We Know Who We Are
and
We Lift Up Our People

Submission to:

AANDC on the Bill C-3 Exploratory Process Regarding First Nations Citizenship, Band Membership and Registration

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Killer Whale Design used as a watermark on front cover – *Designed by renowned Haida artist Bill Reid for the First Nations Summit in commemoration of the September 21, 1992 BC Treaty Commission Agreement signing ceremony held at the Squamish Nation Recreation Centre.*

We Know Who We Are *and* We Lift Up Our People*

This report has been prepared as part of the First Nations Summit's participation in Aboriginal Affairs and Northern Development Canada's (AANDC) "Exploratory Process" regarding Bill C-3. The Exploratory Process was announced at the time Bill C-3 was tabled in the federal Parliament to address concerns raised by First Nations and others about Bill C-3. The Exploratory Process is intended to examine and explore broader issues related to First Nations citizenship, Band Membership and registration as Status Indians.

BACKGROUND

Historically, as First Nations, we were self-determining and relied on and benefitted from the resources in our traditional territories to sustain ourselves. Our traditional laws and systems of governance applied to our lands and resources, our Citizens and to those passing through our territories. One of the key elements of our self-determination was the right of each First Nation to establish its own systems for recognizing and gaining citizenship. There was considerable diversity among these systems across Canada. While each First Nation established its own approach to citizenship, many of these systems were structured so that citizenship could be gained in a number of ways, such as birth, marriage, adoption and residency.

The colonization of North America brought about significant changes to our traditional systems of governance. In many parts of Canada, treaties were entered into between the Crown and First Nations, although this was not the case throughout most of British Columbia (BC). Throughout Canada, First Nations, including those with treaties, were placed on reserves and the federal government imposed a new system of governance through various statutes, most notably the *Indian Act*.

The *Indian Act* was established as a mechanism to administer "Indians" and "Lands reserved for the Indians." This retrograde legislation was not designed to promote and respect First Nations' systems of governance. In particular, the *Indian Act* membership provisions did not originally, and still do not today, reflect First Nations' own systems and laws related to citizenship and have consequently significantly interfered with the jurisdiction of First Nations over citizenship.

Canada's policies and statutes directed at Indians, such as the *Indian Act*, were unilaterally developed, assimilation-based initiatives and were principally designed to benefit and protect the interests of the Crown. Crown policies stemming from the colonial period and carrying through to the modern era appropriated First Nations' lands, territories and resources without our prior, free and informed consent. Further, federal laws were passed to ban the

** The title of this report refers to First Nations' traditional laws and systems for determining who are our Citizens and our obligation to support and lift up our people.*

potlatch system, thereby suppressing First Nations' self-determination and an essential component of many First Nations' political, legal, social and cultural structures.

Decolonization will require that Canada recognize that the definition and determination of "Indian" must be consistent with both emerging domestic (especially constitutional) and international law. In this regard, Canada must respect its nation-to-nation relationship with First Nations, which was recognized in the Royal Proclamation of 1763 (which referred to "the several Nations or Tribes of Indians"). Furthermore, the Supreme Court of Canada, in the Powley case, has already indicated that there is Aboriginal authority for defining identity. Canada may have authority over "Indians" under section 91(24) of the *Constitution Act, 1867*, but this must be read together with sections 25 and 35 of the *Constitution Act, 1982*, which recognize and affirm Aboriginal and treaty rights and Canada's international law obligations (as set out in international instruments such as the UN Declaration on the Rights of Indigenous Peoples, various instruments adopted by the Organization of American States and International Labour Organization Convention No. 169). Thus, Canada's recognition of First Nations' authority for determining citizenship and who is an Indian would in no way be inconsistent with section 91(24) when viewed in its larger constitutional and international law context.

Despite the Crown's attempts to subjugate First Nations, we have consistently asserted our inherent right to determine our own Citizens under our own laws. We have also voiced our deep concerns that federal policies and statutes, such as the *Indian Act*, do not provide us with suitable tools for effective governance. In order to address the lack of recognition of, and respect for, our Aboriginal and treaty rights, including the right to determine our Citizens, First Nations have sought out remedies through a number of avenues, including treaty negotiations and the pursuit of remedies in domestic and international courts and tribunals.

Although First Nations hoped that treaties concluded under the BC treaty negotiations process would provide formal recognition by the Crown of our right to determine our own citizenship, this has not been the case. The intractable position of the federal government in treaty negotiations is that, while a First Nation may determine its own Citizens, the federal government must continue to maintain sole control over the determination and registration of Status Indians. This poses tremendous funding challenges for First Nations attempting to negotiate treaties, as the federal government limits its funding responsibility to Status Indians and refuses to fund services for First Nations' Citizens who are not Status Indians. This and other related challenges are discussed in more detail below.

FIRST NATIONS SUMMIT ACTIVITIES

In order to obtain input from its constituents regarding issues related to First Nations citizenship, Band Membership and registration as Status Indians, the First Nations Summit hosted a number of sessions:

- an Open Forum on First Nations Citizenship (September 20, 2011);
- a Side Room Session - held during the First Nations Summit Chiefs' meeting (September 22, 2011);
- an Initial Focus Group Meeting (October 11, 2011);
- a First Nation Chief Negotiators' Forum on Citizenship (October 26, 2011); and
- a Second Focus Group Meeting (November 24, 2011).

In order to further help frame some of the issues and establish a common information base, the First Nations Summit prepared a backgrounder (attached as Appendix 2) that was distributed at all of the sessions. The First Nations

Summit also prepared a list of proposed definitions to assist in developing common ground regarding terminology, which was updated during the process. These documents were provided to participants in the First Nations Summit sessions along with background information regarding Bill C-3 and the Exploratory Process, examples of self-governing First Nations' membership/citizenship rules and research done by other organizations on the issues.

TERMINOLOGY

For the purposes of this report, the following terminology is used:

"**Band Membership**" means the membership of a Band as determined under rules adopted by:
(a) the Band pursuant to section 10 of the *Indian Act*; or
(b) AANDC under section 11 of the *Indian Act*, where the Band has not adopted its own rules for membership.

"**Citizen**" means an individual who is recognized as belonging to a First Nation under its citizenship rules adopted under its authority set out in a treaty or self-government agreement, or its inherent right of self-government. A Citizen need not be a Status Indian. Some modern treaties refer to Citizens as "beneficiaries".

"**Member**" means an individual who is on the Band Membership list of a Band. A Member need not be a Status Indian.

"**Non-Status Indian**" means an individual who is of First Nation ancestry but is not eligible to register as an Indian under the *Indian Act*.

"**Status Indian**" means an individual who is registered, or entitled to be registered, as an Indian on the federal Registrar of Indians under section 6 of the *Indian Act*. Not all Status Indians are Members of a Band.

LIST OF ISSUES AND RECOMMENDATIONS

As the First Nations Summit began to gather information and input from participants, a number of key issues emerged. The recommendations that follow are designed to address these issues.

Participants also noted their support for the following principles established by focus group participants in the 2008 AFN-INAC research initiative:

- Blood quantum cannot be the basis for defining membership;
- First Nations need to define their terminology: identity, citizenship, membership and Indian status;
- International law principles (e.g. *United Nations Declaration on the Rights of Indigenous Peoples*) can provide a guide for discussion of First Nations citizenship;
- Reforms must be consistent with and supportive of First Nations right to self-determination;
- Processes should be inclusive, gender sensitive, and linked to culture and traditions; and
- The federal government's role should be limited to providing support in rectifying the damage caused by their legislation, not redefining "Indian".

ISSUE #1

RECOGNITION OF JURISDICTION OVER CITIZENSHIP AND THE DETERMINATION OF INDIAN STATUS AS AN INHERENT GOVERNANCE RIGHT

Canada has unilaterally assumed and continues to retain control over who is entitled to membership in First Nations under the *Indian Act*.

Discussion

Canada's unilateral assumption and retention of control over membership in First Nations fails to recognize and respect its nation-to-nation relationship with First Nations and First Nations' right to self-determination.

From a First Nations perspective, identity is closely tied to ancestral lands and language and is informed by cultural and spiritual traditions, oral histories, traditional laws and complex, historic social structures and governing systems. It guides relationships within the community, as well as interactions with other nations. Collective identity forms the foundation of inherent governing systems. Exercising control over the act of defining identity is an important element in implementing First Nations' inherent right to self-determination.

Under section 35 of the *Constitution Act, 1982*, the Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed. This includes the inherent right of self-government. Control and jurisdiction over the determination of citizenship is a core self-government right, which must be recognized and respected by the Crown. First Nations must also support and legitimize one another's authority by recognizing and respecting each other's inherent authority and the mechanisms used by each First Nation to determine citizenship, and by engaging with one another on a nation-to-nation basis.

