Transition to First Nations Control of Citizenship

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LEGAL AFFAIRS AND JUSTICE

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I. Introduction

A. The context and purpose of this discussion paper

Prior to the arrival of Europeans, the question of whether a certain person "belonged" to a First Nation was determined by the cultural rules and practices of that nation. In the 1850s, however, governments within British colonies established laws to regulate which individuals, in the government's view, validly belonged to a particular group of First Nations peoples.[1] These various policies, eventually consolidated into the 1876 *Indian Act,* had little or nothing to do with the cultural practices and family structures of First Nations peoples; rather, the colonial, and later federal, legislators defined who was an "Indian" according to false stereotypes to justify their own priorities. The state reinforced *Indian Act* through the rule of law despite the disconnect from First Nations peoples lived realities about who they were as a people. These actions caused irreparable harm to First Nations peoples, harm which is still being suffered today.

There is presently a great deal of momentum within First Nations to discard the concepts of "Indian status" and "band membership" as markers for belonging and to move towards full First Nations citizenship.[2] The goal of this change is to leave behind the colonial past and to move into a new era where communities and nations will decide for themselves who and how citizenship is acquired, based on their culture, traditions, and modern realities. The federal government has also indicated that it wishes to remove itself from the process of determining Indian status and community membership.[3]

The purpose of this paper is to discuss the legal and practical issues raised by the transition away from Indian status and band membership towards full First Nations citizenship. It will address issues such as: the steps required for First Nations to exercise jurisdiction; the steps required for Canada to cease determining who is a First Nations citizen and/or registered Indian; and how First Nations could avoid a legislative vacuum in relation to citizenship during any transition period. Since a great

[1] One early example is *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, 13-14 Vict., (1850), c 42.

[2] Government of Canada, *Report to Parliament on the Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship* (June 2019): https://www.rcaanc-cirnac.gc.ca/eng/1560878580290/1568897675238. The Report notes that "Indigenous organizations and First Nations have been telling the Government for many years that First Nations should be the ones deciding who their people are as members or citizens of their Nations."

[3] Government of Canada, "Getting out of the business of Indian registration", available online: https://www.rcaanc-cirnac.gc.ca/eng/1540403121778/1568898903708 (last updated Nov 28, 2011; accessed June 11, 2020).

deal is still unknown about the legal mechanisms that will be used to effect this change, this paper cannot offer detailed advice for the transition; instead, this policy paper is intended as a starting point for First Nations leaders and policy makers in the transition to First Nations citizenship.

B. Preliminary issues

Before proceeding to the discussion regarding the transition to First Nations control of citizenship, we would like to address two preliminary issues. The first is the meaning of "First Nations citizenship" and what we mean when we refer to "citizenship codes."

The United Nations Educational, Scientific and Cultural Organization (UNESCO) offers the following definition of citizenship:

> Citizenship can be defined as *"the status of having the right to participate in and to be represented in politics."* It is a collection of rights and obligations that give individuals a formal juridical identity. T.H. Marshall, whose work has long dominated the debates about social citizenship, considered citizenship as *"a status bestowed on those who are full members of a community. All who posses the status are equal with respect to the rights and duties with which the status is endowed."*[4]

In the Canadian context, citizenship comes with a package of rights (for example, the right to enter and remain in Canada, the right to vote, the right to "minority" language education in either French or English) but not many obligations. In other states, however, citizenship may include significant obligations, such as compulsory military service. In this paper, a "citizenship code" is the legal document that explains how citizenship is acquired and lays out the procedure for applying for citizenship. It may also include an explanation of the rights and duties of citizens in relation to the community (or, put another way, an explanation of the relationship between citizens and the greater community), and the creation of an administrative process for contesting decisions regarding citizenship.

The second preliminary issue we wish to highlight is that the discussion offered below is subject to the following qualification: while the right to determine citizenship is often framed as an aspect of the overarching right to self-government, this paper will assume that the transition to First Nations control of citizenship will occur outside of a more extensive self-government agreement. This means

[4] UNESCO, "Citizenship", available online at: http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/citizenship/ (accessed October 10, 2019) (citations omitted)

that this paper will assume that the broader legal framework governing First Nations peoples and governments will remain static, including the majority of the *Indian Act*'s provisions. This assumption is necessary to provide useful analysis, since, without it, there would be too many uncertainties to offer any insight into the way ahead.

C. Citizenship codes and human rights

The relationship between First Nations citizenship codes and human rights, particularly equality rights, will be a running theme in this discussion paper. This is a natural consequence of the federal government's historic interference with First Nations peoples' membership First Nations. As is now well-known, for most its existence, the *Indian Act* status provisions have discriminated against women and their descendants, often forcing the removal and alienation from their communities. This reality has been decried for generations, and has led many to insist that any rules regarding belonging in First Nations communities be strictly compliant with human rights norms and, in particular, equality rights.[5] Such calls have been all the more insistent as a result of the federal government's recurring failure to truly address the inequalities (despite being fully aware of them), and to give women and their descendants status rights equal to those of men. Further, many First Nations peoples are concerned by the decisions of some communities to adopt membership codes prior to June 29, 1987, which refuse membership to some of those persons who were the victims of the *Act*'s discrimination.[6]

It is arguable, however, that we are now entering a new era. On August 15, 2019, the final provisions of *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général),* SC 2017, c 25 (also known as "Bill S-3") came into force.[7] This legislation amended the *Indian Act* status provisions to adopt into law what is known as "6(1)(a) All the Way." These provisions open status to women and their descendants on an equal basis to what was historically available to men and their descendants and are designed to remedy the discrimination which resulted from the "married-out" clauses of the *Act*. There is a great deal of uncertainty regarding the demographic effect that the adoption of '6(1)(a) All the Way' will have on

[5] Subsection 11(2) of the *Indian Act* allowed bands that adopted membership codes before June 29, 1987, to exclude from band membership certain categories of individuals that had acquired or reacquired Indian status as a result of the amendments, including individuals that had been "voluntarily" enfranchised and the children of women who married-out.

[6] See for example *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 FC 513. While the exclusionary practices discussed in that case were not specifically outlined in the band's membership code, they nonetheless are a good example what took place in certain communities.

[7] Order in Council PC 2019-1163 (August 7, 2019).

the size of the status Indian population. A low estimatimation predicts that approximately 85,000 more people would become eligible for Indian status; the high estimate would see almost a doubling of the total status Indian population.[8]

One of the central questions for the post-6(1)(a) All the Way world is whether First Nations desiring more control over their citizenship must grant citizenship to those who have an ancestral link to the community, regardless of how removed they may have become from the cultural reality of that community. We believe this is a serious issue since under 6(1)(a) All the Way, individuals whose last ancestral link to the community dates as far back as 1869, but have had no contact with the community – and may not have even been aware of this ancestry – may now be eligible for status.

Should First Nations be legally obliged to grant individuals citizenship, regardless of the cultural connection to the community? Viewed from the perspective of these individuals, it may seem unfair to be refused citizenship on the grounds of no cultural connection when this lack of connection is not due to their fault or choice but purely the result of discriminatory government policy. Indeed, this could be viewed as a re-entrenchment of the unconstitutional gender discrimination once present in the *Indian Act*. On the other hand, viewed from the perspective of First Nations collectivities, being forced to grant citizenship to individuals who have no connection to the modern-day culture of that community, and who in some cases have not experienced the lived reality of First Nations peoples in Canada, may be seen as the re-enactment of inequitable government policy. This approach could also be seen as extremely regressive, in that it would make citizenship in a First Nation community a function of blood and race rather than culture, something that was categorically rejected by, among others, the Royal Commission on Aboriginal Peoples.[9]

We do not propose an answer to this difficult issue in this paper. However, we believe it is an essential issue to address when discussing the possible legal mechanisms through which First Nations may assert control over citizenship because we firmly believe that First Nations should have

[8] Based on the two reports commissioned by INAC during the debates regarding Bill S-3*: An Assessment of the Population Impacts of Select Hypothetical Amendments to Section 6 of the Indian Act*, Four Directions Project Consultants (September 22, 2017) and *Estimates of Potential Population Impacts of "6(1)a All the Way" Based on 2016 Census Data*, Four Directions Project Consultants (November 1, 2017).

[9] *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship*, text preceding recommendation 2.3.8: "As we saw earlier, the Aboriginal peoples recognized in the section are political and cultural entities rather than racial groups … The Aboriginal identity lies in people's collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race."

a real choice about who belongs to their communities. We additionally believe that First Nations' citizenship codes should not be dictated to them by other legal doctrines.

D. Structure of this paper

The structure of this paper is as follows: after this introduction (which is Part I), Part II will review the pros and cons of various legal frameworks and mechanisms that will provide First Nation communities greater control over their citizenship. Part III will discuss important unresolved legal issues regarding which entities are to assert the right to control citizenship, and the application of various human rights doctrines to First Nations citizenship codes. Part IV will outline the funding problem, and lastly, Part V outlines transitional issues such as the continued existence of "Indian status" as a legal category within the *Indian Act* as greater control over citizenship becomes a reality.

