

Reclaiming Our Identity

Band Membership, Citizenship and the Inherent Right

National Centre for First Nations Governance

Introduction

To be an Indian in Canada is not just a cultural identity but also a legal category. Canada, rather than aboriginal communities themselves has through the Indian Act historically legislated who is an Indian.

We are constantly developing our identity, from birth to the end of our lives. We build it based on our relationships to relatives, friends, community, geography, language and other social factors. Identity plays a key role in our lives. When a child feels a sense of belonging to family, community and peers he or she is better able to deal with adversity.

Prior to contact First Nations had their own histories and methods of determining our identity. We had matriarchal, patriarchal, clan and kinship systems. Before Europeans came to North America, First Nations communities or nations were sovereign nations, that is, we were self-governing. Our oral history is supported by the work of anthropologists and historians, and illustrates that there was a complex system of governance. We also had our own laws and systems of justice. Our systems were characterized by oral teachings, collectivities and consensus.

First Nations peoples relied on a variety of distinctive and cultural ways to organize their political systems and institutions. Later, many of these institutions were ignored or legally suppressed while the federal government attempted to impose a uniform set of vastly different Euro-Canadian political ideals on First Nations societies, through various legislative acts.

Our History of Identity to the Present

The Indian Act is federal legislation that governs the lives of all Canadian Indian People, from birth to death. Contained within it are provisions and regulations relating to all aspects of social and economic life, from Indian registration, to

lands, revenues, education, health status, elections, and estates and wills. The Indian Act has regulatory power over all facets of Indian life and provides the federal government with a major concentration of authority and social control over Indians. That is those that they identify as Indians.

To decide Indian status there is a Registrar in Ottawa who determines who is and who is not an Indian, based on INAC policies and legislation. The Registrar, accordingly, adds or takes people off a list called the Indian Register. The issue is not who is actually an Indian, but who is entitled to be registered as an Indian according to the Indian Act. The Registrar also decides who is not entitled to be registered in the Indian Register.

Historical Background

Since 1869 the Indian Act has controlled who would be recognized as “Indian” in legal terms. The Indian Act stated;

“Provided always that any Indian women marrying any other than Indian shall cease to be an Indian within the meaning of this Act nor shall the children of such marriage be considered Indians”.

The first Act to be called the Indian Act was enacted in 1876. It redefined an Indian as;

- Any male person of Indian blood reputed to belong to a particular band
- Any child of such person
- Any person who is or was lawfully married to such person

The Act also spelled out a process of enfranchisement whereby Indians could acquire full Canadian citizenship by relinquishing their ties to their community. A definition for enfranchisement first appeared in 1876, which stated that an enfranchised Indian is:

“Any Indian, his wife and or minor unmarried children who has letters

granting him in fee simple any portion of the reserve which may have been allotted to him, his wife or minor children by the band which he belongs or any unmarried Indian who may have received letters patent for an allotment of the reserve”¹

Enfranchisement meant giving up Indian status, culture and traditions, and any rights to land. You would become a “citizen” of Canada thereby giving you the right to vote in federal elections and to move freely about the country. There were also provisions that any Indian that became a lawyer, doctor or clergyman received a degree from a university, or joined the military would be enfranchised. If you lost your status you lost the right to live on the reserve and any benefits that might be associated with it. The federal government viewed enfranchisement as a way of “civilizing” and assimilating the Indian.

In 1951, the Indian Act was again amended and Section 12 (1) b was added. This section meant that any Indian woman who married a non-Indian was not entitled to be registered, nor were any children of the marriage. In contrast, section 11(1) (f) was added and stated that the wife or widow of any registered Indian man was entitled to Indian status irregardless of whether this person was a non-Indian.

Section 12(1) b was the start of legislated discrimination specifically aimed at Indian women. If an Indian woman married a non-Indian then she would lose her status but if a non-Indian women married an Indian man the woman would gain Indian status and become an Indian within the meaning of the Indian Act, despite the fact that the person had absolutely no Indian heritage.

