

# Aboriginal Citizenship in Transition

By  
Doug Kane

A Project submitted to the School of Policy Studies in partial fulfillment of  
requirements for the degree of Master of Public Administration

Queen's University  
Kingston, Ontario, Canada

September, 2000

## Acknowledgements

The perspective developed in this paper has been significantly influenced by the writings of two scholars, Alan C. Cairns and Will Kymlicka. Both of these academics have written extensively on Canadian federalism and citizenship issues. I thank Patrick Fafard, formerly of the School of Policy Studies, for bringing their work to my attention and the other contributions that Patrick made to my early thinking on the focus of the paper.

I especially want to thank my Co-Supervisors, Dr. Andrew Nurse, Mount Allison University and John Graham, Institute on Governance for their advice, support and contributions to the development of the paper. I also want to thank a number of others who reviewed early drafts and provided comments, including Simon Rosenblum, Daniel Beavon, Mary Jane Norris, Alexandra McQueen, and Pam Devine. As well, I thank Kathy Brock, Associate Professor, School of Policy Studies, for her invaluable insight and advice as the ‘outside reader’ of the paper. Finally, I thank Douglas Bland, Professor and Master’s Project Coordinator, School of Policy Studies, for his support on this project.

In closing, I want to convey a special thanks to Robert Louie and the Chiefs of the Lands Advisory Board and my family for their patience and support during the period I was writing this paper.

## Executive Summary

The central thesis of the 1996 report of the Royal Commission on Aboriginal Peoples is that the relationship between Aboriginal People and Non-Aboriginal People of Canada needs to be fundamentally restructured. A key feature of the Royal Commission's proposal to restructure the relationship is greater recognition of First Nation citizenship status. The paper describes how the Aboriginal citizenship issue has evolved over time, how it relates to the current debate on Canadian citizenship, and why this issue needs more consideration and debate in the larger society.

Following the introduction (Section 1), the paper provides a brief historical review (Section 2) of the kinds of measures that were undertaken in the nineteenth and early part of the twentieth century to narrow the definition of who was considered an officially recognized Aboriginal person (i.e. an Indian) in order to promote gradual assimilation of Aboriginal people into the larger society. When voluntary assimilation failed, the government turned to coercive measures and other ways to accelerate assimilation. Over the past forty years, these colonial policies have been rejected as they came into conflict with modern democratic and humanitarian values that were recently entrenched in the *Constitution Act* (1982) and the *Charter of Rights and Freedoms*. The incompatibility of these policies and the new societal values forced the government to introduce amendments to the *Indian Act* in the mid-1980's dealing with the rights of Indian women. However, Bill C-31 left many issues unresolved and introduced new problems. The paper contends that the capacity of the courts to deal with these issues is very limited and any future policy initiative in this area requires a political commitment to some form of 'special status' recognition. The paper also argues that there are other complications related to the citizenship issue dealing with changes to the demographics of First Nation communities and other socio-economic factors that need to be part of a more comprehensive consideration of this issue.

The third section of the paper examines how issues of First Nation status/membership/citizenship are invariably linked to a broader set of political questions dealing with the nature of Canada and Canadian citizenship. The paper examines two competing views on Canadian citizenship and shows how the concept of Aboriginal citizenship relates to these models. The section concludes with a discussion of a number of key issues related to special status and Canadian citizenship that require further consideration.

The conclusion (Section 4) summarizes the argument and contends that the emerging challenge for the federation will be how to institutionally accommodate Aboriginal Peoples and clarify their 'special status' rights and responsibilities in a way that accommodates their aspirations, while at the same time not increasing the fragmentation of the federation and the capacity of Canadians to think and act collectively. It also identifies a number of substantive and procedural issues that require serious examination if the concept of Aboriginal citizenship is to be accommodated into a renewed Canadian federalism.

# Table of Contents

ACKNOWLEDGEMENTS.....	I
EXECUTIVE SUMMARY .....	II
<b>1 INTRODUCTION.....</b>	<b>1</b>
1.1 The Genesis of the Canadian Debate .....	2
1.2 Scope of the Paper .....	3
1.3 Issues Beyond the Scope of the Paper .....	4
<b>2 THE LEGACY OF COLONIALISM AND CHANGING DEFINITIONS OF     ‘ABORIGINALITY’ .....</b>	<b>6</b>
2.1 Use of the <i>Indian Act</i> to Define ‘Aboriginality’ .....	6
2.2 The Beginning of the Transition.....	10
2.3 Challenges to the Definition of ‘Status’ Under the <i>Indian Act</i> .....	10
2.3.1 <i>Determining First Nation Membership/Citizenship</i> .....	13
2.3.2 <i>The Source of the Authority for Membership/Citizenship</i> .....	14
2.4 Recent Political Developments .....	14
2.5 Other Issues Impacting on the Membership/Citizenship Issue.....	17
2.6 Concluding Observations.....	19
<b>3 COMPETING VIEWS OF CANADIAN CITIZENSHIP AND ABORIGINAL     CITIZENSHIP .....</b>	<b>20</b>
3.1 Introduction.....	20
3.2 The Unitary Concept of Canadian Citizenship .....	21
3.3 The Evolution of Differentiated Citizenship in Canada .....	22
3.4 Aboriginal Citizenship .....	25
3.5 The RCAP Proposal on Dual Citizenship .....	26
3.6 Final Thoughts .....	28
3.6.1 <i>Special Status</i> .....	28
3.6.2 <i>Similar But Different Aspirations</i> .....	28
3.6.3 <i>Retaining a Common Canadian Identity</i> .....	29
<b>4 BUILDING ROOM FOR ABORIGINAL CITIZENSHIP AND STRENGTHENING     CANADIAN CITIZENSHIP .....</b>	<b>30</b>
4.1 Summary .....	30
4.2 Moving Beyond Conceptual Distinctions.....	31
<b>BIBLIOGRAPHY .....</b>	<b>34</b>

# 1 Introduction

The central thesis of the report of the Royal Commission on Aboriginal Peoples (RCAP) is that the relationship between Aboriginal and non-Aboriginal people of Canada needs to be fundamentally restructured. To renew the relationship, the report proposed a comprehensive vision and 440 recommendations designed to develop this new relationship over a twenty-year period. The Commission recommended that Aboriginal nations be recognized as “political entities through which Aboriginal people can express their distinctive identity within the context of their Canadian citizenship.”<sup>1</sup> According to the Commission, this recognition must accept the fact that “Aboriginal peoples *are* peoples, that they form collectivities of unique character, and that they have a right of governmental autonomy”<sup>2</sup>.

One of the Commission’s recommendations that has not yet received a lot of public attention is a proposal that “the government of Canada recognize Aboriginal people in Canada as enjoying a unique form of dual citizenship”<sup>3</sup>, as citizens of one of the 60-odd Aboriginal Nations and citizens of Canada. Although this recommendation did not attract a lot of public scrutiny when the RCAP report was released in December 1996, this paper suggests this concept of dual citizenship is both central to the underlying philosophy of the Royal Commission’s report and touches upon one of the most challenging governance issues that the Canadian federation faces: the relationship of Aboriginal self-government and Aboriginal citizenship<sup>4</sup> to current concepts of Canadian citizenship and other aspects of Canadian federalism.

Although Alan Cairns and Cynthia Williams warned, in the mid-1980’s, the failure to engage in a public discussion on Aboriginal self-government and Aboriginal citizenship could foster poorly-conceived policies that could prove “costly for the future generations”,<sup>5</sup> the importance of this issue is only now beginning to emerge as the concept of who is a citizen of a First Nation is defined in the context of self-government. As a recent Assembly of First Nations (AFN) report noted, the need to define who aboriginal citizens are takes on “new and greater urgency as First Nations seek to assert self-government”<sup>6</sup>. How this definition will deal with “the delicate balance between individual and collective rights”<sup>7</sup> is likely to raise complex and emotional issues related to status and membership for First Nation communities and significant implications for the larger society. As evidenced by “the reawakening scholarly interest in citizenship”<sup>8</sup> and the debate at recent meetings of the Senate Standing Committee on Aboriginal Affairs<sup>9</sup>, the importance of this issue is attracting increasing public attention.

On one level, the issue raises interesting technical questions such as: What criteria should be applied to Aboriginal citizenship (i.e. community acceptance, self-identification, parentage or ancestry, birthplace, adoption, marriage to another citizen, cultural or linguistic affiliation, residence, etc.). Who should define Aboriginal citizenship? How does the concept of Aboriginal citizenship relate to the concept of ‘special status’ that has evolved with respect to Indians? How does the concept of Aboriginal citizenship relate to First Nation membership, existing definitions for status Indian, and other terms such as Inuit, Metis and non-status Indians?

On another level, the Aboriginal citizenship issue raises more fundamental philosophical questions about the nature of the country and Canadian citizenship. For example: Does the concept of Aboriginal citizenship alter the concept of Canadian citizenship? To what extent are members of First Nations also citizens of Canada? What special rights should flow to Aboriginal citizens? What are the fiscal implications to federal and provincial governments of Aboriginal citizenship? How will the concept of Aboriginal citizenship deal with emerging demographic patterns and other developments? How does the concept of Aboriginal citizenship relate to current theories of Canadian citizenship? Should these issues be openly debated, if so by whom? What relationship do these issues have to other national issues, such as Quebec?

These types of questions may appear to be extraneous or irrelevant to the current mainstream debates on Aboriginal policy that deal primarily with issues related to the nature and scope of Aboriginal and treaty rights. However, the paper will argue that questions of Aboriginal citizenship will likely take on much greater relevance, as the debate enters the next stage and Aboriginal and non-Aboriginal policy makers try to rationalize future self-government arrangements with the current arrangements under the *Indian Act* and the demographic and other changes that are likely to impact First Nation communities over the next few decades.<sup>10</sup>

The last forty years have seen dramatic changes in the direction of Aboriginal policies and this transition is likely to accelerate. The country is fast approaching a time when the inconsistencies, between the *Indian Act* (with its old colonial terms and concepts of state controlled membership) and new self-government arrangements (that allow First Nations communities to define their own citizens) will no longer be tolerated. One of the key issues that needs to be resolved to allow for this transition is the question of Aboriginal citizenship. Can concept of Aboriginal citizenship be accommodated by the current uniform definition of citizenship or is a new concept of citizenship required?

## **1.1 The Genesis of the Canadian Debate**

The societal pressures in Canada to consider new approaches to citizenship flow from a number of sources. The most obvious influence has been the Canada/Quebec debates of the past century. These debates on what some commentators call the “national question” are based on two different perspectives of the country and the nature of Canadian citizenship. At the very essence of the issue (if you exclude the sovereigntist option) is the question of whether or not one can be both a citizen of Quebec and of Canada. This paper will suggest that a similar debate is underway with respect to Aboriginal citizenship.

Those that argue for a new concept of citizenship are supported by a growing body of political thought that asserts that a liberal democratic state is sometimes justified in treating people differently in order to treat them equally.<sup>11</sup> In the case of Aboriginal Peoples, this kind of argument is usually premised on a belief that Aboriginal minorities have often been excluded from common rights of citizenship because of their socio-economic status or socio-cultural identity.<sup>12</sup> Although not often articulated, this kind of argumentation

appears to be embedded in the RCAP report and forms the basis for current federal government policies in many areas within the existing definition of citizenship.

Iris Marion Young, one of the leading advocates of this view, contends that “cultural assimilation should not be a condition of full social participation” for Aboriginal Peoples.<sup>13</sup> Others, such as Darlene Johnston, assert that “before First Nations can be expected to embrace Canadian citizenship, there must be assurances of respect, acceptance, and the right to be different.”<sup>14</sup> Some commentators even claim that this recognition of difference is a condition necessary for longer-term accommodation with Aboriginal people.

Based on this kind of analysis, Joseph Carens suggests that First Nations can only be integrated into the common culture by adopting what he calls a differentiated citizenship approach.<sup>15</sup> The Royal Commission seems to suggest that the implementation of this differentiated citizenship approach for Aboriginal people would have the consequence of creating a form of ‘dual citizenship’.

At the moment, policy makers (Aboriginal and non-Aboriginal) are only beginning to explore the nature of the issue. To date there has been very little serious research or policy work conducted on the implications of applying a differentiated form of citizenship to First Nation communities and the longer-term implications to Canadian citizenship issues or other national issues. Where work has been undertaken it does not take the issue much beyond broad conceptual distinctions.

## **1.2 Scope of the Paper**

The primary objective of this paper will be to provide some insight on how the Aboriginal citizenship question has evolved and begin to explore why this issue needs to be more comprehensively assessed. Only by openly debating this issue can Canadians (Aboriginal and non-Aboriginal) begin to build the kind of consensus necessary to move forward in this area and engage in a dialogue. In exploring this issue, the challenge will be to determine how the concept of Aboriginal citizenship fits within Canadian federalism and what are the implications of this emerging concept for other Canadians and Canadian society as a whole.

In order to clarify the broader policy implications of this issue, the paper will start with an examination of how the concept of Aboriginal person has been defined in Canada over the past one hundred and fifty years. This first section of the paper (Section 2) will describe the various techniques that the state has used to attempt to assimilate the Aboriginal population into the larger society and the kinds of debate that this colonial policy has generated in the twentieth century. It will also outline the dramatic social reforms that have occurred in the Aboriginal/non-Aboriginal relationship over the past thirty years and identify a number of factors that will likely impact on future developments. The section will conclude with some observations on the lessons that can be drawn from this experience.

The next section of the paper (Section 3), examines the on-going debate on the nature of Canadian citizenship that has intensified over the past decade between the current unitary

concept of Canadian citizenship and those who contend (usually with reference to Quebec) that the country should move towards some form of differentiated concept of Canadian citizenship. As noted earlier, this debate on citizenship has increasing application to recent developments related to Aboriginal self-government. These two views offer different interpretations of not just the transition that is occurring but also its significance and desirability. The arguments set out by these two conflicting schools of thought will be reviewed and the implications will be examined as they relate specifically to the Aboriginal citizenship issue. The section concludes with an examination of where the Royal Commission's recommendation on dual citizenship for Aboriginal Peoples is situated in the context of this debate.

The final section of the paper (Section 4) concludes by identifying a number of issues that require serious consideration and further dialogue if the concept of aboriginal citizenship is to be accommodated into a renewed Canadian federalism.

### **1.3 Issues Beyond the Scope of the Paper**

As often happens in researching and writing a paper of this nature, one explores various avenues of intellectual inquiry to develop an argument or verify a statement of fact. Some of these avenues have contributed to the final development of the paper; some have not. Although consideration of these issues go beyond the scope of the paper, they are touched on briefly here as they assist in defining the boundaries of the paper. If opportunities arise, these issues may be examined later in another context.

For instance, the paper will not deal with the individual legal issues related to treaty rights which flow from status, residency rights, rights to access First Nations programs and services and rights to participate in political decisions making. These matters have been studied by many legal scholars.<sup>16</sup> The key issue, for this paper, is not the legal technicalities of this unique relationship between the state and Aboriginal peoples but how, and in what way, the definition of aboriginal citizenship is changing and what are the issues that require greater public policy attention.