II. Possible legal mechanisms

In considering the transition to First Nations control over citizenship, the first issue to consider is the legal mechanism by which First Nations intend to assert this power. A great deal of the transitional work that will be required hinges on this choice, for each raises different legal considerations and will require different adaptations elsewhere.

In the following sections, we will examine three different approaches that could be pursued for the adoption and enforcement of First Nations citizenship codes: inherent rights, treaty rights, and federal government legislation.

A. The adoption of a citizenship code pursuant to the inherent right

Since the Royal Commission on Aboriginal Peoples released its report in 1996, First Nations have consistently taken the position that they have an inherent right to control their citizenship. The right is said to be "inherent" because "it is derived not from the Canadian Constitution or Canadian law, but from the existence of First Nations as independent cultural, social, and political entities with their own laws and systems of government prior to European colonization of North America."[10] This right is also now recognized in international law, at articles 9 and 33 of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").[11]

[10] Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government," Windsor Yearbook of Access to Justice22 (2003): 329-361, at p. 331.
[11] A/RES/61/295.

Because the determination of citizenship is an inherent right, a First Nation could simply declare and apply its citizenship codes since in theory, there are no external legal preconditions to the exercise of an inherent right. On the other hand, there may legal preconditions that are *internal* to exercising that right, i.e. certain practices or ceremonies within a given group often take place before membership is recognized. To take a completely hypothetical example, perhaps the consent of clan mothers is necessary in order for an outsider to become a member of the community. This approach is advantageous for First Nations wishing to remove the federal government entirely from the process, at least at the outset. Consequential amendments to federal laws may later be required, but the First Nation could immediately act on its own to redefine the terms of its citizenship.

However, there are significant uncertainties in proceeding in this manner, due to the legal framework that Canadian courts have imposed upon the exercise of inherent rights. In the current Canadian context, any claim of inherent rights will be construed as a claim under s. 35 of the *Constitution Act, 1982*. As a result, the claimed right will be subject to the scrutiny of the Supreme Court and the legal structure it has built around the exercise of s. 35 rights. Under this structure, a First Nation whose inherent rights are challenged in a Canadian court must demonstrate that the right it is exercising was "integral" to its "distinctive culture" at the time of the Crown's assertion to sovereignty.[12] The application of this test in the citizenship context poses significant hurdles for First Nations, including:

- The requirement to produce historical evidence, usually through an expert witness, that demonstrates that the practice in question was integral to the distinctive culture of the group at the time of contact.
- The tendency of Canadian courts to characterize the aboriginal right being claimed very narrowly.[13] This is best illustrated through an example: imagine that a First Nation's citizenship code contains a provision that provides that a citizen who lives outside of the community for five years or more will have their citizenship automatically revoked. A woman

[12] *R. v. Van der Peet*, [1996] 2 SCR 507; *R. v. Pamajewon*, [1996] 2 SCR 821.

[13] Senwung Luk, "Confounding Concepts : The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Governement in Canada" (2009) 41:1 Ottawa Law Review 101, p. 126; Leonard I. Rotman, "Creating A Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36:1 Alberta Law Review 1. The classic example of this tendency is the Supreme Court's judgment in *R. v. Pamajewon*, [1996] 2 SCR 821, where the bands in question claimed broad self-government and land management rights that the Supreme Court narrowed to a claim of a right to regulate high stakes gambling. For a more recent example of this phenomenon, see Band (Eeyouch) c. Napash, 2014 QCCQ 10367, and in particular the excerpt from Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville, Qc.: Yvon Blais, 2008) cited at para. 165 of that judgment.

born and raised in the community returns from the United States, where she has been working for seven years, and attempts to reintegrate into the community but is refused citizenship based on this provision. This individual then files a challenge with the court and, in its defence, the First Nation argues that its decision was made pursuant to its Aboriginal right to determine its own citizenship. In this case, a court might determine that the aboriginal right being claimed is much narrower than a general right to control citizenship. While the First Nation may have good historical evidence that it exercised jurisdiction and control over membership, it might not have good historical evidence regarding the specific practice of revoking the citizenship of those who left the community. As a result, this narrow characterization of the right could lead a court to conclude that the First Nation has not proven the right in question, even where the historical evidence demonstrates that it controlled membership generally at the time of the Crown's assertion to sovereignty.

- The possibility that another party argues that the right has been extinguished by the federal government's regulation of Indian status since Confederation. Although the courts have held that regulation of a right does not cause its extinguishment,[14] and while academics have argued convincingly that the *Indian Act* status provisions have not extinguished First Nations' rights to determine their own citizenship,[15] it nonetheless remains the case that the individual refused citizenship in a community would have an incentive to argue that the right in question had been extinguished. First Nations would likely be forced to address this argument in many cases involving the inherent right to determine citizenship.

It should also be noted that, under an inherent rights approach, each First Nation's ability to determine citizenship would differ in character and extent, because the right to govern citizenship relies on the specific history and traditions of the peoples in question. This means that each nation would likely have to start from scratch in determining the extent of their rights and how they can be appropriately exercised.

In addition to these legal uncertainties, there is also a very important question as to which social entity is endowed with the right. Is it at a nation level, as suggested by the Royal Commission,[16] or is it at a community or "band" level? Does the right depend on the practices and social structure of

[14] *R. v. Sparrow*, [1990] 1 SCR 1075.
[15] See for example Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity*, (Saskatoon: Purich Publishing Ltd., 2011), p. 67 *et seq*.
[16] *Report of the Royal Commission*, *supra* note 9, text preceding Recommendation 2.3.7. See also discussion preceding Recommendation 2.3.2.

each people at the time of contact? The complex issue of *who* exercises the right will be further addressed in Part III of this paper.

Finally, with respect to the exercise of an inherent right to determine citizenship, there are other considerations involving the application of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and the international human rights norms that are referred to in UNDRIP. These considerations will also be discussed in Part III.

B. Citizenship code adopted through a treaty

The second legal mechanism through which First Nations could assert control over their citizenship is a treaty with the Crown. Under this approach, a First Nations collectivity (whether the nation as a whole or a smaller entity) and the federal government would sign a treaty recognizing the First Nations collectivity's right to determine its own citizenship. These treaties could be extremely detailed, establishing themselves the relevant citizenship rules and procedures, or simply limit themselves to recognizing the First Nations collectivity's treaty right to adopt and enforce a citizenship code. Once confirmed in a treaty, the right to control citizenship would be protected by s. 35 of the *Constitution Act*, regardless of whether that specific group could have proven an Aboriginal right under the *Van der Peet* test.

Establishing a modern treaty right to adopt and implement a citizenship code has the advantage of avoiding the challenges outlined above. In particular, when a group has a treaty right to determine its own citizenship, the debate around which social entity has the power to exercise the right is avoided, the group would not have to prove the nature of its practices prior to Crown sovereignty in order to prove its rights, and the group would not be subject to arguments that their right had been extinguished.

Many modern land claims and self-government agreements provide rules that establish who "belongs" to the group. Some of these rules were discussed in a recent AFN discussion paper on the relationship between First Nations control of membership and the Bill S-3 amendments to the *Indian Act*.[17] However, these models have encountered difficulties and have been subject to criticisms which may mean that other First Nations should be cautious in adopting a similar approach. One of these difficulties is with respect to funding: some First Nation signatories to self-government

[17] Assembly of First Nations, "An Act Respecting Membership: Canada's Collaborative Process on Indian Registration Reforms," (February 19, 2019), Section IV: https://www.afn.ca/wp-content/uploads/2020/01/00-19-02-06-Discussion-Paper-Citizenship.pdf.

agreements have found that despite entering into a treaty with the federal government that specifies criteria for enrollment that are broader than the *Indian Act* (prior to the adoption of 6(1)(a) All the Way), the federal government has continued to fund most programs according to the population of status Indian. As a result, these First Nations have found themselves responsible for delivering programs to a population larger than anticipated by this funding formula. [18] This issue is similar to bands have experienced in adopted membership codes under the *Indian Act* which grant membership those who do not have Indian status. The funding issues raised by the transition towards First Nations' control of citizenship will be discussed in more depth later in Part IV this paper.

A second, but related, difficulty with many of the current land claims and self-government agreements is that they give the federal government influence over determining the enrollment criteria. This role is not necessarily benign, given the federal government's interest in limiting its expenditures and responsibilities.[19] Moreover, the inclusion of the membership or citizenship rules in the text of the treaty or agreement itself means that the First Nation cannot amend these rules without the agreement of the federal government. This creates unnecessary and unwelcome restrictions on the rights of communities to determine for themselves appropriate rules for citizenship.[20] For these reasons, it may be preferable that a treaty with the Crown regarding the right to determine citizenship be limited to acknowledging and confirming the right, and that the treaty itself does not contain the citizenship rules in question.

As with inherent rights in general, there are human rights considerations related to the control of citizenship by virtue of a treaty right, and these will be discussed in more detail below.

