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# A Human Rights and Legal Analysis of the Understanding Our Roots Report

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A Human Rights and Legal Analysis of the  
*Understanding Our Roots Report*

by

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and Policy, Schulich School of Law

Cheryl Simon, Assistant Professor, Schulich School of Law

December 2023

## About the Authors

**Naiomi Metallic** is Mi'gmaq from the Listuguj Mi'gmaq First Nation, a practicing lawyer and law professor. She has worked on Indigenous identity issues and their intersection with human rights / equality protections and Aboriginal rights both as a practitioner and scholar. As a lawyer, she represented the Congress of Aboriginal Peoples in both their national engagement and preparation of reports on the Repeal of Section 67 of the *Canadian Human Rights Act* (2009-2010) and Exploratory Process on Indian Registration, Band Membership and Citizenship following the enactment of *Bill C-3, The Gender Equity in Indian Registration Act* (2011). She has been part of the case committee for LEAF's intervention in several cases on discrimination in relation to Indigenous identity, including *Gespeg Micmac Nation v Canada*, 2009 FCA 377; *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239; and *Canadian Human Rights Commission v Canada (AG)*, 2016 FCA 200 (sub nom Matson). She has written about the history of Indigenous peoples' equality claims in Canada, particularly as they intersection with identity: see "[The Door has a Tendency to Swing Shut: The Saga of Aboriginal Peoples' Equality Claims](#)" in Patrick Smith, ed, *Aboriginal Law Bench Book*, 2nd ed (Ottawa: National Judicial Institute, 2017). She was lead counsel in *Bernard v. R.*, 2017 NBCA 48 about narrow court interpretations of who are s 35 rights holders, and has published a paper on this case: "Searching for '[Superchief](#)' and Other Fictional Indians: Case Comment on *R v Bernard*, 2017 NBCA 48" (2020) 57:1 OHLJ 230. Her writing and advocacy on the chronic underfunding and neglect of First Nations services also touches on intersecting Indigenous identity issues. See, for example, [Doing Better for Indigenous Children and Families: A Report on Jordan's Principle Accountability Mechanisms](#), March 31, 2022 (co-authored with Hadley Friedland and Shelby Thomas). Naiomi is currently writing a PhD dissertation on the *United Nations Declaration on the Rights of Indigenous Peoples*. She has given numerous presentations on all these topics, as set out in her [Curriculum Vitae](#).

**Cheryl Simon** has worked on Indigenous identity issues for over twenty years, since discovering that despite having Indian status, her Band's membership code's criteria discriminated against her by preventing her from obtaining membership because she held status via s 6(2) of the *Indian Act*. Despite being a Mi'kmaw woman, the status provisions have seen her be born white, become half an Indian when she was eight years old, and a full Indian when she had children with her non-Indian husband. The absurdity of this system led her to eschew status as a basis of identity, and focus on Mi'kmaw law. She worked with the National Centre for First Nations Governance and later her own company, Simon Governance Services, to support First Nations in creating culturally relevant governance systems. She has overseen the creation of membership and election codes and facilitated community referendums to allow communities to take control of their membership. She successfully mobilized a grassroots challenge to the

custom election code within her own community which discriminated against members off reserve: see [Clark v. Abegweit First Nation Band Council](#), 2019 FC 721, and brought a human rights complaint, which resulted in membership with her Band now being a birthright. Her understanding of Indigenous law flows from her immersion in traditional Mi'kmaw porcupine quillwork and splint basketry, and she uses harvesting for the materials for the traditional art forms via land based learning, to teach Indigenous law. How land based learning and art can develop an identity separate from the *Indian Act* was documented on the podcast [Epekwithk Quill Sisters on Apple Podcasts](#), which she co-hosted. She is a knowledge keeper, having taken on five quillwork apprentices, and uses quillwork to educate the public on Indigenous legal ways. She has developed and taught courses on the effects of colonization on Indigenous Identity, and Indigenous law at Cape Breton University, the University of PEI and the Schulich School of Law at Dalhousie University. She is horrified that the publication she co-wrote with her mother, Elder Judy Clark, which laid bare the intergenerational trauma caused by the *Indian Act* status provisions on her family and community, including the death of her great-aunt as testified to at the MMIWG Inquiry, [View of Exploring Inequities Under the Indian Act \(unb.ca\)](#) UNBLJ RD UN-B Vol. 64/Tome 64 2013, along with her piece [Fraudulent claims of indigeneity: Indigenous nations are the identity experts](#), has been referenced by the Report to support a system centered on supporting the use of Indian Status. Cheryl currently holds a mandate from the Mi'gmaq Chiefs of New Brunswick to conduct research which will ultimately be used to create a Mi'gmaq identity law to displace status and the federal government's assumed jurisdiction over identity. She is a recipient of a 2022 *Belong Fellowship Award* via Dalhousie University, which she is using to assist in carrying out this work.

### **Our intentions, thanks and apology for any oversights**

We wrote this legal analysis over a condensed period of about a week and a half out of a great sense of urgency, drawing on our expertise and previous work. We are seeing the Report and its verification process already being implemented in several different ways, causing confusion among our non-Indigenous colleagues, and most concerning, harm to fellow colleagues and students. We hope our analysis will be helpful to our institution as well as other institutions currently facing pressure to react amid what is perceived by some as a 'crisis' of settler misappropriation of Indigenous identity.

We thank Dr. Hadley Friedland, Associate Professor at the University of Alberta for reviewing and providing comments on our final draft. We have tried to be as careful and thorough in drafting as we can be, though we acknowledge that the short period in which we wrote this analysis could have led to some typos, oversights and errors. We take full responsibility for those.

## Executive Summary

Our primary issues of concern with the Report are as follows:

1. The Task Force was comprised of members unqualified in the historical and legal complexity of Indigenous identity;
2. The Task Force's engagement process may have violated research ethics, was grossly inadequate in both scope and timeline, and may be in breach of procedural fairness standards;
3. The proposed verification process conflates self-identification and uncertainty over Indigenous identity with academic fraud;
4. The proposed verification process is underinclusive and discriminatory by overlooking several categories of Indigenous people who have legitimate, legally-supported claims to being Indigenous, including those people without Indian Status but entitled to be registered under the *Indian Act*, the large and growing Non-Status First Nation population in the region, and members of Indigenous collectives like NunatuKavut Community Council and the Peskotomuhkati Nation at Skutik;
5. The proposed verification process fails to support Indigenous self-determination over identity because it centers Indigenous identity on official federal government recognition, which is not in keeping with constitutional law, domestic and international human rights, including the *United Nations Declaration on the Rights of Indigenous Peoples*;
6. The proposed verification process exposes Dalhousie to liability, including in relation to labour, employment, and human rights law;
7. Implementation of the verification criteria is already occurring without appropriate review and legal analysis;
8. The verification process will actively cause harm to Indigenous students, faculty, and staff and compromise current and planned work; and
9. The University already has all the necessary tools to address situations of academic fraud of Indigenous identity, as well as to respond to the distinct concern of privileging individuals whose self-identification as Indigenous rests solely on having distant ancestry over those with legitimate, legally-supported claims to being Indigenous. Thus, no new process is necessary.

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## A. Introduction

In October 2023, the University released *Understanding Our Roots - Nstikuk tan wtapeksikw* Report [the “Report”] written by the Task Force on Settler Misappropriation of Indigenous Identity [the “Task Force”].<sup>1</sup> The Report recommends the creation of a Standing Committee who would verify claims to Indigenous identity by students, faculty and staff seeking to benefit from any opportunity at the University that prioritizes access for Indigenous peoples, as well as investigate and recommend sanction in cases of suspected academic fraud whereby an individual assumes an Indigenous identity. Some aspects of the Report are already being implemented.

While the University’s motivation to take a strong stand against academic fraud via settler misappropriation of Indigenous identity may be well-intended, we are of the opinion that the Report’s verification process raises several serious legal issues, most notably the potential to violate the human rights and Aboriginal rights of current and prospective students, professors and staff.

