Recovery and Renewal – Reclaiming Indigenous Citizenship

Union of B.C. Indian Chiefs
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Introduction

Citizenship determines membership and belonging within a political and social community. Historically, Canada sought to destroy Indigenous citizenship laws to undermine Indigenous governance and nationhood, and weaken Aboriginal Title claims to lands and resources. The ability to define citizenship - according to laws and traditions that respect and honour the role of women - is a fundamental human right, essential to the survival of Indigenous Peoples.

On March 11, 2010, the Minister of Aboriginal Affairs and Northern Development (AANDC) tabled Bill C-3 the Gender Equity in Indian Registration Act and announced a joint exploratory process to examine issues related to citizenship, band membership and registration. The Union of B.C. Indian Chiefs (“UBCIC”) expressed concerns that Bill C-3 continued a history of discrimination and division, while ignoring larger questions related to Indigenous citizenship, including the need to recognize Indigenous laws for defining citizenship in a contemporary context.

At two Nation-based regional Citizenship Forums, the UBCIC membership identified that while working to decolonize Indigenous citizenship it is important to acknowledge the discrimination that continues under the Indian Act. A two-pronged approach for decolonizing Indigenous citizenship is reflected in this discussion paper:

**PART ONE: Colonization and Control:** Discusses ongoing discrimination under the Indian Act, and identifies interim steps to help Indigenous communities address challenges posed by recent changes to the Indian Act status regime.

**PART TWO: Decolonizing Indigenous Citizenship:** Explores ways to implement Indigenous citizenship self-determination through the reinvigoration of Indigenous laws and use of international human rights mechanisms, Canadian common law, and the practices of other states internationally.
Part One: Colonization and Control

Colonization and Control

The Land Question and Statistical Extermination

Canadian governments have imposed legal definitions on Indigenous Peoples (defining who is, or is not, an “Indian”) as a tool of assimilation to attack Indigenous nationhood, governance and identity. Canada’s initial legislation for defining “Indians” was tied to the denial of Aboriginal Title and Rights. Canada tried to solve the Land Question by eliminating – through statutory definition – the Indigenous Peoples entitled to make claims to lands that conflicted with the assertion of Crown title over those lands.

Canada “statistically exterminated” many Indigenous people (and devastated the populations of many Indigenous Nations) by simply passing laws stating that people were no longer Indian. With the imposition of the Indian Act and the denial of status to certain people, it became illegal for people to continue to live within their home communities or to participate in many political and social aspects of those communities.

The Land Question and Citizenship

Self-Determination

[Revised from the UBCIC Aboriginal Title Curriculum Project]

When newcomers first arrived in North America, they acknowledged the Indigenous political and legal structures that were in place. Under their own laws, newcomers could only acquire an interest in Indigenous lands where the Aboriginal Title had first been addressed, including by (1) conquest or (2) agreement if Indigenous Peoples voluntarily ceded their interests in the land (i.e., through treaty or sale).

The modern day Land Question arises because newcomers ignored their own laws and simply pretended that Aboriginal Title did not exist and settled lands already occupied by Indigenous Peoples. The Aboriginal Title to these lands was never dealt with and so continues today.

Newcomers had to find a way around their own laws that recognized Aboriginal Title and forbade the settlement of Aboriginal Title lands without the consent of Indigenous Nations. To deny Aboriginal Title, newcomers relied on several legal arguments, which have since been discredited, including the doctrine of Terra Nullius: The newcomer claim that there were no Indigenous People (or they were so uncivilized so as to be incapable of holding Aboriginal Title) living on the land and therefore the land was “empty” and they did not have to follow their own laws and address Aboriginal Title to the land before settling it.

The status provisions of the Indian Act were a re-formulation of the doctrine of terra nullius: Canada attempted to statistically empty the land of “Indians” by eliminating categories of people (primarily Indigenous women and their descendants) legally defined as “Indian”.

Early examples of legislation which limited the definition of “Indians” and imposed divisions on Indigenous Peoples, included:

- **An Act providing for the organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands (1868)** - Indians were defined as: “All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immovable property, and their descendants.” All women who married an Indian were considered “Indian.” Indian women who married non-Indians were not mentioned.

- **1869 Amendment** An Indian woman who married a non-Indian man was no longer an “Indian” nor were any of her children.

- **Indian Act, 1876** – An Indian was defined as any male person of Indian blood, and his children, or any woman who married an Indian. Any Indian woman who married a non-Indian man was no longer considered Indian, nor were her children.

- **Indian Act, 1951** - An illegitimate child of an Indian woman (whether or not their father is an Indian) was considered an Indian unless the Registrar declared that the child was not entitled to be registered because their father is non-Indian. Many Indian women chose not to marry their non-status partners so that their children could retain status. Despite the fact that their Indian mother did not marry their non-Indian father, and the Registrar did not challenge their entitlement, many children were arbitrarily denied status.

Participants at the Citizenship Forums identified the status and registration provisions of the Indian Act as a form of legislative genocide, designed to break down Indigenous Nations and families. Canada’s legislation was tied to colonial notions of gender, which afforded power and authority to men, and subordinated women by removing any independent status – contrary to Indigenous cultures which relied upon powerful women as the foundation of Indigenous societies. The denial of Aboriginal Title and Rights deprived

The Indian Act’s status provisions were designed to achieve the goal of assimilation outlined by the Superintendent General of Indian Affairs, Duncan Campbell Scott, in 1920:

Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department.
Indigenous People of the economic means to resist these colonial assimilation tactics, while simultaneously the family breakdown imposed through the *Indian Act*’s status regime eroded traditional governance systems.