In summary, over the last century and a half the government has developed identities known as “Indian” in a chronological order and for various reasons these are;

¹ Indian Act 1876:s5

Indian

- 1850 Any person deemed to be aboriginal by birth or blood, any person reputed to belong to a particular band or body of Indians and any person who married an Indian or was adopted by Indians
- 1876 Any male person of Indian blood reputed to belong to a particular band; any child of such person; any woman who is or was lawfully married to such person
- 1951 A person who is registered or entitled to be registered in the Indian Register. The establishment of the Indian register as a means of conferring Indian status resulted in a complex set of eligibility rules. Generally Indians who had been members of a band were entitled to registration. The emphasis on male lineage was maintained and many persons lost status because of the discrimination aimed at Indian women and illegitimate children.
- 1985 A person who is registered or entitled to be registered in the Indian register based on the revised Indian Act rules.²

Many people believed that Indian registration would provide them with a cultural identity. This would be an unreasonable expectation since Indian Act registration categories were never based on cultural criteria. These categories were based on restricting the Indian population because of financial obligations.

Bill C-31: An Act to Amend the Indian Act

In 1985, the Indian Act was again amended. Bill C-31: An Act to Amend the Indian Act was passed as an attempt to bring the Indian Act into conformity with the Equality Rights section of the Canadian Charter of Rights and Freedoms (1982) which stated;

15. (1) Every individual is equal before and under the law and has the

² Indian and Northern Affairs, Legislation Manual, Glossary

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.

The federal government knew that it would face a number of law suits because of the discrimination it had historically aimed at Indian women. Therefore, they enacted changes which were intended to eliminate the discrimination of Indian women.

Bill C-31 was legislation aimed at removing more than a hundred years of sexual discrimination from the Indian Act. The intent was to eliminate all sexually discriminatory provisions within the Act and to recognize the right of Indian bands to control band membership. David Crombie then Minister of Indian Affairs, expressed his views of the issue by stating”

“What greater intrusion can there be than the arrogance of assuming the right to tell another people of another culture and tradition who is and who is not a member of their community and who can and cannot live on their lands.”³

Mr. Crombie felt that by correcting this intrusion by government into band membership meant recognizing the existence of the collective rights of the band. Furthermore, he felt that Indian status could be viewed as an individual right. He described Indian status as defining those individuals whom the government wishes to include within the meaning of the Indian Act.

In enacting Bill C-31, Minister Crombie stated that Bill C-31 would provide a balance between collective and individual rights. Indian status and band membership would be restored to those individuals that had previously lost their status. However, Bill C-31 did not just restore Indian status it created new

³ Indian and Northern Affairs 1985

categories of Indian status.

Prior to the Bill's passage you were either a status Indian or you were non-status. If you had Indian status you also had band membership and you could pass your band membership and Indian status to your children. Once Bill C-31 was passed the way you gain Indian status changed. Indian status was now divided into two sections Section 6(1) and Section 6(2) each with differing rights.

Section 6 states: (Persons entitled to Indian status):

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

(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 is or, if no longer living, was at the time of death entitled to be registered under this section.

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

Section 6 (2)

(One-Parent Entitlement to Status)

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).⁴

The changes created by Bill C-31 created two categories of status Indians which could be called “full” and “half” Indians. This is because under Bill C-31 there were now two Sections for registration of Indians. These were Sections 6(1) and

⁴ Indian Act 1985

6(2) of the revised Indian Act. If you were registered under section 6(1) you were considered to have two registered Indian parents and could pass your Indian status to your children. If you were registered under Section 6(2) you are considered to have only one registered Indian parent and you have to marry another registered Indian (either 6(1) or 6(2)) to pass your status to your children.

Many of the children who were registered for the first time after Bill C-31 was enacted were registered under Section 6(2). And since Bill C-31, many children have been born in First Nation communities that have been registered under Section 6(2) or perhaps have no Indian status because they are children of those registered under Section 6(2).

New Rules for establishing Indian status (NI = Non Indian)

Parents Registration:	6(1) + 6(1)	6(1) + 6(2)	6(1) + NI	6(2) + NI
Child's Registration:	6(1)	6(1)	6(2)	Non-Status

***** These rules apply to any child born after 1985.

Implications of Section 6(2)

The implication of Section 6(2) to the First Nations population in Canada is tremendous. People who are registered under Section 6(2) have fewer rights than those registered under Section 6(1). All persons registered, today, under Section 6(2) cannot pass their status on, unless their mate is a registered Indian. This provision applies whether or not a Childs parents are married. In fact, if a single mother wishes to register her child she must list the fathers name on the birth certificate to prove that he is an Indian otherwise the child is automatically registered under Section 6(2).

