Parry Island First Nation if:

i) he or she can demonstrate that he or she has at least 50% First Nation blood and

ii) he or she is sponsored by a citizen of Parry Island First Nation and

⁷⁹ Wasauksing First Nation, “Wasauksing First Nation”, online: Wasauksing First Nation <<http://www.angelfire.com/band/WasauksingFN/WFN.html>>.

⁸⁰ Ontario, Parry Island Band, *Parry Island Citizenship Code*, (Ottawa: INAC, 2007) at ss. 2, 3.

⁸¹ *Ibid.* at s.16. In the code, the term “citizen” is defined as “band member”. Therefore, their citizenship code is really their band membership code.

- iii) if the applicant is not related to a citizen of Parry Island First Nation, Council has approved the application.
 - b) A person born on or after April 17, 1990 but before December 31, 2010 is entitled to become a citizen of Parry Island First Nation if:
 - i) he or she can demonstrate that he or she has at least 60% First Nation blood and
 - ii) he or she is sponsored by a citizen of Parry Island First Nation and
 - iii) if the applicant is not related to a citizen of Parry Island First Nation, Council has approved the application.
 - c) A person born on or after December 31, 2010 is entitled to become a citizen of Parry Island First Nation if:
 - i) he or she can demonstrate that he or she has at least 75% First Nation blood and
 - ii) he or she is sponsored by a citizen of Parry Island First Nation and
 - iii) if the applicant is not related to a citizen of Parry Island First Nation, Council has approved the application.
6. A non-citizen who marries a citizen of Parry Island First Nation is entitled to become a citizen of Parry Island First Nation if and only if he or she meets the blood content and sponsorship requirements of this Code.
7. A person who does not otherwise qualify is eligible for citizenship in the Parry Island First Nation in a special case if he or she is sponsored by a citizen of Parry Island First Nation and the Chief and Council adopt the person on humanitarian or compassionate grounds, taking into consideration:
- a) his or her connection to the community;
 - b) his or her contribution to the community;
 - c) his or her residency.

8. Any person who has voluntarily enfranchised under the former section 12(1)(a)(iii) of the Indian Act (Indian man voluntarily enfranchises) or the former section 111 of the Indian Act (becoming a priest or professional) is not entitled to citizenship unless the Chief and Council decide in favour of his or her application, taking into consideration:

- a) the reasons for enfranchisement;
- b) the reasons for applying for citizenship;
- c) his or her plans for the future;
- d) the existence of a sponsor.

9. a) A person, including a child, who is or becomes a citizen of another First Nation is not entitled to be a citizen of Parry Island First Nation

- b) A former citizen who became a citizen of another First Nation may apply to transfer citizenship back to Parry Island First Nation.⁸²

Their specific type of acceptable “blood” is what they refer to as “First Nation blood”.

This is what allows them to accept band members from other bands who would not necessarily be of Ojibway or Parry Island community blood. It would appear by this code that Parry Island will allow the blood of other Aboriginal Nations to be inter-mixed with that of their community, but not the blood of any other Nation. However, given that status under previous *Indian Acts* allowed non-Aboriginal women to become members, their blood quantum analysis appears to be largely a work of fiction. This code also establishes a citizenship roll, enrolment officers, and a citizenship committee comprised of elders, council, youth and regular citizens.⁸³ The citizenship committee makes the recommendations regarding the acceptance or rejection of each application to Council

⁸² *Ibid.* at ss. 4-9.

⁸³ *Ibid.* at ss.10-13.

and the Band Council has the final decision.⁸⁴ There is no review or appeal mechanism, except that applicants who have had their applications rejected may reapply if they provide new information.⁸⁵

Parry Island band had an out-marriage rate of 51.6% in 1992, and their *Bill C-31* population was 34.4%.⁸⁶ Clatworthy noted that their band membership code most closely resemble that of the Gibson band (now known as the Wahta Mohawk).⁸⁷ The Gibson band's membership code also used a blood quantum rule in their code.⁸⁸ Therefore, the registered Indian population in Parry Island (based on the Gibson Band projections) is expected to remain stable for the first 15 years of the projection period (1991-2006), but will rapidly decline throughout the rest of the projection period (to the end of 2091), until it is reduced to about 25% of its current size.⁸⁹ Similarly, the membership population will remain stable for the first 15 years of the projection period, and then rapidly decline until the membership population is reduced to only 17% of the current level by the end of 2091.⁹⁰ What should be of great concern to the Parry Island band is the fact that: "The last child with eligibility for membership is projected to be born during the 2081-2086 period. After that time, no descendants of the current member population would qualify

⁸⁴ *Ibid.* at ss.13-14.

⁸⁵ *Ibid.* at s.15.

⁸⁶ *Population Implications*, *supra* note 52 at 89.

⁸⁷ *Ibid.* at 89. See also: Indian and Northern Affairs Canada, "Wahta Mohawk (Gibson) Claim", online: INAC <http://www.ainc-inac.gc.ca/nr/prs/j-a2005/02582bk_e.html>.

⁸⁸ *Population Implications*, *supra* note 52 at 111-112.

⁸⁹ *Ibid.* at 112.

⁹⁰ *Ibid.*

for membership.”⁹¹ It is difficult to imagine that the members of Parry Island could have taken this information into account when they approved their band membership code.

The Gibson band’s rate of out-marriage is 66% and their registered Indian population is currently 169 on reserve and 510 off-reserve for a total of 679.⁹² Parry Island’s total registered population is 991.⁹³ By way of comparison, Gibson band “only” has a blood quantum requirement of 50%, whereas Parry Island’s requirements are 50% blood quantum for people born before 1990, 60% blood for people born between 1990 and 2010, and 75% blood for people born after 2010. This formula mixes both an increasing blood quantum requirement coupled with very high rates of out-marriage (51.6%). It is hard to imagine more restrictive membership criteria. As a result, both bands will see their last eligible child entitled for membership to be born much quicker than other bands. Perhaps the members of Parry Island ought to complete a review of their current code and compare those projections with their stated goal of ensuring that future generations will enjoy the rights and benefits of citizenship in Parry Island.

The last example of a band membership code is one that follows the *Indian Act* rules either by choice (i.e., having assumed control of band membership and enacted their own code which follows the *Indian Act*), or by default (choosing not to assume control

⁹¹ *Ibid.*

⁹² *Ibid.* at 94. See also: Indian and Northern Affairs Canada, “Registered Population: Wahta Mohawks”, online: INAC
<http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_GeneralInformation.asp?BAND_NUMBER=134&BAND_NAME=Wahta+Mohawk>.

⁹³ Aboriginal Canada Portal, “Connectivity Profile: Wasauksing First Nation”, online: Aboriginal Canada Portal
<http://www.aboriginalcanada.gc.ca/abdt/apps/connectivitysurvey.nsf/vAllCProfile_en/363.html>.

over band membership and the *Indian Act* rules apply by default). This situation applies to the majority of bands in Canada. The sample band I have chosen is the Millbrook band in Nova Scotia, which forms part of the larger Mi'kmaq Nation in the Atlantic region. As of 1992, the Millbrook band's membership was determined solely by the requirements of the *Indian Act*.⁹⁴ It was the same case for Six Nations (now referred to as Six Nations of the Grand River).⁹⁵ Therefore, the closest comparison for the Millbrook band in terms of registration and membership population is Six Nations of the Grand River.⁹⁶ Since Six Nations did not adopt their own band membership code, its membership is still determined by the rules of the *Indian Act*, which means that INAC's Indian Register and membership list for Six Nations would likely contain the same individuals (i.e., if one was registered, then one was a member).⁹⁷ The population entitled to membership is expected to grow in the first 35 year period (1991 – 2026) but will then rapidly decline until it is 20% smaller than the present population by the end of the projection period (2091).⁹⁸ Of most concern for these bands is the conclusion that: "Further declines in the size of the member population would occur beyond the projection time frame."⁹⁹ These two bands are very similar in that their out-marriage rates were almost identical at 27.3% and 27.5% respectively. Similarly, their *Bill C-31* populations were 24.4% and 22.6% respectively.

⁹⁴ *Population Implications, supra* note 52 at 87.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* See also: Six Nations of the Grand River, "Annual Report", online: Six Nations <<http://www.sixnations.ca/AnnualReport.pdf>>.

⁹⁷ *Population Implications, supra* note 52 at 99.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

While there were many similarities between the two bands, there is also one significant difference between the Millbrook band and Six Nations that could affect their “extinction dates”. How fast their registered populations would decline is affected by their current population numbers. In 1991, Millbrook’s registered population was 809, whereas Six Nations’ registered population was 16, 697 individuals.¹⁰⁰ This gives Six Nations more time to address their membership issues as compared to Millbrook. In the end, the *Indian Act* rules for determining band membership have similar results to using sections 6(1) and 6(2) to determine registration status of Indians. The second generation cut-off within s.6 means that band membership is also limited by the second generation cut-off. Coupled with the modern-day reality of out-marriage, the *Indian Act* rules for determining both registration (status) and band membership, spells the eventual legislated extinction of status Indians and band members, for both Six Nations and Millbrook. Given that the status of these two bands is very large in population (relative to their regions), and given that they are both known to be economically and politically advanced in their regions, it would seem counter-productive to have a membership code which would result in their legislated extinction. This would be an incredible loss for both Mi’kmaq and Mohawk peoples who have long been known as very powerful peoples and Nations.

While all of these band membership codes fall into one or the other category, what is not reflected in those categories is the additional criteria that may be used to further restrict membership numbers that make the actual forecasts of future population numbers entitled to membership likely larger than they are in reality. Therefore, the

¹⁰⁰ *Ibid.* at 87 and 91.

numbers reviewed above cannot be viewed as the worst case scenarios.¹⁰¹ Whether or not individuals will be approved for membership based on these additional criteria or even how these criteria are interpreted or applied by various band councils and/or membership committees is also unknown. For example, the Mowachaht band only had a 1.4% *Bill C-31* population and a 21% out-marriage rate in 1991.¹⁰² Their current registered population is 316 off-reserve and 235 on reserve (541 total).¹⁰³ They also adopted their band membership code on the basis of their “inherent right to determine who their own people are” and created the rules based on the belief that their “ancestral roots never fade”.¹⁰⁴ The basis for their rules appear to be taking into consideration their future generations. But other factors can also lead to a decline in population numbers depending on their application. According to their rules, the following people are some of those entitled to have their names entered on the band membership list: anyone whose name was or was entitled to be on the Band List prior to the adoption of the code, anyone who has two parents who are band members; anyone who has one parent who is a band member, and anyone under the age of 18 who is of Aboriginal descent and has been adopted by a band member.¹⁰⁵ They are a band whose population forecasts closely resemble that of the

¹⁰¹ *Population Implications*, *supra* note 52.

¹⁰² *Ibid.* at 88.

¹⁰³ Indian and Northern Affairs Canada, “Registered Population: Mowachaht / Muchalaht”, online: INAC

<http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_GeneralInformation.asp?BAND_NUMBER=630&BAND_NAME=Mowachaht/Muchalaht>.

¹⁰⁴ British Columbia, Mowachaht Band, *Mowachaht Membership Rules*, (Ottawa: INAC, 2007) at preamble.

¹⁰⁵ *Ibid.* at s.4

Sheshaht band (membership numbers will rise initially and then level off, whereas registration numbers will eventually decline).¹⁰⁶

What is different about the Mowachaht band membership code as compared to the majority of codes is that they also include the following provision which details how band members can lose membership in the band:

6.(1) Notwithstanding any other provision of these Rules, a person who is of the full age of eighteen years and who is entitled to be a member of Mowachaht Band of Indians and who is registered in the Mowachaht Band List and who is a grave threat to the Mowachaht Band or the members of the Mowachaht Band may have his name removed from the Mowachaht Band List and lose entitlement to have his name so registered.

By way of example, grave threat includes continued child sexual abuse, continued selling of liquor or drugs to children or endangering the lives of Mowachaht Band members.¹⁰⁷

The section goes on to provide that no one will be removed from the band list without: a fair hearing, a recommendation by the Membership Committee that he or she be removed and a vote by a majority of the adult band members to remove that person's name.¹⁰⁸

Their membership committee consists of 5 people appointed by the band who are band members and live on the reserve.¹⁰⁹ It is not known how many band members have actually lost their membership status from this provision, nor is the scope of this provision known. It also appears from the wording of their code that the off-reserve band members do not have a say in membership applications or decisions about the loss of

¹⁰⁶ *Population Implications*, *supra* note 52 at 88, 103.

¹⁰⁷ *Mowachaht Membership Rules*, *supra* note 104 at s.6(1).

¹⁰⁸ *Ibid.* at s.6(2).

¹⁰⁹ *Ibid.* at s.7.

membership by individuals, because residence on the reserve is one of the required criteria for being a membership decision-maker.¹¹⁰

There are several other bands that have similar provisions regarding how band members can lose their membership status once it has been obtained. The Ehattesaht band, for example, is a band of Nuu-chah-nulth (formerly known as the Nootkas) located in British Columbia, with a *Bill C-31* population of 5.8% and an out-marriage rate of 7% in 1991.¹¹¹ Their current registered population is 209 off reserve and 116 on reserve (325 total).¹¹² They adopted their membership rules on the following basis:

The Ehattesaht Indian Band Membership Rules shall protect, nurture and pay special attention to Nuu-chah-nulth Culture, Heritage, Traditions and Language, as practiced by our forefathers now and in the future.

The Membership Rules shall especially protect and safeguard the Ehattesaht/Nuu-chah-nulth Identity, of our children now and forever.¹¹³

They go on to explain that their philosophy of government is based on a better life for all their people and that their Chief and Council speak for their children and elders.¹¹⁴ They further explain that their membership rules will be used as:

¹¹⁰ *Ibid.* at s.7.3(c). Only those who reside on reserve are entitled to be part of the band's membership committee.

¹¹¹ *Population Implications*, *supra* note 52 at 86. See also: British Columbia, Ehattesaht Band, *Ehattesaht Tribe Membership Rule* (Ottawa: INAC, 2007) [*Ehattesaht Membership code*] at 6.

¹¹² Indian and Northern Affairs Canada, "General Information: Registered Population: Ehattesaht", online: INAC <http://sdiproduct2.inac.gc.ca/FNProfiles/FNProfiles_GeneralInformation.asp?BAND_NUMBER=634&BAND_NAME=Ehattesaht>.

¹¹³ *Ehattesaht Membership Code*, *supra* note 111 at 1.

¹¹⁴ *Ibid.*

the vehicle for the continuing existence of Ehattesahts as Aboriginal People and ensuring the longevity of The Ehattesaht Communities by:

Safeguarding all, what we were, what are now and what we hope to be in the future as Ehattesahts.¹¹⁵

Similar to the Mowachaht band, the Ehattesaht band also closely resembles the Sheshaht band in terms of population projections (membership initially increases and then levels off, whereas registration numbers eventually decline).¹¹⁶ They include (in part), as band members, those who were previously on the band list, those with two parents who are band members, illegitimate children whose registration was rejected, and native children adopted by Ehattesaht band members.¹¹⁷ They also include: “All those persons who can prove their Ehattesaht/Nuu-chah-nulth Ancestry through direct or collateral lineage, whether maternal or paternal.”¹¹⁸ This appears to be an inclusive membership code allowing those with direct familial connections to the band to become members. Their code goes on to specify who is not entitled to apply, which include those without Aboriginal descent, which is defined in their code as someone “who can not prove a blood relationship to an ancestor”.¹¹⁹ It also includes a section on what applicants need to include with their applications and what rules they need to live by in order to be granted band membership. For example, the most important criteria for membership as stated by

¹¹⁵ *Ibid.*

¹¹⁶ *Population Implications, supra* note 52 at 83, 103.

¹¹⁷ *Ehattesaht Membership Code, supra* note 111 at s.4 This section is quite lengthy in comparison to many other band membership codes and includes 19 subsections which list the different categories of who can become band members.

¹¹⁸ *Ibid.* at s.4(f).

¹¹⁹ *Ibid.* at s.5(a) and s.3(i).

the code are the respect of Ehattesaht traditions and customs.¹²⁰ Another criterion involves a residency requirement:

Any person applying for membership with The Ehattesaht Indian Band must show intent to reside within one of The Ehattesaht Bands Indian Reserves or on Federal Crown Land for a period of time. A person must display genuine intent of residency by establishing an ongoing physical presence within The Ehattesaht Indian Band Reserves or Federal Crown Lands and show some indication that his or her presence is not just transitory in nature.¹²¹

This residency requirement could prove to be very exclusive of otherwise eligible band members in the future and significantly reduce the otherwise level membership population numbers forecasted by the Sheshaht model. Given that their current off-reserve population nearly doubles that of their on-reserve population (209 off versus 116 on), a significant number of potential band members could be excluded by this residency requirement.

Another difference between this code and others is that the Ehattesaht band includes a provision on how some members can lose their membership, namely, female band members can lose their band membership upon marriage to a non-band member. Section 8 of the code provides as follows:

8. Loss of Membership on Marriage

- a) An Ehattesaht woman who marries a person who is not an Ehattesaht Band Member shall renounce her membership and make application to her husband's Band. If the woman is denied membership by her husband's Band she shall remain a member of The Ehattesaht Indian Band.

¹²⁰ *Ibid.* at s.7(a)(ii). This section provides: "With Criteria the most important standard for applying for membership in the Ehattesaht Indian Band shall be respect of Ehattesaht's traditions and customs".

¹²¹ *Ibid.* at s.7(o).

Divorce, Separation and Widowhood

- b) When a man and a woman decided and agreed to end a traditional marriage [sic], the woman relinquished her Ehattesaht Indian Band Membership. For the purpose of these Membership Rules if a woman's former Band will not accept her back as a member, she will remain as a member of the Ehattesaht Indian Band till such time as:
- i) She remarries and is accepted by her new husband's Band,
or
 - ii) She makes application for membership and is accepted by another Band.¹²²

This provision only applies to female band members and is quite similar to the kind of discrimination challenged by Sandra Lovelace and Jeanette Lavell.¹²³ While the band may try to argue that this code is not based on similar *Indian Act* provisions, but merely represents their tradition in this regard, one must remember that any Aboriginal right to determine citizenship based on s.35 of the *Constitution Act, 1982*, cannot discriminate between men and women as per s.35(4).¹²⁴ Similarly, any claim of protection of their membership traditions through s.25 of the *Charter* would also be limited by s.28 which ensures that all rights are granted equally to men and women. This code will no doubt be challenged at some point if steps are not taken to address the distinctions based on sex.

The above marrying-out provision only speaks to marriages between members of different bands. It does not speak to the possibility of a marriage between a female band

¹²² *Ibid.* at s.8.

¹²³ *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981) [*Lovelace UN*]. *Lavell v. Canada (Attorney General)*; *Isaac v. Bedard* (1974) S.C.R. 1349 [*Lavell*].

¹²⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11 [*Constitution Act, 1982*].

member and a non-Aboriginal person, although, presumably, if one follows the same logic of the female band member having to follow the husband's status, the band might withdraw her band membership. If this is the case, and the rate of out-marriage remains steady or increases as predicted in the Sheshaht band model forecast, then more and more female band members would be at risk of losing their band membership and would affect their children's rights as well. Then the band would have re-created the s.12(1)(b) scenario all over again, further reducing band membership numbers under the guise of tradition. Male band members do not have to be concerned with ever losing their membership by virtue of marriage. Thus, it is conceivable that with this code, Aboriginal women will continue to be viewed in the stereotypical manner that they are less capable of transmitting the culture and identity of their Nation simply by virtue of their sex.¹²⁵

The Matsqui band is part of the Sto:lo Nation of British Columbia.¹²⁶ They currently have a registered population of 135 people off-reserve and 99 people on reserve (234 total).¹²⁷ In 1991, they had a *Bill C-31* population of 30.8% and an out-marriage rate

¹²⁵ Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol.1 (Ottawa: Supply and Services Canada, 1996) [RCAP, vol.1] at Chapter 9, Part 4. RCAP explained that these provisions appeared very early in Indian legislation: "The *Gradual Enfranchisement Act* also provided for the first time that an Indian woman who married a non-Indian would lose Indian status and band membership, as would any children of that marriage. In a similar way, any Indian woman who married an Indian from another band and any children from that marriage would become members of the husband's band." Therefore, it appears that these types of rules may have their basis in early Indian legislation.

¹²⁶ British Columbia, Ministry of Aboriginal Relations and Reconciliation, "Sto:lo Nation", online: BC
<http://www.gov.bc.ca/arr/firstnation/stolo/default.html#member_bands>.

¹²⁷ Indian and Northern Affairs Canada, "General Information: Matsqui First Nation", online: INAC

of 63.8%. Based on this information, the Matsqui band most resembles the Sheshaht band in terms of population forecasts.¹²⁸ Not only did the Matsqui band enact their membership code in order to “protect the cultural integrity” of their community. They also designed their code with a view to maintaining “social harmony” and “enhancing economic stability” among the members of the band.¹²⁹ This band is one of several that explicitly stated that economic reasons form part of their membership criteria and decisions. Their band membership code allows base enrollees (those previously entitled to have their names on the band list) and the children of base enrollees to be band members.¹³⁰ The code also allows “restored members” (those who had lost status under the old *Indian Act* and regained it with the *Bill C-31* amendments) to be members, but does not allow the children of restored members to become members until: “the Band is granted or acquires additional lands to accommodate them”.¹³¹ Therefore, despite the population forecasts for their band membership as rising initially and then levelling off, the Matsqui band’s additional criteria of ensuring they have enough lands to accommodate any additional members could drastically reduce their membership numbers if the amount of land they acquire never exceeds the land required for their current band members and for special projects like schools, offices and economic development projects.

<http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_GeneralInformation.asp?BAND_NUMBER=565&BAND_NAME=Matsqui>.

¹²⁸ *Population Implications*, *supra* note 52 at 87, 103.

¹²⁹ British Columbia, Matsqui Band, *Matsqui Band Membership Code*, (Ottawa: INAC, 2007) [*Matsqui Membership Code*] at 2 (preamble).

¹³⁰ *Ibid.* at ss.3,4.

¹³¹ *Ibid.* at ss.5,6.

This criterion is obviously beyond the control of potential applicants for membership and is further complicated by their residency criteria for those who are already approved band members. There is also an additional “abandonment of residency” clause which provides as follows:

If any member abandons his residence on the Matsqui Reserve for a minimum period of one year, that person may be removed from the Matsqui Band list if his absence causes the Matsqui Band to assume a financial liability on his behalf. A minimum of 75% of the Matsqui eligible electors must consent before the Peacemakers Tribunal may revoke a persons [sic] membership in the Band.¹³²

It is not clear from the code what sort of financial liability will suffice to enable the non-residency clause to cause a band member to lose their membership, but a strict application of this provision could significantly reduce membership numbers, given that the majority of the registered population at Matsqui already live off reserve and many may have to move away for work, school or for personal reasons (given the high rate of out-marriage).¹³³ This clause appears to discriminate between on and off-reserve band

¹³² *Ibid.* at s.12(4).

¹³³ See also: Alberta, Woodland Cree Band, *Membership Code of the Woodland Cree Indian Band* (Ottawa: INAC, 2007) at s.5.3. This band membership code provides an interesting example of how one can lose their membership for a lack of commitment to the traditions of the band. Section 5.3 provides as follows: “The Band Council may at any time delete from the Band membership list the name of any person who in the judgement of the Band Council does not have a significant commitment to the history, customs, traditions, culture and communal life of the Band or has a character or lifestyle that would cause their continued membership in the Band to be seriously detrimental to the future welfare or advancement of the Band.” See also: British Columbia, Little Shuswap Band, *Little Shuswap Indian Band Membership Rules*, (Ottawa: INAC, 2007) [*Little Shuswap Membership Code*] at s.9 provides that non-residency in Canada can be cause for removal from the band membership list: “A Band member who has voluntarily or ordinarily resided outside of Canada for twenty (20) years or more and has not

members based only on residency and finances. The *Corbiere* case held that Aboriginality-residence was an analogous ground under s.15 of the *Charter* and that the complete denial of voting rights to off-reserve band members amounted to discrimination.¹³⁴ With regards to the Matsqui, not only do they differentiate between band members on the basis of reserve residency and finances, but they could deny band membership itself on that basis. It is arguable that the loss of band membership is far more severe than the denial of voting rights and, as such, Matsqui may be hard pressed to justify such distinctions.

The Sucker Creek band is part of the Cree Nation from Alberta.¹³⁵ They had a *Bill C-31* population of 36.5%, an out-marriage rate of 64% in 1991, and their current registered population is 1672 people off reserve and 681 on reserve (2353 total).¹³⁶ Their population forecasts most closely resemble that of the Gibson band (Wahta Mohawks),

maintained regular contact with Band affairs may have his name removed from the Band list upon a majority vote of all eligible electors, providing one month written notice of the Band vote has been given to the Band member.”

¹³⁴ *Corbiere*, *supra* note 27. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. [*Charter*] at s.15.

¹³⁵ Assembly of First Nations, “Sucker Creek First Nation”, online: AFN <<http://www.afn.ca/misc/PP.pdf>>. The band referred to in this paragraph is to be differentiated from the Sucker Creek band of Ojibways in Manitoulin Island. See: Sucker Creek, “Sucker Creek Site”, online: Sucker Creek <<http://www.geocities.com/sucker creek fn/>>. The other Sucker Creek band is in Alberta and is Cree.

¹³⁶ *Population Implications*, *supra* note 52 at 91, 111. See also: Indian and Northern Affairs Canada, “Registered Population: Sucker Creek”, online: INAC <http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_GeneralInformation.asp?BAND_NUMBER=456&BAND_NAME=Sucker+Creek>.

especially with regard to their registered populations.¹³⁷ They too assert their “inherent right and traditional authority to control its membership,” and base their membership code both on the “principles of fundamental fairness and the rules of natural justice” as well as the “values, customs, and traditions of the Sucker Creek Band”.¹³⁸ The band also adds an additional interpretive provision which aims to protect the individual Aboriginal and treaty rights of its band members against its own band membership code:

This code shall not be applied or interpreted in any manner that abrogates or derogates from or denies any of the existing aboriginal and treaty rights of the members of the Sucker Creek Band or of any of the existing Aboriginal and Treaty rights of any individuals that might apply for membership to the Sucker Creek Indian Band.¹³⁹

This section could serve to invalidate several of its own membership provisions which currently exclude potential band members. For example, the Sucker Cree membership code provides that children with parents who are both band members are automatically entitled to become band members upon submission of proof of parentage; whereas children who only have one parent who is a band member must both make application to and seek approval of the band council. This latter group of applicants are also subjected to further considerations not imposed on the former group.¹⁴⁰ The other considerations for membership include:

1) The person’s previous conduct and circumstance as is relevant to the person’s compatibility with the customs and way of life of the Sucker Creek Band;

¹³⁷ *Population Implications*, *supra* note 52 at 91, 111.

¹³⁸ Alberta, Sucker Creek Band, *Sucker Creek Band Membership Code*, (Ottawa: INAC, 2007) [*Sucker Creek Membership Code*] at Part 1, ss.1,5.

¹³⁹ *Ibid.* at Part 1, s.6.

¹⁴⁰ *Ibid.* at Part 3, s.3-5.

- 2) The person's knowledge of the history, customs, culture and way of life of the Sucker Creek Band; or
- 3) The person's contribution or potential for contribution to the benefit and well-being of the Sucker Creek Band.¹⁴¹

They further add that admission will be contingent upon proof that the member will not be "harmful to the interests of the band" and that the band council has the sole discretion to determine whether or not it has "sufficient land, housing and resources to provide services to present and additional members".¹⁴² The Sucker Creek band also reserves the right to consider any other factor raised by any other band member in relation to an applicant's application for membership.¹⁴³

This means that in addition to having a population that is significantly impacted by high rates of out-marriage and a high *Bill C-31* population in comparison to the Gibson band (their comparator band), they can expect to have a registered Indian population of less than 25% its current size at the end of the projection period (2091).¹⁴⁴ If they apply their membership code strictly as against the children who only have one parent as band members, then it is reasonable to assume that they could also expect declines in membership populations similar to those who have two-parent band membership codes. Their additional discretionary factors, such as ensuring they have sufficient land, housing, and resources, could affect their future membership populations and could even lead to moratoriums on membership if taken to the extreme.¹⁴⁵ Although

¹⁴¹ *Ibid.* at Part 4, s.2(b).

¹⁴² *Ibid.* at Part 4, s.2(c),(d).

¹⁴³ *Ibid.* at Part 4, s.3.

¹⁴⁴ *Population Implications, supra* note 52 at 112.

¹⁴⁵ *Registration and Membership, supra* note 13 at 9. Clatworthy indicated that when he followed up with First Nations on the current status of the band membership codes, some

the code is based on fairness and justice, it would appear by the clauses themselves that any irrelevant issue can be taken into consideration in deciding membership. Without knowing how this code is applied in practice, it leaves open the door for inappropriate personal issues to find their way into the decision-making process. Similarly, if members are found to have an Aboriginal right to belong to their Nation and therefore a similar right to belong to their band, it would appear that the band code would be over-ruled by virtue of the Aboriginal rights having paramountcy over the code; but the code is not clear on this issue.

