



FIRST NATIONS REGISTRATION (STATUS) AND MEMBERSHIP RESEARCH REPORT

Prepared by the AFN-INAC
Joint Technical Working Group

July 2008



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada



TABLE OF CONTENTS



INTRODUCTION 1
Mandate..... 1
Joint Technical Working Group: Tasks and Activities..... 2

PURPOSE OF REPORT 3

REGISTRATION, MEMBERSHIP AND FIRST NATIONS CITIZENSHIP: A BRIEF SUMMARY..... 3

 Pre-Contact to the Indian Act..... 3
 The 1951 Amendments to the Indian Act..... 5
 1985 Amendments to the Indian Act (Bill C-31)..... 5
 Impacts of the 1985 Amendments 6
 Continuing Inequities in Legislation..... 6
 Demographic Implications 6
 Program Funding and Community Cohesion Issues 7
 Litigation Against the Federal Crown..... 7

PAST INITIATIVES DEALING WITH REGISTRATION AND MEMBERSHIP 8
 The AFN-LTS (INAC) Joint Initiative for Policy Development (1998-2001)..... 8

RESEARCH AND ANALYSIS OF THE EXISTING KNOWLEDGE- BASE 9
 Methodology 9
 Gaps in Research and Knowledge 10
 AFN Focus Group on Registration and Membership 11

REVIEW OF THE STATE OF RESEARCH AND ANALYSIS IN SELECTED KEY AREAS 15

 Descendency / Blood Quantum Policy Issues..... 15
 Youth Identity Issues..... 15
 Unrecognized/Unstated Paternity Issues..... 15
 Implications of Canadian Case Law on Identity..... 18
 The Relationship between Indian Status, Band Membership and First Nations Citizenship 23
 Distinctiveness of Peoples and Control over Legal Definitions of Identity..... 24
 Evolving Judicial Approaches to Issues Involving of ‘Indians’, ‘Race’ & Identity 25
 The Relationship between Programs and Services and Indian Status, Band Membership and Reserve-Residency 25
 International Indigenous Developments with Implications for Identity 26

CONCLUDING REMARKS..... 26

BIBLIOGRAPHY..... 29

INTRODUCTION

Mandate

In the fall of 2007, the Governance Branch, Lands and Trust Services (LTS) of the Department of Indian and Northern Affairs (INAC) received a departmental mandate for the fiscal year 2007-08 to engage in a technical-level process with the Assembly of First Nations (AFN) for the purposes of undertaking research and analysis on issues relating to registration and membership under the *Indian Act*. In January 2008, the AFN received funding for its participation in the joint technical working group process based on the acceptance of a proposal that it had submitted for this purpose.

The AFN had previously sought funding to engage on policy matters relating to registration and membership for several years. Based on resolutions passed by Chiefs-in-Assembly and as instructed by the AFN Executive, the AFN has a broad mandate to explore all aspects of the issues that arise in respect of registration, membership, First Nations identity and citizenship, including options for future reform in these areas, in response to the direction from First Nations.

Since 2001, at least five resolutions have been passed calling on Canada to recognize First Nations control to determine First Nation citizenship and for some form of national dialogue between the AFN and Canada to address issues arising from the *Indian Act*. They are as follow:

- Confederacy of Nations Resolution No. 53/2000 – Challenge to Bill C-31
- AGA Resolution No. 21/2001 – Bill C-31
- Confederacy of Nations Resolution No. 37/2002 – First Nations Citizenship
- Confederacy of Nations Resolution No. 8/2004 – A Call For Immediate Action On The Bill C-31 Crisis
- AGA Resolution No. 12/2005 – Implementation of First Nations Citizenship Symposium Recommendations
- Special Chiefs Assembly Resolution No. 40/2007 – Recognition of First Nation Right to Determine Citizenship.

AFN resolutions also identified human rights issues touching on *Charter* rights, as well as section 35 Aboriginal and Treaty rights in Canada's treatment of First Nations identity. Resolutions have also been adopted respecting "Bandless and

Landless Issues" (Special Chiefs Assembly Resolution No. 48/2005), "Cross Border Identity Requirements" (Special Chiefs Resolution No. 1/2006) and "Recognition of First Nations as Nations" (Special Chiefs Assembly Resolution No. 59/2006).

In the wake of the failure of the federal government's proposed First Nations Governance Act (Bill C-7), the AFN was mandated in July 2004 to develop a broad framework to include principles, process and strategies as a constructive and pro-active alternative to pursuing change, with the objectives of recognizing and implementing First Nation governments. The framework, for the *Recognition and Implementation of First Nations Governments* was approved by resolution at a Special Chiefs Assembly in March 2005, and was subsequently confirmed by Canada in May 2005, when it signed the *First Nations-Federal Crown Political Accord for the Recognition and Implementation of First Nation Governments*.

Now referred to as the ***First Nation Government Framework***, it provides the AFN with broad parameters, detailed principles and processes to facilitate engagement on all policy and legislative matters, including those relating to citizenship.

In this context, the research proposal of the AFN that led to this initiative stated: "*Central to issues of First Nation governance, and to the future of First Nations in Canada, is the issue of identity.*"¹ A key focus of this research effort was therefore to examine current and emerging issues concerning the treatment of First Nations' identity under the law. This included a review of the treatment of First Nations/Band membership and Indian status under the *Indian Act* and related federal policies and how all of this relates to First Nations governance.

INAC has received a much more limited mandate for engagement in these areas based on a staged approach and focused on research and analysis of issues relating to registration and membership as the first phase in potentially a broader multi-phased future process. Such a process could include, but may not necessarily be limited to, subsequent work involving the joint development of options and next steps for reform in respect of registration and membership under the *Indian Act*, and consultation with First Nations on these matters.

¹ Proposal on a Joint Research Initiative to Examine Membership and Registration Issues to Strengthen First Nations Identity, Assembly of First Nations, Ottawa, November 26, 2007.

The Governance Branch's initial mandate was limited to a joint process for research and policy analysis ending March 31, 2008. The Branch has subsequently received departmental authority to complete this phase of research and analysis jointly with the AFN over 2008-09. However, in order to participate in joint work above and beyond research and analysis, that is, the joint development of options for reform in respect of registration and membership, and consultations with First Nations on these matters, INAC would likely have to seek a Cabinet mandate to undertake such joint activities with the AFN (and as required with other First Nations groups and organizations).

Joint Technical Working Group: Tasks and Activities

Despite the differences in the nature and scope of AFN's and INAC's respective mandates for engagement, there was a recognition and a consensus that this preliminary research and analysis phase is a necessary

and useful first step in responding to the broader legal and policy issues associated with registration and membership.

In this context, an AFN/LTS Joint Technical Working Group was formed in January 2008 to undertake work relating to research and analysis of registration and membership issues. Participants in the joint technical working group included representatives of the AFN (and designates of the AFN), and representatives of the Governance Policy Directorate, Governance Branch, LTS, INAC. It was recognized that with the identification of research gaps and consensus around a proposed future research and analysis agenda, that officials representing other INAC sectors, and other federal departments, would also be invited to participate in the joint working group process as required.

A collaborative approach was adopted by the AFN and INAC in respect of the working relationship within the joint process. The guiding principles for this collaborative approach are outlined in the Joint Technical Working Group's *Terms of Reference* and include:

- **A commitment to building a shared framework of understanding:** AFN and INAC commit to listen and learn from the other and to respect the perspectives of the other, while also striving to understand the perspectives of each other.

- **A commitment to search for inclusive responses:** AFN and INAC commit to work towards building an appropriate plan that aims to meet the needs and interests of both parties.
- **A shared responsibility for collaboration:** An appropriate and effective plan (i.e. one that can be implemented) will require support from all parties.

As part of this collaborative approach, the AFN and INAC agreed to the joint preparation of research, discussion and/or policy papers and other documents as a result of the research reviewed, undertaken or managed by the working group, and/or issues/topics that emerge as a result of substantive policy discussions undertaken by the group.

While the working group would strive to collaborate on the preparation of papers and other documents, it was recognized, however, that the need may arise for the preparation of discussion and/or policy documents by individual members of the working group that would not necessarily rely upon a collaborative approach. In these instances, it was further agreed that papers and other documents prepared by individual members be shared with the working group upon their completion as a means of generating further discussion on the subject matter(s) at hand.

The main task of the joint technical working group is to undertake substantive research and policy analysis in respect of issues relating to registration and membership under the *Indian Act* with the aim of informing the development of future considerations and options for reform in these areas, as well as to facilitate and inform decision-making on the part of both First Nations leadership and the federal government.

More specifically, the mandate of the joint technical working group is to:

- identify, review and analyse existing research and information on issues relating to Indian registration and Band membership;
- identify research gaps and outline an agenda for additional research on issues relating to Indian registration and band membership; and
- undertake research and conduct analysis on issues relating to Indian registration and Band membership.

To this end, tasks and activities of the joint working group include, but may not necessarily be limited to, the following:

- The review, synthesis and analysis of existing research and information on registration and membership.
- The identification of research and information gaps on issues relating to registration and membership, and the preparation of an agenda for new research to be undertaken or managed by the working group.
- The analysis of any new research undertaken by the joint working group.
- Substantive discussions on issues emerging from existing or new research, as well as any emerging issues that arise as a result of other work of the group.
- The collaborative preparation of discussion, policy papers and other documents as a result of the research reviewed, undertaken or managed by the working group, and/or issues/topics that emerge as a result of substantive policy discussions undertaken by the group.

The AFN and INAC began their joint work at the end of January 2008, beginning with the preparation of the group's Terms of Reference, which were completed and approved by both the AFN and INAC. Between the end of January and March 2008, a joint review of existing research and information on issues related to registration and membership was also undertaken as a means of identifying research and information gaps.

As part of this work, the Assembly conducted a two-day focus group on March 17 and 18, 2008 in Ottawa on registration and membership issues with First Nations technicians from across the country representing on and off-reserve interests, including, youth, Elder and women representation. The purpose of the focus group was to discuss issues surrounding registration and membership from a First Nations perspective and with the assistance of focus group participants, establish some priority areas with respect to future research on these issues. An agenda and background discussion document were prepared by the AFN for the focus group, as well as a final report of the session.

Based on the research and analysis, and informed by the findings of the focus group, the AFN and LTS have prepared this joint research report that, among others, provides a review, synthesis and analysis of existing research and information on registration and membership, as well as

identifies research and information gaps for possible future research and analysis.

PURPOSE OF REPORT



This report is designed to provide findings from research and analysis activities undertaken by the joint technical working group beginning in late January 2008 and ending in late March 2008. The report provides a brief history of registration and membership issues, as well as some observations on the current state of affairs in respect of these issues as identified and discussed by the working group. The report also provides a review, synthesis and analysis of existing research and information on registration and membership, identifies some key areas that future research should focus on, and aims to establish a proposed research and analysis agenda for future joint work.

The purpose of this document is to engender further discussion on a future joint AFN-INAC agenda for research and analysis of issues relating to registration and membership. The report is without prejudice and is not intended to be a statement of federal government or AFN policies and positions in respect of registration and membership issues, or to suggest any particular direction for the future evolution of legislation and/or policy in these areas.