However, the largest impact is found in that fact that the out-parenting rate in some communities is very high and as a result many children are now being registered under Section 6(2) or not registered at all. This in turn will lead to a decrease in the Indian status population. This has many implications, in particular the status of our land. Where will the land go if there are no more status Indians since Section 91.24 of the Constitution of Canada gives the federal government jurisdiction over “Indians and Lands Reserved for Indians”?

There is also a large population growing on the reserves that have no status as a result of Section 6(2). These individuals will have no political rights as either band members or status Indians. They will live on the reserve but will become “ghost people” people with no rights.

Band Membership

Bill C-31 introduced several new by-law powers for bands. Included in these are the powers to regulate which band members and other individuals who may live on a reserve, the provision of benefits to non-member spouses and children of band members living on reserve and the protection of dependent children’s right to reside with their parents or guardians on reserve.

As previously stated, prior to 1985, automatic entitlement to band membership usually accompanied entitlement to Indian status. However, the 1985 amendments recognized the rights of bands to determine their own membership. As a result, persons may possess Indian status, but not be members of a band.

Section 10 enables First Nations to enact their own membership or citizenship codes, according to procedures set out in the *Indian Act*. Bands must follow two principles: 50% plus 1 of the Band’s electors must consent to the Band’s taking control of membership, and to the set of membership rules which have certain factors which must be met such as the inclusion of a review mechanism and the

membership rules cannot deprive a person of previously acquired rights to membership.

Once the band controls its membership list, Indian and Northern Affairs Canada has no authority to make additions or deletions, and no further responsibilities regarding the band membership list. However, Indian Affairs still maintains control over who is registered as an Indian.

Indian Bands that took control of their membership had until June 28, 1987, to exclude the conditional band membership individuals. Primarily these were individuals registered under Section 6(2). If a band had not submitted a band membership code before June 28th, the band could not exclude these individuals, until a band membership custom code was submitted and approved.

There was a wild flurry of activity as bands scrambled to develop membership codes before June 28, which would exclude Section 6(2) individuals. 81% of the membership codes that were adopted were adopted in the 4 weeks before the June deadline. First Nations believed that by adopting these types of codes they could limit the amount of individuals seeking to return to the reserve, thereby reducing the strain on already meager resources.

In developing these codes many First Nations took Section 11 of the Indian Act which allowed them to deny Section 6(2)'s from membership and adopted it as their membership code.

Section 11 reads:

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

(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.⁵ (**Exclusion of 6(2)**).

As of December 2003, 232 First Nations had developed and were using rules for band membership. A review by Stewart Clatworthy found four general types of membership rules;

Limited One Parent rule: Eligibility for membership requires that a person also have at least one parent who is a band member and is also a registered Indian

Unlimited One Parent Rule Eligibility for membership requires that a person have at least one parent who is a member regardless if the parent is a registered Indian

Two Parent Rule: Eligibility for membership requires that both parents are band members; and

⁵ Indian Act 1985

Blood Quantum rules A person's eligibility for membership is determined by the amount of "Indian" blood that person has.⁶

Clatworthy's study (2004) points out that out marriage rates in aboriginal communities are high. Between 1985 and 1999 the out-marriage rates were 36% on-reserve and 75% off-reserve.⁷ As a result membership rules will have varying effects on a First Nations population. His assumption was that if the out-marriage rate stayed constant the following demographic projections could be made;

- In communities with similar rules for membership and registration, about one in eight descendants will lack criteria for registration either in one generation, growing to about one in four in two generations, or one in three in the third generation.
- In communities with one-parent membership rules, in one generation about one in eight individuals is expected to lack Indian registration but retain membership, a proportion growing to one in four in two generations, and about one in three in the third generation.
- In communities with two-parent membership rules, in one generation more than half of the community will lack membership and 70% within two generations, even though most of these will retain Indian status registration. In three generations a mere 19% of the population will have both membership and status.
- In communities with 50% blood quantum rules, about one-third of the descendents made ineligible for membership each year will nonetheless have Indian registration.

