



# Guide to Membership Codes

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LEGAL AFFAIRS  
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## INTRODUCTION

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 particular nation. In the 1850s, however, the governments of the Canadian colonies began to use laws to establish which individuals, in the government’s view, validly belonged to a particular group of First Nations people. These rules, which eventually became part of the first *Indian Acts*, 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 their own stereotypes and priorities. They then used the power of the law and the state to enforce their definitions, despite the disconnect of these definitions from First Nations peoples lived realities. These actions caused irreparable harm to First Nations peoples, harm which is still being suffered today.

Since the amendments to the *Indian Act* in 1985, those First Nations had the power to adopt their own membership codes to define who will be considered a member of their community. While this change allowed First Nations some autonomy over how membership in the community is determined, there remain many legal rules that limit what a band can do in a membership code. In light of the continuing disconnect between who the law claims is a “Status Indian” and the cultural understandings of belonging that exist at the grassroots level, changes to the Indian status and band membership provisions of the *Indian Act* following the judgments of Canadian courts in *Mclvor* and *Descheneaux*, an increasing number of First Nations are interested in finding out more about what they can do to exercise some control over who and who does not “belong” to their community.

The purpose of this guide is to clarify certain concepts relating to Indian status, band membership, and citizenship in First Nations, and to provide First Nations who are considering taking steps to adopt their own citizenship laws or band membership codes with an overview of some of the important issues that they will have to consider when drafting these laws or codes. This guide is not intended to offer legal advice regarding these issues, and any First Nation that is seriously considering adopting a citizenship law, membership code, or similar document, should seek legal advice at an early stage, in order to ensure that both the process of adoption and the content of these codes are legally acceptable and enforceable.



## KEY CONCEPTS

Prior to exploring the options that are available to First Nations who wish to exert more control over membership in the community, it is necessary to explain in detail some of the key concepts that will be used throughout this handbook. This is particularly the case given the complexity of these concepts, a complexity which has resulted from the federal government's mismanagement of the issue, the various court judgments that have been issued in recent years, and the amendments to the *Indian Act* that have resulted from these judgments resulting. The present section will therefore provide an overview of three key concepts: First Nations citizenship, Indian status, and band membership.

### Key Concept #1: First Nations Citizenship

In response to the harm that has been caused and continues to be caused by the federal government's imposition of its own rules on community membership practices, many First Nations and bands have begun to discuss the idea of First Nations citizenship. One of the main reasons for changing the terms of the discussion from those of "status" and "membership" to that of "citizenship" is to escape these colonial constructs and to re-direct the focus to a nation level rather than a band level. This terminology can also be seen as emphasizing that relations between First Nations and Canada should be conducted on a nation-to-nation basis, rather than on a basis of state and subjects.

According to UNESCO:

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 possess the status are equal with respect to the rights and duties with which the status is endowed."*<sup>1</sup>

This concept of citizenship is linked with the rise of modern nation states, and the need to define who had legal, political, and social rights within the state.

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<sup>1</sup> UNESCO, "Citizenship", available online at: <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/citizenship/> (consulted October 10, 2019) (citations omitted)



A person with Canadian citizenship has certain rights (such as the right to vote and to run for political office, and the right to enter and remain in Canada) that are not available to non-citizens. There are not many direct obligations that come with Canadian citizenship, though in other countries citizens may be obliged to perform military service or to vote in elections.

In Canada, and in many other western states, there is no necessary link between culture and citizenship. That is, a person born in Canada is a citizen, whatever the ethnicity or cultural background of their parents. There are countries, however, that require that a person be related by blood to a certain pre-existing population in order to be considered a citizen.

The legal context to First Nations citizenship, and its relationship with Indian status and band membership, will be discussed in the next section.

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## **Key Concept #2: Indian Status**

Indian status is a status that is granted by the federal government pursuant to section 6 of the *Indian Act*. An individual with Indian status has certain rights and immunities: for example, their on-reserve property is exempt from taxation and from seizure by non-Indians. A person with Indian status is also eligible for certain government programs that are not available to other Canadians, such as the non-insured health benefits program.

