



Assembly of First Nations

**FOCUS GROUP REPORT  
ON  
MEMBERSHIP AND INDIAN STATUS**

HELD:  
Ottawa  
March 17 & 18th, 2008

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## ***Introduction***

### **Overview**

Status and Membership have been of concern to First Nations for well over a century. Pre-confederation legislation and later, federal legislation began the incursion into First Nations' self-definitions. In its earliest usage, the term "Indian" referred the many nations in North America lumped together into a common description which was really only relevant to European governments. Early treaty documents use the term only in reference to a tribe<sup>1</sup>. As the term "Indian" evolved in Canadian law, it became closely associated with the *Indian Act*, though it had already been used in section 91(24) of the *British North America Act, 1876* to describe the federal legislative power over "Indians and lands reserved for the Indians." It is also used in section 35 of the *Constitution Act, 1982* where "Aboriginal peoples of Canada" are defined as the Indian, Inuit and Métis peoples of Canada.<sup>2</sup> It has thus had various meanings under Canadian law.

Until 1985, Indian status was defined in relation to one's husband or father. As such, until the 1985 *Indian Act* amendments (Bill C-31), Indian women lost their status and band membership upon marriage to a non-status man and women gained Indian status and band membership upon marriage.

In 1985, the *Indian Act* was amended to comply with the Charter of Rights and Freedoms sexual equality provision, reinstating status and band membership to women who had lost it due to marriage, and conferring status on her children. While a person could never lose his/her status after the amendment, he/she only passes along the right to Indian status if he/she is registered under section 6(1). A person registered under section 6(2) can only pass along Indian status if the child's other parent is registered under this provision or section 6(1). The amendment separated status from band membership, maintaining the right of the federal government to define Indians, while enabling bands to enact membership codes, thereby controlling their membership. Indian women and men have the same ability to confer status, so in both cases their descendants face the possibility of losing Indian status depending on what section their parent is registered under. The

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<sup>1</sup> For instance, the Preconfederation Treaties signed in 1760 to the LaHave Tribe of Indians at Halifax.

<sup>2</sup> *Constitution Act, 1982* section 35(2)

implication for many communities is a sharp decline in their status Indian population within the upcoming decades.

As this was being brought to light, the status and membership provisions of the *Indian Act* were being subjected to court challenges. Most prominently, in the recent *McIvor* decision,<sup>3</sup> the British Columbia Supreme Court found that the membership and status provisions of the *Indian Act* contravened the guarantee of equality in section 15 of the *Canadian Charter of Rights and Freedoms*.

With these growing pressures, in November 2007, the AFN drew up a plan to address issues related to membership and Indian status identified by various prior AFN resolutions and brought before the courts in the *McIvor* decision. The proposal outlined the following activities for the 2007/08 fiscal year:

*January 2008*

- Jointly identify the current state of research and potential gaps, to develop and effectively communicate a full understanding of current reality; to examine interests and positions of parties;

*February 2008*

- Jointly discuss and develop a plan for First Nations engagement
- Coordination with the Recognition and Implementation of First Nation governments (RIFNG) Strategy Committee to ensure consistency ;

*March 2008*

- Development of a First Nations action plan to respond to First Nation mandate and direction (through resolution)
- Organizing, planning and hosting a small national work-shop on these matters;

In December 2007, the Special Chief's Assembly Resolution 40/2007 entitled "Recognition of First Nations Right to Determine Citizenship was adopted by consensus. The resolution directed the formation of an AFN National Citizenship Working Group to

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<sup>3</sup> *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827. Available on-line at <http://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc827/2007bcsc827.html>.

research policy and options for legislative changes in order to prevent the loss of status through the section 6 status provisions of the *Indian Act*.

## **Focus Group Participants**

On March 17 and 18th 2007, the Assembly of First Nations brought together members of the AFN Elder's, Youth and Women's Councils, as well as representatives from the National Association of Friendship Centres for a two day focus group dealing with membership, citizenship, status and identity. The following is a report on the outcome of those discussions.

## **Themes:**

The focus group agenda was divided into two key themes covered over the course of the two days in which participants were offered the opportunity to discuss the issue of status and membership in the context of the past as well as the future.

The themes, entitled:

1. Looking Back: Furthering Our Awareness and Understanding; and
2. Looking Forward: Developing a Plan

These themes focused discussions on the issue of identity at an individual and community level as it has evolved over time, and the contemplated approaches to change as First Nations individually and collectively reassert a more active role in the evolution of their identity.