Economic factors influence the determination of membership in Sucker Creek as well as other bands with membership codes. The difference is that all bands have been so forthright about stating this in their codes.¹⁴⁶ Economic factors are often out of the control of individual applicants and can act as major obstacles to obtaining membership status if that particular criterion is strictly applied. A few bands have even instituted a fee for specific types of membership applications and appeals that may also be prohibitive to

bands indicated that they were not using their codes to determine membership. Some of the bands indicated that they had instituted a moratorium on membership altogether.

¹⁴⁶ *Sucker Creek Membership Code*, *supra* note 138 at Part 4, s.2(b). See also: Alberta, Whitefish Lake Band, *Membership Code of the Whitefish Lake Indian Band #459* (Ottawa: INAC, 2007) at s.7.2(v). This section provides that the band will consider whether it “has sufficient housing, land and other resources for additional band members” prior to making any decisions on new applications for membership. See also: Alberta, Fort McMurray Band, *Membership Code of the Fort McMurray Indian Band*, (Ottawa: INAC, 2007) at s.7.3(v) and (vii). This code appears to set up a possible conflict between its own criteria in that it requires that new applicants intend to reside on reserve, but they also make approvals for new members subject to the Band determining that they have “sufficient land, housing and resources for existing and additional members”.

some applicants.¹⁴⁷ Having a specified blood quantum or being directly descended from a blood relative was also common to a good number of band codes.¹⁴⁸ Some bands have even included a provision that after so many years of their band membership code being in effect, they will perform a review of their band membership list to ensure that every

¹⁴⁷ British Columbia, Canim Lake Band, *Canim Lake Indian Band Membership Code*, (Ottawa: INAC, 2007) [*Canim Lake Membership Code*] at s.7.(b) prescribes a fee of \$200.00 for all applications for membership transfers from other bands. See also: British Columbia, Red Bluff Band, *Red Bluff Indian Band Membership Laws*, (Ottawa: INAC, 2007) [*Red Bluff Membership Code*] at s.7.(a)(iv) and (b)(b). These two sections prescribe a fee of \$100.00 for all applications for membership transfers from other bands and an additional \$100.00 to appeal any decisions regarding the transfer application.

¹⁴⁸ Alberta, Blood Band, *Blood Tribe Membership Code*, (Ottawa: INAC, 2007) [*Blood Membership Code*] at s.1(g) and (j). In this code, the Blood Tribe defines a “blood Indian person” as a person who “is a descendant of that Tribe of Indians of the Blackfoot Confederacy known as the Blood Tribe and who is of at least ONE HALF (1/2 or 50%) DEGREE BLOOD Indian blood”. They further go on to define an “Indian” as a person who is “registered as an Indian pursuant to the Indian Act as it reads immediately prior to April 17, 1985 but who has some degree of Indian blood and, includes a person of Indian blood duly enrolled as an Indian in the United States of America”. Therefore, non-Indian women who gained Indian status by virtue of marriage to an Indian are not considered Indians according to this code. Pursuant to article 4, they assign blood quantum based on how one was registered under the *Indian Act*. For example, pre-*Bill C-31* band members (with Indian blood) are assigned 100% blood quantum, those acquired status (without Indian blood) by marriage are assigned 0% blood and *Bill C-31* reinstates are assigned 50% blood quantum. Pursuant to article 5, all applicants must have at least 50% blood quantum. See also: Alberta, Montana tribe of the Cree Nation Band, *Montana tribe of the Cree Nation Membership Code* (Ottawa: INAC, 2007) at s.1.1(e) which defines an “Indian” as a person who “has at least fifty (50%) percent Cree blood quantum or fifty (50%) percent blood quantum of another tribe indigenous to North America. For purposes of determining the blood quantum herein, everyone, except as otherwise stated, who is a member of the Montana Tribe as of April 17, 1985, shall be deemed to have one hundred (100%) percent Indian blood quantum.” See also: British Columbia, Osoyoos Band, *Membership Code of Osoyoos Indian Band*, (Ottawa: INAC, 2007) [*Osoyoos Membership Code*] at s.5(a) which provides: “no one of known aboriginal ancestry with historic family ties to the traditional lands of the Osoyoos Indian people will be denied the right to apply for Osoyoos Indian Band Membership.”

person on that list is of Aboriginal descent.¹⁴⁹ One matrilineal band adopted their code to adjust to modern realities of out-marriage and incorporated patrilineal descent to determine membership where necessary.¹⁵⁰ The issue of adoptions (children being adopted into and out of the band) was addressed in a significant number of the band membership codes as well. Many of the bands restricted membership to those adopted children who were of “Indian blood”.¹⁵¹ Some bands also incorporated some form of

¹⁴⁹ See: British Columbia, Ahousaht Band, *Ahousaht Band Membership Rules*, (Ottawa: INAC, 2007) [*Ahousaht Membership Code*] at s.6(5)(a)(i)(a) which provides that the Ahousaht Band will review their band membership list within 5 years of their code coming into force to determine if each person on the band list is “of aboriginal descent”. In section 2(1) they define “aboriginal descent” to mean people who are “descended from the aboriginal peoples of the Americas, and accepted by the aboriginal peoples as being of aboriginal descent”. See also: British Columbia, Opetchesaht Band, *Opetchesaht Band Membership Rules*, (Ottawa: INAC, 2007) at s.6(5)(a)(i)(a) is similar to that of Ahousaht’s review provision.

¹⁵⁰ Yukon, Carcross/Tagish Band, *Carcross/Tagish Band Membership Code* (Ottawa: INAC, 2007) at Part IV, section A.(1) which provides: “Lineage will be based upon a matriarchal clan/house system. That is, children will follow their mother’s clan/house and ancestry. Where the child’s mother is non-Tlingit, the child’s [sic] lineage will [sic] determined by tracing lineage [sic] back to the opposite clan/house of the Daxkwan father. Band membership includes those who: show that they have some Tlingit blood/ancestry, or that they have one parent who is a band member or they were adopted by a band member. (This is one of the bands that are now under self-government agreements in the Yukon that have replaced their band membership codes with self-government citizenship codes.)

¹⁵¹ Ontario, Big Island Band, *Big Island Band Membership Code*, (Ottawa: INAC, 2007) at ss.8-10. These sections provide that only children with 50% or more Indian blood who are adopted by band members may qualify for band membership. Any non-Indian children who are adopted by band members are specifically excluded from membership, but children who are band members who are later adopted outside of the band do not lose their membership in the band. See also: Ontario, Sheshegwaning Band, *Sheshegwaning Band Membership Code*, (Ontario, INAC, 2007) at s.6(6) which allows the following people to be considered for probationary membership: “A child, not of native ancestry, adopted under the laws of Canada or in accordance with Indian custom.” See also:

residency requirement, either in terms of their initial membership application criteria or it was incorporated into their rules on how to lose band membership.¹⁵² Knowledge of the band's traditions and customs and ways of life were also common criteria for new applicants as was a commitment to the common good of the band or having ties to the community.¹⁵³ The purpose of the probationary period was to allow new applicants time to meet one of two criteria: to learn the traditions and customs of the band and/or to take up residency on the reserve.¹⁵⁴

Ontario, Ojibways of Sucker Creek, *Ojibways of Sucker Creek Membership Code*, (Ottawa: INAC, 2007) at 3.(b) which allows as probationary members the following individuals: "Non-Indian children adopted by full members of the Ojibways of Sucker Creek (Indians adopted by full members get full membership)".

¹⁵² Alberta, Driftpile Band, *Driftpile Indian Band Membership Code*, (Ottawa: INAC, 2007) at s.6, 7. This section provides that the Band Council can delete any name from the Band List of any person who is not "lawfully resident on the reserve" and who does not have "a significant commitment to the history, customs, traditions, culture and communal life of the Band. Pursuant to section 7, the Band Council may also remove the names of the children of the affected band member. See also: Alberta, Sawridge Band, *Sawridge Indian Band Membership Code*, (Ottawa: INAC, 2007) at ss.6,7 and Alberta, Swan River Band, *Swan River Band Membership Rules*, (Ottawa: INAC, 2007) at ss. 6,7. These codes are similar to that of the Driftpile Band's Code.

¹⁵³ *St. Basile Membership Code*, *supra* note 56 at s.8(a)(i) provides that the applicant must show they are "knowledgeable, loyal, and follows a way of life consistent with the community of the St. Basile Indian Band and has evidenced such ties to the community by his/her familiarity of the language, customs, and history of the Band". See also: Prince Edward Island, Lennox Band, *Lennox Island Indian Band Membership Code*, (Ottawa: INAC, 2007) [*Lennox Island Membership Code*] at s.15.(a)-(c). This section provides that the applicant must demonstrate their connections to the band, their knowledge of the history and culture and their familiarity with the way of life of the band.

¹⁵⁴ Alberta, Louis Bull Band, *Louis Bull Tribe of the Cree Nation Membership Code* (Ottawa: INAC, 2007) [*Louis Bull Membership Code*] at s.9.1(ii). This section provides that the band will take the following into consideration for all applications for membership: "the performance of the applicant during a five (5) year probation to acquire knowledge of the way of life of the community and such other matters as required by the

Other factors that have been taken into account when reviewing applications for band membership in various codes include: being of good character¹⁵⁵; whether one's behaviour might encourage criminal activity or they have a criminal record¹⁵⁶; applicant's medical report and/or records¹⁵⁷; being financially stable or self-supporting¹⁵⁸;

Tribe". See also: Alberta, Tall Cree Band, *Tall Cree Band Membership Code* (Ottawa: INAC, 2007) [*Tall Cree Membership Code*] at s.20. This section provides, in part, that the applicant must complete a probationary period of 5 years and must reside on the reserve for at least 3 years of the 5 year probationary period. See also: *Osoyoos Membership Code*, *supra* note 148 at s.7.(c)(1) provides that non-members who have no known Aboriginal ancestry must live amongst the Osoyoos Indian Band for two years before making application for membership. According to s.7(c)(3) these applicants will then have a one year probation period.

¹⁵⁵ Alberta, Blackfoot Band, *Blackfoot (Siksika) Membership Code* (Ottawa: INAC, 2007) at s.4(c)(iv). This section provides that one of the conditions to membership that can be taken into account by the band is the applicant's character. The relevant portion of that section provides: "in the judgement of Chief and Council (or Tribunal) has a character and lifestyle that would not cause his or her admission to membership in the Tribe to be detrimental to the future welfare or advancement of the Tribe". See also: *Tall Cree Membership Code*, *supra* note 154 at s.20.(iii) which provides that the applicant must "conduct himself or herself as a good probationary member of the Tall Cree Band". (emphasis added) This presumably means that they must be of good character. See also: Alberta, Sunchild Band, *Membership Code of the Sunchild Band*, (Ottawa: INAC, 2007) [*Sunchild Membership Code*] at s.6(g) where the band takes into account "The character of the applicant".

¹⁵⁶ Manitoba, Little Black River Band, *Little Black River First Nation Membership Code*, (Ottawa: INAC, 2007) at s.6.(b) provides that the Membership Committee will take into account whether: "the behaviour and lifestyle of the person would be detrimental to the community, or might encourage criminal activity, or activities damaging to the health and safety of the Little Black River First Nation". See also: *Ojibways of Sucker Creek Membership Code*, *supra* note 138 at s.15.(a) which provides that membership will be refused if the applicant "has been convicted with the ten years previous to the application of any criminal offence involving homicide, wounding, robbery with violence, sexual assault or sexual relations with minors".

¹⁵⁷ *Ojibways of Sucker Creek Membership Code*, *supra* note 138 at ss.12, 15.(b). Section 12 provides: "Every person who applies for probationary membership or residency privileges (which ever applies) shall provide the Membership Clerk with a report from a

contribution of personal and economic resources to the band¹⁵⁹; skills and/or employment record¹⁶⁰; knowing the traditional language¹⁶¹; being affiliated with the tribe¹⁶²;

doctor of a medical examination in the form prescribed by the Council”. According to section 15.(b), their application for membership will be refused if the applicant “is reported in the medical report to have a dangerous or communicable disease”. See also: Ontario, Fort William Band, *Fort William Band Membership Code*, (Ottawa: INAC, 2007) at s.11.(2) which provides that all applicants must provide a medical report from their doctor. Section 5.(b) provides that no one with a communicable disease can be a member.

¹⁵⁸ British Columbia, Tobacco Plains Band, *Tobacco Plains Indian Band Membership Rules*, (Ottawa: INAC, 2007) [*Tobacco Plains Membership Rules*] at s.6 qualifies for membership: “a self-supporting adult who has specific Ancestral ties to the Band and who appears likely to make a valuable contribution to the Band”. See also: Ontario, Pays Plat Band, *The Pays Plat Band Membership Code*, (Ottawa: INAC, 2007) [*Pays Plat Membership Code*] at s.11.(i)(a) includes the following as an inadmissible class of person to band membership: “persons who there are reasonable ground to believe are, or, will be unable or unwilling to support themselves and those persons who are dependent on them for care and support, except those persons who have satisfied the Chief and Council that adequate arrangements have been made for their care and support”.

¹⁵⁹ Manitoba, Hollow Water Band, *Hollow Water First Nation Membership Code* (Ottawa: INAC, 2007) [*Hollow Water Membership Code*] at s.6.(b) which provides that the membership committee will take into account the following factor in reviewing applications for membership: “the extent to which that person is prepared to commit his or her personal and economic resources to the welfare and advancement of the Hollow Water First Nation”.

¹⁶⁰ Ontario, Mississauga Ojibway Band, *Citizenship Code of the Mississauga Ojibway Nation*, (Ottawa: INAC, 2007) at s.11.(d),(e). The applicant must provide information about their “skills” and their “employment and employment history” when applying for band membership.

¹⁶¹ Alberta, Tsuu T’ina Band, *Tsuu T’ina Citizenship Code*, (Ottawa: INAC, 2007) at s.5(c)(i) provides that all applicants for membership must be able to: “Understand and speak the Tsuu t’ina Spoken Language”. See also: *Blood Membership Code*, *supra* note 119 at s.5(c)(iii). This section provides that the Chief and Council will decide if the applicant has a sufficient commitment to and knowledge of the “history, customs, traditions, culture, language and lifestyle of the Tribe”. (emphasis added)

¹⁶² Manitoba, Mathias Colomb Band, *Mathias Colomb First Nation Citizenship Code*, (Ottawa: INAC, 2007) at 4. The term “tribal affiliation” is defined as having a

knowledge of band government¹⁶³; the responsibility to foster and respect their people¹⁶⁴; respect their elders¹⁶⁵; respect and/or obey Chief and Council¹⁶⁶; participates in band affairs¹⁶⁷; the performance of community service¹⁶⁸; and complies with all band by-laws

“connection with the FIRST NATION through adoption, marriage, or kinship”. Section 5 of their band membership code provides that other applications for membership may be considered from the following individuals: “Any other person who has a substantial connection with the First Nation through Tribal Affiliation or Ancestry may apply for citizenship in the First Nation and, if approved for citizenship in accordance with this Code, shall be entitled to be registered on the First Nation List”.

¹⁶³ *Sunchild Membership Code*, *supra* note 155 at s.6(b) which provides that applicants for membership must demonstrate a degree of knowledge “concerning the Band, the form of government of the Band, the history, customs and traditions of the Band”.

¹⁶⁴ British Columbia, Gitlakdamix Band, *Gitlakdamix Indian Band Membership Code*, (Ottawa: INAC, 2007) [*Gitlakdamix Membership Code*] at 3.1. This section requires that each band member is responsible to “foster and protect Ayuukhl Nisga’a”. Nisga’a Lisims Government, “Nisga’a Lisims Government”, online: Nisga’a Lisims <<http://www.nisgaalisims.ca/?q=welcome>>. This band, the Gitlakdamix, along with the Gitwinksihlkw, Laxgalts’ap, Gingolx (Kincolith) and 3 urban villages are now part of the Nisga’a Lisims Self-Government Agreement. See also: Indian and Northern Affairs Canada, “Fact Sheet: The Nisga’a Treaty”, online: INAC <http://www.ainc-inac.gc.ca/pr/info/nit_e.html>.

¹⁶⁵ *Gitlakdamix Membership Code*, *supra* note 164 at s.3.1(b). This section explains that band members are to “uphold, obey and respect Elders as the repositories and teachers of Ayuukhl Nisga’a”.

¹⁶⁶ *Ibid.* at s.3.1(c). Members must “respect the Chief and Council”. See also: *Pays Plat Membership Code*, *supra* note 140 at s.11.(i)(c) which provides the following as an inadmissible class of persons for band membership: “persons who there are reasonable grounds to believe will engage in acts of subversion against the Pays Plat local government, or, any processes as they are understood in Pays Plat, except those persons who have satisfied the Chief and Council that their admission would not be detrimental to the Pays Plat community interest”.

¹⁶⁷ *Little Shuswap Membership Code*, *supra* note 133 at s.6(3). This section provides that all applicants for membership must show an interest in and “support for the welfare of the community by participating in Band affairs”.

¹⁶⁸ *Pays Plat Band Membership Code*, *supra* note 158 at s.6.(iii) provides: “A sponsored applicant may be granted admission subject to any terms and conditions prescribed

and regulations.¹⁶⁹ It is interesting to note that few, if any bands, made any specific exceptions within their membership codes for applicants who may have trouble meeting any or all of the criteria due to life circumstances caused by previous discriminatory applications of the *Indian Act* within their families.¹⁷⁰ Some bands also had provisions which allow community members to submit petitions if they do not wish certain individuals to become members.¹⁷¹ It was not clear under what circumstances this may be the case.

Regardless of the additional criteria, so long as the bands fit themselves into the two parent, blood quantum/descent or *Indian Act* codes, they have doomed themselves to

including: (a) the duration of sponsorship, not to exceed two (2) years; and (b) the reasonable performance of community service, not to exceed two (2) years”.

¹⁶⁹ *Little Shuswap Membership Code*, *supra* note 133 at s.6(2) provides that all applicants for membership must demonstrate “compliance with all Band by-laws and regulations”.

¹⁷⁰ One exception that stands out is the Carry-the-Kettle band from Saskatchewan. See: Saskatchewan, Carry-the-Kettle Band, *Carry-the-Kettle Band Rules of Membership in the Band*, (Ottawa: INAC, 2007) at s.6. The band takes into account whether the applicant has self-identified with their community or whether life circumstances may have prevented them from doing so: “whether the applicant identifies himself or herself with the Indian community and with the Carry the Kettle Band, and evidences such identification in such matters as knowledge of the language, custom and history of the Band; however, no person shall be excluded from membership solely on the basis of lack of such lack of identification or evidence thereof, where given consideration of the person’s life circumstances, they have not had a reasonable opportunity to maintain such identity”.

¹⁷¹ Ontario, Wapekeka Band, *Wapekeka Band Membership Code*, (Ottawa: INAC, 2007) at s.4.4(b) provides that an applicant can lose their bid for membership in the band if: “a majority of the electors of the band sign a petition demanding the termination of the person’s probationary membership, and the Chief and Council of the band approve the petition by band council resolution. Section 4.5 provides that there is no right of appeal for this action. See: Chiefs of Ontario, “Wapekeka First Nation”, online: Chiefs of Ontario <http://www.chiefs-of-ontario.org/profiles/pr_wapekeka.html>. Wapekeka First Nation was formerly known as the Angling Lake Band.

certain legislated extinction dates. Their additional criteria, depending on how they are implemented, may also help extinguish their communities at a faster rate. The one-parent codes offer the most hope, so long as the additional criteria does not limit membership and indirectly end up maintaining the “status” quo. Some individuals and bands are putting their faith in future self-government agreements and hoping that citizenship codes will offer a new way to rebuild communities and Nations. But if self-government agreements base their citizenship codes on the Indian Act status rules or band membership codes which incorporate those same problematic criteria, then one must ask whether self-government agreements are really the solution to the current band membership and status issues for the future, or do they merely maintain the “status” quo under a new guise?

(b) Self-Government Citizenship

Self-government agreements are no longer just an idea for the future, something to aspire to, or a distant hope for bands. There are currently a number of self-government agreements that have already been negotiated, ratified and implemented. There are also comprehensive land claims agreements, also referred to as “modern treaties” that are negotiated to include many of the same powers and authorities that can be found under a self-government agreement. While the negotiations for both agreements are based on their own separate federal policy, in effect, they can bring about very similar results for the bands and/or Nations who partake in those agreements¹⁷². Some of the bands,

¹⁷² See: Indian and Northern Affairs Canada, “Federal Policy Guide: Aboriginal Self-Government: The Government of Canada’s Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government”, online: INAC <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html> [*Inherent Right Policy*]. See also:

Aboriginal Nations and/or Aboriginal groups who have already negotiated self-government agreements are the Carcross/Tagish, Kwanlin Dun, and Westbank First Nations.¹⁷³ Some of those who have negotiated comprehensive land claim agreements (or modern treaties) are the Council of Yukon Indians, the Sahtu Dene and Métis, and the Nisga'a.¹⁷⁴

Within these comprehensive claims agreements, some of the groups have also been able to negotiate self-government type provisions or agreements. Therefore, the self-government agreements reviewed in this chapter could be from agreements which have originated from either or both of these two processes. It should also be noted that the majority of bands, Aboriginal Nations and Aboriginal groups in Canada do not have self-government agreements. As federal policy favours negotiation tables where the province is a willing partner, there are many Aboriginal groups who are unable to commence tri-lateral self-government negotiations due to provincial opposition or lack of interest.¹⁷⁵ While bi-lateral negotiations may be possible, Canada's stated preference is to have the relevant province or territory at the negotiating table.¹⁷⁶

Indian and Northern Affairs Canada, "Comprehensive Claims (Modern Treaties) in Canada" online: INAC <http://www.ainc-inac.gc.ca/pr/info/trty_e.html> [*Comprehensive Claims Policy*].

¹⁷³ Indian and Northern Affairs Canada, "Agreements", online: INAC <http://www.ainc-inac.gc.ca/pr/agr/index_e.html#Self-GovernmentAgreements> [*INAC Agreements*].

¹⁷⁴ *Comprehensive Claims Policy*, *supra* note 172.

¹⁷⁵ New Brunswick and Prince Edward Island are two examples of provinces that have not come to the table in a tri-lateral treaty negotiation process (federal-provincial-Aboriginal) for the purposes of negotiating self-governments and/or modern treaties agreements with Aboriginal peoples.

¹⁷⁶ *Inherent Right Policy*, *supra* note 72.

(i) RCAP's Aboriginal "Citizen"

The Royal Commission on Aboriginal Peoples (RCAP) commenced in 1991 and issued its final report in 1996, comprising 5 volumes and 4000 pages.¹⁷⁷ It had 440 recommendations calling for everything from official recognition of the Métis to the dismantling and replacement of Indian Affairs.¹⁷⁸ Although there were some criticisms, the *RCAP Report* was generally well-accepted among Aboriginal people, and created an expectation of positive response from the federal government. The federal government's response in 1998 came only after protests by the Assembly of First Nations (AFN) in 1997.¹⁷⁹ The response entitled "Gathering Strength" outlined a four-pronged approach to address RCAP's recommendations, including the following:

Renewing the Partnership: this commitment included an initial Statement of Reconciliation acknowledging historic injustices to Aboriginal peoples and establishment of a \$350-million "healing fund" to address the legacy of abuse in the residential school system. Other elements related to, *inter alia*, the preservation and promotion of Aboriginal languages; increased public understanding of Aboriginal traditions and issues; inclusion of Aboriginal partners in program design,

¹⁷⁷ M. Hurley, J. Wherrett, "The Report of the Royal Commission on Aboriginal Peoples", Library of Parliament, online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/prb9924-e.htm>> [*Overview of RCAP*] at 1. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vols. 1-5 (Ottawa: Minister of Supply and Services Canada, 1996) [*RCAP Report*].

¹⁷⁸ *Ibid.*

¹⁷⁹ Assembly of First Nations, "National Indian Brotherhood: Assembly of First Nations: Resolutions: 'People to People, Nation to Nation, Resolution 1/97'", online: AFN <<http://afn.ca/resolutions/1997/rcap1-97.htm>>. This resolution provided that since the Prime Minister had been invited to discuss RCAP with the AFN Chiefs, and since he declined, that they resolved to take several actions, one of which was to have a national day of action to send a message to the Government.

development and delivery; government willingness to explore how existing systems might be improved; and addressing the needs of urban Aboriginal people more effectively.

Strengthening Aboriginal Governance: initiatives identified under this heading pertained to, among other things, developing the capacity of Aboriginal peoples to negotiate and implement self-government; establishment of additional treaty commissions, as well as Aboriginal governance centres; creation of an independent claims body in co-operation with First Nations; a Métis enumeration program; funding Aboriginal women's organizations to enhance women's participation in self-government processes; possible development of an Aboriginal government recognition instrument.

Developing a New Fiscal Relationship: the government's goals in this area included working toward greater stability, accountability and self-reliance; developing new financial standards with public account and audit systems that conform to accepted accounting principles; assisting First Nations governments to achieve greater independence through development of their own revenue sources; enhanced data collection and information exchange.

Supporting Strong Communities, People and Economics: this objective entailed devoting resources to improving living standards in Aboriginal communities with respect to housing, water and sewer systems; welfare reform to reduce dependence and focus on job creation; a five-year Aboriginal Human Resources Development Strategy; expansion of the Aboriginal Head Start program; education reform; increased focus on health-related needs and programs; improved access to capital; and establishment of urban youth centres.¹⁸⁰

Since that time, the Government's approach (or lack thereof) to the RCAP Report has been the subject of numerous criticisms, including by domestic and international human rights bodies.¹⁸¹ More recently, the Special Rapporteur prepared a report on the situation

¹⁸⁰ *Overview of RCAP, supra* note 177.

¹⁸¹ *Ibid.* "In December 1998, the United Nations Committee on Economic, Social and Cultural Rights "[viewed] with concern the direct connection between Aboriginal

of human rights and fundamental freedoms of indigenous peoples and included references to the *RCAP Report* in many of his recommendations, which were released in 2005.¹⁸² He concluded his *UN Report on Canada* by observing that: "Despite the progress already achieved, Aboriginal people are justifiably concerned about continuing inequalities in the attainment of economic and social rights, as well as the slow pace of effective recognition of their constitutional Aboriginal and treaty rights, and the concomitant redistribution of lands and resources that will be required to bring about sustainable economies and socio-political development."¹⁸³ He also made recommendations related to housing and the increasing of the land and resource base of Aboriginal peoples which also referred to the recommendations of the *RCAP Report*.¹⁸⁴ Despite the fact that the government has been slow to adopt the recommendations in the *RCAP Report*, the report itself provides a very

economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by RCAP," and expressed its "[great] concern that the recommendations of RCAP have not yet been implemented, in spite of the urgency of the situation." In April 1999, the United Nations Human Rights Committee also expressed concern that Canada had "not yet implemented the recommendations of the [RCAP]," and recommended "that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation." In its 1999 Annual Report, the Canadian Human Rights Commission "reiterate[d] the view expressed in previous annual reports that the government's response to the 1996 report of the [RCAP] has been slow. We would not wish to minimize the significance of steps such as the ... \$350 million Healing Fund, nor deny the good intentions underlying *Gathering Strength* ... Nonetheless, much more attention still needs to be given to pressing issues...."

¹⁸² Report of Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people – Mission to Canada, CHR 61st, UN ESC, 2005, UN Doc, E/CN.4/2005/88/ADD.3, online: United Nations <<http://daccessdds.un.org/doc/UNDOC/GEN/G05/100/26/PDF/G0510026.pdf?OpenElement>> [*UN Report on Canada*].

¹⁸³ *Ibid.* at 21. (para. 85).

¹⁸⁴ *Ibid.* at 23, 24. (paras.105, 107).

detailed argument for the protection of Aboriginal Nations that may impact on how future self-government agreements are structured.

With regards to the negotiation/renegotiation of treaties, land claims and self-government agreements, RCAP started on the premise that the “authentic renewal of treaty relationships will require realignment not only on the part of the Crown but also on the part of Aboriginal and treaty nations.”¹⁸⁵ It was also the contention of the authors of the *RCAP Report* that the relationship between Aboriginal peoples and the Crown was based on a Nation to Nation relationship and that evidence of this could even be seen in such historical documents as the *Royal Proclamation of 1763* which referred to “Nations or Tribes of Indians”.¹⁸⁶ British and French relations with Aboriginal peoples were conducted on the basis: “of the assumption that their Aboriginal counterparts possessed the political, territorial and economic characteristics of nationhood.”¹⁸⁷ They went on to define an Aboriginal or treaty nation as “an indigenous society, possessing its own political organization, economy, culture, language and territory”.¹⁸⁸ The *RCAP Report* also notes that the problem for Aboriginal Nations came largely with the *Indian Act* in 1876 which divided Aboriginal nations into bands and imposed a certain uniform administrative and political structure upon them.¹⁸⁹ This imposition was a deliberate

¹⁸⁵ Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship: Part 1, (Ottawa: Minister of Supply and Services, 1996) [*RCAP, vol. 2, part 1*] at 87.