REGISTRATION, MEMBERSHIP AND FIRST NATIONS CITIZENSHIP:

A BRIEF SUMMARY



Pre-Contact to the *Indian Act*

Long before European contact, First Nations had their own systems for identifying the citizens of their nations. These systems were and are diverse, comprised of clan systems, matrilineal (mother-based) and patrilineal (father-based) kinship systems, hereditary systems, and included provisions for marriages and traditional adoptions. While each nation had established its own methods for recognizing and

acquiring citizenship, available research indicates that there was a commonality across all nations in that the acquisition of citizenship was flexible and could be gained through a number of ways, including through birth, marriage, adoption and residency. In addition, citizenship recognition was based on self-identification and gender-neutral kinship and community ties.²

With all nations, citizenship carried important responsibilities, and all citizens were expected to contribute to their nations in observable ways. For example, for men this frequently meant providing food and protection while women were responsible for a range of undertakings, including domestic needs, socio-cultural education and, in some cases, clan leadership or leadership selection.³

Initial contact with European nations did little to alter First Nations concepts of citizenship. In this period of acknowledged political autonomy, social distance was preserved between First Nations and settler societies, with First Nations adhering to their usual forms of social organization, political decision-making and cultural activities. This state of affairs was displaced as a consequence of a number of factors not least of which was the establishment of colonial rule and the introduction by successive colonial governments of a number of “civilization” statutes and policies that encompassed, as key elements, a reconstituted meaning of First Nations citizenship⁴ and the legal definition of the term “Indian”.

It has been argued that in comparison to the present, the definition of an “Indian” in early colonial legislation was more broadly based, focused on social and tribal ties and relatively gender neutral. These early broad definitions generally included any person of Indian birth or blood, any person reputed to belong to a particular group of Indian, and any person married to an Indian or adopted into an Indian family.⁵ In this context, it appears that early colonial powers relied upon First Nations criteria to determine early colonial definitions of an “Indian” including; birth; marriage; adoption; residency; self-identification; kinship; and community ties. However, the consolidation of colonial legislation and policy into the first *Indian Act* in 1876,

which included legal definitions of the term “Indian” and statutory criteria for who was and was not able to register as an “Indian,” essentially lay the ground work for the complete segregation of those who remained “Indian” and assimilation, through the loss of status and existing rights.⁶

Legal definitions of the term “Indian” were first introduced in 1850 colonial legislation governing Indians and the use of Indian lands in both Upper and Lower Canada. Both *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada* and *An Act for the Protection of the Indian in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury* defined the term “Indian” for the purposes of residency on the protected reserve land base, for the first time in Canadian history. Moreover, these laws introduced the notion of race as the determining factor in the legal identification of an “Indian”, that is, only a person of Indian blood or someone married to a person of Indian blood would be considered an Indian.⁷

In 1857, the concept of “enfranchisement” was introduced, whereby an Indian could give up legal status, with the families of males who did so also losing their status, and over time, the definition of an “Indian” became narrower.⁸

The *Gradual Enfranchisement Act* of 1869 was the first law denying Indian status to an Indian woman who married out and preventing her children from acquiring status. This provision was carried forward into the first *Indian Act* in 1876.⁹ Therefore, from 1869 on, federal “Indian” legislation, including successive *Indian Acts* introduced and solidified gender-based criteria within the definition of an “Indian” and in the treatment of Indian men and women. This included the central role of patrilineal descent requirements and gender-based discrimination in the treatment of Indian-to-non-Indian marriages, whereby Indian women who married non-Indians lost their status and their children were not entitled to be registered. In contrast, Indian men who married non-Indians retained their status and their non-

2 Lynn Chabot, *The Concept of Citizenship in Western Liberal Democracies and in First Nations: A Research Paper*, (Ottawa: Department of Indian Affairs and Northern Development), March 2007, p. 32.

3 Ibid., p. 31.

4 Ibid., p. 32.

5 Megan Furi and Jill Wherrett, *Indian Status and Band Membership Issues*, (Ottawa, Political and Social Affairs Division, Parliamentary Research Branch, Library of Parliament), February 2003, p. 2.

6 Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal Peoples*, Volume I - “Looking Forward, Looking Back,” Chapter 9 – “The Indian Act,” (Ottawa: Supply and Services Canada, 1996).

7 Ibid. Also see, *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, S.C. 1850, c. 42, 13 & 14 Vic., s. 5 and *An Act for the Protection of the Indian in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury*, S.C. 1850, c. 74.

8 Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal Peoples*, Volume I - “Looking Forward, Looking Back,” Chapter 9 – “The Indian Act,” (Ottawa: Supply and Services Canada, 1996).

9 Ibid.

Indian spouse and off-springs were entitled to be registered as Indians.

The *Constitution Act, 1867* gave the federal government authority to legislate in respect of “Indians and Lands Reserved for Indians” under section 91(24). Under this authority, Parliament consolidated the existing legislation and policies dealing with Indians into the first *Indian Act* in 1876. The definition of an “Indian” in the 1876 *Act* emphasized patrilineal descent and defined an “Indian” as “any male person of Indian blood reputed to belong to a particular Band; any child of such person; and any woman lawfully married to such a person.” Consequently, any Indian women married to a non-Indian man would lose her status as would her children. In addition, the *Act* and subsequent amendments also continued and furthered the policy of enfranchisement, which became compulsory in a number of circumstances. For example, enfranchisement was automatic if an Indian became a doctor, lawyer, Christian minister or earned a university degree.¹⁰

It is important to note that from the implementation of the first *Indian Act* in 1876 to 1985, eligibility criteria for “registration” as an Indian coincided with Band membership, and that “status” or “registered” Indians were also Band members, with rights under the *Indian Act* to live on-reserve, vote for Band Council and Chief, share in Band moneys and own or inherit property on-reserve.¹¹

The 1951 Amendments to the Indian Act

For almost a century, the sections of the *Indian Act* that dealt with Indian “status” and Band membership remained virtually unchanged until amendments were instituted to the *Act* in 1951.

The 1951 *Indian Act* amendments established a centralized Indian registry system and the Office of the Indian Registrar, and introduced federal government control over registration through the Minister of Indian and Northern Affairs. In addition, the 1951 amendments further entrenched gender-based criteria in the definition of an “Indian” and eligibility for registration and some precedents set by earlier *Indian Acts* continued to prevail. For example:

- Indians were defined as male persons of Indian blood, and their descendants and wives.
- A woman derived her status first through her father and then through her husband. If she married a non-Native, a Métis, or a non-status Indian she lost her status. And since children derived their status through their fathers, her children and future generations would also be ineligible to register.
- The child of an unmarried registered mother would have status unless it was demonstrated that the father of the child did not have status.
- People who received, or whose ancestors received, land or money scrip were not considered Indians and therefore, not eligible to be registered.

1985 Amendments to the Indian Act (Bill C-31)

With the incorporation of the Canadian *Charter of Rights and Freedoms (Charter)* into the *Constitution Act, 1982*, and more specifically Section 15 of the *Charter* which, among others, recognizes equal rights for women, as well as international pressure and the influence exerted by the case of *Lovelace v. Canada, 1985*, the federal government was motivated to eliminate provisions of the *Indian Act* that for years had been criticized for discriminating against Indian women who married non-Indian men.

This led to the passage of Bill C-31: *An Act to Amend the Indian Act*, in 1985. As part of the amendments to the *Indian Act* under Bill C-31:

- Indian women who married non-Indians no longer lost their Indian status and Indian women who had previously lost their status through out-marriage became eligible to apply for reinstatement. Their children could also apply to have their status restored. In addition, non-Indian women could no longer acquire status through marriage to Indian men.
- Bill C-31 eliminated the process of enfranchisement altogether and Indian people who had been previously voluntarily or involuntarily enfranchised under the *Indian Act* could apply to have their status restored.

¹⁰ Megan Furi and Jill Wherrett, *Indian Status and Band Membership Issues*, (Ottawa: Political and Social Affairs Division, Parliamentary Research Branch, Library of Parliament), February 2003, p. 2.

¹¹ Ibid.

- Categories of registered Indians were established within the registration system through sections 6(1) and 6(2) of the *Act*.¹²
- Separate regimes to determine registration and membership in individual Bands were established
- Bands received the option of assuming control over determining their membership through section 10 of the *Act*.

Impacts of the 1985 Amendments

The main impetus for the 1985 amendments to the *Indian Act* was to remove gender and other discrimination inherent in the *Indian Act's* patrilineal descent rules, restore status and membership rights to those disenfranchised under historic discrimination and increase control of Indian Bands over membership.

While Bill C-31 served to eliminate some aspects of gender discrimination in the *Indian Act* and provided Bands with greater control over determining their membership, it left several issues unresolved and introduced new problems.¹³ The following provides a brief description and summary of some of the key impacts of Bill C-31.

Continuing Inequities in Legislation

Despite efforts to eliminate inequities through Bill C-31, the effects of past discrimination remain and the 1985 amendments precipitated new forms of legislative inequities. The amendments resulted in a complicated array of categories of “Indians” and restrictions on registration, and residual gender-based discrimination all of which have been significant sources of grievance and increased litigation against the federal Crown.¹⁴

The introduction of categories of registered Indians through sections 6(1) and 6(2), which prescribed the loss of status after two successive generations of parenting with non-Indian parents (referred to as the “second generation cut-

off”) has been the key target of criticism. Individuals registered under section 6(2) have fewer rights than those registered under section 6(1), because they cannot pass on status to their child unless the child’s other parent is also a registered Indian.¹⁵

The amendments also precipitated residual gender-based discrimination whereby the children of brothers and sisters who married non-Indians prior to 1985 are treated differently in terms of registration. For example, the sister’s children are registered as 6(2) while the brother’s children are registered as 6(1).

In addition, children of unmarried non-Indian women and Indian men are also treated differently according to gender. Male lineage criteria in the legislation prior to 1985 permitted the registration of all such male children born before 1985. However, after the passage of Bill C-31, female children born to Indian men and non-Indian women between September 4, 1951 and April 17, 1985 became eligible for registration only as the children of one Indian parent.¹⁶

These continued legislative inequities have also given rise to situations in which members of the same family may be registered under different categories.

Demographic Implications

According to research conducted by Stewart Clatworthy on behalf of INAC, the 1985 amendments resulted in approximately 114,000 registrations to 2002, with much of this growth occurring off-reserve.¹⁷

Research on the continued demographic impacts of the 1985 amendments conducted by Clatworthy suggests that while population projections vary considerably by region and First Nation, depending on exogamous parenting patterns, overall, First Nations populations (on and off -reserve) will undergo significant transformation over the next generations where large

and growing numbers of individuals will lack eligibility for Indian registration and membership and in some communities the registered Indian population will decline dramatically.¹⁸

12 Section 6(1) assigns status to all those who were currently registered Indians, members of new Bands created after the 1985 amendments came into effect, and those who lost status under previously discriminatory sections of the *Indian Act*, i.e. s.12(1)(b). Section 6(2) assigns status to all those with only one Indian parent registered under section 6(1). Those with one Indian parent registered under section 6(2) and one non-Indian parent would not be entitled to Indian status.