Discussions were conducted in both a plenary setting as well as in facilitated small groups. Roger Jones moderated the proceedings and facilitated a group. Small group discussions were also facilitated by Wendy Cornet, Marie Henry Frawley, and Tonio Sadik. For purposes of this report, comments are only attributed to speakers where there is a specific reason to note them (ie. where the point made provides a situational example) or where they are quoted directly to illustrate a specific point. This is therefore not a record of proceedings, but could more accurately be described as a summary of the input, observations, and remarks of participants.

## ***Day 1 Proceedings - Looking Back: Furthering Our Awareness and Understanding***

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

Elder Elmer Couchene  
Saughehne First Nation

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

Roger Jones and Jennifer Brennan explained some background to this meeting, discussing the AFN resolution and previous work of the AFN on membership and status, including the LTS Initiative and former Minister Robert Nault's First Nations Governance Act proposal. They indicated that the theme for this focus group discussion is "identity" rather than "Indian status and membership," terms that are associated with a negative history that was largely outside of First Nations' control. This meeting was intended to look beyond the lines drawn by the anarchistic ideology of the *Indian Act*, so participants can consider how First Nations would look without the limitations imposed by that legislation.

The discussion commenced with a statement read on behalf of the Elders' Council, after which participants were asked to discuss the topic of Identity by reflecting on their own identity and how it may differ from that of your grandparents and that of your grandchildren. The statement (below) is a summary of the key messages from the TriCouncil meeting that was held in July 2007 between the three AFN Councils,

representing Elders', Youth and Women. It outlines the advisory role that the Councils play within the AFN, providing guidance grounded in the broader First Nations family. It also underlines the commitment of the Councils to work collaboratively in the cooperative spirit of family when offering counsel to the AFN Executive and Chiefs on matters such as identity.

*Key Messages from the TriCouncil Meeting, July 9, 2007*

*Family is the shared foundation, as well as the shared focus, of the AFN Elders, Youth and Women's Councils. The Councils will provide advice and guidance to the AFN Executive and Chiefs-in-Assembly on how our collective voice can nurture and support First Nations families. Family is understood in the context of our historic relationships as First Nations peoples, extending beyond borders and interconnected by the Creator and our shared environment.*

*The Councils will develop strong communications, facilitated by the AFN Secretariat, to pursue activities in solidarity, building on the success of the National Day of Action. The Councils will promote a balance between celebrating our successes and honoring our resiliency as Nations, and identifying and creating strategies to address our hardships and challenges.*

*The Councils have committed to working collaboratively to honor the historic and contemporary roles of Elders, Women and Youth in First Nations*

## **A Growing Awareness**

Participants expressed relief that the AFN is seeking to address the issue of identity, status and membership. The United Anishnaabeg Councils indicated that they had become aware of the issue of a declining trend in status and membership in the context of self-government negotiations. It alarmed them that, like them, most First Nations were likely not aware of the long-term consequences of the *Indian Act* status and membership provisions. At a conference held in Toronto, they had seen a computer model demonstrating how in a number of communities, the membership code and status provisions were causing a quick decline in the population. Some would have no status members left in as few as thirty years, and, in time, a number would have no members left.

It was observed that awareness is, however, growing. The Union of BC Indian Chiefs has formed a Working Group on the issue, and hopes to work with the AFN Working Group to build on the principles in the *Tsilhqot'in Nation*<sup>4</sup> (also referred to as *Xeni Gwet'in*) court decision (affirming aboriginal rights in B.C., and limiting the government's ability to interfere with the exercise of those rights.)

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

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

### **Language, Culture, Tradition and Identity**

In discussion the concept of First Nations identity, many participants noted the importance of culture and traditions. This arose frequently throughout the meeting. As they introduced themselves, some participants referred to the degree to which identity has been altered over the past century, not just by legislation, but through such subtle means as the renaming of First Nations people - changing traditional names, or translating traditional names into English, robbing them of their real meaning, and thereby erasing

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<sup>4</sup> *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700



part of their identity. Some participants noted that European naming also replaced the ceremony attached to traditional naming, undermining community acknowledgment of a child's connectedness to the First Nation.