¹⁸⁶ *Ibid.* Royal Proclamation, 1763, R.S.C., 1985, App. II, No.1 [*Royal Proclamation of 1763*].

¹⁸⁷ *Ibid.* at 88.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

attempt to break up Aboriginal Nations and fulfill their goal of assimilation of Aboriginal individuals into the larger society.¹⁹⁰

Thus, RCAP recommended that Canada's future development "must be guided by the fact that there are three orders of government in this country: Aboriginal, provincial and federal" and this involves a vision of self-government that (1) "involves greater authority over a traditional territory and its inhabitants, whether this territory be exclusive to a particular Aboriginal people or shared with others" and (2) "greater control over matters that affect the particular Aboriginal nation in question: its culture, identity and collective well-being".¹⁹¹ With regard to self-government, RCAP explains that most self-government agreements would involve both territorial and communal jurisdiction.¹⁹² Territorial jurisdiction would involve jurisdiction over a specific territory and its inhabitants and the jurisdiction over the members and residents would be mandatory.¹⁹³ Communal jurisdiction would be exercised over the membership of the Aboriginal group, and would depend on the voluntary association of members with the group and the voluntary submission of these members to the group's jurisdiction.¹⁹⁴ RCAP also cautioned that with the right to exercise self-government came inherent limitations.

The entities entitled to exercise self-government could take various forms from single-entity approaches by one Aboriginal Nation to multi-layered approaches that might be taken by traditional confederacies such as the Haudenosaunee or Wabanaki

¹⁹⁰ *Ibid.* at 89.

¹⁹¹ *Ibid.* at 106, 140.

¹⁹² *Ibid.* at 140.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.* at 140-141.

confederacies.¹⁹⁵ In their view, however, the right of self-government vests in Aboriginal Nations and not in “small local communities” (i.e. bands).¹⁹⁶ In this, they refer to the 60-80 traditional Aboriginal Nations in Canada as opposed to the 634 *Indian Act* bands and their local communities.¹⁹⁷ These Aboriginal Nations are described as political and cultural groups and not as racial groups:

Aboriginal peoples are not racial groups; they are organic political and cultural entities. Although contemporary Aboriginal peoples stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestries. As organic political entities, they have the capacity to evolve over time and change in their internal composition.¹⁹⁸

While RCAP agrees that Aboriginal Nations have the right to determine who their citizens are, and that this right is protected under section 35 of the *Constitution Act, 1982*, they also believe that this right is subject to two very important limitations:

First, it cannot be exercised in a manner that is discriminatory towards women or men. Second, it cannot specify a minimum “blood quantum” as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions, and ties to the land, rather than in their race.¹⁹⁹

¹⁹⁵ *Ibid.* at 160-163.

¹⁹⁶ *Ibid.* at 166. “By Aboriginal nation, we mean sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories.” At page 236, RCAP further explains: “This nation-based approach does not, of course, rule out approaches that encompass two or several Aboriginal nations.”

¹⁹⁷ *Ibid.* “There are 60-80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities.”

¹⁹⁸ *Ibid.* at 166.

¹⁹⁹ *Ibid.* at 168. At page 237, RCAP explains that they believe that the Aboriginal nations have the right to determine who their citizens are as both an Aboriginal and a treaty right,

Therefore, blood quantum/descent was specifically excluded by RCAP as a basis for determining the identities of Aboriginal peoples. Since RCAP recommended that self-government be exercised by Aboriginal Nations, and that many Aboriginal Nations would have to reorganise themselves after so many years of being divided into bands and smaller communities, they felt that the reconstitution of Aboriginal Nations ought to be done fairly. They felt so strongly about this in fact, that they argued that inclusive membership codes ought to be a pre-requisite to the exercise of the right of self-government by any Aboriginal Nation:

This process of reconstitution must be an open and inclusive one that does not shut out people by reference to overly restrictive or irrelevant criteria. An Aboriginal group that restricts its membership on an unprincipled or arbitrary basis cannot qualify for the right of self-determination.²⁰⁰

Large-scale membership disputes are inevitable given the significant number of non-status Indians who are unfairly excluded from their Aboriginal Nation by flawed membership rules. Significant fairness issues at the local community level (bands) could seriously affect the right of Aboriginal Nations to exercise self-government according to RCAP.²⁰¹

both of which are protected under section 35, of the *Constitution Act, 1982*. I dealt with the right of Aboriginal Nations to determine citizenship earlier in this thesis, but the matter of treaty rights is not reviewed for lack of space and time.

²⁰⁰ *Ibid.* at 179.

²⁰¹ *Ibid.* at 183. “Finally, a membership dispute concerns whether a certain Aboriginal nation is properly configured to exercise the right of self-determination or whether its status is impaired by serious flaws in its membership rules and practices. A First Nation is composed of a number of local communities, whose membership is governed by rules laid down in the Indian Act. A large group of non-status individuals living in the vicinity might argue that they form part of the larger national unit even if they do not qualify

This does not change the fact that according to RCAP, one of the core areas of jurisdiction of Aboriginal nations of self-government (which is protected by section 35 of the *Constitution Act, 1982*), is anything that can be considered “of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity”.²⁰² This specifically includes the right of each Aboriginal nation to determine their own criteria for residency in their territory, elections and referenda, and their own citizenship/membership, for example.²⁰³ The federal *Inherent Right Policy* also includes membership, elections and residency rights as items for negotiation in self-government agreements.²⁰⁴ Citizenship in Aboriginal Nations is an important aspect of self-government rights under section 35 of the *Constitution Act, 1982*, and RCAP contends that any rules laid down by Aboriginal nations with regard to citizenship “must satisfy certain basic constitutional standards flowing from the terms of section 35 itself.” RCAP emphasised their view that Aboriginal nations must determine their citizenship codes in an inclusive manner:

The purpose of these standards is to prevent an Aboriginal group from unfairly excluding anyone from participating in the enjoyment of collective Aboriginal and treaty rights guaranteed by section 35(1), including the right of self-government. In other words, the guarantee of Aboriginal and treaty rights in section 35 could be frustrated if a nation were free to deny citizenship to individuals on an arbitrary basis and

under local membership rules. They might claim that they have been unfairly excluded from the group exercising the right of self-determination. Since an Aboriginal nation must be constituted in an inclusive manner to qualify for the right of self-determination, a large-scale membership dispute of this kind could be very significant.”

²⁰² *Ibid.* at 215.

²⁰³ *Ibid.* at 218.

²⁰⁴ *Inherent Right Policy*, *supra* note 172. See also: *RCAP, vol. 2, part 1, supra* note 185 at 221.

thus prevent them from sharing in the benefit of the collective rights recognized in section 35.²⁰⁵

The first of these limitations is found in section 35(4) which guarantees Aboriginal and treaty rights equally to male and female persons. Therefore, citizenship codes could not discriminate on this basis, as it would offend section 35, the very section protecting their collective right of self-government.

RCAP explained that there is a second limitation to the criteria that can be used to make up citizenship codes in Aboriginal nations. This is that Aboriginal Nations cannot be viewed as racial groups, but should be seen as political and cultural groups.²⁰⁶ While the issue of blood quantum was a controversial one in some Aboriginal communities, RCAP was, nonetheless, of the view that a minimum blood quantum had no place in section 35 self-governing Aboriginal Nations.²⁰⁷ It felt that the section limited what Aboriginal groups could enact in their citizenship codes:

It prevents an Aboriginal group from specifying that a certain degree of Aboriginal blood (what is often called blood quantum) is a general prerequisite for citizenship. On this point, it is important to distinguish between rules that specify ancestry as one among several ways of establishing eligibility for membership and rules that specify ancestry as a general prerequisite. By general prerequisite, we mean a requirement that applies in all cases or that only allows for very limited exceptions. For example, a citizenship code that requires that a candidate must be at least “half-blood”, except in cases of marriage or adoption, would lay down a general pre-requisite and as such, in our view, be unconstitutional. By contrast, it would be acceptable for a code to specify, for example, that someone with at least one parent belonging to the group qualifies for citizenship, so long as this provision represents only one among several general ways for an individual to

²⁰⁵ *RCAP, vol.2, part 1, supra* note 185 at 237.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.* at 238.

qualify for membership, including, for example, meeting such criteria as birth in the community, long-time residency, group acceptance and so on.²⁰⁸

Therefore, RCAP further recommended that the *Charter* and international norms and standards apply to these codes, in addition to the requirement that they be consistent with section 35 of the *Constitution Act, 1982*, generally, and specifically with regards to section 35(4).²⁰⁹ In addition to being citizens of their Aboriginal nations, they would also be Canadian citizens and for some, they may also be members of sub-groups within their Nations, such as clans.²¹⁰ In the end, RCAP recommended that persons could be considered eligible for citizenship in an Aboriginal nation on the basis of the following: “community acceptance, self-identification, parentage or ancestry, birthplace, adoption, marriage to a citizen, cultural or linguistic affiliation, and residence”.²¹¹ What RCAP has recommended and what has actually occurred within self-government agreements can be very different. The next part of this chapter reviews the citizenship codes of self-government agreements to see how they compare to RCAP’s recommendations and band membership codes.

(ii) Self-Government “Enrollees”

The Council for Yukon Indians (CYI), the Government of Canada and the Government of the Yukon signed an Umbrella Final Agreement on May 29, 1993.²¹² This

²⁰⁸ *Ibid.* at 237-238.

²⁰⁹ *Ibid.* at 240.

²¹⁰ *Ibid.* at 251-252.

²¹¹ *Ibid.* at 251.

²¹² Indian and Northern Affairs Canada, “Umbrella Final Agreement Between The Government of Canada, The Council for Yukon Indians And The Government Of The

was a major comprehensive land claim agreement (now referred to as modern treaty) which pre-dated both RCAP and the federal government's *Inherent Right Policy* on self-government.²¹³ The *Yukon Agreement* provided lands, financial compensation, training, provisions for sharing management of lands, resources and royalties, economic development measures and provisions for self-government for the 14 member First Nations of the Council of the Yukon Indians.²¹⁴ The Teslin Tlingit Council, Vuntut Gwitchin, Champagne, and Aishihik First Nations were the four First Nations to sign their self-government agreements pursuant to the *Yukon Agreement*.²¹⁵ The CYI also represents the Carcross/Tagish, Ehdiiat Gwich'in, Nacho Nyak Dun, Gwichya Gwich'in, Kluane, Little Salmon Carmacks, Nihtat Gwich'in, Selkirk, Ta'an Kwach'an, Tetlit Gwich'in, Tr'ondek Hwech'in, and White River First Nations.²¹⁶ Agreements have now been signed with eleven of the CYI's member First Nations.²¹⁷ While some aspects of the agreements can vary slightly to suit community needs, the main components of the *Yukon Agreement* are seen in each of the individual community agreements, especially for matters like "Eligibility and Enrolment".

Yukon", online: INAC <http://www.ainc-inac.gc.ca/pr/agr/umb/index_e.html> [*Yukon Agreement*]. See also: *INAC Agreements*, *supra* note 173.

²¹³ See: *RCAP*, vol. 1, *supra* note 125. RCAP started in 1991 but was not published until 1996. See also: *Inherent Right Policy*, *supra* note 154. The federal government's *Inherent Right Policy* was released in 1996.

²¹⁴ Indian and Northern Affairs Canada, "Council for Yukon Indians Sign Umbrella Final Agreement / Four Yukon First Nations Sign Land Claim and Self-Government Agreements", online: INAC <http://www.ainc-inac.gc.ca/pr/agr/ykn/1-9325_e.html> [*Yukon Agreement Highlights*].

²¹⁵ *Ibid.*

²¹⁶ Council of Yukon First Nations, "Our Nations", online: Council of Yukon First Nations: <<http://www.cyfn.ca/ournations>> [*CYFN online*].

²¹⁷ *Yukon Agreement Highlights*, *supra* note 214. See also: *CYFN online*, *supra* note 216.

Each of the sections related to Eligibility read identically in each of the Agreements except for minor additional wording specific to each community. For example, Chapter 3 of the *Yukon Agreement* provides the basic “Eligibility and Enrolment” criteria that must be found in the individual First Nation agreements. Section 3.2.0 provides the following as its criteria:

3.2.0 Eligibility Criteria

3.2.1 Eligibility for enrollment under a Yukon First Nation Final Agreement shall be determined by the process set out in this chapter.

3.2.2 A Person is eligible for enrolment as a Yukon Indian Person under one of the Yukon First Nation Final Agreements if that Person is a Canadian citizen, and:

3.2.2.1 establishes that he is of 25% or more Indian ancestry and was Ordinarily Resident in the Yukon between January 1, 1800 and January 1, 1940;

3.2.2.2 establishes that he is a Descendant of a Person living or deceased eligible under 3.2.2.1;

3.2.2.3 establishes that he is an Adopted Child of a Person living or deceased eligible under 3.2.2.1 or 3.2.2.2; or

3.2.2.4 upon application within two years of the Effective Date of a Yukon First Nation Final Agreement to the Enrollment Commission by that Yukon First Nation, is determined by the Enrollment Commission in its discretion, and upon consideration of all relevant circumstances, to have a sufficient affiliation with that Yukon First Nation so as to justify enrolment.

3.2.3 Notwithstanding the requirement for Canadian citizenship in 3.2.2, a Person who is not a Canadian citizen is eligible for enrolment as a Yukon Indian person under one of the Yukon First Nation Final Agreements if that Person meets one of the criteria set out in 3.2.2.1 to 3.2.2.4.

3.2.4 Enrollment of a Person under 3.2.3 shall not confer on that Person any rights or benefits under the Indian Act, R.S. 1985, c.I-5, rights of entry into Canada or of Canadian citizenship.

3.2.5 Any Person eligible for enrolment as a Yukon Indian Person pursuant to 3.2.2 or 3.2.3 is entitled to be enrolled under one, and no more than one, Yukon First Nation Final Agreement.

3.2.6 Where a Person applying for enrolment is eligible for enrolment under more than one Yukon First Nation Final Agreement, the Enrollment Commission shall take into account the wishes of that Person and any affected Yukon First Nation in deciding under which Yukon First Nation Final Agreement that Person will be enrolled.

3.2.7 Membership in a Yukon Indian Band under the Indian Act, R.S. 1985, c.I-5 does not necessarily result in eligibility for enrolment under a Yukon First Nation Final Agreement.

3.2.8 A Minor may apply on his own behalf to an Enrollment Committee for enrolment under a Yukon First Nation Final Agreement.²¹⁸

The *Yukon Agreement* defines an “adopted child” as including any natural person who has been adopted according to the laws of Canada or Aboriginal custom. It also defines a “descendant” as including anyone who directly descends by a maternal or paternal line, notwithstanding any intervening adoptions. A minimum blood quantum of 25% (described as “Indian ancestry”) is the base criteria for enrolment. Therefore, the basic criteria for becoming a citizen in the CYI communities, is through a minimum blood quantum.

Although there are alternative ways of becoming an enrollee, some of those alternatives are also based on blood quantum/descent. For example, one can become an

²¹⁸ *Yukon Agreement*, *supra* note 212 at s.3.2.0.

enrollee by being a descendant of someone with minimum blood quantum, or being an adopted child of someone with minimum blood quantum (adoptions not requiring blood descent). The focus appears to remain on the blood quantum of enrollees. The only exception that does not have any blood quantum connection at all is someone who has a “sufficient affiliation” with the community and can apply to be enrolled. Presumably this may include non-Aboriginal spouses who have lived in the community for a very long time, although it is not known how these rules are applied in practice. All eleven First Nations that have negotiated final agreements have the same provisions with respect to “Eligibility and Enrolment”.²¹⁹ Given that most of these codes were enacted after the

²¹⁹ Indian and Northern Affairs Canada, *The Carcross/Tagish First Nation Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/ccr/ctf_e.pdf>. This agreement was signed on October 22, 2005. See also: Indian and Northern Affairs Canada, *Kwanlin Dun First Nation Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/ykn/kdfn/kdfn1_e.pdf>. This agreement was signed on Feb.19, 2005. See also: Indian and Northern Affairs Canada, *Kluane First Nation Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/klu/fia1_e.pdf>. This agreement was signed Oct.18, 2003. See also: Indian and Northern Affairs Canada, *Ta'an Kwach'an Council Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/ykn/taan/cha3_e.html>. This agreement was signed January 13, 2002. See also: Indian and Northern Affairs Canada, *Little Salmon / Carmacks First Nation Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/slmon/lsfa_e.pdf>. This agreement was signed July 21, 1997. See also: Indian and Northern Affairs Canada, *Selkirk First Nation Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/selkirk/sfa1_e.pdf>. This agreement was signed on July 21, 1997. See also: Indian and Northern Affairs Canada, *Vuntut Gwinchin First Nation Self-Government Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/gwich/Vuntut/gwivun_e.pdf>. This agreement was signed in 1993. See also: Indian and Northern Affairs Canada, *Teslin Tlingit Council Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/ykn/ttcf_a_e.pdf>. This agreement was signed in 1993. See also: Indian and Northern Affairs Canada, *Tr'ondek Hwech'in Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/trondek/thfa_e.pdf>. This agreement was signed on July 16, 1998. See also: Indian and Northern Affairs Canada,

RCAP Report was released, one can presume that they had the benefit of RCAP's insight into citizenship issues. However, it is easy to see Canada's influence in these codes through the negotiation of a 25% minimum blood quantum. Recall in Chapter 5 the discussion related to Canada's submissions in *McIvor* where it argued that two generations of out-parenting between Indians and non-Indians should result in the loss of status for those children (i.e., the second generation cut-off rule, also known as the $\frac{1}{4}$ blood rule). Similarly, for the majority of bands who determine membership through the *Indian Act* or through *Act* like rules, band membership will be lost through two generations of out-parenting. Therefore, citizenship codes, such as those adopted by the CYI communities, simply carry on the second generation cut-off rule, as opposed to providing alternatives for their communities. It appears that whether by status, membership or citizenship, Canada does its best to enforce a blood quantum/descent rule.

The Westbank First Nation is located in the Okanagan Valley of British Columbia. They are one of seven communities that belong to the Okanagan Nation (syilx) who are part of the Salish.²²⁰ The Westbank First Nation has a self-government agreement with the Government of Canada concluded in 1993.²²¹ This bi-lateral

Champagne and Aishihik First Nations Final Agreement, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/ykn/chama1_e.pdf>. This agreement was signed on June 19, 1992. See also: Indian and Northern Affairs Canada, *First Nation of Nacho Nyak Dun Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/nacho/nnd_e.html>. This agreement was signed in 1993.

²²⁰ Westbank First Nation, "Community Profile", online: WFN <<http://www.wfn.ca/profile.asp>> [*Westbank*]. The Okanagan Nation is also referred to as "syilx".

²²¹ Indian and Northern Affairs Canada, *Westbank First Nation Self-Government Agreement*, online: INAC <http://www.ainc-inac.gc.ca/nr/prs/s-d2003/wfn07_e.html#part7> [*Westbank Agreement*].

agreement was negotiated under the federal *Inherent Right Policy* and did not include the province of British Columbia as a party.²²² Since then, the Westbank First Nation has embarked on a tri-lateral treaty negotiation with the Government of Canada and the Province of British Columbia and, at the writing of this chapter, was in stage four of a six-stage treaty negotiation process.²²³ Section 70 of the *Westbank Agreement* provides that the Nation has jurisdiction in relation to their own membership.²²⁴ Interestingly, the agreement also provides that the Westbank First Nation will not be precluded from: “using its best efforts to establish a process whereby all Members who are not registered as Indians shall be entitled to be registered as Indians under the *Indian Act*”. It is unusual but encouraging to see this kind of advocacy provision included in a self-government agreement, which may benefit non-status Indians in the future.

Section 72 of the agreement refers to the constitution of the Westbank First Nation that would deal with membership rules for their people.²²⁵ The “Westbank First Nation Constitution” was last amended in July 1997, and includes provisions specific to the initial membership list and how new members would be added to their membership

²²² Ministry of Aboriginal Relations and Reconciliation, “Westbank First Nation”, online: Ministry of Aboriginal Relations and Reconciliation <<http://www.gov.bc.ca/arr/firstnation/westbank/default.html>>. [*Westbank Overview*].

²²³ *Ibid.*

²²⁴ *Westbank Agreement*, *supra* note 221 at Part VII, s.70. This section provides: “Westbank First Nation has jurisdiction in relation to membership of Westbank First Nation.”

²²⁵ *Ibid.* at Part VII, s. 72. This section provides: “The membership rules in the Constitution and Westbank Laws in relation to membership shall not deprive any person who had the right to have his or her name entered in the Band List, as defined in the Indian Act, for Westbank First Nation, immediately prior to the Effective Date, of the right to be a Member by reason only of a situation that existed or an action that was taken before the Effective Date.”

rolls.²²⁶ Specifically, section 7.3 provides that: “On the date this Constitution comes into force, the names on the band list maintained by INAC for Westbank shall constitute the names on the Membership Roll”.²²⁷ Therefore, the charter (or initial/starter) group for Westbank First Nation are all those who had previously qualified for band membership under the *Indian Act*.²²⁸ Since their band membership list was maintained by INAC, it means that they did not have their own membership code and, therefore, relied on the provisions of the *Indian Act* which determine membership through status.

8. Persons Entitled to Membership

8.1 A person is entitled to be a Member and be included on the Membership Roll if he or she was registered as an Indian under the Indian Act, and:

- (a) at least one of his or her parents is a Member or is entitled to be a Member; or
- (b) his or her transfer to become a Member has been approved under section 13 of this Part.²²⁹

Therefore, the initial charter group of Westbank First Nation is based on the *Indian Act* register (those entitled to status under the *Indian Act*) and incorporates the same discrimination in the *Act* into their new code. This attachment to registration under the *Indian Act* as a pre-requisite for membership under Westbank’s self-government

²²⁶ Westbank First Nation, *Westbank First Nation Constitution: Consolidated Version: Including amendments approved by Referendum, July 19, 2007*, online: WFN <http://www.wfn.ca/pdf/070719wfn_constitution_revision_final.pdf> [*Westbank Constitution*].

²²⁷ *Ibid.* at s.7.3.

²²⁸ *Population Implications*, *supra* note 52 at 92, 120. Westbank used the *Indian Act* to determine their membership (i.e. they did not have their own code) which made it most like the Golden Lake band, which forecast sharp declines in both registration and band membership over the forecast period of 1991 to 2091.

²²⁹ *Westbank Constitution*, *supra* note 226 at s.8.

agreement appears to be at odds with their stated desire to use their best efforts to register non-status Indians as members. Perhaps this was a non-negotiable item on Canada's part?

The Nisga'a, on the other hand, who are also from British Columbia, adopted a more traditional form of eligibility criteria. The Nisga'a Final Agreement was signed by the Nisga'a on April 27th, 1999.²³⁰ Their agreement provides several important clarifications with regard to the status of certain laws: (1) that the *Constitution Act, 1982* is not altered by virtue of their agreement; (2) that they are no longer a band under the *Indian Act*, nor are their lands considered reserves (for the purposes of the *Indian Act* or section 91(24) of the *Constitution Act, 1867*); and (3) that the *Charter* applies to the Nisga'a Lisims Government in all matters over which it has jurisdiction.²³¹ One of those areas over which it has jurisdiction is the administration of the "Eligibility and Enrolment Criteria" for their agreement. Chapter 20 of the Nisga'a Agreement provides for the Eligibility Criteria:

²³⁰ Indian and Northern Affairs Canada, *Nisga'a Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/nsga/nis/nisdex12_e.pdf> [*Nisga'a Agreement*].

²³¹ *Ibid.* at s.8-10. Section 8 provides: "This Agreement does not alter the Constitution of Canada, including: (a) the distribution of powers between Canada and British Columbia; (b) the identity of the Nisga'a Nation as an aboriginal people of Canada within the meaning of the *Constitution Act, 1982*; and (c) sections 25 and 35 of the *Constitution Act, 1982*." Section 9 provides: "The *Canadian Charter of Rights and Freedoms* applies to the Nisga'a Government in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government as set out in this Agreement." Section 10 provides: "There are no 'lands reserved for the Indians' within the meaning of the *Constitution Act, 1867* for the Nisga'a Nation, and there are no 'reserves' as defined in the *Indian Act* for the use and benefit of a Nisga'a Village, or an Indian band referred to in the *Indian Act* Transition Chapter, and, for greater certainty, Nisga'a Lands and Nisga'a Fee Simple Lands are not 'lands reserved for the Indians' within the meaning of the *Constitution Act, 1867*, and are not 'reserves' as defined in the *Indian Act*."

Eligibility Criteria

1. An individual is eligible to be enrolled under this Agreement if that individual is:

(a) of Nisga'a ancestry and their mother was born into one of the Nisga'a tribes;

(b) a descendant of an individual described in subparagraphs 1(a) or 1(c);

(c) an adopted child of an individual described in subparagraphs 1(a) or 1(b); or

(d) an aboriginal individual who is married to someone described in subparagraphs 1(a), (b), or (c) and has been adopted by one of the four Nisga'a tribes in accordance with Ayuukhl Nisga'a, that is, the individual has been accepted by a Nisga'a tribe, as a member of that tribe, in the presence of witnesses from the other Nisga'a tribes at a settlement or stone moving feast.²³²

There is no reference to the *Indian Act* in terms of enrolment criteria for the *Nisga'a Agreement*. Their primary focus seems to be ancestry as traced through the mother's side of the family. The provision which allows the descendants of those who have Nisga'a ancestry and a mother who was born into a Nisga'a tribe may save some applicants, but it is not clear from the whole section whether it includes all descendants from successive generations as eligible enrollees, or whether they are speaking only to the first generation descendant of the person with Nisga'a ancestry and a mother who belonged to a Nisga'a tribe. Given that the Nisga'a have specifically incorporated the *Charter* into their

²³² *Nisga'a Agreement*, *supra* note 230 at Chapter 20, s.1. Section 2 further clarifies that: "Enrolment under this Agreement does not: (a) confer or deny rights of entry into Canada, Canadian citizenship, the right to be registered as an Indian under the *Indian Act*, or any of the rights and benefits under the Indian Act; or (b) except as set out in this Agreement or in any federal or provincial law, impose any obligation on Canada or British Columbia to provide rights or benefits."

agreement, it is quite possible that the distinctions made between members based on sex would not pass a s.15 equality test. Although the Nisga'a might argue that their eligibility criteria are based on tradition and, as such, are protected under s.25 of the *Charter*, it is more likely that s.28 of the *Charter* would apply to ensure equality between the sexes. Even though their agreement is protected under s.35(3) as a modern treaty or land claim, s.35(4) would also ensure that the rights thereunder are protected for male and female Aboriginal people equally.²³³ Further, given today's rates of out-marriage and grim population forecasts for most bands, it would seem that an enrolment criteria based on maternal descent would exclude a large number of people based only on the gender of their ancestor. Even if this reflects their traditional practices and may have worked well for many generations pre-contact, the modern reality of children from mixed marriages means that traditional practices should evolve to fit the modern circumstances of their people. If they do not, then the very existence of their community is at risk.

Other final agreements involving communities from the same province or territory often have eligibility criteria which tend to be similar to one another in terms of format, clauses and/or criteria. The CYI is an example of an umbrella agreement which requires that the individual communities include certain clauses from the umbrella agreement in their individual agreements. The Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene and Métis Comprehensive Land Claim Agreement involve communities

²³³ *Constitution Act, 1982, supra* note 124 at s.35(3),(4). Section 35(3) provides: "For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired." Section 35(4) provides: "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons." See Chapter 4 for a more detailed discussion about the limits on Aboriginal rights protected under s.35.

from the Northwest Territories.²³⁴ Both groups have agreements which provide that a person will be entitled to be enrolled as a participant in the land claim if that person is a Canadian citizen and a Gwich'in (for the former) or a Sahtu Dene or Métis (for the latter).²³⁵ In both cases, if that person is not of the specific Aboriginal origin of that community, they can still be enrolled if they are a Canadian citizen of Aboriginal ancestry resident in the settlement area and are "accepted" by the specific community.²³⁶ "Acceptance" is defined as meaning that the person is "sponsored by a person eligible to be enrolled" and "was approved by a process" to be determined by the relevant community.²³⁷ These agreements do not further specify what counts as Aboriginal, or how far back or forward one can go to establish descent from the specified group, or what level of ancestry is acceptable for Aboriginal peoples outside of the specific group. These provisions are similar in nature to the band membership codes reviewed earlier that allow for non-band descendants to be considered as band members if they are proven to be of First Nation ancestry, or have membership in another band. On one hand, communities like the Sahtu focus on their community's blood lines to establish citizenship; yet, they

²³⁴ Sahtu, "Sahtu Portal: Sahtu Dene and Métis Comprehensive Land Claims", online: Sahtu <<http://www.sahtu.ca/index.html>>. See also: Gwich'in, Gwich'in Tribal Council, *Gwich'in Comprehensive Land Claim Agreement*, online: Gwich'in <<http://www.gwichin.nt.ca/LCA>>.