The concept of Indian status has its roots in legislation adopted by the Canadian colonies in the 1850s. These laws sought to distinguish between those persons who were members of First Nations groups and those who were not, and this for the purpose of determining who had a right to use and settle on the lands that had been set aside by the government for First Nations peoples. Some of these first definitions took a much wider view of who was an Indian than that which would eventually be adopted after Confederation: for example, under certain laws non-Indian men who married Indian women were considered Indian, and community identification played a part in determining who was validly an Indian.<sup>2</sup>

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<sup>2</sup> *An Act for the better protection of the Lands and Property of the Indians in Lower Canada, 1850; An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians, 1857*



By the time the first *Indian Act* was adopted in 1876 however, the definition of “Indian” 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 their own stereotypes and priorities. These definitions had no solid foundation in either culture or blood quantum, with the result that there were persons with status who had less Indian blood or who were less connected with the culture of the group than those who were considered non-status.

Since the amendments to the *Act* in 1985, the entitlement to Indian status is determined by section 6 of the *Act*. A person can be registered under subsection 6(1) or subsection 6(2). There are many diverse situations that can lead to a person being registered under subsection 6(1), but, for the purposes of simplification, they can be grouped into three (very) broad categories:

- Those persons whose right to status finds its source in events that took place prior to 1985. This includes both those people who had a right to status before the *Act* was amended in 1985 and those people whose right to status was restored in 1985 or subsequently (notably as a result of the amendments to the *Act* following the court decisions in *Mclvor* and *Descheneaux*) to correct for injustices that occurred prior to 1985.
- Those persons who have status because they are a member of a group of people that has been declared by the federal government to be a band since April 17, 1985.
- Those persons who are the children of two people who are registered (whether under 6(1) or 6(2)).

An individual is registered under subsection 6(2) where they have one parent who can be registered under subsection 6(1) and another parent who is not entitled to registration (also referred to as “non-Indian”).

The effect of these provisions on the transmission of Indian status to subsequent generations can be summarized as follows – note that it no longer matters, for the purposes of Indian status under the *Act*, whether the parents are married:



### Comparative table of Indian status

		Second Parent		
		6(1)	6(2)	No Status
First Parent	6(1)	Child has status under 6(1)	Child has status under 6(1)	Child has status under 6(2)
	6(2)	Child has status under 6(1)	Child has status under 6(1)	Child does not have Indian status
	No Status	Child has status under 6(2)	Child does not have Indian status	Child does not have Indian status

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### Key Concept #3: Band Membership

Band membership is the right to be considered a member of the community, and to participate in the community's political life. A band member has the right to reside on and possess land in their band's reserve and to benefit from monies that relate to the commonly held rights of the band, such as revenues related to reserve lands.

For much of the history of the regulation of First Nations identity by Canada, there was no distinction made between "band membership", on the one hand, and "Indian status", on the other. Indeed, between 1867 and 1951 the definition required that, to be an Indian, a person of Indian blood be "reputed to belong to a particular band."<sup>3</sup> In other words, if a person was on a band list that meant that they were an Indian.

The concepts of "Indian status" and "band membership" first diverged with the adoption by Parliament in 1951 of amendments to the Indian act that reworked the definition of "Indian" and created the Indian register. Under this law it became possible to be a status Indian without being

<sup>3</sup> See, for example, the definition of "Indian" at s. 2 of the *Indian Act*, RSC 1886, c 43. Note that there were some limited exceptions to this rule, such as the definition of "non-treaty Indian" which included "a person of Indian blood ... who follows the Indian mode of life, even if such person is only temporarily resident in Canada."



a member of a band. However, this was not a common situation, and, between 1951 and 1985, the vast majority of people who were “Indians” were also band members.

In practical terms, the real division between band membership and Indian status was created by the amendments to the *Indian Act* in 1985, which provided for a means by which a band could “assume control of its own membership” by establishing written membership rules that are approved by the electors of the band. Approximately 37% of bands have had adopted membership codes pursuant to this power – they are sometimes known as “section 10” bands, because it is section 10 of the *Indian Act* which provides for the creation of such codes.<sup>4</sup> Band membership in bands that have not adopted membership codes under this section are governed by the rules set out by the government in section 11 of the *Act* – they are sometimes known as “section 11” bands.

