2007

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7

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Introduction

Under the current *Indian Act*, responsibility for defining certain First Nation identities in law is shared between First Nation governments and the federal parliament. This paper examines human rights and governance issues arising from current approaches to defining First Nation identities.[2]

For much of Canada's history, the legal definitions of "Indian" and "band member" have been shaped by governments outside First Nation control. This paper will show that the boundaries of these legal constructs have been defined predominately through criteria reflecting high levels of arbitrariness, both historically and under the current state of the law. Law in this area has evolved from a relatively flexible and gender-neutral kinship-based system (1850–1868) to a patrilineal, patrilocal, and patriarchal kinship-based system involving various forms of gender-based discrimination (1876–1985) to the current blood quantum system with some residual gender-based discrimination (1985). The blood quantum approach is also evident in many band membership and First Nation citizenship laws. In all cases, definitions that rely solely on a simple in-out classification system of individuals based on descent criteria alone, or discrimination on grounds of sex, raise serious human rights issues.

Legal definitions of Indian status, band membership, and First Nation citizenship can impact personal identity at the individual level. Consequently, policy decisions reflected in laws respecting Indian status, band membership, and First Nation citizenship can affect the enjoyment of individual human rights. Collectively, federal and First Nation laws have created numerous different legal classes of people of First Nation descent. This complexity can result in arbitrariness with negative effects on human dignity, personal autonomy, and self-esteem.

Another important consideration is the negative impact of a complex and arcane system of defining First Nation identities (a system flowing from the *Indian Act*) on the capacity of governments at all levels to effectively plan the delivery of vital programs and services such as health and education.

In some ways, the legal concept of "Indian" under the *Indian Act* reflects prevailing societal myths about race and about "Aboriginality" or "Indianness" as categories of race. There has been confusion regarding the distinction between "racial" and "cultural" identities. Many people view the legal concept of Indian status as a foreign notion imposed on First Nations people. Many (but not all) people of First Nation descent reject the term "Indian" as a marker of identity and prefer the term "First Nation."

Difficulties can arise when individuals discover that the law does not accommodate their self-perception of cultural identity, whether that law is federal or First Nation in source.

The Role of Federal Law in Defining First Nation Identities

Law is a product of society and some aspects of Canadian law reflect societal assumptions about race. The notion of "Indian" in the sense of a "North American Indian race" is a social and legal abstraction. The influence of socially constructed notions of race is evident in the history of Indian Affairs policy and the *Indian Act* itself.[3] The application of the term "Indian" to a multiplicity of diverse cultures, nations, and language groups is a striking example of how colonialism and other social forces have created and defined racial categories. The notion of "Indian" lumps a diverse array of distinct peoples Indigenous to North America into one legal and racial category—without regard to their own distinct cultural and political identities. In this way the legal concept of Indian status under the *Indian Act* has contributed to the "racialization"[4] of First Nation peoples—meaning that the law has contributed to the imposition of a generic racial category on diverse peoples Indigenous to Canada.[5]

An important policy question is whether the goal of ensuring the equality and cultural rights of First Nation peoples is well served by the continued use in statutes of the racial term "Indian" (and the federal role of defining this term) or whether these goals would be better met by First Nation concepts of First Nation citizenship and the use of criteria such as culture and family relationships (kinship) as well as descent.

Historically, the legal category of "Indian" has served as the basis for specialized legal treatment, sometimes with a positive impact on the rights of First Nation people, and sometimes with a negative impact. In the past, this specialized legal treatment often involved discrimination—legal distinctions with negative consequences for the peoples concerned, such as denial of the right to vote (a denial of an individual civil and political right) or denial of nation recognition (a denial of a collective right to a specific cultural and national identity). At one time, "Indian" status meant "not a person," and denoted a legal incapacity in regard to many civil and political rights and freedoms. The legal consequences attached to Indian status have evolved over time. More recently, Canadian law has recognized the

need for specialized legal treatment of Indians/First Nations as peoples—not races—to protect the fundamental cultural, social, economic, civil, and political rights of First Nations as nations and peoples. (An example of this change is the entrenchment of Aboriginal and treaty rights of the Aboriginal peoples of Canada in section 35 of the *Constitution Act*, 1982.) This policy goal is consistent with international human rights norms respecting the equality of all peoples and their right to self-determination.

The *Indian Act* continues to provide a legal framework to define individuals in and out of identities such as "band member" and "Indian." Federal law currently does this by creating an objective standard of "Indianness." This standard is applied in an either/or type classification system based on the circumstances of a person's birth. This approach carries a great potential for arbitrariness and discrimination. Any set of rules defining a legal identity based primarily on descent will involve a degree of arbitrariness—whether it is Indian status, band membership, or citizenship. The greater the degree of arbitrariness, the greater is the potential for harm to individual identities and rights.