13 Megan Furi and Jill Wherrett, *Indian Status and Band Membership Issues*, (Ottawa, Political and Social Affairs Division, Parliamentary Research Branch, Library of Parliament), February 2003, p. 6.

14 *Ibid.*, 8.

15 *Ibid.*

16 *Ibid.*, p. 9.

17 Stewart Clatworthy, *Indian Registration, Membership and Population Change in First Nations Communities*, Four Directions Project Consultants, Winnipeg, 2005.

18 *Ibid.*

According to Clatworthy as a result of current *Indian Act* rules regarding registration and membership:

Those who lack registration entitlement and consequently membership status are expected to form about 1 in every 8 individuals within one generation. This segment of the population is expected to account for about 1 in every 4 individuals within two generations and about 1 in every 3 individuals within three generations.¹⁹

Program Funding and Community Cohesion Issues

Status Indians living on or off reserve are eligible for non-insured health benefits and may apply for post-secondary assistance. For those residing on-reserve, the federal government, mainly through INAC, provides funding for a host of programs and services, including housing, elementary and secondary education, health services and social assistance.²⁰

Until 2001,²¹ federal funding, and in particular INAC funding for many on-reserve programs was based on the number of status Indian Band members and in general funding was not provided to Bands for persons who were not status Indians. This meant that Bands that allowed people without Indian status to become Band members were penalized financially since they would have to provide housing and other services to these Band members without off-setting federal payments.²²

The increase in the registered Indian population as a result of the 1985 *Indian Act* amendments had major impacts on federal programming and expenditures, as well as for Band governments now required to provide additional

programming, facilities and services to newly reinstated individuals.

Available research indicates that during the decade immediately following the 1985 amendments there was a significant increase in both the number of individuals entitled to programming, with an ensuing increase in program expenditures to accommodate the increase in the status population.²³ However, Band governments and First Nations/Aboriginal organizations stressed that the increase in funding was not adequate to meet the needs created by the 1985 amendments, as additional demands had been placed on already underfunded programs.²⁴

As a result of the inadequate financial resources to accommodate reinstated individuals, many Bands had difficulties in accepting new members and in providing them access to on-reserve programs and services. These pressures, coupled with the socio-cultural implications of classes of Indians created by the 1985 reforms [i.e. 6(1) and 6(2)], contributed to community conflict, which continues to challenge community cohesion even in the present.

Litigation Against the Federal Crown

The grievances against the “second generation cut-off” and the residual gender-based discrimination in respect of Indian registration have resulted in increased litigation against the federal Crown, in particular with respect to *Charter* challenges. A decision in the first *Charter* challenge (the *McIvor* case) was rendered by the Supreme Court of British Columbia in June 2007. In its decision, the Court determined that section 6 of the *Indian Act* unjustifiably infringes the equality provisions of the *Charter* in conferring Indian registration, insofar as it authorises the differential treatment of Indian men and Indian women born prior to 17 April 1985 and of patrilineal and matrilineal descendants born prior to 17 April 1985.

First Nations have publicly supported this legal action with political resolutions expressing support for the removal of all discriminatory treatment. Subsequent to this decision, Canada has filed an appeal of the decision and a stay in the decision has been granted by the Court pending the appeal hearing.

19 Stewart Clatworthy, *Registration and Membership: Implications for First Nations Communities*, Four Directions Project Consultants, Winnipeg, March 2006. Presentation to the Aboriginal Policy Research Conference, Ottawa, Ontario, March 2006.

20 Megan Furi and Jill Wherrett, *Indian Status and Band Membership Issues*, (Ottawa, Political and Social Affairs Division, Parliamentary Research Branch, Library of Parliament), February 2003, p. 12.

21 In 2001, INAC authorities for on-reserve programming began to shift toward residency-based funding.

22 Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal Peoples*, Volume I - “Looking Forward, Looking Back,” Chapter 9 – “The Indian Act,” (Ottawa: Supply and Services Canada, 1996).

23 See Megan Furi and Jill Wherrett, *Indian Status and Band Membership Issues*, (Ottawa, Political and Social Affairs Division, Parliamentary Research Branch, Library of Parliament), February 2003, p. 12.

24 *Ibid.*

PAST INITIATIVES DEALING WITH REGISTRATION AND MEMBERSHIP



The AFN-LTS (INAC) Joint Initiative for Policy Development (1998-2001)

The AFN-INAC Joint Initiative for Policy Development in respect of Lands and Trust Services, hereafter referred to as the Joint Initiative, began in the fall of 1998 and ended in the winter of 2001. The purpose of the Joint Initiative was to create a policy and operational framework by which First Nations could assume control over lands and governance functions within the context of the *Indian Act*, and without the need for legislative amendments to the *Act*. In this context the Joint Initiative was focussed on policy and operational reform, rather than legislative changes to the *Indian Act*, and was devoted to creating a framework for greater First Nations control over all matters within the Lands and Trusts Services Sector that cover approximately 80 per cent of the *Indian Act*.

Under the Joint Initiative, the 21 LTS business lines were regrouped into nine research subject-matter areas as follow:

- environment;
- natural resources;
- additions to reserves;
- land management;
- membership and citizenship;
- elections and leadership selection;
- First Nations monies;
- wills and estates; and
- law-making.

In addition, the fiduciary relationship, capacity requirements and costs and implementation options were also considered under the Joint Initiative as cross-cutting issues that impacted the nine research subject areas.

A series of principles were jointly developed and agreed upon by the AFN and INAC to guide the work and joint structures and processes were developed and put in place by the AFN and INAC to conduct the research and policy work under the Joint Initiative that would ensure both national and regional First Nations and INAC/federal government representation, participation and input.

A final report of research findings and recommendations/ options to address key policy issues with respect to the nine Joint Initiative subject-matter areas was tabled in 2001 and is entitled, *The Voice of First Nations: Planning for Change*. The Report highlights activities and change consistent with the direction received from First Nations. Policy areas that were explored include options under the *Indian Act* and Band custom including individual and collective rights, *Charter* compliancy and issues related to citizenship, membership,

leadership selection and elections, as well as alternate measures for appeals and dispute resolution. This was essentially the beginning of discussions where First Nations brought forward a plan for change without actually amending the *Indian Act*, or requiring other forms of legislation.

Through extensive policy and participatory action research²⁵ the Joint Initiative identified important issues and obstacles under the *Indian Act* regime, and developed and tabled short, medium and long-term options and recommendations for First Nations governance capacity under the *Act* and with a view to enhancing First Nations governance capacities over the longer-term and in the transition to self-government.

In respect of issues relating to membership and citizenship, the Joint Initiative identified three options for further consideration. The options addressed short, medium and long term proposals for change:

1. Improve the Existing Delivery System (Short-Term)

- Implement a direct data entry capacity for First Nations Indian Registration Administrators (IRAs) who already have ready access to the Indian Registry System.
- Review policy and procedures with respect to proof of paternity for applicants.
- Promote awareness of individual rights and access to programs and services.
- Explore ways of increasing use of First Nations genealogy research in processing applications.

²⁵ Participatory action research (PAR) is a research model that actively promotes community-based involvement in several, or all aspects of the actual research process, including the development of research methodologies; the collection of information; and research analysis, verification and interpretation. Under the PAR model research is conducted according to a community's interests, values and protocols. PAR examines issues of relevance as identified by a community and could include both community-based and external researchers in the actual research process. The model promotes a qualitative approach to the collection, analysis and interpretation of information.

- Implement arrangements that recognize traditional records/documents in support of applications with interested First Nations (e.g., Longhouse).

2. Develop Co-Management Models (Medium-Term)

- Promote Elder involvement in reviewing entitlement decisions of the Registrar.
- Develop dispute resolution mechanisms at the community level to assist in resolving disagreements between INAC and applicants.
- Encourage involvement of community membership committees in application processes.

3. Considerations Regarding Citizenship (Long-Term)

- Given that First Nations determinations of citizenship was not within the mandate of the Joint Initiative, the discussions to date have not done more than identify issues to be addressed and guiding principles for further consideration. Some proposed guiding principles are as follows:
 - First Nations should determine First Nation citizenship.
 - There will be a continuing need for a national registration list of First Nation members or citizens.
 - In moving from the current system to increased First Nations control, many First Nations will need a transition period.²⁶

RESEARCH AND ANALYSIS OF THE EXISTING KNOWLEDGE-BASE



Methodology

A review of literature was conducted to identify resources relevant to Band membership, Indian registration (status) and First Nation citizenship and identity issues generally as a means of identifying existing research and potential gaps in knowledge base.

In this regard, existing bibliographies were relied on such as that compiled by Public History Inc. in 2004 (“A Select and Annotated Bibliography Regarding Bill C-31, Indian Registration and Band Membership, Aboriginal Identity, Women and Gender Issues”) and other resources such as the reports and research of the *Royal Commission on Aboriginal Peoples*. These sources were supplemented and updated through a search of electronic databases such as University of Ottawa electronic catalogue, Academic Search Primer and LegalTrac as well as Google searches. In addition, the project also sought to collect materials on some important topics that have received less attention in previous literature reviews, namely: blood quantum policies in the U.S. and Canada and research on the formation of identity among First Nation youth. The result of these efforts is contained in a bibliography “First Nations Identity Database – 16 March 2008” which was prepared by the AFN.

AFN suggested, and there was agreement by INAC members of the joint process, that the engagement of diverse First Nations perspectives at very preliminary stages was essential to ensure that discussions are responsive and reflective of community perspectives at every stage. In order to ensure diversity, AFN structured the first focus group through engagement of the AFN Youth Council, the AFN Elders Council, the AFN Women’s Council and the National Association of Friendship Centres. Each entity was an enthusiastic participant in the planning of the focus group and ensured participants from diverse geographical locations as well. The focus group was held in Ottawa on March 17 and 18, 2008. A summary of this focus group, including key directions for future work follows.

²⁶ AFN/INAC Joint Initiative for Policy Development (Lands and Trust Services), *The Voice of First Nations: Planning for Change*, (Ottawa: Assembly of First Nations), 2001, p. 105.

Gaps in Research and Knowledge

The objectives of both the AFN and INAC in respect of this joint research and analysis project for the fiscal year 2007-2008 were to:

- review the state of research and analysis regarding First Nations/Band membership and Indian registration (status) issues and First Nations identity issues more generally;
- identify current and emerging issues relating to First Nations/Band membership and Indian registration (status) issues and those relating to First Nations identity;
- identify significant gaps in the knowledge-base; and
- prepare a research agenda to begin addressing the gaps in research, information and knowledge.

In addition to the above, the AFN had additional objectives pertaining to joint research and analysis, as follows:

- to conduct research on two current issues of particular interest: (1) the policy implications of blood quantum identity systems; and (2) issues relating to youth identity formation and how this may be affected by the current Indian registration (status) system and Band membership entitlement; and
- to situate all of the above within the broader context of First Nations concerns about the treatment of First Nations' identity under the law.

A joint review of existing research and available information revealed that some major topics have been thoroughly researched, such as the demographic trends relating to Indian status and Band membership and residual sex and gender-based discrimination as a result of the 1985 amendments to the *Indian Act* (Bill C-31).