Our greatest concerns are that the Report’s verification process goes far beyond situations of academic fraud and is too blunt an instrument to deal with the nuances of Indigenous identity. It excludes several different categories of people who have legitimate and legally-supported claims to being Indigenous, and is centered on settler government authority over Indigeneity. In the case of prospective staff, students and faculty, this will result in their experiencing denials of opportunities at Dalhousie, if not completely ostracizing them from the institution. Existing staff, students and faculty who do not fit the unduly narrow verification criteria can be investigated and face disciplinary action. We do not yet know whether this will go as far as expulsions and dismissals, but we know that already some people have been told they may no longer pursue opportunities (research grants, awards, promotions, etc) or participate in activities at the University (committees, talks, courses, etc) presenting themselves as Indigenous. This is already causing, and, if fully sanctioned across the University, will increasingly cause tremendous harm (educational, professional, emotional, psychological, etc.) to those individuals with legitimate but complicated Indigenous identity. These people tend to be among the most vulnerable and most misunderstood amongst one of the most oppressed groups within Canada (Indigenous people).<sup>2</sup>

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<sup>1</sup> Dalhousie University, Task Force on Settler Misappropriation of Indigenous Identity, [Understanding our Roots - Nestimuk tan wtapeksikw](#) (2023, October) [Report].

<sup>2</sup> “The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.” This quote is from a memorandum of the federal Cabinet from the Secretary of State dated July 6, 1972 and it is cited in *Daniels v Canada*, 2013 FC 6 at para 84. See also Heather Dicks,



The Report does not address or respond to potential legal issues and rights violations arising from its recommendation. More generally, the Report adopts a hostile tone to anyone with concerns with its proposals, painting Indigenous dissenters as having mental health issues<sup>3</sup> or possible fraudsters,<sup>4</sup> and any non-Indigenous people who might side with them having “a misguided sense of allyship” or suffering from “white saviorism.”<sup>5</sup>

To our knowledge, no legal analysis has been conducted on the implications of the proposed verification process. Instead, the Report recommends that the University finds ways around its existing policy and legal obligations, including collective agreements, and disciplinary frameworks to implement verification.<sup>6</sup> In the hopes of encouraging more nuance and circumspection on this issue we offer the following analysis, informed by our respective areas of expertise.

## **B. Overview of the Report**

### *1) Purpose*

The Report’s purpose is to address the issue of academic fraud via settler misappropriation of Indigenous identity and propose recommendations “to serve as the basis for future Dalhousie University policies related to the verification of Indigenous identity, citizenship and

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“Beyond Binaries: mixed-blood inequalities” (2023) 19(2) *AlterNative: An International Journal of Indigenous Peoples*, 261-270, [online](#).

<sup>3</sup> *Ibid* at 10, regarding sessions held with Indigenous staff and faculty where concerns were raised: “A small number of individuals at the university reported psychological distress with the introduction of the task force, and they were directed to counseling supports as appropriate.”

<sup>4</sup> *Ibid* at 13, suggesting that delay in the University taking more decisive action on identity fraud “is partly related to the university relying on those making false claims to propose solutions through existing governance structures.”

<sup>5</sup> *Ibid* at 11: “Decision-makers at Dalhousie have, at times, resisted efforts to disrupt false claims to Indigenous identity, membership, or citizenship. Indigenous people have described a misguided sense of allyship and white saviorism among non-Indigenous people who have interfered in efforts to disrupt fraudulent claims to Indigeneity at Dalhousie in the past.”

<sup>6</sup> *Ibid* at 17, Recommendation #9: “Dalhousie University must work to ensure that guidelines, policies, and collective agreements do not preclude the university from taking action against those who are found to have made false, exaggerated, or misleading claims to Indigenous identity, membership, or citizenship for material gain.”

membership.”<sup>7</sup> It identifies this issue as a significant harm<sup>8</sup> “[w]ith evidence of widespread issues mounting.”<sup>9</sup>

The evidence provided for this is “several high-profile cases of Indigenous identity fraud in Canada”<sup>10</sup> and the fact that 30% of student applicants to the Faculty of Medicine's Indigenous Admissions Pathways initiative failed to meet the criteria outlined in the similar verification approach recently adopted by the Pathways initiative.<sup>11</sup> There has been no analysis of the current processes, such as the Indigenous Black & Mi’kmaq Initiative, the Indigenous Student Access Pathway of the Faculty of Agriculture, and the other programs set out in the Report, to determine how they ensure students are Indigenous, what expertise is drawn upon, whether there have been concerns regarding fraud, or if self-identification has created gaps that need to be addressed.<sup>12</sup> Rather, the Task Force points to anecdotal reports or suspicion of more cases of Indigenous identity fraud at Dalhousie heard in their engagement sessions<sup>13</sup> but provides no evidence in support of widespread fraud.

## 2) Creation of the Task Force

The Task Force was composed of four members who are Indigenous, three internal to the University (Dr. Brent Young, Assistant Professor and Academic Director of Indigenous Health, Faculty of Medicine; Ann Labillois, Dalhousie Elder in Residence and Catherine Martin, Dalhousie’s Director of Indigenous Community Engagement) and one external to the University (John R. Sylliboy, from the Millbrook First Nation).<sup>14</sup>

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<sup>7</sup> Report, *supra* note 1 at 8.

<sup>8</sup> *Ibid* at 7, framed as undermining Indigenous self-determination, permitting the “leakage of intended supports in the form of bursaries, scholarships, employment and designated seats” leading to “enormous economic and spiritual loss to a community... .” Further harms are enumerated in the findings at 11, including “significant reputational, financial and legal hurdles as a result of past indifference and inaction on these matters.” See also 13 referring to frequent “misallocation of resources to support Indigenous Peoples.”

<sup>9</sup> *Ibid* at 8.

<sup>10</sup> *Ibid* at 8, see also 18, where Task Forces reference a 2021 case where “a prominent researcher at another Canadian university was accused of Indigenous identity fraud. Additional allegations of this nature have since entered public discourse.”

<sup>11</sup> *Ibid*. However, as we discuss further below, this percentage may just as likely be the result of underinclusive definitions of who is Indigenous rather than cases of settler fraud.

<sup>12</sup> *Ibid*, at 20.

<sup>13</sup> *Ibid* at 11: “there is reason to believe that some students, faculty and staff have made false or misleading statements about their own Indigenous identity, membership or citizenship at Dalhousie University. Numerous claims are likely to have gone undetected.”

<sup>14</sup> *Ibid* at 9.

The need for a task force on settler misappropriation of identity was proposed by Dr. Brent Young to Dr. Thresa Rajack-Talley, Vice Provost of Equity and Inclusion,<sup>15</sup> according to the Report, because of the perceived seriousness of the matter and the “IAC [Indigenous Advisory Council] was unable to present recommendations to the university on this matter.”<sup>16</sup> The proposal was developed with feedback from Catherine Martin and Patti Doyle-Bedwell, a Dalhousie University Senator and Indigenous faculty member.<sup>17</sup> We are not aware of any larger group of Indigenous people, whether internal or external to Dalhousie, mandating this small group to advocate for action on this issue. The lack of consensus by the Indigenous Advisory Council to mandate such work, which was, and is, strenuously opposed by several members with expertise in this area, was not addressed by the Task Force. In fact, as will be discussed further below, we know that several members of the Indigenous Advisory Council cautioned the University against adopting a verification approach in September 2022. Nonetheless, the proposal was approved by then acting Vice-Provost Academic, Dr Kim Brooks (now the President).<sup>18</sup>

### *3) Verification and criteria*

The Report recommends the adoption of a mandatory, university-wide process for verifying claims to Indigenous identity where material gain may arise from such a claim.<sup>19</sup> What constitutes a materials gain is expressed broadly as including “applications for designated teaching positions, awards/bursaries/scholarships, pathway programs, professorships, promotion, tenure and grant funding.”<sup>20</sup> Further, any members of any Indigenous “advisory and decision-making bodies” at the University must also have their identities verified.<sup>21</sup> It appears this will require all the current members of the Indigenous Advisory Council (approximately 30+ people made up of faculty and staff) to prove their identity through the verification process. It is not clear from the Report whether this would also extend to voluntary student associations,

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* at 8-9. The Indigenous Advisory Council (IAC) is a voluntary association of Indigenous staff and faculty at the University formed in August 2013. Its numbers fluctuate, but in recent years, upwards of 30 people were part of the IAC’s email list. As discussed further below, it was never mandated to provide recommendations to the University on addressing false Indigenous claims, and several members (including the authors) hold deep concerns about such an endeavour.

<sup>17</sup> *Ibid* at 9.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* at 14.

<sup>20</sup> *Ibid* 14-15. The reference to “promotion, tenure and grant funding” appears to suggest that beyond designated positions or opportunities, where someone’s accomplishments relating to their Indigenous identity factors into any hiring, promotion or award, they may be subject to verification (even if not appointed to a designated position).