The federal rules now governing Indian status and band membership rely heavily on descent-based criteria, with rigid cut-off rules to address situations of Indian–non-Indian parentage. There is little provision under the current *Indian Act* for alternate eligibility criteria. In the case of Indian status, for persons born after April 16, 1985, descent is the only criteria, apart from adoption and some limited exceptions provided by section 4(1). The simplicity of descent-based criteria presumably makes administration of entitlement less complex than systems requiring assessment of factors such as cultural knowledge or degree of connection to a community. However, this simplicity is traded off for the complexity of delivering diverse government services and programs through varying criteria of Indian status, First Nation membership/citizenship, or reserve residency for eligibility or funding purposes. Federal and First Nation law-making and policy-making face the same challenge in this regard.

Arbitrariness in definitions of Indian status and membership/citizenship has long been a concern of many First Nations women activists and organizations—whether the discrimination is based on sex, descent, marital, or family status. Of course, it is true that Aboriginal rights by definition are the rights attached to persons connected to the Indigenous peoples in control of their territories prior to European colonization and this necessarily involves descent criteria to determine entitlement. However, the rigid descent rules that now typify Indian status entitlement and most band membership rules are a relatively recent development. This rigidity has the unfortunate consequence of perpetuating colonial notions of race and also fails to respond to the needs of "bi-racial" or "multi-racial" children.

Federal laws, policies, and funding criteria may influence First Nation–controlled decisions about band membership criteria. The colonial legacy of racial categorization may also influence First Nation decision-making in some

cases. Carole Ambrose-Goldberg has commented on the influence U.S. federal law can have on tribal identities and definitions in the United States: "Law is one potentially powerful outside influence on political identity. Explicitly, law may establish categories of people eligible for benefits or subject to burdens according to particular understandings of ethnicity or nationality. These definitions may in turn provide incentives or disincentives for groups to organize politically along particular lines" (Ambrose-Goldberg 1994, 1123–1124). Ambrose-Goldberg notes that in the U.S., federal legislation began supplanting treaties in the early nineteenth century and finally took over after 1871. The result was national legislation that focused on group rights for Indians as a whole (that is, for Indians as a racial group) rather than the rights of individual tribes (that is, distinct peoples with rights to maintain their distinct cultures, modes of political organization, law, etc.) (Ambrose-Goldberg 1994, 1141). Ambrose-Goldberg makes the following conclusion about the impact of this race-focused legal approach on the Indian nations themselves: "By classifying all the many native peoples as 'Indians,' the first European invaders generated an idea that has in turn created a reality in its own image, through non-Indian power and native response … the racially inspired policies of non-Indians began to reproduce in Indians the original European race-based conceptions" (Ambrose-Goldberg 1994, 1140).

For a long period, aspects of the Indian status and band membership provisions supported federal policy goals of forcibly assimilating First Nation people as individuals. First Nation women were a key target of assimilative policies launched through previous *Indian Act* provisions governing Indian status and band membership entitlement. Section 12(1)(b) of the pre-1985 *Indian Act* is perhaps the most infamous example. This provision removed Indian status from any woman marrying a person without Indian status and from her children. While section 12(1)(b) was often rationalized as necessary to protect the reserve base from exploitation by non-Aboriginal husbands of Indian women, there is no evidence of alternative measures ever being considered to address this concern until the legislative process that led to the 1985 amendments.

For some time, First Nation people have struggled to reassert control over their personal identities as individuals and their collective identities as nations or peoples. First Nation women activists and organizations have fought for fair and non-discriminatory systems of determining Indian status and band membership, whether controlled by the federal government or First Nation governments. Despite the removal of much of the sex-based discrimination from the *Indian Act*, the concepts of "Indian" and "band member" remain problematic and residual sex discrimination is still evident.

The federal government and many First Nations have expressed interest in moving towards a system that recognizes First Nation citizenship as a legal concept in place of the *Indian Act* notion of band membership. Future policy reforms by the federal government or First Nation governments to reduce arbitrariness should first determine the relevance of notions of "descent" and "race" in

the development of any new definitions of First Nations identity and the relevance of alternative criteria such as cultural knowledge and connection to community. Policy work in this area must also consider how any proposed reforms may impact men and women differently (e.g., due to the continuing impact of past discriminatory laws).

Race Creation, Gender-based Discrimination, and Legal Indian Status

A review of Canadian case law reveals a lack of clarity on whether the legal category of "Indian" under the *Indian Act* refers to a racial group, or diverse cultural and political entities. This can be seen by comparing the 1983 decision of the Supreme Court of Canada in *Martin v. Chapman*[6] (which discusses the legal concept of "Indian" in the racial terminology of "Indian blood") to the 1999 decision *Corbière v. Canada*[7] (where the Court references both race and culture as part of the legal conception of "Indian").[8] This is a critical area of legal analysis that requires clarification (through legislation, judicial decision, or both) if Aboriginal rights within the Canadian legal system are to be understood and analyzed as rights of peoples or nations, and not as "race-based rights." This would not affect the capacity of human rights law to sanction harmful discriminatory action arising from the ongoing social phenomenon of racial categorization and discrimination aimed at the members of the diverse Indigenous nations as "Indians."