The joint review and analysis of existing research also revealed some major gaps in the knowledge-base. Two research themes have emerged as being critical to addressing the gaps in the knowledge base:

1. Issues relating to First Nations identity.

2. Issues relating to the impacts of the current state of law and policy on Indian registration (status), Band membership and First Nations citizenship.

There are specific areas relating to the two identified themes where the state of existing research is under-developed or virtually non-existent, and they require particular attention. The following provides a non-exhaustive list of specific research topics that would contribute greatly to the knowledge base:

- The interplay between identity and governance and the impacts on the inability of First Nations to determine their citizens.
- Kinship and identity issues, including the relationship between kinship and concepts of First Nations citizenship
- Exploring the balance between individual identity and the collectivity, and how balance can be maintained in the context of membership and citizenship.
- Exploring the relationship amongst Indian status, Band membership and First Nations citizenship.
- Impacts of historic determination of membership and status on youth identity.
- An examination of custom adoption issues and how traditional and custom adoption practices have been undermined under the membership provisions of the *Indian Act* and the impacts on individuals and communities.
- Issues relating to unrecognized/unstated paternity.
- Federal practices of retaining power to determine Indian status post self-government agreement.
- The relationship amongst programs and services, and Indian status, Band membership and reserve residency.
- Issues relating to the Indian status card.

A more in depth discussion of some of the identified areas/topics for further research and analysis is outlined in the subsection of this paper entitled, *Review of the State of Research and Analysis in Selected Key Areas*.

AFN Focus Group on Registration and Membership

This is an opportunity to write our own history; to determine who we are and where we belong ... We need to make the world understand that we still know who we are ... We need to talk together as family so that we can leave a legacy for the little ones – we are their family, and it is our responsibility to lay this out for our little ones. The creator will give us the direction.

*Elder Elmer Courchene
Saugeen First Nation*

AFN Focus Group, Ottawa, March 17, 2008

Elder Elmer Courchene's prayer noted not only the personal nature of the issue, but the importance of considering it from the perspective of the survival of First Nations. He made reference to the deep emotions attached to questions about First Nations identity, and to the fears that children continue to be defined away by law. His opening prayer set the tone for serious contemplation by the participants.

1. *Growing Awareness*

Participants expressed relief that the AFN is seeking to address the issue of identity, status and membership. The United Anishnaabeg Councils indicated that they had become aware of the issue of a declining trend in status and membership in the context of self-government negotiations. It alarmed them that, like them, most First Nations were likely not aware of the long-term consequences of the *Indian Act* status and membership provisions.

It was observed that awareness is, however, growing. The Union of BC Indian Chiefs has formed a Working Group on the issue, and hopes to work with the AFN Working Group to build on the principles in the Tsilhqot'in Nation (also referred to as Xeni Gwet'in) court decision (affirming aboriginal rights in B.C., and limiting the government's ability to interfere with the exercise of those rights.)

The Maliseet First Nations have decided to address the issue through a process involving each community. They recognize the urgency since too many children have been lost through the *Indian Act* as well as through the adoption laws of the province. They are considering the question in terms of protecting the children, and are looking at options such as maintaining their own birth and death registry. The Maliseet Nation was split by the Canada-U.S. border. They must therefore look to the other side of the border for their citizens, and will discuss how they are dealing with the issue on the U.S. side. Some nations in the U.S. have developed their own citizenship card, which is recognized at the border.

Awareness is also growing within the government of Canada. Some participants observed that Canada is tri-juridical, or perhaps more accurately, multi-juridical, given that there are many indigenous nations, each with their own law-making powers. The federal and provincial governments can therefore no longer assume exclusive power over First Nations. There are currently discussions within the Senate regarding the need for First Nations and Canada to harmonize their laws. However, many First Nations have not yet addressed the question of what this may mean or how it will impact on the existing treaty relationships.

2. *Language, Culture, Tradition and Identity*

In discussion of the concept of First Nations identity, many participants noted the importance of culture and traditions. This arose frequently throughout the meeting. As they introduced themselves, some participants referred to the degree to which identity has been altered over the past century, not just by legislation, but through such subtle means as the renaming of First Nations people - changing traditional names, or translating traditional names into English, robbing them of their real meaning, and thereby erasing part of their identity. Some participants noted that European naming also replaced the ceremony attached to traditional naming, undermining community acknowledgment of a child's connectedness to the First Nation.

Participants considered the loss of language to be a component in loss of identity, robbing First Nations of their ability to self-identify an ability which reflected their inherent capacity to distinguish themselves as a nation from others. Individuals from a specific First Nation had a word in their language meaning “the People,”²⁷ which differentiates them from people of other nations. One group noted that the First Nations language users could not think of words in their language for “Indian” or “citizen”. They could, however, identify words that expressed one’s relationship to others in the community, and other words that identified one’s status within the community.

While language is an important part of identity, a number of participants expressed concern for people who have limited access to language and cultural activities. Some noted that they had not grown up in their culture, but had reconnected through a Friendship Centre.

A number of participants saw celebrations, dances and songs as key to maintaining identity. They therefore felt that it was important that all First Nations citizens be given the opportunity to learn the songs and dances as well as their meaning.

One group noted that culture is always evolving. Traditional practices are also dynamic and constantly changing. That is how First Nations have survived. As one participant observed, if a nation stops changing it dies. Some observed that it is the core values that underlie the traditions that form the basis of identity and connect people to their culture.

3. *The Importance of Kinship*

All participants agreed that kinship ties are and have always been the foundation of First Nations societies. This is evident in the languages of many nations which acknowledge subtle distinctions in kinship that cannot be translated into English. Since kinship was and remains at the centre of identity, the *Indian Act* has had a tremendous impact. Participants observed that the colonial system had arbitrarily designated identity and interfered with the traditional mechanisms of kinship. It cast out

the women who were the Clan Mothers with key roles in matrilineal societies, thereby upsetting the balance.

The *Indian Act* also removed the customary way of adoption as a means of conferring citizenship. Given the years of interference in First Nations’ traditional kinship systems, participants felt that restoration of these systems would take some effort, yet many participants asserted that family ties and the relationship of family could ultimately overcome the impacts of external interferences.

Participants were clear that the kinship ties do not end with a specific blood quantum. Blood quantum was rejected by all groups as a basis for establishing identity, citizenship, Indian status or band membership. Rather, participants saw lineage as providing the linkage between the generations. Although kinship is the main tie, other factors can also create the collective identity, including a common history, language, ceremonies, values, connection with a land base and knowledge of the land. Participants noted that the government’s rules regarding status, their adoption laws, mental incapacity and criminalization of First Nations people have removed many people from their cultural community, and they may no longer be connected to their reserve.

4. *Collective and Individual Identity*

Focus Group participants agreed that identity is both individual and collective in nature. However, the collective identity is the nation and individuals are within it. Identity flows through the ties between individuals. It exceeds the reserve boundaries and the definition set out in the *Indian Act*. It is maintained through stories and common history. Participants emphasized the need for First Nations to understand their history as a means of knowing who they are. Because the more recent history (i.e. displacement, poverty, residential schools) taught many people to be ashamed of their identity, a number of participants identified a need for First Nations people to become the authors of their own history and stories. They express the need for First Nations and non-First Nations people to understand First Nations history before the arrival

27 ie. Anishnawbe, On-Kwe-On-Kwe, etc.

of Europeans. Some felt that First Nations need to reach back to the pre-contact state of mind, so people are in touch with the teachings of the old people. In that way, First Nations people could reconnect with their collective identity without the divisions created by the *Indian Act*.

Some noted a growing appreciation of the importance of First Nations values within the general population, such as our connectedness to the land and environment, which can influence the identity of First Nations in positive way. These values were considered by some participants as exemplary of the collective character of all First Nations.

How we came into existence on this continent is described through three creation stories. The first story was handed down to us, the Newcomers came- they brought a new “creation story” – the one in the Bible - it was very costly to our people. The third Creation story is called the “*Indian Act*” which had the power to create or un-create people.

Our responsibility is to give our people back the first Creation Story... These stories are the instructions that we received from the Creator, but this was replaced by force with the second story in residential schools..., the third creation story which is even more problematic was created by the Legislation.

Elder Participant

nation, and needed to assume responsibility for the children of that nation to ensure they remained connected.

Many participants were of the view that political relationships were not only embodied in the internal governance of the nations, but also in their external relationship with other nations. A number of participants made reference to their Treaties as confirmation of their right to define themselves within Canada and under international law. Some expressed the view that all descendents of those identified at the time of Treaty were part of their nation, and Canada’s policies and laws which severed this internal relationship contravened international law. They felt that it was important to identify all Treaty descendants and reconfirm their nation as a whole in order to restore the relationships internally within First Nations and restore the government to government/nation to nation relationship with Canada.

Some breakout groups discussed the concept of dual citizenship, with First Nations people being citizens of both their nation and Canada. While identity may include a variety of political relationships, a number of participants expressed concern with this concept.

Some participants were of the view that Canada is in a conflict of interest position with respect to First Nations rights. Defining First Nations people away was consistent with policies of assimilation and extinguishment. Participants observed that the lack of agreed-upon dispute resolution mechanisms for addressing disagreements between First Nations and Canada is a serious problem. While the international mechanisms provide some options for resolving disputes, participants saw the need for something nation-to-nation between First Nations and Canada.

5. Political Relationships

Some participants felt that identity can be characterized as a cluster of reciprocal rights and responsibilities between individuals and their nations, as well as between and among First Nations and other nations, including Canada. Nations and individuals need to take steps to ensure that children can meet the responsibilities of citizenship in their nation. Participants felt that individuals should have the opportunity to be fully engaged within their

6. Principles for Change

Focus Group participants were in agreement with the following principles:

- blood Quantum cannot be the basis for defining membership;

- First Nations need to define their terminology – identity, citizenship, membership, Indian status;
- the principles of international law (the UN Declaration on the Rights of Indigenous Peoples) can provide a guide for discussion of First Nations citizenship;
- reforms must be consistent and supportive of First Nations right to self-determination;
- processes should be inclusive, gender sensitive, and linked to culture and traditions
- the federal government’s role should be limited to providing support to First Nations in rectifying the damage caused by their legislation, not redefining “Indians”.

The Elders considered it important that barriers for change be addressed by revitalizing traditional laws to guide change. They advocated First Nations challenging Canada’s assertion of jurisdiction over citizenship and other matters. They were clear in their rejection of blood quantum as a determinant of citizenship, and advised of the importance to emphasize the collective over individuals. The nation as a collective must form the basis of thought for any future reforms.

7. *Independent Conflict Resolution Mechanisms*

The participants recommended that AFN take steps to initiate research and policy work with senior levels of government leading to the establishment of mechanisms for mediation or arbitration on issues related to Indian status, citizenship and membership.

8. *Education from First Nations Perspectives*

Participants observed that senior government officials, Members of Parliament, political parties, Standing Committees, Human Rights Commissions, the Auditor General and specific caucuses/political organizations need to be educated on these issues from a First Nations perspective. This is part of their responsibility for maintaining the relationship with First Nations. The AFN should seek to engage these groups for the purpose of sharing the First Nations perspective. Participants felt that the federal government must be

held accountable for its role in actively attempting to terminate First Nations through unjust laws. They recommended that the AFN challenge the federal government to assume responsibility by taking steps to mitigate the damages.