⁶ Stewart Clatworthy, Power Point Presentation, March 2006

⁷ Stewart Clatworthy, presentation to TANAGA Roundtable, Citizen and Membership Issues, 2004

- In the handful of communities with 25% blood quantum rules, finally, most descendants will retain membership over subsequent generations, but a steadily growing proportion of these will not have Indian registration.
- Most dramatically, the rates of out-marriage parenting can be expected to lead to an “extinguishment” of the Registered Indian population, and “reserves without Indians” in around 6 generations.⁸

To sum, Indian status and band membership which were once the same are now separated and on reserves there are several “categories” of Indian people. Some with status and band membership, some with band membership only, and some people who have neither and are children who live with their parents. There is also another category of people who by virtue of the Indian Act live on reserve, but are registered under Section 6(2) and their community does not accept Section 6(2)’s for band membership. Because they have a code that was developed in 1987 and they have not revisited the code.

Membership in a First Nation can mean many things on an emotional level. To many, membership in a First Nation is like citizenship in a country; i.e. their band. Many First Nation leaders and members understand this but because many do not understand the special nature of First Nations membership issues, problems of membership and Indian registration are often not taken seriously.

The misunderstanding of the nature of First Nations membership as it exists under the Indian Act is also why many people apply for membership as they erroneously believe that there are monetary benefits associated with band membership which of course is not always true. People do not think of the

⁸ Stewart Clatworthy, presentation to TANAGA Roundtable, Citizen and Membership Issues, 2004

responsibilities they owe to the First Nation community in exchange for the benefits of membership.

The Royal Commission on Aboriginal Peoples recognized that First Nations must create their government institutions as Nations and begin a nation building process. In particular they indicated that:

- For Aboriginal individuals, association with their various peoples as a collective is central to individual and community identity.
- Aboriginal culture and values are distinct and often sharply at variance with the dominant culture.
- Those values and that sense of collective identity are vital to restoring health and effectiveness to individuals and communities.
- After almost a century and a half of treating aboriginal peoples as wards of state, mainstream institutions must make way for them to design their own solutions and institutions.

The First Nations Constitution

What is very important to knowing who are people are is the creation of a community/governing constitution? On all levels of government the basic law which establishes the form of government, grants powers to the leaders and limits these powers is called the constitution. A government's constitution is the blueprint for the organization, structure and operation. It establishes shapes and controls government. All First Nations citizens must have the ability to vote on the constitution and only the First Nation citizens could change it through a voting process.

The First Nations constitution can serve many purposes. The survival of the First Nation largely depends on the First Nation's ability to meet the needs of its citizens and to represent the First Nation as a whole to the outside world. A

group of people cannot act with the authority and character of one, unified group without organization or form of government. The constitution expresses the First Nations will to act as one through a particular form of government. The constitution establishes and provides a means to ensure that the government responds to the people. If the constitution does not comply with First Nations citizens wishes, it must contain the procedure for orderly and legally changing or amending the document. Many, if not all constitutions, should define the territory in which the First Nation's law governs.

The constitution empowers the First Nation governing body to perform specific functions for the First Nation. These powers limit the government's authority because public officials can do nothing in the name of the First Nation that is not specifically or generally stated in the constitution. A First Nation government may decide if it would like to act officially in some way that would benefit First Nation people. However, if the constitution does not grant the power to act this way the act cannot be done. The government cannot threaten the First Nations freedom and survival even though the act appears to be for the First Nations welfare by ignoring the constitution.

The First Nations constitution states in the citizenship provision those who will make up the First Nation and to whom the government will respond. The citizenship provision establishes all the requirements a person must meet to have the rights and responsibilities of citizenship. Since First Nations uniqueness is maintained by its citizens, establishing these requirements in the constitution secures the First Nations special identity. If future citizens want to restrict or loosen the requirements for citizenship they must do so only by amending the constitution. If the leaders abuse their power, the constitution provides a means for their orderly removal, recall or replacement in the next election. These procedures to elect, remove, recall and replace council members ensure that the leadership meets the citizen's needs and earns their respect and trust.