²³⁵ Indian and Northern Affairs Canada, "Sahtu Dene and Métis Comprehensive Land Claim Agreement" vol.1 (6 September 1993), online: INAC <http://www.ainc-inac.gc.ca/pr/agr/sahtu/sahmet_e.html> [*Sahtu Dene Agreement*] at s.4. See also: Indian and Northern Affairs Canada, *Gwich'in Comprehensive Land Claim Agreement*, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/agr/gwich/gwic/index_e.html> [*Gwich'in Agreement*] at s.4.

²³⁶ *Sahtu Dene Agreement*, *supra* note 235 at s.4.2.2(a), *Gwich'in Agreement*, *supra* note 235 at s.4.2.2(a).

²³⁷ *Ibid.* at s.4.2.2(b) (for both agreements).

also allow non-Sahtu Aboriginal people to become citizens. So the distinction appears to be between Aboriginal and non-Aboriginal blood lines, similar to that found in some band membership codes. These communities are willing to accommodate mixed parenting as between different Aboriginal Nations, but not those with non-Aboriginal people. Those who have been excluded on this basis may feel that they have been discriminated against on the basis of blood quantum/descent and/or race.²³⁸

Other agreements have different criteria based on their own specific communal needs. Some of the eligibility criteria used in other agreements include the following: a person who was on the voters list to approve the agreement or is of ¼ Inuvialuit blood²³⁹; a person who was a member of one of the eight Cree Indian bands of Quebec or is a person of Cree ancestry ordinarily resident in the Territory²⁴⁰; a person who was a member of the Naskapi band or a person of Naskapi ancestry ordinarily resident in the Territory²⁴¹; and a person of Inuit ancestry and is resident in or has a connection to the

²³⁸ See Chapter 5 for a more detailed discussion about the kinds of discrimination claims that have been raised to date in relation to status and band membership. In Chapter 5, I specifically argue that distinctions based on blood quantum or proximity and remoteness of descent with respect to status and membership amount to discrimination as per s.15 of the *Charter*.

²³⁹ Indian and Northern Affairs Canada, *The Western Arctic Claim: The Inuvialuit Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/inu/wesar_e.pdf> [*Western Arctic Claim*] at s.1 (of the Amending Agreement dated May 19, 1987).

²⁴⁰ Indian and Northern Affairs Canada, *James Bay and Northern Quebec Agreement and Complementary Agreements: 1998 Edition*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/que/jbnq_e.PDF> [*James Bay Agreement*] at s.3.

²⁴¹ Indian and Northern Affairs Canada, *Northeastern Quebec Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/que/neqa_e.PDF> [*Quebec Agreement*] at s.3.

Settlement Area or is a person with at least ¼ Inuit ancestry.²⁴² What is important to note in these agreements is the focus on the charter group being comprised of those people who were originally entitled to be band members of the *Indian Act* band prior to obtaining land claim or self-government status. It also gives band members a type of preferential eligibility, in that they are automatic members or enrollees, as opposed to those who must go through a community “acceptance” process. It also means that those who were wrongfully excluded from band membership (and/or status) previously, are disadvantaged in the self-government and land claim process as they are unlikely to have been on the voters list and, therefore, not in the charter group or in the group of automatic enrollees. Depending on their “blood” levels or status as non-registered Indians (non-status Indians), they might not become enrolled at all.

If that is the case and more flexible provisions are not present, then I have to seriously question whether the majority of the self-government agreements (including modern treaties) offer something better for Aboriginal peoples in comparison to Indian status and band membership, or whether self-government agreements serve to maintain and promote the “status” quo, i.e., status under the *Indian Act* determines individual identity, communal identity and access to Aboriginal and treaty rights. To date, serious analysis of this issue has been largely overshadowed by all the publicity related to land claims agreements, self-government and modern treaty agreements, large natural resources partnerships and economic development agreements. It cannot be understated how important these types of agreements are for Aboriginal peoples as they redistribute

²⁴² Indian and Northern Affairs Canada, *Labrador Inuit Land Claims Agreement*, online: INAC <http://www.ainc-inac.gc.ca/pr/agr/labi/labi_e.pdf> [*Labrador Inuit Agreement*] at s.3.

land, natural resources and revenues back to the Aboriginal communities from which they were originally taken.

However, my point is that the intangible benefits of communal identity and culture, as well as the tangible benefits listed above, are equally important to non-status Indians and others who are excluded from the consultation, negotiation and agreement process of self-government agreements and modern treaties. By relying on the *Indian Act* or blood quantum/descent as a means of determining self-government citizens or enrollees, a vicious cycle is created whereby those who want in are excluded from the decision-making process of who gets in and are, therefore, excluded.²⁴³ Self-government

²⁴³ Indian and Northern Affairs Canada, *Tsawwassen First Nation Final Agreement*, online: INAC <http://www.ainc-inac.gc.ca/bc/treapro/agrmts/tfn/fa/tfnfa_e.pdf> [*Tsawwassen Agreement*] at chapter 21. A recent agreement, like the one signed with the Tsawwassen First Nation in British Columbia pursuant to the British Columbia Treaty Commission negotiation process, has ancestry and descent provisions that do not offer alternatives for membership/citizenship for Tsawwassen people. At ss.2,3, the agreement provides that to be eligible one must either have been a band member, be of Tsawwassen ancestry or a descendant of someone with Tsawwassen ancestry. There are no provisions that allow for someone to have married in, been born in the community, have a cultural or linguistic affiliation to the community, or have resided there for a very long time. Therefore, the only way to become enrolled pursuant to this agreement is by ancestry or status under the *Indian Act*. This is to be contrasted with: British Columbia, *Maa-Nulth First Nations Final Agreement*, online: BC <http://www.leg.bc.ca/38th3rd/3rd_read/gov45/gov45-3-sch-26.htm#ch26?toc=1> [*Maa-Nulth Agreement*] at chapter 26. The Maa-nulth First Nations Final Agreement has similar provisions but includes additional criteria. Their eligibility requirements allow someone to be accepted for enrolment as a member in accordance with custom and has demonstrated an attachment to the community. The relevant portions of section 26 provides as follows: “26.1.1 As regards a Maa-nulth First Nation, an individual is eligible for enrolment under this Agreement if that individual: (a) is of that Maa-nulth First Nation ancestry; (b) was adopted under laws recognized in Canada or in accordance with the custom of that Maa-nulth First Nation by an individual of that applicable Maa-nulth First Nation who is eligible for enrolment under a., b. or c.; (c) is a descendant of an

agreements were meant to be more than just a continuation of the status quo; it was meant to honour the inherent right of self-government for all Aboriginal citizens and not only those deemed to be Aboriginal from Canada's self-interested perspective. It therefore looks as though self-government agreements have a long way to go to make good on the claim that they offer the solution to status and membership issues that will continue to impact our future generations for many years.

(c) Rethinking Aboriginal Identity and Belonging

Who are the people who identify as Aboriginal and why is there such a difference between the people that claim to be Indians, band members, treaty beneficiaries, land claims enrollees and/or self-government citizens? It would seem that one's identity as an Aboriginal person, such as a Maliseet, Cree, Mohawk or Mi'kmaq, would also include a corresponding legal identity as an Indian, a communal identity as a band member or citizen of an Aboriginal Nation who has signed a self-government agreement. The fact that these groups are often not the same are indicative of the two most discriminatory modes of denying Aboriginal identity: registration under the *Indian Act* and blood quantum/descent (which, it can also be argued, are one and the same in many instances). The only way to ensure that Aboriginal Nations and their cultures thrive and survive into the future is to ensure that the individual and communal identities of Aboriginal peoples are protected. As discussed in Chapter 4, this is the very promise that is contained in s.35 of the *Constitution Act, 1982*, and that promise should inform every aspect of relations

individual of that Maa-nulth First Nation who is eligible for enrolment under a. or b.; or (d) is accepted by that Maa-nulth First Nation as a member of that Maa-nulth First Nation in accordance with the custom of the Maa-nulth First Nation and has a demonstrated attachment to that Maa-nulth First Nation community.”

between Canada and Aboriginal peoples. Further, this promise is based on the goal of all peoples to ensure that their identities are passed on to future generations so that they may also have the cultural context from which to live the “good life”. If this is to happen, Canada must abandon its biological notions of Aboriginality, take steps to undo the harm that has already been caused, and then step back from making future determinations of Aboriginality. Aboriginal peoples are also responsible to acknowledge the damage that has been done to their peoples by the incorporation of colonial notions of Aboriginality and to take positive steps to undo the harm by being more inclusive in their Nation-building exercises.

(i) Avoiding the Traps of the Past

The legal identification of Aboriginal peoples affects every aspect of their daily lives. Some might argue that the identification of Aboriginal peoples is a necessary part of the delivery of federal programs and services, such as post-secondary education funding or non-insured health benefits. Identification of Aboriginal people may also be considered necessary for provincial governments in the delivery of their own programs targeted for Aboriginal peoples. Both federal and provincial governments have various enforcement bodies which also claim to require a formalised way of identifying Aboriginal peoples to manage certain hunting, fishing or gathering rights that do not accrue to non-Aboriginal peoples. Similarly, Indian bands, Aboriginal Nations, Aboriginal organisations, and other related groups may also see the benefit in an identification system that is recognized in Canada and even internationally. Even if one were to assume that the identification of Aboriginal peoples is necessary, this does not mean that Canada or the provinces have any right to make those determinations for

Aboriginal peoples.²⁴⁴ I have been limited by space and time limitations from dealing with the issue of federal jurisdiction over the determination of Aboriginal identity like status and membership. However, I wish to stress that the valid needs of all levels of government, including Aboriginal governments to know who Aboriginal people are, does not equate to the right of Canada to make those determinations. The section that follows looks at the solutions that have been offered by other academics in regards to how Aboriginal identity should be determined, and how I view the issue as well. Any references to changes to the *Indian Act*, band membership or citizenship, does not imply that the *Act* is the solution, but attempt to provide solutions of a short term nature until longer term solutions are arranged.

Aboriginal identity and belonging (membership and citizenship) involve complex legal, social, cultural, and political factors that do not lend themselves to easy, one-size-fits-all solutions or quick fixes. *Bill C-31* has been described by some as an attempt by the federal government to eliminate some of the discrimination against Aboriginal women under the *Indian Act*.²⁴⁵ *Bill C-31* is also a good example of how this relatively quick fix not only failed to address all the discrimination against Aboriginal women in the *Indian Act*, but arguably created new discrimination via 6(1) and 6(2) Indians with different rights, and excluding Aboriginal peoples from legal recognition as Indians on

²⁴⁴ W. Cornet, "Aboriginality: Legal Foundations, Past Trends, Future Prospects" in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation* (Markham: LexisNexis, 2003) 122 [*Aboriginality*] at 135. Cornet argues that: "The need to define those entitled to live on reserve remains a legitimate and necessary policy goal."

²⁴⁵ See generally: *McIvor v. Canada*, [2009] BCCA 153 (QL), *McIvor v. Canada*, [2007] 2 C.N.L.R. 72 [*McIvor*].

the basis of blood quantum/descent and sex.²⁴⁶ Many Aboriginal peoples are refocusing their efforts on healing, rebuilding their communities, learning their languages and traditions, and seeking the teachings of their elders so that they can learn from their collective histories. Also important in this process of healing and rebuilding is the need to acknowledge what has caused them the greatest harm in the past, consult on what they want for their future as communities and Nations, and ensure that as they move forward, they avoid those same traps of the past. What can make this process difficult for Aboriginal advocates leading the way are the colonial-based concepts about (1) Aboriginal cultures being frozen at an arbitrary point in time; (2) Aboriginal customs and practices that must be different from that of non-Aboriginal peoples to be truly Aboriginal; and (3) racist perceptions about Aboriginality based on notions of blood purity. All of these underlying presumptions do not emanate from the traditions, views and practices of Aboriginal peoples, but through years of colonial imposition, they are now ingrained in many communities. In order to make positive changes for the future, Aboriginal peoples, Canadian governments and the public will all have to reassess their ways of seeing Aboriginality. To do any less, amounts to a breach of the constitutional promise to Aboriginal peoples to ensure the survival of their cultures. Such a failure can also shorten the lives of Aboriginal peoples who already suffer from the lowest socio-economic indicators in Canada.

Connection to one's culture and identity is not only part of the good life, but its denial may also risk lives in the Aboriginal community. Children often receive their

²⁴⁶ *Aboriginality*, *supra* note 244 at 134.

identity and culture from their parents.²⁴⁷ However, when this natural process is barred by the *Indian Act*, for example, some youth cannot find a proper context for their lives and suicides can be the devastating result.²⁴⁸ One need only look to the youth of a Nation to see how healthy the Nation is, as a whole. For example, the Aboriginal population in Canada is a very youthful one, much younger than the non-Aboriginal population.²⁴⁹ The median age of the Aboriginal population is 27 years, compared to the non-Aboriginal population which is 40 years, and 48% of the Aboriginal population is under 24 compared to 31% of the non-Aboriginal population.²⁵⁰ Non-status Indians are the fastest growing Aboriginal population and could become the youngest of the Aboriginal populations by 2026.²⁵¹ Given that Aboriginal communities comprise of such high

²⁴⁷ *McIvor*, *supra* note 245 at para.71. The appeal court specifically held that: “Parents are responsible for their children’s upbringing, and financial benefits that an Indian child receives will, accordingly, alleviate burdens that would otherwise fall on the parent. Quite apart from such benefits though, it seems to me that the ability to transmit Indian status to one’s offspring can be of significant spiritual and cultural value. I accept that the ability to pass on Indian status to a child can be a matter of comfort and pride for a parent, even leaving aside the financial benefits that accrue to the family.”

²⁴⁸ See generally: M. Chandler, C. Lalonde, “Cultural Continuity as a Protective Factor against Suicide in First Nations Youth” in Government of Canada, *Hope or Heartbreak: Aboriginal Youth and Canada’s Future*, (Ottawa: Policy Research Initiative, 2008) Vol.10, No.1, online: Government of Canada <http://www.policyresearch.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf> [*Suicide in First Nations Youth*].

²⁴⁹ Statistics Canada, “Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census: Aboriginal Peoples, 2006 Census: Census Year 2006”, online: Statistics Canada <<http://www12.statcan.ca/english/census06/analysis/aboriginal/pdf/97-558-XIE2006001.pdf>> [*Aboriginal Peoples, 2006 Census*] at 14.

²⁵⁰ *Ibid.* at “Highlights”.

²⁵¹ J. Steffler, “Aboriginal Peoples: A Young Population for Years to Come” in Government of Canada, *Hope or Heartbreak: Aboriginal Youth and Canada’s Future*, (Ottawa: Policy Research Initiative, 2008) Vol.10, No.1, online: Government of Canada

numbers of Aboriginal youth, issues faced by Aboriginal youth affect the whole of Aboriginal communities, including parents, grandparents, caretakers, educators, and elders.²⁵² Some of the serious issues being faced by Aboriginal youth today are lower levels of education than other Canadians, disproportionately higher rates of incarceration and suicide, especially among male Aboriginal youth. Teen pregnancies among Aboriginal female youth are six times that of other Canadians.²⁵³

In addition to the regular pressures that every youth in Canada must deal with, Aboriginal youth in particular: “also have to deal with stereotypes, low expectations and incidents of outright racism in their encounters with non-Aboriginal society”.²⁵⁴ Many of these youth also suffer the same pain that their parents, grandparents and extended relatives have suffered with regards to the loss of land and the suppression of languages,

<http://www.policyresearch.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf>
[*Aboriginal Peoples, A Young Population*] at 19.

²⁵² E. Guimond, “The Current Well-Being of Registered Indian Youth: Concerns for the Future?” in Government of Canada, *Hope or Heartbreak: Aboriginal Youth and Canada’s Future*, (Ottawa: Policy Research Initiative, 2008) Vol.10, No.1, online: Government of Canada

<http://www.policyresearch.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf> [*Well-Being of Indian Youth*] at 30. “A focus on tracking the conditions of young people is important not only from the perspective of improving their situations today, but also because young people reflect future possibilities for populations and communities.”

²⁵³ M. Brant Castellano, “Reflections on Identity and Empowerment: Recurring Themes in the Discourse on and with Aboriginal Youth” in Government of Canada, *Hope or Heartbreak: Aboriginal Youth and Canada’s Future*, (Ottawa: Policy Research Initiative, 2008) Vol.10, No.1, online: Government of Canada

<http://www.policyresearch.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf>
[*Reflections on Identity*] at 7.

²⁵⁴ *Ibid.* at 8.

cultures and identities, etc.²⁵⁵ The majority of Aboriginal youth are not about to disappear or assimilate into Canadian society, but youth between the ages of 15 and 29 are at the highest risk of making ill-fated choices for themselves especially if they do not have a clear, healthy sense of their identity: “They seek a place in society that affirms their value as citizens and as Aboriginal persons”.²⁵⁶ When young Aboriginals cannot make this crucial link between their identity, acceptance in their community (or Nation) and their culture, they are at increased risk for poor health and educational achievement, lower workforce participation levels and even worse, suicide.²⁵⁷ Suicide rates for Aboriginal youth far surpass that of other Canadians and in fact: “have reached such calamitous proportions – rates said to be higher than those of any culturally identifiable group in the world”.²⁵⁸ The reasons for this are many and complex, but researchers have emphasised the fact that if one’s cultural identity has been “marginalized” because of colonization, or “the trustworthy ways of one’s community are criminalized, legislated out of existence, or otherwise assimilated beyond easy recognition, then the path for those transitioning

²⁵⁵ *Ibid.* “Research sponsored by the Aboriginal Healing Foundation highlighted the dynamics of historic trauma transmission over generations (Wesley-Esquimaux and Smolewski, 2004), The shocks of epidemics, displacement from lands, depleted food supply, suppression of ceremonies and languages, and the loss of children to residential schools and child welfare agencies reverberate through tight knit communities, provoking adaptive and maladaptive responses. These responses become embedded in the collective memory and are passed on in oral narratives, shaping perceptions and behaviour in successive generations. When the shocks follow one another without intervals for recovery, pain and dysfunction are laid down layer upon layer and the original causes and effects become obscured.”

²⁵⁶ *Ibid.* at 12.

²⁵⁷ See generally: *Suicide in First Nations Youth*, *supra* note 248.

²⁵⁸ *Ibid.* at 68.

toward maturity becomes much more difficult”²⁵⁹ Therefore, the continual increase of the non-status Indian population and the corresponding increase in Aboriginal peoples who are denied band membership as a result are at serious risk. The youth represent our only link to future generations and continued exclusion of our current youth (non-status Indians), pose risks to our communities today and into the future. The potential harms to our youth from disconnection to their cultures are too significant to be ignored.

What is important to note here is that these high rates of suicide are not prevalent in all First Nations communities.²⁶⁰ Aboriginal youth suicide rates were studied from the period 1987 to 1992, and each community (band) from which each youth originated was also noted, together with an assessment of whether indicators of “cultural continuity” were present in the community.²⁶¹ Some of these markers of cultural continuity included whether the community had some measure of self-government, had litigated for Aboriginal title to their traditional lands, or whether they had community centres dedicated to preserving their cultures.²⁶² The study found that: “Bands that evidenced all of these cultural continuity factors had no youth suicides during our first study window.” The study further found: “By contrast, bands that evidenced none of these “protective” factors suffered youth suicide rates many times the national average.” Their study

²⁵⁹ *Ibid.* at 70.

²⁶⁰ *Ibid.* at 71. “What these data show is that nearly 90 percent of suicides occur in less than 10 percent of communities, and that in more than half of all bands, and 20 percent of tribal councils, youth suicide is effectively unknown. Clearly, the ‘epidemic’ of youth suicides regularly reported in the popular press is not a ‘First Nations’ epidemic, but a tragedy suffered by some communities and not others.”

²⁶¹ *Ibid.* at 71.

²⁶² *Ibid.*

concluded that both individual and cultural continuity are strongly linked.²⁶³ Given that Aboriginal youth comprise approximately half of the Aboriginal population and the non-status Indian population is the fastest growing of all the Aboriginal populations, it would seem prudent to find solutions that ensure that the Aboriginal youth are included in their communities and Nations, and that their identities as Aboriginal peoples are recognized, legitimized and encouraged, instead of denied because of irrelevant factors like status or blood quantum. This conclusion is supported by the fact that studies have shown that First Nations who like the way they are and feel proud of themselves tend not to engage in higher risk activities.²⁶⁴ Those who participate in traditional activities, among other healthy activities, are also more likely to stay in school and perform better.²⁶⁵ Those who do not have the benefit of this cultural context are at far greater risk of many high risk activities, the most tragic of which is suicide.²⁶⁶

²⁶³ *Ibid.* at 72.

²⁶⁴ V. Gideon, J. Gray, W. Nicholas, P. Ha, "First Nations Youth Health: Recognizing the Challenges, Recognizing the Potential" in Government of Canada, *Hope or Heartbreak: Aboriginal Youth and Canada's Future*, (Ottawa: Policy Research Initiative, 2008) Vol.10, No.1, online: Government of Canada <http://www.policyresearch.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf> [*First Nations Youth Health*] at 85.

²⁶⁵ *Ibid.*

²⁶⁶ Royal Canadian Mounted Police, "Criminal Intelligence: The Aboriginal Youth Cohort: A Discussion Paper on Future Consequences" (Ottawa: RCMP, 2007) [*RCMP Report*] at 5-6. This paper was obtained through an ATIP request in 2008. As a result, some parts of this report have been blacked out. The RCMP concluded that "The fallout from Aboriginal poverty is all too obvious and will only get worse. The symptoms of this state of poverty are manifested in crime, delinquency, school dropouts and abuse." They conclude that shattered cultures will continue to result in Aboriginal gangs and criminal activity. "Poverty, in combination with other factors such as shattered cultures, has left many individuals with very little sense of a past and, from that, little sense of any positive future. It seems very clear that many Aboriginal people are in a state of anomie; a

The *Bill C-31* amendments to the *Indian Act* have not addressed all the discrimination against Indian women and their descendants and I have argued in Chapter 5 that the *Act* has, in fact, created new forms of discrimination, like the second generation cut-off rule which discriminates on the basis of blood quantum/descent. The fact that the *Indian Act* was based on blood quantum/descent and the superiority of male Indian blood over female Indian blood has had the effect of “bleeding off” Indian women and their children from their communities. By extending the second generation cut-off provisions to men and women equally on a go forward basis, INAC continues to reduce communities by out-dated conceptions of blood purity.²⁶⁷ Although the *Indian Act* no longer specifically provides for a specific blood quantum, that original racial conception of Indian is apparent:

Every aspect of the Indian Act relating to Indian blood begins with the notion that Indian status is equivalent to “pure-bloodedness,” and that the contorted fragmentation of identity within the Indian Act categories actually reflects an individual’s real blood quantum.²⁶⁸

The problem does not lie so much in relaying that information to Aboriginal communities, but that the association between Indian status, blood quantum and

condition of malaise in individuals, characterized by an absence or diminution of standards or values and an associated feeling of alienation and purposelessness.” Finally, on page 7, they emphasize that: “Many Aboriginal people find themselves limited in education and employment opportunities because of the social order created by the *Indian Act*” and on page 11 that “It would be very hard to explain to future generations that, at the height of such prosperity and abundance, we were unable to dramatically improve the lives and futures of Aboriginal Canadians.”

²⁶⁷ B. Lawrence, *Real Indians and Others: Mixed Blood Urban Native Peoples and Indigenous Nationhood* (Lincoln, Nebraska: University of Nebraska Press, 2004) [*Real Indians and Others*] at 64, 67.

²⁶⁸ *Ibid.* at 73.

authenticity has been enforced by governments for so long that it has been internalized by many Aboriginal individuals and communities. This internalisation of legislated identity (i.e., legislated recognition of one's identity) is much more difficult to combat:

This is the problem when legislation is introduced that controls a group's identity – once created and established, it cannot simply be undone. You cannot put the genie back in the bottle again – You have to deal with it. It is one thing to recognize that the Indian Act categories are artificial – or even that they have been internalized – as if these divisions can be overcome simply by denying their importance. Legal categories, however, shape peoples' lives. They set the terms that individuals and communities must utilize, even in resisting these categories.²⁶⁹

Even when communities do take the step of moving out of the *Indian Act* into self-government agreements, for example, some do so by setting up their charter groups with reference to the *Indian Act* and/or their band membership lists. So, while the efforts towards transforming conceptions of Aboriginal citizenship are necessary, the *Indian Act* is still a major impediment in the short term.

Blood quantum/descent or racial purity is endemic in the way that it has been promoted to determine who is an Aboriginal person. If we do not acknowledge its origins and the power it holds over our communities, we have little chance of making the necessary changes in both legal and social thinking. Refusal to acknowledge the severe harm that the conceptions of blood purity in the determination of status, band membership and self-government citizenship causes, would be akin to ignoring the similar harms suffered by many residential school survivors. By way of example, in the United States, the most common requirement for 2/3 of the tribes (as they are

²⁶⁹ *Ibid.* at 230.

described) is blood quantum.²⁷⁰ Of those, most of the tribes use a blood quantum of ¼ percent Indian blood to qualify for membership.²⁷¹ It is worth noting that most federal definitions of “Indian” in the United States provide a minimum blood quantum to qualify for various programs and services.²⁷² This situation has been going on longer than legislated identity in Canada. The effect that blood quantum and its subsequent non-recognition of individuals and groups has had on the tribes in the United States should act as a warning to both Canada and Aboriginal Nations who believe that blood quantum determines identity and communal legitimacy:

A report by the American Indian Policy Review Commission stated: ‘The results of nonrecognition on Indian communities and individuals have been devastating... [They include] the continued erosion of tribal lands, or the complete loss thereof; the deterioration of cohesive, effective tribal governments and social organisation; and the elimination of special Federal services, through the continued denial of such services which Indian communities in general appear to need desperately.’²⁷³

In the United States, as in Canada, the use of blood quantum by colonial administrators to determine “Indian” status was never meant as a tool to preserve or legitimize Aboriginal cultures. To the contrary: “The ultimate and explicit federal intention was to use blood quantum standard as a means to liquidate tribal lands and to eliminate government trust responsibility to tribes, along with entitlement programs, treaty rights, and reservations.”²⁷⁴

²⁷⁰ E. Garrouette, *Real Indians: Identity and the Survival of Native America* (Los Angeles: University of California press, 2003) [*Real Indians*] at 15.

²⁷¹ *Ibid.*

²⁷² *Ibid.* at 16.

²⁷³ *Ibid.* at 27.

²⁷⁴ *Ibid.* at 42.

It was the colonial governments who introduced the biological definitions of Aboriginal identity, not Aboriginal peoples.²⁷⁵ The problem with using blood quantum in the United States, as it is in Canada, is that:

“To make genetics the defining criterion for continuation of [tribes with only small numbers of full blood members]... would be quite literally suicidal.” It projects, indeed, a scenario in which such tribes may find themselves redefined as technically “extinct”, even when they continue to exist as functioning social, cultural, political, linguistic, or residential groupings.²⁷⁶

Having said this, blood quantum as a concept of identity and as a means of proving authenticity is now well ingrained in many communities even if only as disguised in the registration provisions of the *Indian Act*.

Even the Supreme Court of Canada has analysed the *Act* and found that its basis is blood quantum/descent. In 1983, the Court in *Martin v. Chapman* found that the basis of certain status provisions under the *Indian Act* was concerned with either the “dilution of Indian blood” or the “purity of Indian blood”.²⁷⁷ More recently, in the Métis case of *Powley*, the Supreme Court of Canada held that blood quantum was inappropriate for use with the Métis.²⁷⁸ Even now, status Indians must present proof in the form of a written letter from their band that they have 50% blood quantum, in order to qualify for special border privileges between Canada and the United States.²⁷⁹ Given that not all bands use blood quantum to determine band membership, it is

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.* at 58.

²⁷⁷ *Martin v. Chapman*, [1983] 1 S.C.R. 365. See also: *Aboriginality*, *supra* note 244 at 131-132.

²⁷⁸ *R. v. Powley*, [2003] 2 S.C.R. 207.

²⁷⁹ *INAC FAQ*, *supra* note 30.

unclear how bands would go about assigning blood quantum, except according to the type of status an individual has [i.e. section 6(1) or 6(2)]. The continued focus on blood quantum is hard to reconcile with RCAP's conclusions:

In our view, any code that specifies a minimum blood quantum as a general prerequisite for citizenship is not only unconstitutional under section 35, it is also wrong in principle, inconsistent with the historical evolution and traditions of most Aboriginal peoples, and an impediment to their future development as autonomous political entities.²⁸⁰

It is not only RCAP, but also some Aboriginal organisations which also assert the same position on blood quantum. For example, the Inuit Tapiriit Kanatami stated to RCAP:

It is not our race in the sense of our physical appearance that binds Inuit together, but rather our culture, our language, our homelands, our society, our laws and our values that make us a people. Our humanity has a collective expression, and to deny us that recognition as a people is to deny us recognition as equal members of the human family.²⁸¹

Unfortunately, it is hard for Aboriginal peoples to distance themselves from the racist values imbued in blood quantum, when the federal government itself insists on blood quantum measurements for eligibility criteria in land claim agreements.²⁸² It is time to look elsewhere for conceptions of Aboriginal identity and citizenship, in order to ensure that Aboriginal Nations have control over who is entitled to be a

²⁸⁰ *RCAP, Volume 2, Part 1, supra* note 185 at 239.