The rules surrounding the adoption of band membership codes under the *Indian Act* will be discussed in more detail later in this handbook. For the purposes of this overview, however, it is important to understand the following:

- It is now possible for an individual to be a band member without being a status Indian. This occurs where a band’s membership rules are less restrictive than the *Indian Act* rules. While these individuals can be considered “Indians” for certain limited purposes,<sup>5</sup> they are not eligible for the majority of benefits that come with this status (such as non-insured health benefits).
- There are now many status Indians who are not a member of any band, because the band which their ancestors were part of adopted membership rules that do not recognize them as members of the band. (These individuals appear on the Band list but not the membership or general list).

Finally, it should be noted that the federal government does not allow a person to be a member of more than one band. However, this limitation applies only to band lists controlled by the government. It is therefore possible that a membership code adopted by a band could allow “dual membership.”

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<sup>4</sup> Note that there are approximately 38 First Nations who control membership through self-government agreements

<sup>5</sup> According to s. 4.1 of the *Indian Act*, band members who are not status Indians can exercise certain rights that are normally reserved to status Indians, such as the right to hold a certificate of possession in land in the reserve and the exemption from seizure for on-reserve property.



## INHERENT RIGHTS, MEMBERSHIP, AND CITIZENSHIP

Despite its long history of ignoring or repressing First Nations' internal governance structures, the federal government now accepts that First Nations have an inherent right to self-government, and that this right includes jurisdiction with respect to membership or citizenship.<sup>6</sup> 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."<sup>7</sup>

While this right has been recognized in a general way, there are presently many legal and practical obstacles facing a First Nation who wishes to exercise this right. The first is that inherent rights, in the Canadian legal context, are often framed through s. 35 of *Constitution* (s. 35 is the provision that "recognizes and affirms" Aboriginal and Treaty rights, giving them constitutional protection). In order to demonstrate that a particular practice is protected under s. 35, a First Nation is required to demonstrate a close historical link between the practice it wishes to protect and the cultural practices of the nation prior to contact with Europeans. Such evidence can be difficult to find and is costly to collect. Moreover, government typically contests these rights in the courts. In addition, it is possible that cultural practices have changed since the arrival of the settler society, which can make satisfying the legal test more difficult. Other challenges include the unclear legal status of "nations" as opposed to bands and practical matters such as legal enforcement powers and the resources for implementation. Finally, First Nations exercising inherent rights with respect to membership should be aware that subsection 35(4) of the *Constitution* guarantees Aboriginal and treaty rights equally to male and female persons.

Because of the complexities related to adopting citizenship rules pursuant to their inherent rights, for many First Nations the easiest and most direct route to gaining control over who is and who is not a member of their community is by adopting membership rules under s. 10 of the *Indian Act*. The rules governing such membership codes will be discussed in the section entitled "Adopting a Band Membership Code under the *Indian Act*."

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<sup>6</sup> See Government of Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government", available online at: <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#inhrsg>; See also *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship*, text preceding Recommendation 2.3.8

<sup>7</sup> Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government," *Windsor Yearbook of Access to Justice* 22 (2003): 329-361, at p. 331.



An alternative means of gaining control over citizenship is through the negotiation of a self-government or comprehensive land claims agreement with the Crown. For example, both Yukon First Nations and Inuit groups have negotiated modern treaties with the Crown that contain rules regarding membership that reflect the culture and priorities of the signatory Nations. At least one First Nation in Yukon negotiated a Final Agreement that includes a definition of “citizens” that does not refer to the *Indian Act* status provisions. Moreover, this First Nation has since received a declaration from the Supreme Court of Yukon that Canada, when negotiating a financial transfer agreement with the First Nation, has the legal obligation to take into account the number of citizens of the First Nation rather than simply the number of status Indians.<sup>8</sup> This judgment stands for the principle that, where governments agree to fund First Nations based on the number of their citizens rather than the number of status Indians, these agreements can be enforced by a court.

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<sup>8</sup> *Teslin Tlingit Council v. Canada (Attorney General)*, 2019 YKSC 3 (CanLII)



## UNDRIP AND COMMUNITY BELONGING

The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations General Assembly on September 13, 2007. While Canada originally voted against the adoption of the Declaration, the federal government has since indicated that it fully supports it.

The Declaration has several provisions that are directly relevant to the issue of membership, including the following:

### Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

### Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

These provisions must be read along with several other articles of the Declaration that deal with the relationship between these rights and other human rights. For example, Article 44 states that the rights and freedoms recognized in the Declaration “are equally guaranteed to male and female indigenous individuals”; Article 49 requires that the exercise of rights recognized in the Declaration respect the “human rights and fundamental freedoms of all” and states that these rights are to be interpreted “in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.”