Participants at the Citizenship Forums emphasized that discussions about citizenship must reflect the sacred nature of citizenship and belonging. Kwan’kwan Kwali’gyadzi (Robert Joseph), Hereditary Chief, Musgamagw-Tsawataineuk, emphasized that in the way of his people, membership is a birthright, and people are born into a family and inherit a line of ancestors and belonging. In contrast, Canada’s practice of “granting” of status implies that membership or belonging are arbitrary and can be given or taken away.

**Incremental changes to the *Indian Act***

The *Indian Act* has been subject to piece-meal amendment over the years, as it became clear that different provisions violated human rights equality standards. Canada made incremental changes in response to mounting international and domestic pressure to eliminate the gender-based discrimination under the *Indian Act*. A successful challenge to the United Nations Committee on Human Rights in *Lovelace v. Canada* \(^1\) and the adoption of the Canadian Charter of Rights and Freedoms in the early 1980s triggered initial amendments to the *Indian Act* through Bill C-31 in 1985.

**An Act to Amend the *Indian Act* (‘Bill C-31’)**

Bill C-31:

1) **Reinstated some Indian women (and their children) who lost status when they married non-status men.** The grandchildren of Indian women reinstated under Bill C-31 continued to be denied status.

2) **Created different classes of status under ss. 6(1) and 6(2), resulting in a second-generation cut-off rule.** Children of parents registered under s. 6(2) are only entitled to status if both of their parents have status. Over time, this provision will lead to the elimination of all status Indians; and

3) **Separated Band Membership from Indian status.** While bands could now determine their own membership, they could not grant status to their members. Key benefits of Indian status provided by the federal government (for example, health, education or housing benefits) are denied to band members without status.

**The McIvor Case and An Act to Promote Gender Equity in Indian Registration (“Bill C-3”)**

Bill C-31 did not eliminate the discrimination under the *Indian Act*. Sharon McIvor and her son, Jacob Grismer, challenged the *Indian Act* on the basis that it continued to treat the descendants of Indian women and men differently. The B.C. Court of Appeal in *McIvor v. Canada (Registrar of Indian and Northern Affairs)* found that the *Indian Act* perpetuated gender-based discrimination because people “are unable to transmit Indian status to their children only because their mothers, rather than fathers, are entitled to status as Indians.”\(^2\) Canada was directed to remedy this discrimination, and Bill C-3 was Canada’s response.

Bill C-3 restored status to the children of a person:

- Whose mother lost Indian status upon marrying a non-Indian man;
- Whose father is a non-Indian;
- Who was born after the mother lost Indian status and before April 17, 1985, unless the individual’s parents married each other prior to that date; and
- Who had a child with a non-Indian on or after September 4, 1951.

Despite Bill C-3, Indian status continues to be denied to:

\(^2\) 2009 BCCA 153 [McIvor].
1) **Grandchildren of Indigenous women born between September 1951-April 1985:** Under Bill C-3, the grandchildren of an Indigenous women who lost status as a result of marriage to a non-Indian man will not be able to pass on status to their children born between September 4, 1951-April 17, 1985. The grandchildren of Indian men who married a non-status woman (who then gained status through that marriage) can transmit status to their children born in the same period.

2) **People who lost status because their grandmother parented out-of-wedlock:** Bill C-3 restores status only to people whose grandmother lost status due to marriage. People whose grandparents were not married and who lost status because the Registrar deemed them to have a non-status father will not recover status under Bill C-3.

3) **People born before 1951:** Bill C-3 continues to deny status to grandchildren of a grandmother who lost status due to marriage to a non-Indian, where those grandchildren were born before September 4, 1951.³

Following passage of Bill-3 and the Supreme Court of Canada’s refusal to hear an appeal, Sharon McIvor challenged the criteria for determining registration status under the *Indian Act* as a violation of the *International Covenant on Civil and Political Rights* with the United Nations Human Rights Committee in Geneva. The UBCIC filed an affidavit in support of the application.

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³ This was a date picked by the BCCA to limit the scope of the finding of discrimination – the BCCA said that it would not fix all discrimination against the descendants of Indigenous women. Instead, the BCCA found that the discrimination that existed was that Sharon McIvor and her son (and others in a similar position) were discriminated against when compared with the people who had lost status as a result of the “double-mother rule”. The practice of taking away status as a result of the “double mother” rule ended under Bill C-31 to those who were born after September 4, 1951.
Aboriginal Title Denial and Poverty

Canada’s continued denial of Aboriginal Title jurisdiction prevents Indigenous Peoples from accessing resources to meet the needs of their members. There is a broad gap between the standard of living of Indigenous Peoples and the general Canadian population.

Canada imposed Bill C-3 without consultation, and without any additional resources to meet the needs of members newly added to band lists. Canada estimates that approximately 45,000 people will be entitled to status registration as a result of Bill C-3, a 6% increase in the total number of status Indians.

At the same time, many Indigenous communities are living in poverty, without access to basic human needs, including lack of adequate housing (with many families living in overcrowded and unsafe conditions), insufficient reserve land base to meet the needs of band members (including for business or public purposes), and inadequate education and health funding. Increased membership under Bill C-3 with no increased land base, housing or funds for services (and continued denial of Aboriginal Title, Rights and jurisdiction) can only worsen the poverty and increase the pressures felt at the local band level.