<sup>21</sup> *Ibid* at 17.

such as the Dalhousie Indigenous Student Collective or Dalhousie Indigenous Law Student Association.<sup>22</sup>

The verification criteria proposed by the Task Force is set out in the first Appendix to the Report.<sup>23</sup> In general, it emphasizes proof of Indigeneity based on formal recognition by the federal government,<sup>24</sup> with a backstop of formal acceptance via the membership or citizenship rules of an Indigenous group for those without such proof (e.g., an Indian Status card issued under the *Indian Act*).<sup>25</sup> However, in the case of First Nations and Inuit, the group must also be formally recognized by the federal government (e.g., an *Indian Act* band or group with whom a modern treaty has been signed). In the case of the Métis, where there has been less of a history of formal federal recognition, the emphasis is on proof of membership in a Métis organizations from Ontario and westward: affiliates of the Métis National Council,<sup>26</sup> the Manitoba Métis Federation or the Métis Settlements of Alberta.

There is a final backstop of showing one is accepted by an otherwise ‘recognized Indigenous People’ but are there little details given on who recognizes or how leaving much discretion in how this is interpreted. The Report suggests that groups that are not acknowledged by their “respective Indigenous nation” should not be recognized by Dalhousie; there is no consideration given to the resources of these nations, and whether they have the capacity to effectively address or participate in a process established by the university.<sup>27</sup> We are aware that members of NunatuKavut Community Council (NCC), a collective of Inuit ancestry from South and Central Labrador, have been told they do not meet the verification criteria. This, despite having a Memorandum of Understanding on Advancing Reconciliation whereby Canada and NCC “commit to renewing and strengthening their nation to nation relationship<sup>28</sup>” and several court decisions recognizing NCC as having a credible claim to 35 Aboriginal rights.

While this approach might strike someone unstudied in the area as comprehensive, those of us familiar with the history of colonial policies of legal exclusion of various Indigenous peoples know there are several different categories of people who have legitimate, legally-supported

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<sup>22</sup> While these associations are often more for networking and mutual support, they are at times consulted and thus providing ‘advice’ to the different units at the University. They may, therefore, by the Task Forces terms be ‘advisory.’

<sup>23</sup> *Ibid* at 19.

<sup>24</sup> See also *ibid* at 12.

<sup>25</sup> See also *ibid* at 14 where it is made clear that if a person is not accepted by a community’s membership or citizenship process, they will not be verified.

<sup>26</sup> This includes the Métis Nation of British Columbia, the Métis Nation of Alberta, the Métis Nation of Saskatchewan and the Métis Nation of Ontario.

<sup>27</sup> Report, *supra* note 1 at 14.

<sup>28</sup> “*Memorandum of Understanding on Advancing Reconciliation*” 5 Sept 2019, [online](#).

claims to being Indigenous who would be ineligible under the proposed verification process.

This includes:

1. Persons who are not registered under the *Indian Act* but entitled to be registered.
2. A large and growing number of Non-Status First Nations people who are not members of their First Nation because:
  - a. Their First Nations (e.g., *Indian Act* band) have not taken control over membership (in other words, the *Indian Act* dictates both registration and Band memberships). The majority of First Nations in Canada are in this position. This is in large part due to the fact that First Nation funding agreements are formulated based on the number of registered status individuals, preventing many First Nations from creating expansive membership criteria.
  - b. Their First Nation has adopted membership rules that excludes them on discriminatory grounds, including women who 'married out' and their children.
  - c. They descend from someone who was assigned to the 'General' registration list who have no associated band in which they can be members.
  - d. In the case of some Mi'kmaq people from Newfoundland, their Indian status was revoked on grounds contested as arbitrary after the number of registrants for the Qualipu First Nation exceeded predicted figures.
3. Collectives whose identity as Aboriginal people and s 35 rights-holders have been affirmed in the courts, such as NunatuKavut, as well as those currently in talks with Canada, such as the Peskotomukhatki nation, or having other credible indicators of being an Indigenous collective.
4. Individuals (First Nation, Inuit or Métis) who have reasonable grounds to believe they are Indigenous but have lost their connection with their Indigenous Nation or community because of colonial policies such as Indian Residential Schools, Sixties Scoop, Millennial, Scoop, Indian Day Schools, incarceration, and enfranchisement.

The Report contemplates the fourth category and suggests these persons will not meet its verification criteria.<sup>29</sup> However, the Report does not contemplate or address the first three categories whatsoever. We will expand on why all four categories have legitimate claims for Indigenous identity and how the verification process is discriminatorily underinclusive.

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<sup>29</sup> See *ibid* at 11-12 and 16.

For those who fail to meet the verification criteria, an appeal is contemplated though no further details are provided (grounds, composition of appeal body, process, etc).<sup>30</sup>

#### 4) *The Standing Committee*

The Report emphasizes that Dalhousie must not determine Indigenous identity on its own,<sup>31</sup> but instead strike a standing committee made up entirely of Indigenous peoples<sup>32</sup> with a mandate, resources and powers to disrupt false claims to Indigenous identity [the “Standing Committee”].<sup>33</sup> Reporting to the Provost,<sup>34</sup> the Standing Committee will develop, revise, and implement policies and procedures related to the disruption of false claims to Indigenous identity.<sup>35</sup>

In addition to verifying new applicants for designated jobs, seats and opportunities, the Standing Committee would also receive and investigate complaints filed against members of the Dalhousie University community who are alleged to be committing academic fraud by misappropriating Indigenous identity.<sup>36</sup> The Standing Committee will be empowered to recommend disciplinary action or remedy where the committee finds fraud has occurred.<sup>37</sup> The Report does not suggest any limits on which members of the Dalhousie community that are self-identifying as Indigenous can be investigated. We therefore assume the intent to be that anyone who publicly holds themselves out as Indigenous could be subject to such an investigation, even if not holding any designated seat, position or grant or scholarship. There is also no reference to any current processes to address academic fraud, and how (or if) the Standing Committee will work in conjunction with current disciplinary processes. The Report does not address qualifications for the Standing Committee, other than to provide that voting members would be verified as Indigenous.

It is unclear how the Standing Committee’s work to investigate and discipline fraud will function within a unionized environment. The Report “anticipates that some people who

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<sup>30</sup> *Ibid* at 19.

<sup>31</sup> *Ibid* at 13.

<sup>32</sup> *Ibid* at 15. Suggested membership is one faculty, one staff, one student, at least one member of the Mi’kmaw, Wolastoqey, or Peskotomuhkati Nations, and two external members who hold membership or citizenship with a recognized Indigenous Peoples.

<sup>33</sup> *Ibid* at 15.

<sup>34</sup> *Ibid* at 16 via the VP Equity and Inclusion and eventually the Associate Vice-Provost Indigenous Relations.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* at 15.

<sup>37</sup> *Ibid*.

commit Indigenous identity fraud may seek protection under current university policies or labour law.”<sup>38</sup> Despite acknowledging the existence of collective agreements, the Report recommends they do not hinder the university from “taking action.”<sup>39</sup> This dismissal of the constitutionally protected right of unions to represent their members who are faculty and staff at the university is demonstrative of the overly simplified approach the Report takes in dealing with complex matters.<sup>40</sup> The same holds true for non-unionized employees who have legitimate and legally protected rights as Indigenous people whose complex identities are not contemplated in the Report; there may be liability regarding employment standards that prohibit discrimination based on human rights grounds if the Report is fully implemented.<sup>41</sup>

There is discretion reserved to the Standing Committee to request further information or deny any application based on “irregularities” in an application despite meeting the documentary requirements.<sup>42</sup> The Report does not explain when this discretion can be invoked, but suggests it may apply in cases of women who gained Indian Status by marriage<sup>43</sup>(a situation not possible since 1985), or where the validity of an asserted Indigenous customs and traditions may be in doubt.<sup>44</sup> No limits or structure is otherwise suggested in relation to a discretion that has the potential to cause serious harm to Indigenous people.

#### 5) Early implementation

The Task Force called the harm from Indigenous identity fraud “immediate and persistent” necessitating investigation of reported false Indigenous identity claims even before full implementation.<sup>45</sup> While there has been no timeline provided and mixed messaging with respect to how implementation will occur, we do know that the Report is already being implemented to some extent.