Nor will the paper examine in any detailed way the psychological dimension of the citizenship issue<sup>17</sup>, although investigation of the concept of Aboriginal citizenship in Canada from this perspective would contribute to a better understanding of these issues. For example, are Aboriginal Canadians more likely to identify with their ancestral community than non-aboriginal Canadians? More specifically, how do aboriginal acculturation rates compare with ethnic groups and what are the policy implications.<sup>18</sup>

Scholars like David Elkin and Nicole Gallant suggest that the very nature of citizenship itself may be changing. This new concept of citizenship may not "limit itself to a single over-arching community but may be shared and may rest on multiple loyalties and identities."<sup>19</sup> For example, Gallant, contends that for some Canadians "being Canadian" is their primary identity, while others view themselves as Canadian citizens, yet their primary identification is elsewhere.<sup>20</sup> Although this kind of perspective may offer further collaboration for some of the views put forward in this paper, the development of this argument is beyond the scope of this paper.



Another aspect of the issue that will not be examined in this paper is the international experience, as it relates to aboriginal citizenship. Canada is not the only country struggling with Aboriginal citizenship issues related to demands for greater autonomy and self-government. How to balance “the demand for effective, equal citizenship and group-specific demands for greater autonomy and self-government”<sup>21</sup> has recently received increased attention in other countries with aboriginal minorities.

Deborah Yashar, for instance, claims that Aboriginal organizations in South America are demanding “multiple types of citizenship with boundaries that guarantee equal rights and representation at the national level and recognize corporate indigenous authority structures in the indigenous territory.”<sup>22</sup> She claims that these demands “challenge policy makers and states to recognize both individual and communal rights in an ideologically meaningful, practical feasible way”.<sup>23</sup> According to Yashar, the law needs to allow a better blending “of universal claims to citizenship and differentiated claims to difference”.<sup>24</sup>

Another country dealing with issues of aboriginal citizenship is Fiji. Although the aboriginal population in Fiji is in the majority in that country, observers such as Henry Srebrnik claim that “the underlying issues” are similar in essence to Canada.<sup>25</sup> According to Srebrnik, the issue is “can special rights and entitlement for aboriginal peoples be reconciled with liberal democratic values that entail equal individual rights, including the right to govern, for all citizens of a state?”<sup>26</sup>

There are also international experiences dealing with citizenship that are not aboriginal in character that could enrich any review of this issue as well. For example, the Hong Kong Court of Final Appeal in January 1999 “granted residency rights to all mainland children of Hong Kong residents, including children born before their parents came to Hong Kong.”<sup>27</sup> In June 1999, the Chinese Parliament overruled this decision. The reports in western papers that commented on this issue focused on the fact that “the Chinese move threatens the rule of law in Hong Kong”.<sup>28</sup>

From another perspective, this case could be described as a situation of the national state overruling the rights of a minority group attempting to define their rights of citizenship. Although there are fundamental political and historical differences between Canada and this case in Hong Kong, it is not too difficult to imagine similar citizenship court challenges arising in Canada in future under Aboriginal self-government.

An examination of these kinds of issues would provide a more comprehensive analysis of the issue of aboriginal citizenship. However, these issues go beyond the scope of this research paper.

## 2 The Legacy of Colonialism and Changing Definitions of ‘Aboriginality’

Citizenship. The very word conjures up notions of freedom and autonomy, the right to participate, a sense of belonging. The western political tradition regards the evolution of citizenship as its crowning democratic achievement. However, for First Nations over whom Canada asserts jurisdiction, the experience of Canadian citizenship has been less than ennobling.

Darlene Johnston<sup>29</sup>

To situate the Royal Commission’s recommendation on ‘dual citizenship’ and the aboriginal citizenship issue in a historical context, this section of the paper provides a brief description of the developments that have shaped the aboriginal citizenship issue in Canada since the pre-confederation period. It outlines the role that the *Indian Act* and previous colonial legislation have played in defining the concept of ‘aboriginality’ and shows how the status of aboriginal people changed during a hundred and fifty year period from citizens of protected nations; to non-citizens whose mobility and political rights were severely restricted; and finally to citizens with ‘special status’.

The latter part of this section examines how the political developments since 1960s have influenced this special status. It concludes with some observations on the nature of Indian ‘special status’ in Canada and identifies a number of emerging issues with which society is currently grappling with as it tries to redefine the relationship between non-Aboriginal and Aboriginal peoples.

### 2.1 Use of the *Indian Act* to Define ‘Aboriginality’

...the Indian Act is the repository of the struggle between Indian peoples and colonial and later Canadian policy makers for control of Indian people’s destiny within Canada....By examining the act, how it came about and how it continues to influence the daily experience of Indian people in Canada, much can be learned ...

RCAP Report<sup>30</sup>

The early historical record clearly indicates that the relationship between Aboriginal Peoples in Canada and the British Imperial government was based on the belief that aboriginal peoples were protected nations that were “capable of governing their own affairs and of negotiating relationships with other nations”.<sup>31</sup> This relationship began to change in the early part of the nineteenth century, from one founded on cooperation, mutual tolerance and respect to more of a colonial or dependency relationship. Up until that time, there was little concern on the part of the British government about who was a member/citizen of a First Nation.

The first legislation to deal with the issue, the *Act for the Better Protection of the Lands and Property of Indians in Lower Canada*, was passed in 1850 by the Province of Canada.

This piece of legislation defined Indians as persons of Indian blood, persons reputed to belong to the particular tribe, persons married to such Indians, persons adopted by such Indians, “the descendents [sic] of all such persons . . . persons residing among such Indians”.<sup>32</sup> In comparison with later legislation, this definition of Indian was very broad. The importance of this legislation, however, was that it was the first time a body beyond the control of Indians “arrogated to itself the authority to define who was or was not an Indian.”<sup>33</sup>

In the first half of the nineteenth century, leading up to the transfer of the responsibility for Aboriginal peoples to the colonies, the British authorities undertook six formal commissions of inquiry to examine the ‘Indian question’ in the Canadas.<sup>34</sup> The final commission, the Pennefather Commission, recommended the establishment of “a policy of complete assimilation of Indians into colonial society.”<sup>35</sup> This new policy had as its goal “to civilize Aboriginal people through educational, economic and social programs delivered primarily by the Christian churches and missionary societies.”<sup>36</sup>

Even before the Pennefather Commission’s report was published, the *Gradual Civilization Act* was passed in 1857. This legislation defined Indians as ‘non-citizens’.<sup>37</sup> It was premised on the belief that if all legal distinctions between Indians and non-Indians could be removed through a process known as voluntary enfranchisement, then it would be possible over time “to absorb Indian people fully into colonial society.”<sup>38</sup> The term ‘enfranchised’ was used to describe a process by which an Aboriginal person voluntarily surrendered their Aboriginal identity.

This legislation “marked a clear change in Indian policy.”<sup>39</sup> In addition to introducing voluntary enfranchisement, it reduced the tribal government’s control over their land base and introduced “the beginning of the process of replacing the natural, community-based and self-identification approach to determining group membership with a purely legal approach controlled by non-aboriginal government officials.”<sup>40</sup> Twelve years later in 1869, two years after confederation, the Parliament of Canada introduced the *Gradual Enfranchisement Act* to achieve the goal of assimilation. It contained voluntary enfranchisement provisions similar to the *Gradual Civilization Act* but also at the same time introduced a number of stronger measures that became known as non-voluntary enfranchisement or mandatory provisions.

The first *Indian Act*, which was passed in 1876, was a consolidation of previous legislation. The legal term ‘Indians’ was used in this legislation to distinguish the group of Aboriginal peoples for which the federal government had jurisdictional responsibilities under section 91(24) of the *British North America Act, 1867*. Over time, the term ‘Indians’ has come to identify the group of persons for whom the federal government had certain responsibilities. Since 1876 the *Indian Act* has been the instrument that defines who is a member of this group and eligible for certain federal government benefits.

The annual report of the Department of the Interior in 1876 reported that the “legislation generally rest on the principle, that the aboriginals [sic] are to be kept in a condition of tutelage and treated as wards or children of the state”.<sup>41</sup> This kind of statement reflects the

values of the time and the role that the *Indian Act* played as the key instrument used to define the concept of Aboriginality. Although no official public policy was ever tabled by the government to explain the reasoning behind this statement, there is ample evidence to demonstrate that the government's objective was "the assimilation of Indians and their eventual disappearance as a distinct people as they were absorbed" into the larger Canadian community.<sup>42</sup>

By the 1870s, it was clear that the voluntary enfranchisement approach was not proving to be very successful. Only one Indian accepted voluntary enfranchisement between 1857 and 1876 when the first *Indian Act* was introduced. In fact, from 1857 to 1920 only 250 individuals opted for full Canadian citizenship and loss of Indian status by means of voluntary enfranchisement.<sup>43</sup>

When efforts to deal with the Indian "problem" by voluntary enfranchisement failed, the government moved to more coercive mandatory approaches.<sup>44</sup> Amendments to the *Indian Act* since 1876 have systematically reduced the number of persons entitled to Indian status through a variety of legal definitions. Over a 100 year period, the government used various methods of promoting voluntary and non-voluntary enfranchisement related to marriage, adoptions and illegitimate children.<sup>45</sup>

In addition to enfranchisement, a variety of other technical measures were used to limit the entitlement to 'Indian' status under the Act. For example, prior to 1876 a number of terms, such as, 'tribe', 'band', or 'body' were used to describe the community of which an Aboriginal person was a member.<sup>46</sup> The 1876 *Indian Act* allowed only Aboriginal persons who could show proof of membership in particular "bands" to be recognized as status Indians. The effect of this amendment was to further restrict the scope and number of communities from which status Indians could be recognized.

Another administrative measure that acted to limit who was defined as an Indian was the distinction made between Indian status recognized by the *Indian Act* and the beneficiaries of the treaties. The entitlement components of the *Indian Act* deal with the issue of "whether a person is entitled to be registered as a status Indian or as a member of a band in accordance with the current *Indian Act*"<sup>47</sup> but the *Indian Act* is silent on the rights of treaty Indians. On the other hand, the concept of treaty entitlement deals with who has benefits under particular treaties. Since there is no reference to treaties in the *Indian Act*, the rights set out in the treaties and the question of entitlement to these rights have been subject to long-standing debates between First Nations and the federal and provincial governments.

According to Larry Gilbert, treaty membership was not an issue during the treaty negotiations "since the Crown assumed that the First Nation negotiating the treaty knew who among its people were treaty. The Crown disputed treaty entitlement only after the treaty was signed because...the Crown was then required to make treaty payments to people who did not look as Indian as others."<sup>48</sup> In other words, the issue of who is an 'Indian' only became an issue because of the financial implications and the government acted to limit its financial exposure.

Towards the end of the nineteenth century and again in the part early of the twentieth century, the government began to make greater use of compulsory enfranchisement and other measures, such as residential schools,<sup>49</sup> as a way of accelerating assimilation. Under compulsory enfranchisement, an Indian automatically lost their status and became 'enfranchised' if he (or she) became a lawyer, a doctor, a Christian Minister or fought for the country in a war. Although these compulsory provisions were first introduced in the 1876 *Indian Act*, they were subsequently dropped in 1880 and then re-introduced again in 1920.<sup>50</sup> There was considerable political debate surrounding compulsory enfranchisement, as the concept was repealed again in 1922 and then restored again in 1933.

As noted earlier, the primary objective of Indian policy changed in the middle of the nineteenth century from the protection of Indian people from non-Indian encroachment to "an underlying assumption of eventual assimilation."<sup>51</sup> In the early part of the twentieth century this policy was further intensified.<sup>52</sup> During this period, treaty negotiations were put on hold, the residential schools program was extended, and the authority of the Indian agent reached its height.

One of the clearest expressions of Indian policy during this period was made in 1920 by Duncan Campbell, the Deputy Superintendent of Indian Affairs to the Special Committee of the House of Commons which was examining a compulsory enfranchisement provision amendment to the *Indian Act*. Campbell stated during his presentation that the government's "objective 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".<sup>53</sup>

Although most mandatory enfranchisement procedures and other obnoxious features of the *Indian Act* (i.e., bans on potlatch and the Sun Dance) were dropped in 1951,<sup>54</sup> the federal government still introduced at that time new ways to reduce the officially recognized aboriginal (i.e. Indian) population.<sup>55</sup> For example, the 'double mother clause' was first introduced at this time. Under this provision, an Indian lost status at the age of 21 if one's mother and grandmother had obtained status only through marriage to a man with Indian status.

Another provision - 12(1) (b) was actually strengthened in 1951 by linking it to the involuntary enfranchisement provision s. 108(2). Under this change Indian women not only lost Indian status when they married a non-Indian but they also could be enfranchised as of the date of their marriage. Before 1951, these women were given an identity card (known as a "red ticket") that allowed them to retain community privileges should they wish to return to their community, if their marriages broke down. The 1951 amendment brought this 'informal' procedure to an end.

According to Gilbert, another amendment in 1951 to the *Indian Act* that acted to accelerate the reduction of the Indian population was the centralization of the membership system. "Prior to that year, membership lists of the individual First Nations communities, treaty pay lists and agency records combined to form the record of who is an Indian."<sup>56</sup> As a result of this amendment, the federal government established a central registry system and

took over the function of maintaining the 'official' record of who was eligible to be registered as Indians under the *Act*. Gilbert suggests that this created a more formal system that introduced incentives to impose tighter restrictions on who was defined as an Indian.

## 2.2 The Beginning of the Transition

The second half of the twentieth century brought sweeping changes in social values and new political pressures with respect to the *Indian Act* and other aboriginal issues. This period is examined in terms of the debate over the concept of membership under the *Indian Act*, the emerging concept of aboriginal citizenship that has arisen in the context of self-government, and a number of other key dimensions of the membership/citizenship issue.

## 2.3 Challenges to the Definition of 'Status' Under the *Indian Act*

Although changes in social values after the Second World War did not impact on the 1951 amendments to the *Indian Act*, which were essentially the unfinished agenda from the pre-war period, new values and ways of thinking began to influence events in the 1950s and 1960s as to how society perceived 'the Indian problem' and the 'ways to resolve the problem'. The debate has evolved over the past forty years through a series of court driven policy issues dealing with the question of who is a First Nation member.

The first element of the *Indian Act* to come under serious attack was the involuntary enfranchisement of Indian women who married non-Indian men. These provisions created growing tension during the 1960 to 1980 period as the post war society became more concerned with human rights issues. The issue was taken to the courts in the Lavell and Bedard cases. The two cases were heard jointly before the Supreme Court of Canada in 1973. The issue the Supreme Court was asked to examine was whether section 12(1)(b) of the *Indian Act* violated the Canadian Bill of Rights. If the logic set out in the 1970 S.C.C. decision on Drybones<sup>57</sup> that the Bill of Rights applied to the *Indian Act* was followed, it appeared that the Court would likely find that this kind of discrimination was prohibited.