The National Collaborating Study for Aboriginal Health outlined startling statistics outlining poverty amongst Indigenous people:

- One in four First Nations children live in poverty as compared to one in six for non-Aboriginal children.
- Approximately 40% of off-reserve Aboriginal children live in poverty.
- Aboriginal people living in urban areas are more than twice as likely to live in poverty than non-Aboriginal people. In 2000 for example, 55.6% of urban Aboriginal people lived below the poverty line compared with 24.5% of Canada’s non-Aboriginal urban residents.
- Rates of poverty for Aboriginal women are double that of non-Aboriginal women. As a result of living under conditions of poverty:
  - More than 100 First Nations communities are currently under boil water advisories and have little or no access to clean water for drinking and sanitation.
  - Nearly one in four First Nations adults live in crowded homes and 23% of Aboriginal people live in houses in need of major repairs.
  - First Nations suffer from ‘third world’ diseases such as tuberculosis at eight to ten times the rate of Canadians in general.
  - Aboriginal people in Canada were found to be four times more likely to experience hunger as a direct result of poverty.
  - More than one quarter of Aboriginal people off reserve and 30% of Inuit children have experienced food insecurity at some point.

Canada’s imposition of amendments to the Indian Act through Bill C-31 and Bill C-3 without consultation and without the prior informed consent of Indigenous Peoples has resulted in legislation that continues the gender-based discrimination under the Indian Act and fosters new divisions within Indigenous communities.

6(2) and Beyond: Continuing the Discrimination

The Indian Act reflects a living history of colonial attempts to assimilate Indigenous Peoples, and continues to divide Indigenous families, communities, and nations into categories of: non-status, 6 (1) [full-status], and 6(2) [half-status]. Sections 6(1) and 6(2) of the Indian Act have resulted in a number of permutations of status entitlement within families and between siblings. The introduction of s. 6(2) created the second-generation cut-off rule, where children of a parent registered under 6(2) are not entitled to status registration unless both of their parents have status. Registration under s. 6(2) has been referred to as “half status” because a parent registered under s. 6(2) cannot independently pass Indian status to their children.

A simple equation, 6(1) + 6(1) = 6(1), 6(2) + 6(1) = 6(1) and 6(2) + 6(2) = 6(1). However, 6(1) + no registration = 6(2) and 6(2) + no registration = no registration, thereby resulting in a loss of registration over two successive generations of joint registered Indian-non-registered Indian parenting.4

The long-term impact of the second-generation cut-off rule will be the near complete elimination of status Indians within generations, despite how a Nation chooses to define its own citizenship and membership: “Within 75 years, individuals

who lack entitlement to Indian registration are expected to account for about one (1) in every three (3) people eligible for First Nations membership."^5

**Unstated or Unproven Paternity**

Under current federal policy, it is impossible for a child to get full status with unstated paternity. Canada assumes that the father of a child is non-status, unless proven otherwise. Where paternity is unstated, a child is either denied status (where their mother is registered under s.6(2), or assigned a 6(2) designation [half status] (where their mother is registered under s. 6(1)). Unstated paternity can occur in a number of situations, including where:

- An Indian woman does not declare who the father is either because she does not know, or there are extenuating circumstances (such as sexual assault or violence) where she does not want to, or cannot, list the father;
- The mother lists the father, but the father does not sign the registration forms (i.e., he may not be present or this is not immediately done for another reason). It may be too cumbersome or expensive for the parents to complete the registration process later, and so the child is treated as though they have unstated paternity because the father did not sign the original registration forms;
- Parent(s) fear that social assistance agencies may attempt to force a father to pay child support; and
- Parent(s) may not see the benefit of status registration or understand benefits that are tied to status and so refuse to take the necessary steps to have their children registered.

Canada’s unstated paternity policy has resulted in a large number of Indian children being denied status or classified as 6(2):

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^5 Clatworthy, Stewart. *Indian Registration, Membership and Population Change in First Nations Communities* (Ottawa: Minister of Indian Affairs and Northern Development, 2005) at 41 (Clatworthy).
Approximately 37,300 children born to women registered under 6(1) between April 17, 1985 and December 31, 1999 were recorded as having unstated fathers. Estimates indicate that as many as 13,000 children of 6(2) registered mothers in that same period may have unstated fathers and are therefore ineligible for registration.\(^6\)

Where a mother is unable or unwilling to register paternity for her child, the child is effectively punished by not being eligible for full status, or perhaps not eligible for status at all, if their mother is registered under s. 6(2). The area of unstated paternity and its use to deny status registration to Indigenous children is solely the result of administrative policy decisions being within the AANDC.

**Customary and Provincial Adoptions – One Option to address Status Denial**

Adoption (either under Indigenous custom or under provincial adoption laws) has been suggested as an option to address the status issues that arise as a result of the Second-Generation Cut-Off Rule and Unstated Paternity. Under the *Indian Act*, definition of a “child” of a status Indian includes those who were adopted under Provincial laws or according to Indigenous custom.

Adoption (whether done under the Provincial system or a customary adoption under Indigenous law) legally puts the adoptive parent in the same position as a birth parent and this has status implications for adopted children (who can either gain, or have an upgraded category of status as a result of adoption). For customary adoptions to have legal implications on status, the adoptive parent(s) would either have to apply to the B.C. Supreme Court (under s. 46 of B.C.’s *Adoption Act*) or directly to the Registrar to have the Indigenous custom adoption recognized.