A First Nations constitution must provide due process and equal protection to its

citizens. Due process can best be determined by a set of rules which limits the methods governments can use to enforce and apply laws. Due process enables everyone in the community to know the rules of the game. They will know what to expect when the government enacts or applies a law. The equal protection requirement ensures that governments play fair in determining how laws affect individuals.

Aboriginal nations can reconstitute themselves as nations and create institutions with the breadth and capacity to undertake self-government. It only requires a willingness and faith to begin the process. It will take time to overcome years of Indian Act brainwashing but without trying it will never happen. As the RCAP report stated “effective governance will require structures that are consistent with a peoples culture and heritage and at the same time encompass sufficient numbers of people to exercise the full authority of effective governance” Developing and knowing who your citizens are and who will be governed must be the first step to rebuilding the nations that we once were.

What Defines Citizenship

A First Nation is a political entity and is organized as a government. However, governments make laws. Most First Nation laws derive their authority from the Indian Act and not from the First Nation and therefore sometimes lack legitimacy in the eyes of the general population and First Nations people in general.

People who belong to a political entity are called “citizens” For example; a person is a citizen of Canada, the province in which he/she lives and a citizen of their community, town or city. Therefore, a First Nation member can be called a citizen because he/she belongs to that political entity called the First Nation.

A citizen is one who owes allegiance or loyalty to a government, has the right to the protection of that government and has responsibilities to that government for the benefits the individual receives. There is a give and take relationship. The

citizen or First Nation member gives allegiance, loyalty, obedience and support through voting and active participation. The citizen or First Nation member takes protection, benefits, stability and general overall good welfare from its government.

Some people might ask what protection and benefits do we get from our First Nation? The federal government operates and funds most of the programs on reserve so just what does my First Nation do for me? It is true that other governments fund and operate many programs on most reserves but with minor exceptions most of the benefits and protections that the First Nation government does not provide are provided by other governments to First Nation members because they are members of a political entity.

First Nation governments have battled long and hard to preserve First Nations existence so that those that ask the questions above can go on being First Nation members, receiving these protections and benefits through their First Nation.

So as in any government, a member owes faithfulness, obedience to law, and the participation in community affairs to their governments in exchange for the benefits and protections that came through them because they belonged to that political entity; called the First Nation.

The rights of Canadian citizens are protected by the Federal Government. Some of the rights of Canadian citizenship are to organize peacefully, to petition the government to correct injustices, to vote if qualified, to travel freely etc. In return for the protection of these rights citizens have responsibilities to their government. Their basic responsibility is to participate in government. Active, responsible citizens study issues and candidates before they vote. They try to obey the laws of their society so that order is maintained. When a law seems unfair they work in the proper legal ways to change it. All governments need to know who their citizens are in order to protect their rights and privileges.

Determining who qualifies as a citizen and keeping accurate records of births, deaths, marriages, addresses and other essential information goes on in nations, provinces, states and cities all over the world.

Governments must also identify and keep lists of those who can rightfully participate in government. It is especially critical for First Nation governments to know who their citizens are so they can represent all citizens fairly. Today, First Nations jurisdiction over determination of identity must be contingent on another government's legislation and determination.

Most important to First Nations people is the social and personal benefits of having First Nations citizenship. These benefits come from belonging to a community of people who share a history, cultural traditions and who plan for the future together. A First Nation citizen's basic responsibility to participate in government is critical to the effectiveness of the First Nation's political and economic structures.

In the past, our citizenship structures were based on kinship. Authorities and leaderships were passed down through ruling families, clans etc and agreed to by groups of families or clans. Traditional governance varied from simple social groups to complex constitutional governance. Among the more loosely organized tribe's family relationships, common language and custom decided the right to membership or citizenship. Among the First Nations who had formal constitutions, citizenship requirements were part of the constitution.

The social realities of contemporary life make it impossible for determining citizenship in the old ways. Our people have married and moved off reserve, many have lost contact with their First Nation. They have married into other races and First Nations. Children were adopted out or scooped only to return years later looking for their family and identity. By defining its own citizenship membership requirements in a constitution, the First Nation can preserve its identity for the future.