The concept of "race" as it has been popularly used in European and European-based societies has changed substantially over the centuries. As Constance Backhouse explains, it was originally used to mark differences of class within European society and also to delineate different cultures and societies who often did not look markedly different from one another.[9] In this sense it simply referred to persons connected by common descent or origin. Backhouse explains: "The word 'race' originally denoted 'family,' and was applied only to noble or important dynasties—the race of the Bourbons and the race of David for example. The term underwent 'a semantic journey of extraordinary proportions' when it expanded during the nineteenth century to categorize large groups of people who were not related directly through kinship, but who shared specified traits. Early classifications based almost exclusively on skin colour had enumerated four separate races: Europaceus albus, Asiaticus luridus, Americanus rufus, and Afer niger" (Backhouse 1999, 42). Later work relied on a combination of physical features such as hair texture, skin colour, eye colour, and shape of nose, and resulted in classification systems of at least seventeen "main races" (Backhouse 1999, 42 citing Otto Klineberg).

With the advent of European colonization of large parts of the globe, the concept of race evolved as a means of rationalizing different and unequal treatment of people based on their physical appearance and cultural distinctiveness relative to people of European descent. With the growth in European scientific activity

in the nineteenth century, and the ongoing thrust of colonialism, considerable effort was expended to prove some biological or genetic foundation to the then prevailing systems of racial classification based on physical appearance. These efforts utterly failed. As many authorities have concluded, race is a social construct with no scientific foundation (Lopez 1994, 1).

The dehumanizing process of classifying other people into arbitrary racial categories and discriminating against them based on such imposed categories is distinguishable from the process of people self-identifying as nations or distinct peoples based on shared attributes which may include kinship ties, language, cultural values, histories, and laws. In the latter situation, the people or nation concerned have agency in asserting fundamental rights that are protected by domestic and international law. Such fundamental rights include the right of peoples to self-determination, the related Aboriginal and treaty rights of First Nations under the Canadian Constitution, and rights under international human rights covenants relating to language and culture.

When the *Indian Act* was first enacted in the late nineteenth century, Euro-Canadian social and legal norms often assigned persons whose ancestry was outside Europe (including First Nation people and people of Asian and African descent among others) to various racial categories deemed not "white." "White" as a racial category became a standard of privilege and the standard for full social, economic, and political rights, against which other "races" were identified, defined, and ranked by decision-makers such as judges or Members of Parliament or Legislatures who considered themselves "white." Assignment to a racial category other than "white" often triggered some form of legal disadvantage such as barriers to voting rights, immigration, or certain kinds of employment. The history of the evolving nature of legal definitions of racial categories and how these were manipulated to secure and perpetuate privilege by people asserting a racial identity as "white" throughout the nineteenth century and half of the twentieth century has been documented by several authorities.[10] It is also evident that the racialization of First Nation peoples through the *Indian Act* began to eclipse the Crown's recognition of Indigenous nations and the treaties the Crown had entered into with them.

The legal definition of "Indian" has evolved from its inception in colonial law in 1850 to the 1985 *Indian Act* amendments from a flexible, broad definition relying on a degree of self-identification and community acceptance to an increasingly narrow definition dependent almost solely on descent-based criteria. Over this period, three distinct approaches can be identified: 1) a flexible gender-neutral and non-unilineal kinship-based system; 2) a patrilineal and patriarchal kinship-based system with various manifestations of sex discrimination; and 3) a strict descent-based system (non-unilineal) with blood quantum requirements and some residual elements of gender-based discrimination.

While the current Indian status entitlement system does not rely on outward physical characteristics to classify people, its almost exclusive reliance on strict

descent-based criteria arguably constitutes a form of race classification. High levels of arbitrariness characterize systems of race classification. With its focus on individual descent histories and its exclusion of relationship criteria (e.g. relationship of individuals to families or to communities) the current *Indian Act* creates an objective but rigid and arbitrary standard of "Indianness"—one that is to be determined by federal law alone and applied on a national basis to a diverse group of nations or peoples. This approach unfortunately implies the existence of some trait or characteristics that make "Indians" inherently different from those deemed "not Indian." The current system offers a binary choice between the categories—"Indian" and "not Indian" based solely on the circumstances of a person's parentage. Within the category of "Indian," two sub-categories have been created which in turn imply the existence of "degrees of Indianness"—Indians registered under section 6(1) of the *Act* and Indians registered under section 6(2). Indians registered under section 6(1) can pass on Indian status to their children, regardless of who they marry. As noted above, Indians registered under section 6(2) can only pass on Indian status if the other parent is registered under either section 6(1) or section 6(2).

The current *Indian Act* reinforces the notion of "Indian" as a racial category in the following ways:

- By specifically referring to "Inuit" as a "race" excluded from the definition of "Indian," section 4(1)
- By relying strictly on descent-based criteria to determine eligibility for persons born after 1985
- By creating subcategories of "Indianness"—"6(1) Indians" and "6(2) Indians" in common parlance today—with different capacities to transmit Indian status
- By establishing a system that leads over time to an escalating separation of Indian status from connectedness to the group identity of band or First Nation
- By separating the determination of "Indian" identity from connection to First Nation land rights

From 1876–1985 Indian status under the federal *Indian Act* was primarily determined by a patrilineal kinship system. The result was that gender-based discrimination was the key tool for meeting the federal policy goal of controlling and narrowing the class of people of First Nation descent who would be entitled to Indian status under the *Indian Act*. Under this system, federal law determined both entitlement to Indian status and band membership, and there was an almost total match between those entitled to Indian status and band membership. Entire nuclear families (husband, wife, children) could move in or out of Indian status and band membership, based on the status of the father or husband. Descent from a male person with Indian status or marriage to a male with Indian status were the primary means of individual entitlement. Conversely, marriage by an Indian woman to a non-Indian male resulted in loss of Indian status to herself and her children.