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<sup>38</sup> *Ibid*, at 18. The Report encourages the university to “exercise all options with the support of Indigenous leaders,” to prevent this from happening. There is nothing to indicate the Task Force received a mandate from Indigenous leadership to make this recommendation. Given the limited resources of Indigenous nations to implement their own legal and political strategies, the support of Indigenous leadership to challenge established labour law may not be sufficient to help shoulder the cost of such action.

<sup>39</sup> *Ibid*, at 17.

<sup>40</sup> *Canadian Charter of Rights and Freedoms*, s.2(d), Part 1 of the *Constitution Act*, 1982 being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 a.

<sup>41</sup> *Human Rights Act*, R.S., c. 214, s 5(d) and (g).

<sup>42</sup> *Ibid* at 19.

<sup>43</sup> *Ibid* at 12. These women would additionally need to show acceptance under the membership rules of the First Nation.

<sup>44</sup> *Ibid* at 14, referencing situations where Elders have been exploited to support fraudulent claims to Indigeneity in the past.

<sup>45</sup> *Ibid* at 16.

The Provost and Vice-President issued a statement on October 10 stating that “[o]ver the coming months we will be consulting with the Task Force members, Dalhousie community, and Mi’kmaw, Wolastoqey, and Peskotomuhkati Nations as we advance our understanding of and action in response to the report’s recommendations,” yet three days later, the President offered an apology in Millbrook First Nation as a first step in “honouring” the recommendations set out in the Report.<sup>46</sup> Whether intended or not, the public launch of the Report by the University, and the accompanying apology, are being seen by some as an endorsement of the Report and its verification approach.

In addition, verification information is now being sought for all staff hires where a person self-identifies as Indigenous (since the University’s employment equity statement could result in the candidate obtaining preference over other candidates on account of their self-identification). We have seen this first-hand in the staff hiring process at our faculty.

We have one colleague who is currently subject to investigation into her Indigenous identity, even though they are from a community whose status as an Indigenous group has been confirmed in the courts.<sup>47</sup> Another colleague—from the same community—is not being similarly investigated. This raises questions regarding due process and why some identities are being investigated, while others are not. These actions give the impression that the ‘train has left the station’ with respect to implementing the report, and runs contrary to the message that action will be done in conjunction with consultations regarding action.

If all Indigenous faculty and staff require verification, this creates issues during the interim period. It is not known if the University will support the current work of individuals who have not yet been verified. This uncertainty has the potential to prevent the submission of designated grant applications, jeopardize projects, stymie committee work, hamper student and staff supervision requiring Indigenous leads, limit Indigenous participation on hiring committees, negatively impact hiring initiatives and stall the careers of Indigenous academics. In short, barriers to academic success will be erected that non-Indigenous people do not face; these barriers run counter to the objectives of “building deep and meaningful partnerships with Indigenous Peoples across Canada” as stated in the President’s message in the Report.<sup>48</sup>

Further, we understand that two Task Force members are to have prominent and continuing roles to play in the Report’s implementation of the process they created. Dr. Brent Young has

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<sup>46</sup> A message from President and Vice-Chancellor Kim Brooks (October 13, 2023), [online](#).

<sup>47</sup> We also know of another colleague who was being investigated, though this was grieved and all details are now confidential.

<sup>48</sup> *Ibid* at 3.



recently been seconded to create and lead the Standing Committee, and the Director of Indigenous Community Engagement is to verify that “all voting members” of the Standing Committee are Indigenous.<sup>49</sup>

As stated earlier, the creation of the Task Force and the creation of a verification process, was not an initiative of the Indigenous Advisory Council, of which several members had strenuous opposition. Yet there was a recent attempt to get tacit approval of the process via a draft Terms of Reference for the Indigenous Advisory Council that was primarily drafted by Dr. Brent Young. In a meeting co-chaired by Cathy Martin and Patty Doyle-Bedwell on December 5, particular objections were made to the provision incorporating verification:

5.1.1 All standing and general members shall demonstrate that they have had their Indigenous identity, membership, or citizenship verified in accordance with university policy where such policy exists.<sup>50</sup>

The draft was not approved, with identity verification being a focal point of the discussion. By our count, there were 8 people who opposed inclusion of a verification provision, 6 in support, with two members submitting their concerns about the proposed Terms of Reference via email.

We now turn to address a number of concerns we have with the Report and verification process.

### **C. Expertise is needed to appropriately grapple with this issue**

We begin by pointing out that the issue of Indigenous identity raises complex issues that are intertwined with history and policy, Canadian law, the Constitution, Indigenous law and domestic and international human rights. Simply being an Indigenous person is not enough to qualify a person to recommend or design a process to verify whether other people are ‘Indigenous’ for the purposes of attending or working at a Canadian post-secondary institution. Having lived experience as an Indigenous person can certainly provide a person with important context and perspective, but more is needed.

We disagree with the Task Force that Indigenous peoples “can often easily identify false claims, [while] non-Indigenous individuals may struggle to recognize them.”<sup>51</sup> Issues of identity can frequently be complicated by historical, colonial policies and laws, lack of or destruction of

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<sup>49</sup> *Ibid* at 15.

<sup>50</sup> Yount, Brent (2023) Indigenous Council Terms of Reference [Draft].

<sup>51</sup> *Ibid*, at 13.

records and more. It requires people considering the question of someone's Indigeneity to appreciate the historical and current context of an individual and their Indigenous nation, thoughtfully considering the matter, and sometimes having to arrive at conclusions without full certainty. This is the case for Indigenous and non-Indigenous people alike. As nice as it would be, Indigenous people do not have inherent or magical abilities to 'suss out' the fraudsters from people with complicated identities.

As a Canadian post-secondary institution, Dalhousie has human rights as well as other legal obligations to respect the individual and collective rights of its students, faculty and staff. Relevant expertise is needed to fully grapple with all of this. We have such expertise, are Indigenous and work for the University. Yet we were not asked to be on the Task Force, provide our expertise to the Task Force, or asked to comment on a draft of the Report. Our dissent, which has been repeatedly expressed to members of the Task Force who will continue to have roles in the Report's implementation have been minimized or not addressed. While feedback on the Report was sought from "three external reviewers," the qualifications of those individuals were not provided.<sup>52</sup>

While all having impressive credentials in their own right, none of the members of the Task Force possess relevant expertise to recommend or design a verification process that is knowledgeable of and responsive to the complex legal issues raised by Indigenous identity verification in a university context.<sup>53</sup> The closest may be Dr. Brent Young, who designed a similar verification process for the Indigenous Admissions Pathways initiative at the Faculty of Medicine, which was launched in fall 2022. However, his creation of a similar process is not, in itself, evidence of him possessing the relevant historical and legal knowledge to ensure the processes designed do not violate Indigenous peoples' inherent and human rights.

As an institution focused on credentialing and expertise, we are dumbfounded that the University would not seek out those with relevant expertise to be a part of, or at the very least, comment on drafts of the Report and its verification process before it launched the Report and started implementing the verification process. It appears that much faith was and is being put in the Indigenous identity of those on the Task Force and the future Standing Committee as a guarantor of qualification to undertake this work. This, however, will not serve to insulate the University from legal liability should the verification process result in rights violations. In other words, the University may be seeking to defer the work of verification to Indigenous peoples

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<sup>52</sup> *Ibid* at 10.

<sup>53</sup> The areas of expertise of the Task Force members were described as "extensive knowledge and experience in Indigenous community engagement in the context of research, post-secondary education, health policy development, and culturally specific community needs in the Atlantic region and nationally": see Report, *supra* note 1 at 9.

but the choice to use a verification process to gatekeep students, faculty and staff is ultimately the University's, as are the consequences.

#### **D. Insufficient engagement and consultation**

In response to concerns about the verification process, University representatives provide assurances that there was ample consultation and engagement over the Report. We disagree.

##### *1) Lack of Ethics Review and Approval*

One of the most pressing issues that may have arisen from the short (12 weeks) timeframe to carry out the work, is the apparent lack of ethics approval.<sup>54</sup> The Task Force conducted engagement sessions with “First Nations, Inuit and Metis, people both internal and external to the university.”<sup>55</sup> The Report references the “psychological distress” that was reported by the Indigenous participants.<sup>56</sup> An ethics review with human participants would ensure there was careful consideration of the costs and benefits of research and the work was conducted in a manner to “minimize the potential for harm or risk that the research poses to participants.”<sup>57</sup> In addition to university ethics review, the engagement included participants who were Mi'kmaw and Wolastoqey, which may have warranted approval from Mi'kmaw Ethics Watch.<sup>58</sup> There is also no mention whether information or cultural knowledge was gathered and stored, let alone mention of any consent from or agreements with relevant Nations. Regardless of whether the Task Force members were Indigenous, an ethics review for work involving Indigenous participants and peoples remains important and should always be at the forefront of research to ensure an “authentic process of reconciliation.”<sup>59</sup>

##### *2) Lack of Territorial Approach*

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<sup>54</sup> The work of the Task Force is unlikely to meet the exception requirements of the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans, TCSP2, (2022) art 2.5 regarding collection of data for management purposes.