Recognition by a court (or the Indian Registrar) that a custom adoption has occurred requires that the adoptive parents show that the adoption was carried out according to the customs of their Indigenous nation(s). Some criteria that a court or the Indian Registrar may require to recognize that a custom adoption has occurred include:

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\(^6\) *Mann*, at v. See also *Clatworthy* who estimates that this means that approximately 19% of all children born to 6(1) women who recorded as having unstated paternity. In many instances, this reflects the fact that the parents do not provide the information about a father’s status in a form that the Registrar will accept.
• consent of the birth and adopting parents;
• child has been voluntarily placed with the adopting parent(s);
• adopting parent(s) are Indigenous or entitled to rely on Indigenous custom;
• rationale for native custom adoptions is present; and,
• the parental relationship created by the custom adoption is essentially the same parental relationship that would result in an adoption made under the provincial Adoption Act.7

Any adult can adopt a child if they meet the criteria for provincial or customary adoption, regardless of gender. This can include a grandmother, grandfather, aunt, uncle, or friend who intends to fulfill a parent role in that child’s life. Adoption by a status-Indian can grant status (or upgrade the status) of a child. For example, if a child is born to a mother with s. 6(2) status and has not listed the father, they are currently not entitled to status. If the child’s status grandmother adopts them as a second parent, then that child now has two status parents (their birth mom registered under s. 6(2)) and their grandmother (as long as she is status, it does not matter what section she is registered under) the child will be entitled to registration under s. 6(1).

Recognition of an adoption done under Indigenous custom can be done under the Adoption Act (s. 46 where the parents would go before the B.C. Supreme Court and ask the court to recognize that a custom adoption had occurred). Alternatively, people can apply to the Indian Registrar for recognition (with status impacts) that a customary adoption has occurred. The criteria are the same, and proof that the Registrar may require include affidavits of the birth and adoptive parents, other members of the community (including perhaps Chief and Council or elders or other traditional leaders within the community). The evidence given to the Registrar would have to include a description of what the Indigenous custom for adoption was within that Nation and that the custom was followed and that an adoption (recognized by the Indigenous nation) resulted.

The rationale or necessity for an adoption must be present and usually this has been read to mean that the adoption should occur when a person is a child and in order for a person to undertake a parent-like role in their life. (This means, for example, that an adult adoption which may be cultural, will not have status implications).

Adoption should not be undertaken lightly. In an adoption (either customary or under provincial law) the adoptive parent acquires full legal responsibilities for the adopted child, with serious legal and financial implications. For example, an adoptive parent may be legally obligated to provide child support (if one parent applies for social assistance the other legal parent may be required to provide support); in the case of inheritances upon death (an adoptive child will be entitled to a share of an adoptive parent’s estate); education funding and other decisions about the health and well-being of an adopted child. Likewise, adoption may not be an adoption to address status issues if there is a non-status parent in place who is active in the child’s life and unwilling to give up their legal parent status to allow for an adoption to occur.

**Impacts within child welfare system**

Status/non-status designations impact the ability of Indigenous nations to be involved in the lives of their member children in the child welfare system. In some cases, children are being born and raised within Indigenous families (including in reserve communities) but not entitled to status registration. Child welfare agencies that provide services to children on reserve may have no jurisdiction to work with children without status, without Ministry consent, or be denied funding, and have to draw funds from other areas of their operations, to provide services to children without status.

**Discussion Point: Section 17**

Some participants at the Citizenship Forums suggested exploring using Section 17 of the Indian Act (which allows for different Bands or their members to amalgamate into a larger band) as an interim step. Participants suggested that amalgamating individual bands/First Nations would be a way of challenging the divisions that have been imposed on Indigenous Nations by the Indian Act and would allow greater possibilities (economically and politically) of moving toward citizenship self-determination).
In some cases, Indigenous parents who were raised within the child welfare system and without meaningful or sustained connections to their own home communities or Nations may feel that status is not important and decide not to register their children. Aboriginal child welfare agencies cannot register children for status contrary to parental wishes.

**Paralyzing Band Governance**

The addition of members to band membership lists under Bill C-3 (particularly for bands whose membership is determined by the Minister under s. 11) has caused administrative difficulties for bands. Canada added members to band lists while refusing to provide contact information to bands for these newly enrolled members, citing privacy issues. Without contact information for newly added band members, bands may be unable to make some governance decisions under the *Indian Act* where approval of a majority of electors is required. For example, assuming control of membership under s. 10 requires a by-law be passed by the majority of electors, and reserve land surrenders or designations made under s. 39 also require a quorum of voters.

**Human Rights Act**

Section 67 of the *Canadian Human Rights Act* (“CHRA”) was recently repealed. Human rights complaints can now be brought against Bands based on any actions authorized under the *Indian Act*. According to the Canadian Human Rights Commission, the impact of the repeal of s. 67 is that “human rights complaints can now be filed against both the federal government and First Nations community governments in their capacity as employers and service providers operating under
the Indian Act.”

Canada has since argued that discrimination complaints cannot be brought on the basis of different levels of program funding.

UBCIC members expressed concern that band councils might be subject to human rights complaints because programs or services are not made available to newly enrolled members, and suggested that this situation was unfair when bands did not cause (nor have the tools or resources to rectify) the discrimination resulting from the Indian Act status regime and lack of available funding.

Recognition and Cultural Reparation

The divisions imposed through the Indian Act have wounded Indigenous families, communities and nations. Decolonization requires healing those wounds by recovering Indigenous laws and citizenship traditions. Decolonizing Indigenous Citizenship cannot be achieved by changing Canada’s discriminatory laws alone, but must include a process of healing and cultural reparation and the re-establishment of family, cultural and social connections. Interim opportunities are available to start this process by taking

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9 The case involved a complaint to the Canadian Human Rights Tribunal by the First Nations Child and Family Caring Society (amongst other organizations) alleging that the federal government discriminated in that it provided less funding for child welfare regimes on reserve than was the provincial standard. Initially the federal government argued (and the tribunal agreed) that federal funding for services could not be a ground of challenge for discrimination. The federal court overturned this ruling and sent this matter back to the tribunal for consideration of whether or not discrimination did in fact exist in the funding regime (First Nations Child and Family Caring Society et al v. Attorney General of Canada et al, 2012 FC 445).
advantage of existing possibilities in child welfare legislation to become involved to attempt to prevent further loss and alienation of children; and also through ceremonies and other actions aimed at welcoming back families and individuals who were historically split from their home communities as a result of the operation of Indian Act.