Participants considered the loss of language to be a component in loss of identity, robbing First Nations of their ability to self-identify; an ability which reflected their inherent capacity to distinguish themselves as a nation from others. Individuals from a specific First Nation had a work in their language meaning "the People,<sup>5</sup>" which differentiate them from people of other nations. One group noted that the First Nations language users could not think of words in their language for "Indian" or "citizen". They could, however, identify words that expressed one's relationship to others in the community, and other words that identified one's status within the community.

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

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

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

### **The importance of Kinship**

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

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<sup>5</sup> ie. Anishnawbe, On-Kwe-On-Kwe, etc.

interfered with the traditional mechanisms of kinship. It cast out the women who were the Clan Mothers with key roles in matrilineal societies, thereby upsetting the balance.

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

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

### **Collective and Individual Identity**

Focus Group participants agreed that identity is both individual and collective in nature. However, the collective identity is the nation and individuals are within it. Identity flows through the ties between individuals. It exceeds the reserve boundaries and the definition set out in the *Indian Act*. It is maintained by through stories and common history. Participants emphasized the need for First Nations to understand their history as a means of knowing who they are. Because the more recent history (i.e. displacement, poverty, residential schools) taught many people to be ashamed of their identity, a number of participants identified a need for First Nations people to become the authors of their own history and stories. They express the need for First Nations and non-First Nations people to understand First Nations history before the arrival of Europeans. Some felt that First Nations need to reach back to the pre-contact state of mind, so people are in touch with the teachings of the old people. In that way, First Nations people could reconnect with their collective identity without the divisions created by the *Indian Act*.

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

How we came into existence on this continent is described three creation stories. These stories were handed down to us, but when the Newcomers came- they brought a new “creation story” – the one in the Bible - it was very costly to our people. The third Creation story is called the “*Indian Act*” which had the power to create or un-create people. Our responsibility is to give our people back the first Creation Story... These stories are the instructions that we received from the Creator, but we have been brainwashed into believing the Second story, through residential schools... the third creation story was created by the Legislation.

Elder Participant

## Political Relationships

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

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

relationship with Canada.

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

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

## ***Day 2 Proceedings - Looking Forward: Developing a Plan***

Following a brief summary of the preceding day's outcomes, Roger Jones introduced the topic for Day 2, "Change" by posing the question to be addressed in the breakout groups: "What is needed to reform existing systems relating to band membership, status, citizenship, and/or the *Indian Act*?"

### **Principles for Change**

Focus Group participants were in agreement with the following principles:

- Blood Quantum cannot be the basis for defining membership;
- First Nations need to define their terminology – identity, citizenship, membership, Indian status;
- The principles of international law (the UN Declaration on the Rights of Indigenous Peoples) can provide a guide for discussion of First Nations citizenship;
- Reforms must be consistent and supportive of First Nations right to self-determination;
- Processes should be inclusive, gender sensitive, and linked to culture and traditions
- The federal government's role should be limited to providing support to First

Nations in rectifying the damage caused by their legislation, not redefining “Indians”;

### **Grand Council of Elders Gathering**

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

In order for the voices of Elders from all nations to be heard, a National Gathering of Elders should be convened at a sacred site to reaffirm the traditional role of Elders and provide a focal point for change.

Such a gathering would resemble traditional Council of nations, following the oral tradition, the main purpose to consider what First Nations are facing and to draw attention that change is coming. Elders can draw attention to the need to make the changes. This is the way First Nations have been given and it can start of healing of First Nations.

The following were identified as initiatives that the focus group participants identified as areas where the AFN could facilitate change:

### **Independent Conflict Resolution Mechanisms**

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

### **Educate Government**

Participants observed that senior government officials, Members of Parliament; Political Parties; Standing Committees, Human Rights Commissions, the Auditor General and specific caucuses/ political organizations need to be educated on these issues from a First Nations perspective. This is part of their responsibility for maintaining the relationship

with First Nations. The AFN should seek to engage these groups for the purpose of educating them on the First Nations perspective. Participants felt that the federal government must be held accountable for its role in actively attempting to terminate First Nations through unjust laws. They recommended that the AFN confront the federal government and challenge them to assume responsibility by taking steps to mitigate the damages.

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

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

### **Educate First Nations**

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

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

### **On-Reserve/Off-Reserve Issues**

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

## ***Matters for Internal Consideration***

### **Consensus Point**

First Nations need to identify their consensus point (i.e. UN Declaration) so that they can work together in a unified manner. They could make use of the courts by developing a test case or explore options for more fundamental challenge.