<sup>55</sup> Report, *supra*, note 1 at 9. It is not known how many other First Nations, Inuit and Metis people were engaged as no demographic information was provided.

<sup>56</sup> There may have been inconsistent with TCSP2 (2022) Chapter 9, “Research Involving the First Nations, Inuit and Metis Peoples of Canada.”

<sup>57</sup> “*Dalhousie University Policy on the Ethical Conduct of Research Involving Humans.*” 14 May 2012. Found online: [Microsoft Word - Approved Policy on the Ethical Conduct of Research Involving Humans May 14, 2012.docx \(dal.ca\)](#) at 1.2.2.

<sup>58</sup> The Report did not provide a demographic background with respect to the participants in the engagement sessions, this inference is drawn from the location of the on reserve sessions in Mi'kmaw and Wolastoqey territory.

<sup>59</sup> Report, *supra*, note 1 at 6.

The Report states that the work was centered on the Mi'kmaw, Wolastoqey and Peskotomuhkati Nations, due to Dalhousie University operating within their territories.<sup>60</sup> While taking a nationhood approach is admirable, it is critical to consider the nations as a whole when defining the work. The Report states that a "particular emphasis" was placed on the Mi'kmaw of Nova Scotia due to the location of Dalhousie's largest campuses,<sup>61</sup> but does not indicate whether the mandate to do so came from Mi'kmaw, Wolastoqey and Peskotomuhkati leadership or from the Task Force itself.<sup>62</sup> There is also no indication that consideration was given to the nature of programs that Dalhousie offers, which may result in the need for other provinces to have a greater degree of engagement. For example, PEI has neither a medical nor law school, Newfoundland does not have a law school, and there is an agreement whereby Dalhousie admits 40 medical students from New Brunswick each year, which means they would rely heavily on Dalhousie's programs. Factors such as these, in addition to physical proximity, should have been considered when defining the scope of engagement with the nations. If the Task Force created the engagement process to focus primarily on Nova Scotia without a mandate from leadership, and did not fully consider the impact on the nations as a whole, this may have a detrimental effect on the relationship Dalhousie has with the nations moving forward.<sup>63</sup>

An extremely important issue when dealing with Indigenous identity issues is the need to take an inclusive approach to better reflect members throughout the entire territory. The number of Indigenous people who live on reserve are in the minority. In Canada, 59.4% of Status Indians live off reserve, and the number of Indians living off reserve in the Maritimes are 59% in Nova Scotia, 55.8% in New Brunswick, and 40.9% in PEI.<sup>64</sup> Despite referencing the fact that Dalhousie is located on "unceded territories" only one of the four engagement sessions was located off reserve. The remaining sessions were held on-reserve, in Millbrook Community Centre, Membertou Trade and Convention Centre, and Maqiyahimok Centre in St. Mary's, New Brunswick. The Report does not address whether efforts were made to ensure participants in the sessions were proportional to the on/off reserve residency of individuals within the nations. If not, given that housing criteria on reserve generally requires an individual to have Indian Status, there is the possibility that holding the majority of the sessions on reserve resulted in a

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<sup>60</sup> *Ibid* at 5.

<sup>61</sup> *Ibid* at 9. It should be noted that two of the Task Force members (Catherine Martin and John Sylliboy) are from Nova Scotia, and Dr. Brent Young grew up in Cape Breton, Nova Scotia.

<sup>62</sup> It is worth noting that an ethics review process following TCSP2 Chapter 9 would have at least provided some reassurance that these Nations had a say.

<sup>63</sup> The status-centered and federal recognition approach used by the Task Force is at odds with the identity work currently being undertaken by the Mi'gmaq in New Brunswick to displace the federal government's assumed jurisdiction over Mi'gmaq identity.

<sup>64</sup> Statistics Canada, Map 1: "In 2021, 4 in 10 First Nations people with Registered or Treaty Indian status lived on reserve" (2021) [online](#).

pro-status bias.<sup>65</sup> This bias may not have been apparent to the Task Force members, as they themselves all have Indian Status.

### *3) Insufficient Population Sample*

Only 23 community members external to the university participated in engagement sessions. The engagement occurred over a period of 12 weeks, from April to June, 2023.<sup>66</sup> This is a remarkably short period of time to undertake effective engagement sessions with First Nations, Inuit and Métis at a local, regional and national level, as the Task Force purports to have done.<sup>67</sup> According to the 2021 census, there were 1.7 million Indigenous peoples in Canada, with 79,605 First Nations people living just in NB, NS, NL and PEI,<sup>68</sup> with an additional 5,780 Mi'gmaq and Wolastoqey in Quebec.<sup>69</sup> To provide some context, there are 5 rights-implementation organizations, the Mi'kmaw Grand Council, and various service delivery organizations such as tribal councils within the territory. Also of note, the Peskotomuhkati nation is divided by the Canada/United States border, is not recognized by the Canadian government and its members are largely located in the United States. There is no mention as to how the Peskotomuhkati were effectively engaged as all of the sessions were held in Canada. The Report also does not indicate how known quantitative processes were utilized when generating its population samples, instead "[p]articipants were recruited through the networks of each task force member."<sup>70</sup> This process would also increase the risk of a pro-status bias. The Report also states that the work involved "community leaders, governing bodies, and kinship networks."<sup>71</sup> Given the serious nature of the work at hand, such an ad hoc process, with such a small number of external participants, is insufficient.

### *4) Insufficient Engagement with Metis, Inuit and other First Nations*

Despite its application to Inuit, Métis, and other nations whose people are part of the University community, the Report contains a shocking disregard of the unique histories and identities of non-Wabanaki nations. In particular, there was no representation of Inuit or Metis people on the Task Force,<sup>72</sup> no engagement session outside of Wabanaki territory, let alone within the homeland of the Métis, Inuit Nunangat or the territory of other nations, and no

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<sup>65</sup> There is the possibility for non-Indigenous spouses to maintain residence on reserve upon the dissolution of the relationship per the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20.

<sup>66</sup> *Ibid* at 9 and 11.

<sup>67</sup> *Ibid* at 9.

<sup>68</sup> Statistics Canada, Data Table: "Indigenous identity population by gender and age." (2021) [online](#).

<sup>69</sup> Gouvernement du Quebec, "Profile of the Nations" (2023) [online](#).

<sup>70</sup> *Ibid* at 9.

<sup>71</sup> *Ibid* at 9.

<sup>72</sup> *Ibid* at 9.

indication that targeted engagement occurred with Inuit or Métis people.<sup>73</sup> The only indication that Inuit or Métis histories or experiences were considered, can be found in the limited reference material located in Table 3.<sup>74</sup> This source material consists of documents created for the Universities of Saskatchewan and Manitoba, a federal court case, an extremely problematic report by a non-Inuit consultant, and the rebuttal to that report; these materials are insufficient if the Report is to be applied to members of other nations and it is not evident how, or if, the material shaped the Report.

While we appreciate that the university campuses are located within Mi'kmaw, Wolastoqey, or Peskotomuhkati territory, and that these nations (especially the Mi'kmaw as the majority of the campuses are located in Kjiipuktuk) should be at the forefront of the University's reconciliation efforts, the proposed verification process would be applied to all Indigenous peoples at the University. As such, it would be problematic to apply a Mi'kmaw bias to any process used to verify the identities of other nations, and even more so if the process takes a pantribal approach by assuming that one process can be effectively applied to all nations.

Our concerns with the proposed process outlined in Figure 1<sup>75</sup> are that its based on the following assumptions: a) there is a clearly defined and functioning governing body for First Nations, Inuit, Métis, and US Tribal Authorities, b) that governing bodies issue cards, c) that all governing bodies can readily provide written confirmation of their members when asked, d) there are no barriers preventing members from being known to their governing bodies, and e) Indigenous people are only located in Canada or the United States. Without the underlying biases of the proposed process being addressed, the University risks furthering the pantribal approach that has caused the existing issues Indigenous people face today.

