DETERMINATION OF INDIAN BAND MEMBERSHIP: AN EXAMINATION OF POLITICAL WILL

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ABSTRACT/RESUME

The concept of Aboriginal citizenship is examined on the basis of three general principles: self-determination, culture and racial preservation. In order for Indian Nations to decide membership to a particular society, Bands must priorize these principles and incorporate them into their own codes of membership. The author suggests that First Nation control of Band membership should be based on implied self-determination, and on blood quantum and desire to practice membership values.

On examine le concept de la citoyenneté aborigine suivant trois prémisses générales: autodétermination, conservation de la culture et de la race. Pour que les Nations autochtones choisissent l'association avec une société particulière, les Bandes doivent établir leurs priorités suivant les prémisses, et incorporer ces prémisses dans leur propre code de conduite. L'auteur suggére que le contrôle par la Première Nation de l'association avec une bande soit basé sur l'autodétermination sous-entendue, et sur les rapports de sang et le désir de maintenir les valeurs de l'association.

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INTRODUCTION

Simply stated, the objective of the following is to examine the implications of Bill C-31 on Indian reserves in Canada, with respect to Band Control of Band Membership. Since the creation of the Indian Act in 1868, the Federal Government of Canada has consistently imposed its own terms and conditions upon the Indian communities by defining those factors which comprise "Indianness". As a result, only those individuals who satisfy the criteria as set out by the Federal Government are given legal recognition as Indian persons. As a direct result of this Act, over 22,000 individuals have lost status and Band membership through specific sections that address the issue of "persons entitled (and not entitled) to be registered" under the Indian Act.

Indian and Inuit Nations, the original Aboriginal peoples of Canada, have lived in distinct, organized societies under their own systems of law since time immemorial (Hatfield, 1984:1). In their quest to regain the sovereignty that Indians surrendered to European colonizers, the Aboriginal peoples must introduce the Aboriginal concept of law based on custom and tradition, a concept which includes both common and custom law. Historically, the Canadian constitutional structure has continually, intentionally and strategically refused to substantiate and recognize Aboriginal law.1 Aboriginal peoples have continually argued that the Canadian legal and political system is, in some critical respect, inappropriately applied and destructive to their communities and traditions. Up until now, one of the most destructive Federal Government policies has been the refusal to recognize the authority of Aboriginal Governments to determine citizenship criteria. The situation has resulted in the imposition of Band membership criteria which are based on Federal standards under the existing Indian Act. In other words, the existing process has been akin to registration through administrative procedure, as opposed to anything related to Aboriginal citizenship. Simplistically, this type of determination of Indian status (i.e., registration) is not unlike the process of registering at a university or college - if one meets specific requirements/criteria, then there is no alternative but to grant admission.

This paper will examine the concept of Aboriginal (Indian and Inuit) citizenship (membership) within the context of legislation passed by Parliament (Bill C-31, 1985), which is designed to ensure sexual equality in the Indian Act and provide for Indian First Nation control of Band membership. This paper will not take up the current debate examining the notion (Indian/Inuit) of self-government through present constitutional discussion and negotiation. Nor will this paper deal with the important debate within Indian communities as to whether changes to the Indian Act reflect gender equality (Gibbins, 1984:6). An examination of this issue is beyond the scope of this paper but should be addressed in the near future. Rather, this paper is written with the understanding that Indian First Nation control of its membership will be secured by all 579 Indian Bands and that the determination of specific membership criteria rests with the local Band. I will, therefore, examine three general principles that Indian First Nations must address in the establishment of their

membership codes: (1) Self-determination, (2) Culture, and (3) Racial Preservation.