C. Citizenship code pursuant to federal legislation

A third legal mechanism through which First Nations could adopt and enforce citizenship codes is through federal legislation. This legislation could be very bare bones, and simply designate that certain collectivities of First Nations people are empowered to adopt citizenship codes, providing

[18] As discussed by the Court in *Teslin Tlingit Council v. Canada (Attorney General)*, 2019 YKSC 3.

[19] Geneviève Motard, « Identité et gouvernance autochtones dans les ententes d'autonomie et de revendications territoriales globales au Canada » (2013) 43:2 Révue générale du droit 501, p. 518; Val Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16:1 CJLS 113, p. 123.

[20] Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities*, (Montreal-Kingston: McGill-Queens University Press, 2009), pp. 112-114.

procedural requirements with respect to the adoption of the codes and enforcement powers for putting these codes into action.

There are several significant disadvantages to this approach. A citizenship code enacted through Parliament would be "delegated legislation" by the federal government and would be inconsistent with the constitutional position of First Nations. Moreover, the legislation could be repealed at any time, invalidating any citizenship codes that had been adopted pursuant to it. Moreover, as delegated legislation, these citizenship codes would be subject to the full force of the *Charter*.

Despite these significant disadvantages, there is one reason why the adoption of citizenship codes pursuant to empowering federal legislation could be attractive for First Nations. The empowering federal legislation could shield the citizenship codes adopted under it from *Charter* scrutiny, through one of two means: either through the designation of citizenship codes as an ameliorative program for the protection and enhancement of the culture of First Nations communities. This would invoke protectionary measures under subsection 15(2) of the *Charter* or through the use of the notwithstanding clause to stipulate that the provisions of citizenship codes apply notwithstanding certain *Charter* protections. These issues will be discussed in Part III, below.

III. Important unresolved legal issues

A. What group is empowered to decide and how should that group liaise with Crown and other interested parties?

As mentioned earlier, one of the difficult issues in determining how to move forward with First Nations control of citizenship is determining which entity can exercise this right. According to the Royal Commission, this right was to be exercised at the "nation" level:

> In our view, the inherent right of self-government [of which the right to determine citizenship is part] is vested in the entire people making up an Aboriginal nation and so is shared in an organic fashion by the various overlapping groups that make up the nation, from the local level upward. The inherent right does not vest in local communities as such, considered apart from the nations of which they are part. [21]

The principled position that the right to control citizenship be exercised at the nation level has been endorsed by many writers, on many grounds, including that this is an essentially step to move past

[21] *Report of the Royal Commission*, *supra* note 9, text preceding Recommendation 2.3.7. See also discussion preceding Recommendation 2.3.2.

the colonial legacy of the *Indian Act*.[22] Tied in with this argument is the observation that Indian bands are a creation of the federal government, and that the division of peoples into small local communities did not necessarily reflect the socio-political organization of First Nations peoples prior to the federal government's interference with First Nations identity.[23] Many authors recognize, however, that despite the colonial origin of band councils, many First Nations individuals now identify strongly with these smaller units and may not necessarily wish to channel the assertion of their rights through a revitalized nation.[24]

Further nuancing this debate is the fact that the level of governance at which membership and belonging were traditionally determined varied significantly between different First Nations peoples. One author describes how for the Gitxsan people, membership or citizenship is an issue dealt with at the level of the house group.[25] In another example, the New Brunswick Court of Appeal found that, on the evidence before it in that case, in pre-colonial and early colonial times, membership in Mi'kmaq communities was not an issue determined by the Mi'kmaq nation at large, but rather at the local community level.[26]

The issue of whether a nation is a proper rights-holding group was addressed by the British Columbia Court of Appeal in the *William v. British Columbia*[27] decision. In that case, the province challenged the trial judge's finding that the nation was the holder of the right to Aboriginal title, arguing, among other things, that "the absence of any traditional pan-Tsilhqot'in governance structure is fatal to any claim on behalf of the Tsilhqot'in Nation"[28] and that "bands under the *Indian Act* will often be the proper claimants in Aboriginal rights cases."[29] The Court of Appeal rejected this argument, stating that "the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself"[30] and that, "[i]n the case before us, the evidence clearly establishes that the holders of Aboriginal rights within the Claim Area have traditionally defined themselves as being the collective of all Tsilhqot'in people. The Tsilhqot'in Nation, therefore, is the

[22] Napoleon, *supra* note 19; Palmater, *Beyond Blood*, *supra* note 15, p. 164 *et seq*.
[23] Napoleon, *supra*, p. 126 *et seq*; Larry Gilbert, *Entitlement to Indian Status and Membership Codes in Canada*, (Scarborough: Thomson Canada Ltd., 1996), p. 14; *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 FC 517 (CanLII), para. 90.
[24] Napoleon, *supra* note 19, p. 126.
[25] *Ibid.*, p. 129 *et seq*.
[26] *Bernard v. R.*, 2017 NBCA 48, paras. 56-62.
[27] *William v. British Columbia*, 2012 BCCA 285
[28] *Ibid.*, para. 145.
[29] *Ibid.*, para. 148.
[30] *Ibid.*, para. 149.

proper rights holder."[31] The Court recognized, however, that an approach that varies based on the traditions and customs of each people will be hard to implement in practice, stating that:

> [151] It will, undoubtedly, be necessary for First Nations, governments, and the courts to wrestle with the problem of who properly represents rights holders in particular cases, and how those representatives will engage with governments. I do not underestimate the challenges in resolving those issues, and recognize that the law in the area is in its infancy. I do not, however, see that these practical difficulties can be allowed to preclude recognition of Aboriginal rights that are otherwise proven.

As one academic has pointed out, what this means for third parties that wish to enter into agreements with First Nations collectivities, is the following:

> The Aboriginal group able to contact could as a result be, depending on the evidence produced with respect to the customs and practices of the group with regard to the claimed territory, the "nation", that is the *supra*-community entity, the local community often known as the "band", or even a sub-group within the band such as a clan or a particular family group.[32]

Considering the possible avenues for the exercise of a First Nations' right to determine citizenship, the first step will often be to establish at what level the community or nation *should*, *can*, or *wishes to* exercise this right. However, there is a still the lack of certainty in Aboriginal law regarding whether an First Nations group can choose to exercise its right to determine citizenship through a certain body (i.e., a nation, a grouping of certain bands, a band, a clan or a house) when that body did not traditionally fulfill this role. One author suggests that courts are open to an Aboriginal group demonstrating that its political structures have evolved since the time of contact and that rights are now exercised by a different body than they were traditionally; in other words, courts are open to a pragmatic approach that reflects how groups organize themselves today rather than in pre-colonial times.[33] However, we argue that the courts still utilize a "frozen rights" approach,[34] and that Aboriginal rights claims, such as the right to determine citizenship, are still be measured against

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[31] *Ibid.*, para. 150.

[32] Ghislain Otis, « Les droits ancestraux des Peuples autochtones au carrefour du droit public et du droit privé : le cas de l'industrie extractive » (2019) 60:2 Les cahiers de droit 451, p. 464.

[33] *Ibid.*, pp. 465-466.

[34] See for example John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 Canadian Historical Review 114, p. 120 and the material cited at footnote 24.

whatever historical and anthropological evidence regarding a group's pre-contact practices is presented before the courts. Regardless, the state of Canadian law on this issue is, as the British Columbia Court of Appeal put it, "in its infancy."

Due to this uncertainty, First Nations may decide that it is desirable to confirm the validity and enforceability of their preferred means to exercise their right to determine citizenship, either through a treaty with the Crown or any legislative measures. As discussed in the previous sections, confirming the rights through treaty or legislation eliminates a great deal of legal uncertainty regarding the identity of the rights-holder, and the nature and extent of these rights. However, engaging with the federal government throughout the process can be seen as undesirable considering the Canadian government's shameful history on the issue of Indian status and its continued desire to limit and control membership in Aboriginal communities to limit its financial liabilities.[35]

We believe any skepticism toward the federal government by First Nations desiring to regain control of citizenship is understandable. The federal government's ability to dictate and take control of the process is significantly weakened, if not outright prohibited, by Articles 9 and 33 of UNDRIP. As one commentary has stated: "The right to determine identity [in Article 33] makes it clear that First Nations people decide what to call themselves and how they identify the constituent groupings that make up the people as a whole."[36] We believe these provisions prohibit the federal government from dictating to First Nations peoples *at what level of organization* they are to assert their right to determine citizenship. Therefore, in any process to conclude a treaty confirming the right to determine citizenship or in any legislation confirming this right, the federal government must accept the social grouping presented by the First Nations party as the appropriate and lawful grouping for the assertion of this right.

B. Equality and *Charter* rights

A second important unresolved legal issue is the extent to which the *Canadian Charter of Rights and Freedoms* would apply to citizenship codes adopted by a First Nations. As discussed above, we believe that this issue is of renewed relevancy considering the adoption into law of "6(1)(a) All the Way." We believe that the discussion regarding membership in First Nations communities may shift

[35] See note 19, *supra*.