This right to self-determination is also recognized at the international level through key instruments such as the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). UNDRIP is the most comprehensive, universal international human rights instrument that addresses the rights of Indigenous peoples. It provides a detailed list of rights that constitute "the minimum standards for the survival, dignity and well-being of indigenous peoples of the world", elaborates on the economic, social, cultural, political, spiritual and environmental rights of Indigenous peoples and applies equally to male and female Indigenous individuals (Articles 3, 4, 5, 6, 43 and 44).

UNDRIP does not create "new" rights, but provides an interpretation of the human rights enshrined in other international human rights instruments as they apply to Indigenous peoples. In particular, it establishes that Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination (Article 2). Further, that Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture (Article 8).

Of particular relevance and significance is Article 33, which provides that Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. First Nations have raised concerns that Bill C-3 violates the above-referenced internationally-recognized principles.

Prior to 1985, Band Membership and registration as a Status Indian went hand-in-hand. An individual was automatically added to a Band's membership list if he or she was added to the Indian Register. This meant that Bands did not have the right to determine their own Band Membership.

The 1985 amendments to the *Indian Act* acknowledged the rights of Bands to determine their own Band Membership under section 10 of the *Indian Act*. However, not all First Nations operate under section 10. For Bands whose membership is still determined by AANDC under section 11 of the *Indian Act*, applicants may be added to the Band Membership list upon registration. For those Bands operating under section 11, Bill C-3 fails to address their need for additional resources to financially manage an influx of Status Indians.

Although section 10 of the *Indian Act* enables First Nations to assume control over developing and enforcing their own membership codes, such codes must be consistent with the procedures set out in the *Indian Act*. This requirement is a clear infringement of First Nations' Aboriginal rights.

Recommendation

Canada must recognize First Nations' inherent right to identify their Members/Citizens and determine their rights, benefits and responsibilities as Members/Citizens.

ISSUE #2

RECOGNITION OF JURISDICTION OVER CITIZENSHIP AND THE DETERMINATION OF INDIAN STATUS AS AN INHERENT GOVERNANCE RIGHT

Canada continues to retain control over who is entitled to citizenship in First Nations in the negotiation of modern treaties.

Discussion

In treaty negotiations, while First Nations are largely able to take control of their citizenship, Canada has nonetheless established a number of "bottom lines" in relation to eligibility and enrollment issues that are non-negotiable. In particular, Canada insists that First Nations establish an enrollment process and will not agree to First Nations automatically enrolling individuals on their current Band lists. Canada also requires that a First Nation accept all current Band members as Citizens regardless of whether they have ancestral ties to that First Nation, including individuals with no Aboriginal ancestry at all. This fails to respect that the First Nations with whom Canada is negotiating treaties have the authority to determine the Citizens of their communities to whom Canada will have obligations under these treaties. This also amounts to a continuing infringement of First Nations' constitutionally-protected aboriginal rights and the right to self-determination recognized under UNDRIP.

Recommendation

Canada's position in treaty negotiations on the issues of eligibility and enrollment must respect First Nations' inherent right to determine their own citizenship.

ISSUE #3

RECOGNITION OF JURISDICTION OVER CITIZENSHIP AND THE DETERMINATION OF INDIAN STATUS AS AN INHERENT GOVERNANCE RIGHT

Canada controls the determination of who is eligible to become a Status Indian under the *Indian Act*, even in the case of First Nations that have concluded treaties and self-government agreements.

Discussion

Since the earliest days of confederation and the first *Indian Act*, Canada has assumed full unilateral control over who is an "Indian".

As indicated above, prior to 1985, Band Membership and registration as a Status Indian went hand-in-hand. If a person was added to the Indian Register, that person was automatically added to the appropriate Band's membership list. However, after 1985, amendments were made to the *Indian Act* that recognized the rights of a Band to determine membership in some cases. Nevertheless, the point remains that AANDC still maintains control over entitlement to Status Indian registration. This has potentially significant funding implications for First Nations, which will be discussed in more detail below.

Since 1985, it has been possible for an individual to be an Indian while not being a Member of any Band. This highlights the extent to which the process for determining who is an Indian has become almost entirely de-linked from the concept of First Nations' nationhood and collective rights to determine identity. This is also symptomatic of an approach that values individual rights over collective ones.

Canada has remained steadfast in its approach to retaining control over who is eligible to become a Status Indian and has not altered it whatsoever in the context of membership code development, modern treaties or self-government agreements. For example, modern treaties provide First Nations with the opportunity to largely take control, and make laws in respect, of citizenship in the First Nation. However, the right of First Nations to confer citizenship is specifically stated to exclude the right to confer status or register an individual as a Status Indian under the *Indian Act*. The right to register individuals as Status Indians remains solely within the purview of the federal government. (See, for example, sections 48-50 of Chapter 16 – Governance of the *Tsawwassen Final Agreement* and 26.1.3 of the *Maa-nulth First Nations Final Agreement*.)

On a related note, research indicates that, in the not too distant future, many First Nations will not have any Status Indians left on their Band Membership lists. This amounts to a statutory form of extinguishment and raises the concern that reserves could revert to the provincial government if there are no Status Indians left on a Band Membership list. One First Nation explained that less than 1/4 of their Members will be able to pass Indian Status on to their children unless the other parent is also a Status Indian.

Recommendation

Canada must recognize First Nations' right to determine who is eligible to be registered as a Status Indian.

ISSUE #4

FEDERAL FUNDING

Canada only provides funding to First Nations under the *Indian Act* for Status Indians. Canada does not provide funding to a First Nation for Non-Status Indians who are Members of that First Nation.

Discussion

Many Non-Status Indians, especially those living on reserve, have limited or no access to basic services that other Canadians enjoy as they often "fall through the cracks" that exist because of the ongoing jurisdictional battle between the federal and provincial governments over responsibility for providing services to Non-Status Indians. If a Band attempts to provide, or make available, basic services to non-status individuals, they often do so at their own risk and cost. First Nations are concerned that they are left with three difficult options:

1. exclude individuals who are not Status Indians from becoming Members of the First Nation so as to not take on the unfunded liability of providing services to them;

2. allow Non-Status Indians to become Members, but provide them with more limited services than are provided to the Status Indian Members; or

3. allow Non-Status Indians to become Members and provide them with the same services as Members who are Status Indians and pay for these services from the First Nation's own source revenue or from funding that was only intended to fund services for Status Indians.

All of these options create situations where First Nations are at risk of being challenged under the *Canadian Charter of Rights and Freedoms*, leaving them in what can only be viewed as a "no win situation." Paying for services using a First Nation's own source revenue is not feasible for many, if not most, First Nations as they are struggling with poverty and do not have established, stable economies in their territories from which they derive a stream of own source revenues.

Recommendation

Canada must ensure that First Nations are provided with adequate funding to enable them to provide services to their Members who are Non-Status Indians. Canada must include all First Nations' Members in the calculation of federal funding to First Nations.

ISSUE #5

FEDERAL FUNDING

AANDC does not generally provide funding to a First Nation with a modern treaty for Citizens of that First Nation who are Non-Status Indians, even though it insists in treaty negotiations that these individuals be eligible for enrollment as Citizens under the treaty.

Discussion

Many of the issues raised under issue #4 also arise in a post-treaty context as the jurisdictional battle between the federal and provincial governments over funding Non-Status Indians living on treaty settlement lands continues.

Modern treaties generally provide that all Aboriginal people of a particular First Nation's ancestry will be eligible for citizenship in that First Nation. This has important implications for this discussion. In particular, as a result of the eligibility and enrollment process under treaties, the number of Citizens within First Nations with modern treaties will over time come to greatly exceed the number of individuals who are registered as Status Indians. However, the federal funding mandates generally rely only on the number of Status Indians living on treaty settlement lands to determine the amount of funding a First Nation will receive. Therefore, First Nations with modern treaties may find themselves with a large number of Citizens for whom they are responsible, but receive little or no funding. This will be particularly problematic for First Nations that are heavily reliant on federal funding.

Recommendation

Canada must ensure that First Nations with modern treaties are provided with adequate funding to enable them to provide services to their Citizens, including those who are Non-Status Indians and those who live off treaty settlement lands. Canada must include all First Nation Citizens, regardless of whether or not they are Status Indians, in the calculation of federal funding for First Nations with modern treaties.

ISSUE #6
SPECIFIC COMMENTS ON BILL C-3 AND ITS IMPLEMENTATION

Bill C-3 does not address many of the existing inequities in the process for determining who can become a Status Indian. It only addresses the concerns of individuals who are in the same situation as Sharon McIvor and her son by virtue of section 6(1)(c) of the *Indian Act*.

Discussion

Canada's current approach of amending the *Indian Act* to address only specific inequities that have been litigated is expensive, confrontational and non-productive. Furthermore, despite efforts to eliminate inequities, the effects of gender discrimination under the registration provisions of the *Indian Act* persist. First Nations, a number of organizations and Sharon McIvor herself have strenuously argued that Bill C-3 does not adequately address the full range of gender discrimination issues under the *Indian Act*. Bill C-3 does not even sufficiently address the source of discrimination identified by the British Columbia Court of Appeal. Further, the Bill does not address discriminatory aspects of the "second generation cut-off rule" enacted in 1985.