In a controversial split decision however, the Supreme Court distinguished between discrimination based on race and discrimination based on gender and held that this section of the *Indian Act* was not made inoperative by the Bill of Rights.<sup>58</sup> In light of the Drybones decision, many legal academics found the Supreme Court decision on Lavell and Bedard to be "virtually unintelligible"<sup>59</sup>. In hindsight, David Elliott has observed that the courts of the 1960's were not bold and their reluctance to be proactive was based on policy considerations, as "striking down the *Indian Act*'s eligibility provisions would have invalidated one of the main foundations of the Act".<sup>60</sup>

The political fallout from this decision dominated the political debate in the mid 1970s to the point that the government finally indicated a willingness to "amend the contentious section of the *Indian Act*."<sup>61</sup> However in the end, when efforts to reach consensus on an amendment failed, the *Indian Act* was exempted by the government from the application of the newly passed *Human Rights Act* in 1977.

The difficulties with the court decision and the decision by the government to exclude the *Indian Act* from the application of the *Human Rights Act* became difficult to justify when

the United Nations Human Rights Committee found in 1981 that Canada was violating “Article 27 of the *International Convent on Civil and Political Rights* which guarantees that persons belonging to minorities may enjoy their own culture.”<sup>62</sup>

At the time, the public perception in the country of the issues raised by the Lavall and Bedard cases was not that Canada was caught between the inconsistency of its Aboriginal policy and new international values on human rights but rather that “women’s rights were pitted against aboriginal rights”.<sup>63</sup> The government distanced itself from the debate by making the position that it was an internal community matter dealing with conflicting Indian culture values and had to be resolved by the Indian community itself.

With hindsight, it is now widely recognized that the tension at the community level was created by a modified but continuing federal assimilation policy that offered no support to allow women and their children to return to their communities without hardship to existing community members. The government was not at that time prepared to revisit the full implications of its assimilation policy and accept that increased financial expenditures would be necessary if these women were to be reinstated as Indians. As a result, the debate was transferred by default to the community level where the reinstatement of these women was actively opposed by the existing members because their return would severely strain limited community resources.<sup>64</sup>

The provisions of the *Indian Act* that allowed aboriginal women to be treated differently than aboriginal men if they married non-Indians had to be changed when the Constitution was amended in 1982 to incorporate the *Canadian Charter of Rights and Freedoms*. Section 15(1) of the Charter recognizes that “every individual is equal before and under the law and has the right to the equal protection and benefits of the law without discrimination based on race, natural or ethnic origin, colour, religion, sex, age, or mental or physical disability”.<sup>65</sup> When this section came into affect in 1985, the federal government amended the discriminatory provisions of the *Indian Act* that treated women differently than men.

An *Act to Amend the Indian Act* (Bill C-31) was passed in June 1985. This piece of legislation ensured that the *Indian Act* “would conform to the equality provisions of the *Charter of Rights and Freedom*”<sup>66</sup>. It represented a compromise between the positions of the AFN (the Assembly of First Nations) and Aboriginal women and non-status Indian groups.<sup>67</sup> As a result of these amendments, the concept of mandatory enfranchisement was abolished and those who had lost status through enfranchisement had their Indian status restored.

Although Bill C-31 eliminated major forms of discrimination in the *Indian Act*, it soon “became apparent that it left issues unresolved and introduced new problems. Some of these were anticipated prior to, or emerged soon after, the bill’s passage while others continued to become evident.”<sup>68</sup> For example, at the time that C-31 was passed, there was serious criticism directed at the ‘second generation cut-off rule’ which “results in the loss of Indian status after two successive generations of parenting by non—Indians”<sup>69</sup> The arbitrary nature of this position was debated by the government policy makers, but in the end decisions were taken to proceed because no consensus could be reached on where the

cut off should be, the new problems would not be fully evident for a few generations and Section 15 of the Charter came into effect in 1985.<sup>70</sup> It was also decided at this time to include another major provision in C-31 that would allow First Nations to take control of their membership. We will return to the implications of this change in s. 2.3.1. below.

It was recognized at the time that a major impact for Bill C-31 would be the increase in Canadian population. By 1995, the total registered Indian population had increased 61% and most of the newly recognized Indians resided off reserves. The implications of this development has forced governments over the past decade to significantly increase the provisions of services to Indians living on and off-reserve in areas of health, housing, education and social assistance. Nevertheless, the funding has not been sufficient in many areas and new inequalities have been created. These new inequalities have created new cleavages between members who lived on-reserve and those who live off-reserve. The tensions are growing and many issues have been forced into the courts for resolution.

The recent Corbiere case is an example. This case deals with the Batchewana First Nation in north western Ontario, where the majority of members now live off-reserve.<sup>71</sup> In 1985, 71.1 percent of the 543 registered members of the Batchewana band lived on-reserve. "In 1991 only 32.8 percent of the 1426 registered members lived on-reserve."<sup>72</sup> The court was asked to decide if subsection 77(10) of the *Indian Act* violates the rights of members living off-reserve by restricting the voting for Chief and Council to members living on-reserve. The court found that the infringement of s.15 was partially justified by s.1 of the Charter but the *Indian Act* needs to be amended to recognize the voting rights of off-reserve members "in a nuanced" way<sup>73</sup>. The government was given until November 2000 to correct the provision. If Parliament has not amended this provision by that date, the court will declare the provision violates the constitutional rights of off-reserve members.

This decision would seem to indicate that discrimination on the basis of residence for certain provisions of the *Indian Act* (at least for the many non-residents who recently regained their Indian status in 1985 but were unable to take up residence on Indian reserves because of lack of government funding for housing) is also not permitted by the *Charter of Rights*. In commenting on this decision a recent *Globe and Mail* editorial observed that "the judges had to put on its sociological robes and determine: what is a Canadian aboriginal, circa 1999".<sup>74</sup> The editorial suggests that sorting out the nature of modern "aboriginalness" is not an easy task and partial failure "was inevitable". It concludes that whatever it decides after eighteen months, "Parliament's resolution of the 'what is an aboriginal' conundrum will have to display that most unexpected of political virtues: Solomonic wisdom."<sup>75</sup>

The debate surrounding the discriminatory nature of the concept of membership in the *Indian Act* raised a number of other new issues that received increased attention following the passage of C-31.



### 2.3.1 Determining First Nation Membership/Citizenship

One of the issues that surfaced in the wake of the 1985 amendments to the *Indian Act* was the issue of what criteria should be applied and who should define Indian membership. This issue arose as a result of the ‘other’ 1985 amendments that allowed a First Nation to “take control of its own membership from the Department of Indian Affairs ”.<sup>76</sup> These changes were apparently made to address the pressures from many First Nation leaders who demanded “that the government of Canada adopt the United States approach to membership.”<sup>77</sup>

In the United States, the Supreme Court has recognized that that a tribe has the right to define its own membership/citizenship. Indian advocates in the mid-1980s argued that s. 25 of the new *Charter of Rights* opened “the door to Indian First Nations in Canada being recognized as separate sovereigns pre-existing the constitution” as they were viewed in the United States.<sup>78</sup> In Bill C – 31, Parliament only recognized delegated authority for Band Councils to determine their membership under the *Indian Act*.

According to David Elliott, the 1985 reforms to the *Indian Act* tried to reach a compromise between the rights of individuals and “the desires of many band councils to have greater control of membership by splitting status and band membership, and giving bands the opportunity to exercise greater control over the latter.”<sup>79</sup> He asserts that there was an underlying logic to this division as it permitted band councils greater control over shared and group benefits, such as residence on reserve lands, and retained for government “control over per capita benefits such as housing and education payments, which are dependent on the number of recipients.”<sup>80</sup>

As a result of this amendment, the legal status of an ‘Indian’ under the *Indian Act* was de-linked from the concept of band membership for those First Nations that opted to set up their own membership codes. First Nations that assumed responsibility for their own membership lists could add and deleted names depending upon the rules of the membership code which was approved by a majority of members.

As of December 1995, “about 240 bands had adopted membership codes and 370 had not.”<sup>81</sup> Of the 240 that have their own membership code 90 bands use the one parent rule, 67 bands use the two parent rule, 30 bands use a blood quantum rule and 49 use the same rules set out in the *Indian Act*. In other words, some First Nations have opted for more open membership policies, others have decided to be more restrictive and link membership to a blood quantum formula and others preferring the status quo have retained the approach set out in the *Indian Act*. The changes protected the acquired rights to membership, but there is “nothing to prevent these codes from subsequently being amended to exclude individuals on grounds other than the rights they acquired before the membership code came into force”.<sup>82</sup> As a result, these “codes can and do vary greatly.”<sup>83</sup> The new s. 10 membership scheme under the *Indian Act*, which allows delegation to the Band Council, has become “extraordinarily complex”.<sup>84</sup>

### 2.3.2 The Source of the Authority for Membership/Citizenship

In the 1990s the focus of the membership/citizenship debate shifted to the issue of the source of the authority for concepts such as Indian membership or aboriginal citizenship. Although the Federal court found in the *Sawridge* case in the mid-1990s that “Parliament has the authority to legislate *qua* Indians pursuant to s.91(24) of the *Constitution Act, 1867*” and has “demonstrated a clear and plain intention to extinguish an aboriginal right or custom by which the identity and definition of Indians was established.”<sup>85</sup> there remains strong First Nation opposition to this view. Gilbert, for example, contends that, “there is ample reason in law to consider First Nations as capable of determining their own citizenship for the purpose of treaty and for the purpose of the *Indian Act*.”<sup>86</sup> According to Gilbert, First Nations do not derive their authority from an Act of Parliament, “their genesis lies within the tribe and the families who comprise the tribe. The *Indian Act* is irrelevant to both the origins and the composition of First Nations.”<sup>87</sup> Under this view, the test of who is an Indian would not be made with reference to the *Indian Act* but rather to the community to whom the person claims to belong. According to the Assembly of First Nations, First Nations “and not the federal government should decide on the citizenship and membership of First Nations.”<sup>88</sup>

In summary, the “complexities of Indian status and band membership pose significant challenges for First Nations”<sup>89</sup>, as well as the federal and provincial governments. The court have concluded that under the existing arrangements, the federal government has a right to regulate Indian control of band membership, but the government cannot discriminate on the basis of sex and in specific circumstances on the basis of residence. On the other hand, many experts believe that “control over membership is seen as an essential component of the right of self-government”<sup>90</sup> and, in fact, federal government policy on self- government announced in 1995, includes membership (but not Indian status) as a matter for self-government negotiation<sup>91</sup>.

## 2.4 Recent Political Developments

Although the *Indian Act* remains the central legal instrument in Canada that defines the relationship between aboriginal and non-aboriginal peoples, aboriginal issues have increasingly over the past thirty years been dealt with outside the context of the *Indian Act*.<sup>92</sup> Many of the central Aboriginal issues, for example, have been debated in the constitutional forum.

The beginning of this new era is usually suggested to have started in summer of 1969 when the Indian organizations reacted to the government’s White Paper on Indian Policy.<sup>93</sup> However, 1969 might be better characterized as the beginning of the end rather than the starting point. The Diefenbaker government’s decision to extend the right to vote to Indians in 1960, was probably the critical decision (although unintended) that caused the reexamination of the issue of Indian status in Canada. In fact, Joseph Carens has suggested that the decision of the federal government in 1960 to enfranchise Indians without requiring the abandonment of Indian culture and community could be interpreted as “...a move toward an equalitarian version of differentiated citizenship that would grant respect to Indians without denying their distinctive position in relation to the rest of Canadian society.”<sup>94</sup>

Alan Cairns and Cynthia Williams have noted that “the [original] enfranchisement policy was based on the assumption that Indians were in a state of dependency which conflicted with the possession of full citizenship rights”.<sup>95</sup> They suggest that this policy was denounced by implication when the government extended the federal enfranchisement to all Indians in 1960. In effect, the Diefenbaker decision introduced a one hundred and eighty degree turn in government policy directions.

Extending the right to vote to Indians, however, became problematic in light of the relationship established by the *Indian Act*. The government then had to justify the colonial *Indian Act* that was still based upon wardship status and a system of governance that assumed that Indian communities were incapable of managing their own affairs. It was recognized in government circles that the government’s position would “become increasingly difficult to defend”<sup>96</sup> and a full examination of Indian status in Canada was required. Having repudiated the assumptions upon which Indian policy was based for the past one hundred years, the government was forced in the 1960s to rethink the fundamentals of their relationship with First Nations.

In 1964, a team of 52 social scientists headed by Harry Hawthorne, was set up by the federal government to look at the situation of status Indians. Two years later, the Hawthorne inquiry reported “that Indians should have all the normal entitlements of citizenship, but in addition they should be the beneficiaries of a ‘plus’ category, drawn from the treaties, from historical priority and from the fact that non-aboriginal society had built a rich, flourishing civilization from lands and resources originally occupied and exploited by Indians”.<sup>97</sup> The approach set out by this report came to be known as the ‘citizenship plus’ concept.

This ‘citizenship plus’ approach was rejected in the late 1960s by the newly-elected Trudeau government which was reluctant to recognize any type of “special status” for Indians which could be used by the Quebec sovereignist to strengthen their view that Quebec should be granted special rights within the federation.<sup>98</sup> In the fall of 1968, the new government conducted a subsequent review of the government’s Indian policy. A White Paper was released in June of 1969 that proposed to end collective rights, eliminate protections for reserve land and transfer the responsibility for service delivery of programs to the provinces.<sup>99</sup> Essentially, the government “sought to terminate the federal government’s special relationship with Aboriginal Peoples”<sup>100</sup> and make them the same as other Canadians.

The reaction to the White Paper from the Indian community was immediate. Indians “saw the White Paper as an attack on their culture and their lands”.<sup>101</sup> A series of protests erupted across the country. The strength of the reaction to the White Paper appeared to surprise the Trudeau government and the debate continued into the winter. Finally, in June of 1970, Prime Minister backed down and indicted that “if the white people and the Indian people in Canada don’t want the proposed policy, we’re not going to force it down their throats”.<sup>102</sup>

Although much of the policy debate was internal to government during the early 1970s, the legal cases on the discrimination of women under the *Indian Act*, the 1973 decision by the Supreme Court of Canada in the *Calder* case<sup>103</sup> and the James Bay Land Claims Agreement in the mid-1970s raised the public profile of aboriginal issues. Around this same time the political rhetoric began to change. The Dene in the Northwest Territories announced in 1975 that they were a separate nation seeking “independence and self-determination” within Canada.<sup>104</sup> The Penner Report [1983] provided the first federal government recognition of self-government. It used the term First Nations instead of Indian bands.