It is currently unclear what role the Declaration plays in Canadian law: some governments have concluded the Declaration has no or very little role, while the courts have found that rights and principles in the Declaration must inform the interpretation of any law or government action relating to First Nations peoples. It is also unclear what the Declaration means for the issue of membership specifically. For example, in what way would the rights recognized above be different from what is presently allowed under the *Indian Act*? Are the *Indian Act* provisions that require a band that adopts its own membership code to accept as members all those individuals



who already have a right to be on a band list merely a reflection of the Declaration’s prohibition on discrimination, or do these provisions undermine an First Nations group’s right to determine membership “in accordance with their customs and traditions”?

The role and effect of the Declaration in Canadian law is an evolving issue, and more will be known in the coming years about the Declaration’s practical effects on First Nations’ powers with respect to citizenship and membership.



## ADOPTING A BAND MEMBERSHIP CODE UNDER THE *INDIAN ACT*

### I. General rules

Before embarking on the process of taking control of their own membership, First Nations communities should be aware of two important constraints on the exercise of this power.

The first constraint is that the *Indian Act* obliges First Nations to include in their membership any person who had a right to be entered onto the band list under the *Indian Act* membership rules at the time the band's own rules are established. This means that a band cannot, through the adoption of its membership rules, exclude individuals who are already on the band list simply because of something that happened in the past (including because of their ancestry, i.e. because their parents were not considered band members until the recent amendments to the *Act*). Another way to think of this constraint is that it does not allow a First Nation to wipe the slate clean and start anew: even with the adoption of its own band membership rules, a First Nation will nonetheless be required to conserve some of the legacy of the *Indian Act*.

The second constraint is that band membership codes are likely subject to the rights set down in the *Canadian Charter of Rights and Freedoms*. This means that membership codes that discriminate on certain grounds, including race, sex, marital status, off-reserve residence, or being an adoptive parent or an adopted child (as opposed to biological) could be found to be contrary to s. 15 of the *Charter*. Bands may wish to consult legal counsel to ensure that the provisions of their draft membership codes do not infringe *Charter* rights or that, if they do, these infringements can be justified based on the particular circumstances of the community.

In addition to these two important restraints, First Nations should also be aware that the decisions taken pursuant to their membership codes are likely subject to review in Canadian courts. First Nations should therefore ensure that the process for making membership decisions is procedurally fair. For example, a code should ensure that a person applying for membership is given an opportunity to make submissions on any evidence that the First Nation intends to rely on in rendering a decision that person's membership, and that reasons be given for decisions regarding membership. Such provisions will help to ensure that decisions taken under membership codes are not overturned for the simple reason that the process followed to render them was unfair.

### II. Process for adopting a membership code

A band that wishes to take control of its membership must follow the process laid out in s. 10 of the *Indian Act*. This process requires that:



1. The band give notice to its members that it intends to take control of its membership and that this intention is approved by a majority of the electors of the band.
2. The band develop a written membership code.
3. The written membership code be approved by a majority of the electors of the band.
4. Once these steps are completed, that notice is given to the Minister that the band is assuming control of its membership.

There are several things to note about this process:

- The “majority” required has been determined to be a “double majority,” which means that a majority of the electors must vote and a majority of those voting must give their approval.<sup>9</sup> For example, in a band with 1000 members, to reach the double majority threshold, at least 501 members must vote on the issue and a majority of those voting must be in favour. This is a lower threshold than an “absolute majority,” which would require that half of all electors vote in favour of the code. Achieving an absolute majority is extremely difficult since, for a variety of reasons, it is often difficult to engage band members on such issues.
- Voting can take place through different means in order to ensure adequate participation. For example, it is possible to conduct the vote by postal ballots.
- A First Nation does not need to hold two separate votes. It can choose instead to present the entire initiative to the electors at one time, asking them to approve both the intention to take control of the membership and the actual rules that have been developed. For communities for which there are many logistical challenges to holding votes, this may be the more efficient option.