Additionally, participants pointed out that, although it is under appeal, the principle in *McIvor* that the Federal government no longer has the exclusive power to determine who is Indian is likely to stand. This decision along with decisions such as *Tsilhqot’in Nation* and *Powley*, suggested that the right of First Nations to determine citizenship based on community standards has a solid basis at law. However, before the federal government takes any action in relation to the provisions of the *Indian Act*, it must consult with First Nations and must offer First Nations the ability to engage and plan for the transition.

In engaging with the federal government, participants saw a need to familiarize themselves with existing policies, laws and regulations that the government has identified as potentially subject to revision as a result of *McIvor*. Additionally, participants recommended that AFN seek access to all demographic studies and records that would assist First Nations in locating their full membership.

The AFN should also take steps to facilitate a discourse within First Nations on the issue of identity by:

1. having government identify funding for First Nations to undertake internal dialogue;
2. undertaking research and analysis on issues of a general nature;
3. developing communications materials to inform First Nations of the issue and assist in community dialogue; and
4. developing tools to assist First Nations in analyzing capacity issues in relation to membership.

9. *On-Reserve/Off-Reserve Issues*

The AFN should seek funding to enable First Nations to implement off-reserve representation and the provision of services to citizens living off the reserve.

Review of the State of Research and Analysis in Selected Key Areas



Descendency / Blood Quantum Policy Issues

The *Indian Act* registration provisions have effectively imposed a “blood quantum” requirement to define identity by requiring a minimum degree of descent to be eligible for Status. Through the operation of s. 6(2), an implicit blood quantum requirement of ¼ is applied to persons born following the implementation of Bill C-31.

A paper was prepared providing a summary analysis of the history of the use of blood quantum (also known as descent requirements) to define Indian/First Nation identities in U.S. and Canadian law and suggests some policy considerations relating to the use of blood quantum that arise from the experience in both countries.

The research project collected and gathered multidisciplinary literature on the use of blood quantum requirements and their policy implications to determine First Nation identities in the U.S. and Canada.

This research material is included among the sources in *the First Nations Identity Bibliography* appended to this report.

Youth Identity Issues

The project assessed the status of research and analysis on youth identity issues as these relate to law and policy affecting First Nation identity using the methodology described in the introduction to this report. This confirmed that youth identity issues have not received much attention as the list of resources collected on the topic below indicate:

- Ann H. Beuf, *Red Children in White America*, Philadelphia: University of Pennsylvania Press, 1977
- Barry Corenblum, Development of Identity in Native Indian Children, (1996) vol. 16(1) *The Canadian Journal of Native Studies* 81.
- Jo-Anne Fiske and Evelyn George, “Bill C-31: A Study of Cultural Trauma” in *Aboriginal Policy Research: Moving Forward, Making a Difference*, Vol. V, Jerry White et al.

(eds.), (Toronto: Thompson Educational Publishing, 2007) at p. 53.

- Nancy Rumbaugh Whitesell, et al., “Developmental Trajectories of Personal and Collective Self-Concept Among American Indian Adolescents”, 2006 *Child Development* Vol. 77(5), p. 1487.
- Michael J. Chandler, Personal Persistence Identity Development and Suicide: A Study of Native and Non-Native North American Adolescents, April 2003, Monographs of the Society for Research in Child Development.

Many factors potentially contribute to the formation of identity among young people and the assumption of a particular racial or cultural identity among young First Nation people in a settler society such as Canada – parents, family, community wellness, cultural trauma, racism, the education system, access to indigenous cultural schools and indigenous teachers and adoption to name a few. The importance of collective control through self-government, and control over identity have been identified as important factors in ensuring a positive process of identity formation among First Nation young people. (Chandler, 2003; Fiske and George, 2007; Whitesell, 2006).

Unrecognized/Unstated Paternity Issues

The project assessed the status of research and analysis on the issue of ‘unrecognized and unstated paternity’ and the registration of persons as ‘Indians’ under the *Indian Act*. A list of key resources discussing the issue is set out below:

- Lynda M. Ashbourne, “Section O: Aboriginal Fathers” in Donna S. Lero, Lynda M. Ashbourne, Denise L. Whitehead, *Inventory of Policies and Policy Areas Influencing Father Involvement*, Father Involvement Research Alliance, May 2006. at p. 75.
- Canada. House of Commons, Fifth Report of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development on consideration of the implementation of the Act to amend the Indian Act as passed by the House of Commons on June 12, 1985, Minutes of Proceedings and Evidence of the Standing Committee on Aboriginal Affairs and Northern Development, 2d. session, 33rd Parl., Issue no.40.
- Stewart Clatworthy, *Factors Contributing to Unstated Paternity*, Ottawa: Indian and Northern Affairs Canada, 2003.

- Stewart Clatworthy, *Paternal Identity and Entitlement to Indian Registration: The Manitoba Context*, Ottawa: Indian and Northern Affairs Canada, 2000.
- Mavis Erickson, *Where are the Women?: Report of the Special Representative on the Protection of First Nations Women's Rights*, Ottawa: Indian and Northern Affairs Canada, 2001.
- Jo-Anne Fiske and Evelyn George, "Bill C-31: A Study of Cultural Trauma" in *Aboriginal Policy Research: Moving Forward, Making a Difference*, Vol. V, Jerry White et al. (eds.), (Toronto: Thompson Educational Publishing, 2007) at p. 53.
- Michelle M. Mann, *Indian Registration: Unrecognized and Unstated Paternity*, Ottawa: Status of Women Canada, 2005.
- Native Women's Association of Canada, *Aboriginal Women and Unstated Paternity*, Issue Paper prepared for the National Aboriginal Women's Summit, June 20-22, 2007, Corner Brook, NL.

The first question to consider is what is "Indian registration and unrecognized and unstated paternity" about? The answer to this question will depend on the perspective and experience of the person answering it.

At one level, "Indian registration and unrecognized and unstated paternity" issues are about the assignment of identity for children born to First Nations women themselves registered under s. 6 of the *Indian Act*; and specifically, how federal law and policy currently shapes the determination of entitlement to 'Indian' status for a child when information about the 'Indian' registration status of the child's father is not available. Registration is not a compulsory legal requirement. The issue affects children born on or after April 17, 1985 when the mother or both parents apply to have a child registered as an 'Indian' under the *Act*. While there are many issues about the significance and function of 'Indian' status, many parents apply on behalf of their children to ensure access to certain federal programs and benefits, or to place a marker for their children until they are old enough to decide for themselves their relationship to this controversial identifying term.

A critical analytical choice at the front end is whether to analyze the issue within a framework that assumes continuing key elements of the status quo, namely: a) continuing federal control over the determination of Indian status and b) sole federal control over the policy merits of

using a racialized concept of 'Indian' as a primary exercise of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. An alternative approach is to situate the issue within the broader policy question of where control should lie over the definition and determination of 'Indian' and other legal identities applied to First Nations. (Mann, 2005 at pp. 10-25 and in the list of recommendations at page 26.)

Beyond this threshold issue are other questions, such as: to what extent are concerns about 'Indian registration and unstated/unrecognized paternity' a legislative issue (and accordingly an issue of federal or First Nation government control); to what extent can concerns be met with administrative and policy change, and coordination with provincial governments; and to what extent is the issue about education and information at the community level.

A review of the literature indicates the issue can be analyzed in terms of law (statute law such as the *Indian Act*, human rights law whether constitutional, federal or international and provincial law respecting the collection of vital statistics), policy, administrative practices, social and cultural issues and community perspectives.

The study by Fiske and George suggests that the experience and response of First Nations people to federal interference in identity issues including residual discrimination based on sex and marital status, s. 6(2) and federal paternity policy fit the notion of "cultural trauma" and "ethnostress" articulated in the disciplines of sociology and anthropology.

"...Bill C-31 generally, and most specifically through its imposition of patrilineal identity with respect to children of reinstated women and the unstated paternity policy and its discontinuity of intergenerational membership, constitutes trauma to a culture, and radically so to matrilineal cultures. The trauma generated by Bill C-31 arises not from an unexpected event of horrific consequences but rather from a persistent destruction of individual well-being and collective continuity. Bill C-31 is experienced as traumatic within a cultural process shaped by continuing fragmentation of First Nations identity and sovereignty resulting from colonization." (Fiske and George, at p. 55.)

A handicap in fully understanding "Indian registration and unrecognized and unstated paternity" issues is the limited published work about community level perceptions. Testimony before the Standing Committee on Aboriginal Affairs in 1998 brought to light some First Nations concerns

about federal law and policy in this area to the attention of Parliament. (The Committee made recommendations for changes to both law and policy in response but these have not been implemented.) An INAC sponsored study encountered difficulties in engaging community members to share their views (Clatworthy 2003). The work of Erickson (2001), Clatworthy (2000), Clatworthy (2003) and Fiske and George (2007) are among the few published works that have explored the issue from any kind of community perspective. From a national perspective, these studies are not sufficient to say that the views and perceptions of the various First Nations affected by this issue are known beyond a broad-based concern about the manner in which current law and policy operate to produce high rates of unrecognized and unstated Indian paternity.

Demographic studies suggest the rates of applications for registration where there are Indian paternity issues is significant (Clatworthy 2003) and that the factors contributing to unrecognized and unstated paternity are both numerous and complex (House of Commons Standing Committee on Aboriginal Affairs, 1988; Clatworthy, 2003; Mann, 2005; Fiske and George, 2007; NWAC 2007).

A detailed description of various administrative issues arising from 'Indian registration and unrecognized and unstated paternity' issues appear to have been identified in the published work to date. (Clatworthy 2003; Mann 2005). Much attention has been paid to the information needs of parents both in regard to the requirements of the Indian registration system and the requirements for registering births in jurisdictions across Canada. This concern flows from an understanding that as many as 50 per cent of unstated paternity cases are unintentional on the part of the mother. However, an orientation towards addressing parents' knowledge of the requirements of the current system carries a presumption that it is parents that need to make adjustments to navigate the system, rather than first resolving whether the system should be fundamentally altered in ways that may remove some of these administrative and parental information issues. Addressing information needs about the current system will not necessarily address the issues raised by Fiske and George and others about the negative impacts on women of being required to prove paternal paternity within a larger system of externally determined control of identity (an identity system that is simultaneously related to an applicant's First Nation heritage and the racialization of First Nations people.

From a legal perspective, the genesis of unrecognized and unstated paternity issues are the amendments brought about by the 1985 amendments to the *Indian Act*. These amendments were intended to eliminate discrimination based on sex and marital status. Two significant changes brought by these amendments (combined with federal policy interpreting how the Act should be applied) have given rise to the two categories of Indian registration application issues known as 'unrecognized Indian paternity' and 'unstated Indian paternity'.