BACKGROUND

The Federal Government estimates that approximately 24,000 living persons have lost their status as a result of sexual discrimination and approximately 2,700 through so-called voluntary enfranchisement. It is also estimated that these two groups have approximately 52,000 living children.[2] All of the individuals mentioned above are eligible for application for registration. Under this recent legislation (Bill C-51) those persons losing status and Band membership through sexual discrimination and unfair enfranchisement (roughly 26,700 people) are entitled to automatic reinstatement of Band Lists. In addition, those persons entitled to be in the Indian Register/Band List mainrained by the Department of Indian Affairs *must* apply for inclusion by virtue of section 5(s) and 9(5) of the Act.[3]

Also contained within amendments to the Indian Act is the possibility that the children of such persons mentioned above (estimated at 52,000) will be given Band membership only if the Band membership codes and rules are satisfied. Another overriding consideration is in the event that Bands cannot or do not take control of their membership, then the children in question would be given Band membership two years after royal assent of Bill C-31. For purposes of this paper, the writer intends to deal specifically with the children of persons directly affected by the Act and their application for membership.

SELF-DETERMINATION

Section 132 of the Constitution Act 1867 (formerly the British North America Act) states as follows:

> 132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under Treaties between the Empire and such foreign countries.

Chief Sol Sanderson of the Federation of Saskatchewan Indian Nations, describing the impact of the phraseology of Section 132 on the inherent sovereignty of Indian First Nations, states the following:

> Section 132 raises the question: Can the Indian Nations properly be regarded as a "foreign country" within the meaning of the Section? The usual use of the term relates to countries whose laws and territory are entirely separate from that of Canada.[4]

Chief Sanderson then concludes that two facts contained within Section 132

are consistent and appropriate to the situation of the Indian Nations of Canada:

> (1) The Indian Nations possess inherent sovereignty to govern themselves and their territories in keeping with Indian law and in keeping with the spirit and intent of the Treaties; this inherent sovereignty has been recognized and confirmed through Canadian Constitutional law and common law; and
> (2) The relationship of the Indian Nations to Canada is seen by Indian Nations as part of their External or Foreign Affairs."[5]

With respect to Bands assuming control of their own membership, if Indian Governments of Canada choose to accept the sovereignty position of Chief Sanderson, then membership codes can be analogized to "Immigration Codes." Just as immigration codes specify what is needed to become Canadian citizens, Indian First Nations may have requirements of individuals before granting citizenship. Therefore, a citizen of a Band would be entitled to the following rights:

> - full political participation - only a citizen of a Band may vote and run for political office;
> - foreign travel and freedom of return - the privilege of travelling outside the Band on a passport and a right to re-enter the Band;
> - full economic rights - within the public domain some professional and commercial enterprises may only be held by members of the Band.[6]

Similarly, Indian Bands may enforce requirements similar to what is needed to become a Canadian citizen. In Canada, those requirements are as follows:

> (1) Legal Entry - you must have been lawfully admitted to Canada for "permanent residence", i.e., a Landed Immigrant.
> (2) Age - You must be 18 years of age or older to apply for yourself.
> (3) Residence - living in Canada for a total time of three years.
> (4) Freedom from Prohibitions - you are ineligible for citizenship if: (i) considered a security risk (ii) under a deportation order; (iii) on probation or parole (iv) incarcerated; or (v) convicted of an indictable offense.
> (5) Official Language - knowledge of one of the official languages well enough to be understood by the community.
> (6) Knowledge of Canada - knowledge of rights and responsibilities as a Canadian citizen, Canada's political system, Geography and History.
> (7) An Oath of Citizenship.[7]

By drawing a comparison between Canadian Immigration Codes and im-

pending Membership/Citizenship determination by Indian Bands, the writer suggests that the Federal Government's initiative (Bill-S1) may represent significant departure from previous Indian Act amendments where the organization of Band government was highly prescribed and uniform across Canada (Long et al., 1984). Bill C-31 is an attempt by the Federal Government to give individual Bands a "blank cheque" in determining Band Government jurisdiction. However, the actual degree of freedom that will be permitted by the legislation remains to be seen (Ibid). In addition, the Federal Government has shifted its focus away from possible legislation on Indian self-government and towards changes to the Indian Act that are consistent with the Constitution Act. By the same token, Aboriginal Citizenship raises the fundamental question of the source and extent of an Indian Government's possible sovereign authority in its own citizenship determination.