Recommendations:

1. UBCIC support and advocate a zero-tolerance policy against discrimination in the Indian Act advocating that there should be no instances where descendants of Indigenous men are entitled to status, where descendants of Indigenous women in the same situation, are denied status.

2. UBCIC work with other Indigenous organizations to educate Members of Parliament, the Senate and the general public about Indigenous citizenship self-determination as an issue of basic human rights.

3. UBCIC produce public education materials and promote speaking engagements to build public support and awareness and use social networking resources to ensure that strong and clear messaging about citizenship self-determination is available to Indigenous Peoples.

4. UBCIC work with other Indigenous organizations to lobby for the appointment of an independent body (such as the auditor general) to provide a comparative analysis of the poverty amongst Indigenous communities relative to the general Canadian population, together with recommendations for how to address that poverty, including through Aboriginal Title recognition.

5. UBCIC work with other Indigenous organizations to lobby the federal government to provide resources to meet the increased needs of band communities, including:
   - An increase in the reserve land bases to allow for additional space for business development, housing, and other community needs; and
   - Funding for services such as health, housing, education, infrastructure, and child welfare.

6. AANDC provide adequate contact information to band offices when adding new members to membership lists so that bands can carry out governance activities, and identify a process for bands to follow when newly added members cannot be contacted, despite reasonable and timely efforts, to ensure that bands can continue to make governance decisions.

7. UBCIC work with other Indigenous and social justice organizations to identify the human rights violations inherent in the Second-Generation Cut Off Rule and to actively lobby for its elimination.

8. UBCIC work with other Indigenous organizations (including in the United States) to:
• Develop a protocol to address status and citizenship entitlements between governments and Indigenous Nations; and
• Articulate international principles to ensure that there are no children who are denied status and membership recognition as a result of their cross-border parentage.

9. UBCIC urge Canada to work with the Aboriginal Veterans Association and Indigenous organizations to identify and rectify areas of continuing discrimination based on the enfranchisement of veterans.

10. UBCIC work with other Indigenous organizations to lobby for an amendment to the unstated paternity policy, including that the AANDC:

- Allow a mother to state that the father is a status Indian without requiring that he acknowledge paternity, in certain circumstances (for example, in cases of sexual assault or domestic violence).
- Provide legal and social protections for women so that they do not incur negative impacts as a result of listing the name of the father on the child’s birth certificate.
- Provide education to Indigenous parents so that they understand the implications for their children of unstated paternity.
- Remove administrative barriers that prevent Indigenous parents from registering births. Ensure that all individuals, including those living in northern and remote communities, can complete birth registrations without being disadvantaged by their geographic location, ability to pay fees, access to notaries or other officials, or any other process barriers.

11. UBCIC approach the office of the Representative for Children and Youth, the Aboriginal Child Welfare and Family Law Bar, and other Indigenous organizations and invite them to work collaboratively to investigate the impact of status/non-status distinctions within the child welfare system, including impacts on the best interests of the children as outlined in international human rights mechanisms.

13. UBCIC produce a technical briefing outlining interim options for Indigenous nations to ensure that their emerging generations of children are not denied status registration, which includes articulating Indigenous laws about citizenship as an alternative to the status-based process that Canada currently follows, including welcoming members through ceremonies based in Indigenous laws, regardless of Canada’s status laws.

14. UBCIC share information about the actions that different Nations take at the local level through cultural ceremony or other culturally appropriate means (their reunification models) for welcoming newly registered people back to their home communities including through social media.

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10 This recommendation incorporates recommendations made by the Native Women’s Association of Canada in their Issue Paper: Aboriginal Women and Unstated Paternity (National Women’s Summit, Corner Brook, NL, 2007).
Part Two: Decolonizing Indigenous Citizenship

Decolonizing Indigenous Citizenship

Reasserting Indigenous Laws for Defining Citizenship

Indigenous Peoples possess the inherent right of self-determination to care for and protect our traditional lands and resources, to govern ourselves, and to enter into relationships with other Nations of Peoples guided by our own laws and legal traditions. Citizenship, belonging and identity are sacred concepts, reflecting who we are as Peoples and our place in the world.

Each Indigenous Nation’s history, stories, spirituality and laws define its citizenship. Laws and traditions for determining citizenship in place within different Indigenous Nations include combinations of: lineage/ancestry; family relationships (including birth, marriage, adoption); clan, house and crest systems of Indigenous governance; and recognition within Indigenous families, communities and nations.

International Human Rights Standards

Canada’s policies for defining Indian status, and of refusing to recognize Indigenous laws about citizenship, violate internationally recognized principles, and impact the sense of belonging and dignity of Indigenous Peoples. Canada is bound by international standards that recognize the fundamental human right of Indigenous Peoples to define our own citizenship. These international standards are recorded in a number of international instruments that guide the interpretation of domestic Canadian law, such as the Indian Act. The force of these international documents
lies in the ability to hold the signatories to the standards they express before the international community, to influence the interpretation of domestic legislation, and in their normative power to identify the fundamental human rights violations that exist.

**United Nations Declaration on the Rights of Indigenous Peoples**

The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), ratified by Canada in 2010, directs an approach that recognizes Indigenous Peoples’ collective and ancestral rights and responsibilities to determine our own identity and citizenship flowing from our own laws:

**Article 6:** Every indigenous individual has the right to a nationality.

**Article 8:** Indigenous Peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

States shall provide effective mechanisms for prevention of, and redress for:

Any form of forced assimilation or integration...