Once a First Nation has completed these steps and given notice to the federal government, the federal government will verify that the required consents of the members have been given and that the code protects the rights of those individuals that have already acquired a right to membership. If it is satisfied on these two points, the government will notify the First Nation that

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<sup>9</sup> *Première Nation des Abenakis d’Odanak c. Canada (Ministre des Affaires indiennes & du Nord)*, 2008 FCA 126



it now has control of its membership; the membership code will be in effect as of the date of the notice.

A First Nation may choose the process it believes appropriate for the development and approval of a membership code. For example, it could choose to designate a committee or working group to develop a draft code and then submit it to public consultation; it could conduct surveys of membership to determine which rules are appropriate; it could develop the code in the Council office and present it to the community as a finished product. In deciding on the process it will adopt, a First Nation must balance many factors, including the legitimacy and transparency of the process, efficiency, and cost.

The assumption by a First Nation of control over its membership means that the government has no further role in determining membership. Thus, a person seeking Indian status and band membership must apply to two separate agencies: to the government's Indian Register, for Indian status, and to the First Nation itself for membership. As discussed in the "Key Concepts" section above, this means that a person may be granted Indian status but refused band membership, if they do not qualify under the First Nations' membership code; it also means that a person may be granted band membership under the First Nations' code, but refused Indian status by the government.

Finally, it should be noted that the *Indian Act* requires that the membership list maintained by the First Nation include the date on which a name was added to or deleted from the list.

### **III. Issues to consider when establishing a membership code**

The most difficult part of establishing a membership code is determining its content. These rules will establish who will be considered a member of the community going forward; they require consideration of the history of the community, its culture, its self-perception, and its future. These issues must be considered against the backdrop of more than 150 years of colonial legislation that, in some cases, has profoundly altered the nature of the community and the expectations of parts of the population. Moreover, the recent amendments to the *Indian Act* status provisions will result in new additions to the community, which can complicate the matter further. In this context, establishing the rules around membership is not an easy task.

In the paragraphs below, some of the issues that must be considered by a First Nation considering adopting a membership code will be discussed. As these issues are so particular to each First Nation, no firm answers or recommendations can be given – the purpose of these paragraphs is to assist First Nations and their members in reflecting on these issues. Please note as well that



this list is only a small sample of the various issues that arise or that can be addressed in a membership code.

### **Issue #1: Method of acquiring membership**

This is perhaps the biggest issue to be considered: how does a person become a member of the community? In many cases, the main response to this question is “by birth”, that is, most individuals acquire their membership as a result of being the child of a member. This is the approach that has been taken the *Indian Act* for over a century, since under the *Act* birth was almost the only way to acquire band membership (there were small exceptions, including transfers between bands (both voluntary and as a result of marriage)). However, even this issue is not necessarily simple, since a decision must be made regarding whether one parent is sufficient to pass membership or whether both a child’s parents must be members in order for them to also acquire membership.

What follows is a list of some of the issues that a First Nation may wish to consider regarding the method of acquiring membership:

- Is birth the only means of acquiring membership? Or can membership also be acquired by one of the following:
  - Adoption? Are both customary and legal adoptions included? If customary adoptions are included, how is the customary adoption to be proven? Is the acquisition of membership through adoption limited to cases where the person is adopted as a minor or does it include adult adoptions as well?
  - Marriage? Does marriage extend to include common-law relationships? If yes, what is the required time of cohabitation and how is a common-law relationship evidenced?
  - Residence in the community over a certain period of time?
  - Engagement with the history and culture of the community? For example, can an outsider who has worked in the community and learned the language become a member?
- If birth is a means of acquiring membership, must both parents be members or is it sufficient that one parent is a member?



On this point, the answer to this question may be influenced by demographic and financial implications, which will be discussed below.

- Is Indian status a factor to be considered?

This question has financial implications, since, as will be discussed below, the funding available to First Nations in some areas is calculated based on the number of status Indians that are affiliated with the band, rather than the actual number of band members. If the feeling of the community is that a person must have Indian status to be a band member, the community may be better served by leaving control of its band list with the federal government since no person who is not a status Indian will be added to a band list controlled by the government.

- Is blood quantum a factor to be considered?