Aboriginal Citizenship in the United States

In the United States, inherent in the Indian Government's sovereign power of membership determination is the Tribal Government's complete authority to:

- establish tribal citizenship by custom, historical practice, written law, treaties with the United States, or agreements between Indian Nations.
- classify various types of citizenship and qualify not only the property rights, but the voting rights of certain members.
- revoke citizenship rights previously granted.
- express rules governing the recognition of members, the adoption of new members, the procedure for citizenship abandonment and the procedure for readoption (Cohen, 1945).

In addition, the United States Congress legislative definition of an Indian person appears to be ambiguous and inconsistent. Accordingly, the Bureau of Indian Affairs' (B.I.A.) definition of an Indian person states, "to be eligible for preference, an individual must be one-fourth or more degree Indian blood and be a member of a Federally recognized tribe."[8] Therefore, for purposes of service and program delivery, Bureau of Indian Affairs policy requires that only those persons of one-fourth Indian ancestry who belong to a Federally recognized tribe may gain membership/citizenship.

Provisions for the definition of an Indian person presently enforced by the Bureau have come into conflict with a number of Indian Governments (i.e., the Navajo Nation) who maintain and exercise inherent sovereign domestic powers including Tribal/Band citizenship. Although the Navajo Nation does not operate under a U.S. federal charter of the *Indian Reorganization Act* (1934) the Navajo Government functions under regulations promulgated in 1958 by the Secretary of the Interior under the *Navajo Tribal Code,*[9] which is omnibus legislation enacted by the Navajo Tribal Council.

The Navajo Tribal Code, Chapter 7 (Membership in the Tribe) indicates specific provisions of membership definition:

> Composition
>
> The Membership of the Navajo Tribe shall consist of the following persons:
>
> 1) All persons of Navajo blood whose names appear on the official roll of the Navajo Tribe maintained by the Bureau of Indian Affairs.
>
> 2) Any person who is at least one-fourth degree Navajo blood, but has not previously been enrolled as a member of the Tribe, is eligible for Tribal membership and enrolment.
>
> 3) Children born to any enrolled member of the Navajo Tribe shall automatically become members of the Navajo Tribe and shall be enrolled, provided they are at least one-fourth degree Navajo blood.
>
> - Adoption is not possible
>
> - Member of another Tribe
>
> No person, otherwise eligible for membership in the Navajo Tribe, may enroll as a member of the said Tribe, who, at the same time, is on the roll of any other tribe of Indians.
>
> - Renunciation of Membership
>
> Any enrolled member of the Navajo Tribe may renounce his membership by written petition to the Chairman of the Navajo Tribe requesting that his name be struck from the Tribal roll. Such person may be reinstated in the Navajo Tribe only by the vote of a majority of the Navajo Tribal Council.
>
> - Application for Enrolment
>
> Anyone wishing to apply for enrolment in the Navajo Tribe may submit an application. Such application must be verified before a Notary Public.
>
> - Standards for Screening Committee Recommendation
>
> The Screening Committee shall be guided by the following standards in making its recommendations:
>
> 1) If the applicant appears to be a Navajo Indian of full blood it shall recommend approval.
>
> 2) If the applicant appears to have Navajo blood of one-fourth degree or higher, but not full blood, it shall base its recommendations on his degree of Navajo blood, how long he has lived among the Navajo people, whether he is presently living among them,

> whether he can be identified as a member of the Navajo clan, whether he is married to an enrolled Navajo. The Screening Committee is authorized to make investigations to determine such facts, but the burden of proof in all cases shall rest on the applicant. [10]

A task force under the American Indian Policy Review Commission, 1976[11] examined the effects of Federal Indian Policy (i.e., Indian Reorganization Act) addressing membership and determined the following:

> - the majority of Federally recognized tribes have adopted minimum one-fourth or one-eighth Indian blood quantum requirements for membership in their respective tribes by way of their tribal constitutions or by tribal ordinances.
> - a minority of tribes, particularly the Five Civilized Tribes of Oklahoma, most if not all of the traditional Alaskan Native Villages and groups and those organized under the *IRA* and a small number of tribes throughout the United States do not have minimum blood quantum requirements for membership in their respective tribes.
> - the Indian blood quantum has gone as low as two hundred-fifty sixth in at least one tribe without a minimum blood quantum criteria for membership.
> - the number of members of the Five Civilized Tribes who are less than one-fourth Indian blood generally outnumber the members who are one-fourth degree Indian blood or more. [12]

Furthermore, the task force stated concurrently "that they were not advocating that the Federal Government interfere or dictate to a tribe what its membership criteria should be."[13] In summary, the conflict with regard to definition of an Indian person in the United States is not about sovereignty membership determination; it is about the Federal Government's (B.I.A.'s) own desire for definition criteria for registation purposes and delivery of service.

Canadian Immigration Codes and Navajo Citizenship Codes - A Comparison

Comparisons between "How to Become a Canadian Citizen" and the "Navajo Tribal Code" indicate that the term "citizen" implies a basic human right to "personhood" or the right to nationhood. An underlying premise to this is that all persons have the right to associate and identify with a specific group or "nationality" that is separate and distinct from other such groups. In the case of Navajo tribal codes on citizenship determination, can nationality (i.e., American Indian) be interpreted as synonymous with citizenship? In other words, is it possible that an individual can gain citizenship/membership without necessarily being a member of that nationality?

It would appear that this could not take place under the Navajo Constitution with respect to membership composition. Provisions relating to membership

include biological children of Navajo members with at least one-quarter blood quantum, prohibition of membership through adoption, and restriction of tribal membership to those persons who are not members of another Indian Nation. This constitution also indicates that applications of persons who are not full blood but meet a minimum one-quarter ancestry quantum are subject to further consideration, including residency on the Navajo Indian Reservation, identification as a member of a Navajo clan and language proficiency.

Conversely, "becoming a Canadian citizen" has seven requirements, none of which mentions a minimum blood quantum or racial requirement. Similarities between the two begin and end with: (1) Language proficiency, (2) Residency, and (3) a general knowledge of the nation. Canadian citizenship law has no "nationality" criteria; this is essentially considered irrelevant. Furthermore many Canadian jurisdictions prohibit discrimination because of "nationality."[14] Fundamentally, the difference between the two codes is that anyone could conceivably become a Canadian citizen regardless of race, provided that all citizenship requirements are met, whereas Navajo Tribal codes do not permit citizenship unless the applicant is of Navajo ancestry. Is it acceptable or reasonable to associate citizenship/membership codes of Nations (i.e., Canada or the Indian Nations of Canada) with one's race, or is this what was considered ultimate racism 40 years ago?

As a conclusion to this segment, perhaps it would be more realistic if First Nation control of Band membership implied self-determination rather than sovereignty. Indians would be the majority group from an ethnic standpoint. Politically, Band membership codes could conceivably accept non-Indians who share the same political views and ideologies of self-determination and Indian control.

Clearly, distinctions must be made between citizenship determination of nations (i.e., a large number of people of mainly common descent, language, history, etc., usually inhabiting a territory bounded by defined limits and forming a society under one government[15]) with little or no consideration for race or ethnicity, and citizenship determination of a *nationality* (an ethnic group forming one or more political nations[16]) which makes citizenship impossible for persons not of a particular ethnic group. If we look at France, as a sovereign nation, the majority of its citizens are of one nationality, but certainly not all.