**Article 9:** Indigenous Peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.

No discrimination of any kind may arise from the exercise of such a right.

**Article 33:**

(1) Indigenous Peoples have the right to determine their own identity or membership in accordance with their customs and traditions. ....

(2) Indigenous Peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.
**International Labour Organization Convention No. 169**

International principles, which recognize the fundamental human right of Indigenous Peoples to citizenship self-determination, are echoed in other international instruments. The *International Labour Organization Convention No. 169*’s definition of Indigenous and Tribal Peoples recognizes that the status of “indigenous”:

is regulated wholly or partially by their own customs or traditions or by special laws or regulations and to peoples who are regarded as indigenous on account of their descent from the populations which inhabit the country at the time of conquest or colonization.

**World Bank’s operational directive 4.20**

Similarly, the *World Bank’s operational directive 4.20*, 1991 defines Indigenous Peoples according to characteristics, which include those based within the laws of Indigenous cultures:

a) close attachment to ancestral territories and to the natural resources in these areas; b) self-identification and identification by others as members of a distinct cultural group; c) an indigenous language, often different from the national language; d) presence of customary social and political institutions; and e) primarily subsistence-oriented production. [Emphasis added].

**United Nations Convention on the Elimination of All Forms of Racial Discrimination**

The *United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD)* requires states to:

2.1 (c): take effective measures to review governmental, national or local policies and to amend, rescind or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

The CERD’s General Recommendation XXIII recognizes that the fundamental human rights of Indigenous Peoples are tied to Aboriginal Title:

3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the
preservation of their culture and their historical identity has been and still is jeopardized.

*United Nations Convention on the Rights of the Child*

The *United Nations Convention on the Rights of the Child*, Article 30, likewise addresses the issue of citizenship as a fundamental human right:

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

Canada’s imposition of the status and registration provisions under the *Indian Act* continue to be imposed without the prior informed consent of Indigenous Peoples contrary to the values and principles set out in international human rights instruments.

**Defining Indigenous Citizenship - International and Domestic Examples**

The ability to define citizenship is one of the most powerful features of self-determination that Peoples can exercise. Common features across different states and cultures for defining citizenship include combinations of ancestry (birth or adoptive), recognition by community, self-identification, place of birth and residency. The international norm for defining membership of Indigenous populations is one based on the laws of Indigenous Peoples.

**Citizenship and Canada’s Constitution**

Under the Canadian constitution, the federal and provincial governments divide jurisdiction over different matters in ss. 91 and 92 of the *Constitution Act, 1867*. [Determining our own citizenship] is an exercise of Aboriginal title and rights. It is self-jurisdiction and authority and that is what we need to move towards. That is the kind of authority that First Nations possess and have never given up. We have to find ways to let the government embrace that, so First Nations can say, “Here are our peoples.” Not by anybody else’s definition…. That’s who we are as people, when we talk about this inherent authority and jurisdiction, that’s what we’re talking about.

- Chief Bob Chamberlin, Kwikwasut ’Iinuxw Haxwa ’mis
Under this division of powers, provincial governments assert jurisdiction over most lands and natural resources. The responsibility for “Indians, and Lands reserved for the Indians” is a federal power under s. 91(24). Although s. 109 of the Constitution Act, 1867 claims to give jurisdiction over lands and resources to the provinces, the case of St. Catherine’s Milling and Lumber Company v. The Queen\(^\text{11}\) confirmed that the provinces cannot acquire an interest in Aboriginal Title lands unless that the Title has been addressed through treaty or other means. The Supreme Court of Canada in *Delgamuukw* said that the Provinces cannot extinguish Aboriginal Title and that unceded Aboriginal Title lands remain a federal responsibility. In B.C. Aboriginal Title for the most part has not been addressed and remains a burden on Crown title.

Section 35(1) of the Constitution Act, 1982 protects Aboriginal Title, Rights and Treaty Rights. Indigenous legal traditions are protected within s. 35(1). The purposes of s. 35(1) include ensuring the cultural survival and continuity of Aboriginal communities and societies (*Sparrow*). The purposes and protection of s. 35(1) are particularly relevant to Indigenous citizenship, and given the importance of citizenship to the cultural survival of Indigenous societies, protection of Indigenous citizenship self-determination falls within the protection of s. 35(1).

Combined, s. 91(24) of the Constitution Act, 1867 and s. 35(1) of the Constitution Act, 1982 create legal and constitutional space for the recognition of Aboriginal Title and Indigenous legal traditions which, if implemented, would protect Indigenous Peoples’ access to lands and resources and impact upon the ability of Indigenous Nations to fully implement (and fund) citizenship self-determination. Section 35 provides a mechanism for Indigenous Peoples to challenge government actions where they threaten or infringe those rights. Indigenous Peoples who assert

\(^{11}\) (1888), 14 App. Cas. 46 (P.C.) [*St. Catherine’s Milling*].
jurisdiction over citizenship based on the legal traditions of their own people should have this jurisdiction protected by the courts.

Indigenous Nations do not accept Canada’s jurisdiction to determine citizenship, or practice of tying of benefits to “status” rather than citizenship as determined under Indigenous laws. Refusal to acknowledge the right of Indigenous Peoples to define our own membership (and have status recognition tied to that recognition) reflects Canada’s desire to limit its fiduciary, legal and financial obligations to status Indians.\textsuperscript{12} Participants at the UBCIC Citizenship Forums discussed the relationship between recognition and responsibility, and questioned if Canada would oppose recognition of Indigenous citizenship laws if there were no legal or financial obligations associated with recognition.