[36] Shin Imai and Catherine Gunn, "Chapter 8: Indigenous Belonging: Membership and Identity in the UNDRIP: Articles 9, 33, 35 and 36," in Jessie Hohmann and Marc Weller, eds., *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford: Oxford University Press, 2018), in Part IV.

from an emphasis on eliminating discrimination (which is where it has been focused for many years, and with good reason) to a focus on rebuilding and reconstituting their own rules and traditions.

1. The applicability of the *Charter*

The *Charter* has been applicable to First Nations electoral codes, even where the community followed its own electoral rules rather than *Indian Act laws*.[37] At least one court has also applied the *Charter* to a band membership code adopted under s. 10 of the *Indian Act*.[38] More importantly, courts have suggested that the *Charter* applies to all activities undertaken by band councils since they are a governance system created by federal statute, in which certain rights are exercised and obligations are carried out.[39] The courts have also held that governance powers exercised under modern treaties are subject to the *Charter*.[40] As far as we know, however, courts have never considered whether the *Charter* applies to an First Nations entity that is not created by federal statute, such as a nation or a clan.[41] We note that the Royal Commission was of the opinion that the *Charter* would apply to Aboriginal entities exercising self-government powers.[42]

2. Subsection 35(4) and UNDRIP

Even if the *Charter* does not apply to the exercise of inherent rights, the exercise of these rights is nonetheless subject to gender equality pursuant to subsection 35(4) of the *Constitution Act*. Further, Articles 9, 33, 44, and 46 of UNDRIP reinforce the respect for equality rights, human rights, and fundamental freedoms at the international level.

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[37] *Clifton v Hartley Bay (Electoral Officer)*, 2005 FC 1030, para. 45; *Thompson v. Leq'á:mel First Nation*, 2007 FC 707, para. 8; *Joseph v. Dzawada'enuxw (Tsawataineuk) First Nation*, 2013 FC 974, para. 51. See also: *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.

[38] *Scrimbitt*, *supra* note 6.

[39] *Taypotat v. Taypotat*, 2013 FCA 192, para. 38 (emphasis added), rev'd. on other grounds, 2015 SCC 30.; *Horse Lake First Nation* v. *Horseman*, 2003 ABQB 152, paras. 17-19; there is also extensive discussion of this point in *Napash*, *supra* note 13.

[40] *Dickson v. Vuntut Gwitchin First Nation*, 2020 YKSC 22, para. 131; *Band (Eeyouch) v. Napash*, 2014 QCCQ 10367, para. 105.

[41] In the case of the *Miller c. Mohawk Council Of Kahnawà:ke,* 2018 QCCS 1784, the Superior Court of Quebec considered the application of the *Charter* to a membership law adopted by the Mohawk Council of Kahnawake outside of the *Indian Act*. The Council conceded that the *Charter* applied, however it is clear from the judgment that the Court considered that the Council "is a creation of the *Indian Act*" (para. 178). It is also clear that the Council had not attempted to justify its membership law on the grounds of inherent rights and asked that the Court make no ruling on that issue (para. 6).

[42] Royal Commission, *supra* note 9, text following Recommendation 2.3.6.

Subsection 35(4) states that: "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." According to at least one judgment, as a result of this provision, any assertion of an inherent right for a First Nation to determine its own citizenship must respect gender equality or it fails to assert a right protected by the Constitution.[43] The Royal Commission also emphasizes, "the rules and processes governing membership cannot discriminate against individuals on grounds of sex, for to do so would violate the guarantee embodied in section 35(4)."[44]

With respect to UNDRIP, Article 46 clearly stipulates that "[i]n the exercise of the rights enunciated in the present declaration, human rights and fundamental freedoms of all shall be respected." The authors note that, given the drafting history and the various provisions in the Declaration that relate to human rights, "it is clear that the Declaration does not contemplate an absolute right to determine membership."[45] However, the authors simultaneously argue:

> Articles 44 and 46 should be applied sensitively so that they do not result in taking away the autonomy of the Indigenous people involved. The International Law Association, in its commentary on Articles 44 and 46 suggests that collective and individual rights "must be properly balanced in order to ascertain how and to what extent both rights can be accommodated." What this means … is that [an Indigenous group's] actions must be scrutinized, but the result of the scrutiny is not a foregone conclusion.[46]

As the authors emphasize, an unreflective application of standards of equality or other individualistic human rights to First Nations citizenship codes risks undermining the autonomy that the adoption of such codes.

3. Possibilities for enhancing First Nations autonomy

A strict application of the *Charter's* equality rights may oblige First Nations to accept citizens with any ancestral link to the community, regardless of the connection to the modern-day culture of the community. Some authors argue that First Nations should engage in the cultural re-appropriation of those who have been separated from the community to avoid reaffirming colonialist notions of

[43] *Sawridge Band v. Canada*, [1996] 1 F.C. 3 (T.D.), rev'd. on other grounds [1997] 3 F.C. 580 (C.A.).
[44] Royal Commission, *supra* note 9, text preceding Recommendation 2.3.8.
[45] Imai, *supra* note 35, Part IV.C.(i).
[46] *Ibid*.

Aboriginal community.[47] However, others argue that forcing First Nations to immediately accept all individuals as full citizens makes First Nations citizenship a function of race rather than culture.[48]

This issue cannot be resolved in this discussion paper. **However, we believe that *Charter* could play a role in deciding *how* the transition to First Nations control of citizenship takes place.** Specifically, we believe that First Nations citizenship rules could in certain circumstances be protected from *Charter* challenges by s. 25 of the *Charter*, as an ameliorative program under subsection 15(2) of the *Charter*, or by invoking the notwithstanding clause.

a. Section 25 of the *Charter*

We believe that there is a strong argument for the adoption of First Nation's citizenship rules pursuant to an inherent or treaty right that would be shielded from *Charter* under s. 25. This provision reads as follows:

> *Aboriginal rights and freedoms not affected by Charter*
>
> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

In the case of *R. v. Kapp*,[49] Justice Bastarache, writing for the concurring decision, found that s. 25 "serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group."[50] Put another way, the purpose of s. 25 is to confirm the "legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from

[47] Napoleon, *supra* note 19.
[48] Royal Commission, *supra* note 9; Palmater, *supra* note 15, p. 164 *et seq*.
[49] 2008 SCC 41.
[50] *Ibid.,* para. 89.

Charter scrutiny."[51] In practice, this means where there is a real conflict between the exercise of an Aboriginal or treaty right and a right protected by the *Charter*, the individual *Charter* right should give way in favour of the collective right. This, however, is subject to the rule, established in s. 28 of the *Charter*, that gender equality must always be respected, even when s. 25 is invoked.[52]

Section 25 has been used to insulate provisions of the Nisga'a Final Agreement from challenge pursuant to s. 3 of the *Charter.* In the *Campbell case*,[53] the British Columbia Supreme Court found that s. 25 "is meant to be a 'shield' which protects aboriginal, treaty and other rights from being adversely affected by provisions of the *Charter.*"[54]

The majority of judges in *Kapp* chose not to pronounce on the meaning and extent of protections offered by s. 25, and left the question open as to whether it constitutes a "shield" or merely "an interpretive provision informing the construction of potentially conflicting *Charter* rights."[55]

This year, the Yukon Supreme Court concluded that if a First Nation's rule is a breach of s. 15 equality rights that cannot be saved under s. 1 of the *Charter* (as a reasonable limit that can be demonstrably justified in a free and democratic society), then the court proceeds to a s. 25 analysis on the following basis.

- "The purpose of s. 25 is to ensure First Nation self-government rights be woven into Canada's constitutional fabric and protected as courts seek to reconcile aboriginal rights, treaties or other rights or freedoms with the interests of all Canadians."
- "s. 25 provides space for the… First Nation to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices. The use of the phrase 'shall not be construed' is significant. It is imperative rather than discretionary to ensure that there will be constitutional space for other rights or freedoms that pertain to the aboriginal peoples of Canada."
- "Whether s. 25 should be an absolute bar or an interpretive provision will depend upon the facts and context of each case. Abrogate means to repeal or do away with a law. Derogate is somewhat less Draconian and means to repeal in part or, to destroy, impair or lessen the effect of. However, the wording 'abrogate or derogate'

[51] *Ibid.*, para. 103.
[52] *Ibid.*, para. 97.
[53] Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al., 2000 BCSC 1123.
[54] *Ibid*, para. 156.
[55] *Kapp*, *supra* note 47, para. 64.

suggests that a wide range of impacts are sufficient to trigger the protection of s. 25."[56]

In this context, once the constitutional character of the First Nation's rule is "established by that fact that it is based upon hundreds of years of leadership by those who reside on the land, understand the essence of being Vuntut Gwitchin and that the custom or tradition exists today" – then a rule that would breach s. 15(1) of the *Charter* can be shielded by s. 25. The Vuntut Gwitchin's rule that a chief or councillor must live on the territory was therefore upheld.[57]

From this we conclude the right of a First Nation to establish and enforce its own citizenship rules should be protected by s. 25. Both Bastarache J. in *Kapp* and the BC Supreme Court in *Campbell* note that the purpose of s. 25 is to protect rights that are held *collectively* from court challenges based on a *Charter* rights regime that is *individualistic* in nature.[58] It would seem that the right of a people to define who they are is by its very nature a right of the collective.