Bill C-3 operates to eliminate gender discrimination, but only for some individuals. For example, individuals who had an Indian grandmother, as opposed to an Indian grandfather continue to face discrimination by receiving a lesser form of or no Status. An individual born before 1985 who is descended from an Indian grandfather would be permitted to transmit status for one generation more than those descending from an Indian grandmother. Bill C-3 could therefore be improved by, for example, providing that a grandchild born before 1985 and descending from an Indian grandmother would receive the same entitlement to Status as a grandchild of a male grandparent born in the same period.

Recommendation

If Canada is unable to implement the far-reaching recommendations set out above under issues #1, 2 and 3 at this point in time, Canada must take a proactive approach and set out to address the remaining inequities in the Indian Act in a comprehensive manner. The inequities not addressed by Bill C-3 include:

(a) grandchildren born before 1985 and descending from an Indian grandmother still do not have the same entitlement to Status as grandchildren of a male grandparent born in the same period;

(b) grandchildren of Status Indians born before September 4, 1951 who are otherwise in the same position as Sharon McIvor and their descendants are not eligible to become Status Indians under this Bill;

(c) children in the same situation as Sharon McIvor, but whose mother did not marry their non-Indian father and therefore did not lose her status and their descendants are not eligible to become Status Indians under this Bill;

(d) children of an enfranchised parent or grandparent will not be eligible to become Status Indians under this Bill (even if their circumstances are otherwise the same as Ms. McIvor's later in their lives);

(e) children in the same situation as Sharon McIvor, but whose mother did not lose her status in marrying their non-Indian father (i.e. where her First Nation had a proclamation under section 12(1)(b)) and their descendants are not eligible to become Status Indians under this Bill;

(f) children who have one parent who is a Status Indian and one who is not are registered under section 6(2) and their children will not be eligible to become Status Indians unless the other parent is a Status Indian (this problem results from Bill C-31);

(g) women who are in the same position as the male plaintiff in the Martin case (who have a Status Indian father, non-Indian mother and whose parents were unmarried) regained their status under section 6(2), while the plaintiff Martin regained his status under section 6(1) of the Indian Act;

(h) children who have a parent who is an "American Indian" (as that parent is not a Status Indian) are not treated the same as children who have a parent who is a Status Indian under Canadian law;

(i) children with a Status Indian mother whose paternity is left "unstated" due to extenuating circumstances (e.g. rape, incest) or for other reasons are treated differently than those whose paternity is stated; and

(j) children and grandchildren of an involuntarily enfranchised individual (e.g. if the enfranchised person's mother married a non-Indian when he/she was a child; in cases where the Indian agent exercised his discretion to enfranchise individuals and delete them from the Band list they had been on) are not eligible to become Status Indians.

ISSUE #7
SPECIFIC COMMENTS ON BILL C-3 AND ITS IMPLEMENTATION

No funding has been provided to First Nations to assist them in implementing Bill C-3.

Discussion

Bill C-3 does not include provisions for additional resources for First Nations to address the influx of Status Indians. This is particularly troubling for First Nations whose Band Membership list is managed by AANDC under section 11 of the *Indian Act*. The lack of funding may result in some First Nations adopting more restrictive membership codes to prohibit the influx.

Recommendation

Canada must provide funding to First Nations to:

- *assist them in implementing Bill C-3. Funding is required to:*
- *address the increase in workload, recognizing that many of the membership-related functions require senior level focus; and*
- *enable Indian Registry Administrators (IRAs) to assist applicants in completing their applications, recognizing that IRAs are currently underfunded and do not receive adequate training; and*
- *support them in providing programs and services to newly-registered Status Indians (including housing, capital, infrastructure, education, health, etc.).*

ISSUE #8
SPECIFIC COMMENTS ON BILL C-3 AND ITS IMPLEMENTATION

AANDC has put the processing of many custom adoptions on hold. This includes applications that have been in the system for up to 10 years.

Discussion

We understand that AANDC based its decision to delay or put on hold the processing of custom adoptions on the understanding that many of these individuals may be eligible for Indian Status under Bill C-3. This, however, ignores the fact that under an adoption, these individuals would, in some cases, have a claim to Status under section 6(1) of the *Indian Act*. If these same individuals obtain their Status under Bill C-3, their claim to Status would only be under section 6(2).

Recommendation

Canada must proceed with the processing of all custom adoptions without further delay, particularly in the case of adoptions that took place before Bill C-3 was passed. The implementation of Bill C-3 should not be used as a rationale for delaying or halting the processing of custom adoptions. Further, regardless of whether an individual obtains Indian Status through custom adoption or as a result of registration under Bill C-3, individuals should receive the highest possible Indian Status (e.g. Status under section 6(1), where applicable).

ISSUE #9
STATUS INDIANS WITHOUT CANADIAN CITIZENSHIP OR PERMANENT RESIDENCE

Individuals who are born in the United States, but are eligible to be Status Indians, have the right to enter and remain in Canada, but cannot rely on their status to apply for permanent residence in Canada.

Discussion

There are a number of potential ramifications of being unable to apply for Canadian citizenship on the basis of being a member of a Canadian First Nation or holding Indian Status.

Individuals who are born in the United States, and are registered as Status Indians in Canada, have the right to live and work in Canada, however, their Indian Status or their citizenship within a First Nation in Canada is not a basis upon which those individuals may apply for permanent residency in Canada.

The combination of a foreign birth certificate and a lack of immigration documentation, such as a permanent residency card, causes difficulties with obtaining other government-issued identification, particularly if the individual's Indian Status card is lost, stolen or has expired. Without proper identification, carrying out basic activities and securing basic necessities becomes difficult (e.g. securing employment, opening a bank account, applying for government or education programs, travel).

Recommendation

The Immigration and Refugee Protection Act (Canada) *must be amended to allow Status Indians the automatic right to apply for and obtain permanent residence in Canada.*

ISSUE #10
ADMINISTRATIVE MATTERS

Funding is required to help reinvigorate and support the activities of the BC Indian Registry Association.

Discussion

The BC Indian Registry Association is the only organization of this type in Canada. It is uniquely placed to help First Nations address issues faced by First Nations in British Columbia as they transition from Bands under the *Indian Act* to self-governing First Nations under modern treaties. More than half of the First Nations in British Columbia are negotiating treaties and moving towards self-government. This has implications for those First Nations themselves, and also for neighbouring First Nations that are not engaged in treaty negotiations or are not close to concluding a treaty. This is because some of the Members of a neighbouring First Nation that has concluded a treaty may seek to transfer to those First Nations.

Recommendation

Canada must provide the BC Indian Registry Association with the funding required to assist it in supporting professional development, training and sharing best practices regarding administration of registration and First Nation Membership/ Citizenship lists and addressing issues of common concern.

ISSUE #11
ADMINISTRATIVE MATTERS

Funding provided by AANDC to First Nations to support the work of Indian Registry Administrators (IRAs)/membership clerks is inadequate to meet the workload and demands of the position.

Discussion

IRAs/membership clerks often lack the necessary funding to build capacity and skills to meet the on the job demands. Funding does not take into account the importance of the position, including the need for training to manage the database and to handle confidential, sensitive information. This lack of funding can lead to recruitment and retention challenges. These concerns are highlighted in a September 2010 AANDC report entitled the "Summative Evaluation of the Contributions Made to Indian Bands for the Registration Administration."

Funding levels also need to take into account the significant liabilities associated with the determination of membership.

Recommendation

Canada must provide the necessary funding to First Nations to enable them to properly fund the position of IRAs/membership clerk, including a dedicated budget to engage in proper training and capacity building activities. Further, the budget for this position should be determined by reference to what AANDC employees, who are carrying out similar duties, are paid. Funding should not be based on a per capita funding amount.

ISSUE #12
ADMINISTRATIVE MATTERS

Adoption records in some provinces are sealed and, in accordance with the laws of those provinces, may not be opened without the consent of both the birth parent(s) and the adoptee. This poses problems for adoptees who are seeking to be registered as Status Indians or apply for Band Membership.

Recommendation

Canada must direct, or strongly encourage, provincial governments to amend their legislation to allow adoption records to be opened where necessary to allow adoptees to obtain the information needed to be registered as Status Indians or apply for Band Membership.

ISSUE #13
QUESTIONS FOR AANDC

A number of issues have been raised by participants during the course of the Exploratory Process that require clarification from AANDC.

Discussion

The issues raised that require clarification from AANDC are as follows:

1. How does AANDC intend to address the funding requirements of BC First Nations with treaties in circumstances where there may be a significant increase in the number of their Citizens who are now Status Indians?