The first significant change was the removal of the concept of "illegitimacy" as a birth status (consistent with provincial and federal legislation across the country to remove the law's longstanding contribution to the social stigma attached to children borne outside of marriage). Prior to 1985, the *Act* labeled children borne outside marriage as "illegitimate" and provided specific rules to determine their entitlement to registration under the *Act*. The focus on "illegitimate" children of females (whether 'Indian' or 'not an Indian') was the product of common legal assumptions of the day and the patrilineal bias of the *Act* at the time. Under laws within all Canadian jurisdictions, children born within marriage were presumed for legal purposes to be the children of the husband. In addition, the *Indian Act* assigned Indian status based on the Indian status of a child's father or in the case of a married woman, the status of her husband. Consistent with these assumptions and biases, the pre-1985 *Indian Act* provided rules to determine the Indian status of children born to women out of wedlock. Under s. 11(e) of the 1951 *Act*, it was left to the Registrar's discretion to decide whether a child's father was an Indian. At this time, a child whose father was not registered under the *Indian Act* would not be entitled to registration.

The 1985 amendments brought several significant changes that rendered the previous policy concern with the connection between children born out of wedlock and Indian fathers obsolete: removal of the concept of "illegitimacy"; the introduction of a new cognatic descent principle in place of the previous patrilineal bias and a second-generation cut-off rule (or ¼ blood quantum requirement) that presumed knowledge of the entitlement to registration of both parents. The new provisions resulted in a new focus respecting paternity, one that extended to children born in and out of wedlock.

Policy concerns of the Department in administering the 1985 registration provisions include providing incentives to ensure accurate reporting of status and ancestry and determining and applying a reasonable standard of proof to determine the paternity of applicants. In the absence of proof that an applicant's father has status under s. 6, the Department interprets the *Act* as treating the child as having only one parent with Indian status. The Department denies that this policy practice effectively amounts to applying a presumption that the father has no entitlement to Indian registration. In such cases, where the mother is registered under s. 6(1), the child will be registered under s. 6(2) based on the assumption that only one parent has Indian status. Where the mother is registered under s. 6(2), the child will not be considered to have entitlement to registration at all.

Outstanding issues are how to address the evidentiary requirements in a sensitive way, how should the status of applicants' fathers be treated in general and what legislative and policy options are available. The literature has provided some recommendations in this regard but there has not been a policy forum for First Nations and INAC to discuss these issues since the Joint AFN/LTS Initiative on Policy Development where the issue was discussed, near the conclusion of that process in 2000 and the Department undertook to review policy options.

Implications of Canadian Case Law on Identity

This section provides a preliminary analysis of approaches taken in Canadian case law dealing with identity issues. This analysis is solely for the purpose of identifying current and emerging policy issues and is without prejudice to the rights of any First Nation peoples.

Three constitutional cases in which identity issues are central demonstrate how laws affecting First Nations and Aboriginal identity may raise individual rights issues under the *Charter* and/or collective rights issues under s. 35 of the *Constitution Act, 1982*. Two of these involve identity issues in a s. 35 context (*Powley* and *Sawridge Band*) and the third (*McIvor*) challenged the way s. 6(2) affects descendants of reinstated women on Charter equality grounds. A decision has not yet been rendered on the substance of the *Sawridge Band* case but decisions on certain procedural matters in

this litigation again demonstrate the evidentiary challenges faced by First Nations having to assert s. 35 rights through the judicial system.

Powley v. The Queen, 2003

In *Powley*, two hunters asserted Métis identity and an aboriginal right to hunt for food near the site of what they claimed was an historic Métis community at Sault Ste. Marie, Ontario.

The Supreme Court of Canada made a number of conclusions about Métis identity in a s.35 context and which could have implications for First Nations asserting rights in relation to identity under s.35. The Court's conclusions about the role of self-identification and community acceptance as factors in determining the existence of Métis people with rights under s.35 are of particular interest. Whether these principles have application in a First Nation context where a federal legislative scheme exists addressing identity is unknown at this point and would depend greatly on the facts of a given case where a s.35 right to determine identity might be argued.

Nevertheless, many of the Court's findings are relevant to a policy discussion of how to approach identity issues in a collective and individual context. Some of these findings are set out below:

- The term "Métis" in s. 35 of the *Constitution Act, 1982* does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears.
- A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life. The purpose of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.

- Aboriginal rights are communal, grounded in the existence of an historic and present community, and exercisable by virtue of an individual's ancestrally based membership in the present community.
- To support a site-specific aboriginal rights claim, an identifiable Métis community with some degree of continuity and stability must be established through evidence of shared customs, traditions, and collective identity, as well as demographic evidence.
- The verification of a claimant's membership in the relevant contemporary community is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community. Self-identification, ancestral connection, and community acceptance are factors which define Métis identity for the purpose of claiming Métis rights under s. 35. Absent formal identification, courts will have to ascertain Métis identity on a case-by-case basis taking into account the value of community self-definition, the need for the process of identification to be objectively verifiable and the purpose of the constitutional guarantee.
- The view that Métis rights must find their origin in the pre-contact practices of their aboriginal ancestors must be rejected. This view in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1).
- The difficulty of identifying members of the Métis community should not be exaggerated so as to defeat constitutional rights. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt.

Sawridge Band v. Her Majesty the Queen, 2006 FCA 228

In this action which began in 1986, the Sawridge Band (now joined by the Tsuu T'ina First Nation) seek a declaration that *Bill C-31* abrogates their constitutionally protected aboriginal right to determine their membership, by unilaterally imposing upon them certain categories of members. The plaintiffs object to the effect of the 1985 amendments to the *Indian Act* in adding individuals to their membership without their consent. The 1985 amendments restore to several categories of persons who had at one time been members but who, for a variety of reasons, had lost their membership. They include those who were members, or entitled to membership, of a First Nation on April 17, 1985, (the date when section 15 of the *Canadian Charter of Rights and Freedoms* came into effect), 'illegitimate' children of status Indian mothers, and women who had married a non-status man.

By limiting the First Nation's right to determine its membership, the Plaintiffs allege that the *Act* infringes upon an existing aboriginal and treaty right protected by subsection 35(1) of the *Constitution Act, 1982*, and based on the First Nation's customs, practices, law, traditions, treaties, and aboriginal title to reserved land. The Sawridge Band maintains that membership of a First Nation is a matter for the Nation itself to decide, not Parliament, since control over membership is integral to the identity of a self-governing aboriginal people.

The litigation in this action has been long and complex. A decision by Justice Muldoon on the substance of the action was set aside by the Federal Court of Appeal in 1996. A new trial was ordered, on the ground that statements by the trial judge gave rise to a reasonable apprehension of bias.²⁸ A second trial followed and has been marked by numerous interlocutory motions and appeals of decisions on motions. Some of the issues raised in these motions relate to how the First Nation plaintiffs have pleaded a right to self-government and whether they have done so in a manner that can be entertained by a court given existing jurisprudence of the Supreme

28 *Sawridge Band v. Canada*, [1997] 3 F.C. 580 (C.A.).

Court of Canada. In a 2006 decision on several of these interlocutory matters, the Federal Court of Appeal found that the trial judge had not committed any reversible error in interpreting the pleadings as not including a claim by the appellants to the control of their membership as ‘parasitic’ upon a right to self-government.

McIvor v. The Registrar, Indian and Northern Affairs Canada, 2007

In this decision, Sharon McIvor and her son Jacob Grismer are described as descendants of members of the ‘Lower Nicola Indian Band’. Sharon McIvor was registered under s. 6(2) by the Registrar in charge of the Indian Register but had applied to be registered under 6(1)(c). Her oldest son Jacob Grismer applied to be registered under s. 6(2). The Registrar determined that her son was not entitled to registration at all because his father was not Indian and his mother was entitled to registration under s. 6(2).

In the face of this decision, the plaintiffs, Sharon McIvor and her son, Charles Grismer, challenged the constitutionality of s. 6 of the *Indian Act* because of the manner in which it deals with the registration of children born to women who ‘married out’ prior to April 1985 (and who lost status and become entitled to reinstatement under the 1985 amendments) compared to children born to men who ‘married out’ prior to April 1985 (and never lost status under any version of the *Act*). The reinstated women who married out, unlike the men who never lost status are treated as having one ‘Indian’ parent and one parent who is not Indian. In 1989, the Registrar concluded that because Ms. McIvor was registered under s. 6(2) rather than s. 6(1) and because Jacob Grismer’s father was not entitled to be registered as ‘Indian’ he was not entitled to registration under s.6.

Launching this case and bringing it to the point of decision required great persistence on the part of the plaintiffs. Litigating this issued also required Ms. McIvor and her son to share in great detail the family history going back generations on matters such as marital status, ‘legitimacy’ of children and the status of her ancestors under various versions of the *Indian Act* at different points in time.

The plaintiffs argued that that the current registration provisions of the *Indian Act* continue to prefer descendants who trace their Indian ancestry along the paternal line over those who trace their Indian ancestry along the maternal line. The plaintiffs also argued that the provisions prefer male Indians who married non-Indians and their descendants, over female Indians who married non-Indians and their descendants. The B.C. Supreme Court agreed with the plaintiff’s contention that the registration provisions of the 1985 *Act* consequently discriminate on the basis of sex and marital status contrary to sections 15 and 28 of the *Charter*; specifically that section 6 of the *Indian Act* violates section 15(1) of the *Charter* in that it discriminates between matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status, and discriminates between descendants born prior to April 17, 1985, of Indian women who married non-Indian men, and the descendants of Indian men who married non-Indian women.

The plaintiffs also led evidence that the court accepted about the cultural and social implications of not having status under the *Indian Act* for someone who identified as an ‘Indian’ and a First Nation person but who was not recognized as such by federal law, essentially because of arbitrary discrimination based on the sex of his mother and her marital status.

The Court further concluded that this discrimination could not be justified under the test required by s. 1 of the *Charter*. In this regard the Court’s analysis was that the 1985 amendments had severed the relationship between status and band membership and as a result “status is now purely a matter between the individual and the state.” Consequently, there are no competing interests to consider as part of a s. 1 analysis. Further, no pressing and substantial objective had been identified with respect to the discriminatory provisions in the registration scheme.

The Court also said: “*The Indian Act as a whole is a comprehensive code whose objective is to determine who has Indian status; who is a member of a band; and who is entitled to the benefits such as the right to live on a reserve. It is legislation to govern Canada’s*

relationship with “Indians, and Lands reserved for Indians” pursuant to s. 91(24) of the Constitutional Act, 1867.”

As to remedy, the Court refused to issue a suspension of invalidity given how long the plaintiffs had waited. Instead, the Court stated its intention to declare that s. 6 of the *1985 Act* is of no force and effect insofar, and only insofar, as it authorizes the differential treatment of Indian men and Indian women born prior to April 17, 1985, and matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status. The court remains seized of the case in order to give the parties the opportunity to draft appropriate relief in light of these reasons. Should the parties fail to reach agreement, the Court said it would hear further submissions on the issue of remedy.

The essence of the *Charter* equality arguments that were central to the litigation will likely be considered sound by most observers.