CULTURE

Aboriginal citizenship determination in the United States and immigration codes in Canada raise fundamental questions and provide two models for impending Indian First Nation control of Band membership in Canada. Specific instances in which conflict may arise involve thousands of Native children including status Indian, non-status Indian and Metis children who are in the care of child welfare authorities in Canada. According to the Canadian Council on Social Development which recently published the book *Foster Care and Adoption in Canada* by H. Phillip Hepworth, 20 per cent of the total number of

Canadian children in care are of Native ancestry (Hepworth, 1980). Hepworth's investigation revealed other facts (Johnston, 1982). Once admitted into care, children of Indian ancestry are much less likely than other children to be returned to their own parents or to be placed for adoption (Johnston, 1982: 176). If placed in foster homes, it is likely to be with a non-Native family. In addition, Department of Indian Affairs statistics over a ten year period (1969-1979) show an average of slightly more than 78 per cent of status Indian children placed for adoption each year were adopted by non-Indian families.

The fact that thousands of children of Native ancestry may not be residents or members on Band lists but do meet blood quantum requirements, means that Indian First Nations must decide if such individuals should gain membership on the basis of race alone. The raising of Indian children in the norms of the dominant white culture means that adopted children are not influenced by culturally-specific values shared by Indian people, such as the importance of the extended family, the influence of Elders, and a strong belief in collective rights. Would Indian First Nations want members who are Indian by virtue of race and ancestry but do not exhibit any of the distinct cultural attributes comprising "Indianness?" As a solution, Indian First Nations could conceivably draw up membership codes with provision for both blood quantum and desire to practice membership values.

Another possible conflict would involve the acceptance of new Band members by existing members through custom adoption or marriage. Is it plausible that such persons could make strong cases for membership based upon desirability, knowledge of the local language, residency, knowledge of the community, and most importantly, knowledge of culture? Interestingly, prior to Euro-Indian contact, there were numerous instances of Indians gaining acceptance as members of tribes and confederacies other than those to which they belonged. For example, during intertribal warfare between the Blackfoot and Cree, it was not uncommon to capture prisoners and hostages from the enemy (i.e., the capture of women) and absorb these prisoners as citizens/ members of the Tribe, irrespective of nationality. Another example of securing membership into another confederacy was the traditional custom adoption of Chief Poundmaker of the Cree as the son of Chief Crowfoot, a leader of the Blackfoot Confederacy (Sluman and Goodwill, 1982:30).

Donald Barnett's historical account of the Cree leader Chief Poundmaker states the following:

> Poundmaker visited Crowfoot several times and the two men learned more of each other and talked about their hope for peace between the two tribes. Crowfoot became more impressed with the young Cree each time they met. On one of his visits to Crowloot's camp, the Blackfoot Chief asked Poundmaker to become his adopted son. It was not unusual for Indians of one band to adopt children or even young men and girls from another band as a way of cementing an alliance, but it was unusual between two traditionally hostile tribes (Barnett, 1976:15).

RACIAL PRESERVATION

A third possibility is that Indian Tribes could develop membership codes with rigid and unyielding consideration for race and ethnicity. It is likely that membership codes developed in the present will have a lasting impact on the physical features and appearance of Indians in the future. If present Band members were to be transported 200 years into the future, it is highly probable that the Band members encountered by these hypothetical "time travellers" would bear little physical resemblance to them, unless membership codes had made provision for racial preservation. Such debate may be highly speculative; nevertheless, the question involves whether Indians will exist as a political body rather than as an ethnic group.

Vine Deloria Jr. and Clifford M. Lytle, authors of the book *American Indians, American Justice,* state:

> Is "Indian" a racial or political or even a religious term? The Supreme Court, first in Morton v. Mancari, 417 U.S. 535 (1974) and later in Fisher v. District Court, 424 U.S. 382 (1976), has described the relationship of Indians to the Federal Government as political rather than racial. Yet on a practical level this political status always seems to involve racial identity. The Federal courts have always been deliberately vague regarding the definition of an Indian when confronted with the question in an Intercultural context (1984:238).