2. Will First Nations with Fiscal Financing Agreements (FFAs) or Comprehensive First Nation Funding Agreements (CFNFAs/ block funding agreements) be able to reopen their agreements to take into account the increase in the number of Status Indians in their communities under Bill C-3?

3. How does AANDC intend to address the following:

    (a) Can an individual with dual ancestry be registered as a Citizen under the treaty of First Nation "A" and the treaty of First Nation "B" at the same time?

    (b) Can an individual be registered as a Citizen under the treaty of First Nation "A" and as a Member of First Nation "C" (an *Indian Act* Band) at the same time?

    (c) If an individual was registered as a Citizen under the treaty of First Nation "A" and then transfers to First Nation "B", can First Nation "B" include that individual: (i) on its citizenship register; and (ii) in determining its membership numbers?

    (f) What categories of funding follow an individual when he or she transfers from First Nation "A" to First Nation "B"?

These issues will be set out in a letter from the First Nations Summit to AANDC.

Recommendation

AANDC must provide a prompt response to all of the issues set out in the First Nations Summit letter.

CONCLUSION

First Nations in BC have consistently asserted their inherent right to determine their own Citizens and called on the federal government to recognize and respect this right. This continues to be the fundamental challenge that needs to be addressed by the federal government. However, it is difficult, if not impossible, to entirely separate citizenship issues from Band Membership and the Status Indian registration process that has played such an important role in First Nations people's lives and, in some cases, woven itself into their identity and consciousness.

Canada has to date refused to address these issues in a comprehensive way that addresses First Nations' inherent right to determine their own Citizens and responds to First Nations' legitimate concerns about their very existence as their numbers are, through the operation of the *Indian Act*, progressively reduced. It has also ignored First Nations' equally grave concerns related to funding for their Members and would-be members who are Non-Status Indians. Instead, it has inadequately responded on a piecemeal basis to specific issues raised in litigation through initiatives such as Bill C-31 and Bill C-3.

First Nations in BC entered the treaty negotiations process with the hope and expectation that treaties would provide them with the opportunity to finally address these issues. However, while First Nations have been successful in obtaining recognition of their right to determine citizenship, Canada has imposed certain conditions (or bottom lines) regarding First Nations' citizenship determination and has retained full control over the determination and registration of Status Indians. Furthermore, Canada has failed to provide the necessary funding to enable First Nations to deal with the growing problem of financing the provision of services to an increasing number of Citizens who are Non-Status Indians.

In the end, we know who we are and it is our right to determine who are the Citizens of our nations. It is Canada's responsibility to recognize that right and provide us the necessary resources so we are not forced to discriminate among our Citizens.

APPENDIX 1
SUMMARY OF FIRST NATIONS SUMMIT RECOMMENDATIONS

In response to the issues set out in this report, the First Nations Summit is proposing the following recommendations:

RECOGNITION OF JURISDICTION OVER CITIZENSHIP AND THE DETERMINATION OF INDIAN STATUS AS AN INHERENT GOVERNANCE RIGHT

1. Canada must recognize that First Nations' inherent right to identify their Members/Citizens and determine their rights, benefits and responsibilities as Members/Citizens.

2. Canada's position in treaty negotiations on the issues of eligibility and enrollment must respect First Nations' inherent right to determine their own citizenship.

3. Canada must recognize First Nations' right to determine who is eligible to registered as a Status Indian.

FEDERAL FUNDING

4. Canada must ensure that First Nations are provided with adequate funding to enable them to provide services to their Members who are Non-Status Indians. Canada must include all First Nations' Members in the calculation of federal funding to First Nations.

5. Canada must ensure that First Nations with modern treaties are provided with adequate funding to enable them to provide services to their Citizens who are Non-Status Indians. Canada must include all First Nation Citizens, regardless of whether or not they are Status Indians, in the calculation of federal funding for First Nations with modern treaties.

SPECIFIC COMMENTS ON BILL C-3 AND ITS IMPLEMENTATION

6. If Canada is unable to implement the far-reaching recommendations set out above under issues #1, 2 and 3 at this point in time, Canada must take a proactive approach and set out to address the remaining inequities in the *Indian Act* in a comprehensive manner. The inequities not addressed by Bill C-3 include:

a) grandchildren born before 1985 and descending from an Indian grandmother still do not have the same entitlement to Status as grandchildren of a male grandparent born in the same period;

b) grandchildren of Status Indians born before September 4, 1951 who are otherwise in the same position as Sharon McIvor are not eligible to become Status Indians;

c) children in the same situation as Sharon McIvor, but whose mother did not marry their non-Indian father are not eligible to become Status Indians;

d) children of an enfranchised parent or grandparent will not be eligible to become Status Indians under Bill C-3 (even if their circumstances are otherwise the same as Ms. McIvor's later in their lives);

e) children in the same situation as Sharon McIvor, but whose mother did not lose her status in marrying their non-Indian father (where her First Nation had a proclamation under section 12(1)(b)) are not eligible to become Status Indians;

f) children who have one parent who is a Status Indian and one who is not are registered under section 6(2) and their children will not be eligible to become Status Indians;

g) women who are in the same position as the male plaintiff in the Martin case (who have a Status Indian father, non-Indian mother and whose parents were unmarried) regained their status under section 6(2), while the plaintiff Martin regained his under section 6(1) of the *Indian Act*;

h) children who have a parent who is an "American Indian" are not treated the same as children who have a parent who is a Status Indian under Canadian law;

i) children with a Status Indian mother whose paternity is left "unstated" due to extenuating circumstances (e.g. rape, incest) or for other reasons are treated differently than those whose paternity is stated; and

j) children and grandchildren of an involuntarily enfranchised individual (e.g. if the enfranchised person's mother married a non-Indian when he/she was a child; in cases where the Indian agent exercised his discretion to enfranchise individuals and delete them from the Band list they had been on) are not eligible to become Status Indians.

7. Canada must provide funding to First Nations to:

a) assist them in implementing Bill C-3. Funding is required to:

(i) address the increase in workload, recognizing that many of the membership-related functions require senior level focus; and

(ii) enable Indian Registry Administrators (IRAs) to assist applicants in completing their applications, recognizing that IRAs are currently underfunded and do not receive adequate training.

b) support them in providing programs and services to newly-registered Status Indians (including housing, capital, infrastructure, education, health, etc.).

8. Canada must proceed with the processing of all custom adoptions without further delay, particularly in the case of adoptions that took place before Bill C-3 was passed. The implementation of Bill C-3 should not be used as a rationale for delaying or halting the processing of custom adoptions. Further, regardless of whether an individual obtains Indian Status through custom adoption or as a result of registration under Bill C-3, individuals should receive the highest possible Indian Status (e.g. 6(1) status).

STATUS INDIANS WITHOUT CANADIAN CITIZENSHIP OR PERMANENT RESIDENCE

9. The *Immigration and Refugee Protection Act* (Canada) must be amended to allow Status Indians the automatic right to apply for and obtain permanent residence in Canada.

ADMINISTRATIVE MATTERS

10. Canada must provide the BC Indian Registry Association with the funding required to assist them in supporting professional development, training and sharing best practices regarding administration of registration and First Nation Membership/Citizenship lists and addressing issues of common concern.

11. Canada must provide the necessary funding to First Nations to enable them to properly fund the position of IRAs/membership clerk, including a dedicated budget to engage in proper training and capacity building activities. Further, the budget for this position should be determined by reference to what AANDC employees, who are carrying out similar duties, are paid. Funding should not be based on a per capita funding amount.

12. Canada must direct, or strongly encourage, provincial governments to amend their legislation to allow adoption records to be opened where necessary to allow adoptees to obtain the information needed to be registered as Status Indians or apply for Band Membership.

QUESTIONS FOR AANDC

13. AANDC must provide a prompt response to the following questions:

a) how does AANDC intend to address the funding requirements of BC First Nations with treaties in circumstances where there may be a significant increase in the number of their Citizens who are now Status Indians as a result of Bill C-3?

b) will First Nations with Fiscal Financing Agreements (FFAs) or Comprehensive First Nation Funding Agreements (CFNFAs/block funding agreements) be able to reopen their agreements to take into account the increase in the number of Status Indians in their communities under Bill C-3?

c) how does AANDC intend to address the following questions:

   (i) can an individual with dual ancestry be registered as a Citizen under the treaty of First Nation "A" and the treaty of First Nation "B" at the same time?

   (ii) can an individual be registered as a Citizen under the treaty of First Nation "A" and as a Member of First Nation "C" (an *Indian Act* Band) at the same time?

   (iii) if an individual was registered as a Citizen under the treaty of First Nation "A" and then transfers to First Nation "B", can First Nation "B" include that individual: (a) on its citizenship register; and (b) in determining its membership numbers?

   (iv) what categories of funding follow an individual when he or she transfers from First Nation "A" to First Nation "B"?