Significantly, the Court explicitly acknowledges that the concept of ‘Indian’ is entirely a creation of statute and there is a disconnect between the *Indian Act* concept of ‘Indian’ and First Nations’ concepts of identity: *“The concept ‘Indian’ is a creation of statute. Prior to the arrival of Europeans, the Aboriginal peoples who inhabited the region that would become Canada had their own forms of social organization with their own names by which to identify their social groups. Fundamental aspects of these forms of social organization included rules for the identification of members of the group, the transmission of membership status in the event of marriage and the transmission of membership status to descendants. These rules were diverse and often quite different from the forms of social organization of the colonists.”* [paragraph 8] The Court also concluded: *“Despite the imposition of the Indian Act regimes, the original First Nations concepts of identity have survived and remain a powerful source of cultural identity.”* [paragraph 132]

However, the balance of the analysis respecting the cultural and legal significance of Indian status is likely more controversial. The *McIvor* decision contains a number of significant conclusions and aspects of its analysis touching on the significance of ‘Indian’ status and the relationship between First Nation

people and the Crown. While acknowledging that Indian status is a creation of federal law that does not conform to First Nation concepts of identity, the Court made two additional conclusions about the significance of Indian status that will likely be the subject of much discussion.

The first conclusion about the significance of Indian status is: *“Although the concept ‘Indian’ is a creation of government, it has developed into a powerful source of cultural identity for the individual and the Aboriginal community.”* [paragraph 7]. This raises the question of whether First Nations regard ‘Indian’ status as a powerful symbol of cultural identity and if so, how to square this with the court’s finding that First Nations’ concepts of identity have survived and remain a powerful source of cultural identity.

The second notable conclusion about the significance of Indian status in the court’s decision is that under the 1985 amendments the federal government retained control over the determination of Indian status in order *“to reflect and recognize the special relationship between Indian people and the Government of Canada.”* This conclusion closely matches a statement by former Minister of Indian Affairs David Crombie in introducing Bill C-31 to Parliament, and which the judge quoted in the decision. However, First Nations have consistently said that the special relationship between the Crown and First Nations is grounded in the historic relationship that pre-dates the creation of Canada and the *Indian Act* itself, in treaties and in the fundamental rights of First Nations as peoples. The central function of protecting Indian reserve lands is about the only aspect of the *Indian Act* that conforms with the true nature of the special relationship between First Nations and the Crown from a First Nations’ perspective.

The Court also likened Indian status to citizenship because it is governed by statute, because it is transmitted based on the status of the parents and because of the value attached to the ability to transmit it: *“Like citizenship, both parents and children have an interest in this intangible aspect of Indian status. In particular, parents have an interest in the transmission of this cultural identity to their children.”* [paragraph 192]

The analogies the Court draws between the concept of citizenship and Indian status under the *Indian Act* (which the court describes as something divorced from any real notion of collective group membership) can be questioned. Citizenship under Canadian law is not restricted to persons who qualify by birth. And the analysis fails to take into account (because it was not argued presumably) that the special relationship between the Crown and First Nation people is signified in more important ways than the artificial device of Indian status. The Court's analysis fails to account for the fact that First Nations as well as other Aboriginal peoples such as Inuit also have a special relationship with the Crown that is signified by s. 91(24) of the *Constitution Act, 1867*, and s. 35 of the *Constitution Act, 1982*, the *Royal Proclamation, 1763* and other constitutional documents. That Inuit are specifically excluded (as a 'race') from the *Indian Act* and that the special relationship between First Nations and the Crown pre-dates the *Indian Act* do not appear to have been considered. Further it can be argued that the statutory creation of 'Indian' status that is: a) divorced from First Nations' concepts of cultural identity; b) divorced from First Nations' connection to reserve lands and treaty relationships; and c) consists only of a relationship between individual 'Indians' and the federal government, only entrenches the "racialization" of First Nation people rather than symbolizing the special constitutional relationship between First Nations and the Crown.

In summary, the Court's conclusion that s. 6 operates in a discriminatory way in terms of sex and marital status is not likely to be contentious. However, the court's analysis of Indian status does raise the following questions:

- 1) whether an admittedly artificially and externally created and defined legal status that is more racial than cultural can truly be said to be 'an aspect of cultural identity'; and
- 2) whether such a status can be said to signify the special relationship between the Crown and First Nation peoples which is founded in a relationship between the Crown and various nations and peoples at the collective level.

These issues would no doubt have to be grappled with if a challenge of s. 6(2) was brought under the *Charter* as racial and cultural discrimination and discrimination based on family status by those excluded by the second-generation cut-off rule **or** through a challenge to s. 6(2) as an infringement of s. 35 rights. A challenge to s.6 (2) as a whole as a violation of s. 35 Aboriginal and Treaty rights would be more ambitious than the scope of the issue raised in *Sawridge Band* (where the Sawridge Band opposes the reinstatement of to band membership of certain First Nations women by federal law). A broad-based s. 35 challenge to s. 6(2) would face considerable evidentiary challenges similar to those raised in *Sawridge Band*: first the need to meet tests established by case precedent requiring proof of the existence of a specific Aboriginal or Treaty right to determine citizenship held by a specific First Nation and second, demonstrating how s. 6(2) interferes with such a right in an unjustified way.

Sawridge Band and *McIvor* demonstrate the limitations of litigation to resolve fundamental issues of policy inherent in contemporary identity rights issues arising under federal law and policy. Nevertheless the decisions in *Powley* and *McIvor* combined with observations of the Supreme Court of Canada on identity issues in cases such as *Corbiere* and *Sappier and Grey* suggest an evolving judicial awareness and analysis of identity issues – one that recognizes the need to be aware of how racial categories can be created and applied to distinct peoples contrary to their own concepts of identity and at risk of violating fundamental individual and collective rights. Finally, while litigation carries inherent risks for First Nations, it has also proven to be an effective way for First Nation people, as individual litigants and as nations, to motivate the Crown to open dialogue on key policy issues.

The Relationship between Indian Status, Band Membership and First Nations Citizenship

The concepts of “registration” (status), “membership,” and “First Nations citizenship” are often used inter-changeably within the context of Bill C-31 issues but they are not synonymous and each carries distinct legal definitions, rights and responsibilities.

The current provisions of the *Indian Act* provide for the definition of an Indian for the purposes of the *Act*, and outline the eligibility criteria for all those entitled to register as Indians under the *Act*. This definition also informs the definition of an Indian for the purposes of other federal legislation dealing with Indians.

The *Indian Act* also defines a member of a Band and provides statutory rules relating to membership eligibility. Registered (status) Indians and Band members essentially form the polity that is governed by Chief and Council under the *Act*. As of July 2006, 240 Bands had developed their own custom membership codes pursuant to section 10 of the *Indian Act*; and 350 Bands fell under the statutory rules for Band membership pursuant to section 11 of the *Act*.²⁹

In effect, Indian registration defines who is an Indian within the context of the *Indian Act*, and enables the federal Crown to clearly identify the reciprocal party (individuals and collectivities) to the multi-layered relationship. Equally, membership defines a collective under the *Indian Act*, and conveys certain political rights for individual members (i.e. to vote for Band Council) and in most First Nations communities is a condition for access to Band-administered programs and services.

For First Nations, registration guarantees certain benefits, such as tax exemption for income earned on-reserve and for federal sales tax; as well as access to two federal programs, Non-Insured Health Benefits and Post-Secondary Education.³⁰ Registration and membership are also linked to Aboriginal and treaty rights.

29 Figures provided by the Office of the Indian Registrar, Department of Indian Affairs and Northern Development.

30 Currently, Non-Insured Health Benefits and the Post Secondary Education Program exclusively rely on status as criteria for funding. Since 2001, the majority of INAC's on-reserve programs have relied on residency as criteria for funding.

While the concepts of Indian registration (status) and Band membership are distinct and each embodies different legal definitions, rights, benefits and responsibilities pursuant to the *Indian Act*, they are intimately linked. Under the statutory rules of the *Act* (section 11), Indian registration is tied to eligibility criteria for Band membership. As a result, registration and membership have become somewhat synonymous for the majority of First Nations communities. Over 70 per cent of Bands rely on the *Indian Act* registration rules, or *Act*-equivalent rules, to determine membership. This includes those Bands that adopt their own custom membership code under section 10 of the *Act*.³¹

The “term” citizen of a First Nation is also often used interchangeably with the terms registered (status) Indian and Band membership. However, as previously noted, these terms are not synonymous and each embodies distinct legal definitions, rights, benefits, entitlements and responsibilities.

As previously outlined in this paper, First Nations concepts of citizenship were and are broad and diverse and encompass clan systems, matrilineal (mother-based) and patrilineal (father-based) kinship systems, hereditary systems, and the acquisition of citizenship was flexible and could be gained through a number of ways, including through birth, marriage, adoption, self-identification, kinship, community ties and residency.

The contemporary western concept of “citizen” in international legal theory and practice is based on Euro-centric thought and practice, and is often associated with a nation, a state or a nation-state.

The *Indian Act* is silent on the concept of a citizen of a First Nation and the concept of Band membership under the *Indian Act* is not necessarily synonymous with that of a “citizen” of an Aboriginal Nation or a First Nation. Under the federal Inherent Right of Aboriginal Self-Government Policy, the federal government and First Nations negotiate and conclude self-government agreements that refer to the polity being governed under the self-government arrangement as “citizens” of a First Nation.

The 1996 Report of the *Royal Commission on Aboriginal Peoples* (RCAP) shed some light on the distinctions between registration and membership under the *Indian Act* and

31 Stewart Clatworthy, “Registration and Membership: Implications for First Nations Communities,” Four Directions Project Consultants. Presented at the Aboriginal Policy Research Conference, Ottawa, Ontario, March 2006, slide 7.

the concept of First Nations and Aboriginal citizenship within the context of nationhood. RCAP acknowledged that the *Indian Act* and other such legislation and policies have had a detrimental impact on Aboriginal peoples, resulting in the muting of the collective consciousness in respect of Aboriginal nationhood and citizenship in an Aboriginal nation. According to RCAP, “citizenship” is not vested in the *Indian Act* Band, but rather in the Aboriginal nation and called for the reconstitution of Aboriginal nations and nation governments, and that would in turn determine criteria for citizenship. As part of its recommendations, RCAP called for Canada’s recognition of dual citizenship for First Nations/Aboriginal peoples within the context of Aboriginal nation re-building and the reconstitution of Aboriginal nation governments.³²

A review of existing research demonstrates that there is a gap in the knowledge base in respect of the definitions and distinctions between the concepts of Indian registration, Band membership and First Nations citizenship and their linkages in respect of governance. Moreover, while RCAP made a huge contribution to research on Aboriginal governance and citizenship, there is a lack of research and information regarding First Nations perspectives and perceptions of the distinctiveness of, and or inter-play between the concepts of Indian registration, Band membership and First Nations citizenship and how First Nation individuals and communities experience these concepts.

Distinctiveness of Peoples and Control over Legal Definitions of Identity

There are now several cases where First Nations have successfully asserted their existence as distinctive peoples as part of the test for establishing their status as s. 35 rights holders.³³

In *Van der Peet*, Mr. Justice Lamer in his majority judgment articulated the test for establishing existing aboriginal rights, a test that reflects the purpose of s. 35 to recognize and reconcile the rights of distinctive societies that pre-existed the creation of Canada with Crown sovereignty: “*More specifically, what s. 35(1) does is provide the constitutional*

framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” [paragraph 31]

In *Delgamuukw*, Mr. Justice Lamer again spoke to the recognition and affirmation of pre-existing aboriginal societies with distinctive cultures as inherent to the purpose of section 35: “*Since the purpose of s. 35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that s. 35(1) must recognize and affirm both aspects of that prior presence - first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land. To date the jurisprudence under s. 35(1) has given more emphasis to the second aspect. To a great extent, this has been a function of the types of cases which have come before this Court under s. 35(1) - prosecutions for regulatory offences that, by their very nature, proscribe discrete types of activity.*” [paragraph 141]

The B.C. Supreme Court recently recognized the “distinctive Tsilhqot’in people”, as well as their distinctive culture and pre-existing rights and title.