²⁸¹ *Ibid.* at 176.

²⁸² *Real Indians and Others, supra* note 267 at 78. Here, Lawrence explains how Canada will publicly criticise other communities as racist if they have blood quantum as part of their self-determining mandate, like Kahnawake for example, but they routinely force blood quantum restrictions on communities involved in land claims. She cites one example where Canada “forced” the Inuit in Labrador to impose a 25% blood quantum in their land claim agreement in order to be eligible as an individual.

member/citizen. At the same time, Aboriginal individuals with legitimate ties to their Nations cannot be arbitrarily excluded.

Some of the band membership codes require that applicants for membership prove that they have resided on the reserve or among the people of the band for a significant length of time, that they speak the relevant Aboriginal language and that they have knowledge of the traditions and customs of the band. In theory, these criteria all sound like legitimate requirements for citizens of any Nation. The reality is that the Aboriginal groups that adopt codes which require new applicants to meet all of the stated criteria, ignore their entire history as a people. Communities should avoid freezing their cultures in time and losing sight of the tremendous damage that has been inflicted through colonization and various assimilation policies. For example, a membership code or citizenship code that requires that new members must reside in the community, speak the language and have knowledge of the customs and traditions of the community, effectively denies membership to a large number of potential new members because (1) the majority of Aboriginal people in Canada live off reserve²⁸³; (2) the majority of Aboriginal languages are in jeopardy²⁸⁴; and (3) the majority of

²⁸³ *Aboriginal Peoples, 2006 Census*, *supra* note 249 at 6. “Aboriginal people are increasingly urban. In 2006, 54% lived in urban areas (including large cities or census metropolitan areas and smaller urban centres), up from 50% in 1996.”

²⁸⁴ M. Morris, “Voices of Aboriginal Youth Today: Keeping Aboriginal Languages Alive for Future Generations” in Government of Canada, *Hope or Heartbreak: Aboriginal Youth and Canada’s Future*, (Ottawa: Policy Research Initiative, 2008) Vol.10, No.1, online: Government of Canada

<http://www.policyresearch.gc.ca/doclib/Horizons_Vol10Num1_final_e.pdf> [*Voices of Aboriginal Youth*] at 60. “Indications are that the intergenerational transmission of Aboriginal languages is in decline among younger generations...”. This study cited census data which showed that 44% of Aboriginal people aged 65 and over spoke their language,

Aboriginal people do not live in conditions conducive to maintaining their culture and traditions.²⁸⁵ By setting up membership or citizenship criteria in this fashion effectively denies membership to members who have suffered the most harms at the hands of Canada's various assimilation policies (*Indian Act* and residential schools for example), and favours those who have not suffered the same level of harm.

This situation, in effect, takes Aboriginal culture, languages and traditions out of their historical context and tries to impose them in a modern day context without regard for the intervening history. While those Aboriginal communities that offer probationary periods to learn the language, culture and traditions are taking a step in the right direction, one is left to wonder if "automatic" or "original" members must also know the language, culture, and traditions to the very same extent that "new"

whereas only 20% of Aboriginal youth and children aged 25 and under could speak their language.

²⁸⁵ The statistics reviewed earlier show that the majority of Aboriginal people live off reserve. That taken together with the findings in the following article that the degree to which one absorbs language and culture are increased or decreased by whether or not one lives on a reserve, leads to the conclusion that the majority of Aboriginal people are at risk of not having learned their culture or not having been as exposed as their reserve-based relatives. See: *Negotiating Identity*, *supra* note 47 at 21. She argues that studies have found that the "degree to which an Aboriginal woman has inculcated Aboriginal culture and language increased if she lived on an Indian Reserve than if she did not live on a Reserve." She further explains on page 23 that: "Migrating to urban and other areas where the Aboriginal way of life was not dominant, as well as living in a society which degraded Aboriginal culture did not encourage the learning or continuity of traditional culture in the lives of these migrants. Those who still lived on Reserves had the opportunity to interact with and learn traditional culture from their families, neighbours and the elders." That is not to say that there are not increasing supports for off-reserve Aboriginal people so that they can maintain connections to their languages and traditions, but it has been much harder for those living off-reserve and this fact should be taken into account when considering membership and citizenship criteria based on traditional and language factors.

members must demonstrate to membership committees? If not, are these communities providing another unfair preference based on historical events that were not the fault of the off-reserve or new members? Blood and status are used to exclude people from their rightful place in their Aboriginal Nations. Tradition, culture and language, while very important for Aboriginal Nations, can just as easily be used to exclude. What seems to make the difference is the underlying principle in various citizenship codes, and whether Aboriginal peoples are willing to give their own people a second chance.²⁸⁶

(ii) Completing the Circle

There are good policy reasons for Aboriginal Nations identifying their own citizens. The key here is who is doing the identifying and how. While it is arguable that federal and provincial governments have legitimate policy reasons for wanting to know who Aboriginal peoples are, they do not have a right to determine who those members are, or to limit access to certain categories of members for programs and services, land claims and self-government agreements or treaties.²⁸⁷ As discussed in Chapter 4, the right of an Aboriginal Nation to determine who their citizens are is an inherent social, cultural, political, and now legally protected right under section 35 of the *Constitution Act, 1982*, as part of their inherent right to self-government, and this stems from their status as self-

²⁸⁶ *Negotiating Identity*, *supra* note 47 at 17. Asante argues that: “If Indigenous languages and cultures are the salient ingredient for the survival of ethnic identity then Aboriginal identity is facing genocide.”

²⁸⁷ The same can be said for the determination of Indian status. While I would like to have included a chapter specifically related to Canada’s section 91(24) legislative powers and its limits, time and space limitations have demanded that this be left for a future project.

determining peoples. If Aboriginal Nations are going to preserve their status as self-determining “peoples” *versus* “vanishing races”, they ought to look to the factors that make them peoples *versus* grasping at out-dated biological conceptions of race.

Aboriginal peoples always were and continue to be collections of communities connected to their larger Nations comprised of Aboriginal “peoples” who are connected to each other. Whether Mohawk, Cree or Mi’kmaq, they are connected to their own common histories, territories, values, ancestors, traditions, customs and practices, laws, politics and social organisations that continue to evolve over time and to adapt to changing circumstances. One should not define Canada by the customs and practices of 1867, no more than one should define Aboriginal Nations and peoples by their particular customs and practices frozen at some arbitrary point in pre-contact times. There is no need to maintain the archetypal “Indian” in order to prove that they still exist, and that they are legitimate as a “people” and have the right to their lands and resources. A people can grow and expand and incorporate people from other Nations and still have that connection to the community’s common history, ancestors, and ties to their traditional territories. The connection of the people to their ancestors and their history is not broken by the cultural, political and social incorporation of people from other Nations or by allowing people of mixed-genetic heritages (Aboriginal and non-Aboriginal) to remain as part of their Nation.

There is a joint interest between individual Aboriginal people and Aboriginal communities to maintain their cultures and identities for future generations. Too often, the social conflict that has arisen between Aboriginal communities and individuals due to the divisive provisions of the *Indian Act* have been viewed from a Canadian legal

perspective – individual rights versus collective rights, or Indian women versus their communities.²⁸⁸ In actual fact, the issue is more about Aboriginal individuals and communities trying to find their way through the legal and political maze imposed upon them, and their efforts to find mutually acceptable ways to restore the communal and individual harmony that existed prior to colonial interference with Aboriginal identity and communal citizenship. What must be remembered is that the conflict is not about individuals *versus* communities, or women *versus* communities, as individuals and women were always part of communities. Simply because their views are being expressed today does not separate them or their legitimate interests from that of the community. For, there can be no future for a community without its individuals and, certainly, not without its women. The issues that affect individuals and women, off-reserve and non-status, 6(2) status Indians and non-band members, are issues that affect the entire communities and the future of Aboriginal cultures. As with any peoples, social conflict is inevitable. But how it is resolved depends on whether there is external interference or support, and whether racist concepts are accepted or acknowledged and rejected. It also depends on the mutual will of both Aboriginal individuals and communities to make the necessary changes for the ultimate benefit of their future generations.²⁸⁹ “The ties between generations, between past and present, form a continuous cycle, a perpetual rebirth. It confirms the importance given to the dynamics of

²⁸⁸ Please see Chapter 4 for a review of the academic literature in this regard.

²⁸⁹ *Seven Generations*, *supra* note 7.

knowledge transmission and to intergenerational and familial relations among First Nations.”²⁹⁰ One can only help complete the circle if one belongs.

The question that naturally follows is what is the best way to start this process? Flanagan argues strenuously that because Aboriginal peoples are treated as a separate “racial group” (i.e., because Aboriginal communities are comprised of peoples based solely on race and receive “benefits” on that basis), that this unfairness is one of the main reasons why Aboriginal people should simply “assimilate”.²⁹¹ In his words, with regards to assimilation: “it has to happen”.²⁹² Cairns does not come across as strong, but he too advocates for Aboriginal people to “jointly participate in common ventures as Canadian citizens”. He defends his solution as a positive approach, and does not view it as being “assimilation in a new guise”.²⁹³ As reviewed earlier in this Chapter, RCAP’s recommended solution is for Aboriginal communities to reconstitute their traditional Aboriginal Nations and determine their citizenship based on a variety of factors which could include self-identification, community acceptance, ancestry, birthplace, residence, marriage, adoption, and cultural or linguistic affiliation.²⁹⁴ It emphasized that the right to determine citizenship was restricted by two limitations: (1) that it was consistent with section 35(4) of the *Constitution Act, 1982*, and (2) that Aboriginal Nations were political and cultural entities and not racial groups and, therefore, they could not use blood

²⁹⁰ *Ibid.*

²⁹¹ T. Flanagan, *First Nations? Second Thoughts*, (Quebec: McGill University Press, 2000) [*First Nations*] at 21, 22, 196.

²⁹² *Ibid.*

²⁹³ A. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*, (Vancouver: UBC Press, 2000) [*Citizens Plus*] at 211.

²⁹⁴ *RCAP, Volume 2, Part 1, supra* note 185 at 251.

quantum as a general prerequisite for citizenship.²⁹⁵ Asante agrees with RCAP's vision but stresses that in order for self-government to work, "it becomes crucial to understand and plan for the complex articulation that surrounds the label 'Aboriginal People'".²⁹⁶

In her view, the success of Aboriginal self-government hinges on the idea of Aboriginal nationhood, and joining all the various ways in which Aboriginal have been defined (status, non-status, 6(1), 6(2), urban aboriginals, male, female, traditional, non-traditional, educated, being employed as mothers, wives, or lawyers). Specifically, she advocates:

The ideas of nation and social integration need to be joined. This union is important because whereas the idea of "nation" is the "bounded nature of all political communities and the embeddedness of all claims to constitute a distinct and autonomous political community", social integration is that "web of relationships that constitutes a people as a "social collectivity" existing independently of common subjection to the rule of a particular state".²⁹⁷

She essentially argues that Aboriginal Nations must socially integrate the reality of the varied identities adopted by their members in order to be viable Nations. This means that the many ways of being Aboriginal should be accepted by their communities in order to achieve social harmony. Her proposed solution appears to be in line with the demographic realities facing Aboriginal Nations today.

The most recent census notes that the "Descendants of the First Peoples of Canada represented 5.4% of the country's total population".²⁹⁸ Interestingly, the Census also

²⁹⁵ *Ibid.* at 240.

²⁹⁶ *Negotiating, Identity, supra* note 47 at 10.

²⁹⁷ *Ibid.* at 6-7, 8-12.

²⁹⁸ Statistics Canada, "Canada's Ethnocultural Mosaic, 2006 Census: Census Year 2006", online: Statistics Canada

noted that: “People with Aboriginal ancestry were more likely than the total population to report multiple origins. In 2006, 62.4% of people with Aboriginal ancestry also reported other origins, compared with 41.4% of the total population of Canada.”²⁹⁹ That is a reality which many Aboriginal communities will have to address if they are to maintain their communities into the future. The out-dated concepts of blood purity (which appears as blood quantum/descent formulas) are not in line with current ethnic realities which only serve to further the notion of the “vanishing race”. If Aboriginal people are to preserve and protect their identity as individuals and communities, Borrows argues that Aboriginal Peoples must adopt a more fluid notion of what it means to be “Aboriginal”. Borrows himself cites the statistic that one in every two Aboriginal peoples marries a non-Aboriginal person.³⁰⁰ Many, if not most of these couples will have children. How long can Aboriginal communities continue to exclude these families and children from taking their rightful place as part of the community, either as residents and citizens or as citizens who reside in their traditional territories or elsewhere, but who still care deeply about and are loyal to their communities? Borrows explains that Aboriginal identity can easily incorporate Aboriginal traditions and practices as part of their identity, so long as those traditions are not frozen in time.

To rely strictly on traditions at an arbitrary date in the past would freeze Aboriginal identity without regard to current realities. Specifically, he advocates a

<<http://www12.statcan.ca/english/census06/analysis/ethnicorigin/pdf/97-562-XIE2006001.pdf>> [*Canada's Ethnocultural Mosaic*] at 11. (emphasis added).

²⁹⁹ *Ibid.* at 11.

³⁰⁰ J. Borrows, “‘Landed’ Citizenship: Narratives of Aboriginal Political Participation” in W. Kymlicka, W. Norman, *Citizenship in Diverse Societies*, (New York: Oxford University Press, 2000) 326 [*Landed Citizenship*] at 330.

solution to the current dilemmas about Aboriginal identity and citizenship that incorporates modern realities:

Yet it should be asked: what does it mean to be Aboriginal or traditional? Aboriginal practices and traditions are not “frozen”. Aboriginal identity is constantly undergoing renegotiation. We are traditional, modern, and postmodern people. Our values and identities are constructed and reconstructed through local, national, and sometimes international experiences. The meaning of Aboriginal is not confined to some pristine moment prior to the arrival of Europeans in North America ... Similarly, the notion of Canadian, or any other cultural identifier, is not fixed.³⁰¹

Traditions were never meant to be used as tools to exclude people, nor were they meant to be guarded and saved only for a privileged few. Traditions, practices and customs were meant to be shared and passed on from generation to generation and by using traditions in an inclusionary way, whether in everyday life or for membership criteria, a strong sense of Aboriginal identity will be passed to Aboriginal youth. The secure connections that Aboriginal youth develop towards their individual identities will flow over into Aboriginal communities and help rebuild Aboriginal Nations for the benefit of current and future generations.

Borrows argues that some restrictions are necessary for Aboriginal citizenship, but like RCAP and Asante, he agrees that blood or descent alone do not make Aboriginal people who they are:

While I think restrictions on Aboriginal citizenship are necessary to maintain the social and political integrity of the group, I must admit that I am troubled by ideas of Aboriginal citizenship that may depend on blood or genealogy to support group membership. Scientifically, there is nothing about blood or descent alone that makes an Aboriginal person substantially

³⁰¹ *Ibid.* at 333-334.

different from any other person. While often not intended by those who advocate such criteria, exclusion from citizenship on the basis of blood or ancestry can lead to racism and more subtle forms of discrimination that destroy human dignity.³⁰²

Borrows does however, acknowledge that some limitations are necessary in determining

Aboriginal citizenship:

However, while I do not favour limits on citizenship on racialized grounds, it may be appropriate to have rigorous citizenship requirements on other grounds, to protect and nurture these communities. Aboriginal peoples are much more than kin-based groups. They have social, political, legal, economic, and spiritual ideologies and institutions that are transmitted through their cultural systems. These systems do not depend exclusively on ethnicity, and can be learned and adopted by others with some effort. Therefore, Aboriginal peoples could consider implementing laws consistent with these traditions to extend citizenship in Aboriginal communities to non-Aboriginal people. If non-Aboriginal people met certain standards that allowed for the creation and reproduction of these communities values, then these people should have a way to become Aboriginal citizens. The extension of this responsibility would respect the autonomy of Aboriginal communities, while at the same time recognizing the need to consider our interdependence as human beings.³⁰³

Thus, Borrows' solution opens the door for Aboriginal Nations to rebuild by including not just Aboriginal peoples with mixed ancestries as citizens, but also leaves the possibility open to incorporate others as well.

Another perspective is that of Cornet who offers that band membership provisions may be the "bridge" to self-government arrangements that include recognition of Aboriginal citizenship.³⁰⁴ She argues that the federal government could declare the *Indian Act* status provisions inoperative and use band membership codes to determine who

³⁰² *Ibid.* at 339-340.

³⁰³ *Ibid.* at 340.

³⁰⁴ *Aboriginality*, *supra* note 244 at 141.

Aboriginals are until self-government agreements have been negotiated.³⁰⁵ She explains that her proposed solution may still involve reliance on some degree of descent, just as Canadian citizenship can be acquired by birth. However, she would reject any rigid descent-based systems.³⁰⁶ Cornet's solutions are somewhat similar to those proposed by Lawrence. Lawrence argues that the transformation of how we think about Aboriginal identity does not have to wait until every Aboriginal Nation has self-government agreement and citizenship codes.³⁰⁷ She explains that interim processes like the amendment of the status provisions under the *Indian Act* and changes to band membership provisions could help extend some benefits to Aboriginal people in the present.³⁰⁸ She also argues that Aboriginal organisations should challenge the section 6(2) cut-off that is currently found in the *Indian Act*. Her ultimate solution to Aboriginal identity and citizenship involves a focus on confederacies versus *Indian Act* bands:

The confederacies represent a way out of the deadlock of fragmentation and divisions that Native people have been sealed into by the Indian Act for two reasons – they not only present the possibility of renegotiating the boundaries that have currently been erected around different categories of Indigeneity, but they envision a potentially sufficient land base to do so. While Bill C-31 Indians may struggle for the right to be members in their mothers' communities, the fact remains that the generations of individuals excluded from Indianness by gender and racial discrimination within the Indian Act will not all be able to rediscover 'home' within the approximately six hundred existing postage-stamp-sized communities that are currently called 'First Nations'. The only really viable way in which urban Native people would be able to have access to

³⁰⁵ *Ibid.* at 141.

³⁰⁶ *Ibid.* at 144.

³⁰⁷ *Real Indians and Others*, *supra* note 267 at 245.

³⁰⁸ *Ibid.*

Native land is through the prospect of being citizens of the original Indigenous territories – the lands that correspond to those that were held by the different Indigenous nations at the time of contact. We must be clear, though, that if First Nations genuinely want an end to the divisiveness of the current system, they cannot create new national entities that simply replicate its logic.³⁰⁹

Therefore, for Lawrence, the focus is not so much on the entity, (bands or Nations or confederacies), but on the criteria that determines who is in and who is out. New entities can easily adopt the discriminatory criteria of the past and, therefore, prevent their communities and individuals from being able to move forward.³¹⁰

While Garrouette takes her examples from the tribes in the United States, the principles she extracts are based on colonial histories which have many similarities for Aboriginal peoples in Canada as well.³¹¹ Garrouette noted that cultural definitions of who is an Indian always seem to be applied to individuals rather than to tribes as a whole.³¹² She argues that cultural definitions lead to obsession with tribal “authenticity”.³¹³ So many Indians tie their identities up with the concept of distinctiveness that this easily gets tied up with the extreme end of “otherness”, such that no one can ever meet such a high standard.³¹⁴ She also explains that there are “good reasons why Indian communities might

³⁰⁹ *Ibid.* at 242.

³¹⁰ *Ibid.* at 233-246. These new entities would be similar to the historical confederacies, like the Iroquois Confederacy or the Wabanaki Confederacy for example. However, she does argue that both the registration provisions and band membership codes have to be fixed in the interim.

³¹¹ *Real Indians*, *supra* note 70.

³¹² *Ibid.* at 69.

³¹³ *Ibid.* at 78.

³¹⁴ *Ibid.* at 81.

want to forgive themselves, and others for the cultural losses they have suffered.”³¹⁵ After reviewing the harm suffered by the tribes due to blood quantum, she proposed a definition of tribal identity based on kinship. Her definition of kinship is based on a relationship to one’s ancestors that is not fractioned by blood quantum, and allows for the incorporation of non-tribal members to be adopted into the tribe.³¹⁶ Her solution envisions a concept of kinship that is not based exclusively on ancestral connections, but can also be obtained through learned behaviours.³¹⁷ She argues that a flexible definition like this would honour one’s ancestors and, at the same, time not shame mixed-bloods or those who become part of the community through a means other than birth (like adoption).³¹⁸ She also explains that her vision of kinship presupposes a commitment to traditional values without seeing the culture as frozen in any particular time period.³¹⁹

Her solution is based on reciprocity between individuals and their communities:

But it does encourage them to see even those who are on the margins of other definitions of identity – the non-enrolled, those of low blood quantum, the culturally dispossessed, and even the “new Indians” – as individuals who carry in their very bodies a powerful and important connection to the ancestors, and thus as potential relatives who possess personal worth and unique talents. And it allows these people to become relatives in the fullest sense, as they are taught to turn their talents to the benefit of Native communities and learn to live in reciprocity.³²⁰

³¹⁵ *Ibid.*

³¹⁶ *Ibid.* at 118-124.

³¹⁷ *Ibid.* at 124-131.

³¹⁸ *Ibid.* at 135.

³¹⁹ *Ibid.*

³²⁰ *Ibid.* at 135.

Both the individuals who are included in the community and the community itself will have to give a little, but both will grow from the exchange.

Lomayesva explains that Indian identity in the United States should be determined in a similar fashion:

I suggest that the term Indian cannot be defined by reference to any set standards based upon blood or cultural belief. It must be understood to describe a type of connection between an individual and tribal community. Thus, to be Indian is to possess a type of connection between oneself and a tribal community.³²¹

While he does not expand on this concept or explain how this connection could be made, he emphasizes that focus should be on the relationship between the individual and the community *versus* trying to “essentialize” what an Indian is in terms of blood or culture.³²² Schouls makes a similar argument that: “It is far better, therefore, to lodge Aboriginal identity within its source; that is, within ancestry, history, location, and the abiding ties of loyalty and affinity that these connections generate, since the source lends to Aboriginal community identity a more permanent foundation.”³²³ Specifically, Schouls argues that:

Aboriginal identity is more properly understood as a relational phenomenon; one acquires it by virtue of one’s connection to others through ancestry, shared historical memories and territories, and shared commitment to one another in community over time. This approach in other words, lends flexibility to Aboriginal identity; it can be shaped to meet

³²¹ F. Lomayesva, “Indian Identity – Post Indian Reflections” (1999) 35 *Tulsa L.J.* 63 [*Indian Identity*] at 64.

³²² *Ibid.* at 72.

³²³ Schouls, T., *Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003) [*Aboriginal Identity*] at 120 (emphasis added).

challenges posed by new circumstances without necessarily jeopardising the integrity of Aboriginal identity itself.³²⁴

The emphasis should be on the many possible factors that demonstrate a real connection with the Aboriginal Nation and not on singular criteria. The singular focus on just about any criteria for membership could be used to exclude people. What is required is a demonstration of a key connection between the individual and the people through a combination of factors which may be different for one person (e.g. familial connections) than for another (e.g. loyalty to the nation).

The fact that solutions are possible to the current issues faced by Aboriginal peoples with regards to Aboriginal identity, membership and citizenship in individual bands, larger Aboriginal Nations or even in Aboriginal organisations, does not mean that change will be easy. Some First Nations are in the process of changing their membership codes, while others have never adopted a code. Some have already negotiated self-government agreements with the federal government which have criteria based on blood quantum/descent that are arguably discriminatory. Some First Nations are presently in the grip of intense membership disputes that are directly impacted by decades of federal interference in determining identity and linking identity to funding.³²⁵ Where the once historic goal was to become large powerful Nations, now some bands try to limit numbers due to resources and fears of political takeovers by new members.³²⁶ These communities

³²⁴ *Ibid.* at 154.

³²⁵ Mohawk Council of Kahnawa'ke, "Membership", online: MCK <<http://www.kahnawake.com/org/sdu/membership.asp>>.

³²⁶ Kahnawa'ke Ratitsenhaeins: Mohawk Council of Kahnawa'ke, "News Release: Grand Chief Responds to 'Mohawk Nations News' re Membership", online: Kahnawa'ke <<http://www.kahnawa'ke.com/news/pr/pr09272007a.pdf>> [*Mohawk Chief Press Release*]

that are using their traditions to exclude people are doing so by referring to an image of an “Indian” that one has to meet; they are not allowing for the many ways in which Aboriginal identities have evolved and adapted to the circumstances around them. Therefore, while political groups advocate for the inclusion of their members in their Aboriginal Nations and fight against ongoing discrimination within the Indian Act and band membership codes, they too have fallen victim to the same kinds of criteria that create discrimination. They are trying to assert their Aboriginal “authenticity” in the only way that the federal government will allow them: by proving direct blood lines to Aboriginal peoples in order to access funding, access seats at negotiating tables, and speak with “authenticity”. There is now even a trend to “traditionalize” these organisations out of fear that they will not be seen as “Indian” enough in their meetings, in their gatherings, and/or in their regular activities.³²⁷

at 8. The press release included an e-mail circulated by one of the members of the Elders Council who decides on membership applications. In her e-mail, she was upset that membership criteria and processes were being reviewed. It was her feeling that the community should not have more members and that the band was caving in to INAC pressure to address their membership criteria. She expressed her fears that new members would take over the community: “The band council also wants more voters because it will get more money. The would-be Mohawks want tax free status, land, health and education benefits, to vote and take over Kahnawa’ke.”

³²⁷ New Brunswick Aboriginal Peoples Council, “37th Annual General Meeting: June 7-8, 2008”, (Fredericton: NBAPC, 2008) (Annual General Meeting docket) [*AGM Docket*]. The Annual General Meeting (AGM) of members raised the issue of the type of meetings that they hold and the format of those meetings. In a discussion panel about self-government, one of the experts opined that the NBAPC meetings were not “Aboriginal” enough and that more tradition needed to be incorporated into the meetings and regular activities. Many of the members took offense to this as being a frozen concept of what is and is not “Indian” in a modern day context.

Membership disputes can be very difficult as they involve long held beliefs that are portrayed in schools, media, federal legislation, and even in court cases. Whether it is a political organisation or a community, membership disputes are deeply personal, and views are often strongly held by individuals. It is no wonder then that some communities, like Kahnawa'ke, are having such serious membership disputes, and why some communities may have decided to avoid dealing with the matter altogether. Kahnawa'ke is well known for its membership code that was adopted outside of the *Indian Act* context and has been the subject of much controversy both inside and outside the community.³²⁸ The community's most recent report which reviewed the membership criteria and procedures concluded:

In general, it must be noted that many of the processes and institutions established through the current Membership Law have failed to live up to its preamble. Instead of developing a sense of community, they have led to disharmony and anger. Instead of respecting the principles of dignity and compassion, they have promoted accusations and resentment. Instead of replacing foreign laws such as the Indian Act, they are often still cited in the decision-making process.³²⁹

Not only does the report recommend that a "total reworking of the law" be considered, but that other laws be made, such as the Election Law, to be consistent with the Membership Law.³³⁰ They adopted their controversial Moratorium Law in 1981, and the

³²⁸ Membership Department, Mohawk Council of Kahnawa'ke, "A Review of the Kahnawa'ke Membership Law", online: Kahnawa'ke <<http://www.kahnawake.com/org/docs/MembershipReport.pdf>> [*Kahnawa'ke Membership Report*]. This report was submitted in October of 2007 with the purpose of reviewing the membership criteria and the procedures for reviewing membership applications, and to make recommendations for change.

³²⁹ *Ibid.* at Executive Summary.

³³⁰ *Ibid.*

Kahnawa'ke Membership Law in 2003.³³¹ Their goal was to have a law that was “malleable” and could adjust to their ever-changing needs, and to focus less on blood quantum and more on residency rights and the rebuilding of “ancestry and family ties”.³³²

Their 1981 law placed a moratorium on all marriages to non-Indians and the adoption of non-Indians. Anyone who broke this law was deprived of the benefits of Mohawk membership. After 1984, the law read so that new members had to meet a 50% blood quantum requirement. In 2004 when the new law came into force, the Mohawk Registry (which kept the names of all members) divided the members into different categories: those who were of “native lineage” and who had been on the previous registry; and those who became automatic members. By comparison, those with “Acquired Status” became entitled to residency, but not membership. These individuals included women who acquired status by marriage and whose marriages were still intact or they were widows.³³³ One of the main concerns with their current law is its lack of enforcement power. They are currently in the process of trying to set up a Court of Kahnawa'ke, as they would like to charge, fine or imprison residents in Mohawk territory who are non-members.³³⁴ They could also suspend membership privileges for anyone who would “cohabit with or rent accommodations to non-members”.³³⁵

³³¹ *Ibid.* at 1.