Often in discussions of membership, the issue of “blood quantum” is raised, the idea often being that a person should have a certain amount of “Indian blood” in order to be considered a member – perhaps 50%, or 25%. Such discussions often presume that a certain part of the population, for example those that had status before 1985, has more “Indian blood” than those members of the community that did not have status at that time. The problem, however, is that this is not true: because of the mix of rules that the *Indian Act* has applied over the years and the discrimination and inconsistencies that plagued these rules, having Indian status did not, even before 1985, necessarily imply that a person had more Indian blood than a person without status.

Codes that establish a blood quantum rule must establish an origin population that, in theory, has 100% Indian blood. In practice, this is very difficult to achieve, as any origin population will almost certainly include individuals with far less than 100% Indian blood, and would likely include those with no Indian blood at all (for example, non-Indian women who “married in” prior to 1985).

It should also be noted that blood quantum rules are a racial rule, and many have noted that, for First Nations communities, identity and membership in the community were traditionally based cultural considerations rather than race.<sup>10</sup>

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<sup>10</sup> See for example: Wendy Cornet, “Indian Status, Band Membership, First Nation Citizenship, Kinship, Gender, and Race: Reconsidering the Role of Federal Law,” in *Aboriginal Policy Research, Volume V; Moving Forward, Making a Difference*, Jerry P. White et al. eds. (Thompson Educational Publishing, 2006); *Report of the Royal Commission on Aboriginal Peoples*, vol. 5, *Renewal: A Twenty-Year Commitment*, text in Appendix A summarizing recommendations for Volume 2



- Should acquisition of membership be subject to certain cultural considerations? That is, must a person demonstrate their knowledge of the language or of the history of the community in order to become a member?

### **Issue #2: Cultural considerations**

As managed by the federal government, Indian status and band membership have nothing to do with the culture of a community. As discussed in earlier sections, status and membership were not given to an individual because they were part of the cultural community of a First Nation, but rather because they fulfilled certain formalistic rules regarding descent; at the same time, individuals who were clearly part of the culture of a community were refused Indian status and band membership.

In adopting their own membership rules, First Nations may wish to reintegrate cultural considerations into decisions regarding membership. In considering this possibility, First Nations may wish to reflect on the following questions:

- Is it appropriate for a person to demonstrate their integration into or interest in the culture of a community in order to qualify for band membership?
- If so, what types of factors indicate integration or interest? Such factors could include: the ability to speak the language, knowledge of the community's history, and interest and ability in traditional practices.
- Are cultural considerations appropriate for all membership applicants, or only those with certain backgrounds? In considering these questions, communities must keep in mind that the membership codes are likely subject to the *Charter* and thus cannot engage in unjustified discrimination.
- Who is best placed to decide on whether an individual meets the cultural criteria?

### **Issue #3: Dual membership**

At present, the *Indian Act* does not allow a person to have their name entered on more than one band list that is controlled by the Department. This is the case even where each of a child's parents is a member of a different band and the child has strong familial and cultural links with both communities. On the other hand, a Canadian citizen may have citizenship in another country. A First Nation adopting its own membership code could allow for dual citizenship. If it



considers doing so, it may also wish to consider whether there are any limits on the way this right is exercised (and whether such limits can be legally justified).

#### **Issue #4: Who decides?**

A membership code will establish the procedural steps that an applicant must follow in order to obtain band membership. It must also address the following question: who is best suited to decide on whether a person has qualified for membership under the membership code?

A First Nation could decide that this process will be administered by a person acting as band registrar, who will collect the required documents and decide whether a person is or is not a member based on the code. In the alternative, the role of deciding whether a person is a member could be designated to a citizenship committee, which would be composed of representatives from certain parts of the community or from certain professions (elders, Council members, lawyers, historians). Regardless of who decides, that body will be bound to apply the rules of the membership code and cannot import into their consideration factors that are not specifically provided for in that code.

A First Nation may also want to consider establishing an appeal or review mechanism for membership decisions. The existence of such a mechanism can help assure that the membership code is applied properly and can help prevent or reverse abuses of power by those charged with making the first decision.

When laying out the procedural steps for acquiring membership, a First Nation should ensure that its rules are very clear regarding the power and duties of each person or body involved in the process. For example, if the decision regarding membership is to be made by a citizenship committee, the membership code should clearly establish what factors the committee is permitted to consider in rendering its decision.