APPENDIX 2
BACKGROUNDER - SEPTEMBER 20, 2011
Indian Registration, Band Membership and Citizenship

The following provides some background information regarding Indian registration, Band membership and citizenship. It is largely based on the information provided in the document entitled *First Nations Registration (Status) and Membership Research Report*, prepared by the AFN-INAC Joint Technical Working Group (July 2008) and materials produced by Aboriginal Affairs and Northern Development Canada (AANDC).

PRE-CONTACT TO EARLY CONTACT

Prior to European contact, First Nations had their own systems for determining citizenship. There was considerable diversity among these systems across Canada. While each First Nation had established its own approach for recognizing and gaining citizenship, many of these systems were structured so that citizenship could be gained in a number of ways, such as birth, marriage, adoption and residency.

While early contact with European settlers had minimal impact on First Nations' concepts of citizenship, First Nations' systems were gradually impacted and displaced by colonial policies and systems aimed at assimilation.

Early colonial powers appear to have relied on First Nations criteria to determine definitions of "Indian" (e.g. birth, marriage, adoption, residency, self-identification, kinship, and community ties). Legal definitions of "Indian" began to appear in colonial legislation in 1850 based on residency on reserve. In 1857, the colonial concept of "enfranchisement" was introduced which permitted an Indian to "give up" his legal status as an Indian, and resulted in his wife and children losing their status as well. *The Gradual Enfranchisement Act* of 1869 was the first law to deny Indian status to an Indian woman who married a non-Indian male, as well as to her children.

FIRST INDIAN ACT, 1876

This enfranchisement provision was carried forward into the first *Indian Act* of 1876 and, over time, the definition of "Indian" became narrower. The consolidation of colonial laws and policy into the first *Indian Act* included a definition of "Indian" and statutory criteria for who could or could not register as an "Indian". This set in place the process by which some First Nations people remained "Indians", while others lost their status and existing rights. Federal "Indian" legislation,

including successive *Indian Act*s, introduced and solidified gender-based criteria within the definition of "Indian" based on patrilineal descent requirements. Under these gender-based and discriminatory rules, Indian women who married non-Indian men lost their status and their children were not entitled to be registered. In contrast, Indian men who married non-Indian women retained their status and their non-Indian spouse and children were entitled to be registered as Indians.

Under section 91(24) of the *Constitution Act, 1867*, the federal government had jurisdiction to legislate in relation to "Indians and Lands Reserved for Indians." Parliament consolidated existing legislation and policies dealing with Indians into the first *Indian Act* in 1876, which defined "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." Gender discrimination was built into the legislation through this definition and subsequent amendments continued and furthered the policy of enfranchisement, which became compulsory in a number of situations (e.g. enfranchisement was automatic where an Indian became a doctor, lawyer, Christian minister or earned a university degree).

From the first *Indian Act* to 1985, eligibility criteria for registration as an Indian coincided with Band Membership, and "status" or "registered" Indians were also Band Members, with rights under the *Indian Act* to live on reserve, vote for Band Council, share in Band monies, and own or inherit property on reserve.

1951 AMENDMENTS TO INDIAN ACT

Provisions of the *Indian Act* dealing with Indian registration and Band Membership remained virtually unchanged until 1951, when amendments were made to establish a central Indian registry and Office of the Indian Registrar and introduce federal control over registration through the Minister of Indian and Northern Affairs. As well, the 1951 Act further entrenched gender-based criteria in the definition of "Indian" and eligibility to be registered as an Indian, for example:

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

1985 AMENDMENTS TO THE INDIAN ACT – BILL C-31

In the 1980s, the Government of Canada faced growing pressure to remove the provisions of the *Indian Act* that had been criticized for discriminating against Indian women who married non-Indian men. These pressures included the adoption of the *Charter of Rights and Freedoms* as part of the *Constitution Act, 1982* (in particular section 15, which recognizes equal rights for women), mounting international pressure and the *Lovelace v. Canada* court decision.

Bill C-31 included the following amendments:

- 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.

- Elimination of enfranchisement. Indian people who had previously been voluntarily or involuntarily enfranchised could apply to have their status restored.

- Establishment of categories of registered Indians through sections 6(1) and 6(2) of the Act.

- Establishment of separate regimes to determine registration and membership in individual Bands.

- Option for Bands to assume control over the determination of membership through section 10 of the Act.

The main impetus for the 1985 amendments were 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 their membership.

However, many issues still remained unresolved and some new problems were introduced:

- *Continuing inequities in legislation:* The amendments resulted in a complicated array of categories of Indians and restrictions to registration, and residual gender-based discrimination. In particular, the operation of sections 6(1) and 6(2) resulted in the loss of status after two successive generations of parenting with non-Indian parents – known as the "second generation cut-off." Indians registered under section 6(2) have fewer rights than those under section 6(1) since they cannot pass on status to their child unless the child's other parent is also a registered Indian. There was residual gender-based discrimination where the children of brothers and sisters who married non-Indians prior to 1985 are treated differently for registration purposes. That is, the sister's children are registered as 6(2) and the brother's children as 6(1).

- *Demographic Implications:* Amendments resulted in approximately 114,000 registrations to 2002, with much of the growth occurring off-reserve. Research regarding the 1985 amendments suggests that 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 Band Membership and, in some communities the registered population will decline dramatically.

- *Program Funding and Community Cohesion Issues:* Status Indians living on- and off-reserve are eligible for non-insured health benefits and may apply for post-secondary assistance. For registered Indians living on reserve, the federal government provides funding for a number of programs and services (e.g. housing, K-12 education, health, social assistance). The increase in registered Indians after 1985 had major impacts on federal programming and expenditures, as well as for Band governments required to provide additional programs, facilities and services to newly reinstated individuals. Increases in funding to Band governments did not meet the needs created by the 1985 amendments.

- *Litigation against Federal Crown:* Issues such as the "second generation cut-off" rule have been significant sources of grievance and have led to increased litigation against the federal Crown. Many challenges have been in the form of *Charter* challenges, including the Supreme Court of Canada decision in McIvor, where the Court found that section 6 of the *Indian Act* unjustifiably infringed the equality provisions of the *Charter* in conferring Indian registration, insofar as it authorizes the differential treatment of Indian men and Indian women born prior to April 17, 1985 and of patrilineal and matrilineal descendants born prior to April 17, 1985.

MCIVOR V. CANADA, 2007

As set out above, from 1869 to 1985, an Indian woman who married a non-Indian man would lose her status as an Indian under the *Indian Act* and her children were not entitled to status. However, an Indian man who married a non-Indian woman would retain his status and his wife and children would gain status. Moreover, if a child's mother and paternal grandmother did not have a right to Indian status other than by virtue of having married Indian men, the child had status only up to the age of 21 (the Double Mother Rule).

Bill C-31 provided that Indian women who married non-Indian men (known as "marrying-out") would no longer lose their status as well as to restore status to those who had lost their status prior to 1985. The *Indian Act* was also amended to give the children and grandchildren of such marriages identical treatment under the legislation. The Double Mother Rule was abolished and replaced by a gender-neutral rule.

While these legislative amendments eliminated the existing distinctions for future marriages and children of those marriages, they did not do so retroactively. Therefore, distinctions between women and their descendants created prior to 1985 continue to this day. It is for this reason that Sharon McIvor brought her case before the British Columbia Supreme Court and the British Columbia Court of Appeal.

Sharon McIvor (an Indian woman who married a non-Indian man prior to April 17, 1985), and her son Jacob Grismer, asserted that the *Indian Act* discriminated against them on the basis of gender, contrary to section 15 of the *Canadian Charter*

of Rights and Freedoms. In particular, they alleged that they were unable to transmit status to Jacob Grismer's sons, born after April 17, 1985, even though his cousins would be entitled if their grandfather was an Indian.

On June 8, 2007, the British Columbia Supreme Court ruled that these distinctions were discriminatory and contrary to the *Charter*. In particular, the Court ruled that section 6 of the *Indian Act* has no effect to the extent that it authorizes the differential treatment of matrilineal and patrilineal descendants born prior to 1985 in conferring Indian status. Canada appealed this judgment.

On April 6, 2009, the British Columbia Court of Appeal agreed with the trial's judge's decision that section 6 of the *Indian Act* infringes Ms. McIvor and Mr. Grismer's right to equality under section 15 of the *Charter* and that the infringement is not justified by section 1 of the *Charter*. The decision, however, was reached on narrower grounds than those found by the trial judge. The Court of Appeal found that the unconstitutionality is not in relation to the descendants of all woman who lost status when "marrying-out" any time since 1869. Instead, the Court of Appeal ruled that the *Charter* violation was limited to the beneficial treatment of persons in the male line previously subject to the transitional provisions relating to the Double-Mother rule, which was introduced in 1951.

The Court of Appeal suspended the declaration of invalidity for 12 months, giving Canada until April 6, 2010 to amend the *Indian Act*. The Government of Canada did not appeal the decision and is addressing issues arising out of McIvor through Bill C-3 amendments to the *Indian Act* (see "Bill C-3 Overview").