In 1982, amendments were made to the constitution to recognize and affirm existing Aboriginal and treaty rights. Another constitutional amendment defined Aboriginal Peoples to include the Inuit and the Metis as well as Indians. As a result of third amendment, four First Ministers’ constitutional conferences were held from 1983- 1987 to discuss the issue of Aboriginal self-government. These conferences brought the issue into a broader public forum. Although, the process was unsuccessful in building political consensus on the meaning of the term, it did change however, the perception of aboriginal issues in two significant ways. From that period onward, it was recognized that federal and provincial governments did not represent or speak for Aboriginal constituents and Aboriginal citizens did not fit into the “standard citizen category”.<sup>105</sup> Although the Meech Lake process in the late 1980s ignored Aboriginal issues, except for the non-derogation clause, the Charlottetown Accord promised to constitutionally entrench the concept of Aboriginal self-government based on an inherent right as well as a number of other major provisions that would have recognized a third order of government in Canada. In the end, the Charlottetown Accord was rejected in October of 1992 by a majority of Canadians in a referendum. Although the soft language of the Accord set general directions that appeared initially to have public support, the technical details were to be “left to future negotiations or judicial processes”.<sup>106</sup> When it came time to vote, many Canadians opposed the Accord because of the uncertainties it would create for the country on a wide variety of fundamental issues, including Aboriginal rights.<sup>107</sup>

The study of Aboriginal issues by the Royal Commission dominated the Aboriginal policy agenda in the early 1990s. The Commission’s final Report was tabled in late 1996. The essential thrust of the Commission’s Report was to promote the concept of Aboriginal self-government as the vehicle for addressing the injustices of the past and developing a new relationship with Aboriginal people.

The Commission’s report did not fully deal, with what some observers have described as, “the conflict between the aboriginal claim for self-government and the basic status of citizenship as a bundle of rights and obligations held by all Canadians.”<sup>108</sup> To the extent that it addresses the aboriginal citizenship issue, it proposes that future accommodation must take the form of a ‘dual-citizenship’ status for aboriginal people. This proposal will be examined in the final section of the paper.

## 2.5 Other Issues Impacting on the Membership/Citizenship Issue

There are a number of other factors that will likely influence the membership and citizenship issues in the years to come. The following sets out a brief description of these issues.

The method used to determine the descent rules governing the size and composition of the future population entitled to be ‘band members’ under the Indian Act and future self-government arrangements is a key factor. In a study of the implications of the C-31 amendments, Stewart Clatworthy examined a wide range of variables and concluded that while certain variables such as out-marriage were significant “the future population eligible for membership is likely to be influenced most dramatically by the descent rules governing eligibility”.<sup>109</sup> In the conclusion to the report, Clatworthy warns that “the descent rules that now govern the inheritance of Indian status appear unsatisfactory as a basis for defining citizenship in self governing First Nations. In the long run, these rules will lead to the extinction of First Nations.”<sup>110</sup>

A subsequent report in 1997 prepared by Clatworthy and Smith for Indian Affairs that examined First Nations demographic trends found that 40% of the First Nations who adopted their own membership codes were creating new classes of citizens “with differing rights and entitlements”.<sup>111</sup> The report also noted that “although the population implications of these rules are presently small, a majority of First Nations appear to be at risk of disqualifying large numbers of future generations from band membership”.<sup>112</sup> According to Clatworthy and Smith, the growth of these new divisions among First Nations members will have implications for the *Indian Act* as well as “the form and administration of Aboriginal self-government.”<sup>113</sup> A key issue will be how First Nations will be able to accommodate these different classes of citizens within continuing resource constraints. Clatworthy and Smith conclude that while these are not new issues, “the emergence of the new classes among the descendents of registered Indians complicates the issue and puts it in new terms.”

In response to these growing concerns, a number of First Nations have begun to undertake detailed reviews of the demographic factors that could affect their future population and their options with respect to membership issues.<sup>114</sup> The full implications of the changes are only now beginning to be examined by government and First Nations. If these future projections are correct, it appears that many First Nations will experience significant reductions in their membership over the next few generations. The key questions in this sort of scenario will be whether First Nations will adapt more open membership policies and what are the consequences of such decisions.

Another key issue is the “dynamic” mobility patterns of young First Nation residents. Based on a plethora of anecdotal reports, various ‘pundits’ have reported that the younger generation “are voting with their feet by moving to cities, where some degree of integration is both necessary and inevitable”.<sup>115</sup> This kind of analysis has contributed to the creation of a popular belief that the more Indian people reside off First Nation land, the higher the likelihood of increased assimilation with non-aboriginal people.<sup>116</sup>

The evidence from Statistic Canada, seems to suggest, however, that the situation may be more complicated, at least within the context of current policy incentives. According to a recent paper by Mary Jane Harris and Dan Beavon, although “analysis of five-year rates of in and out migration to and from large Census Metropolitan Areas (CMAs)...supports the observation of higher mobility and migration of registered Indians in comparison to other Aboriginal groups and Canadians”<sup>117</sup>, they contend that “what is important to note ...is not so much the impact of net migration – which is relatively small in any case for the 1991-96 period- but rather the “churn” represented by the relatively high Aboriginal rates of in and out migration, especially for the registered Indian population.”<sup>118</sup>

In other words, although the registered on-reserve Indian youth are highly mobile, they continue to return to their reserve communities. Norris and Beavon conclude that the “reserves play a distinct role in the difference between registered Indians and other Aboriginals in their migration patterns to and from reserves.”<sup>119</sup> Even though this rural-to-urban movement is similar to non-aboriginal demographic trends in Canada, the policy considerations are likely to have significant differences because of the complicating membership issues. The central question is to what extent the membership incentives influence individual mobility patterns. And, more importantly, what happens if these incentives are altered?

A third issue that is likely to influence future debate is the emergence of increased internal tensions in First Nations communities between those that advocate traditional values and those who are more willing to find accommodation within a modern Canada. According to Taiaiake Alfred, one of the leading traditionalist writers, “native American community life today is framed by two value systems that are fundamentally opposed. One, still rooted in traditional teachings, structures social and cultural relations; the other imposed by the colonial state, structures politics.”<sup>120</sup>

Already, there is evidence that these two groups see the issue of Aboriginal membership/citizenship from very different perspectives. According to a 1996 Library of Parliament report, there are growing tensions in some communities “between those who see membership rules as a means to prevent assimilation, and those who view it as a form of discrimination.”<sup>121</sup> Continuing high levels of Indian mobility to the urban areas is likely to further increase these tensions. The Parliamentary report concludes that there are a growing number of critics who are challenging “the adequacy of existing rules for defining members in self-governing First Nations communities and how self-governing First Nations will resolve conflicts over access to rights and services.”<sup>122</sup> In the long-run, the report suggests, solutions will only be found by addressing “the impacts of having an increasing number of Indians disenfranchised from the benefits associated with registration under the Indian Act ” as well as the emerging internal community conflicts.<sup>123</sup>

A fourth factor that will likely influence the issue of Aboriginal citizenship is the question of the rights of non-aboriginal people living on First Nations land. Just as the sovereigntist position in Quebec raises concerns among English and Aboriginal minorities, the fears of non-aboriginal people who reside on First Nation territory are likely to increase as the country implements self-government arrangements. Some observers claim this issue is not

likely to be a major issue except perhaps in areas like Nunavut because “most Aboriginal governments are not likely to include significant numbers of non-aboriginal people under their jurisdiction”.<sup>124</sup> However, this issue became heated in 1999 in British Columbia as a result of the rent increase on the non-Indian lessees at the Musqueam First Nation and the debate surrounding the recently enacted *First Nation Land Management Act*. Given the interventions on this piece of legislation before the Parliamentary Standing Committees in 1998-1999 and various court actions, it appears that the rights of non-aboriginal people residing on First Nation land will likely receive judicial attention in the years ahead.

The extent to which these factors may influence the future debate is difficult to determine. The challenge from a policy perspective will be to understand better how these factors will impact on the membership/citizenship issue and begin to engage the larger society in a more open dialogue on the kinds of policy options that should be considered.

## 2.6 Concluding Observations

A few concluding observations can be drawn from this historical experience and the special circumstances that have defined the relationship between Aboriginal peoples and the rest of the Canadian population.

1. For one-hundred and fifty years, the government has used the concept of ‘Indian’ to define who is a ‘real’ Aboriginal person. This condensed history of the Aboriginal and non-Aboriginal relationship has attempted to demonstrate how and why this definition has been in constant flux over this period. Over the past thirty years, the definition of who is an ‘Indian’ has become extremely complex in order to be consistent with other modern values. Policies designed to modernize Aboriginal citizenship will need to deal with the issue of how our history and group differences impose limitations on our capacity to reshape the future.
2. Despite the pressures to assimilate, Aboriginal Peoples have shown that their “identity and autonomy will not be sacrificed for participation in Canadian citizenship.”<sup>125</sup>

Future arrangements with aboriginal peoples will need to recognize this reality as a first principle. The experience of the past one hundred fifty years demonstrates that some form of 'special status' recognition of aboriginal peoples is the most likely way to accommodate aboriginal people within the larger Canadian society. As Alan Cairns has observed “some form of special positive status for Indians is increasingly recognized as either desirable or inevitable or both”.<sup>126</sup>

3. As described above, the concept of 'citizen plus' was officially rejected by the Trudeau government in the late 1960s. However, the amendments to the Constitution in 1982 that recognized and confirmed existing aboriginal and treaty rights have fostered a number of court decisions and federal policy decisions (i.e. self-government, fiduciary obligations guidelines, etc.) that have essentially developed incrementally along lines similar to the ‘citizenship plus’ concept. At the same time, the solutions proposed by various political reviews since 1983 such as the Penner report, the Charlottetown Accord and the RCAP report are based on a vision of parallelism and a multinational

Canadian federalism that go significantly beyond the concept of citizenship plus, at least as it was envisaged in the 1960s.

4. Despite the wide range of the debate at the political level, the interactions at the local level continue to be defined by a legislative framework that is universally recognized as inadequate. Many provisions of the *Indian Act* have come into serious conflict with modern Canadian values and some of them have been found to be discriminatory. The 1985 amendments that ensures that Indian women are treated equally and allowed First Nations to resume control of their membership lists have generated new complexity by creating 'different classes' of Aboriginal groups that appear to be heading to further "legal challenges, internal conflicts and intergovernmental disputes"<sup>127</sup> In addition, demographic projections on future First Nation populations are raising new questions about the size and composition of future populations entitled to be recognized as 'Indians' and the longer term viability of First Nations communities. Other trends such as mobility patterns of First Nation youth suggest that government policies may be a key factor in influencing future First Nation populations. In additional to all these influences, there are growing community tensions between those members living on reserve and those living off reserve, debates between traditionalists who want to restrict membership and those who want more open membership codes and new pressures to create rights for non-members living on First Nation land. In combination, these various factors raise difficult issues that challenge both the concept of Indian membership and aboriginal citizenship under self-government.
5. How these issues will be resolved remains very much an open question. The C-31 amendments dealt with only the most blatant discriminatory issues. Many issues related to membership/citizenship are only now beginning to be more openly debated within the larger society. The Aboriginal citizenship issue is in a period of transition. The crucial question, according to Alan C. Cairns, is "transition to what?"<sup>128</sup>.

The next section of the paper probes how the concept of Aboriginal citizenship fits with the two central views of Canadian citizenship. It also examines the concepts of differentiated citizenship and the multination state and how they relate to the approach proposed by the Royal Commission to recognize a form of dual citizenship for aboriginal people.

### **3 Competing Views of Canadian Citizenship and Aboriginal Citizenship**

#### **3.1 Introduction**

To deal with the Aboriginal membership/citizenship issues set out in the first part of the paper, Aboriginal and non-Aboriginal Canadians will have to come to terms with how the aspirations of Aboriginal People might be institutionally accommodated within the federation and the nature of their rights and responsibilities under this new arrangement.



This section of the paper explores this question by examining two very different views of Canadian citizenship and investigates some of the arguments that have been put forward in support of the Aboriginal 'dual citizenship' recommendation suggested by the Royal Commission of Aboriginal Peoples in its final Report. It concludes with a few observations on the RCAP proposal to recognize a dual citizenship status for Aboriginal Peoples.

### **3.2 The Unitary Concept of Canadian Citizenship**

The 'unitary view' of Canadian citizenship holds that citizenship is a status that all Canadians enjoy equally. This universal approach to citizenship is the existing 'official' view of Canadian citizenship. Under the unitary model of citizenship, there may be racial, ethnic, cultural and linguistic diversity but "the citizen's membership in them and allegiance to them are expected to be subordinated to membership in the more inclusive national political community".<sup>129</sup>

Advocates of the unity concept of citizenship often cite the United States as the model of the unitary concept of membership. The founders of American federalism aimed "to protect the equal rights of individuals within a common community, not to recognize the rights of national minorities to self-government".<sup>130</sup> This type of 'federal territorialism' is the dominant perspective in English-speaking Canada and is often defended by those who want all the provinces to be equal. This model recognizes no special status for Quebec or Aboriginal Peoples. According to Peter Russell, this model of citizenship "connotes membership in a single, if not unitary nation. The constitution of the nation-state defines the fundamental rights which all citizens share equally and which give them their primacy civic identity."<sup>131</sup>

Despite the new directions on Aboriginal issues that have occurred over the past thirty years, and the increased support for Aboriginal self-government, many Canadians remain uncertain about the direction of current policies on Aboriginal issues. At the heart of this uncertainty is the issue of the legitimacy of government policy decisions that are based on assumptions of 'special rights' that treat Aboriginal Peoples and particular Indians "differently and apart from the mainstream of Canadian society".<sup>132</sup>

According to Mel Smith, a former senior public servant under the Social Credit government in B.C. "it is contrary to all that Canada stands for to support a policy that extends special privileges based on race and ethnicity."<sup>133</sup> Smith claims that "this is a principle so fundamental to liberal democratic societies that it should not even be necessary to state it".<sup>134</sup> With little regard to the significance of s.35(1) of the 1982 *Constitutional Act*, he asserts that 'this principle' "...is ignored by governments in Canada in furtherance of the native agenda".<sup>135</sup>

Increasingly, there have been allegations from the political right that the government is moving the country away from the unitary concept of citizenship without properly informing the public. They contend that there is a need for new Aboriginal directions based on a legal system that treats all Canadians equally. The government has been regularly accused by members of the Official Opposition of "creating two classes of citizens"<sup>136</sup> during heated exchanges on every piece of new legislation dealing with self-government.

The most recent example was the attempt by the Reform Party in December 1999 to introduce over 400 amendments to the Nisga'a legislation.<sup>137</sup> Further evidence of the extent and fervor of the growing discordance on aboriginal issues was illustrated by the public reaction to the recent Supreme Court decision on the Marshall case<sup>138</sup> that dealt with treaty fishing rights in the Maritimes.