³³² *Ibid.* “The Law was intended to focus less on blood quantum and address the eligibility of those who could be members and/or reside in the community through an increased emphasis on the rebuilding of their ancestry and family ties. It is a way of thinking that will develop our community for the future and, as the law is malleable, will be able to adjust to our changing needs.”

³³³ *Ibid.*

³³⁴ *Ibid.* at 10.

³³⁵ *Ibid.*

In 2006, the Council approved a project called the “Affiliated Individuals Project”. This was intended to find out how many people were affiliated with the community, who they were, and where they lived.³³⁶ It was thought that this information might be useful for possible future consultations and to allow the membership department to forecast impacts on membership statistics. “We have been able to contact at least two thirds of these individuals and have found that for the first thousand people contacted there were a thousand more who were their descendants.”³³⁷ The membership department appears to be quite concerned about the *McIvor* case and the extent to which they may be forced to accept new members:

The area of concern for membership will be the reaction of the Federal Government. It can be assumed that they will appeal this decision. But, if the decision holds, the question remains as to whether it invalidates the law (Bill C-31) and to what extent will corrective measures be taken. The date utilized in any corrective measures will determine the extent of the numbers that will be added as Status Indians.³³⁸

At the same time, they have also noted that in comparison to other Aboriginal communities in Canada, they have stricter membership requirements: “When it comes to lineage it appears that we are the most difficult on our own people”.³³⁹ They have also noted problems in terms of the actual decision-making process with their Council of Elders. The membership department notes that: “Numerous complaints have been

³³⁶ *Ibid.* at 7.

³³⁷ *Ibid.*

³³⁸ *Ibid.* at 3.

³³⁹ *Ibid.* at 12.

received” regarding the decisions and conduct of the Council of Elders alleging the “inconsistent treatment of applicants”.³⁴⁰

One striking example of the alleged inconsistencies is when a certain Aboriginal lineage quantum is accepted for one sibling and not for another.³⁴¹ While not in their mandate, the Council of Elders continues to “feel an obligation to the community not to allow further erosion of our culture and bloodlines”.³⁴² Additional complaints against the Council of Elders by community members include the following:

Complaints by community members regarding conduct include assertions of unnecessary prying into personal lives as well as dismissive treatment and harmful statements made during hearings.

In addition, many community members insist that the real reasons for unfavourable decisions are not publicly stated. For example, the published reason may state a reason such as “no connection to the community or culture” while the applicant insists that this is obviously untrue and that the stated reason is “personal history such as troubles in their past”.³⁴³

Other issues include lack of redress for community members to any appeal boards or courts for unfavourable decisions, lack of transparency and accountability by the Council of Elders (they do not record membership application discussions or record their reasons)³⁴⁴; the insistence by the Council of Elders to interpret the criteria to include blood quantum (when it does not)³⁴⁵; the issue of whether to include Mohawk Nation

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Ibid.* at 14.

³⁴⁵ *Ibid.*

members or only Kahnawa'ke community members³⁴⁶; and the issue of citizenship *versus* membership and the political agreements that may have been made with other Mohawk communities to establish who is a Mohawk.³⁴⁷ Their report concludes by concluding that: "Few of our community would actually fit into the strictest mode of lineage calculation as evidenced by the application of strict blood quantum consideration, clan association and ties to the community,"³⁴⁸ and that: "if the community were truly traditional, not many would be refused".³⁴⁹

Therefore, despite all of the work, consultations and studies done to date in Kahnawa'ke regarding membership, they are still struggling with the issue of Aboriginal identity, membership and citizenship, and how to bring about positive changes to ensure the survival of their people without ensuring their extinction by incorporating stringent or overly exclusionary measures.³⁵⁰ Here too, this community could achieve many of its goals and include many of the concerns of its community members by reuniting the important relationships between Aboriginal identity and belonging (membership and citizenship). The connections that individuals have to their communities and Nations, and

³⁴⁶ *Ibid.* at 14, 15.

³⁴⁷ *Ibid.* at 15-16.

³⁴⁸ *Ibid.* at 18, 19.

³⁴⁹ *Ibid.*

³⁵⁰ Kahnawa'ke, "Kahnawa'ke Membership Law", online: Kahnawa'ke <<http://www.kahnawa'ke.com/council/docs/MembershipLaw.pdf>> at preamble, s.10. Their preamble provides in part: "As Indigenous Peoples, we have the collective right to determine our own membership. This right is fundamental to our survival." Section 10 provides that in order to be a member, one must have two parents who are members and have 4 or more Kanien'keha:ka great-grandparents and is willing to seek a clan, or who has one parent who is a member, and one parent who is one of the Six Nations (Mohawk, Oneida, Onondaga, Cayuga, Seneca or Tuscarora) and has 4 or more great-grandparents who are one of the Six Nations and is willing to seek a clan.

vice versa, are inseparable from one another. Individuals have all had separate life experiences, all of which have shaped their identities. Similarly, communal identities are not frozen in time, but grow, evolve and adapt to ever-changing circumstances. Therefore, an identification system which focuses on the inter-relationships or connections between individuals and communities, and allows for alternative ways of identifying those connections *versus* focusing on exclusionary measures, will accomplish many goals. This will allow individuals the freedom to be part of their communities and to form safe attachments by being free to identify as Aboriginal. It will also allow communities the authority to decide who does and does not belong, based on a fair, non-discriminatory system that does not freeze their cultures in time.

The New Brunswick Aboriginal Peoples Council (NBAPC) is a provincial affiliate of the Congress of Aboriginal Peoples (CAP), both of whom claim to represent the interests of status and non-status Indians living off-reserve.³⁵¹ Their example shows that it is not just First Nations who struggle with the issue of identity and membership. In order to be a member of the New Brunswick Aboriginal Peoples Council, one must provide documentary evidence (in the form of birth certificates, marriage certificates,

³⁵¹ New Brunswick Aboriginal Peoples Council, “New Brunswick Aboriginal Peoples Council”, online: New Brunswick Aboriginal Peoples Council <<http://www.nbapc.org/main.asp?deptid=0&lid=0>> [NBAPC online]. The NBAPC claims to be a “community of Aboriginal people living off-reserve in Mi’kmaq/Maliseet/Passamaquoddy territory in New Brunswick”. See also: Congress of Aboriginal Peoples, “Overview”, online: Congress of Aboriginal Peoples <<http://www.abo-peoples.org/about/overview.html>> [CAP online]. CAP claims to represent the interests of the off-reserve, non-status and Métis peoples in Canada.

etc.), that one is a direct descendant of a person with Aboriginal ancestry (blood).³⁵² Further, applicants must be able to trace their ancestral/blood relative back no earlier than July 1, 1867.³⁵³ This means that if the person one relies on as their Aboriginal relative was born in 1725 and died in 1790 that would be too remote of a blood/descent connection to entitle you to membership in the NBAPC. What is even more ironic is the choice of date to limit the remoteness of descent from an Aboriginal ancestor. Aboriginal Nations did not begin or end on July 1, 1867, and choosing the date of confederation seems to be the ultimate example of assimilation at work. What does confederation have to do with Aboriginal identity, other than a reminder of the many ways in which Canada has reduced, restricted and eliminated Aboriginal peoples from their identities? The relevant portion of the NBAPC's membership section provides as follows:

- A. **FULL MEMBERSHIP** in the Council shall be open to persons of Aboriginal Ancestry 16 years of age and older and who ordinarily reside in New Brunswick and not on a Reserve. Only a Full Member shall be eligible to vote at Assemblies or Special Meetings or to hold elective office at the Executive or Board of Director level of the Council. To be eligible for Full Membership, the Aboriginal person must
- i) Application for Full Membership must be made at the community local level and forwarded to the Membership Clerk at Head Office with recommendation for approval.

³⁵² *NBAPC online, supra* note 351. See the "Terms and Conditions" under the section entitled "Membership". The base criteria for membership (in addition to living off-reserve in New Brunswick for 6 months and filling out the form), one must "be a descendant of a verified and known Aboriginal person since July 1, 1867". See also: New Brunswick Aboriginal Peoples Council, *The New Brunswick Aboriginal Peoples Council Constitution and By-Laws*, (Fredericton: NBAPC, February 19, 2008) [*NBAPC Constitution 2008*] at s.1.

³⁵³ *NBAPC Constitution, supra* note 352 at s.1. (iv).

ii) be ordinarily resident in New Brunswick, off a Reserve, for six (6) months prior to applying for Membership;

iii) meet the requirements of Membership and must fill out and have approved a Membership form prescribed for such purposes;

iv) be a descendant of a verified and known Aboriginal person since July 1st, 1867.

v) Documents to support Aboriginal ancestry must be certified. Photocopies of the certified documents shall be made by the Membership Committee and certified documents returned thereafter to the applicants.

vi) Requests for new membership to be actioned within a 90 day period. Withdrawing memberships to be processed within a 90 day period.³⁵⁴

Not only must applicants prove their blood link, but the code also specifies that non-Aboriginal spouses of approved members cannot become full members. This section provides:

B. Spousal Membership shall be open to the spouse of a Full Member. No formal Membership application is required for Spousal Membership but Spouse's name shall be included in the Annual Charter list from Community Locals. Spousal members shall not be eligible to vote at Assemblies or Special Meetings or to hold elective office at the Executive or Board or Director level of the Council.³⁵⁵

The only exception the NBAPC appears to allow to this ancestry/blood descent rule is that of non-Aboriginal women who gained their Indian status through marriage to a status Indian man. This exception allows the non-Aboriginal spouses of status Indians to become full members, but does not allow the non-Aboriginal spouses of non-status

³⁵⁴ *Ibid.* at s.1.A.

³⁵⁵ *Ibid.* at s.1.B.

Indians to become full members.³⁵⁶ This is an odd result for an organisation that claims to represent the interests of non-status Indians. Many in the community may also find this to be a discriminatory practice against non-status Indians and their spouses.³⁵⁷ This is bound to be the result when membership codes try to mix blood/descent criteria with that of status. Neither one is a true reflection of one's Aboriginal identity but in fact continues the reliance on racist and sexist criteria for determining membership.

Additionally, many First Nations discriminate against their members on the basis of residency (i.e., whether they live on the reserve) in terms of whether or not they can be members, whether they can vote in elections or run for office, and/or whether they can have access to programs and services provided by the band, like housing. Until new amendments were made to the *NBAPC Constitution* at the 37th Annual General Meeting in 2008, the NBAPC arguably discriminated, in the same way, against their off-reserve

³⁵⁶ This example refers to the situation where a non-Aboriginal woman married a status Indian man pre-1985 and gained status as an Indian. This circumstance is compared to a non-Aboriginal woman who married a non-status Indian man. Post 1985, the non-Aboriginal spouse of the Indian man can have membership in the NBAPC, but the non-Aboriginal spouse of the non-status Indian cannot.

³⁵⁷ *Ibid.* at 2. "The Council is duly mandated to represent to all other levels of government, and to protect and preserve forever, the Aboriginal and Treaty rights, including Land Claim rights, of the Off-reserve Mi'kmaq, Maliseet and Passamaquoddy People of New Brunswick." Further, their aims and goals provide: "To foster and strengthen cultural identity and pride among people of Aboriginal Ancestry in New Brunswick". See also: G. Gould, A. Semple, *Our Land: The Maritimes: The Basis of the Indian Claim in the Maritime Provinces in Canada*, (Fredericton: Saint Annes Point Press, 1980). The New Brunswick Aboriginal Peoples Council (NBAPC) used to be called the New Brunswick Association of Métis and Non-Status Indians (NBAMNSI). On page 159, the NBAMNSI (now NBAPC) insisted in part, that: "The Government recognize our right as Indian People to special status in accordance with the provisions of the British North America Act."

members as against anyone who was not resident in the province.³⁵⁸ Just as off-reserve band members in First Nations could not vote or run for office in band elections; similarly, the NBAPC refused to allow their non-provincial members to vote or run for office in their elections.³⁵⁹ While the NBAPC criticised some bands for failing to provide information, programs and services to off-reserve band members, the NBAPC appeared to be doing the very same thing.³⁶⁰ Given the long history of the NBAPC's political advocacy activities to combat discrimination under the *Indian Act* and band membership codes, it is somewhat surprising that they got caught up in the politics of trying to adjust their membership criteria to incorporate some of the very same issues which they complain. A pre-requisite for membership based on blood descent dating to July 1, 1867, is no less arbitrary than the status provisions under the *Indian Act*. Perhaps what this shows is that off-reserve Aboriginal peoples have been impacted by assimilation as much as on-reserve Aboriginal peoples and, will require just as much time to address similar issues related to identity and membership.

What these solutions and examples of membership difficulties show is that legal and social conceptions of Aboriginal identity based on blood quantum or rigid descent-based formulas do not accurately reflect the rich identities and cultures of Aboriginal peoples. Some of these solutions offer alternatives to the current *Indian Act* status

³⁵⁸ New Brunswick Aboriginal Peoples Council, *The New Brunswick Aboriginal Peoples Council Constitution and By-Laws*, (Fredericton: NBAPC, July 4, 2006) [*NBAPC Constitution 2006*] taken from the 36th Annual General Meeting Docket.

³⁵⁹ *Ibid.* at s.1.G. "Non-Resident Members will not be entitled to vote or hold elected offices at the community local level, zone level or the provincial level of the NBAPC".

³⁶⁰ *Ibid.* at s.11.A., 1.C. Notice of annual AGMs were given to members in good standing only, defined as full members. This was interpreted by NBAPC as meaning only resident members.

provisions and band membership codes. They also speak to the importance of incorporating tradition without freezing it in time, or using it to exclude rightful members from communities. The importance of Aboriginal Nations having control over determining their own citizens and the importance of individuals belonging to their communities is also emphasised. These solutions will obviously not come without debate, struggle and social conflict. But the benefits that accrue to individuals and communities in relation to their identities and cultures far outweigh the challenges they face in getting there. All of the ideas suggested above are central to the solution that I believe best suits the current reality faced by Aboriginal Nations and their individual members. In coming up with principles for determining identity and citizenship, I am cognizant of the fact that there is no one size-fits all solution, and that each Aboriginal Nation must engage in a community process to determine what the cultural factors are which are most important to them. Any detailed band membership code or self-government citizenship code would have to be constructed in consultation with communities and individuals with legitimate interests in their communities.

The principles I propose take into account several challenges reviewed in previous chapters: (1) courts tend to view Aboriginal cultures as frozen in pre-contact times; (2) there has been a long history of government interference in both individual and communal Aboriginal identity and these harms have to be acknowledged and accounted for in order to move forward; (3) Aboriginal Nations are not races and, as such, there is no room for identity, membership or citizenship criteria based on blood quantum or rigid descent criteria which only serves to perpetuate the myth of vanishing races; and (4) self-determining peoples, like Aboriginal Nations, must be cognizant of the fact that they

exercise their powers (including self-government) within a context of domestic and international legal regimes which much be reconciled. While this may mean that the laws of Aboriginal Nations will be paramount over other laws in many core areas like citizenship, it will also mean that Aboriginal citizens will have the benefit of both the laws of their Aboriginal Nations, and the relevant laws of Canada. Thus, communal laws are limited by the laws which benefit individuals, and vice versa.

I believe that the underlying basis of a community's citizenship principles must be the individual's connection to their Nation (e.g. Mohawk, Cree, Mi'kmaq, or Maliseet). I see it as a flexible concept which will inform the particular criteria which determines either community membership or Nationhood citizenship. Flexibility must be built in to accommodate the ongoing struggles faced by Aboriginal peoples in maintaining their cultures, languages, traditions and identities in the face of assimilatory laws and policies. My suggestions come from my views about the traditional concept of relationships that is common in many of our Aboriginal communities. This is a circular concept which is continually renewed, and depends on those within the relationship to contribute equally, even if differently. The relationship between an individual and a Nation is experienced differently by each generation (past, current and future), and the wealth of these experiences needs to be passed on and shared with families, friends, acquaintances, co-workers, elders, advisors, leaders, children, and other communities. These relationships will evolve over time, just as a community's traditions, customs and practices do. The circle can only be complete if an individual, who identifies as Mi'kmaq, is recognized as Mi'kmaq and is welcome into the local Mi'kmaq community as a Mi'kmaq. Only then can all parties benefit from the rights, benefits, obligations and protections offered by the

Mi'kmaq Nation. This circle of relationships also works in the reverse: the Mi'kmaq as a Nation will only thrive and survive into the future if they maintain their relations with their local communities, which are in turn made up of individuals who identify as Mi'kmaq and commit to the overall well-being of their Nation, culture and identity.

Loyalty, commitment, sacrifice, volunteerism and civic duty will come freely from Aboriginal citizens who have their individual and communal identities recognized, supported and protected. This kind of protection extends not merely to select individuals, but also to one's brothers and sisters, aunts and uncles, and children and grandchildren, regardless of sex, blood quantum, or reserve-based residency. In exchange for communities forgiving their members for the harms they have suffered through assimilatory laws and policies, individuals have a lot to offer their Nations in terms of Nation-building. There are Aboriginal doctors, lawyers, elders, grandmothers, teachers, labourers, hunters and politicians who all have a role to play in building strong Nations. They may all have different opinions, or they may all have different views on how to rebuild their Nations, but their common identity gives them all, new members and old alike, a common purpose: to improve the lives of their people, rebuild their Nations and preserve their cultures for endless future generations. The key connections which maintain these relations will have different meanings and levels of priority in each community. However, the goals will be similar as Aboriginal communities move from externally controlled people to become self-determining peoples who care about preserving their identity for future generations.

While a thorough consultation and information process would be necessary in each community to work out these varying priorities, and a complete community

membership code or self-government citizenship code would be much larger than what I can offer in this thesis, what follows is how I would start the discussions in my community. Therefore, I will use my home community of Eel River Bar and the Mi'kmaq Nation as the example, and demonstrate how my family would be affected by various citizenship criteria. The criteria that I believe are most appropriate for my Nation and community are: (1) ancestral connection; (2) commitment to the survival of the Mi'kmaq Nation; (3) respect for Mi'kmaq language, traditions, customs and practices. While these criteria are focused on self-government citizenship codes, they could also be applied to band membership in the interim. These criteria are also very general in nature and represent categories of criteria that could be presented in various combinations to determine citizenship. These criteria are also focused on the Mi'kmaq Nation and, therefore, would not include things like clans, houses, and/or hereditary factors that might be found in other Nations. I will address each category and speak to how my family might make some of these links in order to prove our claims to citizenship.

I believe that a connection to one's ancestors is an important part of establishing citizenship in a Nation, membership in a community, and of determining individual identity. However, a requirement that an applicant prove an ancestral connection to the Mi'kmaq Nation does not equate with the imposition of a certain blood quantum or fixed formula relating to remoteness or proximity of descent from one's ancestors. I view an ancestral connection to the Mi'kmaq Nation as a valid category for determining citizenship, and this connection could be demonstrated in several different ways. For example, proof of an ancestral connection for one applicant could take the form of demonstrating familial links to citizens of the Mi'kmaq Nation directly or through its

various communities all over Mi'kma'ki.³⁶¹ This might include demonstrating a familial connection to past elders, chiefs, or known Mi'kmaq families within the area. This does not mean that an individual could make an unsubstantiated claim that one of their great-grandmothers 7 times removed might have looked Indian. The connection cannot be tenuous or left open for abuse, but must represent a genuine familial link to the Mi'kmaq. For example, an applicant might show that while his/her parents were not members of the specific local Mi'kmaq band, due to the *Indian Act* or past membership codes, they may still be able to show that their grandparents or great grandparents were members. Another way to demonstrate an ancestral connection might be to allow spouses (male and female) who have married into our communities and have been a part of our communities for a substantial period of time to be considered for citizenship. Other applicants may have been adopted by Mi'kmaq citizens and/or community members when they were young and therefore can show an ancestral connection that way.

Given that I am referring to citizenship in the Mi'kmaq Nation primarily, it is important to recognize that when I speak of being born or adopted into a community, I do not mean only the Eel River Bar reserve. Reserves were a creation of Canada and are not representative of our traditional territories. Therefore, being born within our community could include being born within any of the vast tracts of traditional territory throughout New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, Quebec and Maine that are Mi'kmaq territory. Instead of our potential citizens being viewed as off-reserve people and shunned from citizenship, they should be viewed as the

³⁶¹ Cape Breton University, "The Mi'kmaq", online: Mikmawey <<http://mikmawey.uccb.ns.ca/mikmaq.html>>. Mi'kma'ki is Mi'kmaq territory which is comprised of seven districts throughout eastern Canada and Maine.

on-traditional-territory people that most of them are. Otherwise, we will end up excluding the majority of our citizens, since more than half of the current band members live off-reserve, and any new applicants for citizenship would likely also live off-reserve. Perhaps if we change our terminology to reflect our realities and not that of Canada's, we will find it easier to amend our citizenship codes to not welcome home new citizens, but to recognize that our Mi'kmaq citizens were always here.

The second category of criteria would involve applicants demonstrating their commitment to the survival of the Mi'kmaq Nation. A very significant way of doing this would be to first self-identify as a Mi'kmaq. Earlier chapters have already explained how there are many more people of Aboriginal ancestry than actually identify as such. Self-identification is an important means of asserting individual identity as well as one's affiliation with both a local community and the larger Mi'kmaq Nation. Given the history of significant government attempts to assimilate Aboriginal peoples and to make them ashamed of their identities, I believe that self-identification is an integral part of demonstrating one's commitment to the Mi'kmaq Nation. Similarly, a long family history of publically identifying with the Mi'kmaq Nation would also help meet this criterion. On the other hand, an applicant whose family has identified as Acadian for 4 generations, and who has not identified as Mi'kmaq, may have a hard demonstrating the sincerity of their current claim. One also has to allow for the possibility that individuals may not wish to identify as Mi'kmaq and, as such, could not be forced to so associate.

One might also demonstrate their commitment to the Mi'kmaq Nation through official methods, like the civic loyalty that comes with pledging alliance to one's Nation. This could take the form of official, formal and/or public commitments made to the

Mi'kmaq Nation by individual applicants. Applicants could also demonstrate that they have made themselves aware of, and pledge their commitment to the aims, goals and aspirations of the Mi'kmaq Nation. This should not be interpreted to mean that all applicants must agree with, support or even like their leadership. Loyalty should not be misconstrued with a requirement to have one single voice on political issues. Loyalty to the community can be shown by voting for a land claim just as much as it can be by voting against a land claim. It is not which viewpoint one takes that is crucial to demonstrating loyalty, but the fact that one cares enough to take a stand on issues impacting Mi'kmaq and participating in the decision-making process.

These kinds of activities could be in conjunction with Nation-based citizenship courses designed to educate current and potential citizenship applicants about the history, politics, governance and laws of the Mi'kmaq, for example. Alternatively, applicants might also show their record of service to the Nation which they have accumulated through working for it, volunteering in the local communities, actively participating in Nation-based governments and/or through significant contributions to the overall social well-being of their local community. Raising happy, healthy children would be a significant contribution to the overall health and well-being of the community as a whole. Similarly, elders who offer advice and guidance to the younger generations perform as great a civic duty for their communities as do those who vote, for example. The idea is not to force citizens to demonstrate their connection to their community in the same way. On the contrary, valuing the diverse contributions of citizens contributes to stronger communities and the Mi'kmaq Nation as a whole. Other examples could include obeying the laws, rules and codes adopted by the Mi'kmaq Nation in relation to peace and order,

distribution of resources, and taxes. Submitting to Mi'kmaq Nation jurisdiction over applicable legal matters would also represent significant commitments to the Mi'kmaq Nation. Any combination of these possible criteria, and numerous others could suffice to demonstrate a commitment to the Mi'kmaq Nation.

The last category is respect for the languages, traditions, customs and practices of the Mi'kmaq. This does not mean that individual citizens must all think the same way spiritually, culturally, and politically, nor does it require applicants to attend traditional ceremonies instead of going to church. The Nation will have to account for the fact that many Mi'kmaq people have been converted to Catholicism, have other ways of expressing their respect of Mi'kmaq tradition, and yet still retain strong Mi'kmaq identities. I have met many Mi'kmaq people who can and cannot speak Mi'kmaq, who do and do not go to church, who like and dislike pow wows. All of these people are still Mi'kmaq, they simply express their identities in different ways. This category is meant to reflect the importance of these items to the maintenance and preservation of Mi'kmaq identity and culture for future generations of Mi'kmaq citizens. A commitment to the preservation of Mi'kmaq culture benefits future generations who will inherit strong, vibrant cultures. An example of meeting this criteria would be applicants who can demonstrate that they speak the traditional Mi'kmaq language, that they are willing to learn the language or that they will promote the language in other capacities, such as sending their children to language classes or supporting the use of Mi'kmaq language use within their communities, governments and education systems for example. This criteria represents a spectrum: on one end, some people may speak Mi'kmaq or choose to learn how to speak Mi'kmaq, and, on the other end, some individuals may choose not to learn

the language, but support their community's use of both Mi'kmaq and English in official correspondence, for example. Other ways of respecting Mi'kmaq traditions and practices would be through adherence to the traditional rules and laws in relation to hunting, fishing and gathering grounds, contributions to ceremonies or redistribution of resources that may or may not find official legislative form. This category is very open to a wide range of factors that the Mi'kmaq Nation may find important to their survival as a Nation. The key will be to ensure a great deal of flexibility and options in its application so as to ensure that different ways of being Mi'kmaq are protected, while at the same time balancing that flexibility with protections to ensure that those bringing tenuous or suspect claims of Mi'kmaq identity are not included. On a go-forward basis, perhaps once the charter group of Mi'kmaq citizens have been determined, then their future generations born to Mi'kmaq citizens can be automatically granted Mi'kmaq citizenship unless and until they denounce their citizenship. New applicants could be offered the same benefits once they have met the requisite criteria. This would be more in keeping with other Nations, like Canada, where one does not have to apply to be a citizen if they have been born in Canada, but does not exclude from applying, those who have not been.

The above review of my suggested categories of citizenship criteria demonstrates a focus on key aspects of what makes a Mi'kmaq citizen, but also incorporates enough flexibility so that applicant's for future Mi'kmaq citizenship are free to be individuals and have their own views about what makes the good life, even as they share a commitment to the preservation of their Nation. No one applicant will have to demonstrate all the criteria noted above, but will be assessed based on the combination of factors which they bring forward. I would suggest that while applicants do not all have to have the same

level or number of criteria to be accepted as citizens, they should be able to show how they meet at least some of the criteria in each category. For example, some citizens will have strong ancestral connections but may be weaker in traditional aspects, while others may have strong commitments to the Mi'kmaq Nation and lesser ancestral connections for example. What is also important is that the criteria for citizenship be publically available, that the decision-making process be credible and fair, and that those making the decisions are representative of all who have legitimate interests in the Mi'kmaq Nation. These criteria can change or evolve with the passage of time along with the changing circumstances and priorities of the Mi'kmaq Nation. The Nation is no more frozen in pre-contact times than it would be frozen at some future point in time. Another important point to stress is that criteria which are considered important to the Mi'kmaq Nation ought to be applied equally to both the charter group and new applicants for citizenship. It would be unacceptable for the Mi'kmaq Nation to indicate that all new citizens must be fluent in the Mi'kmaq language, for example, when the majority of its current citizens are not. These are the kinds of double standards that lead to arbitrary exclusions, claims of discrimination, and malcontent within families and communities, and which foster ongoing, harmful divisions within the Mi'kmaq Nation.

Therefore, the three categories of citizenship criteria that I have proposed are not set in stone, nor do they represent all the possible ways in which the Mi'kmaq Nation might determine its citizenship. This brief overview of the key factors which I feel are important for citizenship determinations are meant to start the conversation within our communities, as opposed to acting as a pronouncement of what has to be. It is often easier to identify problems than it is to offer solutions. My goal in this thesis was to do

both. In this way, individual citizens and those who have legitimate claims to citizenship can have open, frank discussions about how to move forward.