Since s. 25 protects from *Charter* scrutiny "any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada," we assert that it should apply to First Nations control of citizenship regardless of whether this jurisdiction finds its source in an inherent right, a treaty, or new federal legislation.

However, since the Yukon Supreme Court followed the majority's view in *Kapp* that "only rights of a constitutional character are likely to benefit from s. 25" it may be prudent, if the transition is to occur via federal legislation, for this legislation to clarify that the right is constitutional in nature, in order to ensure that a s. 25 defense will be open to a First Nation whose citizenship code is challenged for violations of the *Charter*.

b. Subsection 15(2) of the *Charter*

We also argue for the possibility to shield First Nations citizenship codes from *Charter* challenge on the grounds of equality rights if the transition to First Nations control of citizenship is framed as an ameliorative program in accordance with s. 15(2) of the *Charter*.

[56] *Dickson v. Vuntut Gwitchin First Nation*, *supra* note 39, para. 199-205
[57] *Ibid.*, para. 207, 217.
[58] *Kapp*, *supra* note 47, para. 89; *Campbell*, *supra* note 51, para. 155.

An interesting example of this approach is found in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*.[59] Under Alberta's *Métis Settlements Act*, an individual cannot be a member of a Métis settlement if they are a registered Indian. Several individuals challenged this provision on the grounds that it discriminated against them as registered Indians. The Court found that, while the *Métis Settlements Act* did make a distinction between groups of people on an analogous ground, it was not discriminatory because of its ameliorative objective. The Court's decision suggests that rules which draw distinctions between First Nations people and others, or between different groups of First Nations peoples, may not be discriminatory where the purpose of those rules is to protect and enhance the culture of First Nations group in question:

> [83] I conclude that the exclusion from membership in any Métis settlement, including the Peavine Settlement, of Métis who are also status Indians serves and advances the object of the ameliorative program. It corresponds to the historic and social distinction between the Métis and Indians, furthers realization of the object of enhancing Métis identity, culture and governance, and respects the role of the Métis in defining themselves as a people.

However, this type of argument may not work for every distinction made in a citizenship code. In the case of *Miller v. Mohawk Council of Kahnawake*,[60] the Superior Court of Quebec found that suspending the membership of community members who married non-Indians could not be characterized as an ameliorative program because it purpose was not to improve the standing of certain individuals, but to protect the entire community instead. According to the judge, a program that aims to improve the situation of the community at large does not qualify as an ameliorative program under s. 15(2). We respectfully hold serious reservations regarding the judge's analysis on this issue because it loses sight of the collective nature of aboriginal rights which is sometimes at odds with the individualistic foundations of Western human rights doctrine, as highlighted by Bastarache J. in *Kapp*.

c. Section 33 of the *Charter* – the notwithstanding clause

A third way in which these issues of the *Charter's* equality rights may influence decisions regarding the transition to First Nations control of citizenship is through the notwithstanding clause. If citizenship codes are adopted pursuant to federal law, the federal government could choose to

[59] 2011 SCC 37.
[60] *Supra* note 39.

invoke the notwithstanding clause to protect the provisions of First Nations' citizenship codes from challenges under the *Charter*.

While the citizenship codes would not be directly adopted by Parliament, caselaw suggests that they could nonetheless be protected from *Charter* scrutiny if the authorizing legislation contains a declaration that it applies notwithstanding the relevant provisions of the *Charter* and if the government gave its approval to the citizenship codes adopted under this legislation.[61]

We acknowledge that the use of the notwithstanding clause is likely politically unfeasible and that it could also be criticized as being overbroad, in that it would could protect First Nations from *Charter* challenges for actions that are not linked with the exercise of their inherent or treaty rights. Nonetheless, it is an option that First Nations may wish to explore in considering how the legal transition to control over citizenship will take place.

4. Conclusion on equality and *Charter* issues

First Nations citizenship rules will be subject to human rights protections, but the nature and extent of these protections will vary based on the legal avenue through which First Nations assert this power. For example:

- If a First Nation asserts this power through an existing band council created under the *Indian Act*, courts are likely to find that the *Charter* applies.
- Where inherent rights or treaty are asserted through a body other than a band council, the *Charter* may not apply but s. 35(4) nonetheless requires that the assertion of these rights be in accordance with gender equality.
- Even if the *Charter* does apply, section 25 of the *Charter* will likely shield the exercise of an inherent or treaty right to determine citizenship from *Charter* review, except on the grounds of gender equality.
- The assertion of rights under UNDRIP is always subject to human rights and fundamental freedoms.

[61] Section 33 allows Parliament to declare "that [an] Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*." In *Barreau du Québec c. Maroist*, [1985] J.Q. no 103, the Quebec Superior Court applied the Supreme Court's reasoning in *Attorney General of Quebec v. Blaikie et al.*, [1981] 1 SCR 312 and found that, while the text of s. 33 does not refer to "regulations" or other delegated legislation, the notwithstanding clause may nonetheless apply to delegated legislation if it is approved by government.

IV. The funding problem

Regardless of which legal mechanism First Nations use to assert control over citizenship, there a question remains as to how Canada's funding policies will change to accommodate those First Nations who decide who is part of the community?

As mentioned in the discussion paper on the relationship between First Nations control of membership and the Bill S-3 amendments to the *Indian Act*, the funding provided to band councils by the federal government is, for most programs, a function of the number of status band members that reside on the reserve. As this paper notes:

- only a few federal programs with no provincial equivalent are available to all status band members, without reference to whether they reside on reserve;
- only a few federal programs are available to all residents of a reserve regardless of whether the person is a band member or a status Indian, while most funding programs are only funded for status band members on reserve;
- no program provides funding based on membership without regard to status.[62]

Recent government funding policy suggests that these conclusions remain true.[63] What this means in practice is bands do not receive funding for a part of their membership if they have adopted membership codes under the *Indian Act* which recognize non-status Indians as members. As a result, these bands may experience funding shortfalls and be forced to make difficult decisions about how to appropriately provide services to their members.

Moreover, even where First Nations have signed modern treaties and/or self-government agreements with the Crown that acknowledge the jurisdiction of First Nations to determine their own citizenship rules, Canada has continued to provide funding to them on the basis of the number of status Indians present in the community rather than the actual number of citizens.[64] In other words, the mere fact of signing a treaty that guarantees a nation's right to determine citizenship

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[62] Assembly of First Nations, *Canada's Collaborative Process on Indian Registration Reforms: Discussion Paper*, February 19, 2019, pp. 18, 36. http://www.afn.ca/wp-content/uploads/2020/01/00-19-02-06-Discussion-Paper-Citizenship.pdf

[63] Government of Canada, "Band Support Funding Program Policy" available online: https://www.sac-isc.gc.ca/eng/1100100013828/1565364945375 (accessed June 11, 2020); Government of Canada, "On-reserve Income Assistance Program" available online: https://www.sac-isc.gc.ca/eng/1100100035256/1533307528663 (accessed June 11, 2020); Government of Canada, "Post-Secondary Student Support Program" available online: https://www.sac-isc.gc.ca/eng/1100100033682/1531933580211 (accessed June 11, 2020).

[64] *Teslin Tlingit*, *supra* note 18.

does not guarantee that this nation will be provided with the necessary resources to make this right meaningful.

The federal government has expressed an intention to work with the AFN to "co-develop" a new fiscal relationship between First Nations and government,[65] and we have heard rumors that the funding criteria for some programs may be changing.[66] **It is our recommendation that if the transition to First Nations control of citizenship is to result in a real and lasting expansion of sovereignty and self-determination for First Nations, the federal government's approach to funding must be radically revised to provide First Nations with sufficient funding that facilitates the full implementation this right.**

V. Transitional issues

A. Individuals with Indian status but no First Nations citizenship

In the current legal framework, in which the federal government determines eligibility for Indian status and bands have the option of adopting membership codes which provide them with some limited control over band membership, there are four legal situations in which people with First Nations ancestry may find themselves:

1. They may be both a status Indian and a member of a band.
2. They may be a status Indian but not a member of a band, in which case they are placed on the "general list." This situation arises where an individual traces their ancestry to a band whose membership code does not grant them band membership.
3. They hold band membership, but not Indian status. This situation arises where a band has adopted a membership code that grants individuals status based on factors that are not accounted for in the *Indian Act*. For example, a band may grant membership to a child of a

[65] Government of Canada, "A New Approach: Co-Development of a New Fiscal Relationship Between Canada and First Nations" available online: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-ACH/STAGING/texte-text/reconciliation_new_fiscal_rel_approach_1512565483826_eng.pdf (accessed June 11, 2020).