The 1985 amendments to the *Indian Act* re-introduced non-unilineal (or "cognatic") descent principles whereby descent is now traced through both maternal and paternal ancestors. Because this approach would dramatically increase the number of persons entitled to Indian registration, the federal policy goal of controlling the number meeting the definition of "Indian" is now met by degree of descent rules. These begin to operate in the first generation of Indian and non-Indian parentage and lead to disentitlement if there are two successive generations of Indian and non-Indian parentage. The only deviations from descent criteria are provisions respecting adoption (in the *Act*'s definition of "child") and the provision that deems band members without Indian status to be "Indians" for several key provisions of the *Act* (section 4.1).

There is still residual sex discrimination in the determination of Indian status. The children of women, who "married-out" prior to 1985 and were reinstated under the 1985 amendments, are treated differently than the children of men who married out prior to 1985. The children of women who married out prior to 1985 are registered under section 6(2) while the children of men who "married-out" are registered under section 6(1). This means that successive generations of inter-marriage results in termination of Indian status one generation earlier for women than for men who married out prior to 1985. In addition to problems arising from provisions of the *Act* itself, there are issues arising from DIAND's policy respecting "unacknowledged paternity" and "unstated paternity." Although the *Act* does not address evidence of paternity, federal policy does. Where a mother cannot establish to the satisfaction of the Department, the Indian status of the father of her child (or who chooses not to) federal policy provides that only on the mother's Indian status will be relied on to determine which subsection to register the child. This policy effectively amounts to deeming the father as not having status as an "Indian" under the *Indian Act*. A raft of gender equality issues are raised by this policy, which have been explored by others.[11]

Rules Governing Entitlement to Band Membership

Under the *Indian Act* diverse First Nations, identified as "bands," are subject to a more or less uniform system of local governance and reserve land regulation.[12] The recognition of distinct "band" entities and brief references to custom bands and treaties is the closest the *Indian Act* comes to recognizing diverse Indigenous cultural or political entities.

Prior to 1985, all band members were deemed to belong to the category of "Indian." The *Indian Act* now allows the development of separate legal rules to govern Indian status and band membership. Indian status remains determined solely by the federal rules set out in sections 6 and 7 of the *Indian Act*. Band membership continues to coincide with Indian status for bands not taking control of their membership rules, as provided by section 10 of the *Act*. Bands who do assume control over their membership codes may develop rules different from

those determining Indian status (within certain parameters). For these bands, band membership can mean something different than Indian status.

The vast majority of bands appear to rely heavily on descent-based criteria as a pre-condition to entitlement either because their membership rules are governed by the *Indian Act*, or where control of membership has been assumed, the rules rely on descent-based rules.

Some bands restrict eligibility criteria to specific descent rules. Others provide for some opportunity for the admission of persons not meeting the standard descent criteria by establishing other criteria such as:

- Demonstrated knowledge of the nation's language
- Demonstrated knowledge of the nation's customs and traditions
- Length of residence among the nation
- Social and cultural ties to the nation
- Support from a majority of electors voting by secret ballot on the application
- Existence of close family ties within the nation
- Is self-supporting or alternatively, can make a valuable contribution to the band, or is a caring parent who can participate in the betterment of the reserve
- A native or non-native adopted child of a person eligible to be a band member[13]

First Nations have taken a range of approaches in defining the initial charter group of persons automatically eligible for band membership. Different cut-off dates have been established for determining the charter group from which descent would be traced to determine the eligibility of future generations. Different terms to name the initial charter group of band members have been used, e.g. "original members" (Adams Lake Indian Band) or "traditional citizens" (Fort Nelson Indian Band). Different approaches have been taken to the relevance of Indian status to eligibility for band membership. The Skeetchestn Indian Band requires both the applicant and at least one of the applicant's parents to have Indian status, in addition to other requirements (Gilbert 1996, 180).

The separation of Indian status from band membership and the differing trends across First Nations in the numbers entitled to each legal status, results in a complex array of legal rules to determine access to many important legal rights and benefits. This is a complex legal field that both nations and individuals must cope with. Indian status determines eligibility for several significant social programs such as the Non-Insured Health Benefits. Band membership determines eligibility for many political and civil rights on-reserve such as voting in band council elections and the right to hold an individual land allotment. It is also important to note that the loss of capacity to transmit Indian status or band membership to children due to "out-marriage" affects women more than men, given rates of Indian/non-Indian parenting are considerably higher for females than males, both on- and off-reserve (Gilbert 1996, 180).