Currently there are few legal options for Indigenous citizenship recognition within Canada – and none transform the fiscal or legal relationship between Indigenous Peoples and the federal government. Canada has been very careful to limit any Indigenous self-determination of citizenship to areas that will not impact upon its fiduciary, legal or financial duties. For example, under the Indian Act, bands can add members but not grant those members status; under modern treaty agreements, Indigenous groups can recognize and enrol their own members but cannot increase the obligations of Canada beyond the bounds of the agreement.

\textbf{The “Golden Thread of Continuity”: Canadian common law supporting Indigenous citizenship jurisdiction}

Legal options exist for recognition of Indigenous citizenship self-determination within Canada, including recognition of Indigenous laws inherent within the pre-Confederation Douglas Treaties; common law recognition of matters internal to Indigenous societies (usually family law matters such as marriage and adoptions) and recognition of the collective nature of the rights of Indigenous Peoples in Aboriginal Title, Rights, and Treaty Rights cases. The Supreme Court of Canada recently discussed recognition of self-identification of Métis people according to Métis

laws and traditions in the cases of R. v. Powley\textsuperscript{13} and Alberta (Aboriginal Affairs and Northern Development) v. Cunningham.\textsuperscript{14} Modern treaty agreements provide an example of a hybrid form of citizenship recognition based on Indigenous traditions and subject to ultimate agreement of Canadian governments.

The historic and continuing recognition of Indigenous customary laws is an area of Canadian law that is as old as Canada itself. In Connolly v. Woolrich the court found that a marriage between a Cree woman and a Canadian man under Cree law was valid: “...the Indian political and territorial right, laws and usages remained in full force” both before and after the arrival of newcomers and assertion of Canadian sovereignty.\textsuperscript{15}

In Casimel v. Insurance Corp of British Columbia, the B.C. Court of Appeal affirmed that Indigenous customary laws for adoption continued to operate and had not been extinguished by the operation of provincial laws.\textsuperscript{16} In Campbell v. British Columbia (Attorney General) the B.C. Supreme Court said that Indigenous laws form part of the Canadian legal system, recognizing “that most aboriginal persons accept the legitimacy of an evolving customary or traditional law, just as most Canadians accept the legitimacy of common and statutory law”.\textsuperscript{17}

The recognition of Indigenous laws embodied within the Canadian common law provides a solid basis for legal recognition of Indigenous jurisdiction over citizenship. The Supreme Court of Canada has relied on the doctrine of continuity (the idea that when newcomers arrived, and asserted sovereignty, the Indigenous laws that were in place continued unless they were inconsistent with the assertion of

\textsuperscript{13} [2003] 2 S.C.R. 207 [Powley].
\textsuperscript{14} 2011 SCC 37 [Cunningham].
\textsuperscript{15} (1867), 1 C.N.L.C. 70 (Que. S.C.).
\textsuperscript{17} 2000 BCSC 1123 [Campbell].
Canadian sovereignty) as the “golden thread” which continues to connect and sustain Aboriginal Title and Rights. Under the Doctrine of Continuity, pre-existing Indigenous laws are said to have survived the arrival of the newcomers societies and their assertion of sovereignty:

European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights...18

Definitions of citizenship and belonging within Indigenous societies ground findings of Aboriginal Title, Rights, and Treaty Rights, including cases such as Van der Peet, Delgamuukw v. B.C. (A.G.), and Tsilhqot’in Nation v. B.C.19 which all rely upon the social, political and cultural organization of distinctive pre-contact Indigenous societies to identify the proper Title and Rights holder in finding Aboriginal Title and Rights. In Van der Peet the Supreme Court cited the Australia High Court discussion in Mabo of Indigenous laws:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs ... 

This position is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" – that which is "handed down [from ancestors] to posterity", The Concise Oxford Dictionary (9th ed. 1995), – implies these origins for the customs and laws that the Australian High Court in Mabo is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in Mabo, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.20

19 2007 BCSC 1700.
Despite recognition of Indigenous laws within the Canadian legal system, the federal government treats Indigenous citizenship self-determination largely as an internal matter - insisting on its own restrictive definitions if there are any federal obligations (fiscal, legal, benefits, services, etc.) at stake. As a result, recognition of citizenship within Indigenous societies has not translated to the ability to bind Canada legally or financially to provide services to the members that Indigenous Nations recognize.

Examples of the ways that citizenship has been determined in Indigenous (and Canadian) contexts:

| United States | Within the United States, Recognition as a member of an Indigenous nation (“tribal enrolment”) is a matter determined by each nation. Membership and enrolment criteria of different tribes includes features such as historic and continued connection to a community, residency, recognition by the community and ancestry or adoption. In different formulations, “blood quantum” requirements form the basis of many citizenship tests (tribes may require that a person be fifty-percent, one-quarter, one-sixteenth, etc. before they will recognize a person’s citizenship). The United States government recognizes the power to define membership within the different tribes as necessary to “preserve the unique character and traditions of each tribe.” |
| New Zealand | Recognition of Maori identity is very broad, based on ancestral connection to a Maori ancestor: “If you have one Māori ancestor, no matter how far back, you are legally entitled to qualify as being “Māori”.

| Australia | Recognition of Indigenous citizenship (as an Aboriginal person or Torres Strait Islander) within Australia is generally shown through a combination of factors: (1) Evidence of Aboriginal or Torres Strait Islander descent (including records or verification by Indigenous political or social groups); |