In a recent book entitled "First Nations? Second Thoughts", Tom Flanagan approaches this issue from a similar perspective but with a much more thoughtful and sophisticated analysis. Flanagan recognizes that "the evolution of language has given the word 'nation' a double meaning".<sup>139</sup> He concedes that the terminology has changed over the past twenty-five years but claims that "calling Indian bands First Nations does not change Canada into a genuine multinational state".<sup>140</sup> He takes the view that the federal government is not violating the concept of unitary citizenship but only borrowing the 'domestic dependent nations' concept<sup>141</sup> from the Americans and endorsing "murky concept(s), such as the inherent right to self-government" in order "to preserve the integrity of the Canadian state".<sup>142</sup>

In summary, those who support the unitary citizenship concept claim that the proper role of government in this area should be to create common bonds between different groups; ensure that all citizens have the same rights and responsibilities; and share common interests and identities that in turn foster integration. They take the view that "the danger of Aboriginal government and of the related concept of differentiated citizenship" is that by institutionalizing difference the society could undermine its sense of common identification.<sup>143</sup>

### 3.3 The Evolution of Differentiated Citizenship in Canada

In the modern world, talk about citizenship sometimes presupposes, as a background assumption, an idealized (and misleading) conception of the nation-state as an administratively centralized, culturally homogeneous form of political community in which citizenship is conceived as a legal status that is universal, equal and democratic. In this idealized conception, the nation-state is the only locus of political community that really matters, and citizenship just means membership in a nation-state....

This picture of citizenship was never realistic or adequate for any society, and less so for Canada than most....

Joseph H. Carens,<sup>144</sup>

The second perspective of Canadian citizenship has evolved, not from the debate on aboriginal self-government but, from the 'two nation' theory of Canada that has been actively debated with respect to Quebec since the *Constitutional Act* of 1791. The Parti Quebecois has argued over the past thirty years that the only way to resolve this contradiction (i.e. two nations cannot exist within one state) is for Quebec to become a sovereign state.<sup>145</sup>

Another approach to the implications of the two nation theory was put forward in the 1950s and 1960s by André Laurendeau who saw Quebec as a nation and called for “the need for a new political arrangement in Canada based upon the reality of two sociological nations.”<sup>146</sup> Unfortunately, although Laurendeau was one of the co-chairmen of the Royal Commission on Bilingualism and Biculturalism, the final report of the Commission (published in six volumes between 1967 and 1970) “steered well away from addressing the question of a restructuring of Canadian federalism of the type Laurendeau might have envisaged.”<sup>147</sup> It has been suggested by Philip Resnick that Laurendeau’s untimely death in 1968 may have altered the ultimate outcome of the B and B report.<sup>148</sup>

With the arrival of Pierre Trudeau on the scene in 1968, a very different vision of Canada and Quebec was introduced that has shaped events since that time. The Trudeau government “promoted equity, seeking to protect disadvantaged groups through a combination of fundamental individual rights and protection from discrimination.”<sup>149</sup> In essence, the Trudeau vision of citizenship was an enhanced version of the unitary model. This vision became embedded in our institutions and government policies with the entrenchment of the Charter of Rights and Freedoms in the Canadian Constitution in 1982.

The results of the 1995 Quebec referendum have forced a reexamination of the ‘Quebec question’. Although the Chretien government has adopted essentially the same course, the tone and definitely the strategy have changed.<sup>150</sup> Outside federal government circles, there is much less certainty by some observers as to the wisdom of the Trudeau approach to dealing with Quebec. For example, Kenneth McRoberts claims that “it is obvious that the Trudeau strategy has failed. In fact, rather than unifying the country, it has left Canada more deeply divided than ever before.”<sup>151</sup>

As the country has struggled over the past three decades through confusion and frustration of the Quebec question, a number of innovative variations on the concept of special status (usually termed ‘multination federalism’ by supporters of this perspective), have been put forward by academics, such as Jeremy Webber, Charles Taylor, Kenneth McRobert, Philip Resnick, Andre Burelle, Guy Laforest, Roger Gibbins, Alan Noel and many others. To date, there has been very little public support for the concept of ‘multination federalism’ and no political party has endorsed this approach to citizenship.<sup>152</sup>

One of the leading thinkers in this area is Will Kymlicka. In a series of articles and, most recently, in a book entitled *Finding Our way: Rethinking Ethnocultural Relations in Canada*, Kymlicka has developed an extended rationale for multination federalism in Canada. The core of his argument is that “[f]or national minorities like the Quebecois, federalism implies, first and foremost, a federation of peoples, and decisions regarding the powers of federal subunits should recognize and affirm the equal status of the founding peoples”<sup>153</sup>

However, the current reality is that for most English-speaking Canadians, federalism is a federation of territorial units. He claims that Canadians outside Quebec have difficulty in comprehending that the demand for special powers is “not just for this or that additional power, but also for national recognition.”<sup>154</sup> According to Kymlicka, “Quebec nationalists

want a symbolic recognition that Quebec alone is a nationality-based unit within Canada.”<sup>155</sup> Kymlicka claims that “...although this may seem a petty concern with symbols rather than the substance of power”, demands of this nature have caused similar problems in other federations. Ultimately, Kymlicka concludes that since it is obviously difficult to convince English Canada of the need for asymmetrical federalism and “since asymmetrical federalism follows almost necessarily from the idea that Canada is a multinational state”<sup>156</sup>, there is not a lot of immediate hope that Canadians will find their way out of this impasse.

In essence, what Kymlicka and other scholars such as Philip Resnick, Jeremy Webber, Charles Taylor and Kenneth McRoberts are advocating is that Canada, like other multinational states (i.e. Belgium, Switzerland, Spain, India, Russia, etc.), is composed of more than one political community. These individual political communities “view their own political community as primary, and the value and authority of the larger federation as derivative.”<sup>157</sup> As a result, these multinational countries tend to experience instability more often than single nation states. This assessment of the Canadian condition is not particularly new. However, this group of academics proposes a new approach to addressing the situation. To date, Canadians have dealt with the multi-national nature of the country through a flexible federalist territorial approach. This group of thinkers propose that a more diversified concept of citizenship might be a better way to allow Canada’s national groups “to protect and promote their interests and identities.”<sup>158</sup> While this group usually refers to the Quebec situation in their writings, over the past decade many have also suggested that the concept of differentiated citizenship could apply to aboriginal peoples.

Another commentator in this area who offers some practical insights that has application beyond the Quebec question is Jane Jenson. She maintains that while many observers see citizenship as synonymous with nationality, the reality is that citizenship “boundaries have never been confined to national frontiers”.<sup>159</sup> She contends that the concept of citizenship has been used to distinguish persons with entitlement to full recognition from non-citizens who are relegated to a second-class status.

For Jenson the concept of citizenship goes beyond legal entitlements and “is taken to denote the institutional arrangements, rules and understandings that guide and shape concurrent policy discussions and expenditures of state, problem definitions by states and citizens and claim making by citizens.”<sup>160</sup> She goes on to explain how citizenship regimes have three dimensions: citizenship as a bundle of rights; citizenship as in belonging to a community or nation; and citizenship in the sense of having access to political power.

These three dimensions of citizenship offer further insight into the two differing views of citizenship in Canada. The perspective that supports the unitary or universal concept sees citizenship as strictly legal entitlements. The other perspective accepts the differential concept of citizenship and takes a much broader perspective that includes the three dimensions that Jenson outlines.

### 3.4 Aboriginal Citizenship

Most writers credit the application of this concept of differential citizenship to aboriginal people to a seminal article written in 1989 by Iris Marion Young in which she critiques the concept of universal citizenship. She contends that "[d]ifferent social groups have different needs, cultures, histories, experiences, and perceptions of social relations which influence their interpretation of the meaning and consequences of policy proposals and influence the form of their political reasoning." She claims that those who argue that justice can only be enjoyed by all by extending rights to previously excluded groups do not appreciate that "group differences can create special disadvantages that call for special remedies in the form of special rights".<sup>161</sup>

According to Carens, "Young's emphasis on the reducibility of cultural differences and their importance for (different) understandings of justice poses an implicit challenge to the notion that a unified Canadian citizenship can legitimately be based on a shared commitment to common principles of justice".<sup>162</sup> Carens contends that "Young helps us to see how recognition of the heterogeneity of the citizenry and a related reconception of the nature of public deliberation can create space for Aboriginal self-determination as part of (and not only apart from) Canadian government as a whole."<sup>163</sup> In other words, "Young reveals the possibility of a conception of citizenship that is universal and inclusive because it acknowledges and affirms difference rather than denying it. In this context, a distinct Aboriginal citizenship can be conceived as a contribution, rather than an obstacle, to a genuinely inclusive Canadian citizenship."<sup>164</sup>

Based on the type of argument that Young put forward, there were efforts in the early 1990s at the time of the Charlottetown Accord to argue that a renewed federalism should recognize the three founding peoples of Canada – Quebec, the rest of Canada (ROC) and Aboriginal. Cairns calls this perspective the "three –nation view of Canada".<sup>165</sup> Although Cairns acknowledges that there has been a growth in pan-Canadian aboriginal nationalism and that this is "the aggregate reaction of many indigenous peoples to their shared experience of historical subordination",<sup>166</sup> he warns that recognition of aboriginal peoples as 'a nation' may be far fetched as "their boundaries are unclear or contested; the extent and nature of their political organization vary; their members belong to and identify with the pan-Canadian community with different degrees of enthusiasm. Their nationalisms are dissimilar and generate distinctive constitutional ambitions."<sup>167</sup>

Will Kymlicka also notes that while the "demands of an inherent rights of self-government" raise some of the same issues as Quebec's demands for 'special status', "the situation of Aboriginal Peoples is much more complicated".<sup>168</sup> This complication is partially based on the divided territorial base and the nature of this political organization, but Kymlicka asserts it is also because of their smaller numbers and "communities that are often dispersed across provincial lines".<sup>169</sup> Finally, it is also a different situation because the historical/legal relationship of Aboriginal Peoples to Canada varies across the country, the languages and cultures are different and the aspirations of the communities vary.

Despite the similarities and differences with the Quebec situation, - a matter which clearly requires further examination - the more important issue is, as Kymlicka has indicated that

special attention needs to be placed on the effects of differentiated citizenship on Canadian citizenship itself. In an article, he wrote with Wayne Norman, entitled 'Return of the Citizen: A survey of Recent Work on Citizenship Theory', Kymlicka cautions "(s)elf-government rights .... are the most complete case of differentiated citizenship, since they divide the people into separate 'peoples' each with its own historic rights, territories, and powers of self-government, and each, therefore, with its own political community."<sup>170</sup>

Kymlicka and Norman also note that limited steps to self-government "may simply fuel the ambitions of nationalist leaders who will be satisfied with nothing short of their own undifferentiated nation-state".<sup>171</sup> The calls for a return to traditional political values<sup>172</sup> and the recent initiatives from communities such as Ackwesasne<sup>173</sup> are evidence that such positions continue to remain active options within the current debate.

In the early 1990s, Kymlicka and Norman suggested, the creation of "overlapping political communities" (i.e. aboriginal self-government within the context of the Canadian state) will "give rise to a sort of dual citizenship and to potential conflicts about which community citizens identify most deeply."<sup>174</sup> Although recent writing by scholars such as Kymlicka suggest that differential citizenship can be developed in a way that will serve a longer term integrative function, it is premature to suggest that there is much consensus on a strategy on how to retain a common Canadian identity if the country moved in this direction. The first attempt to 'operationalize' the concept of 'dual citizenship' was undertaken by the Royal Commission.

### **3.5 The RCAP Proposal on Dual Citizenship**

In anticipation of this emerging issue, the Royal Commission requested a number of academics to investigate new ways to think about aboriginal citizenship issues.<sup>175</sup> In one background paper prepared for the Commission, Joseph H. Carens argues that the concept of aboriginal citizenship must "make sense in the context of the complex political relationships that Aboriginal government would create."<sup>176</sup> Essentially, Carens contends that there is a need for society to recognize some form of differentiated citizenship for Aboriginal Peoples in order to take into account their unique history of the country.

Based upon the assumptions that Aboriginal Canadians want to continue to be legal citizens of Canada and that it is possible to reconcile the strongest form of Aboriginal self-government with an attractive conception of Canadian citizenship, Carens proposes a new framework for examining citizenship. He claims that citizenship is more than "the legal status of a citizen".<sup>177</sup> According to Carens, there is also another important aspect of citizenship which he calls the 'psychological dimension of citizenship'.<sup>178</sup> He acknowledges that it is normally understood that people who have legal status of citizens usually are the ones who feel this sort of psychological connection to a political community. What is not often understood, claims Carens, is that "some people without legal status of citizens can feel attached to a political community"<sup>179</sup> As an example, he cites the case of Indian women who lost their standing as members in their communities because they married men without status.

Carens' argument implies that government policy in Canada over the past century has had the unintended consequence of fostering this kind of psychological dimension of citizenship. He does not suggest that aboriginal identity would not have survived without the oppressive measures of the government, but rather emphasizes that the policies of oppression and neglect over this period have played a significant role in re-enforcing Aboriginal identity.

In addition, Carens points out that the nature of Aboriginal citizenship is further complicated for Aboriginal People today because "people may belong to more than one community at once, so that questions about the dimensions of membership interact not only with one another with respect to a single community but also across the different communities to which people belong."<sup>180</sup> Today, most Aboriginal people experience their 'primary communal identification' at the First Nation level or at least some collectivity smaller than the Nation level or the Aboriginal community as a whole level. He speculates that future forms of Aboriginal organizations may transcend these "primary communities of identification"<sup>181</sup> and contends that future Aboriginal organizations may well reflect previous forms of organization or alternatively may organize collectively on a larger scale (i.e. a pan-Canadian organization). The Royal Commission's recommendations, which proposed returning to the 'Nation' concept as the basis of future self-government negotiations in non-urban areas of Canada, appears to be an attempt to address this kind of issue.

As noted in the introduction to the paper, the final report of the Royal Commission proposed that Aboriginal people should enjoy "a unique form of dual citizenship" under the nation government model, as citizens of an Aboriginal nation and citizens of Canada. The Commission held that an aboriginal nation has the right "to determine which individuals belong to the nation as members and citizens" and applied two limitations to this right: (1) the nation "cannot discriminate on the basis of sex" and (2) the criteria for membership cannot be based on a minimum blood quantum and it must include "a mixture of genetic heritages"<sup>182</sup>

The first limitation is identical to the 'cannot discriminate on the basis of sex' condition applied to the *Indian Act* in the early 1980s that resulted in the C-31 amendments and is required by the *Charter of Rights*. The second limitation relates to a concern that the aboriginal citizenship should not be determined on basis of race. This second condition may prove over time to be the more controversial issue.