#### **Issue #5: Amendment to the rules**

A First Nation may wish to provide for a mechanism by which the membership code can be revised, amended, or replaced. Such a mechanism is useful to allow the community to respond to changing circumstances, particularly where the future effects of a membership code cannot always be fully understood at the time of drafting.

When considering the amendment mechanism, a First Nation must balance two contradictory goals: on the one hand, it is important that any change to a membership code require a high enough threshold for approval to prevent a small faction of a community from taking control of



the process and amending the code for its own purposes; on the other hand, the threshold must not be so high that it effectively prevents any amendment from ever taking place. The amendment procedure should also require that clear notice be provided to all affected individuals, to ensure that every person whose rights may be at stake has the opportunity to express their views.

It is important that any procedure providing for the amendment or replacement of the membership code also be very clear on the process to be followed, as this will prevent conflicts and controversy regarding the validity of any amendments.

#### **IV. Demographic considerations**

The choices a First Nation makes in its membership code regarding the acquisition of membership will have demographic consequences over the generations to come. Specifically, these choices will affect the size of the community as well as the number of its members that have Indian status. The extent and nature of these changes will largely depend on two factors:

1. The extent to which the acquisition of membership is permissive (e.g., a child only needs to demonstrate that one parent was a band member) or restrictive (e.g., child needs to show that both parents were band members, or that the child has a 50% blood quantum). In general, the more restrictive the membership rules, the fewer of the descendants of present members will qualify for membership down the road.
2. The extent to which the members of the community have children with non-members. In membership codes that require more than simply having one parent that is a band member to qualify for membership, the higher the rate at which members have children with non-members, the more descendants of the current membership will be deprived of membership. First Nations may therefore wish to consider at what rate their members have children with individuals from outside of the community when drafting membership rules.

In 2005, a demographer assessed the effect of various membership rules on the future size of First Nations communities and made the following projections for the next 25 years<sup>11</sup>:

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<sup>11</sup> Stewart Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities," February 2005, pp. 41-42.



- in First Nations that use the *Indian Act* or equivalent rules, the population eligible for membership would increase over the following 50-year period and decline gradually over the next 25 years;
- among First Nations that use a 50% blood quantum rules, on average, the population eligible for membership would increase for about 40 years, but the population of those descended from members who would be ineligible for First Nations membership would increase within 75 years and account for nearly 40% of the total, even though the excluded group is expected to contain a growing number of individuals who qualify for Indian registration;
- in First Nations that use a 25% blood quantum rules, a large majority of those descended from members would themselves be eligible for membership over the entire 75-year period and all of those entitled to Indian registration would also be eligible for First Nations membership, but members not entitled to be registered under the *Indian Act* would account for about 18% of the total population eligible for membership within 75 years;
- in First Nations that use two-parent membership rules, the population would increase only slightly over the following 20 years and then decline to a level about one-half that of the 2002 population within 75 years and a majority of those descended from members would not themselves be eligible for membership within 25 years, even though most of those excluded by the two-parent rule would be entitled to registration under the *Indian Act*;
- First Nations that use one-parent rules would also have growing populations, but their membership would include a rapidly-growing proportion of individuals who do not qualify for registration under the *Indian Act* and they would account for about 1/3 of eligible members within 75 years.

In short, First Nations with the most restrictive membership rules would have the earliest population drops and large numbers of descendants would be ineligible for membership even though most of those would remain eligible to be registered under the *Indian Act*.

At the other extreme, First Nations with the least restrictive membership rules would have growing populations, but an increasing and significant proportion of members ineligible to be registered under the *Indian Act*.



## V. Financial implications

Most First Nations receive significant amounts of funding from the federal government pursuant to various funding agreements and transfer programs. When considering its membership rules, a First Nation should keep in mind that, at present, many of these programs provide funding on the basis of status Indian population rather than band membership. For example, band support funding is calculated based on the number of members with Indian status, with those members who live on reserve weighing more heavily than those members off the reserve; funding for capital projects on the reserve is calculated based on the number of status Indians who are ordinarily resident on the reserve. This means that, where a community adopts rules that provide membership to those individuals that are not eligible for Indian status, it will be taking on members for whom it does not always receive funding.

While it is possible that the federal government revises its funding criteria and begins to provide First Nations with funding based on the number of members they have rather than the number of members with Indian status, communities should be aware that, at present, there are financial considerations that may be important to consider when drafting a membership code.