Many applicants might feel that since they cannot meet a singular criterion that this might result in the denial of their application. However, in using my own personal family situation as an example, perhaps others can see how they fit into these categories, but in different, yet valuable ways. Similarly, those with tenuous claims might better understand why Mi'kmaq identity cannot simply be a free-for-all, or it stops being a Mi'kmaq identity and turns into something else. In my own personal example, I would argue that my family could meet the basic citizenship standard that I have proposed. By way of review, the categories and related factors that I consider important in determining citizenship in the Mi'kmaq Nation are as follows:

(1) Ancestral Connections

- Familial ties to elders, chiefs, or other members of local Mi'kmaq communities (on-reserve or on-traditional-territory) within the Mi'kmaq Nation territory;
- Parents or grandparents who are/were community members;
- Spouses who have married into local Mi'kmaq communities and have been a part of those communities for a substantial period of time (20 years, for example);
- Adoption into the Mi'kmaq Nation in youth, by community member(s);

(2) Commitment to the Mi'kmaq Nation

- Self-identifying as Mi'kmaq;
- Familial history of identifying as Mi'kmaq;
- Official pledge of commitment to the Mi'kmaq Nation;
- Knowledge of and subscription to aims, goals and objectives of the Nation;
- Record of service to the Mi'kmaq Nation through volunteerism, employment, political activities, etc.;
- Obeying all laws and submitting to jurisdiction of Mi'kmaq Nation, like paying taxes, attending Mi'kmaq court;
- Participation in Mi'kmaq civic activities like voting, consultations, surveys, community events, etc.;

(3) Respect for Mi'kmaq language, traditions, customs and practices

- Commitment to maintain and preserve Mi'kmaq culture;
- Fluency in Mi'kmaq, willingness to learn the language
- Supporting use of Mi'kmaq language in school, government, community;
- Respecting traditional Mi'kmaq rules regarding hunting and fishing, ceremonies;
- Respecting land, natural resource, governance and/or other important agreements negotiated by the Mi'kmaq;
- Participating in traditional ceremonies and/or supporting their use in official functions like schools, government offices and celebrations;

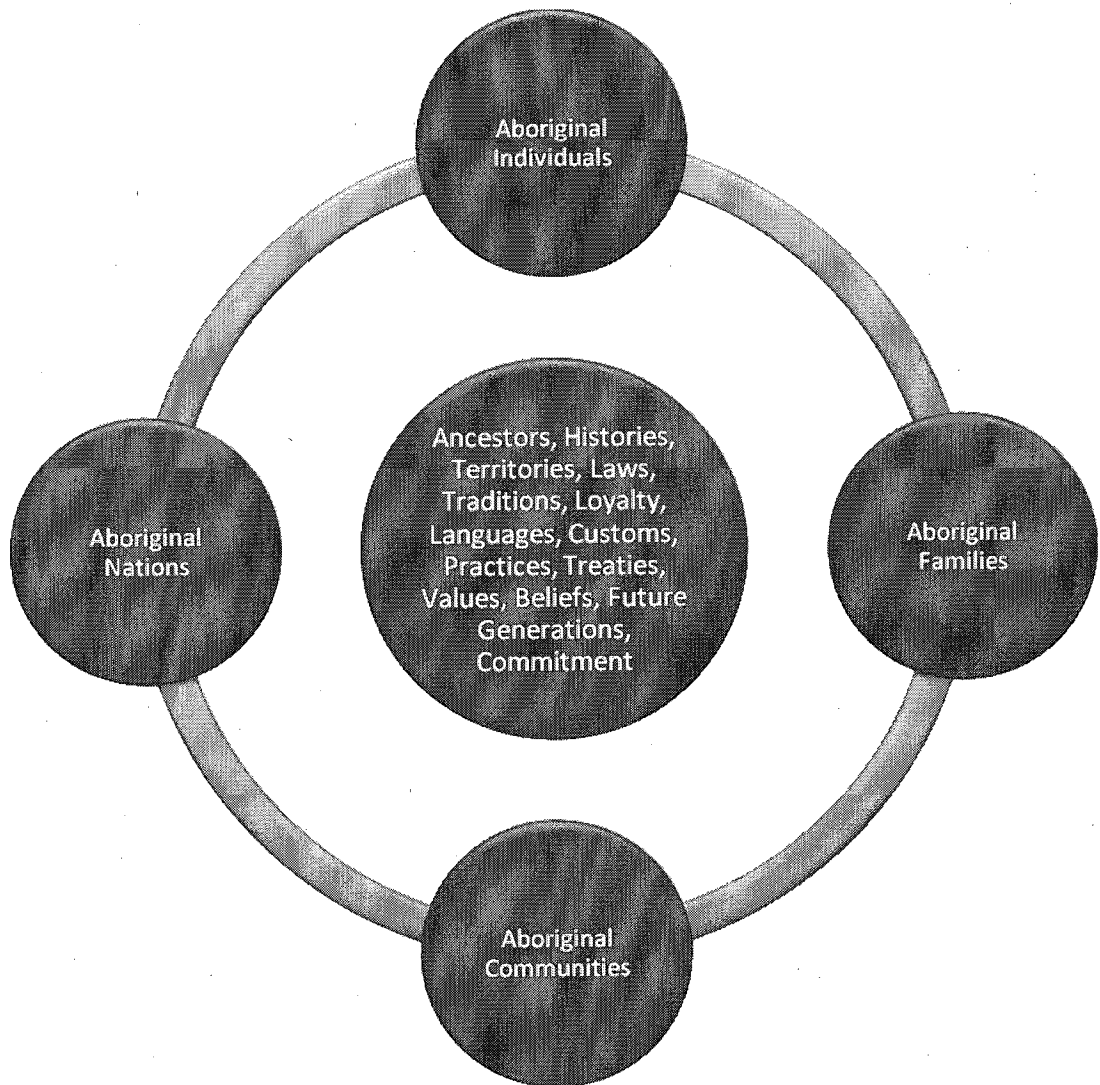
In my case, I would be able to show that my family and I meet various criteria from all three categories. For example, my children and I have a direct familial relationship to many community members, like the former Chief Louis Jerome (my great grandfather). Also, my father was a band member of a local Mi'kmaq community, namely, Eel River Bar. In the second category, my children and I have always publically identified as Mi'kmaq people, as have my brothers and sisters, my father, my grandmother, my great grandfather, and so on. We would, without hesitation, make an official commitment to the Mi'kmaq Nation and always work in furtherance of its interests. I would argue that through my years of volunteerism, education and work, I have a substantial record of service to the Mi'kmaq Nation, as do my children who have been politically and socially active Mi'kmaq. In the third category, my children and I are not fluent in the Mi'kmaq language, but I have taken language courses and my children would definitely participate in language courses made available to them. We would agree to obey all legislative and traditional laws and already participate in practices and ceremonies related to Mi'kmaq peoples. In many ways, my children and I have been immersed in Mi'kmaq culture, politics and social activism since we were born. My extended family has a long history of

working and volunteering in efforts to protect our lands, treaties, rights and identities as Mi'kmaq people. The only difference between my family and those who live on the Eel River Bar reserve is status under the *Act*. However, status has nothing to do with being a Mi'kmaq, and relies solely on arbitrary blood quantum/descent formulas to determine Indianness. It has been my life's work to help advocate for changes that make it possible to reunite those currently excluded by these discriminatory Indian categories with their traditional Aboriginal Nations.

Aboriginal Nations have no need to define themselves out of existence by relying on criteria based on conceptions of race or blood or discrimination between the sexes. Aboriginal Peoples can incorporate Aboriginal peoples from other communities (as they do now under band membership codes), as well as from non-Aboriginal communities. By regaining their population numbers lost through so many years of assimilatory laws, they will have strength in numbers, more people to serve their governments, to carry on their traditions and customs, to preserve their languages, and more people to continue their Nations for many generations into the future. The more people they have, the more influence they can have on domestic politics in Canada and internationally as Indigenous Peoples. It is important that the many ways of being Aboriginal be protected for the benefit of Aboriginal Nations and for their children, seven generations into the future. Just as Aboriginal Nations demand the right to be self-defining as against Canada, so too should Aboriginal individuals have some freedom in how they self-identify and are included in their Aboriginal Nations. In this way, Aboriginal Nations will be able to maintain political and social integrity of their communities in a fair and equitable manner, and thus help to rebuild their Nations to their former status, and simultaneously, to

protect their lands, resources and treaty rights for their rightful citizens and for their heirs and heirs forever.

ABORIGINAL IDENTITY: CULTURAL CONNECTIONS



Chapter Seven: Conclusion

When I started my research for this doctoral thesis, I had a very clear idea in my mind about what makes an Aboriginal person. I felt very strongly that the determination of Aboriginal identity for the purposes of land claims and treaty rights, for example, was much easier than governments were making it out to be. For the most part, I always felt that one just knew when someone was Aboriginal, or otherwise. I also felt that I had a better knowledge than most about the concept of Aboriginality, seeing that I had been raised in a politically active family where identity was the most central of all the issues we addressed. There would not have been a lawyer or professor in the world who could tell me any different. Most of my knowledge had been based on my own personal experiences gained from my family, my home community of Eel River Bar, my education, my volunteer activities with Aboriginal organizations, and especially those organizations like the New Brunswick Aboriginal Peoples Council (NBAPC) which represented off-reserve Aboriginal peoples.¹ I have even learned a great deal having worked for the federal government, especially at Justice Canada and Indian Affairs.² All

¹ Indian Claims Commission, *Eel River Bar First Nation Inquiry: Eel River Dam Claim*, Indian Claims, online: <<http://www.indianclaims.ca/pdf/EelRiverEng.pdf>>. Eel River Bar First Nations is one of the Mi'kmaq bands who are part of the larger Mi'kmaq Nation. They are located in northern New Brunswick on the Bay of Chaleur near the town of Dalhousie. New Brunswick Aboriginal Peoples Council, online: NBAPC <<http://www.nbapc.org/main.asp?deptid=0&lid=0>>. The New Brunswick Aboriginal Peoples Council (NBAPC) is an Aboriginal organisation located in Fredericton which represents the interests of off-reserve Mi'kmaq, Maliseet and Passamaquoddy peoples in New Brunswick. This includes both status and non-status Indians.

² In Halifax, Nova Scotia, I worked at Justice Canada as legal counsel for Indian and Northern Affairs Canada (INAC). I also worked for INAC as their Director of Lands and Trusts Services (LTS) and then as Director of Government Relations (treaties, land claims, self-government and economic development). More recently, in Ottawa, I worked

of these experiences have helped confirm the views and opinions I have held since I was very young.

In the past, whenever I was faced with conflicting views about my place in this world, I always tried to remember the three things I knew for sure: my family is Mi'kmaq, I am Mi'kmaq, and my purpose in this world is to make things better for future generations of Mi'kmaq people.³ These are the three basic principles that my large extended family made sure, were part of my context for life. Their passion to change the world for my benefit was passed on to me so that I could do the same for my children. While this meant going through all the growing pains of understanding what this was all about, I was never unsure about who I was. I can remember endless occasions where my family challenged me to put these concepts and passions into practice, even at a young age. For example, I remember in elementary school that my much older brother, Nelson, came to my classroom and told the teacher, in front of all of my friends, that I was not allowed to sing "O Canada" until Canada returned all the lands and resources it had stolen from us. I have to say that as a young person, I was embarrassed and confused.⁴

I did not yet know all of our history and the impact that colonialism had on our families. Similarly, when I told my older brother, Frankie, that the teachers had taught me that there were no treaties in the Maritimes, he lectured me for hours about our treaties

for Justice Canada in their Aboriginal Affairs Portfolio on legal issues pertaining to *Bill C-31. Indian Act*, R.S.C. 1985, c. I-5, as am. By R.S.C. 1985, c.2 (1st Supp.) [*Bill C-31*].

³ Cape Breton University, "The Mi'kmaq", online: Mikmawey <<http://mikmawey.uccb.ns.ca/mikmaq.html>>. The Mi'kmaq are a traditional Aboriginal Nation whose territory of Mi'kma'ki comprises Prince Edward Island, Nova Scotia, parts of New Brunswick, Gaspé Peninsula of Quebec, parts of Newfoundland and the north eastern part of the United States.

⁴ Canadian Heritage, "National Anthem: O Canada", online: Canadian Heritage <<http://www.pch.gc.ca/pgm/ceem-cced/symbbl/anthem-eng.cfm>>.

and what they meant, and made me promise to correct the teachers each and every time they tried to say otherwise. At the time, I did not even know what a treaty was, but I knew from my brother that had I better protect it, and so even without fully understanding it, I did.⁵ As I went to a school where we were the only Aboriginal family, many of the other children did not have the benefit of knowing Aboriginal people, but they could see that we were more than the cowboys and Indians version they read in our school books. I cannot count how many times I was followed home by kids who would call me names and make what they must have thought were Indian war cries. They always commented about my long black hair and called me names I would never repeat here. To add further confusion to the matter, my mother was non-Aboriginal and did not know how to address these upsets. Her solution was to tell me to wear long socks so that no one would see the colour of my legs. This was not her fault, as her own parents had significant difficulties with the fact that she had children with a Mi'kmaq man. At various times when I was growing up, I started to wonder what being Aboriginal meant if so many others appeared not to like Aboriginal people.

However, those moments were countered by the times when I was surrounded by my own family and our community. These times reinforced the positive aspects of my identity and what it gave me in terms of a context for life. I had the benefit of a large extended family which was politically active in many Aboriginal organisations whose objectives were to combat discrimination against off-reserve Aboriginal peoples, especially non-status Indians. This often meant trailing after my brothers and sisters,

⁵ Cape Breton University, "Mi'kmaq Resource Centre: Treaties", online: Mikmawey <<http://mikmawey.uccb.ns.ca/treaties.html>>.

aunts, cousins and in-laws to meetings, negotiations, protests and assemblies.⁶ I did not always know what they were talking about, but I knew it had to be important because everyone at these meetings would stand up when they spoke and often yelled or cried while making their points. I always felt like I was part of something really important, and I wanted so much to someday be brave enough to say something in front of all those people. However, at the time, I did not know what I should say. I had always thought of myself as a Mi'kmaq person, but in numerous meetings with governments and at various negotiations over natural resources, I heard people telling us that we were not "really Indians". We were non-status Indians and, as such, we did not have any claims on natural resources, lands or otherwise. This also caused me much confusion and hurt because I had always assumed that Mi'kmaq people were just that, and this issue about being excluded on the basis of whether I had status or not was quite upsetting.

⁶ My brothers Frankie and Nelson (No No), along with my sisters Patsy (Pee Pot), Glenda (Gingy), Phebe (Phebus) and Sandy were the most active in Aboriginal politics and were responsible for my attendance at every meeting, protest, or assembly they attended. Phil (Flip) Fraser, who is my sister Glenda's husband and Shawn (String) McKinney, who is my sister Patsy's husband were also very involved in our political activities and did everything from protest hunts to taking care of kids at summer camp. I owe the strength of my Mi'kmaq identity to them. Other people who had married into our family, like Mary Louise (Tootie) Palmater, my brother Frank's wife, Raymond Ring (Mary's brother), and Liam McKinney (Shawn's brother) all made significant contributions to Aboriginal politics and set strong examples for us younger ones coming behind them. Gary Gould, who was the President of the NBAPC for many years, not only helped advance our interests politically, but provided a strong example of how important it is to know your facts and be wary of falling for government "concessions" that may be more harmful than beneficial. Other Aboriginal women, like Georgina McKinney (Shawn's Mom) and Louise Ring (Mary's Mom), not only acted like grandmothers to the younger generation, but also provided strong female role models to encourage younger Aboriginal women to be involved in Aboriginal politics so as to benefit future generations.

As I was getting older and starting to be exposed to these issues, I started to understand what everyone was so passionate about at our gatherings. Try to imagine a meeting with all of your aunts, uncles, cousins, brothers, sisters, in-laws and friends, many of whom brought their babies or small children with them. These same people who passionately debated issues (sometimes at the top of their lungs), could then sit next to one another at the feast that followed. Their passion and ability to keep an open mind and forgive one another showed me how important political debate was and how important it was to ensure that everyone had a voice, regardless of whether we, as individuals, disagreed with those voices. The recurring theme in our meetings was that we would continue to fight for our rights and those of our children, and that no matter what the government could not deny the blood that ran through our veins. That blood connection to our ancestors formed the very basis of our ties to our traditional communities, and so long as we had that, we could never be denied our rightful identities as Mi'kmaq and Maliseet peoples.

I think, best of all, was the fact that my family raised me to know who I was, and to be very proud of that despite all the political and legal challenges that they knew I would face as I got older. My favourite time of the year when I was a child was not Christmas, but the one week out of every summer where I got to go to summer camp with all my nieces, nephews, cousins and friends. I counted the days until we got to go to "Indian summer camp". We were taught outdoor skills, various lessons in getting along, and to be proud of who we were. Many of my family members had important roles in these summer camps, like my brother Frankie, who always took on roles that we only understood as important later in life, like his covering himself up with lily pads and

pretending to be a lake monster so as to scare kids out of the deeper waters. What I liked best though, was meal time because all the women who cooked in the kitchen made sure to give lots of affection, offered comfort to anyone who was home sick, and bandaging our daily wounds. These women, like our own grandmothers, would so gently tend to our wounds, were also the same politically active women who stood up at meetings and ensured that our leaders were acting in the best interests of our future generations. It was not until I grew up that I realized that I had not been attending an Indian summer camp after all. It was a non-status Indian summer camp which was comprised of mainly the descendants of Indian women who had married out and lost their status, all from different families. These families felt that it was important that we not lose our sense of community or our connections to our identities as Mi'kmaq and Maliseet peoples. So, even as kids, we were protected as much as possible from the assimilatory effects of government laws and policies. Therefore, I had the benefit of some very powerful role models, male and female, status and non-status, on and off-reserve, whose number one priority was to ensure our identities survived.

It should be no surprise then that I grew up staying involved in the politics related to Mi'kmaq people, and especially non-status Indians. I absorbed all of those messages about the need to eliminate discrimination against non-status Indians, to overcome the imposition of foreign laws upon our people and to be proud of the blood that ran through my veins. It was upon this that my educational goals were based. As I started to get politically active and to exercise my voice at meetings and negotiations, I was met with numerous angry band leaders who thought I had no place at the table, first and foremost

because I was a woman, and secondly because they saw me as a non-status Indian.⁷ I faced similar backlash from various government officials who not only rejected non-status Indians as real Indians, but also questioned my credentials. Whether it was the federal or provincial government at the table talking about rights, they always had lawyers, scientists or academics with doctorates backing up their positions. On the Aboriginal side of the table, we had only two things: each other and the strength of our common identities. Most of the time, our side of the table knew more about the history and law than their side, but we were easily dismissed without the letters behind our name. Even today, I would pit Gary Gould (the former President of the NBAPC for many years) against any of the lawyers working for government and be confident that Gary would know more about the issues affecting us and how to effectively resolve them.⁸ The difference between Gary and them is that Gary has lived the discrimination against which we were fighting.

Similarly, the rejection of Canadian and provincial laws that were imposed upon us was a significant theme in our activities. We had never consented to the *Indian Act* and therefore, it should not apply to us.⁹ The *Indian Act* had only ever caused us pain and

⁷ In my personal experience, I have noted that over time, some band leaders have come to accept Aboriginal women at the negotiating tables. However, most still seem to be resistant to accepting that non-status Indians are part of the same Aboriginal Nations as themselves and, therefore, still resist their inclusion at negotiating tables.

⁸ Gary Gould was the former President of the NBAPC and still plays a major role in the provision of Aboriginal housing to off-reserve Aboriginal peoples at Skigin-Elnoog Housing Corporation located in Fredericton, NB. New Brunswick Aboriginal Peoples Council, "Skigin-Elnoog Housing Corporation", online: NBAPC <<http://www.nbapc.org/categories/Skigin%252dElnoog-Housing-Corporation/>>. He also co-authored a book about land claims: Gould, G., Semple, A. eds., *Our Land the Maritimes: The Basis of an Indian Claim in the Maritime Provinces of Canada* (Fredericton: Saint Annes Point Press, 1980).

⁹ *Indian Act*, R.S.C. 1985, c. I-5.

hardship and was the very reason for the divisions in our communities today between status and non-status, and on and off-reserve Indians. The fact that most of my extended family and families like ours either still lived off the land or, at least, supplemented their small household incomes with hunting, fishing and gathering, also highlighted the long arm of provincial law. I cannot remember a time when my family has not been harassed by provincial enforcement officers when they hunted or fished. Members of my extended family have not only participated in protest hunts as a result (*Fowler*), but they continue to be stopped and charged today.¹⁰ Most recently, my brother, Nelson, was stopped and charged by provincial officers as he hunted for food within Mi'kmaq territory. Though the Crown eventually dropped the charges after several trips to the court room, they had already caused much stress and upset to my brother, and effectively prevented him from obtaining his food for the winter. Therefore, it is no wonder that our family and others like us had no trust in federal and provincial laws as they had only ever caused us pain and offered few benefits or protections.

Therefore, not only did I decide to seek higher education in order to fulfill my Dad's dreams for me, but also because I grew up experiencing all the reasons why such an education was necessary. Thus, by the time I got to my doctoral studies, I felt very confident about what my topic would be and how I would argue it. I knew that I had to write about the struggles of non-status Indians and how to address the ongoing discrimination against them. My plan of action was to offer a concept of Aboriginality that ensured that non-status Indians were included in our home communities and welcomed at government negotiating tables, and that the basis of this inclusion was the

¹⁰ *R. v. Fowler* (1993), 134 N.B.R. (2d) 361.

fact that the same blood that runs through my veins is the same as that which runs in the veins of those Indians who lived on reserve. This solution would be bolstered by the rejection of all Canadian and provincial laws that had been imposed upon us. Although I started this thesis thinking I knew what I wanted to write, reflections on my past and new historical information started to open my mind to all the other issues that impact Aboriginal identity but which I had not always included in my assessments. It was quite alarming to be half way through my doctoral program only to realise that I might have to change direction. These revelations were so significant that they changed the very basis upon which I wrote my thesis. At first this presented a huge problem for me, in that if I could no longer use the old criteria to write about Aboriginal identity, then I was not sure what I would use. However, it turned out that I did not have to worry so much, because all the key aspects of my Mi'kmaq identity had always been there. They were just submerged under what I thought were more important facts.

Even so, I still had a significant issue to tackle: if I had felt so strongly about my views of Aboriginality, and I had not known some of the problems associated with those views, then others who may be less educated and experienced, or had a similar upbringing where they had always identified the same way, would also be holding on tightly to some of those very same views. I had identified this as my most significant hurdle because one can win or lose arguments in court, but to advocate for a significant change in communal thinking is another process altogether. As a result, I felt that the only way to move forward was to identify the problems with some of our strongly held views about Aboriginal identity, and to provide an understanding of how we, as Aboriginal peoples, could have held on so tight to these views which do more harm to our people

than good. I knew then that I wanted my thesis to be a useful tool for others to challenge the status quo and to identify what we could salvage and what should be abandoned altogether. In this regard, I had to open up myself to other teachings. My family always told me that formal education is important, but to them, the education we got from our families, leaders, elders and communities about all aspects of our people, from politics to culture, was just as important. Therefore, I had to reconsider everything I had been taught in the past in order to see where we as Aboriginal peoples could go in the future.

So, I went back to the three pillars of my identity and revisited their meanings. The first pillar was based on the rights of individuals. I had always viewed the struggle with regards to a recognized legal Aboriginal identity from an individual perspective. Our political struggles involved trying to combat discrimination against non-status Indians and fighting to ensure that various groups of us, like Aboriginal women and their descendants, were not excluded from individual registration in the *Indian Act*. It also involved ensuring that non-status Indians were included in band membership. What I had not considered at the time was the right of Aboriginal Nations to determine their own identities, and in so doing, determine who are the rightful citizens of their Nations. I had seen the struggle as between individual non-status Indians and individual bands for so long that I had forgotten my earlier teachings: I am a Mi'kmaq and my nation is the Mi'kmaq Nation. From this perspective, I could see that Mi'kmaq identity is not solely determined by its collective, just as it is not solely determined by its individuals. Mi'kmaq identity is formed through the inextricable relation between individuals and the Nation. While the Nation is made up of large extended families and local communities, they still form part of the Nation. Therefore, in talking about identity rights, I came to

understand that while the Mi'kmaq Nation has the right to determine its own identity and, therefore, who gets to be a citizen, this right is limited and supported by the right of individual identities of Mi'kmaq people and their right to belong to their Nation, and vice versa. It also follows that while local Mi'kmaq communities may have their own concepts about Mi'kmaq identity and who should be a band member, their ideas about identity and the right to determine band membership are limited and supported by both the Mi'kmaq Nation and that of individual Mi'kmaq people. So, while I have abandoned the purely individual focus of Aboriginal identity, it still remains an important component of it, albeit, in a more relational way.

Similarly, I had definite ideas about the use of Canadian and provincial laws in determining Aboriginal identity. Our identity as Mi'kmaq and that of other Aboriginal peoples has suffered through so many assimilation policies, that our Nations, communities and citizens are divided along numerous lines that we did not create. On and off-reserve Aboriginal peoples struggle in their relationships in the same way that status and non-status Indians do. My view has thus been that the external laws imposed upon us do much more harm than good and should be completely avoided. However, I have also come to see the benefit in some of the Canadian laws which are more protective in nature. For example, unlike the *Indian Act*, the *Charter* does not seek to assimilate Indians, ban their ceremonies or divide Nations into bands.¹¹ The *Charter* is about protecting the rights and freedoms of Canadians, including Aboriginal peoples, so that they can enjoy the good life in their Nations and within the Canadian democracy. Not only should Aboriginal peoples have the benefit of these rights and freedoms, but the *Charter* also

¹¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

makes a specific allowance for an interpretation of the rights contained in it so as not to negatively impact their special Aboriginal rights.¹² I started out with the view that no external laws should apply to Aboriginal Nations, but I have come to realise that certain laws resemble our own values and beliefs so closely that our traditional laws can work hand in hand with the *Charter* for the benefit of all our people. Just because the *Charter* came from Canada does not mean we should automatically cast it aside without first assessing its potential. Just as we balanced the rights and responsibilities of our Aboriginal citizens and Nations in the past, we can use the *Charter* to help us make those same balances in the future. The *Charter*, then, can act as a mechanism to help Aboriginal individuals and Nations get through the difficult transitional phase of rejecting the assimilatory views of the past and moving towards our self-governing goals, and as well providing flexible ways for accommodating some of the harms, divisions and disconnections caused by the *Indian Act* and Canada's past assimilatory policies. Just as the self-definition of Aboriginal Nations is complemented and strengthened by the self-definitions of its individual citizens, so too can the *Charter* help reconnect individuals and Nations in that self-identification process.

One of the only significant barriers to this reunification process between communal and individual conceptions of Aboriginal identity is the concept that Indian blood is not only a legitimate and quantifiable criterion, but that it is the most important aspect of Aboriginal identity. This represents the third pillar upon which I have always based my identity: the extreme pride associated with the Mi'kmaq blood that runs

¹² *Ibid.* at s. 25. These special rights include Aboriginal and treaty rights, land claims and any rights contained in the *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No.1 [*Royal Proclamation of 1763*].

through my veins. The fact that my great grandfather was the chief of my home community, that my grandmother was a healer for my home community and that my father was a member of that community has always assured me that I have a legitimate claim to my identity as a Mi'kmaq person. I cannot count the number of times I have heard this expression and have really identified with it. I have seen countless Aboriginal leaders, politicians and other community members say that no matter what Canada has done to or taken away from Aboriginal peoples, it can never take their bloodlines away from them. This is a very powerful and significant source of identity for many Aboriginal people and communities in Canada. I have to admit that I too have struggled with the possible consequences of giving this up as the determinant of my Mi'kmaq identity. For so many years, we, as Aboriginal peoples, and especially non-status Indians, have looked for that critical link that proves our undeniable connection to our ancestors, our communities and our future generations. But what is it about that connection that makes me Mi'kmaq? If I were to give up the concept that my blood determines my identity, will I still be Mi'kmaq? The fact that some people have no answer to that question is often what makes them cling so hard to blood as the ultimate determinant of identity.

As hard as it was for me to consider abandoning this concept, once I saw that it causes more harm to our identities than it does to support them, my fear started to subside. Then my fear completely left me when I realised that when our ancestors spoke of the blood that runs through our veins, they were not talking about the actual blood, but referring to our deep connection with our past through our ancestors, with our present through our families and communities, and to our future through our generations yet to come. This circle of life within which all of us as Mi'kmaq are connected, forms the very

basis of our identities. If we, as individuals, families, communities, and Nations looked beyond superficial measurements of blood, and looked deeper at what makes those connections between individuals, their communities and Nations so strong, we would see that blood is not only unnecessary as an indicator of our identities; it is completely irrelevant. All the indicators of Mi'kmaq identity have been there all along; we have just been too affected by discriminatory laws, assimilatory policies, and racist stereotypes for so long that it has been hard to see through the shame and the pain to celebrate those aspects of our identities that our ancestors fought so hard to protect for us. I am a Mi'kmaq because I have deep-rooted connections to the Mi'kmaq Nation based on my familial connections to my home community of Eel River Bar, my common history, values, and beliefs that are shared with the Mi'kmaq people, my connection to our traditional territories which forms a significant part of my identity, my commitment to protect our treaties, and my loyalty and dedication to the Mi'kmaq Nation. No amount of Indian blood could either reinforce or destroy those connections. Had I been adopted into the Mi'kmaq community, I would still have all these connections. Had both of my parents been Mi'kmaq, I would still have all of these connections. Identity is formed in part by one's parents, extended families, community and one's own personal journey of discovery. I started out this journey as a Mi'kmaq person, and I have ended it more confident of my Mi'kmaq identity than I could have imagined. Even more important to me, is that my views about Mi'kmaq identity, which are based on my ancestral connections, will also ensure that this rich identity will be available for my children and their children for endless generations to come.