### **Funding**

Focus group participants identified funding for programs and services as a major concern, particularly when it is status and residency based. The federal government is likely to continue to cut back on what it considers discretionary funding to First Nations. Despite this, focus group participants did not consider this a sound basis for citizenship. However, knowing that funding will continue to be an obstacle, the AFN may wish to explore and develop options for alternative funding arrangements ie. treaty based transfer, legislative based health, education, etc.) that may be available to First Nations.

Some focus group participants also anticipate the need to raise funds for potential litigation. Although in the past test case funding was available for such purposes, this funding option was revoked leaving First Nations to fund such cases on their own.

### **Preparation stage: Identify and Communicate the Issue**

Participants recommended that the AFN engage in an education process aimed at individuals as well as First Nations leadership, for the purpose of explaining the impacts of existing system. Communication materials should be developed using identity as the basis for discussion and presenting various options, including the pros and cons. Background materials should provide a review of such things as “individual” & “collective rights.” Where possible, communities should have access to any software tools available that may assist them in evaluating their circumstances.

Communication efforts should be aimed at encouraging off-reserve participation. Tools such as the internet could reach an otherwise disparate group off – reserve and youth. The AFN can build on materials developed through the LTS Joint Initiative. Background information on population statistics and funding should be developed, as well as federal policies that create or aggravate existing arbitrarily created divisions. Timeframes can be highlighted by statistical information and expected rate of change.

## **Areas of Research**

A number of research areas were identified by participants to inform First Nations policy including: investigating the consequences of the enfranchisement of individuals; incidents of administrative errors in the federal registration system; legal precedents recognizing a community authority to define own people; evidence of Canada's fiscal motives in relation to the depletion of First Nations land, resources and population; policy considerations that First Nations may refer to in relation to citizenship laws; policies and powers relating to the creation of new bands vs addition-to- reserve lands; International precedents such as the return law of Israel – based on descent; technologies to share research; potential linkages to losses of children through residential schools, child welfare, etc.

## **Educate the First Nations' Community**

Participants saw community education as key, since many people consider the *Indian Act* to be the basis for rights and entitlements. In order to encourage a shift in thinking, the framework needs to change, including terminology such as identity vs membership;status. The issue can be better characterized in the context of jurisdiction and control over who your people are; reclaiming the right to self-determination as preserved in the treaties or within such other contexts as comprehensive claims, treaty or self-government negotiations.

Participants identified a need for funding for First Nations to address this issue at a local and nation level. The involvement of leadership at community; local, regional, and national levels is key. In many instance, local officials, such as membership clerks, will be excellent resources and can provide leaders with the necessary information to project the future population declines.

Regional Conferences could be used to draw attention to the issues and provide information.

## **PROCESS : AFN Working Group**

Participants suggested that the AFN Working Group established by AFN Resolution of 2007 be made up of the Councils with a mandate to develop and implement a range of



strategies and activities to respond to *MacIvor*. This would include public relations strategies to engage allies outside the First Nations community who could assist in fund-raising. Participants suggested that First Nations could partner with universities and academic bodies to undertake research studies.

They also recommended that AFN utilize the various UN human rights instruments including International Convention on Civil & Political Rights, the UN Convention on Rights of Child, UN Special Rapporteur, and other UN mechanisms.

Because of the sensitivity of this subject matter, focus group participants were concerned about the disclosure of strategies, particularly those pertaining to potential litigation. While they were sensitive to the need for transparency & accountability to First Nations people, this must be balanced against the need for strategic planning.

### **Capacity**

Participants felt that there was a need to address the diversity of capacity needs that exist within First Nations. They also felt it was important to allow for information sharing between and among First Nations, suggesting that internet technology would be useful.

### **Conclusions**

Participants were offered a final opportunity to comment on the meeting. NAFC representatives thanked AFN for inviting their involvement; a member of the AFN Women's Council provided a brief perspective on the need to maintain a connection to treaty and tradition; Chief from Alderville expressed satisfaction that the issue is being addressed within AFN.

### **Next Steps:**

Tonio Sadik provided a summary of anticipated next steps as follows:

1. Participants will review report.
2. Workplan will be prepared for the next fiscal year, including (subject to funding);
3. work with First Nations; youth and communities; ;
4. regional dialogue on these issues;
5. community and regional levels discussion;

6. Formation of a coordinating committee to spearhead the work;
7. Report to AGA in Quebec; NAFC; and regional assemblies; (other considerations welcome).

Elder Couchene lowered the fire and the meeting was closed.