The Royal Commission proposes that citizenship criteria should "reflect Aboriginal nations as political and cultural entities rather than racial groups"<sup>183</sup> and not make blood quantum the general prerequisite for citizenship. Instead, it proposed factors such as self-identification, community acceptance, culture, marriage, adoption, residency, birthplace, descent, and ancestry as ways to define citizenship. These criteria are similar to the traditions of most Aboriginal Peoples.<sup>184</sup>

Beyond these types of qualifications the RCAP report did not deal with the issue of Aboriginal citizenship in a very extensive manner. It did indicate that passports should be

given to Aboriginal citizens that explicitly recognizes their dual citizenship and proposed a dispute resolution mechanism to resolve citizenship problems but provided little rationale for 'dual citizenship' only that this right is one of the rights that an aboriginal nation has under s.35 of the Constitution Act (1982). Nor did the report make any effort to accommodate this notion of dual citizenship within the larger concept of Canadian citizenship as was provided in the background papers prepared for the Commission.

### **3.6 Final Thoughts**

This section identifies a number of issues that require further consideration, irrespective of the model adopted, if the concept of Aboriginal citizenship is going to be accommodated into Canadian federalism.

#### **3.6.1 Special Status**

Although the existing unitary view of citizenship does not accept the central belief that our history and group differences impose limitations upon our capacity to reshape the future that is one of the key rationalizations for moving to special status, there are a number of points raised by this perspective that require attention. The first relates to the allegation that Canada has already moved a considerable distance down the road towards special status for some groups. Although change is always a relative concept, the fact is that there is some truth to this assertion. It might even be argued that Canadians have already accepted the notion of differentiated citizenship. The 1982 constitutional amendments dealing with aboriginal rights and language protection could be cited as evidence of this. The passage of future aboriginal self-government legislation will continue to move the markers further down the road.

The second issue is the claim that the public has not been appropriately 'engaged' in the development of decisions related to self-government and by implication, the aboriginal citizenship issue. While it is recognized that the democratic process is not always perfect, there are growing expectations in almost every public field that the public will be consulted on almost all aspects of government decision making.<sup>185</sup> In fact, most major public sector controversies today reflect an aspect of this expectation. Public sector decisions and processes that circumvent the traditional vehicles for public debate often cause credibility problems for government that goes beyond specific issues to the very foundation of its credibility. The extent of this damage to public institutions is not always immediately evident but there can be very real long-term social and political costs to the whole society when actions are taken without adequate consultation.

#### **3.6.2 Similar But Different Aspirations**

Clearly, most commentators on this issue who support the differentiated citizenship concept are focused primarily on the Quebec issue. Many make reference to the similarity of the aspirations of aboriginal people and many acknowledge the differences. However, with the exception of the RCAP recommendations on dual citizenship, there appears to have been little attempt to date to take the argument beyond broad conceptual distinctions. This inability to begin to translate these concepts into concrete policy directions may reflect a fairly realistic assessment of the willingness of the larger society to support the concept of differentiated citizenship and/or the increased vocal opposition to special rights



and the concept of differentiated citizenship. On the other hand, it may also relate to the difficulty of making operative the concept of aboriginal citizenship.

What would differentiated citizenship mean to Quebec or aboriginal people? Would the concept be similarly applied to both groups? If the application is different how would the distinctions be drawn? Is the concept of aboriginal citizenship limited to First Nations populations with a territorial base? These among other issues need to be addressed.

### **3.6.3 Retaining a Common Canadian Identity**

Is it possible to retain a common identity, if two groups in the country are further recognized as requiring special citizenship status? As noted, a number of writers have probed this question even further. They ask if can we maintain a common Canadian identity if people not only belong to separate political communities but also belong to these communities in different ways – that is, “some are incorporated as individuals and others through membership in a group”.<sup>186</sup>

There is also a set of questions that warrant special consideration with respect to Aboriginal peoples. How can a Canadian common identity be retained if the country were to move, as proposed by the RCAP report, to a world of sixty-eighty odd Aboriginal Nations? Are there ways of reducing the complexity of future aboriginal citizenship issues? Will each recognized Nation have its own citizenship code or are there ways of aggregating the concept of Aboriginal citizenship that will benefit all Canadians?

Recognizing diversity without, at the same time, ensuring broad-based support for the idea of Canada could create new uncertainties for the federation. As Alan C. Cairns has warned, it is important that the country “... accommodate diversity without so destroying our interconnectedness that we shall be incapable of undertaking future civic tasks together.”<sup>187</sup> On the other hand, for the government to reverse current directions of moving to Aboriginal self-government and redefining the relationship with Aboriginal peoples could have serious political implications for the country.

When the Royal Commission on Aboriginal Peoples was first established in the early 1990s, Alan Cairns expressed the hope that the Commission would provide some guidance on how to deal with issues related to the status of aboriginal citizens or at least “set the parameters for subsequent debate”.<sup>188</sup>

The final section of this paper will suggest some directions as to how these ‘parameters’ might be more actively explored.

## 4 Building Room For Aboriginal Citizenship and Strengthening Canadian Citizenship

The question of citizenship is a serious matter. In this country who has the right to decide who we are or who we would like to be? ....(N)on-Aboriginal people decided for themselves....We did not. The Nisga'a did not. Someone else defined our status and our citizenship.... I do not want to become emotional, but it is very difficult when we talk about that, my friends. Could we have room?...It is about time that we define our status. Give us some room for that and have confidence....We can be very serious citizens in this country....

Senator Gill, Senate Committee discussion of  
Nisga'a legislation<sup>189</sup>

Citizenship is the institutional arrangement that makes empathy a natural fellow-feeling for all within its compass. To be excluded from citizenship by law or practice .... is to be deprived of dignity and subjugated to the will of others. Accordingly, if the institution of citizenship is threatened, we are all potentially at risk. Attempts to strengthen citizenship, to enhance its ability to tame the leviathan and predispose people to undertake common endeavors are therefore eminently worthwhile ....

Alan C. Cairn<sup>190</sup>

### 4.1 Summary

The first part of this paper provided a brief historical review of the elaborate administrative efforts that were undertaken by colonial administrators in the nineteenth century and early part of the twentieth century to narrow the definition of who was considered an officially-recognized Aboriginal person (i.e. an Indian) in order to promote gradual assimilation of Aboriginal people into the larger society. When voluntary assimilation failed, the government turned to coercive measures and others means to accelerate assimilation. In the later part of the twentieth century, these colonialist policies have been rejected as they ran head on into new modern democratic and humanitarian values that became entrenched in the Constitution Act (1982) and the *Charter of Rights*. The incompatibility between the colonial policies and the new societal values has caused key sections of the *Indian Act* to be found to be discriminatory and have contributed to major shifts in Aboriginal policy directions.

As a result, the government was forced to introduce amendments to the *Indian Act* in the mid-1980s dealing with the rights of Indian women. These changes, however, only dealt with the most blatant problems. It is now widely acknowledged that Bill C-31 “left issues unresolved and introduced new problems”<sup>191</sup> Some of these issues have gone to the courts for clarification and others are likely to be put forward in future, but the capacity of the

courts to deal with these issues is limited. In addition to the legal and political dimensions of the membership/citizenship issue, there are increasing complications arising with changes to the demographics of First Nation communities and other socio-economic factors that need to be part of a more comprehensive review of this issue.

The second part of the paper attempts to show that most issues of membership/citizenship are not just archaic technical issues left over from the colonial period but invariably linked to a broader set of political questions related to the nature of Canada and Canadian citizenship. The paper sets out two competing views on Canadian citizenship and situates the Royal Commission's proposal for Aboriginal dual citizenship within a framework for citizenship that recognizes the true diversity of Canada and the multinational character of the country. Most importantly, it acknowledges that there are practical complications that require further study and analysis if new policy directions in this area are to be set. The challenge in the years ahead, as the federation attempts to institutionally accommodate Aboriginal peoples and clarify their 'special status' rights and responsibilities under the new arrangements, will be to address these issues in a way that will not increase fragmentation and effect our capability "of thinking and acting as a single people."<sup>192</sup>

## 4.2 Moving Beyond Conceptual Distinctions

In order to move beyond conceptual distinctions, there needs to be further examination and clarification of the practical issues in order to build a broader consensus as to why the federation might chose to move further in the direction of recognizing cultural diversity. The following sets out a number of the key substantive and procedural issues that require more study and debate in the larger society:

1. The departure point of any future policy initiative as it relates to Aboriginal Peoples must be more formal commitment to some form of special status recognition. As James Tully has observed "the question is not whether one should be for or against cultural diversity. Rather, it is the prior question of what is the critical attitude or spirit in which justice can be rendered to the demands for cultural recognition."<sup>193</sup> In the case of the Aboriginal citizenship issue, recognition of special status means that future accommodation must go beyond the limited legal parameters that relate to 'status' and discrimination under the *Indian Act* and deal with the question on a moral and political plane. It must translate aboriginal and treaties rights into a modern context, spelling out both rights and responsibilities and delineate the application of these special rights to First Nation territory, traditional territory, provincial territory and other parts of Canada (including other First Nation territory). The implications of the Corbiere decision for non-resident Aboriginal citizens must be addressed and formal assurances provided to non-aboriginal people that reside on First Nation land. In short, the new arrangement must articulate the meaning behind the concept of differentiate citizenship for Aboriginal People and clarify the "unique form of duel citizenship" that Aboriginal People will have under self-government.

2. Recognition of special status does not necessarily mean that the discussion starts with a preference for the differentiated model of citizenship over the unitary model.<sup>194</sup> Canada's official citizenship policy already "reflects the acceptance of a distinction between legal citizenship, which is extended to all Canadians and has to do with the right to vote and the duty to pay taxes, and 'societal' citizenship, which is related to origins, particularistic collective memories, and cultural-linguistic loyalties and preferences."<sup>195</sup> Regional differences and multiculturalism have long been part of our cultural landscape. Whether the country attempts to modify the existing distinctions between legal and 'societal' citizenship or adopts a new approach, such as the differentiated citizenship approach, should not be the issue. Rather the central issue should be "what mix of multiple identities do we wish to support in future"<sup>196</sup> and what is the best way to get there.
3. The fact that aboriginal issues have been discussed in two separate tracks over the past thirty years – one focused on the past and the other focused on the future - is evidence of the priority of the issue on the national agenda. Paradoxically, it is also evidence of the reluctance of First Nation and government leaders to dispose of the *Indian Act* before board consensus is developed on the new directions. One of the major challenges of the next stage of the debate will be to integrate the concepts of 'status Indian' and membership under the *Indian Act* and citizenship under self-government.
4. It has also been suggested that the future debate on aboriginal citizenship may be significantly influenced by demographic factors and other realities in ways that are only now emerging. To what extent are these factors relevant to the Aboriginal citizenship issue? Are Aboriginal and non-Aboriginal Canadians willing to aggregate and modernize the concept of Aboriginal citizenship beyond the band level? These kinds of issues need more study.
5. According to observers such as Nicole Gallant, the issue of differentiated citizenship raises the question of whether and "to what extent should Canada try to foster a so-called national" identity.<sup>197</sup> This issue has of course been central to the country's survival for many generations, but will likely become more important if this concept of differentiated citizenship is considered. There are experts who assert that "it is necessary for a country to foster primary identification to itself rather than subgroups."<sup>198</sup> According to Nicole Gallant, those that argue in favour of this thesis hold the view that "allowing citizens to broadly identify with another group is dangerous, as it fosters divisiveness. Having several allegiances might lead to conflicting loyalties."<sup>199</sup> On the other hand, Gallant contends it is "not necessary for citizens' main identification to be at the level of the country".<sup>200</sup> Gallant essentially maintains that polity and cultural identification can be separated. She concludes that citizens of democratic states should be "free to choose whichever identities they wish, while feeling they are part of the whole, thereby respecting public institutions."<sup>201</sup> A comprehensive assessment of the pros and cons of these options would create a better understanding of the consequences of any decisions related to differentiated citizenship.

6. As indicated earlier, there are many similarities but also significant differences between the Quebec situation and Aboriginal citizenship issue. More examination of this issue would serve to enlarge our collective understanding of these differences as well the elements of commonality.
  
7. The movement from a colonial regime designed to assimilate the Aboriginal people into the larger society into a modern world of Aboriginal self-government will not be accomplished without some debate and rancour. We are currently in the middle of this transition and there are many uncertainties as to how the concept of Aboriginal citizenship will fit with Aboriginal self-government and a renewed Canadian federalism. A key element in navigating this transition will be the approach or method adopted to explore these issues. The time for unilateral federal leadership on this issue has passed. Future work in this area should include representation from Aboriginal and non-Aboriginal policy makers and the involvement of others groups and individual Canadians who have an interest in the relationship between Aboriginal self-government and Aboriginal citizenship and the current debate on Canadian citizenship and Canadian federalism.

## Bibliography

Abele, Frances, Katherine A. Graham, and Allan Maslove, 'Negotiating Canada: Changes in Aboriginal Policy over the Last Thirty Years', in *How Ottawa Spends 1999-2000 – Shape Shifting: Canadian Governance Toward the 21<sup>st</sup> Century*, (Oxford University Press 1999).

Alfred, Taiaiake, *Peace Power Righteousness: An Indigenous Manifesto*, (Oxford University Press, 1999).

Cairns, Alan C., 'The Fragmentation of Canadian Citizenship', in William Kaplin (ed.), *Belonging: The Meaning and the Future of Canadian Citizenship* (Montreal and Kingston: McGill-Queen's University Press, 1993).

\_\_\_\_\_. 'Aboriginal Canadians, Citizenship and the Constitution', in *Reconfigurations: Canadian Citizenship and Constitutional Change: Selected Essays by Alan C. Cairns*, Edited by Alan C. Douglas E. Williams, (Toronto: McClelland and Stewart, 1995).

\_\_\_\_\_. *Citizens Plus: Aboriginal Peoples and the Canadian State*, (UBC Press, 2000).

\_\_\_\_\_, ed. *Citizenship, Diversity and Pluralism*, (McGill –Queen's University Press, 1999).

Cairns, Alan C., and Cynthia Williams, 'Constitutionalism, Citizenship and Society in Canada', in *Constitutionalism, Citizenship and Society in Canada*, Research Coordinators, Alan Cairns and Cynthia Williams, (University Of Toronto Press in cooperation with the Royal Commission on the Economic Union and Development Projects in Canada., 1985).

Canada. Federal Policy Guide, *Aboriginal Self-Government: the Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. (Catalogue No. R32-15511-1995).

\_\_\_\_\_. Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy*, [known as the White Paper on Indian Policy] (Ottawa, 1969).

\_\_\_\_\_. National Archives of Canada, RG 10, Vol. 86/10, file 470-2-3, vol. 7.

\_\_\_\_\_. Report of the Standing Senate Committee on Aboriginal Affairs Hearing of February 16, 2000, 32. ([www.parl.gc.ca/cgi-bin/36/pb.pl?e](http://www.parl.gc.ca/cgi-bin/36/pb.pl?e)).

\_\_\_\_\_. Report of the Royal Commission on Aboriginal Peoples, Volumes 1-5 *Renewal: A Twenty-Year Commitment*, (Canada Communication Group, 1996).

Carens, Joseph, H., *Citizenship and Aboriginal Self-Government*, a background paper to the Royal Commission on Aboriginal Peoples, (January 1995) in RCAP CD Rom, 1-43.