[66] We have heard this from our clients with respect to education funding, and Indigenous Services Canada announced that a new funding approach for First Nations students would be in effect as of April 1, 2019. However, we are unclear how much of an improvement this "new approach" represents or if it provides funding for individuals for whom financing was not previously received: Indigenous Services Canada, "New policy and funding approach for First Nations kindergarten to grade 12 education," (April 2019), available online: https://www.sac-isc.gc.ca/eng/1553859736924/1553859762978#chp2 (accessed June 11, 2020).

member with status under 6(2), even where that child's other parent does not have Indian status (with the result that the child will not themselves be eligible for Indian status).

4. They may have neither Indian status nor band membership, despite their ancestry. For example, they may be the grandchildren of a person who enfranchised – even if this person has maintained cultural and family ties with their grand-parent's First Nation. They will not be entitled to status or band membership (unless the band's own membership code provides otherwise).

It is unclear what would happen to this structure with a transition to First Nations control of citizenship. The questions that arise from this transition include the following: if a person has a right to be considered a band member pursuant to the current rules (whether those rules are found in the *Indian Act* membership rules or the band's own membership code), do they automatically acquire a right to citizenship? What will be the legal status of those individuals that are or were status Indians but do not qualify for citizenship in any First Nation?

We cannot answer these questions without knowing more about the legal structures that will be adopted to facilitate First Nations control of citizenship. **We believe, however, that some residual category of "Indian status" will have to remain in place under federal law even after all First Nations have gained control of their own citizenship.**

Firstly, as the Supreme Court recently declared in the case of *Daniels v. Canada (Indian Affairs and Northern Development*), the federal government has constitutional responsibility for all "Indians," even "non-status Indians."[67] While the number of "non-status Indians" may be substantially smaller following the adoption of 6(1)(a) All the Way,[68] there will undoubtedly remain individuals who fall into this category.[69] What follows from the *Daniels* decision is that, even if First Nations adopt control of their citizenship, the federal Crown will remain responsible for those persons with First Nations ancestry who are not citizens of a First Nation.

[67] 2016 SCC 12.

[68] The trial judge noted that the marrying-out provisions of the *Indian Act* were one of the "major causes" of the creation of the non-status Indian population: *Daniels v. Canada*, 2013 FC 6, para. 115.

[69] The trial judgment in *Daniels* defined non-status Indians as "those to whom status could be granted by federal legislation. They would be people who had ancestral connection not necessarily genetic to those considered as 'Indians' either in law or fact or any person who self-identifies as an Indian and is accepted as such by the Indian community, or a locally organized community, branch or council of an Indian association or organization which which that person wishes to be associated": para. 122.

The second reason we believe that some residual form of "Indian status" must remain in federal law is that the existence of such status will likely help to insulate First Nations citizenship codes from *Charter* challenges. In particular, the existence of a residual Indian status will can help avoid marginalizing individuals who have been denied citizenship by maintaining access to federal programs and other rights associated with Indian status. This is significant especially if a First Nations' citizenship code are deemed discriminatory because it could demonstrate that the discrimination in the citizenship code is nonetheless "reasonable and demonstrably justified in a free and democratic society."[70] Therefore, the continuation of status might help demonstrate that only a minimal impairment of the individual's right to non-discrimination arises from the compromise which reaffirms First Nations' self-determination to exclude individuals in order to further the goal of protecting their culture, while at the same time guaranteeing the rights derived from status for those who are denied First Nation citizenship.

This compromise would be very similar to the one struck at the time Bill C-31 came into force, which allowed bands to adopt their own membership codes. While this compromise has been subject to significant criticism since it allowed bands to refuse status to the descendants of women who were involuntarily enfranchised as a result of marriage, it nonetheless stands to this day.

The third reason we believe the federal government must maintain "Indian status" in federal law despite the assertion of First Nations control over citizenship is that it is outlined within UNDRIP. Article 9 provides that "Indigenous … individuals have the right to belong to a community or nation, in accordance with the traditions and customs of the community or nation concerned." One author who is familiar with the Canadian context suggests that this "right to belong" means that:

> …where the State has been complicit in the creation of groups of Indigenous individuals who do not belong to an Indigenous community or nation, the State has a positive obligation to create mechanisms in consultation with the Indigenous individuals in question to facilitate the creation of new groupings of Indigenous communities and nations to implement the right to belong.[71]

Finally, it can be argued that since it is the federal government that denied the right for First Nations to determine their citizenship, the government must rectify the situation by bearing the costs to support those who have First Nations ancestry but are not citizens of a First Nation. However, there are also convincing arguments against this approach. Specifically, Napoleon warns against travelling

[70] *R. v. Oakes*, [1986] 1 SCR 103, para. 66.
[71] Imai, *supra* note 35, Part. IV.C.(iii).

down the dangerous path of ethnic nationalism at a time when First Nations should be adopting an inclusive approach based on civic nationalism that seeks to reintegrate all culturally disconnected descendants.[72]

B. Bands with existing membership codes under the *Indian Act*

The transition to First Nations control of citizenship raises special considerations for those bands that have adopted membership codes pursuant to s. 10 of the *Indian Act* Currenlty, approximately 37% of bands are in this situation.[73] We contend that these bands face two key questions: first, do the amendment procedures laid out in existing codes have to be followed when a First Nation decides to take control of citizenship? Second, what considerations might apply where a new citizenship code would deny citizenship to those individuals who have an existing right to membership under the current membership code?

Section 10 of the *Indian Act* allows bands to take control of their membership list from the Indian Registrar. This section was appended to the *Act* in 1985 simultaneously with Bill C-31, which returned status to women who married out and their children. While section 10 does not explicitly dictate the rules of membership codes, it does outline the extent to which a band has control over their membership rules:

> *Acquired rights*
>
> 10(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.

This provision has received little judicial consideration, but at the very least it requires that membership codes guarantee continued membership to any person whose name was previously on the department's band list at the time that the band assumes control of membership, regardless of the code's content.[74] This statute may even go further and require that the membership rules guarantee membership to any person who *could* have been on the band list prior to the band taking control even if their name had not been entered. If this interpretation is correct, the band will be

[72] Napoleon, *supra* note 19, p. 139 *et seq*.
[73] Government of Canada, "Getting out of the business of Indian Registration", *supra* note 3.
[74] *Omeasoo v. Canada (Min. of Indian Affairs and Nor.Dev.) and Buffalo et al.*, [1989] 1 CNLR 110.

bound by the departmental rules for all persons who were alive at the time the band adopted its membership rules. As a result, the band would be forced to accept anyone who registers years after the band has taken control of its membership, even if the person does not have the right to membership under the terms of the band's membership code. The difficulty interpreting this subsection arises from Parliament's use of the phrase "had the right". Other sections of the *Act* dealing with registration and band membership use the term "entitled" to indicate that a person has the right to be registered as an Indian or entered on the band list.

Most membership codes adopted under s. 10 contain provisions stipulating how the code may be amended. For example, a code might provide that amendments have to be approved by a fixed majority of eligible voting members present at a special general assembly convened for the purpose of the proposed amendments. But what happens when the band combines with a larger entity, such as a nation to adopt a new citizenship code? Will a court require that the procedure for amending the membership code be followed? Or will such procedure be inapplicable because either: a) the entity adopting the code is different; or, b) the adoption of a new citizenship code differs in nature because it is not a statutory right under the *Indian Act* but rather an inherent or treaty right?

To date, courts have established the following principles with respect to the nature of membership codes adopted under s. 10 of the *Indian Act*:

- when a band adopts a band list under s. 10, it is not exercising inherent or customary powers but rather, statutory powers delegated under the *Indian Act*;[75]
- since the adoption and maintenance of a band list is a delegated statutory power, a band's failure to respect its own membership code can be characterized as a breach of the *Indian Act* itself and sanctioned by the courts.[76]

In these decisions, the courts refrained from considering what the legal situation would have been if the codes were adopted pursuant to a customary right. This question remains open.

Based on the existing state of the law, we claim that the following issues with respect to s. 10 membership codes should be considered in the transition to First Nations control of citizenship:

- **Where a band that has an existing membership code under s. 10 of the *Indian Act* and desires a new citizenship code, it may be wise to follow the amending formula outlined in**

[75] *Cameron v. Albrich*, 2011 BCSC 549; *Ermineskin v. Ermineskin Band Council*, [1995] FCJ No. 821.
[76] *Ibid*. See also *Scrimbitt*, *supra* note 6.

its existing membership code. This is to ensure that its transition to a citizenship code is not subsequently quashed by a court for failure to respect the existing amendment process. Courts prefer due process and adverse to sudden or unilateral changes to a individual's right. For these reasons, it would be very difficult for a band with an existing membership code to convince a court that it can ignore the existing process because now it is adopting a citizenship law pursuant to an inherent or treaty right. The safest approach for a First Nation in this situation would be to follow the process outlined in the existing code. In order to alleviate concerns about the continued application of the *Act*, the new citizenship code could make clear that it was not adopted under s. 10 of the *Act* but rather pursuant to the community's inherent or treaty rights.