The combined effect of rigid, yet differing descent-based rules for Indian status and band membership, creates a complex legal and policy environment for federal, provincial, and First Nation governments. This complicates the planning and delivery of government services and programs on- and off-reserve. The separation of Indian status from band membership is creating an increasingly incoherent system that fails to reflect the family relationships of First Nation people on- and off-reserve. Yet another set of legal rights are defined in terms of treaty beneficiary rights for First Nations who have entered treaties with the Crown. In addition, some federal programs are based on funding criteria determined by the number of people resident on-reserve. Moving to a legal system based on recognizing nations and First Nation citizenship could provide an opportunity to rationalize at least some of these overlapping legal statuses and funding criteria.

Equality Rights, Notions of "Difference," and Legally Created Identities

As a matter of personal identity, each person of First Nation descent is entitled to choose an identity as Aboriginal, First Nation, or any other. Some people are comfortable with one or more of the generic terms commonly used today such as First Nation, Aboriginal, or Indigenous. There are also individuals who refer to themselves as "Indian." Still others, with equal legitimacy, do not identify with any of these generic terms and relate only to their specific national identity (such as Mi'Kmaq or Nisga'a).

The personal right of individuals to identify themselves is distinct from considering the legal and social consequences of identities created and defined in law, especially by governments outside the control of the group being defined. Each individual has the right to shape their own identity to the extent they are able, or wish to, beyond the influence of their parents, families, cultures, and nations. However, the capacity of individuals to assert this freedom can be affected by the broad powers of government to create and define legal categories of people (subject to constitutional restraints such as the Charter guarantees of equality or Aboriginal and treaty rights).

Citizenship, band membership, and Indian status are all legally defined categories that necessarily involve defining some people in, and some people out of each category as well as the rights and benefits attached to each. The first step to begin addressing concerns about the arbitrariness of current rules relating to Indian status and band membership is to understand how "difference" is typically identified and created by Western (meaning, European-derived) systems of law. The analysis in this chapter relies on the legal theory of American equality rights theorist, Martha Minow on Western understandings of "difference."[14] Minow provides several examples demonstrating how categories of difference are created and defined by law, and how these are often culturally bound. Western notions of human difference in turn have influenced the development of equality rights

theory—the legal theory that identifies when different treatment amounts to discrimination contrary to human rights norms.

Minow observes that the creation of different abstract categories of people is a common function of the law in European-derived legal systems. She notes that the operation of American law in any field typically involves distinguishing things, situations, and people from other things, situations, and people and does so through the establishment of abstract legal definitions or concepts. However, she points out that difference is a comparative term and that the very idea of difference implies a reference point to make any given comparison (Minow 1990, 22). That is, a finding of difference and the assigning of a person to one group rather than another implies difference from some standard of comparison. Minow states that a legal system that purports to value individual equality constantly poses the "dilemma of difference": sometimes ensuring real or substantive equality requires treating people the same regardless of personal traits and sometimes equality requires acknowledging and accommodating differences between people.

Western legal theory, for example, tends to construct dichotomous (opposing) categories such as gender and sex (male/female). By comparison, in at least one major Aboriginal language, there are no words to connote "male" and "female" (Henderson 1996, 1). Further, the idea of "Indians" and "bands" are products of European colonial law and did not exist prior to European arrival in the Western Hemisphere. The legal creation of "Indians" has created a need to identify "non-Indians" and a process of distinguishing between the two legal categories of people. The problem of identifying difference is inherent in issues relating to entitlement to Indian status as well as band membership and First Nation citizenship. It is inherent in determining when such distinctions amount to discrimination.

Equality rights theory in Canada responds to the dilemma of difference by identifying legal distinctions that harm human dignity and personal autonomy. For example, a decision to exclude a person from a benefit under the law because of a personal characteristic—such as sex or race—in a way that implies the person is of less value because of that personal characteristic, can be a form of discrimination.

Laws and government decisions which impair human dignity carry the potential to negatively affect self-esteem and the process of identity formation in young people. Policy makers should consider the impact on young First Nation people of having to cope with, and find their place in, a confusing array of legal statuses somehow related to their family histories (e.g. Status Indian, Non-Status Indian, C-31 Indian, 6(1) Indian, 6(2) Indian, band member, non-band member, Treaty Indian). Some of these legal categories may overlap when applied to a particular individual and some may not. A further consideration is that multiracial children not only face the complexities of identity formation in a race-conscious society, but also a legal system that establishes multiple categories of First Nation people. The key focus of policy reform should be on moving away from legal categories

that racialize people into categories and subcategories. Instead, policy could promote the development of First Nation–controlled legal systems that define citizenship in ways reflecting First Nation cultural identities while respecting the fundamental dignity and equality of First Nation men, women, and children. This may require development of kinship rules that meet the contemporary needs of the family situations of First Nation people. Movement in this direction would be consistent with the conclusions of the Royal Commission on Aboriginal Peoples, which stated that the distinctiveness of Aboriginal people is cultural and political, not "racial": "Aboriginal peoples are not racial groups; rather they are organic political and cultural entities. Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change in their internal composition."[15]

Determining when a distinction in law or policy amounts to discrimination is not always easy. While all discrimination necessarily involves some form of identifying difference between two categories of people, not all legal distinctions amount to discrimination under Canadian law (whether the Charter is being applied or federal or provincial human rights legislation).