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21 U.S. Department of the Interior Guide to Tracing Your American Indian Ancestry (“Guide” at 3). Blood quantum is a common denominator (though not present in all cases) for determining citizenship. Many have argued that blood quantum requirements form the basis for genocide over the long term.  
| **Canada – general** | Citizenship for the general Canadian population is determined by a number of factors. A person is entitled to Canadian citizenship by:  
- Place of birth (they were born in Canada);  
- Citizenship (one of their parents is a Canadian citizen); or  
- Naturalization (a person can apply to become a Canadian citizen with full citizenship rights). |
|---|---|
| **Canada – Métis** | In its consideration of Métis Aboriginal Rights in *Powley*, the Supreme Court of Canada discussed the right of Métis to determine their own citizenship and identity, based on factors that include recognition by the aboriginal group, self-identification and some historical connection. In *Cunningham*, the S.C.C. reiterated that membership and belonging within the Métis Nation is a matter internal to the Métis Nation, reflecting internal laws and traditions:  
The significant role that the Métis must play in defining settlement membership requirements does not mean that this exercise is exempt from Charter scrutiny. Nevertheless, it does suggest that the courts must approach the task of reviewing membership requirements with prudence and due regard to the Métis’s own conception of the distinct features of their community. |
| **Anishinabek Citizenship Commission** | Based on the laws and principles of the Anishnabek Nation, the Citizenship Commission proposed a citizenship law based on a “one-parent” citizenship rule, meaning:  
that an individual is eligible for Anishnabek Nation citizenship if either parent is entitled to be registered as a citizen of the Anishnabek Nation. This will effectively dispense with the Indian Act provision, Section 6.2, also known as the second generation cut-off rule. (Anishnabek Draft Final Report at 10.) |

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24 The *Cunningham* case was “not about defining entitlement to s. 35 rights, it is about the identification of membership requirements for Métis settlements for the purpose of establishing a Métis land base.” The Supreme Court of Canada observed that: “As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified.”

Anishnabek citizenship to any person who could establish that they have at least one parent who is a member of the Anishnabek Nation. Public consultations within the nation emphasized the need for renewed efforts to re-establish language, culture and identity to address the ongoing impacts of years of forced assimilation on the Nation’s citizens.

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<tr>
<th>Modern Treaty Agreements</th>
<th>Various Indigenous groups have entered into self-government agreements with Canada and provincial or territorial governments that set different membership enrolment criteria. While modern treaty agreements allow Indigenous groups to determine their membership in different ways that reflect their own traditions and culture (they can determine who is entitled to be an enrolled member of their treaty agreement), they cannot grant status or attach any fiduciary obligations outside of the envelope agreed to under the agreement. For example, both the Nisga'a Agreement and Tsawwassen Treaty allow for the Indigenous group to pass a constitution that provides a process for the enrolment (or un-enrolment) of members as part of that agreement.</th>
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<th>Pre-Confederation Douglas Treaties</th>
<th>Pre-confederation Douglas Treaties provide an early example of the recognition of self-determination of Indigenous Nations, which necessarily includes the right to define citizenship. At the time when the Douglas Treaties were entered the colonial powers relied on the Indigenous Peoples to be able to enforce them, to ensure the safety and security of small settler populations. The treaties themselves contain broad recognition of hunting and fishing rights, which Canadian courts have found to be exercisable according to the laws of the Indigenous Peoples in place at the time. The right (and ability) to both define their own citizenship and to be able to enforce the treaty promises made by the Indigenous treaty parties are implied within the structure of the Douglas Treaties. Canada and the province have sought to limit Douglas Treaty rights by restricting those rights to status Indians and limiting them to band registration in particular communities - concepts that are far more restrictive than the promises under the Douglas Treaties.</th>
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**Recommendations:**

15. UBCIC work with other Indigenous organizations to highlight the fact that Canada is not meeting its obligations under international human rights instruments, particularly the UNDRIP, on the issue of Citizenship and continues an assimilationist policy of denying Indigenous Peoples this fundamental human right.

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26 See the BCAFN Governance Toolkit: A Guide to Nation Building, Chapter 3.6.4.1 for citizenship provisions in modern treaty agreements.
16. UBCIC work with other Indigenous organizations at the international level to identify and correct the impact on Indigenous Peoples that arises from Canada’s continued denial of Aboriginal Title to lands and resources, including in the area of citizenship self-determination.

17. That UBCIC work with other Indigenous organizations and academic institutions or research institutes to forward research that supports the reinvigoration of the laws – unique to each Indigenous Nation – for determining citizenship.

18. MAIN RECOMMENDATION: That UBCIC work with other Indigenous and social justice organizations to advocate for recognition that the just and honourable approach is that citizenship is a matter internal to each Indigenous Nation and must be determined according to the laws of each Indigenous Nation, based on:
   - Self-identification;
   - Recognition by an Indigenous Nation; and
   - An historic connection to an Indigenous Nation, as determined by the laws and principles of each Indigenous Nation.

Decolonizing Indigenous Citizenship

The Canadian Common Law provides a clear legal path for how existing Canadian law makes room (arguably requires) recognition of Indigenous Peoples’ citizenship self-determination. Decolonizing Indigenous citizenship in the long term requires that Indigenous Peoples reinvigorate their own citizenship laws and practices.

We have an incredible opportunity...to begin to give description to the kind of membership that our ancestors handed down to us. They didn’t just invent it overnight, they talked about it and it evolved through the millennia thousands of years. So it had integrity, it had spirit, it was noble, it was sustaining, it was deep, it was profound, and we could not change it at whim. That is the difference between the kinds of laws we are talking about now in the modern-day context and the kinds of laws that our ancestors handed down to us until colonization.

- Kwan’kwan Kwali’gyadzi (Robert Joseph), Hereditary Chief, Musgamagw-Tsawataineuk