- **Where a First Nation with an existing membership code decides to exercise its right to determine citizenship through a body which is not the existing band or band council (for example, through the "nation"), it should take steps to reduce the risk that the citizenship code would be quashed for failure to respect the procedural rights of the community as outlined in the existing membership code.**
- **If a system can be devised to facilitate the transition of *all* First Nations to take control of citizenship, the *Indian Act* should be amended to remove s. 10.** This would make it clear to the courts that these membership codes were no longer valid and that the rules respecting community belonging must now be found in the newly adopted citizenship codes.

We would also highlight that pursuant to the doctrine of acquired rights, when interpreting a law, the courts will presume that the existing rights under previous laws are preserved within new legislation.[77] While this presumption can be overcome through express wording in the new law or through the demonstration that the necessary and inescapable effect of the new law is to revoke acquired rights,[78] it is nonetheless a powerful presumption, and one which has even more force in situations where the potential prejudice to the individual is high.[79]

Therefore, to overcome this problem, **First Nations groups adopting a new citizenship code that removes certain status, rights, or privileges from parts of the population should clearly state in the new citizenship code that it is intended to apply to all situations, and that any rights not in**

[77] Pierre-André Côté, *Interprétation des lois*, 4th ed. (Montréal : Les Éditions Themis, 2009), para. 596; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] SCR 629
[78] Côté, *supra*, para. 643 *et seq*.
[79] *Ibid.*, para. 609.

accordance with the new rules are thereby revoked. Groups should work with legal counsel on the exact wording of such a provision.

C. First Nations citizenship and Aboriginal and treaty rights

Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982* are collective rights. They are held by a collective[80] and adhere to individuals as a result of their membership in the band or nation and/or descent from original rights-bearing people. However, as the law presently stands, the ability to assert such rights does not necessarily align with Indian status or band membership. For this reason, while transitioning the control of citizenship, First Nations may wish to seek certainty regarding who can exercise their collective rights.

In the following sections, we will outline the present state of the law with respect to the ability to exercise Aboriginal and treaty rights.

1. Aboriginal rights

In general, a person who holds the Indian status and who is member of a band will be able to exercise Aboriginal rights held collectively by his or her community. However, the link between Indian status/band membership and the ability to exercise such rights is not perfect.

For example, in *R. v. Lavigne*, a man who was arrested for hunting during the closed season without a proper license successfully defended himself against the charges by arguing that he was exercising an Aboriginal right under s. 35.[81] Even though Mr. Lavigne was not registered under the *Indian Act* and was not member of a band, the trial judge decided that he was a Mi'gmaq entitled to the protection guaranteed by s. 35. The decision was confirmed on appeal.

On the other hand, in *R. v. Lamb*, a woman charged with hunting moose during the closed season who was registered under the *Indian Act* and was a band member of the Burnt Church (Esgenoôpetitj) First Nation was found guilty after the court found that she could not assert a defense based on Aboriginal rights.[82] Ms. Lamb was not Aboriginal and acquired her Indian status and band membership by marriage before 1985. She divorced a few years later and had no further connection to the Burnt Church when the facts occurred. She also admitted at trial that she did not

[80] *R.* v. *Sparrow* [1990] 1 SCR 1075, p 1112.
[81] *R. v. Lavigne*, [2007] NBJ No 169.
[82] *R. v. Lamb*, 2020 NBCA 22.

identify as Aboriginal. In that case, the mere fact that a person holds a band card was found insufficient to establish the entitlement to exercise constitutionally guaranteed Aboriginal rights.

These discrepancies between status/band membership and the ability to exercise Aboriginal rights arise from the application of the test developed by the Supreme Court in *R. v. Powley*[83] to claims of Métis rights. In *Powley*, the Supreme Court established that, in order to validly claim Aboriginal rights associated with a Métis community, an individual must demonstrate the following three things: (1) self-identification with the community that holds the rights; (2) an ancestral connection to that community; and (3) community acceptance.[84] While the test was developed for Métis rights, it has more recently been applied in cases like those described above where a defendant claims Aboriginal rights and the Crown contests the individual's standing.

The application of the *Powley* test to claims of Aboriginal rights constitutes a challenge to First Nations' ability to determine for themselves who belongs to their community and who enjoys the nation's collective rights. In *Powley*, the Supreme Court significantly undermined the importance of community-based rules for membership, stating that "[i]t is important to remember that, no matter how contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim s. 35 rights."[85] According to one author, the Supreme Court's approach in this regard is questionable primarily because it "is in line with a judicial policy that goes back to colonial practices of the early 20th century".[86]

In addition to this focus on direct ancestry, courts do not always genuinely consider First Nations perspectives with respect to the "community acceptance" part of the test. For example, in the case of Mr. Lavigne, the courts found there was sufficient evidence to conclude that the Mi'gmaq community of Pabineau First Nation had accepted Lavigne as one their own, even though no one from Pabineau testified at the trial.

2. Treaty rights

Before modern treaties in the late 20th century, no membership criteria were specified in the wording of treaties signed by First Nations peoples and Canada.[87] As a result, courts would

[83] [2003] 2 SRC 207, 2003 SCC 43.
[84] *ibid*.
[85] *Ibid*., para. 34.
[86] Motard, *supra* note 19, p. 512 (our translation).
[87] *Ibid*.

sometimes require that individuals asserting treaty rights demonstrate that they were direct descendants of members of the original signatory band.[88]

In *Simon v. The Queen*, the Supreme Court took a different approach. Instead of requiring the defendant to demonstrate "direct descent" from the group that signed the treaty, the Court established that evidence of a "sufficient connection" with the signatory Indian tribe was enough for Mr. Simon to raise the treaty in his defense.[89] The Court held that requiring the proof of direct descent in this case would undermine treaty rights, rending the right to hunt based on this treaty 'nugatory'.[90]

The question of what constitutes a "sufficient connection", however, remains unclear. Moreover, there is a contradiction between the "sufficient connection" test established in *Simon* and Canadian courts' more recent use of the *Powley* test, which requires "some proof that the claimant's ancestors belonged to a historic First Nations community by birth, adoption, or other means."[91]

Based on this caselaw, it is possible that a person who is a citizen of a First Nation party to a treaty may be refused the ability to assert the collective treaty rights of that First Nation if they cannot show a direct ancestral link at the time the treaty was signed.

3. Rights under the Natural Resources Transfer Agreements

Natural Resources Transfer Agreements (NRTAs) were entered into between each of the provinces of Alberta, Saskatchewan and Manitoba, and the Canadian government for the primary purpose of transferring control of natural resources and Crown lands from the federal government to the provinces. By enacting the *Constitution Act, 1930*, the Imperial Parliament gave these agreements force of law. These agreements secure certain rights to "the Indians," but they do not contain a definition of this word.[92]

Determining who is characterized as an "Indian" within the meaning of NRTAs remains an issue of interpretation of the *Constitution Act, 1930*. Because it is a matter of constitutional interpretation, courts must analyze the definition prevailing at the time the agreements were entered. They cannot

[88] For example: *R. v. Moses*, [1969] OJ No 1609 (ONSC).
[89] *Simon v. The Queen*, [1985] 2 SCR 387 at p 407-408.
[90] *Ibid*.
[91] *Powley*, *supra* note 78, para. 32. This contradiction is discussed in Motard, *supra* note 19.
[92] *R. v. Horse* [1988] 1 RCS.

rely on the subsequent changes to the definition provided for in ordinary statutes like the *Indian Act*.[93]

In *R. v. Ferguson*, the Alberta Provincial Court decided that Mr. Ferguson could benefit from the immunities provided for by the NRTA of Alberta even though he was neither a treaty beneficiary nor a status Indian within the meaning of the *Indian Act*.[94] The Provincial Court interpreted the NRTA in light of the version of the *Indian Act* which was in force at the time of its signature to find that Mr. Ferguson was a "non-treaty Indian" within the meaning of that statute, and that the word "Indians" in the NRTA referred equally to "non-treaty Indians."

In a similar case, a court decided that a person without the Indian status asserting rights under the NRTA must prove that he is of "Indian blood and lives an Indian mode of life."[95]

4. Treaty annuities

The previous subsections dealt with the issue of who can exercise traditional activities protected by s. 35 of the *Constitution Act, 1982* and the NRTAs. Another issue concerning the distinction between "treaty beneficiaries" and "Indian" status arises with respect to treaty annuities.

Under current federal government policy, annuities are payable to individuals who are registered Indians and are members of a treaty band, as well as to individuals who are registered Indians on the general list and are "associated" with a treaty band.[96] In contrast, band members who are not registered as Indians do not receive treaty annuities.[97] If this approach were maintained following the transition to First Nations control of citizenship, the federal government might discriminate between citizens of a First Nation, and only provide treaty annuities to those it believes are descended from the original treaty signatories.