The purpose of Canadian anti-discrimination law is to identify and provide remedies for arbitrary legal distinctions that impose real disadvantage—disadvantage based on negative stereotypes attached to a personal characteristic, such as sex or race, or multiple personal characteristics at the same time. When the result of applying such stereotypes and disadvantage is impairment of a person's dignity as a human being, discrimination is usually found to exist as a matter of law. For example, a provision of the *Indian Act* that prohibited off-reserve band members from voting in band council elections has been held a violation of section 15 Charter equality rights in *Corbière v. Canada*.[16] The exclusion of band members living off-reserve from participation in a key part of the political life of *Indian Act* bands was found to be an impairment of the human dignity of the members affected, because the exclusion: 1) suggested that off-reserve band members were less worthy as band members and 2) perpetuated a longstanding stereotype that off-reserve band members are necessarily more culturally assimilated than members resident on-reserve.

Martha Minow's theory of how the law creates and shapes notions of "difference" can be used to better understand Indian status and band membership issues in Canadian law. Drawing on theories from a range of disciplines including sociology, law, and psychology, Minow describes "a social relations approach" to addressing perceptions of difference within an equality rights framework (Minow 1990, 12). Minow suggests that a social relations approach to law focuses on identifying the relationships and interdependency of people, as an essential part of the context for making decisions on rights related questions. A social relations approach takes into consideration the dynamic and evolving nature of human

relationships, and adopts the view that legal distinctions do not necessarily, and often do not, reflect differences inherent in the people assigned to different legal categories. In a Canadian context, this suggests that rigid in/out definitions will likely not take account of the diversity of family relationships nor how the mobility of First Nation people to seek employment or education off-reserve often influences their choice of partners.

The arbitrariness of strict descent-based criteria perhaps could be alleviated by moving away from strict either/or classification approaches determined only by descent and instead develop codes that reflect the inherent nature of human relationships as dynamic, evolving, and interconnected. It may also help to keep in mind that legal distinctions between "Indian" and "non-Indian" under the *Indian Act* do not necessarily reflect real differences inherent in the persons concerned.

Notions of Citizenship

Citizenship is a legal status that brings with it a specific political identity and specific rights and obligations. The definition of citizenship and its rights and responsibilities are controlled by the government of the nation in question. Citizenship is a legal concept determined by specific events (such as being born in a certain territory or being born to parents with a particular citizenship or meeting the requirements of a naturalization process) and not by qualities inherent in a person.

Prior to 1947, there was no such thing as Canadian citizenship, as all Canadians were simply considered British subjects (Young 1997). The British common law system historically determined an individual's entitlement to citizenship by the place of birth (jus soli), regardless of the citizenship of the parents. European countries whose legal systems derive from Roman law historically relied on the citizenship of the parents (jus sanguinis) to determine the citizenship of a child. Other countries such as Japan have similar rules.

Canadian law provides three means of acquiring Canadian citizenship: 1) being born on Canadian soil; 2) being born to at least one parent with Canadian citizenship; and 3) if not automatically entitled by birth (either by place of birth or by blood) through "naturalization."

The notion of band membership does bear some resemblance to the concept of citizenship. Traditionally, entitlement to band membership and Indian status has been determined by the specifics of the parents' entitlement to band membership and Indian status. Since the 1985 amendments to the *Indian Act*, bands have been able to take control of their membership rules and use criteria other than descent either in addition to, or as an alternative to, descent criteria. Unlike Canadian citizenship, birth in a First Nation's territory such as a reserve typically does not confer band membership. Given the small numbers of people of First Nation descent relative to people with no First Nations descent on a national basis, such rules could undermine the transmission and survival of First Nations cultural values.

First Nation citizenship codes can determine access to civil, political, and social rights within First Nation communities. First Nation citizenship, like band

membership, raises difficult policy issues involving personal identities. When personal identities do not match the legal rules determining citizenship rights, lack of access to important cultural rights tied to civil, political, and social rights within First Nation communities are felt as particular hardships by persons falling outside definitions of band membership or First Nation citizenship. Citizenship and band membership codes necessarily involve establishing rules for the inclusion or exclusion of individuals. Like citizenship laws of other nations, citizenship codes likely will be the focus of ongoing controversy and feelings of hurt and injustice by those seeking inclusion but failing to meet citizenship requirements. However, First Nation lawmakers could seek to reduce arbitrariness through codes that focus on relationships and connection to community as well as descent, and by continuing dialogue within their communities on citizenship issues.

There has been a strong interest in moving away from the *Indian Act* concept of "bands" and "band membership" to a more respectful terminology of "Nation" and "First Nation citizenship." First Nation representatives have said that the system of bands imposed by the *Indian Act* does not reflect the traditional nations in which Indigenous people organized themselves prior to colonization. The Royal Commission on Aboriginal Peoples noted that before colonization there were approximately 80 to 90 distinct peoples or nations in the territory now known as Canada. The 600 plus bands recognized under the *Indian Act* do not necessarily reflect the traditional political organization of First Nations in Canada, as nations. While Aboriginal nations are understood to often encompass more than one *Indian Act* band, there is a noticeable trend particularly in federal legislation, to equate the legal term "band" with "First Nation." The term First Nation citizenship today is often used to refer to the same unit as band membership.