With respect to the U.S. Supreme Court's ambiguity on the definition of an Indian, Deloria and Lytle say:

> The term Indian is confined to those who by the usages and customs of Indians are belonging to their race. It does not speak of members of the tribe but of the race generally, of the family of Indians (Ibid. :239).

It is interesting that Deloria and Lytle suggest that the U.S. Supreme Court has deliberately avoided any definition of Indians to the (Federal) government. However, on a practical level this political status always seems to involve racial identity (Deloria and Lytle, 1984:239). Federal Governments, both in the United States and Canada, cannot make racial distinctions; nevertheless, with matters relating to specific customs, traditions and religious ceremonies, Deloria and Lytle question whether non-Indians can have meaningful participation. They analyse the participation of non-Indians this way:

> Can non-Indians, even with the most sincere motives and emotional devotional attitudes, be protected by the American Indian Religious Freedom Resolution if they are discovered with a bag of peyote or with eagle feathers? (Deloria and Lytle, 1984:238)

This debate does have application towards citizenship determination and racial classification. Sensitivity surrounding any attempt to debate issues involving race and ethnicity raises the question of whether or not such topics can be discussed rationally. However, exclusionary and inclusionary provisions with respect to race/ethnicity and membership cannot be avoided. Undoubtedly, Indian Governments will have to address such matters (i.e., marriages between Indians and non-Indians) and act upon them. Unfortunately, children of such marriages may be the target of scrutiny and denunciation for "having light skins" (Wilkins, 1981:332). Furthermore, Indian Governments may place heavier consideration for membership on complexion than on conviction or behaviour. Howard Adams, author of *Prison of Grass,* expressed the following:

> To the whites of Canada, "Metis" means a light-coloured Indian. In Canadian history, "half-breed" refers specifically to the group of people who are part Indian and part white. These half-breed people did not have a choice as to whether or not they would be Indians or whites or inbetween; society defined them as members of the Native society and it still does today (1975).

Adam's comments reflect racial antagonism against persons of mixed blood by Canadian society. In addition, Because of the separation of Indians and persons of mixed blood, antagonism - racial or otherwise - may also exist between these two groups. Clearly, what is to be avoided is the use of "South African apartheid concepts of racial gradations" (Drake, 1984:1) by Indian Government leaders in denouncing other Native people for having light skin (Wilkins, 1981:332).

CONCLUSION

As a conclusion to this paper, the writer would like to impress upon Indian Governments, in their quest for self-determination, the need to examine general principles of First Nation control of Band membership. Indian Nation control of Band membership must examine the importance of self-determination, racial preservation and culture in developing membership codes. In addition, Bands must priorize these principles and incorporate them into their own codes of membership. As a consequence, Indian Nations will be deciding the philosophical premises that are basic to becoming a member of a particular society.

NOTES

1. R.E. Hatfield, "Aboriginal Citizenship" (1984), p. 1.

2. Indian Act, R.S.C. 1970, C. I-6.

3. "Amendments to the Indian Act as a result of Bill C-31", Assembly of

First Nations, Parliamentary Liaison, July 1985, p. 12

4. Chief Sol Sanderson, "Sovereignty Paper", Federation of Saskatchewan Indian Nations (March 22, 1985).

5. Ibid., p. 70.

6. Ibid.

7. "How to Become a Canadian Citizen", Court of Canadian Citizenship, Secretary of State (1980).

8. The American Indian Policy Review Commission (1976), *Final Report,* p. 70.

9. Navajo Tribal Code (1977) Vol. 4.

10. Ibid.

11. The American Indian Policy Review Commission (1976) *Final Report,* p. 107.

12. Ibid.

13. Ibid.

14. Ontario, Saskatchewan, Manitoba and the North West Territories.

15. *Oxford Dictionary,* 7th Edition (1983) p. 673.

16. Ibid., p. 674.

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