#### *5) Impact on Existing Students, Staff and Faculty*

With respect to those to whom the Report will be applied, the Task Force met with a limited number of people. The Report states that they met with only a "small group of Indigenous students" but do not indicate what percentage of the Indigenous student body it constituted.<sup>76</sup> Fully considering the perspectives of students is critical; undergraduate students may be particularly impacted compared to graduate students, as they may fail the criteria of membership in a First Nation community. A common criteria for obtaining membership with a First Nation is achieving the provincial age of majority; many undergrad students apply and

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<sup>73</sup> *Ibid* at 9. While the Task Force purports to have considered "diverse First Nations, Inuit and Métis perspectives," one cannot fail to engage with entire nations.

<sup>74</sup> *Ibid* at 22.

<sup>75</sup> *Ibid* at 19.

<sup>76</sup> *Ibid* at 9.

attend post-secondary institutions prior to coming of age. Issues such as these may have been overlooked by not engaging a larger segment of the Indigenous student body.

Given that the number of the Indigenous Advisory Council participants the Task Force met with was 16 (out of 30+), it is concerning that more effort was not taken to engage those who will be directly impacted.<sup>77</sup> Dalhousie Human Resources maintains statistics on faculty and staff who identify as Indigenous, and while the Task Force mentions that an environmental scan was submitted to them, they do not indicate what percentage of Indigenous people were engaged.<sup>78</sup> The engagement sessions were also undertaken at the end of the semester (April-June) when exams are being written and marked, which is an extremely busy time at the University. The Report indicates the engagement sessions focused on in-person meetings, some of which may have been hybrid to allow for online participation, without utilizing alternate research methodologies (i.e. surveys) that would have provided feedback from a greater percentage of Indigenous people at Dalhousie during the timeframe.

In all, 23 community members external to Dalhousie were engaged, 16 Indigenous Advisory Council members and a small number of students. At most, this would approximate 55 people, yet the Report utilizes sweeping statements such as there being a “wide perception that the university has fallen behind others,”<sup>79</sup> and it is able to reflect “prevailing perceptions and opinions,”<sup>80</sup> while being capable of making findings grounded in “substantial support among Indigenous people”<sup>81</sup> reflecting the desire of “many people within Indigenous communities.”<sup>82</sup> Further, while members of the Task Force did attend the 2023 National Indigenous Citizenship Forum, there is no account as to how, or if, that participation shaped the Report.

The Task Force does not appear to have been open to the objections and concerns regarding their work. As stated earlier, consensus amongst the Indigenous Advisory Council has not been reached, yet despite acknowledging the “reported psychological distress,”<sup>83</sup> of individuals who attended the engagement session, there is no mention of either dissent or consideration given to the extremely nuanced realities of the Indigenous identity of the members in crafting the verification process.<sup>84</sup> These nuances were relayed in depth during the 2021 Indigenous Advisory Council retreat. The issue of identity has dominated the Indigenous Advisory Council

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<sup>77</sup> *Ibid* at 9.

<sup>78</sup> *Ibid* at 10.

<sup>79</sup> *Ibid* at 10.

<sup>80</sup> *Ibid* at 11.

<sup>81</sup> *Ibid* at 12.

<sup>82</sup> *Ibid* at 12.

<sup>83</sup> *Ibid* at 10.

<sup>84</sup> *Ibid* at 10.

ever since; this focus led to a meeting in September 2022 with the Provost Dr. Frank Harvey, Laura Neals (then Director of Academic Staff Relations), and Laura Godsoe, Director of Executive Recruitment and Employment Equity. Ceremony was conducted, led by Elder Ann LaBillois, where members shared their histories and expressed serious concern with any process that would rely on colonial processes or was centered on government sources of evidence. While the Report states that participants expressed “reasonable cautions,” there is no indication what these cautions were, nor how they could be mitigated, relying instead on “the vast majority of those who participated in task force proceedings were supportive and grateful for this effort.”<sup>85</sup>

### *6) Failure to Centre Indigenous Voices & Experts*

The Report purports to “centre the voice of Indigenous people who have lived experience and expertise with this issue” yet there is no evidence that this was done.<sup>86</sup> The Report highlights the number of students who failed to meet the criteria of the Faculty of Medicine’s Indigenous Admissions Pathway which was implemented in fall 2022, yet conducts no analysis of programs such as the Indigenous Black and Mi’kmaq program at the Schulich School of Law, which was established in 1989 and has been vetting Mi’kmaq and Indigenous students for 34 years without a centralized verification process. It also does not analyze the Indigenous pathways programs implemented by the Faculties of Science, Agriculture or Open Learning and Career Development. It is clear that there is awareness of these programs, as they are listed in programs to be targeted for a verification process. Again, a failure to undertake such an analysis may indicate a bias with respect to the Task Force Members, to whom only the Faculty of Medicine’s Pathways program would be familiar.

There is also no evidence that Indigenous people with expertise were centred in the Report. A list of select reference material is included in Table 3,<sup>87</sup> but it is extremely limited and materials are primarily focused on preventing identity fraud and not on understanding the nuances of Indigenous identity, an extremely legally complex area. Such an understanding would be required to effectively craft a solution to the proposed academic fraud that does not replicate or perpetuate colonial legal constructs of Indigenous identity that have been repeatedly found discriminatory by Canadian courts.<sup>88</sup> There was no engagement session of Indigenous

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<sup>85</sup> *Ibid* at 12.

<sup>86</sup> *Ibid* at 8.

<sup>87</sup> *Ibid* at 20.

<sup>88</sup> It is of note that the only Mi’kmaq author whose work is included in the reference material, Prof Cheryl Simon, has been extremely vocal in her dissent in a process centered on colonial evidence such as status cards, and despite being a faculty member, a member of the IAC, and an individual who reached out to arrange an engagement session, the Task Force did not engage her on the Report. The authors of



academics who specialize in this area, nor are we aware of any who were contacted to provide a review. Expertise is essential to consider the actual provisions of the *Indian Act*; this is evident by the Report's reliance on First Nations individuals being required to provide a copy of a certificate of Indian status. This requirement establishes criteria more stringent than that of the *Indian Act*. The statutory definition of "Indian", recognizes individuals "registered or entitled to be registered."<sup>89</sup> Registration is voluntary, and many people choose not to register themselves or their children for a variety of reasons, meaning that an individual who is entitled for registration could potentially be legally recognized as an Indian by the government, but not at Dalhousie University. Another consideration is the processing times for status applications. According to Indigenous Services Canada, it can take from 6 months to 2 years, depending on the complexity of the file.<sup>90</sup> This is a considerable amount of time for Indigenous people to be lacking a status card, when desiring to make applications to the University.

A serious consequence of not taking the time to familiarize themselves with the legal nuances of Indigenous identity, is that there is no attention paid to all those Indigenous people who have failed to meet the criteria established by the federal government's assumed jurisdiction over identity.<sup>91</sup> The organization which has historically represented the interests of non-status off-reserve people fall under the umbrella of the Congress of Aboriginal People and their provincial affiliates. Yet, there was no engagement with the Nova Scotia Native Council, nor any of the other CAP affiliates in the region. This, despite non-status individuals constituting a significant percentage of the First Nations population within the territory: 35% of First Nations in New Brunswick, 43% in Nova Scotia, and 43% in Prince Edward Island.<sup>92</sup>

There are also gender issues to take into account. Historically, the *Indian Act* definition has focused on Indian men.<sup>93</sup> There is a long history of documented gender discrimination in the *Indian Act*.<sup>94</sup> Given this, the Missing and Murdered Women and Girls (MMIWG) Report calls for distinctions to be recognized based on self-identification, geographical information, residency, and a gendered lens and framework to ensure impacts on women, girls and 2SLGBTQIA

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this analysis have also confirmed that the only other IAC member to be referenced, Dr. Debbie Martin, does not see her work reflected in the Report and was not consulted regarding the draft.

<sup>89</sup> *Indian Act*, R.S. 1985, c. 1-5, s 6(1)(a).

<sup>90</sup> See Indigenous Services Canada website, "[Indian status \(sac-isc.gc.ca\)](https://www.sac-isc.gc.ca)."

<sup>91</sup> People who were stripped of their status will be covered in another section.

<sup>92</sup> Statistics Canada, Data Table, *supra* note 68.