All of these examples demonstrate that section 35 cases necessarily raise the question of First Nation control over defining the individuals who comprise a ‘distinctive people’.

In *Mitchell v. M.N.R.*³⁴, the Supreme Court confirmed the dual status of First Nation as members of distinctive societies with constitutional status, and their status as Canadian citizens. [at paragraph 133]

Evolving Judicial Approaches to Issues Involving of ‘Indians’, ‘Race’ & Identity

Since the *Constitution Act, 1982*, Supreme Court judgments have variously referenced the concept of ‘Indian blood’ in dealing with the meaning of Indian identity under the double-mother clause (in the 1982 decision in *Martin v.*

32 Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal Peoples*, Volume II – “Restructuring the Relationship,” Chapter 3 – “Governance,” (Ottawa: Supply and Services Canada, 1996).

33 See for example, *R. v. Van Der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Tsilhqot’in v. British Columbia* 2007 BCSC.

34 *Mitchell v. M.N.R.* [2001] 3 C.N.L.R. 122 (SCC).

*Chapman*³⁵) and concepts of ‘race’ and ‘cultural identity’ (in *Corbiere* in describing the political right to vote in band elections³⁶).

In the 1999 *Corbiere* decision, the Court concluded that personal characteristics, such as place of residence, cannot be used to arbitrarily determine the political right to vote because of erroneous and prejudicial assumptions that residence can determine degree of assimilation with non-native culture. This analysis could have potential application in examining assumptions about assimilation and persons of First Nation and non-First Nation heritage.

Corbiere is also significant for deciding that in conducting a *Charter* equality analysis involving the *Indian Act*, specific considerations should be taken into account: “All band members affected by this legislation, whether on-reserve or off-reserve, have been affected by the legacy of stereotyping and prejudice against Aboriginal peoples.... When analyzing a claim that involves possibly conflicting interests of minority groups, one must be especially sensitive to their realities and experiences, and to their values, history, and identity. Thus, in the case of equality rights affecting Aboriginal people and communities, the legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of the Aboriginal and treaty rights guaranteed in the Constitution, and with respect for and consideration of the cultural attachment and background of all Aboriginal women and men.” [paragraphs 66 and 67]

The Court recently has demonstrated awareness and sensitivity to the concept of “racialization” and how it may affect First Nations.³⁷ In the *Sappier* and *Grey* decisions (2006)³⁸, the Supreme Court of Canada cautioned against using “racialized stereotypes” of aboriginal peoples in dealing with aboriginal rights issues.

There is yet to be a case focusing on issues of racialization under federal law and the impacts of racialization on First Nations’ rights to define entitlement to citizenship.

The Relationship between Programs and Services and Indian Status, Band Membership and Reserve-Residency

As a result of changing authorities for INAC’s on-reserve programs and services there is a lack of clear understanding of how Indian registration, Band membership and on-reserve residency currently relate to funding eligibility for programs and services.

As previously mentioned, Indian status and Band membership are linked to Aboriginal rights (hunting, fishing, harvesting) and treaty rights (including treaty annuities) and status provides a tax exemption for income earned on-reserve. Since 2001, authorities for eligibility in INAC programs and services have been moving toward residency-based funding. There are only two federal programs that currently rely exclusively on “status” to determine funding eligibility: Non-Insured Health Benefits, funded by Health Canada; and the Post-Secondary Education Program funded by INAC.

There is a need to undertake research and analysis on the relationship between programs and services and Indian status, Band membership and reserve-residency. It is envisioned that a review and analysis of existing program authorities, for both INAC and other federal programs, to identify the criteria for funding eligibility for programs delivered to First Nations on-reserve, would inform the current interplay between programs and services and status, membership and residency.

35 *Martin v. Chapman*, [1983] 1 S.C.R. 365.

36 *Corbiere v. Canada* [1999] 2 S.C.R. 203.

37 “Racialization” is a process of imposing an arbitrary racial category on other people from an outside authority irregardless of their cultural, national or other personal identity.

38 *R. v Sappier; R. v. Grey* [2006] 2 S.C.R. 686.

International Indigenous Developments with Implications for Identity

In October 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples. Article 33 specifically recognizes the right of indigenous peoples to determine their own identity:

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.

Other Articles of the Declaration that are relevant to First Nations rights to determine their own identity include Articles 3,4,5,8 and 9.

Several other international human rights instruments support First Nations control over identity and the fundamental human right of First Nation children not to be denied their identity as indigenous peoples.³⁹ For example, Article 30 of the *United Nations Convention on the Rights of the Child* provides that:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

CONCLUDING REMARKS

This project represents a preliminary and initial examination of the critical and complex array of issues relating to First Nations identity, citizenship, Indian status and Band membership.

A review of existing research and available information has revealed that some major topics have been thoroughly researched, such as the demographic trends relating to Indian status and Band membership and residual sex and gender-based discrimination as a result of the 1985 amendments to the *Indian Act* (Bill C-31).

The joint review and analysis of existing research has also revealed some major gaps in the knowledge-base. Two research themes have emerged as being critical to addressing these gaps:

1. Issues relating to First Nations identity.
2. Issues relating to the impacts of the current state of law and policy on Indian status, Band membership and First Nations citizenship.

Continued research and analysis is needed in all of the areas examined in this project. There are some specific areas where the state of existing research is under-developed, and they require special attention, including, but not limited to:

- The impacts of historic determination of membership and status on youth identity.
- Kinship and identity issues including the relationship between kinship and concepts of First Nations citizenship.
- First Nations' concepts of citizenship through an examination of literature, self-government and claims agreements and other sources.

³⁹ Michelle M. Mann, *Indian Registration: Unrecognized and Unstated Paternity*, (Ottawa: Status of Women Canada, 2005), p. 30.

In addition to these areas, there are a number of other areas relating to First Nations identity and the current state of law and policy that also merit study, including:

- Custom adoption issues—examination of how traditional and custom practices with regards to adoption have been undermined under membership provisions of the *Indian Act* and the impacts this has had on First Nation individuals and communities.
- The inter-play and relationships between identity and governance – what has it meant to First Nations to be unable to exercise sovereignty over who is, and is not, a citizen of their Nation.
- Federal practices of retaining power to determine Indian status post self-government agreement.
- How program and service funding is based on Indian status, Band membership or reserve residence.
- The balance between individual identity and the collectivity (community and nation), and how can this be maintained in the context of membership and citizenship.
- Exploring the relationship between Indian status, First Nation citizenship and Band membership and how First Nation individuals and communities experience these concepts.
- Issues related to the Indian status card.

Both the AFN and INAC recognize that research and analysis aimed at informing the development of future options for reform in respect of Indian registration and Band membership under the *Indian Act* cannot be a unilateral process of the federal government and will require the substantive involvement of First Nations and their organizations. In this context, this process serves as a vehicle to engender further discussion between INAC and the AFN on the aforementioned, and with a view to reaching consensus on an approach and process for moving forward jointly on research and policy analysis on issues relating to registration and membership.

AFN and INAC have agreed through the joint technical working group to design a process of policy and issue identification that utilizes participatory research as a principal methodology. As such, the first phase included a focus group as a central vehicle to drive the preliminary issues and research identification. Additional focus groups will be a central activity through the completion of the first phase of this initiative.

AFN has confirmed and resolved that the best approach to achieving policy change is one that contains the following general elements: First Nation leadership; independent research and expertise; national dialogue; clear mandates and commitment; and finally, joint, principled policy engagement to develop options for the consideration and adoption of First Nation governments.⁴⁰ To this end, a major policy imperative is the establishment of joint Crown-First Nations forum (as called for by many AFN Resolutions) to engage on issues relating to First Nation citizenship and in particular, how federal law and policy impacts First Nations' control of identity at the nation level and impacts on First Nation citizens.

40 Assembly of First Nations, *Successful First Nation Policy Development: Delivering Sustainability, Accountability and Innovation*, 2006. Presented at the Aboriginal Policy Research Conference, Ottawa, March 2006 and later published.

BIBLIOGRAPHY

An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada, S.C. 1850, c. 42, 13 & 14 Vic., s. 5.

An Act for the Protection of the Indian in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury, S.C. 1850, c. 74.

Assembly of First Nations / Indian and Northern Affairs Canada Joint Initiative for Policy Development (Lands and Trust Services). *The Voice of First Nations: Planning for Change*. Ottawa: Assembly of First Nations, 2001.

Assembly of First Nations, *Proposal on a Joint Research Initiative to Examine Membership and Registration Issues to Strengthen First Nations Identity*, Ottawa, November 26, 2007.

Assembly of First Nations, *Successful First Nation Policy Development: Delivering Sustainability, Accountability and Innovation*, 2006. Presented at the Aboriginal Policy Research Conference, Ottawa, March 2006 and later published.

Chabot, Lynn. *The Concept of Citizenship in Western Liberal Democracies and in First Nations: A Research Paper*. Ottawa: Department of Indian Affairs and Northern Development, March 2007.

Clatworthy, Stewart. *Indian Registration, Membership and Population Change in First Nations Communities*. Four Directions Project Consultants, Winnipeg, 2005.

Clatworthy, Stewart. *Registration and Membership: Implications for First Nations Communities*. Four Directions Project Consultants, Winnipeg, March 2006. Presentation to the Aboriginal Policy Research Conference, Ottawa, Ontario, March 2006.

Corbiere v. Canada [1999] 2 S.C.R. 203.

Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010.

Furi, Megan and Wherrett, Jill. *Indian Status and Band Membership Issues*. Ottawa: Political and Social Affairs Division, Parliamentary Research Branch, Library of Parliament, February 2003.

Mann, Michelle M. *Indian Registration: Unrecognized and Unstated Paternity*. Ottawa: Status of Women Canada, 2005.

Martin v. Chapman [1983] 1 S.C.R. 365.

Mitchell v. M.N.R. [2001] 3 C.N.L.R. 122 (SCC).

R. v Sappier; R. v. Grey [2006] 2 S.C.R. 686.

R. v. Van Der Peet [1996] 2 S.C.R. 507.

Royal Commission on Aboriginal Peoples. *The Report of the Royal Commission on Aboriginal Peoples*, Volume I - "Looking Forward, Looking Back," Chapter 9 - "The Indian Act." Ottawa: Supply and Services Canada, 1996.

Royal Commission on Aboriginal Peoples. *The Report of the Royal Commission on Aboriginal Peoples*, Volume II - "Restructuring the Relationship," Chapter 3 - "Governance." Ottawa: Supply and Services Canada, 1996.

Sawridge Band v. Canada [1997] 3 F.C. 580 (C.A.).

Tsilhqot'in v. British Columbia [2007] BCSC.