The Royal Commission on Aboriginal Peoples concluded that First Nations have the right to determine their membership as an element of their inherent right of self-government. Significantly, the Commission also concluded this right is limited by two requirements: 1) to ensure no discrimination between men and women, and 2) there should be no reliance on minimum blood quantum as a "general pre-requisite" for citizenship: "Under section 35 of the *Constitution Act*, 1982, an Aboriginal nation has the right to determine which individuals belong to the nation as members and citizens. However, this right is subject to two basic limitations. First, it cannot be exercised in a manner that discriminates between men and women. Second, it cannot specify a minimum blood quantum as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions, and ties to the land, rather than in their race as such."[17]

Kimberley Tallbear has argued against the use of rigid blood quantum criteria in contemporary First Nation laws on membership or citizenship and against assumptions that equate race with culture or blood quantum with transmission of culture. She states that prior to colonization, there were First Nations that used

nonracial criteria to determine citizenship such as "marrying into the community, long-term residence within the tribal community, and the assumption of cultural norms such as language, religion, and other practices" (see Tallbear 20012000).

The types of band membership rules described in Clatworthy's studies of band-designed membership codes are different in some important ways from the legal definition of Canadian citizenship. Entitlement to Canadian citizenship is determined by birth in Canadian territory. In addition, it can be acquired by persons born outside Canada if born to a Canadian or meeting the requirements of naturalization. By contrast, band membership and Indian status are largely determined by descent from persons with Indian status or band membership, regardless of where a person is born. Band membership can be extended to persons not entitled to it by birth if the band membership rules so provide. The fact of colonization and its resulting loss of land and control over traditional territory place First Nations in a very different situation than Canada with respect to "immigration" norms and citizenship. Presumably acquisition of citizenship by birth in First Nations territory is not attractive to many, because of the threat of being overwhelmed eventually by non-Aboriginal people. Canada, on the other hand, promotes immigration and acquisition of Canadian citizenship as a social and economic benefit to the country as a whole.

It should also be kept in mind that descent has been a relevant factor for passing on Canadian citizenship, and cut-off rules have been used regarding children of Canadian citizens born abroad. Gender-based discrimination in the operation of such rules has been found unconstitutional. A sexually discriminatory rule that permitted a married Canadian father to pass on his citizenship but not a Canadian mother was found an unconstitutional violation of section 15 in *Benner v. Canada*.[18]

First Nation citizenship as a concept could invoke notions of political membership, cultural affiliation and family relationships rather than colonial notions of race based on rigid descent rules alone. Legislation to introduce a new system of nation recognition to replace the current system of band recognition would be consistent with the right of First Nations to self-government and self-determination and could include provision for human rights protection. Concerns about the need to respect equality rights within the nation (whether gender equality concerns, treatment of on- and off-reserve members, or other differences) could be addressed by the application of the *Canadian Human Rights Act*, the Charter or First Nation–designed human rights instruments consistent with international human rights standards.

Conclusion

The number and complexity of legal statuses for First Nation people have grown over the years. New forms of arbitrary discrimination in definitions of Indian status and band membership have replaced old ones. The various legal statuses for Aboriginal people under Canadian law—such as "Indian," "band member," and "treaty beneficiary"—overlap but do not always coincide.

Arbitrariness could be reduced by focusing more on the relationships between people as a context for developing laws to determine First Nation identity categories such as membership or citizenship. This would mean focusing on the contemporary context and manifestation of First Nation kinship and determining how this is relevant to citizenship. Such a focus may involve taking account of factors such as degree of participation in the life of the community, residence in community, community acceptance, contributions to the First Nation, or support of family in the community or other community members. Other objective factors might include an assessment of cultural knowledge or knowledge of the nation's language. Any or several such factors could be used as alternative criteria for people not meeting descent-based criteria. While some First Nations already have incorporated such criteria into their band membership codes, rigid descent criteria still appear to be the predominant and only determinant for many membership codes to date as the work of Stewart Clatworthy demonstrates.

Aboriginal people must cope with layers of legal identities beyond their control but vital to their lives. Understanding these rules and falling within the recognition they offer can mean the difference between being able to reside on-reserve or not, being able to buy a house on-reserve or not, having access to post-secondary education, employment training, and other programs. The current level of complexity and arbitrariness in the legal rules governing Indian status and band membership also creates impractical burdens for administrators and leaders of First Nations, and confusion and conflict for First Nation individuals attempting to find their way through a mass of technical rules coming from federal and First Nation sources.

At a broader level, the concepts of Indian status and band membership themselves are problematic. The legal notion of "Indian" perpetuates the notion of a universal "Indian" race and undermines recognition of the distinct nation status of the diverse First Nations of Canada. Similarly, the notions of "band" and "band membership" do not promote recognition of First Nations as nations.