The Transition Phase

Where do we go from here? We have court jurisprudence and precedents on our side, yet we also have the realities of INAC controlling who our people are through the Indian registration process. The total status Indian population in Canada at December 2005 was 954,816 of which the total Indian registration numbers were broken down as follows;

6(1)	(-)	39,466	Under Revision
	(a)	299,453	On Register April 17 th , 1985
	(b)	1624	Newly formed bands (Conne River)
	(c)	77,622	Lost status through marriage
	(d)	2632	Enfranchisement
	(e)	16	Got a University degree or lived abroad
	(f)	189,037	Has two Indian parents after 1985
6(2)		210674	Includes all people with 1 Indian parent
		134,292	People born after 1985

Therefore, today in Canada of the total registered population, we have a total of 609,850 people registered under Section 6(1) and 344,966 registered under Section 6(2). This represents a total of 36% of our total status Indian population registered under 6(2). Given the high out-marriage rates and other factors such as migration off-reserve to look for jobs, go to school and university, it is possible this rate will get even higher, and more and more children will be lost to us.

The federal Indian Act does provide an option to create band membership codes within the parameters of Section 10. These codes must meet three requirements; they must protect acquired rights, they must be passed by 50% plus 1 of the voting population and they must have an appeals mechanism in place. The process does not dictate who can and cannot be a band member. That is left to the community.

As Sherry Pictou states in her report to the Bear River First Nation “Membership codes and control can begin to address the issue of protecting the rights of descendants of parents with 6(2) status. She states that

“although there are many disadvantages associated with the development and implementation of membership codes there is an opportunity to preserve or protect our gradual elimination from existence and to alleviate the physiological struggle so many of us have experienced in maintaining our identity against the external government’s imposition of definitions of identity that are not of our making”⁹

In essence, what is being proposed is an open band membership code that provides membership based on descent. That is to say one parent must have band membership irregardless of whether they have Indian status. This code could be developed now within the parameters of the current band membership regime under Section 10 of the Indian Act. There are benefits to be had if band membership is extended irregardless of whether the person has Indian status. This would mean that individuals would now have the right to participate in the life and activities of the band. There are provisions within the Indian Act which provide rights to band members even without Indian status. Maria Moratelli summarized this in a paper she submitted to the BC Regional Office of the NCFNG.

Implications of the Indian Act Registration and Band Membership Provisions¹⁰

1. Implications for Status vs. Non-Status Band Members

Section 4.1 of the *Indian Act* provides that non-status band members are entitled to receive the same treatment as status Indians with respect to certain matters. In particular, non-status band members:

- (a) may form part of the band; is noteworthy that at common law all band members are entitled to the band’s collective interest in reserve lands and resources;

⁹ Bear River First Nation Band Membership Development, Interim Report, 2005

¹⁰ Maria Moretelli, Memorandum to NCFNG, December 2006.

- (b) may be the beneficiaries of trust funds;
- (c) are regulated by the provisions concerning the estates of mentally incompetent band members and the infant children of band members;
- (d) may be exempt from the operation of certain sections of the *Indian Act*;
- (e) may be compensated for expropriated land;
- (f) may be issued Certificates of Possession;
- (g) have the same rights as status members with respect to prosecution of trespassers on reserves;
- (h) may receive benefits from band revenue money;
- (i) may receive certain loans from the Minister;
- (j) may receive benefits under farm programs;
- (k) are subject to the same regulations with respect to health and hospitalization;
- (l) may participate in band elections;
- (m) are subject to the enforcement of band taxation by-laws;
- (n) are exempt from taxes on reserve land;
- (o) are subject to provincial laws affecting Indian rights;
- (p) are exempt from execution against real and personal property on reserve; and
- (q) along with their property are subject to the jurisdiction of special appointed to hear certain Indian cases.