OTHER ISSUES

From 1998 to 2001, the Assembly of First Nations conducted research with INAC through the "AFN-LTS INAC Joint Initiative for Policy Development" to address issues related to Indian registration and membership. Through this work, the following options for change were identified:

- Improve the Existing Delivery System (short term);
- Develop Co-Management Models (medium term); and
- Considerations Regarding Citizenship (long term).

These research initiatives also identified the following gaps in research and knowledge:

- Interplay between identity and governance, and the impacts on the ability of First Nations to determine their citizens.

- Kinship and identity issues, including the relationship between kinship and concepts of First Nations citizenship. Kinship is at the centre of identity and the *Indian Act* has had a tremendous impact through imposition of a colonial system that arbitrarily designated identity, and interfered with traditional systems of kinship, such as casting out the women with key roles in matrilineal societies, thereby upsetting the balance.

- 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, Indian Status, Band Membership and reserve residency.

- Issues relating to the Indian Status card (Secure Certificate of Indian Status).

Focus group participants in the AFN-INAC research initiatives identified the following principles:

- Blood quantum cannot be the basis for defining Membership.

- First Nations need to define their terminology: identity, citizenship, membership and Indian status.

- International law principles (e.g. *United Nations Declaration on the Rights of Indigenous Peoples*) can provide a guide for discussion of First Nations citizenship.

- Reforms must be consistent with 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 in rectifying the damage caused by their legislation, not redefining "Indian".

CITIZENSHIP IMPLICATIONS FOR TREATY NEGOTIATIONS

Modern-day treaties generally provide that all Aboriginal people of a particular First Nation's ancestry will be eligible for citizenship in that First Nation. This approach has important implications for this discussion. In particular, as a result of the eligibility and enrolment process under treaties, the number of citizens within First Nations with modern treaties will come to greatly exceed the number of individuals who are registered as Status Indians. However, the federal funding mandates generally rely on the number of Status Indians to determine the amount of funding a First Nation will receive. Therefore, First Nations with modern treaties that are heavily reliant on federal funding may find themselves with a large number of citizens for whom they are responsible, but receive little or no funding.

NEXT STEPS

Following the Open Forum on First Nations Citizenship on September 20, and the side room session at the First Nations Summit meeting on September 22, the First Nations Summit will be hosting a second Citizenship Forum for First Nations' Chief Negotiators to address these issues on October 19, 2011.

Based on input received from participants in the open Citizenship Forum on September 20, the side room session on September 22 and the Citizenship Forum with Chief Negotiators on October 26, the First Nations Summit will prepare a draft report. This draft report will be presented to the First Nations Summit Chiefs in Assembly at the November 30 to December 2 Summit meeting for review and consideration. The final report will be presented to AANDC in December 2011.

APPENDIX 3
FIRST NATIONS SUMMIT CITIZENSHIP MEETING SUMMARIES

FIRST NATIONS SUMMIT
OPEN FORUM ON FIRST NATIONS CITIZENSHIP
SEPTEMBER 20, 2011

I. MEETING DETAILS

Time: September 20, 2011 at 1:00 p.m.
Location: Chief Joe Mathias Centre, North Vancouver, BC
Number of People in attendance: 41
Meeting Chairs: Leah George-Wilson and Ray Harris (First Nations Summit Co-Chairs)

II. INTRODUCTION

This First Nations Summit (FNS) held an Open Forum on First Nations Citizenship. The FNS presented participants with a background package. There were several contextual and technical presentations made, opening remarks from the FNS and discussions loosely guided by focus questions relating to:

- Outstanding discrimination issues not addressed by Bill C-3;
- Challenges providing services to new registrants under Bill C-3;
- Challenges that arise when a First Nation has more members than there are status Indians in its community;
- Issues unique to BC First Nation treaty negotiations/implementation, including the possibility of a First Nation having a majority of citizens/members who are non-status; and
- Other issues and concerns.

III. SUMMARY OF KEY ISSUES RAISED

TECHNICAL AND ADMINISTRATIVE ISSUES

- There are different systems in different First Nations. Different administrative process leads to confusion in terms of registration and membership. It also leads to confusion on First Nation transfers.
- Concern about individuals being on more than one band list. In particular, there is concern that people coming from a treaty First Nation to a non-treaty First Nation are still on the old band list.
- There is concern that if a First Nation has not gone though the treaty process yet, but is planning on doing so, that the people who have transferred to their First Nation from a treaty First Nation, will not be able to bring their funding with them.
- There is a concern with people "double dipping" (getting benefits from more than one First Nation).

TREATY-RELATED ISSUES

- First Nations are concerned that they have to enroll members in the Treaty process through an affirmative action (no automatic enrollment, even for current First Nation members on the band list). This has led to some members of the First Nation being left out of the treaty process. They may not understand the repercussions of not taking part. For example, they may lose and be unable to access programs and services they were eligible for pre-Treaty.
- Even when a First Nation concludes a Treaty, "Indian-ness" (i.e. status as an Indian) is still managed under the rules of the *Indian Act*.

FINANCING AND LIABILITY ISSUES

- There are serious potential inequities between status and non-status members because the federal government will not provide funding to enable the First Nation to provide services to the non-status members.
- In terms of liability, First Nations are faced with either funding non-status Indians from their own financial resources (e.g. own source revenues aka OSR) or using federal transfers, which may not be permitted.
- First Nations are pleased to welcome back new members, but need more land, resources, and cash to pay for the increased population of their First Nation and to welcome those new members home. The federal government has not said they will fund the new registrants, which in turn creates problems in the First Nations. This causes community rifts

due to tighter funding and therefore reduced benefits and services for each member. There are also housing issues due to increased population and no increased land or social housing.

BELONGING AND IDENTITY ISSUES

- How do First Nations incorporate members who are not eligible to register as status Indians? How do we fund programs and services for these people and smooth out inequities?
- Fear that people not living on reserve and not registered will not feel wanted and valued by the community. Fear of assimilation into Western culture.
- Gender discrimination continues. For example, people who were enfranchised pre-1985 are treated better if they came from the male line. There are many other examples of ongoing gender discrimination.
- What about those registered Indians and members of First Nations who may not qualify as citizens under some Treaties being negotiated? Will AANDC, Health Canada, and Revenue Canada still recognize them as registered Indians and provide them with benefits?
- AANDC has put holds on Indian custom adoptions that have been in the process for 3-10 years.
- A First Nation cannot provide certain benefits to its members who reside in the US, even though these individuals can be eligible for First Nation membership. Travel across the Canada/US border can be difficult for members who are not Canadian citizens or permanent residents due to new passport and identification requirements.
- Traditional vs. modern ideas of citizenship. Modern day definitions of citizenship come into conflict with traditional views because of the issue of money and resources. In the past, you were born into your tribe, now you must prove it.

IV. EMERGING RECOMMENDATIONS

TECHNICAL AND ADMINISTRATIVE ISSUES

- Need to come to a universal terminology for words related to registration, band membership and citizenship.
- Need a simple model membership code.
- Need a written guideline/flow chart for all registration clerks to indicate a clear process for them to follow in order to avoid confusion.

- Need to model our registration systems after each other so as to make it easier to address issues such as transfers and to take a stronger united political stance on issues related to registration.

FINANCING AND LIABILITY ISSUES

- The federal government must be responsible for increasing funding to correspond with the increase in our membership due to Bill C-3.
- Must work to create a registration framework that will allow those people who are not eligible for registration to become eligible.
- First Nations must have complete control of citizenship.
- Lobby for a broader definition of who is an "Indian."

BELONGING AND IDENTITY ISSUES

- Make known the continuing unfairness of the definition of "Indian" under the *Indian Act*, even with the changes from Bill C-31 and Bill C-3.
- There continues to be gender discrimination for descendants down matriarchal lines (which is a particular issue in BC where many First Nations are matriarchal).
- There is discrimination against adopted persons.
- Encourage US residents to register on your band list even if they cannot receive benefits.
- Need to find a speedier way for US citizens who are status Indians to obtain travel documents to travel to and remain in their First Nation in Canada.
- Remember that we are who we are, and that we want to accept everyone who was previously enfranchised, or lost status due to the provisions of the *Indian Act* and the legacy of colonialism.

FIRST NATIONS SUMMIT
SIDE ROOM SESSION
SEPTEMBER 22, 2011

I. MEETING DETAILS

Date: September 22, 2011at 1:00 p.m.
Location: Chief Joe Mathias Centre, North Vancouver, BC
Number of People in Attendance: 10
Facilitator: Harold Tarbell

II. INTRODUCTION

This side room session was a follow-up to the Open Forum on First Nations Citizenship held Tuesday, September 20, 2011. It was conducted in a similar fashion with a background package being provided, opening remarks from the FNS and discussions loosely guided by focus questions relating to:

- Bill C-3 (outstanding issues and ability to provide services to new members);
- Issues unique to BC First Nations treaty negotiations/implementation, including the possibility of a First Nation having a majority of citizens who are non-status; and
- Other issues and concerns.