5. Conclusion on citizenship and Aboriginal and treaty rights

First Nations may wish while preparing to assert full jurisdiction over citizenship to seek guarantees from the federal and provincial governments that individuals recognized by the

[93] *R. v. Grumbo*, [1998] SJ No 331, para 24.
[94] *R. v. Ferguson*, [1993] 2 CNLR. 148 (AB PC) (affirmed by: *R. v. Ferguson*, [1994] 1 CNLR 117).
[95] *R. v. Desjarlais*, [1996] 1 CNLR 148.
[96] *Treaty Annuity Payments Policy Manual*, Indigenous and Northern Affairs Canada, CIDM#8884268, 2017, p. 10.
[97] There are exceptions to the rule, one of which is that annuities can be provided to "a non-registered Indian who is elected Chief of a treaty band."

community as citizens will be able to exercise the Aboriginal and treaty rights of the community. At present, individuals who are citizens or members of a First Nation may be denied the ability to assert Aboriginal or treaty rights if a court finds that they are not direct descendants of an ancestral community.

This incoherence should be eliminated. This can be done in two ways. The first, through a treaty confirming a First Nation's control over its citizenship with a provision that recognizes all citizens equally enjoy the collective rights of that nation. Second, through a statutory enactment to the same effect.

We note that, as discussed above, even if this change takes place, there will remain the possibility that individuals who are neither citizens of a First Nation nor status Indians will be found to have Aboriginal or treaty rights.

D. Required changes to the *Indian Act*

If First Nations control of citizenship becomes a reality, several changes to the *Indian Act* will be required to ensure that First Nations citizens have access to certain legal privileges that are associated with Indian status. As highlighted in Part I of this paper, this discussion assumes that during the transition to First Nations control of citizenship, all other aspects of the Canadian legal framework governing First Nations peoples remain static.

In a scenario where all First Nations determine their own citizenship, the *Indian Act* could be amended by removing sections 5 to 14.3 and replacing the term "Indian" in the remaining sections with "citizen of a First Nation" (or alternatively "citizen of a designated Aboriginal nation" or "citizen of a designated First Nations people"). As discussed above, if First Nations ancestry who are not First Nations citizens, this new term may have to be added into the *Act* alongside "Indian" and the *Act* would have to be clear that the federal government plays no role in determining citizenship status.

Doing this would ensure that First Nations citizens were exempt from taxes and seizure, and that the Minister has the same powers with respect to First Nations citizens as she has with respect to Indians (such as powers over wills and estates of Indians ordinarily resident on reserve and powers with respect to "mentally incompetent Indians").[98]

[98] See ss. 42, 43, 45, 46, 51, 52, 70, 87, and 89, among others.

Determining the desirability of such a power is outside the scope of this paper. We merely mean to highlight what needs to be done to prevent gaps in the current legal framework that may result in the transition to First Nations control of citizenship. For example, in 2013, a private member's bill proposed to eliminate the role of the Department of Indian Affairs and Northern Development in the administration of estates and approval of wills for Indians resident on reserve. The Canadian Bar Association opposed the amendment in the absence of transitional measures because it would have created a legislative vacuum with respect to transferring land interests on reserve to estates, inconsistent results between different provinces and had the potential to invalidate existing wills.[99]

A similar and even more complicated issue is that of reserves. A reserve is defined as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band."[100] In other words, a reserve is in part defined by the relation to a specific band (or several bands in the case of shared reserves). This legal relationship is integral to both concepts (indeed, one of the components of the definition of "band" is that it is a "body of Indians 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").[101] Only members of a band have a right to reside on or acquire possessory rights in that reserve, and only the members of the band may consent to a surrender or designation of land in the reserve.[102]

This intertwining of the legal concepts of "band" and "reserve" becomes complicated if a First Nation decides to exercise control over citizenship at the level of "nation," or in some form of organization that does not align with the band structure imposed by the federal government. In this scenario, how will these First Nations communities determine which of their citizens have rights in which reserves? This would seem to be one of the most complex parts of the process since it also touches on the nature of band councils which, at least as imagined in the *Indian Act*, have as their primary purpose the governance of the reserve. Does the transition to citizenship on a nation level mean that reserves will no longer tied to a local community, but rather to a larger nation? If so, it raises the issue of whether this form of local government is appropriate. Similar considerations apply for

[99] Canadian Bar Association, National Aboriginal Law Section, "Bill C -428 *Indian Act* Amendment and Replacement Act," April 2013 https://www.cba.org/CMSPages/GetFile.aspx?guid=08749669-e3e2-46b5-a5bb-d03cf6e3c00c

[100] *Indian Act*, s. 2(1)

[101] *Ibid.*

[102] See ss. 20, 22-25, and 37-41.

"Indian moneys"[103] and settling specific claims, or other cases that address a band's rights in land and reserves.

For example, in Québec, the Agreement on Cree Nation Governance of 2017 assigned certain powers to the Cree Nation Government, but each Cree First Nation retains "the Jurisdiction to make laws of a local nature for the good government of its Category IA Land and of the inhabitants of such land, and for the general welfare of the members of the Cree First Nation." Moreover, the members of each Cree First Nation and their families always retain the right to reside on those lands.[104]

As we stated, it is not the intention of this paper to reimagine First Nations governance. The answer to these questions of governance will vary from community to community, from nation to nation. **However, we assert, if the transfer to First Nations control of citizenship is to occur smoothly, without conflict or expensive litigation, it is necessary for First Nations to clarify the relationship between the newly constituted or revised national collective and existing band communities.**[105]

E. Changes to other federal legislation

In addition to the changes that will be required to the *Indian Act*, the transition to First Nations control of citizenship will require the federal government to amend other legislation in order to preserve rights of First Nations citizens. In general, the acts mentioned below include provisions that use the word "Indian". The interpretation of these provisions and the rights they recognize to citizens of First Nations may therefore be affected if the legal status of "Indian" were to disappear. We have categorized these acts to give the reader an idea of the legislative areas that may be affected:

1. Tax and employment:
    - Employment exempted from contributions payable and the amount of contributory salary and wages for Indians: *Canada Pension Plan*, R.C.S., 1985, c. C-8, sections 6(2)(j.1), 12 (2.1) and 14.

[103] "*Indian moneys* means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands": s. 2(1) of the *Act.*

[104] *Agreement on Cree Nation Governance*, ss. 6.2, 9.3 https://www.rcaanc-cirnac.gc.ca/eng/1504798011685/1542989671051

[105] This would not be necessary however if First Nations decide to exercise their rights to determine citizenship at the band level rather than some other level, or if the transition was accompanied by a reimagining of the reserve system.

- Determination of regional rates of unemployment and calculation of income for self-employed persons: *Employment Insurance Act*, S.C. 1996, c. 23, sections 54 (x) and 152.01 (3).
- Relief from sales tax on telecommunications for Indians: *Excise Tax Act*, R.S.C., 1985, c. E-15, section 21.27 (5).
- Exclusion of federal property occupied by an Indian: *Payments in Lieu of Taxes Act*, R.C.S., 1985, c. M-13, section 2 (3) (e) (ii).

2. Culture
    - Leave from work for traditional aboriginal practices: *Canada Labour Code*, R.C.S., 1985, c. L-2, section 206.8 (4).
    - Control Protection from the exportation of Aboriginal cultural property: *Canadian Cultural Property Export Control List*, CRC, c 448 (*Cultural Property Export and Import Act*, RSC 1985, c C-51), section 1, Group I and section 1, Group II.
3. Indian status and citizenship and immigration issues
    - Right to enter and remain in Canada for registered Indians who are not citizens: *Immigration and Refugee Protection Act*, S.C. 2001, c.27, sections 19 (1) and 45.
    - Qualifying as student if Indian: *Canada Student Financial Assistance Act*, S.C. 1994, c. 28, section 2(1).
    - Eligibility of status Indian parents for the Canada child benefit regardless of whether a Canadian citizen or permanent resident: *Income Tax Act*, R.S.C., 1985, c. 1 (5th supp.), section 122.6 (e) (v).
4. Others
    - Tax and seizure exemptions in Eeyou Istchee territory: *Cree Nation of Eeyou Istchee Governance Agreement Act*, SC 2018, c 4, s 1, sections 11, 14, 15 and 16 to 20.
    - Application of the act to spouses or common-law partners if at least one of them is a First Nation member or an Indian: *Family Homes on Reserves and Matrimonial Interest or Rights Act*, S.C. 2013, c.20, section 6.
    - Tax and seizure exemptions for Indians who are not Naskapi beneficiaries: *Naskapi and the Cree-Naskapi Commission Act*, SC 1984, c 18, sections 20.1, 187 to 193.
    - Application of the *Indian Act* to determine which members of the Band are "Indians": *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27, section 35 (2).

- Tax exemptions and property of minors and mental incompetents: *Yukon First Nations Self Government Act*, SC 1994, c 35, sections 17 (2), 22.1 and 32.

Please note that we only considered federal legislation and that provincial legislation is most likely affected as well. Furthermore, there are other federal statutes would be affected if the legal category of an "Indian band" were to disappear. These include legislation regarding land and environmental protection, health, governance and tax.