Chesterman John, and Brian Colligan, *Citizens Without Rights Aborigines and Australian Citizenship*, (Cambridge University, 1997).

Clatworthy, S.J. *Revised Projection Scenarios Concerning the Population Implications of Section 6 of the Indian Act*, (Four Directions Consulting Group, February, 1994).

\_\_\_\_\_. *The Migration and Mobility Patterns of Canada's Aboriginal Population*, (Ottawa: Canada Mortgage and Housing Corporation and the Royal Commission on Aboriginal Peoples, 1996).

\_\_\_\_\_. *Populations and Membership Projections - the Mohawks of Kahnawake*, (Draft, November 1998).

Clatworthy, Stewart, and Anthony H. Smith, *Implications of First Nations Demography*, (Four Directions Consulting Group, August 1997).

Dene Declaration (1975).

Dodds, Susan, 'Citizenship, Justice and Indigenous Group-Specific Rights – Citizenship and Indigenous Australia', *Citizenship Studies*, Vol. 2, No. 1, 1998.

Elkins, David, *Aboriginal Citizenship and Federalism: Exploring Non-Territorial Models*, (RCAP Discussion Paper- Draft May, 1994).

Elliott, David W., *Law and Aboriginal Peoples in Canada*, (Captus Press Inc. 1997).

Flanagan, Tom, *First Nations? Second Thoughts*, (McGill-Queen's University Press, 2000).

Gallant, Nicole, 'Feeling Canadian, Feeling Other: Perceptions of Citizenship and Identity Among Aboriginals and Second-Generation immigrants in Quebec', a paper presented at a conference on Nationalism, Citizenship and National Identity in Canada, Centre for Canadian Studies, Mont Allison University, Sackville, NB, November 11-13, 1999.

Gilbert, Larry, *Entitlements to Indian Status and Membership Codes in Canada*, (Carswell, 1996).

Ginger Group Consultants, *New Approaches to Aboriginal Problems: Shifting Focus From Indian Status to First Nation Collectivities*, (A discussion paper prepared for INAC Research Directorate, 1995).

Goldman, Gustave 'The Measurement of Acculturation' in *Canadian Studies in Population*, Vol. 25(2) 1998, 115-144.

Green, Kathy, 'Working Paper on Status and Membership Current Situation', (AFN/INAC Joint Initiative for Policy Development, February 1999).

Imai, Shin, (ed.) *The 1997 Annotated Indian Act*, (Carswell, 1996).

Jenson, Jane 'Recognizing Difference: Distinct Societies, Citizenship Regimes and Partnership', in *Beyond the Impasse: Toward Reconciliation*, (the Institute on Public Policy, 1998).

Johnston, Darlene, 'First Nations and Canadian Citizenship', in *Belonging: the Meaning and Future of Canadian Citizenship*, ed. William Kaplin, (McGill-Queen's University Press, 1993).

Kymlicka, Will, *Finding our Way: Rethinking Ethnocultural Relations in Canada*, (Oxford University Press 1998).

Kymlicka, Will and Wayne Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' in *Theorizing Citizenship*, ed. Ronald Beiner, (State of University of New York Press, 1995).

Lenihan, Donald G., Gordon Robertson and Roger Tasse, *Canada: Reclaiming the Middle Ground*, (Montreal: Institute for Research on Policy, 1994).

Leslie, John, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate memory for the Indian department*, (Ottawa: Indian Affairs and Northern Development, February 1985) .

Lévesque, René, *Options Quebec*, (Montreal: Editions de l'homme, 1968) .

Macqueen, Alexandra, Richard Aniol, Stephan Aronson and Mel Jacobs, Research Report: Impacts of the Authority to Determine E-Dbendaagzijig (Membership): United Anishnaabeg Councils, (March 31, 1999).

McRoberts, Kenneth, *Misconceiving Canada: the Struggle for National Unity*, (Toronto: Oxford University Press, 1997).

Mercredi, Ovide and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations*, (The Penguin Group, 1993).

Miller, J.R., *Skyscrapers Hide the Sky: A History of Indian-White Relations in Canada*, (Toronto: University of Toronto Press).

Norris, Mary Jane, and Dan Beavon, *Registered Indian Mobility and Migration: An Analysis of 1996 Census Data*, a paper presented at the Canadian Population Society meeting, June 9-11, 1996.



Opekokew, Delia 'Self-identification and Cultural Preservation: A Commentary on Recent Indian Act Amendments', 4 *Canadian Native Law Review*, 1986.

Paquet, Gilles, 'Tectonic Change in Canadian Governance' in *How Ottawa Spends 1999-2000 - Shape Shifting : Canadian Governance Toward the 21<sup>st</sup> Century*, (Oxford University Press Canada 1999).

Resnick, Philip, *Toward A Canada-Quebec Union*, (McGill-Queen's University Press, 1991).

Richards, John, 'Economist blasts native land claim deals in B.C.' in the *Globe and Mail*, April 22, 1999, A2.

Russell, Peter, 'The Constitution, Citizenship and Ethnicity', in *Ethnicity and Citizenship-The Canadian Case*, edited by Jean Laponce and William Safran, (London: Frank Carr and Company, 1996).

Safran, William, 'The Conclusion', in *Ethnicity and Citizenship-the Canadian Case*, (ed. by Jean Laponce and William Safran, (London: Frank Cass and Co., 1996).

Simpson, Jeffery, 'The Aboriginal Challenge' in the *Globe and Mail*, May 19, 1999, A12.

Segal, Philip, 'Top Hong Kong Court Trumped by Beijing', in the *Globe and Mail*, Monday, June 28, 1999, A 10.

Smith, Mel, *Our Native Land: What the Government's Aboriginal Policy is Doing to Canada*, (Crown Western, 1995).

Srebrnik, Henry, 'The Fiji coup: A cautionary tale', *National Post*, May 30, 2000.

Tully, James, *Strange Multiplicity: Constitutionalism in An Age of Diversity*, (Cambridge University Press, 1995).

Weaver, Sally 'The Status of Indian Women' in Jean Elliott (ed.) *Two Nations Many Cultures*, (Prentice Hall Canada Inc., 1983).

Weaver, Sally, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970*, (University of Toronto Press, 1981).

Wherrett, Jill, *Background Paper: Indian Status and Band Membership Issues*, Political and Social Affairs Division, Library of Parliament, (Feb. 1996).

Yashar, Deborah J., 'Indigenous Movements and Democracy in Latin America', in *Comparative Politics*, October 1998, v.31 n1.

Young, Iris Marion, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, *Ethics* 99, (January 1989).

---

<sup>1</sup> Report of the Royal Commission on Aboriginal Peoples, Volume 5, *Renewal: A Twenty-Year Commitment*, (Canada Communication Group, 1996) 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, 161.

<sup>4</sup> Although the concept of 'Aboriginal citizenship' or 'citizen' is not used in the *Indian Act*, the term 'citizen' has been used in the *Yukon First Nations Self-Government Act* (1995) and the Nisga'a Self-Government Act (Bill-C9) that was passed by Parliament in June 2000. The term 'Aboriginal citizenship', as used in this paper refers to certain shared understandings between individuals and their governments and the rights and duties of the individuals and applies primarily to First Nation communities with a land base.

<sup>5</sup> Alan Cairns and Cynthia Williams, 'Constitutionalism, Citizenship and Society in Canada', in *Constitutionalism, Citizenship and Society in Canada*, Research Coordinators, Alan Cairns and Cynthia Williams, (University Of Toronto Press in cooperation with the Royal Commission on the Economic Union and Development Projects in Canada., 1985), 31.

<sup>6</sup> Kathy Green, 'Working Paper on Status and Membership Current Situation', (AFN/INAC Joint Initiative for Policy Development, February 1999), 2.

<sup>7</sup> *Ibid.*

<sup>8</sup> Alan C. Cairns, *Citizenship, Diversity and Pluralism*, (McGill –Queen's University Press, 1999), 3.

<sup>9</sup> See the Report of the Standing Senate Committee on Aboriginal Affairs Hearing of February 16, 2000, 32. ([www.parl.gc.ca/cgi-bin/36/pb.pl?e](http://www.parl.gc.ca/cgi-bin/36/pb.pl?e)).

<sup>10</sup> See for example, S.J. Clatworthy, *The Migration and Mobility Patterns of Canada's Aboriginal Population*, (Ottawa: Canada Mortgage and Housing Corporation and the Royal Commission on Aboriginal Peoples, 1996).

<sup>11</sup> Donald G. Lenihan, Gordon Robertson and Roger Tasse, *Canada: Reclaiming the Middle Ground*, (Montreal: Institute for Research on Policy, 1994).

<sup>12</sup> Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, *Ethics* 99, (January 1989) 250-274.

<sup>13</sup> *Ibid.*, 272.

<sup>14</sup> Darlene Johnston, 'First Nations and Canadian Citizenship', in *Belonging: the Meaning and Future of Canadian Citizenship*, ed. William Kaplin, (McGill-Queen's University Press, 1993), 364.

<sup>15</sup> Joseph H. Carens, *Citizenship and Aboriginal Self-Government*, a background paper to the Royal Commission on Aboriginal Peoples, (January 1995) in RCAP CD Rom, 1-43.

<sup>16</sup> For example see David W. Elliott, *Law and Aboriginal Peoples in Canada*, (Captus Press Inc. 1997).

<sup>17</sup> For a preliminary discussion of the elements of aboriginal citizenship see Joseph Carens, *Citizenship and Aboriginal Self-Government*, a background paper prepared for The Royal Commission on Aboriginal Peoples, 1995, 24-31.

<sup>18</sup> For an interesting article on how to approach these kinds of questions, see Gustave Goldman, 'The Measurement of Acculturation' in *Canadian Studies in Population*, Vol. 25(2) 1998, 115-144.

<sup>19</sup> David Elkins, *Aboriginal Citizenship and Federalism: Exploring Non-Territorial Models*, (RCAP Discussion Paper- Revised May, 1994).

<sup>20</sup> Nicole Gallant, 'Feeling Canadian, Feeling Other: Perceptions of Citizenship and Identity Among Aboriginals and Second-Generation immigrants in Quebec', a paper presented at a conference on Nationalism, Citizenship and National Identity in Canada, Centre for Canadian Studies, Mont Allison University, Sackville, NB, November 11-13, 1999, 23.

<sup>21</sup> Susan Dodds, 'Citizenship, Justice and Indigenous Group-specific Rights – Citizenship and Indigenous Australia', *Citizenship Studies*, Vol. 2, No. 1, 1998, 118.

<sup>22</sup> Deborah J. Yashar, 'Indigenous Movements and Democracy in Latin America', in *Comparative Politics*, October 1998, v.31 n1, 39.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Henry Srebrnik, 'The Fiji coup: A cautionary tale', *National Post*, May 30, 2000.

- 
- <sup>26</sup> Ibid.
- <sup>27</sup> The Globe and Mail article by Philip Segal 'Top Hong Kong Court Trumped by Beijing', Monday, June 28, 1999, A10.
- <sup>28</sup> Ibid.
- <sup>29</sup> Darlene Johnston, 'First Nations and Canadian Citizenship...', 349.
- <sup>30</sup> Report of the Royal Commission on Aboriginal Peoples, Volume 1, *Looking Forward, Looking Back*, (Canada Communication group, 1996) 258.
- <sup>31</sup> RCAP Report, Vol. 1, 130.
- <sup>32</sup> Cited in J.R. Miller, *Skyscrapers Hide the Sky: A History of Indian-White Relations in Canada*, (Toronto: University of Toronto Press), 109.
- <sup>33</sup> Ibid., 110.
- <sup>34</sup> John Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate memory for the Indian department*, (Ottawa: Indian Affairs and Northern Development, February 1985)
- <sup>35</sup> RCAP Report, Vol. 1, 270.
- <sup>36</sup> RCAP Report, Vol. 1, 142.
- <sup>37</sup> Miller, *Skyscrapers Hide the Sky*...., 111.
- <sup>38</sup> RCAP Report, Vol.1, 271.
- <sup>39</sup> RCAP Report, Vol.1, 272.
- <sup>40</sup> RCAP Report, Vol.1, 272.
- <sup>41</sup> RCAP Report, Vol. 1, 326.
- <sup>42</sup> See Alan C. Cairns, 'Aboriginal Canadians, Citizenship and the Constitution', in *Reconfigurations: Canadian Citizenship and Constitutional Change: Selected Essays by Alan C. Cairns*, Edited by Alan C. Douglas E. Williams, (Toronto: McClelland and Stewart, 1995), 244. Also see footnote #6 in this article for an articulation of this view by John A. Macdonald (1887), Duncan Campbell (1920), and Diamond Jenness (1940).
- <sup>43</sup> Miller, *Skyscrapers Hide the Sky*...., 297.
- <sup>44</sup> Larry Gilbert, *Entitlements to Indian Status and Membership Codes in Canada*, (Carswell, 1996) 11-48.
- <sup>45</sup> Ibid.
- <sup>46</sup> Ibid.
- <sup>47</sup> Ibid., 3.
- <sup>48</sup> Ibid., 4.
- <sup>49</sup> RCAP Report, Vol. 1, 333-386.
- <sup>50</sup> RCAP Report, Vol. 1, 287.
- <sup>51</sup> Delia Opekowek, 'Self-identification and Cultural Preservation: A Commentary on Recent Indian Act Amendments', 4 *Canadian Native Law Review*, 1986, 3.
- <sup>52</sup> See John Chesterman and Brian Colligan, *Citizens Without Rights Aborigines and Australian Citizenship*, (Cambridge University, 1997) . According to Chesterman and Colligan the experience in Australia was similar during the 1920s and 1930s, where the government used more oppressive measures "...when it became clear that the aboriginal race was not going to die out." (p 8)
- <sup>53</sup> National Archives of Canada, RG 10, vol.86/10, file 470-2-3, vol.7.
- <sup>54</sup> RCAP Report, Vol. 4, 29-31.
- <sup>55</sup> See Miller, *Skyscrapers Hide the Sky*...., 221. According to Miller, the Parliamentary Committee that proposed the 1951 amendments was convinced "...that the assimilation and integration was well advanced and that all that was required was a little more time and less bureaucratic intervention in Indian communities."
- <sup>56</sup> Gilbert, *Entitlements to Indian Status*, 2.
- <sup>57</sup> R. v. Drybones [1970] S.C.C. 282.
- <sup>58</sup> A.G. of Canada v Lavell-Isaac v. Bedard, [1974] S.C.R.
- <sup>59</sup> Sally Weaver, 'The Status of Indian Women' in Jean Elliott (ed.) *Two Nations Many Cultures*, (Prentice Hall Canada Inc., 1983), 68.
- <sup>60</sup> Elliott, *Law and Aboriginal Peoples in Canada*, 12.
- <sup>61</sup> Ibid., 71.
- <sup>62</sup> Jill Wherrett, *Background Paper: Indian Status and Band Membership Issues*, Political and Social Affairs Division, Library of Parliament, (Feb. 1996) 4.
- <sup>63</sup> RCAP Report, Vol. 4, 33.