III. SUMMARY OF KEY ISSUES RAISED

TECHNICAL AND ADMINISTRATIVE ISSUES

- Every family has a story where historic events have resulted in some members being and others not being eligible or registered as status Indians.
- There is not a clear definition of Citizenship or Membership. There are no clear registration guidelines.
- Many membership codes were based on considerations of whether federal money would be available to fund services to non-status members. As a result, many membership codes exclude non-status individuals.
- There is a difference between Section 10 and Section 11 First Nations.

- There are an increasing number of people who are caught in the Second Generation Cut-off, and therefore, their grandchildren are not eligible for status.
- Bill C-3 does not fully address gender inequity. A lot was disregarded.
- Registration is based on the male line, not the female line. It is a European hereditary system, but most First Nations were matrilineal.
- There are many reasons why Individuals became enfranchised and lost their status; Bills C-31 and C-3 only cover some of the reasons. Selective enfranchisement creates divisions in communities.
- Current codes built under C-31 were tied to resources and status of the day and need now to be revisited.
- Length of process to get registered results in people giving up.
- There are continuing issues around accessing provincial adoption records (e.g. Manitoba) and information for children taken/lost in the past that affects status registration and treaty eligibility.

TREATY-RELATED ISSUES

- Discrepancy between what was expected in entering treaty negotiations, and what First Nations received.
- There was an underlying assumption that the First Nation would get control of membership and would be able to decide who was a member.

FINANCING AND LIABILITY ISSUES

- There was a legitimate expectation that the First Nation would get more funding with the new members, yet there is no new funding.
- First Nations cannot provide programs and services to non-registered Indians with money from the federal government. This could amount to non-compliance with their funding agreements.
- Leads to unequal treatment between status and non-status members. There is an issue of liability. Are First Nations at risk of being sued if their rules exclude individuals on the basis of status?
- First Nations are carrying the debt for the federal government by financing the treaty negotiation process.

- First Nations must be responsible for knowing who is on their band list, and there is serious concern about individuals "double dipping" by receiving benefits from more than one First Nation.

- The current policy and process continues to be based on an underlying patrilineal European system/orientation.

BELONGING AND IDENTITY ISSUES

- There is an alarming trend of decreasing numbers of Status Indians and concern that some First Nations will soon have no status members. At that point in time, the Indian Band could cease to exist and reserve lands could revert or default to the province. The governments have a responsibility to make sure this does not happen. They must maintain the identity of First Nations/Indigenous Peoples in Canada.

- Difficult to find and recruit all of the transients, the adopted, and those living in the United States. Many who are disconnected do not care about whether or not they are eligible and do not care about the future of their First Nation.

- There are disincentives for our citizens living or born in the United States to return home including border crossing challenges and on-reserve inheritance issues.

- A sense of belonging is sometimes more important than actual participation.

IV. EMERGING RECOMMENDATIONS

TECHNICAL AND ADMINISTRATIVE ISSUES

- It is important to continue to identify discrepancies in Bill C-3 that are discriminatory, and still unfairly exclude people from being eligible for registration.

- Create a guideline for administration concerning registration and band membership.

- Support the role of Local Registrars in improving the registration system and working with the leadership at community level.

FINANCING AND LIABILITY ISSUES

- First Nations must try to smooth out inequities between status and non-status members and address concerns about using federal and their own financial resources.

- First Nations in treaty negotiations need to try and focus on what we can give people with what we have. For example: fishing and hunting, even if we can't give tax exemption to non-status members.
- Find creative ways to address some of the funding shortages. For example, encourage more people to take out their own mortgages for housing, instead of waiting for social housing.
- Try to access/carve out provincial and territorial funding that is intended for Aboriginal people.
- Formalize informal "work arounds" in more advantageous ways for First Nations.
- Retain an economist to do an analysis about the implications and to dispel the myth of exorbitant cost implications for the federal government.

BELONGING AND IDENTITY ISSUES

- Continue to strengthen First Nations' ability to determine their own members.
- Must accommodate non-status members as much as possible.
- Consider developing a broad definition of First Nations Citizenship.
- Look at refocusing issues and process on rights as outlined by the *Charter* and the Constitution rather than primarily on the money issues.

TREATY-RELATED ISSUES

- Look into more creative, technology supported ways of finding people who have moved away from their First Nation territory, who are in the United States, or who have been adopted, and ensure they aware of being eligible to enroll for the treaty (i.e. create a website; social media/Facebook)

FIRST NATIONS SUMMIT FOCUS GROUP MEETING OCTOBER 11, 2011

I. MEETING DETAILS

Time: October 11, 2011 at 1:00 p.m.
Location: First Nations Summit Boardroom, West Vancouver, BC
Number of People in attendance: 10
Meeting Facilitator: Harold Tarbell

II. INTRODUCTION

The FNS convened a small-facilitated focus group as part of its activities within the "Exploratory Process" examining broader issues related to First Nations citizenship, band membership and registration pursuant to the *Gender Equity in Indian Registration Act* (Bill C-3).

The process for the focus group was generally consistent with the approach used in each of the other sessions (e.g. Summit open forum; Summit side room session; Chief Negotiators' forum). Following a welcoming to the territory and opening remarks by the FNS Executive Director, the Tsawwassen First Nation provided an overview of the membership process being utilized pursuant to their recent treaty. Participants were then engaged in a focused dialogue organized around focus questions, worksheets and emerging themes/issues.

For the focus group, there were three modifications made to the FNS exploratory process. First, rather than an open invitation to all Chiefs and Communities issued for the other events, specific invitations were sent to a select group of registry administrators and members of council from First Nations operating under the *Indian Act*, self-government agreements and modern treaties. Second, building on the discussions in the preceding 2 sessions, an issues and recommendations paper was prepared for review during the focus group. Third, a series of worksheets were prepared to generate additional and more specific input during the focus group relating to key messages, definitions and the issues and recommendations.

III. SUMMARY OF ISSUES

Following a welcome to the First Nation Summit offices and acknowledgement of the contributions the participants were making, the facilitator summarized the issues that had been identified in the September 20 and 22 meetings as follows:

BILL C-3

- Not all issues addressed within current amendments, particularly the continuing gender, enfranchisement and other forms of discrimination.
- No additional funding provided (see below).

BELONGING AND IDENTITY

- Members do not feel that they are being recognized or valued by the government (especially when they are non-status or registered under 6(2) and less able to pass on status).
- Some of those eligible under the *Indian Act* or treaty are not interested in or connected with their First Nation's identity.
- The process of membership/status is over-reliant on western culture/approaches/ways of doing things.
- Custom adoptions practiced in many communities to retain family. In some cases, community connections are not being respected.
- Different terminology being used by First Nations.

TREATY-SPECIFIC ISSUES

- These discussions generally arise in the treaty negotiations relating to eligibility and enrollment, voting (ratification) and financing agreements.
- After identifying all eligible 'beneficiaries', the enrollment in the treaty is not automatic and requires an affirmative step by each potential member.
- First Nations are finding that they are beginning to have more citizens/members than status Indians.
- There are a wide number of reasons, resource implications, and considerable uncertainty as to the integrity of the system when it comes to individuals who transfer in and out of treaty.
- When raised, these issues are simply treated as outside the mandate of federal negotiators.

FINANCIAL, FISCAL AND LIABILITY ISSUES

- Funding formulas regardless of process are based on registration/status.
- First Nations are under pressure to provide services to their non-status citizens/members.
- The situation has a great impact where First Nations use their own/non-AANDC revenues to provide programs and services to non-status members.
- Some have experienced challenges with providing services to members who live off-reserve or off treaty lands. Responsibility for members may have both territorial and jurisdictional limits.
- The actual cost of maintaining and operating registries (treaty and non-treaty) is not recognized or accommodated within current funding arrangements.
- There is concern that individuals may be accessing band programs and services from more than one First Nation or treaty group.
- There is concern that First Nations are being placed in a position of violating the human rights of its members when they are unable to provide program and service access to non-status members.

TECHNICAL/ADMINISTRATIVE ISSUES

- There are differences in the way registries are structured and managed in different First Nations.
- There are continuing inequities being experienced at the individual, family, community, First Nation, Tribal Council and Nation levels.

The participants noted that this summary appeared to touch on all the key issues.

IV. KEY MESSAGES

At the beginning and end of the session, participants were asked to identify a key message(s) they wanted to make sure the FNS addressed within the exploratory process. The key messages provided are attached below. In summary the facilitator would describe the overall key message as follows:

- First Nations want their decisions about who they recognize as their people to be accommodated in the federal definitions and funding formulas relating to rights, programs and services, and administrative (O&M) costs.

