

OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: May 28, 2019
TO: OKT Blog
FROM: Kaitlin Ritchie
RE: Why have a membership code?
FILE NO: 11112

Since time immemorial, many First Nations had traditional leadership structures that organized community life, resolved disputes, made decisions about land use and relations with other nations. The *Indian Act*, however, imposed a structure on First Nations called “bands” (as that term is defined in the *Indian Act*), set up a governance structure and band council for each community, and established rules regarding band membership.

In the 1980s, however, amendments to the *Indian Act* provided bands with the ability to draft and enact their own membership codes. Since then, some communities have developed their own membership code under this authority. For communities who have not, this likely brings to mind some questions, such as:

- Why is having a membership code important?
- Why should we define our own membership, instead of letting Canada do it for us?
- How does a membership code come into effect?

These are discussed below.

Background: The *Indian Act* and Band Membership Codes

A “band member” is defined in the *Indian Act* (the “Act”) as “a person whose name appears on a Band List or who is entitled to have his name appear on a Band List” (see section 2 of the Act).

Prior to 1985, band membership carried Indian status along with it (note: the term “status” Indian is used to refer to people who are registered or entitled to be registered as Indians under the *Indian Act*). In other words, they were one and the same: people who had Indian status under the Act and who had band membership were treated the same at law.

In 1985, however, Canada introduced amendments to the *Indian Act* which changed the way in which Indian status and band membership is determined. After the 1985 amendments, Indian status and band membership can be determined separately, and may not coincide.

The 1985 amendments allowed a band to control their own membership by adopting their own membership codes under section 10 of the *Indian Act*. Section 10 allows a band to control its own membership, *if* it gets consent from a majority of electors, and *if* it establishes “membership rules” (e.g. a membership code). Membership codes must meet certain requirements under the *Indian Act* and be compliant with the *Canadian Charter of Rights and Freedoms*, but can otherwise be drafted to meet the community’s needs and wishes.

Where a band chooses *not* to establish a band membership code, the *Indian Act* provides that band membership will be determined by INAC, and INAC remains in control of the band membership list (see sections 8 and 11 of the Act). In this case, the regulations governing band membership where the band list is maintained by INAC are the same as those for determining a person's entitlement to Indian status under the *Indian Act*.

Note that even with a membership code, INAC still maintains the list of status Indians in Canada in the Indian Register (see section 5 of the Act).

Why have your own membership code?

For communities who have not developed their own code, the current rules governing membership are determined by INAC according to the rules relating defining status under the *Indian Act*. As noted above, those rules were not created by First Nation communities, and are not reflective of their belief systems, natural laws, or inherent right to be self-governing.

The *Indian Act* has rules and criteria that people must meet and fall within in order to obtain Indian status, and, without a membership code, band membership, too. These rules are outlined in sections 6 and 7 of the Act.

In 1985, the government of Canada passed "Bill C-31", which made changes to the *Indian Act* regarding these rules of status entitlement. Although the goal was to restore status to Indigenous women who lost it through marrying a non-Indigenous man, the effect of the Bill was to create a two-tiered system of Indian status:

- **"Tier 1"** includes those registered under section 6(1) of the *Indian Act*. These individuals can get all the benefits of registration, and can also pass on their status to their children, regardless of whether the children's other parent has status (or is entitled to status). This "full" form of status was available to persons with two parents who were entitled to be registered, to women who lost their status by marrying out, and anyone who lost their status through "enfranchisement".
- **"Tier 2"** includes those who have only one parent who has status (or who is entitled to status). These persons are entitled to a "lesser" form of status under 6(2) of the Act. If a 6(2) status person has children with a person who does not have status, then her children will not be entitled to status at all.

Although there have been court cases and legislative amendments that have tried to fix the inequalities in the Act, the two-tiered status provisions are still there. What this means is that, if the *Indian Act* system and rules were to continue to be used to determine band membership, the effect is that, over time, more and more individuals will be excluded from being eligible for band membership, as it is anticipated that those eligible for *Indian Act* status will decrease with each successive generation.

With a membership code, First Nation communities can decide whether they would like to limit band membership to those with Indian status (or eligible for status), or not, and can define entitlement to membership based on their own beliefs, laws, and so on.

Why should we define our own membership, instead of letting Canada do it?

As mentioned above, the rules for Indian status and band membership under the *Indian Act* are not reflective of communities' own laws. Creating your own membership code allows communities to determine the membership and citizenry of their own people. It is an expression of a Nation's inherent right to self-government.

This is also supported by UNDRIP. Article 33 says that:

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions; and
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

How does a membership code come into effect?

The *Indian Act* permits a band can bring a membership code into effect by passing a by-law under s. 81(1)(p.4) with the consent of its membership. This is done through a referendum on the membership code. Once a band has the consent of its membership, the Chief and Council give notice to the Minister (in writing) that the band is assuming control of its own membership, and also give the Minister a copy of the band's membership code. The membership code will take effect from the day that notice is given to the Minister.

Once a First Nation controls its own membership, it will also have control over its band membership list, meaning that the INAC will no longer be able to make any additions or deletions (or do anything else, for that matter) in respect of the list. INAC will not be able to decide who is or is not a member of that community.

While having a membership code will not enable First Nations to define who is or who is not an "Indian" for the purposes of the *Indian Act*, it will enable First Nations who develop their own code to determine who is a member of their community, and can be an opportunity for communities to revitalize its laws and customs around that.