Getting to this stage took many years of questioning the world around me. My thesis reflects this journey and how my own opinions have changed as I did. I set out wanting to demonstrate that excluding non-status Indians was wrong, and in supporting those arguments, I have discovered how inextricably entwined the concepts of Aboriginal identity and belonging truly are. Aboriginal individuals and communities rely on each other to support, protect and reinforce each other's identities. My review of how Aboriginal identity came to be legislated, and why identity is so important for Aboriginal peoples, is an important background to understanding how Aboriginal identity was changed and how some of those changes are so ingrained that they seem to have always been part of Aboriginal identity. Only in identifying the hidden dangers of how we construct our otherness is it possible to undo those factors which only hurt our identities rather than enrich them. Through my research, I came to realize that a balancing of interests between the right of individuals to belong, and the right to be self-defining as a Nation, is necessary. By acknowledging both the positive and problematic aspects of how we identify ourselves, we can start undoing the harms that negatively impact on our identities, while fostering those key aspects of our identities with our families and communities.

In Chapter 1, I introduced my personal family history and the specific identity issues which affect my family. It was important to me that a real life example be evaluated against the legal analysis and theory that follow in subsequent chapters. My great-grandfather, Louis Jerome, was one of the first chiefs of our home community, Eel River Bar First Nation. In his lifetime, he saw the forced relocation of our Mi'kmaq community from the New Mills area, to a much smaller plot of land in its current

location. It was his daughter (my grandmother), Margaret Jerome, who married a non-Indian man and gave birth to my father Frank Palmater. My father also parented with a non-Indian woman and I was born. As a result, when the *Bill C-31* amendments were made to the *Indian Act*, my grandmother was deemed to have been a s.6(1)(c) Indian, my father a s.6(2) Indian, and me and my children are all considered non-status Indians. My father eventually gained band membership in Eel River Bar, but their membership code does not allow me or my children to be members because of our lack of status. Therefore, we are excluded from participating in our band's governance, land claims, and both federal and band-related programs and services. We are also not invited to cultural gatherings, included in consultation meetings or information sessions, and lack access to our communal elders and leaders. We are denied both our individual identities and our communal identities that come with belonging to a community. While I have used my family as an example, there are many more families, just like mine, that suffer from the same type of exclusions. It was for this reason that the next chapter highlighted the legal, political and historical context behind these present-day identity issues.

In Chapter 2, I provided a detailed background on how Aboriginal peoples became so divided politically, socially and legally. The long process of controlling Aboriginal identity, dividing Aboriginal individuals from their communities, and Aboriginal communities from their Nations, was all part of Canada's original assimilation plans for Aboriginal peoples. Present-day Aboriginal organisations are divided among which legal sub-group of Aboriginal peoples they represent. For example, the Assembly of First Nations (AFN) represents status Indians through their band chiefs, while the Congress of Aboriginal Peoples (CAP) represents status Indians who live off-reserve,

non-status Indians and Métis. Even the Métis are generally divided between those represented by CAP, those represented by the Métis National Council (MNC) and those in the Métis Settlements in Alberta. The long history of assimilatory laws and policies in Canada have also left Aboriginal Nations divided into smaller bands, and Aboriginal individuals divided into those with or without status and membership. While Canada has since acknowledged that reliance on those assimilatory views to establish Aboriginal policy was wrong, it has not taken the corresponding steps to amend the *Indian Act* or its related policies that still continue with the old objective of assimilation.

Chapter 2 also provided an overview of the development of Indian legislation over the years, especially in regards to individual and communal identities. The preference for Indians that descend from the male Indian blood line has been part of Indian legislation for decades, and is even incorporated into the most recent *Indian Act*. Even today, Indian status is solely determined by Canada and factors as the largest determinate of individual and communal Aboriginal identity. The second generation cut-off rule in the registration provisions, together with often high rates of out-marriage for most bands, amounts to a disappearing formula for Indians, and disproportionately affects the descendants of Indian women who married out.¹³ Stewart Clatworthy who has done a significant amount of demographic research in this area indicates that Indians and their home communities are facing legislative extinction within several generations.¹⁴

¹³ *McIvor v. Canada*, [2009] BCCA 153 (QL) [*McIvor*]. *McIvor v. Canada*, [2007] 2 C.N.L.R. 72 [*McIvor, trial*].

¹⁴ Clatworthy, S., “Bill C-31, Indian Registration and First Nations Membership”, (Winnipeg: Four Directions Consulting Group, 2001). S. Clathworthy, “Factors Contributing to Unstated Paternity” (Winnipeg: Four Directions Project Consultants, 2003) online: INAC <http://www.ainc-inac.gc.ca/pr/ra/uncp_e.pdf>. S. Clatworthy, Four Directions Consulting Group, “Indian Registration, Membership and Population Change

Chapter 2 reviewed the future demographic implications for Indians and their communities as highlighted by Clatworthy in various studies. He found that the majority of bands still rely on the *Indian Act* to determine their membership and, as a result, the population forecasts for many of these bands are grim. In fact, Clatworthy argues that some of the membership codes that the bands write for themselves may bring about that extinction faster than the rules found in the *Indian Act*.¹⁵ Specifically, band codes that have blood quantum or two-parent rules will bring their communities' population decline even faster.¹⁶ Based on the research conducted by Clatworthy, there is not a band in Canada that cannot match their band membership code with their individual populations and rates of out-marriage to determine their population forecasts and the approximate dates when their last generation will be entitled to status and/or membership.¹⁷ My band is among those that have dismal population forecasts due to their current membership code which relies on entitlement to status under the *Act*.¹⁸ My children and I cannot be

in First Nation Communities” (Winnipeg: INAC, 2005). S. Clatworthy, Four Directions Consulting Group, “Implications of First Nations Demography: Final Report” (Winnipeg: INAC, 2004). S. Clatworthy, “Paternal Identity and Entitlement to Indian Registration: The Manitoba Context” (Winnipeg: Four Directions Consulting Group, 2001). S. Clatworthy, “Reassessing the Population Impacts of Bill C-31” (Winnipeg: Four Directions Project Consultants, 2001) online: INAC <http://www.ainc-inac.gc.ca/pr/ra/rpi/rpi_e.pdf>. S. Clatworthy, “Revised Population Scenarios Concerning the Population Implications of Section 6 of the Indian Act” (Winnipeg: Four Directions Consulting Group, 1994). S. Clatworthy, A. Smith, “Population Implications of the 1985 Amendments to the Indian Act: Final Report” (Winnipeg: Four Directions Consulting Group, 1992) [*Population Implications*].

¹⁵ *Ibid.* *Population Implications*, *supra* note 14 at i-iv.

¹⁶ Kahnawa'ke, “Kahnawa'ke Membership Law”, online: Kahnawa'ke <<http://www.kahnawa'ke.com/council/docs/MembershipLaw.pdf>>.

¹⁷ *Population Implications*, *supra* note 14.

¹⁸ New Brunswick, Eel River Band, *Eel River Band Membership Rules* (Ottawa: INAC, 2007).

members of our own community, which, for Eel River Band, represents two lost generations of members who could be contributing to their government and acting alongside other band members to bring about positive changes for the band. However grim the outlook, it was necessary to include this research in Chapter 2 to form the basis for answering the questions posed in Chapter 3 and subsequent chapters.

While Chapter 2 laid out the politics surrounding Aboriginal identity, the history of Canada's legislative control over various definitions of status and membership, and the grim population forecasts awaiting bands if nothing is done to change the situation, Chapter 3 asked a more basic question: why is Aboriginal identity important? Canadians live in a country which is a modern liberal democracy based on the principle of equality. Therefore, some commentators, like Flanagan, Gibson and Widdowson, have suggested that Aboriginal peoples should just assimilate into the majority culture and assume the majority identity.¹⁹ While Cairns argues, on the one hand, that those who remain on the ever-dwindling reserves should be able to continue to practice their traditions, customs and practices, he also makes arguments that would suggest that since urbanism is inevitable, and urbanism equates with loss of identity, that the assimilation of Aboriginal peoples is inevitable.²⁰ These commentators seem to suggest that equality means sameness (formal equality). But I argued in this chapter that equality can also mean difference in treatment. I pointed out that even the Supreme Court of Canada has

¹⁹ T. Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000). G. Gibson, *A New Look at Canadian Indian Policy: Respect the Collective – Promote the Individual* (Vancouver: Fraser Institute, 2009). F. Widdowson, A. Howard, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal: McGill-Queen's University Press, 2008).

²⁰ Cairns, A., *Citizens Plus: Aboriginal Peoples and The Canadian State* (Vancouver: UBC Press, 1999) [*Citizens Plus*].

recognized that Aboriginal peoples were the original inhabitants of this land with their own governments, laws, traditions and ways of life.²¹ There was no nation-wide war that was won where Aboriginal peoples agreed to give up their identities, cultures, governments or lands. To the contrary, they constantly asserted their rights in this regard, and some Aboriginal Nations even protected their rights in treaties.²² Section 35 of the *Constitution Act, 1982*, recognizes this fact and now protects all of their Aboriginal and treaty rights, including land claims and modern agreements.²³ Furthermore, writers like Kymlicka, Macklem and Borrows have argued that access to culture provides the necessary context for people to live the good life.²⁴ Aboriginal peoples have resisted decades of assimilatory laws and policies and, while they have suffered a great deal of harm, they have also demonstrated that preservation of their culture is part of the good

²¹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

²² See: Cape Breton University, “Mi’kmaq Resource Centre: Treaties”, online: Mikmawey <<http://mikmawey.uccb.ns.ca/treaties.html>> for a list of treaties applicable to the Mi’kmaq Nation for example.

²³ *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11 [*Constitution Act, 1982*].

²⁴ W. Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (New York: Oxford University Press, 1998). W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995). W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001). W. Kymlicka, *The Rights of Minority Cultures* (New York: Oxford University Press, 1995). W. Kymlicka, W. Norman, eds., *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000). P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001). J. Borrows, “Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics” in D. Schneiderman, K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 169. J. Borrows, “‘Landed’ Citizenship Narratives of Aboriginal Political Participation” in W. Kymlicka, W. Norman, eds., *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) 326.

life for Aboriginal peoples, and that access to this identity and culture is part of their substantive equality.

The Supreme Court of Canada has also explained that these cultures cannot be frozen in time, otherwise Aboriginal peoples and their cultures will be reduced to “anthropological curiosities.”²⁵ That is why Aboriginal communities must look seriously at the principles upon which they base their identities and rules for communal belonging, so that they do not perpetuate the same racist criteria that have been imposed on them for so long.²⁶ It is for this reason that I included discussion in Chapter 3 which clearly differentiates principles upon which a community could base its identity, from those problematic criteria that have already caused so much damage to Aboriginal individuals and communities. For example, while I agree that ancestry or connection to one’s Aboriginal Nation is important in determining citizenship, this does not equate with blood quantum or rigid rules related to proximity or remoteness of descent. The Report of the Royal Commission on Aboriginal Peoples also spoke out against blood quantum as a

²⁵ *R. v. Sappier, R. v. Gray*, [2006] 2 S.C.R. 686 at para.42.

²⁶ B. Lawrence, *“Real” Indians and Others: Mixed Blood Urban Native Peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004). E. Garroutte, *Real Indians: Identity and the Survival of Native America* (Los Angeles: University of California Press, 2003). W. Cornet, “Aboriginality: Legal Foundations, Past Trends, Future Prospects” in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation* (Markham: LexisNexis Canada, 2003). W. Cornet, “First Nation Identities and Individual Equality Rights: A Discussion of Citizenship, Band Membership and Indian Status: Executive Summary Prepared for NAWA” (26 January 2003). W. Cornet, “Indian Status, Band Membership, First Nation Citizenship, Kinship, Gender & Race: Reconsidering the Role of Federal Law” (Paper presented to the Bill C-31 and First Nation Membership Pre-Conference Workshop, March 2006) [unpublished].

means of determining citizenship.²⁷ I also argued that any rules which were established should be interpreted with a view to including citizens *versus* how to exclude them. So much damage has been caused by the *Indian Act*, residential schools, and forced relocations that the benefit of the doubt ought to be given to those who have a weaker connection than others to their communities. This mandates a careful consideration of what kinds of rules and policies would most benefit future generations of Aboriginal peoples, and not just those alive today. While Aboriginal traditions are an important part of Aboriginal cultures and identity, several commentators also note that traditions which are rigidly interpreted and applied can be just as exclusionary as other membership or identity criteria, like blood quantum or status. These principles, I argue, should form the basis of future membership rules as they are more reflective of Aboriginal identities and cultures.

In Chapter 4, I follow up this discussion in Chapter 3 related to individual and communal Aboriginal identity in general, and argue that Aboriginal Nations have a constitutional right to be self-defining and so determine their own citizenship.²⁸ I specifically argued that it is not the proper function of the Canadian government to make decisions for Aboriginal peoples and their Nations about how to determine either individual or communal identities, be it through the registration provisions, band membership codes or rigidly defined self-government citizenship codes. The Assembly of First Nations has explained that control over individual and communal Aboriginal

²⁷ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vols. 1-5 (Ottawa: Minister of Supply and Services Canada, 1996) [RCAP Report].

²⁸ *Constitution Act, 1982*, *supra* note 23 at s.35.

identity is a core function of Aboriginal Nations.²⁹ Even the federal policy on the inherent right to self-government notes that membership is within the core jurisdictions of Aboriginal communities.³⁰ I further argued that there is no right which is more integral to an Aboriginal Nation than its ability to be self-defining and, therefore, have the ability to determine its own citizenship criteria. However, there are no governments, including Aboriginal governments, which are all-powerful and thus their rights and powers are limited by the rights of others. I also argue that the right of an Aboriginal Nation to determine its own citizenship is tempered by other rights like s.35(4) which guarantees the exercise of Aboriginal and treaty rights equally as between male and female persons.³¹

Similarly, some academics, like Macklem and Cairns, have argued that the *Charter* should apply to Aboriginal governments and that any concerns about its interpretation can be addressed through s.25.³² There are also those academics like Long and Kent, who provide strong arguments against the application of the *Charter* to Aboriginal peoples because they see the issue as individual rights *versus* communal

²⁹ Assembly of First Nations, "Our Nations, Our Governments: Choosing Our Own Paths" (Ottawa: AFN, 2005). Assembly of First Nations and Indian and Northern Affairs, Joint Technical Committee, "First Nations Registration (Status) and Membership Research Report", online: AFN <<http://www.afn.ca/misc/mrp.pdf>>.

³⁰ Indian and Northern Affairs Canada, "Federal Policy Guide: Aboriginal Self-Government: The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (Ottawa: Minister of Public Works and Government Services, 1995), online: INAC <<http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/sg/sg-eng.asp#PartI>>.

³¹ *Constitution Act, 1982*, *supra* note 23 at s.35(4).

³² P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001). *Citizens Plus*, *supra* note 20.

rights.³³ However, I argued that framing the debate in terms of individual rights *versus* communal rights, or Aboriginal women *versus* their communities, detracts from addressing its beneficial applications. The real issue is what the *Charter* does for vulnerable groups within Aboriginal societies, and whether its application also protects our future generations. The *Charter* offers a way to balance the rights of citizens and their governments in a way that can preserve their identities *versus* harm them, like the *Indian Act* does. The main argument in this chapter, namely, that Aboriginal Nations have a right to determine their own citizenship, is balanced by the following chapter which highlights the rights of those citizens.

In Chapter 5, I argued that individual Aboriginal peoples have a corresponding right to belong to their Nations (which presently includes bands), and to be legally recognized as Indians, i.e., how Aboriginal peoples are currently identified. This right of individual Mi'kmaq to belong to their Nation means that they cannot be unfairly excluded from their home communities on discriminatory grounds, like their registration status, blood quantum or proximity or remoteness of descent from their Aboriginal ancestors. When Aboriginal bands or self-governing Aboriginal Nations rely on status as the criteria for belonging, they end up incorporating the discrimination in the registration provisions as part of their identity. For example, *Bill C-31* did not address all the discrimination based on sex within the *Indian Act* and, therefore, this residual discrimination gets incorporated directly into band codes. Although the Sharon McIvor case is proceeding

³³ A. Long, K. Chiste, "Indian Governments and the Canadian Charter of Rights and Freedoms" 18 *Amer. In. Culture and Res. J.* 91 (1994). K. McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34 *Osgoode Hall L.J.* 61, republished in K. McNeil, *Emerging Justice? Essays in Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 215.

through the system, and a recent application has been made by McIvor to seek leave to appeal to the Supreme Court of Canada, the remedies sought in that case will not address all the current discrimination engendered by the *Act*.³⁴ I argue that the second generation cut-off rule amounts to discrimination on the basis of blood quantum/descent, and that codes which incorporate the *Act* or similar provisions are equally discriminatory. Even if Canada decided to amend the legislation and address all the sex discrimination within the registration provisions of the *Act*, people would still be unfairly excluded on the basis of their blood quantum/descent through the second generation cut-off rule, i.e., gender-neutral discrimination on the basis of blood is still discrimination.

Chapter 5 also highlights the fact while many discrimination claims that come before the courts are often framed according to a single ground of discrimination, several grounds can be implicated at the same time, depending on the fact scenario. Using my family as an example, my grandmother was an Indian woman who married out and, therefore, my children and I are affected by the residual sex discrimination that was not addressed in the *Bill C-31* amendments. However, we are also negatively impacted by the second generation cut-off rule which denies me, and my children, status under the *Act* and membership in our home band. Legislators described this rule as a one-quarter blood rule during the *Bill C-31* amendments, and that the effect was to exclude people based on blood quantum/descent.³⁵ Racist conceptions of blood purity used to establish authentic Aboriginal identity is not only out-dated and inaccurate, but also discriminatory, and violates the s.15 equality rights of those so affected. While the registration provisions are complex and involve a long history of amendments, remedies that respect equality are

³⁴ *McIvor*, *supra* note 13.

³⁵ *Ibid.*

possible. This chapter concludes with a discussion about possible remedies to a potential claim by non-status Indians that the second generation cut-off rule is discriminatory.

These remedies are meant to be an interim solution to address discrimination in the *Act* so that reliance on it in the future for band membership codes or self-government agreements will not also incorporate the same discrimination.

Chapter 6 continues the discussion about remedies but in the form of long-term remedies that would be found in, for example, self-government agreements. After a review of the types of band membership codes that currently exist, I highlight some of the key problem areas for those codes. For example, membership codes which include criteria based on reserve-residency, fluency in the traditional language, blood quantum or status, and that are applied rigidly, all have the potential to unfairly exclude potential members on either discriminatory grounds (like blood quantum or Aboriginality-residence), or with regards to factors that are beyond the control of applicants. For example, if status is the sole or determining criterion for membership under a code, this could result in the unfair exclusion of an applicant for membership whose lack of status might be the result of the residual discrimination in the *Indian Act*. I argue that the same problem occurs for self-government agreements which rely on band lists or status lists to determine the charter group and/or future members. Though these agreements are meant to support self-governing Aboriginal Nations, reliance on discriminatory criteria to determine citizenship taints the whole agreement and needs to be reassessed in light of these arguments. Some self-government agreements also contain blood quantum requirements which can appear as references to 25% ancestry. These agreements contain the same blood quantum/descent requirements as the second generation cut-off date in the

Indian Act does, and which I argue is discriminatory. If self-government agreements merely incorporate the discrimination found in either status or membership, then they only serve to perpetuate the “status” quo rather than offer real solutions for their citizens, solutions that reflect their true identities.

My proposed solutions offer flexible categories of criteria that balance both the need to maintain the culture for future generations, with some allowance for historical factors which may have unfairly prejudiced some applicants for citizenship. It also builds upon my arguments in the preceding chapters, that the discrimination within the status provisions must be remedied first in order to prevent these longstanding inequities to be incorporated into band membership codes and self-government agreements. This chapter also reviewed the suggestions by other commentators who offered principles to address some of these problems in the future. For example, Cornet argues that the dismantling of status might be possible if we relied on band membership codes in the interim.³⁶ However, as I pointed out, most of the bands in Canada do not have their own codes and rely on status to determine membership. Even among those that do have their own codes, many of them are fraught with the same discriminatory provisions that can be found in the *Act*. Lawrence suggests that perhaps a reconstitution of the old Confederacies would rid us of the need for the *Indian Act* and band membership codes. However, given the

³⁶ W. Cornet, “Aboriginality: Legal Foundations, Past Trends, Future Prospects” in J. Magnet, D. Dorey, eds., *Aboriginal Rights Litigation* (Markham: LexisNexis Canada, 2003). W. Cornet, “First Nation Identities and Individual Equality Rights: A Discussion of Citizenship, Band Membership and Indian Status: Executive Summary Prepared for NAWA” (26 January 2003). W. Cornet, “Indian Status, Band Membership, First Nation Citizenship, Kinship, Gender & Race: Reconsidering the Role of Federal Law” (Paper presented to the Bill C-31 and First Nation Membership Pre-Conference Workshop, March 2006) [unpublished].

reluctance of Aboriginal bands to reconstitute themselves into Aboriginal Nations as suggested by RCAP in 1996, it is hard to imagine that the reconstitution of multiple Nations into confederacies would happen any quicker, if at all.³⁷ Borrows, on the other hand, offers general principles upon which Aboriginal Nations might base their citizenship codes. Those principles specifically exclude criteria like blood quantum, but they might allow non-Aboriginal people to become citizens.³⁸ He does not indicate how these principles might be applied practically, or how to address the matter in the interim.

My solutions build upon the positive ideas and critiques of these commentators who spoke out against the current situation and have offered possible criteria for future use. My contributions to solutions for the future deal with all aspects of the problem: registration, band membership, and both current and future self-government agreements. I argued that solutions for the future are not possible without addressing the problems that exist now. In other words, we cannot rely on band membership agreements to replace the registration provisions of the *Act*, if they themselves are based on the *Act* or incorporate

³⁷ B. Lawrence, *“Real” Indians and Others: Mixed Blood Urban Native Peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004). Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vols. 1-5 (Ottawa: Minister of Supply and Services Canada, 1996).

³⁸ J. Borrows, “Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics” in D. Schneiderman, K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 169. J. Borrows, “‘Landed’ Citizenship: Narratives of Aboriginal Political Participation” in W. Kymlicka, W. Norman, eds., *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) 326. J. Borrows, “Seven Generations, Seven Teachings: Ending the Indian Act” (British Columbia: National Centre for First Nations Governance, 2008), online: NCFNG <http://www.fngovernance.org/research/john_borrows.pdf>. J. Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right” (2005) 38 U.B.C.L. Rev. 285.

their own discriminatory provisions. Similarly, we cannot rely on current or self-government agreements if they, in turn, rely on their previous band membership lists that were determined either by problematic membership codes or on the *Indian Act*'s membership provisions which, I have argued, are also discriminatory. Therefore, the inequities that remain in the registration provisions and membership codes have to be addressed both in the interim (as we will be relying on these provisions for some time) and to ensure that long term solutions are not tainted with discrimination. The criteria that I suggested were meant for practical application, as opposed to some of the more theoretical ideas previously suggested by some commentators. As a result, although significant community consultations are always required, my suggestions could be the framework or starting point for discussion. While some may argue that my suggestions for criteria may open up citizenship too widely as to be over-inclusive, I believe that some flexibility is necessary to address some of the discrimination issues that exist within the *Act*, band membership codes and current self-government agreements. In the end, over-inclusiveness will help protect the identity of Aboriginal peoples *versus* over-exclusiveness which can only serve to extinguish it. That being said, in order to protect Aboriginal identity, this flexibility must be balanced with protections for Nations against illegitimate claims.

The overall length of this thesis may be deceiving in that one might think it represent a complete review of the issues affecting Aboriginal identity in Canada. That is not the case. Many of the issues raised are so complex that to try to deal with them all would have made this thesis much longer. For example, I could only deal with certain types of discrimination claims regarding the status provisions of the *Indian Act*. I had no

time to deal with Canada's exercise of its s.91(24) authority in the *Constitution Act, 1867* except to argue that determining individual or communal identity for Aboriginal peoples is well beyond its scope. I feel that this topic would be an excellent project for future research, especially given the upcoming challenge to this section by the Congress of Aboriginal Peoples in the *Daniels* case.³⁹ In addition to the federal jurisdictional issue, there are many other issues that are worthy of separate research. For example, specific Aboriginal Nations may also have treaties that could support claims that Aboriginal Nations have the right to determine their own citizens, or claims by individuals that they have the right to belong. I know that the Mi'kmaq are signatories to several treaties that protect the treaty rights of the heirs and heirs forever. How this may assist with identity and belonging claims would make a worthy legal and/or historical research project. Similarly, arguments that were raised in *McIvor* (but not addressed here), relate to the potential of international legal instruments to assist status and non-status Indians in their efforts to rid the *Act* of discriminatory distinctions between individuals based on sex and/or blood quantum/descent. Lovelace's victory, together with relevant international laws may well support international options should *McIvor* not be successful before the SCC.⁴⁰ Along the same vein, comprehensive international comparisons between different indigenous groups are a particular interest of mine. I would be interested in knowing how

³⁹ *Congress of Aboriginal Peoples v. Canada (Minister of Indian Affairs and Northern Development, Attorney General)* (14 December 1999) T-2172-99 (Fed. Ct.) (Statement of Claim, Plaintiffs). The Congress of Aboriginal Peoples argues that non-status Indians and Métis peoples should fall under the definition of the term "Indian" within section 91(24) of the *Constitution Act, 1867*. They further argue that Canada has an obligation to include non-status Indians and Métis peoples in consultations and negotiations on a wide range of issues that affect Aboriginal peoples.

⁴⁰ *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

the Maori in New Zealand, the Aborigines in Australia, or the Native Americans have addressed these issues of identity and belonging, and what they view as options for the future. Lessons learned in indigenous communities around the world would be useful for domestic consideration.

International research and the potential for international human rights claims in this regard would be a relevant undertaking for what is happening here in Canada. However, what has been missing on the domestic scene is involvement by the Canadian Human Rights Commission (CHRC). Only recently was section 67 of the *Act* removed and replaced with provisions allowing individual Aboriginal peoples to bring claims against their bands and/or Canada for breaching their human rights.⁴¹ While claims can now be brought against Canada, Aboriginal people have to wait three years from the date of the amendment to bring claims against their bands. Given that the CHRC represents uncharted territory for most Aboriginal peoples, communities and organisations, research in the area of domestic human rights might be a timely undertaking, especially in the context of *Indian Act* discrimination. Having worked for a provincial human rights commission, I am aware that claims such as these are not within provincial jurisdiction and, have traditionally been referred to the CHRC even if the CHRC could not ultimately deal with them. Therefore, I would imagine that a significant amount of research would benefit this area of the law.

I think the project that most interests me is an opportunity to undertake a complete membership review in a First Nation, like my home community of Eel River Bar. Being involved in community-based membership consultations, and going through the whole

⁴¹ *Canadian Human Rights Act*, S.C. 2008, c. 30.

process of determining the community's priorities, and trying to bring about consensus, would bring a whole new dynamic to the legal research that I have completed to date. Getting input from the youth, elders, past and current community leaders, and various role models both inside and outside the community, would also be an incredible source of information and a valuable tool for the researcher and community alike. A project like this could also assist a community in its efforts to draft a code which truly represents who they are. Future projects might even include assisting communities to determine how they might tie their local community codes into that of a future Nation-based citizenship code that may be promulgated by the larger Aboriginal Nation to which they belong. For example, a future membership code so constructed by Eel River Bar may also provide a good example for how the Mi'kmaq Nation may want to construct its nation-based code.

Embarking on any one of the projects suggested above was the very point of putting so much effort and research into my thesis. I did not commence this for the sole purpose of obtaining a doctoral degree in law. I wanted to contribute to the serious issues related to Aboriginal identity and belonging, and to be part of the change that makes life in our communities better for our current and future generations. Canada has made a promise to Aboriginal peoples in s.35 to protect our cultures so that we could leave thriving cultures to our future generations. However, we as Aboriginal peoples cannot rely solely on that promise to get us there. We have our own responsibilities, as individuals, families, communities and Nations to do whatever it takes to preserve our identity and culture for our children's children seven generations into the future. If we do any less, we dishonour all the suffering experienced by our families and all the hard work done by our ancestors to ensure that our culture, lands and communities would be

protected. It has been a long journey for me to discover that our identities should not be tied to racist concepts like blood. At times; this left me feeling uncertain about my own identity. However, having reflected on the teachings that I have had over the years, I discovered that the principles underlying my Mi'kmaq identity had always been there. We as Mi'kmaq people never had an identity based on racial concepts and blood quantum, nor has any other Aboriginal Nation. Part of the legacy of the assimilatory laws and policies that have been imposed on our people is that we have come to believe some of these racial characterisations of ourselves. I owe it to those who have asked me to use my education for the benefit of my family and community, like my father, and those who need my protection, like my children, to ensure that we are no longer left out. We as Mi'kmaq citizens who have been labelled as non-status Indians are not asking to be welcomed as new-comers to our communities. We were always here, living on our traditional territories and fighting for the rights of all of our future generations, status and non-status alike. We, as Mi'kmaq peoples, have always been here, and if I have any say in the matter, we, as Mi'kmaq peoples, will continue to be here in the future.

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