V. DEFINITIONS

An identified issue is the lack of consistent definitions for common terminology. As a result, participants were asked to comment on the working definitions being used by the FNS in this exploratory process. The full definitions (i.e. citizen; member; band member; registered status Indian; non status Indian) and comments provided are also attached below. In summary, some of the issues raised and suggestions made included:

- Recognition that not everyone uses the term "citizen" (even when definitions are similar).
- Concern about whether there should be dual enrollment between bands and First Nations communities coming under treaty (in a manner similar to "dual citizenship").
- Further emphasis that a direct connection be made between a First Nation's decisions on citizenship and related rights such as the link to federal registration/status, Canadian residency, and US/Canada immigration.

VI. EMERGING RECOMMENDATIONS

Based on the comments from the September 20 and 22 sessions, seven "Emerging Recommendations" were presented to the participants. They address: continuing inequities and funding limitations relating to Bill C-3; process and funding concerns relating to status registration under the *Indian Act* and treaty settlements; funding for support organizations/activities; and custom adoptions.

The "emerging recommendations" were well received and comments were made to strengthen them. In addition, a number of questions were also identified for further discussion:

- How Bill C-3 impacts multi-year funding agreements;
- The relationship of transfers out of treaty on financing (e.g. no $ with transfers; impact on other First Nations' future treaties); and
- Addressing the challenge of having more citizens than status Indians.

FIRST NATIONS SUMMIT
CHIEF NEGOTIATORS' FORUM ON CITIZENSHIP
OCTOBER 26, 2011

I. MEETING DETAILS

Time: October 26, 2011 at 1:00 p.m.
Location: Tsleil-Waututh Nation Recreation Centre, North Vancouver, BC
Number of People in Attendance: 27
Facilitator: Harold Tarbell

II. INTRODUCTION

The FNS convened a session of the Chief Negotiators' Forum in order to provide a spotlight on First Nations experiences related to citizenship within the BC treaty negotiations process. The session followed the general process used in all of the previous sessions including the package of background materials, welcoming remarks from the FNS, a Tsawwassen Nation presentation and participant dialogue on a draft list of nine issues and related emerging recommendations plus six questions of clarification. Tsawwassen highlighted the membership/ registration process pursuant to their treaty and the key challenges (i.e. funding and program and service access for members/status Indians; and members resident in/citizens in the US).

III. SUMMARY OF KEY ISSUES RAISED

TREATY-RELATED ISSUES

- Are there provisions for non-aboriginal spouses (not to become members, but estate transition periods for non-aboriginal spouses)?

- Emerging lawmaking and exercise of governance authority in this area (see BCAFN Governance Toolkit).

FINANCING AND LIABILITY

- First Nations have always advocated that funding should be based on membership, but the federal government disagreed. It was not open for discussion in treaty negotiations.

- During the 5 year period in which funding was made available to First Nations in connection with Bill C-31, funding amounts were based on Treasury Board guesstimates. This funding was greatly under utilized when available, but no longer available when it was needed. That approach may not be a sound basis for projecting costs under Bill C-3.

- Funding arrangements and land allocations should be based on membership, and status should be de-emphasized for administration in First Nations communities.

- The Crown needs to undergo a paradigm shift and understand what are the real/actual cost of programs and services compared to programs and services available to Canadians in general.

ADMINISTRATIVE AND TECHNICAL ISSUES

- If a person gained band membership through marriage and if their children had children with a non-First Nations person, are their natural and/or adopted children entitled to membership?

- Determining who is responsible for maintaining an up to date members list and the challenges associated with doing that.

- Continuing issues of enfranchisement and challenges/gaps involved in correcting the injustice of involuntary enfranchisement.

BELONGING AND IDENTITY ISSUES

- Continuing concerns about "dual citizenship/membership" both within Canada and between 'related communities' in the US.

- Gitxsan has had to overcome arguments that using matrilineal (traditional) methods of determining citizenship infringe the *Charter*.

- Intransigence of the federal government on addressing the status/membership connection.

- How adoption is being handled (or not dealt with) through treaty or by AANDC.

- The Gitxsan have had to overcome arguments that using matrilineal (traditional) methods of determining citizenship infringe the *Charter*.

- In 75 years, there will be no more status Indians. A lot of our nations will lose our land rights.

IV. EMERGING RECOMMENDATIONS

- Keep a careful eye on the link between adoption and status and citizenship/membership and the impact of the interplay between provincial law (legal foundation for adoption), the federal statute (status), and the first nation law (citizenship) relating to adoptions.

- Separate discussion of registration (status) under the *Indian Act* from the concept of citizenship and governance (i.e. constitution and laws) will enable First Nations to move forward without federal processes under the *Indian Act* being in the way.

- Examine creative ways to secure federal government compliance with existing domestic and internal constitutional and legal frameworks.

- Consider incorporating part of the *Charter* and the UN Declaration of Indigenous Rights in First Nations own constitutions.

- Consider developing an operational policy that under the *Charter* gives fair and equal treatment to all members of First Nations.

- Consider what changes may be needed to other pieces of federal legislation that infringe rights (e.g. the *Fisheries Act* and policies, etc.).

- Following this discussion, specific recommendations were made with respect to the document that had been circulated.

FIRST NATIONS SUMMIT
SECOND FOCUS GROUP MEETING
NOVEMBER 24, 2011

I. MEETING DETAILS

Time: November 24, 2011 at 12:00 pm
Location: First Nations Summit Boardroom (12th floor, 100 Park Royal)
Number of People in Attendance: 12
Facilitator: Harold Tarbell

II. INTRODUCTION

The second and final focus group was convened to examine two major items:

- Identify any outstanding 'broader' issues relating to citizenship, membership and registration; and
- Review and comment on the draft report on the FNS Exploratory Process prior to it being presented to the First Nations Summit Chiefs in Assembly on December 1, 2011.

III. SUMMARY OF KEY ISSUES RAISED

The one "big issue" that was identified was the importance of distinguishing between membership and registration and First Nations' broader goals of self-determination.

Another issue of concern was the need for Canada to move from its current "piecemeal litigation to legislation" approach in favour of a more comprehensive solution. The report identified the issues that need to be addressed either through a more comprehensive approach.

Participants also mentioned the importance of BC First Nations representation in any follow up process/mechanism that might be put in place by AANDC as a result of the Exploratory Process.

IV. REVIEW OF DRAFT REPORT

The participants were provided with a draft copy of the report entitled the "Draft Report to AANDC on the Bill C-3 Exploratory Process Regarding First Nations Citizenship, Band Membership and Registration". The Facilitator provided an overview of the draft report in PowerPoint and participants worked through the document for the remainder of the meeting.

Building on the input received in previous FNS exploratory sessions, the draft report reorganized the issues into 6 main categories:

- Recognition of Citizenship and Indian Status as an Inherent Governance Right
- Federal Funding
- Bill C-3 and its Implementation
- Status Indians without Canadian Citizenship/Permanent Residence
- Administrative Matters
- Questions for AANDC

The majority of the comments were about clarifying and strengthening the draft report. The input was generally focused on the following:

- The report must address the banning of the potlatch as an example of how Canada has oppressed BC First Nations ways of identifying citizens and community members.
- BC First Nations have consistently asserted the inherent right to determine their own citizens and there is an obligation on the federal crown to respect that right. This continues to be the broad issue that needs attention
- Exploration of citizenship difficult to separate from the *Indian Act* status registration process that has dominated First Nations people's lives.
- Canada needs to move from "piecemeal litigation to legislation" approach to comprehensive solutions.
- The BC treaty negotiations process was supposed to be the way in which First Nations' rights to determine their own citizens were to be recognized, respected and supported by the federal government, but the federal insistence on retaining control of determination of status and the link between status and funding has undermined that.
- This has contributed to a situation where individuals without any descent or connection to First Nations who have gained status are treated as having more rights than First Nations' members.
- The issues identified in the draft report need to be addressed through such a comprehensive approach.
- There was support for including the "Principles" identified in the background paper as part of the report.

- There was a request for some form of "transition" mechanism and the inclusion of IRAs in capacity building/training.

- The "Summative Evaluation of the Contributions Made to Indian Bands for the Registration Administration" (AANDC, September 2010) may offer helpful language for the recommendations about funding (as might the ongoing modernization of Indian registration initiative). The 2nd and 3rd recommendations in the executive summary of the Summative Evaluation talk about refocusing the program and addressing recruitment and retention issues. It also notes that only 38% of bands having assumed control of their membership lists. In addition, it refers to the need for "specific incentives and support … for IRAs to improve recruitment and treatment", the value of regional networks and the need to update the contribution formula.

- Participants also recommended that the title of the report be changed to something more meaningful.

V. CONCLUSION

The focus group confirmed that the draft report had captured the concerns and issues identified by the focus group members and the participants in the various FNS exploratory sessions. Based on the input received, the draft report is to be revised and presented to the FNS Chiefs in Assembly for discussion and direction.

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