Some alternative policy choices to revise the Indian status and band membership provisions under the current *Indian Act* could include:

1) Focus on eliminating residual sex discrimination in the existing system including addressing policy issues respecting: a) " unstated paternity"; b) discriminatory treatment of the children of Indian women who "married out" before 1985 with respect to Indian status and band membership; and c) discriminatory treatment of children of female "illegitimate" children with respect to band membership
2) Recognize two legal sources for Indian status entitlement by amending section 4.1 of the *Indian Act* so that: a) all persons with band membership as determined by bands would be deemed "Indians" for all provisions of the *Indian Act* and other federal purposes such as funding formulas; and b) persons without band membership would continue to be eligible for Indian

status according to federal law

3) Eliminate the concept of Indian status and use band membership/First Nation citizenship as the primary legal status for federal and constitutional matters relating to First Nations
4) Replace Indian status and band membership systems with First Nation citizenship codes as determined by First Nation laws

Historically, First Nation women have been subject to various forms of discrimination in regard to Indian status and band membership entitlement. Any initiative to examine law and policy relating to Indian status and band membership will require a gender-based analysis to address the various layers of discrimination to which women and children reinstated under the 1985 amendments to the *Indian Act* have been made subject—including discrimination based on sex, race, marital status and family status. To address concerns about the need to protect against new forms of sex discrimination in future laws, the *Canadian Human Rights Act* could be amended to ensure a fuller application to First Nation laws, pending the development of First Nation human rights codes consistent with international human rights norms. An interpretive clause to take account of the need to balance individual rights with collective Aboriginal, treaty and self-government rights would likely be required (as recommended by the *Canadian Human Rights Act* Review Panel). The addition of new responsibilities would require additional resources to ensure that access to the Commission's complaint process by First Nation people is more than theoretical. Locally accessible mechanisms—such as mediation, tribunals, and courts—to deal with conflicts over membership or citizenship decisions are also needed.

A policy shift respecting the concept of Indian status under the *Indian Act* (without affecting the different legal meaning of "Indian" under the *Constitution Act*, 1867 and *Constitution Act*, 1982) would require a fundamental rethinking of the role and purpose of federal legislation in this area. This may involve new legislation or a treaty process providing a procedure for recognizing First Nations without again contributing to the racialization of the diverse nations concerned. The same legislation could require that citizenship codes respect fundamental human rights.

There could be advantages to ultimately eliminating the federally created legal statuses of "Indian" and band membership and moving to recognize First Nation citizenship more broadly than it is now. Returning to the use of one primary legal status to identify beneficiaries of rights in relation to First Nation lands and self-government would reduce the multiple combinations and permutations of Indian status and band membership within the same families.

Overall, it is a fair conclusion to say that First Nation people as a whole are not well served by a legal category like Indian status, which has done much to contribute to the myth of a single biologically based North American Indian race. In addition, the growing demographic dissonance in Canada between those entitled to

Indian status and those entitled to band membership will be an increasing challenge for governments (federal, provincial, and First Nation) charged with delivering programs and services to First Nation people whether on- or off-reserves.

Endnotes

1 This paper is a revision and updating of an unpublished paper by the author entitled "First Nation Identities and Individual Equality Rights: A Discussion of Citizenship, Band Membership, and Indian Status," January 2003.

2 Issues relating to the inherent right of self-government are not discussed in any depth due to limitations of space.

3 For discussions on the social construction of "race", see Omi and Winant (1986), Jackson (1987, 3), Lock (1999, 83), Lopez (1994, 1), Powell (1997, 99), and Tallbear (2001 and 2000).

4 The term "racialization of identity" is used by Cheryl Harris in her article, "Whiteness as Property," p. 1709.

5 See also Turpel-Lafond (1997, 64–66) and Cornet (2003, 121–147) .

6 [1983] 1 S.C.R. 365 (S.C.C.).

7 [1999] 2 S.C.R. 203 (S.C.C.).

8 For detailed discussion of this issue see, Cornet (2003).

9 See also Backhouse (1999, 5) and Lock (1999); Margaret Lock also provides a review of the historical meanings of race and notes its early usage to determine matters of kinship and thus its concern with descent and genealogy, not outward physical appearance.

10 See for example, Backhouse (1999) or McCalla and Satzewich (2002, 25).

11 The demographic trends in regard to unstated paternity and some of the program and policy implications of these trends are examined by Clatworthy (2003) and Mann (2005).

12 However, there are opportunities to opt out of the *Indian Act* reserve land system and establish a First Nations–designed land management regime under the *First Nations Land Management Act*, S.C. 1999, C.24.

13 These observations are based on the codes reviewed in Gilbert (1996). Any of these membership codes since may have been modified.

14 Martha Minow is an American legal expert on the nature of equality and on issues of identity and equality rights. See in particular, Minow (1990).

15 Report of the Royal Commission on Aboriginal Peoples, Volume 5, Chapter 3.

16 *Corbière v. Canada*, [1999] S.C.J. No. 24, 2 S.C.R. 203, (1999) 173 D.L.R. (4th) 1, 239 N.R. 1, [1999] 3 C.N.L.R. 19 (S.C.C.).

17 Report of the Royal Commission on Aboriginal Peoples, Volume 5, Chapter 3.

18 [1997] 1 S.C.R. 358.

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