In her summary, she states that “band membership, and the right to determine who will be included in that membership, is of great consequence to a band, as it is a person’s designation as a band member that will enable him or her to benefit from and exercise the band’s aboriginal governance and title rights. If band membership is limited to only those persons with Indian status under the *Indian*

Act, then the number of persons who may participate in the band's collective Aboriginal rights, as enumerated above, may be significantly diminished." ¹¹

In summary, the creation of a band membership code under Section 10 of the Indian Act that is based on inheritance through one parent could serve as a useful tool in increasing membership within your First Nation and protect the birthright of y our citizens.

Moving Forward in the Reclamation of Identity

As First Nations people we have an inherent right to self-government. "Inherent" means that the right comes with the very existence of the people and communities. The basis of the inherent right to self-government is the very existence of the First Nations communities and the fact that historically, First Nations communities governed themselves. The right to self-government has never been given up by First Nations peoples and is a right which still exists today. However this right has not been exercised to the fullest extent.

Our Inherent Right to Self Government has been upheld and is recognized in law through recent Supreme Court cases such as; Delgamuukw vs. British Columbia, Haida vs.Weyerhauser; Taku River Tlinglit vs British Columbia and the Mikisew Cree vs. Sheila Copps Minister of Heritage and Thebaca Road Society.

Self-government is a way to regain control over the management of our communities and to preserve our cultural identities. Self-government is often referred to as an "inherent" right, a pre-existing right rooted in our long occupation and governing of the land before European settlement.

Many First Nations people speak of sovereignty and self-government as responsibilities given to them by the Creator and of a spiritual connection to the

¹¹ Maria Moratello, Memorandum to NCFNG, December 2006

land. We do not seek to be granted self-government by Canadian governments, this is a factor contained within inherent rights.

First Nation members often say “we have an inherent right to self-government and self-determination” or we have “First Nations sovereignty”. By these statements they mean; we are a political entity with the right to make laws and to compel obedience to our laws. The members of our group owe faithfulness and obedience to the group’s laws in exchange for the protection and benefits that come from the group.

First Nations peoples have also used the right of self-determination in international law to support our claims. Much attention has focused, in recent years, on the developing body of international law on human rights, on the right to self-determination as it applies to Indigenous peoples around the world. First Nations organizations have argued that the inherent right of self-government is an aspect of the right of self-determination recognized in the United Nations Charter and in the Draft Declaration of the Rights of Indigenous Peoples. In June 2006, an overwhelming majority of member states of the United Nations Human Rights Council voted to adopt the UN Declaration on the Rights of Indigenous peoples. Canada was one of only two states to vote against the declaration. This they said was due to the fact that the Declaration might have a possible incompatibility with domestic policies relating to Indigenous peoples in Canada. In fact, Canada was recognizing that the draft declaration would conflict with the rules contained within the Indian Act particularly the Indian status categories.

Articles 7 and 8 of the Draft Declaration states;

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer who has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- (e) Any form of propaganda directed against them.

Article 8

“Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such”.¹²

If in fact indigenous nations have the right to self identify by virtue of our Inherent Right, then as First Nation governments we must come to grips with the whole idea of what constitutes our identity and as a result begin to identify the “self” in self-government.

Considering First Nation Citizenship

The federal government’s legislated identity of First Nations people must be ended. There are too many indicators which point to a day when the very existence of First Nations will cease. Is it possible that the federal government is liable for breach of trust as the Indian Act determines who the “Indians” are in Canada, and the federal government has a Constitutional responsibility for “Indians and Lands Reserved for Indians”. This would seem to be a direct conflict between the Constitutional responsibility of section 91 (24) and Canadian legislation. Can the fiduciary identify the beneficiaries of the fiduciary?

¹² Draft Declaration on the Rights of Indigenous Peoples, United Nations, 1994

In the interim, between implementing the inherent right and today, First Nations who wish to move from membership to citizenship may consider using Section 10 provisions as identified by Sherry Pictou of Bear River Nova Scotia. Section 10, provides for a First Nation to recognize non-status people as members of their community regardless of the other sections of the Indian Act. These provisions will protect the identity of those people who are now being termed as “Ghost People” until the First Nation has progressed to a point in their transition out of the Indian Act and into a First Nation Constitutional framework which was developed by the people.

In sum, we need to guard our people from extinguishment and protect our children’s future by ensuring that they can inherit their birthright and keep our lands safe from further erosion.

The future is yours to revolutionize.