<sup>93</sup> *Indian Act, 1876*. S.C. 1876, c.18. (39 Vict) s. 3. The status provisions set out the criteria for "Indian" as: Firstl. Any male person of Indian blood reputed to belong to a particular band; Secondly. any child of such person; and Thirdly. Any woman who is or was lawfully married to such person.

<sup>94</sup> See on this, Bora Laskin Law Library, "Collection of Documents on Gender Discrimination and the *Indian Act*" [online](#).

individuals be taken into account.<sup>95</sup> Yet, there were no engagement sessions with Indigenous women’s groups, such as the Native Women’s Association of Canada and their provincial affiliates, 2SLGBTQQIA organizations, or the Canadian Network of Native Friendship Centres. While there was an engagement session held at the Mi’kmaq Friendship Centre, there is nothing to indicate the expertise of the network, especially in regard to serving women and 2SLGBTQQIA people who have been rejected or fled from their communities, was utilized. There is no evidence that consideration was given to the views of these marginalized segments of the Indigenous populations and without providing demographic information, no analysis can be conducted as to the effectiveness of any outreach.

We end this section extremely concerned that the consultation and engagement process was deeply problematic. Not only was there no ethics review, but consideration for the relevant nations was not adequate. In addition, the engagement of Indigenous students, faculty and staff, who stand to be most affected and who make up a vulnerable segment of society, was minimal and the Task Force’s selective choices and processes for engagement created the appearance or potential of bias. The Task Force also did not appear open to addressing concerns about the impact of recommendations and did not draw upon those with expertise. All of these factors raise serious procedural fairness concerns and suggest the need for the University to adhere to the legal framework in *Baker v Canada*.<sup>96</sup> Where a decision stands to have a significant adverse impact on Indigenous peoples livelihood and wellbeing, greater procedural safeguards are required, especially to understand the full impacts of the decision. In *Simon v Canada*, about changes to Canada’s on-reserve social assistance Manual in First Nations in the Maritimes, the decision to implement the manual was quashed on the basis that “[i]t is clear from the evidence that there was never any meaningful consultation about the merits of the Manual before it was developed and implemented.”<sup>97</sup> To this, the Court added, “The recipients of social assistance are the most vulnerable in society and yet a decision affecting a number of them is made without any true comprehension of its impact.”<sup>98</sup>

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<sup>95</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada). (2019a). *Reclaiming power and place: The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Vol. 1a.* (Catalogue No. CP32-163/2-1-2019E-PDF) at 6.

<sup>96</sup> *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817. Whether the University is strictly bound to follow procedural fairness and is carrying out government functions in this situation is less clear, though see *Pridgen v. University of Calgary*, 2012 ABCA 139. Nonetheless, the University often holds itself out as obligated to meaningfully engage with Indigenous people, citing the mantra “Nothing about us, without us.” Hence we feel these principles are relevant in how the University conducts its business.

<sup>97</sup> *Simon v. Canada (Attorney General)*, 2013 FC 1117 at para 143 [emphasis added]. The decision was overturned on appeal (2015 FCA 18) but on grounds unrelated to procedural fairness issues.

<sup>98</sup> *Ibid* at para 155 [emphasis added].

## E. Conflating fraud and complex identity issues

The Report conflates cases of academic fraud, complicated cases of Indigenous identity, and situations of a person with a distant Indigenous ancestor because it implies anyone who does not meet the verification criteria are committing fraud or fraudulent misrepresentation.<sup>99</sup> But these are very different situations that require different responses and approaches. Fraud is when someone intentionally misrepresents they are Indigenous when they know they are not. In the other two cases, a person believes in good faith that they have basis to claim they are Indigenous. This might be because they have some ancestry or have a connection to a community or nation, or some combination of these. Other people may agree or disagree with their claim, but the individual is not in fact acting fraudulently. It is also not fraudulent misrepresentation or a fraud for someone to explore and seek to reconnect with their Indigenous connections once they learn of them.

Due to the long history and continuing colonial legal interventions in Indigenous identity issues, it is overly simplistic and naive to think that it is possible to draw a simple, bright line between Indigenous and non-Indigenous. Unfortunately, that is exactly what the Report appears to do. A central point that the Report ignores is that there is no, simple, clear definition of who is Indigenous in Canada or globally.<sup>100</sup> In settler mainstream discourse, Indigeneity is often boiled down to a matter of race/ethnicity, with questions of ‘who is...’ reduced to debates on a person’s amount of Indigenous ancestry/blood.<sup>101</sup> But this is contested and other models are possible. Val Napoleon, a Cree and Gitksan legal scholar, urges adoption of a ‘civic’ as opposed to an ‘ethnic’ model of Indigenous citizenship focused on ethnic “purity.”<sup>102</sup> A civic model emphasizes ideological identification with a nation and commitment to be bound by its laws and values.<sup>103</sup> Similarly, Mi’kmaq scholar Pamela Palmater urges thinking about citizenship in

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<sup>99</sup> At page 8 of the Report *supra* note 1, the problem is presented as intentional misrepresentation for personal or financial, but at page 13 this is expanded to “misleading statements regarding an individual’s Indigeneity” without explaining what those are. At page 16, this is further expanded to “false, exaggerated, or misleading claims,” again without explanation or examples. On this same page, claims of those “who have been disconnected due to colonialism” are framed as potentially falling within this definition, as are those for which “[t]he passage of time ... has resulted in a significant generational gap between an individual and a distant Indigenous ancestor” at page 17.

<sup>100</sup> This is why no definition of “Indigenous” appears in the UN Declaration: see Andrew Erueti, *The U.N. Declaration on the Rights of Indigenous Peoples: A New Interpretive Approach* (New York, New York: Oxford University Press, 2021) at 87-88, 156. See also *Daniels v Canada*, *infra* note 110, where the Supreme Court of Canada acknowledged that there is no consensus on who is Métis and Non-Status Indians (paras 46-47).

<sup>101</sup> See Sébastien Grammond, “Disentangling ‘Race’ and Indigenous Status: The Role of Ethnicity” (2009) 33 Queen’s LJ 487.

<sup>102</sup> Val Napoleon, “Extinction by Number: Colonialism Made Easy” (2001) 16:1 Can J Law & Soc’y 113.

<sup>103</sup> *Ibid* at 136-137.

terms ‘beyond blood’ based on flexible and contextual criteria that examines connections and capacity to contribute to the nation.<sup>104</sup>

Pre-contact, Indigenous nations decided who their citizens were based on their own customs and laws. This could vary from nation to nation, although it generally tended to be generous (recognizing adoption, marriage, absorption, etc.) and often focused on relationships and responsibilities to the collective well-being.<sup>105</sup> Some work is starting to happen to assist nations in revitalizing their Indigenous notions of citizenship,<sup>106</sup> but it is still early days. Unfortunately, many Indigenous peoples today subscribe to the racial/ethnic view of Indigeneity and see Indian Status and other forms of federal recognition as proxies for this. As will be discussed further below, this can be seen in the formal membership codes that most First Nations (with membership codes under the *Indian Act*) have adopted, with blood-quantum rules as strict, if not stricter, than the current Indian status rules.<sup>107</sup> State-financed media focus on high-profile settler fraud cases seems to be having the effect of encouraging a ‘blood quantum’ view of Indigenous identity.<sup>108</sup>

While the assumption that Indian Status is an appropriate proxy for Indigenous identity is flawed, it is sadly predictable. Over 155 years of imposed colonial definitions will have such effects on people. Debates on the issue are further complicated by communities feeling pitted against each other in fights over limited funding, land and other resources.<sup>109</sup> We see these issues materialize both in discussions around First Nations membership codes as well as land claims. Such debates often tend to be political rather than principled and Dalhousie should not take sides in such matters.

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<sup>104</sup> Pamela Palmater, *Beyond Blood: Rethinking Aboriginal Identity and Belonging* (Doctor in the Science of Law, Dalhousie University, 2009) [unpublished] at 595-605. See also Grammond *supra* note 101.

<sup>105</sup> *Nisga'a Citizenship Act*, s. 5 and Schedule ([online](#)) (last accessed: 8 December, 2023).

<sup>106</sup> See, for example, Indigenous Law Revitalization Unit project, “Secwépemc-kt ell k’weselktnéws-kt (“we are all Secwépemc and we are all related”): Secwépemc Citizenship Law,” 2017-2019, [online](#). Professor Simon currently holds a research mandate from the Chiefs of New Brunswick via Mi’gma’we’l Tplu’taqann Inc. to assist in the development of a law to reassert Mi’gmaq jurisdiction over identity and displace the status provision under the *Indian Act*. See also Damien Lee, “Adoption Constitutionalism: Anishinaabe Citizenship Law at Fort William First Nation” (2019) 56:3 *Alta LR* 785.