- 
- <sup>64</sup> RCAP Report, Vol. 4, 33.
- <sup>65</sup> *Constitution Act* (1982) in Shin Imai (ed.) *The 1997 Annotated Indian Act*, (Carswell, 1996).
- <sup>66</sup> Jim Wherrett, *Background Paper: Indian Status and Band Membership Issues*, 5.
- <sup>67</sup> See RCAP Report, Vol. 4, 37-43.
- <sup>68</sup> Jim Wherrett, *Background Paper: Indian Status and Band Membership Issues*, 7.
- <sup>69</sup> *Ibid.*, 9-10.
- <sup>70</sup> This was the common view of INAC officials following the passage of C-31.
- <sup>71</sup> This kind of change has happened in many communities after the passage of C-31. See [www.uac.org/html/erp.html](http://www.uac.org/html/erp.html) for a summary of a recent research paper entitled 'Impacts of the Authority to determine E-Dbendaagzijig' prepared for the United Anishnaabeg Councils (UAC) which indicates that the average rate of growth during the 1980-1998 period for the 8 UAC communities "...was 344 percent compared with an average rate of growth for the on-reserve population of 60 percent".
- <sup>72</sup> *Cobiere vs. Canada*, (SCC) 13, <http://www.droit.umontreal.ca/doc/csc-scc/en/rec/html/bachewa.en.html>
- <sup>73</sup> *Ibid.*
- <sup>74</sup> 'Solomon and Aboriginals', *Globe and Mail*, (May 25, 1999) A12.
- <sup>75</sup> *Ibid.*
- <sup>76</sup> RCAP Report, Vol. 4, 34.
- <sup>77</sup> Gilbert, *Entitlements to Indian Status*, 130.
- <sup>78</sup> See Delia Opekokew 'Self-identification and Cultural Preservation....' 3-8 for full argument
- <sup>79</sup> Elliott, *Law and Aboriginal People...*, 13.
- <sup>80</sup> *Ibid.*
- <sup>81</sup> RCAP Report, Vol.4, 44.
- <sup>82</sup> RCAP Report, Vol. 4, 45.
- <sup>83</sup> Ginger Group Consultants, *New Approaches to Aboriginal Problems: Shifting Focus From Indian Status to First Nation Collectivities*, (discussion paper prepared for INAC Research Directorate, 1995), 43.
- <sup>84</sup> Elliott, *Law and Aboriginal People...*, 13.
- <sup>85</sup> Wherrett, *Background Paper: Indian Status and Band Membership Issues*, 6.
- <sup>86</sup> Gilbert, *Entitlements to Indian Status*, 4.
- <sup>87</sup> *Ibid.* Also see Delia Opekokew, 'Self-identification and Cultural Preservation....'.
- <sup>88</sup> See AFN position at [www.afn.ca/press/supreme-court.htm](http://www.afn.ca/press/supreme-court.htm)
- <sup>89</sup> Wherrett, *Background Paper: Indian Status and Band Membership Issues*, 19.
- <sup>90</sup> *Ibid.*, 12.
- <sup>91</sup> See the Federal Policy Guide, *Aboriginal Self-Government: the Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. (Catalogue No.R32-15511-1995), 5.
- <sup>92</sup> Frances Abele, Katherine A. Graham, and Allan Maslove, 'Negotiating Canada: Changes in Aboriginal Policy over the Last Thirty Years', in *How Ottawa Spends 1999-2000 – Shape Shifting: Canadian Governance Toward the 21<sup>st</sup> Century*, (Oxford University Press 1999) 251-292. Although this article makes little reference to the importance of the 1960's, it does provide a detailed review of events since 1969.
- <sup>93</sup> The 'White Paper on Indian Policy' that was released by the federal government in June of 1969 proposed to terminate all special rights for Indian people, including the Indian Act, reserves and treaties.
- <sup>94</sup> Carens, *Citizenship and Aboriginal Self-Government*, 11.
- <sup>95</sup> Cairns and Williams, *Constitutionalism, Citizenship and Society in Canada*, 29.
- <sup>96</sup> Alan C. Cairns, 'Aboriginal Canadians, Citizenship, and the Constitution', 243.
- <sup>97</sup> *Ibid.*, 243.
- <sup>98</sup> Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970*, (University of Toronto Press, 1981), 53-56.
- <sup>99</sup> Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (Ottawa, 1969).
- <sup>100</sup> RCAP, Vol. 1, 202.
- <sup>101</sup> Opekokew, 'Self-identification and Cultural Preservation', 3.
- <sup>102</sup> Weaver, *Making Canadian Indian Policy...*, 182.
- <sup>103</sup> The *Calder* case was an action by Nisga'a people of the Nass River area of British Columbia. The case was lost on a technicality but is considered to be a landmark case because the majority of Judges found that

---

aboriginal title may exist in common law. As a result of this case, the government introduced the land claims policy to resolve aboriginal title issues where treaties had not been negotiated.

<sup>104</sup> Dene Declaration [1975] 3-4.

<sup>105</sup> Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*, (UBC Press, 2000) 172.

<sup>106</sup> Cairns, *Aboriginal Canadians, Citizenship and the Constitution*, 240.

<sup>107</sup> The majority of First Nations communities opposed the Accord. See Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations*, (The Penguin Group, 1993) 207-228.

<sup>108</sup> Cairns and Williams, 'Constitutionalism, Citizenship, and Society in Canada', 30.

<sup>109</sup> Stewart Clatworthy, *Revised Projection Scenarios Concerning the Population Implications of section 6 of the Indian Act*, (Four Directions Consulting Group, February, 1994), 51.

<sup>110</sup> *Ibid.*, 51. Also, see chart on page 48.

<sup>111</sup> Stewart Clatworthy and Anthony H. Smith, *Implications of First Nations Demography*, (Four Directions Consulting Group, August 1997) 101.

<sup>112</sup> *Ibid.*, 101.

<sup>113</sup> *Ibid.*, 106.

<sup>114</sup> See studies by Stewart Clatworthy, *Populations and Membership Projections - the Mohawks of Kahnawake*, (November 1998); Also see Alexandra Macqueen et al, Research Report: Impacts of the Authority to determine E-Dbendaagzjig: United Anishnaabeg Councils, ( March 31, 1999).

<sup>115</sup> Jeffery Simpson, 'The Aboriginal Challenge' in the *Globe and Mail*, May 19, 1999, A12.

<sup>116</sup> Also see John Richards' comments in a *Globe & Mail* article entitled 'Economist blasts native land claim deals in B.C.' of April 22, 1999, A2.

<sup>117</sup> Mary Jane Norris and Dan Beavon, *Registered Indian Mobility and Migration: An Analysis of 1996 Census Data*, a paper presented at the Canadian Population Society meeting, June 9-11,1996, 29.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> Taiaiake Alfred, *Peace Power Righteousness: An Indigenous Manifesto*, (Oxford University Press, 1999), 1.

<sup>121</sup> Wherrett, *Background Paper: Indian Status and Band Membership Issues*, 19.

<sup>122</sup> *Ibid.*, 20.

<sup>123</sup> *Ibid.*, 21.

<sup>124</sup> Carens, *Citizenship and Aboriginal Self-Government*, 29.

<sup>125</sup> Johnston, *First Nations and Canadian Citizenship*, 364.

<sup>126</sup> Cairns, 'Aboriginal Canadians, Citizenship, and the Constitution', 251.

<sup>127</sup> Stewart Clatworthy, 'Revised Projections Scenarios Concerning the Population Implications of Section 6 of the Indian Act', 105.

<sup>128</sup> Cairns, 'Aboriginal Canadians, Citizenship, and the Constitution', 238.

<sup>129</sup> Peter Russell, 'The Constitution, Citizenship and Ethnicity', in *Ethnicity and Citizenship- The Canadian Case*, edited by Jean Lapointe and William Safran, (London: Frank Carr and Company, 1996), 97.

<sup>130</sup> Will Kymlicka, *Finding our Way: Rethinking Ethnocultural Relations in Canada*, (Oxford University Press 1998) 137.

<sup>131</sup> Russell, *The Constitution Citizenship and Ethnicity*, 97.

<sup>132</sup> Hansard, 1998-11-05, 39.

<sup>133</sup> Mel Smith, *Our Native Land: What the Government's Aboriginal Policy is Doing to Canada*, (Crown Western, 1995) 263.

<sup>134</sup> *Ibid.*, 263.

<sup>135</sup> *Ibid.*, 263.

<sup>136</sup> Hansard 1998-11-05, 39.

<sup>137</sup> Hansard 1999-10-27.

<sup>138</sup> *Regina v. Marshall*, S.C.C. [1999].

<sup>139</sup> Tom Flanagan, *First Nations? Second Thoughts*, (McGill-Queen's University Press, 2000), 69.

<sup>140</sup> *Ibid.*, 88.

<sup>141</sup> *Cherokee v. Georgia* [1831], 30 U.S. , 16-17.

<sup>142</sup> *Ibid.*, 87.

<sup>143</sup> Carens, 'Citizenship and Aboriginal Self-Government', 32.

<sup>144</sup> Carens, 'Citizenship and Aboriginal Self-Government', 4.

- 
- <sup>145</sup> René Lévesque, *Options Quebec*, (Montreal: Editions de l'homme, 1968).
- <sup>146</sup> Philip Resnick, *Toward A Canada-Quebec Union*, (McGill-Queen's University Press, 1991) 21.
- <sup>147</sup> *Ibid.*, 12
- <sup>148</sup> *Ibid.*, 21.
- <sup>149</sup> Jane Jenson, Recognizing Difference: Distinct Societies, *Citizenship Regimes and Partnership*, in *Beyond the Impasse: Toward Reconciliation*, (the Institute on Public Policy, 1998) 216.
- <sup>150</sup> *The Clarity Act* (2000).
- <sup>151</sup> Kenneth McRoberts, *Misconceiving Canada: the Struggle for National Unity*, (Toronto: Oxford University Press, 1997) 245.
- <sup>152</sup> Although Robert Stanfield promoted the idea "two nations" in the late 1960s, it was not accepted as party policy.
- <sup>153</sup> Will Kymlicka, *Finding Our Way....*, 143.
- <sup>154</sup> *Ibid.*, 143.
- <sup>155</sup> *Ibid.*, 143.
- <sup>156</sup> *Ibid.*, 143.
- <sup>157</sup> *Ibid.*, 170.
- <sup>158</sup> *Ibid.*, 167.
- <sup>159</sup> Jane Jenson, 'Recognizing Difference....' 217.
- <sup>160</sup> Jenson, 'Recognizing Difference....', 218.
- <sup>161</sup> Carens, 'Citizenship and Aboriginal Self-Government....', 17.
- <sup>162</sup> *Ibid.*
- <sup>163</sup> *Ibid.*, 18
- <sup>164</sup> *Ibid.*
- <sup>165</sup> Alan C. Cairns, 'The Fragmentation of Canadian Citizenship', in William Kaplin (ed.), *Belonging: The Meaning and the Future of Canadian Citizenship* (Montreal and Kingston: McGill-Queen's University Press), 185.
- <sup>166</sup> *Ibid.*, 188.
- <sup>167</sup> *Ibid.*, 186.
- <sup>168</sup> Will Kymlicka, *Finding Our Way....*, 144.
- <sup>169</sup> *Ibid.*
- <sup>170</sup> Will Kymlicka and Wayne Norman, 'Return of the Citizen: A survey of Recent Work on Citizenship Theory' in *Theorizing Citizenship*, ed. Ronald Beiner, (State of University of New York Press, 1995), 307.
- <sup>171</sup> *Ibid.*
- <sup>172</sup> See writing of Alfred, *Peace, Power, Righteous: An Indigenous Manifesto*
- <sup>173</sup> See for example, 'Mohawks 'testing the waters': Plan to set up offshore bank just another step in quest for control over native affairs, Akwesasne's Chief says', the *Ottawa Citizen*, November 20, 1999, A8.
- <sup>174</sup> *Ibid.*, 307.
- <sup>175</sup> Carens, 'Citizenship and Self-Government....' and David J. Elkins, 'Aboriginal Citizenship and Federalism: Exploring Non-Territorial Models (Draft RCAP Background Paper, May, 1994).
- <sup>176</sup> Carens, 'Citizenship and Aboriginal Self-Government', 4.
- <sup>177</sup> *Ibid.*, 9.
- <sup>178</sup> This concept seems similar to Jane Jenson's concept of membership mentioned earlier.
- <sup>179</sup> Carens, 'Citizenship and Aboriginal Self-Government', 7.
- <sup>180</sup> *Ibid.*, 9.
- <sup>181</sup> *Ibid.*, 9.
- <sup>182</sup> RCAP Report, Vol.5, 160.
- <sup>183</sup> RCAP Report, Vol. 2, 240.
- <sup>184</sup> RCAP Report, Vol. 2, 239.
- <sup>185</sup> Gilles Paquet, 'Tectonic Change in Canadian Governance' in *How Ottawa Spends 1999-2000 - Shape Shifting : Canadian Governance Toward the 21<sup>st</sup> Century*, (Oxford University Press Canada 1999), 102.
- <sup>186</sup> Kymlicka and Norman, *Return of the Citizen....*, 309.
- <sup>187</sup> Cairns, 'The Fragmentation of Canadian Citizenship', 212.
- <sup>188</sup> Cairns, *Aboriginal Canadians, Citizenship and the Constitution*, 238.
- <sup>189</sup> Senator Gill, at the Senate Standing Committee Hearing on the Nisga'a Self Government Act (Bill C-9) on February 16, 2000. ([www.parl.gc.ca/cgi-bin/36/pb.pl?e](http://www.parl.gc.ca/cgi-bin/36/pb.pl?e))

---

<sup>190</sup> Alan C. Cairns, *Citizenship, Diversity and Pluralism*, 5.

<sup>191</sup> Wherrett, Background Paper: Indian Status and Band Membership Issues, 5.

<sup>192</sup> Cairns, *The Fragmentation of Canadian Citizenship*, 212.

<sup>193</sup> James Tully, *Strange Multiplicity: Constitutionalism in An Age of Diversity*, (Cambridge University Press, 1995) 1.

<sup>194</sup> Although this paper suggests that serious consideration of the differentiated model is warranted, a less problematic starting point may ensure a more thoughtful examination of the issues and options.

<sup>195</sup> William Safran, 'The Conclusion', in *Ethnicity and Citizenship-the Canadian Case*, (ed. by Jean Laponce and William Safran, (London: Frank Cass and Co., 1996) 109.

<sup>196</sup> Cairns, *Citizenship Plus: Aboriginal People and the Canadian State*, 109.

<sup>197</sup> Gallant, , *Feeling Canadian, Feeling Other: Perceptions of Citizenship and Identity .....*, 22.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.