<sup>107</sup> On this, see Exploring Section 10: Narrating Three Decades of Indian Band Membership Policy, 1985 to Present [website](#). The website provides links to all publicly accessible First Nation membership codes. The Task Force, and the University central administration would benefit from a review of this website and the complexity of issues that have compelled many First Nations to adopt rules that will eventually result in their having no more status Indians or formal membership.

<sup>108</sup> Interview of Cheryl Simon by Jeff Douglas (6 November 2023) on *Mainstreet*, CBC, Halifax, [online](#).

<sup>109</sup> An illustration of this is the Assembly of First Nations’ submissions in 2020 CHRT 20 *infra* note 194 at paras 292. While the Tribunal said this was “a serious issue to needs important consideration” (*ibid*) it ultimately ruled that human rights concerns overrode such concerns (see *ibid* para 294).

Our point here is that it is inappropriate for the University to take a punitive approach to those who think they have claim to being Indigenous on a good faith basis (as opposed to those who fraudulently adopt an Indigenous identity) when there is no universally accepted definition of who is Indigenous at this time. That does not mean anyone who in good faith self-identifies as Indigenous has legal grounds to claim Indigeneity, but this question cannot be reduced down to the simple categories seen in the Report. The tools we have to consider this difficult question are state-recognition, Canadian constitutional and human rights law and Indigenous law and processes. All these tools must be considered, though they will not always provide clear or consistent answers, necessitating careful and reasoned determinations that defy insistence on absolute certainty.

The Report draws on the tools of state-recognition and some Indigenous-processes (that are state-recognized), but largely fails to engage with Canadian constitutional and human rights law, as well as Indigenous law. This results in several categories of people who have legitimate, legally-supported claims to being Indigenous that are entirely overlooked in the verification criteria or dismissed. We turn to this next.

We end this section by acknowledging there will be individuals with distant Indigenous ancestry that do not fall within these categories, but this is not nearly so simple as drawing a line by an arbitrary date or number of generations. Dalhousie would do better to educate these people, and its community more broadly, about the complexities of Indigenous identity, as well as the colonial causes of that complexity, rather than punish people and police how they identify themselves. This also does not prevent the University from establishing hiring and admissions policies for designated positions that prioritize Indigenous peoples who are recognized in the ways discussed (either by state-recognition, Canadian constitutional and human rights law or Indigenous law) we address further below.

#### **F. An unduly narrow approach to who is Indigenous**

Canadian constitutional law embraces a broad definition of who is Indigenous. Section 91(24) of the *Constitution Act, 1867*, which speaks to the Indigenous peoples that Canada has responsibilities to, although referring to “Indians,” has been interpreted by the Supreme Court of Canada to include both Inuit and Métis, as well as Status and Non-Status Indian’ people.<sup>110</sup>

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<sup>110</sup> Reference as to whether “Indians” includes in s. 91 (24) of the B.N.A. Act includes Eskimo in habitants of the Province of Quebec, 1939 CanLII 22 (SCC), [1939] SCR 104; and *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (CanLII), [2016] 1 SCR 99.

This is consistent with the approach the courts have taken to interpreting “[A]boriginal [P]eoples of Canada” in section 35(1) of the *Constitution Act, 1982*, which protects the collective Aboriginal and Treaty rights of Indigenous peoples. For the purpose of this provision, Indigenous Peoples are defined as including “the Indian, Inuit and Métis peoples of Canada.”<sup>111</sup> While the courts have accepted the Indigeneity of people who are formally recognized by settler governments at face value in section 35 cases (e.g., individuals registered under the *Indian Act*, members under a modern treaty, etc), they have also recognized the rights of members of Indigenous groups without such recognition. In *R v Powley*, the Supreme Court of Canada set out a test for determining who are Métis rights holders when their community has yet to be formally recognized by governments.<sup>112</sup> The person must self-identify with a modern Métis community that has ties to a historic Métis community, and the individual must be accepted by the modern community.<sup>113</sup> In a similar vein, courts have interpreted “Indian” in section 35 as being broader than the definition in the *Indian Act*, finding Non-Status Indian persons to be section 35 rights holders.<sup>114</sup>

It is important to appreciate that legal obligations to Indigenous peoples include but go beyond protection of their collective Aboriginal and Treaty rights in section 35 of the *Constitution Act, 1982*. There appears to be some confusion on this both in the Report and in the University’s public statements on the Report. There are obligations not to discriminate against Indigenous groups and individuals under human rights law, not harm them through negligence under tort law, to respect their contractual rights, as well as their *Charter* rights like their freedom to associate, expression, life, liberty and security, and more.<sup>115</sup> In *Daniels v Canada*, the Supreme Court of Canada underscored that the federal government could still have obligations to an Indigenous person under s 91(24) of the *Constitution Act, 1867*, even if the person was not a rights holder under section 35 (because, for example, they did not meet the community acceptance under *Powley* because they were disconnected from their community):

Section 91(24) serves a very different constitutional purpose. It is about the federal government’s relationship with Canada’s Aboriginal peoples. This includes people who

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<sup>111</sup> Section 35(2), being Part II of the *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11*.

<sup>112</sup> *R v Powley*, 2003 SCC 43 at paras 28-33.

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

<sup>114</sup> See, for example, *R v Lavigne*, 2005 NBPC 8, aff’d 2007 NBQB 171.

<sup>115</sup> The *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) 15 [UN Declaration], recognizes all of the these collective and individual rights and more, stating at art 34 that these are “the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world.” Through the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, Canada has committed to implement the UN Declaration and recognizes that the UN Declaration already applies to the interpretation of domestic law.

may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools. There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test.<sup>116</sup>

Thus, in Canadian law, the definition of who is Indigenous is not exhausted by section 35, whether that be under the courts' tests for being a rights holder under section 35, or an Indigenous group's membership or citizenship rules.

At various points, the Report assumes that Canada (and Dalhousie University by extension) must prioritize Indigenous groups' membership and citizenship rules as a matter of respecting the Indigenous peoples' right to self-determination under the *United Nations Declaration on the Rights of Indigenous Peoples* (the "UN Declaration").<sup>117</sup> The President has also made comments to this effect.<sup>118</sup> While this right is the cornerstone of the UN Declaration, the issue is far more complex and nuanced. The UN Declaration affirms both collective and individual rights. In addition, the type of control over membership available to First Nations under the *Indian Act* is a far cry from the self-determination contemplated under the UN Declaration as it gives little meaningful control to First Nations free from colonial constraints and federal funding policies coercively encourage First Nations to adopt restrictive rule.<sup>119</sup> The UN Declaration also requires the exercise of self-determination and self-government to be in accordance with international human rights standards.<sup>120</sup> In particular, the UN Declaration underscores that "[n]o discrimination of any kind may arise" from the exercise of self-determination over membership.<sup>121</sup>

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<sup>116</sup> *Daniels supra* note 110 at para 49.

<sup>117</sup> Report *supra* note 1 at 10, 13-14. UN Declaration *supra* note 115.

<sup>118</sup> For example, see the President's remarks when announcing the Report, *supra* note 46: "Moving forward, Dalhousie will not infringe on the collective right of Indigenous Peoples to determine their own identity or membership."

<sup>119</sup> See Maria Morellato, "Memorandum on Indian Status and Band Membership" for the National Center for the First Nations Governance (15 December 2006), [online](#), at 7: "It is noteworthy that as a matter of policy and practice, the Minister will provide funding for housing, infrastructure, water and sewer facilities for status Indians on reserve but will generally not do so for non-status Indians. This distinction is a matter of policy and past practice and is not required by legislation."

<sup>120</sup> UN Declaration, *supra* note 115 at article 33; see also article 46(2).

<sup>121</sup> *Ibid* at article 9: "Indigenous peoples and individuals have the right to belong to an [I]ndigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right." This is because international human rights law holds all human rights (including Indigenous collective rights) to be universal, interdependent and interrelated, and strives to achieve interpretations that maximize the enjoyment of rights: see M. Celeste McKay and Craig Benjamin, "A Vision for Fulfilling the Indivisible Rights of Indigenous Women" in Jackie Hartley, Paul Joffe, and Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing Ltd, 2010) at 160.

The above tells us that not only is the definition of who is Indigenous (and obligations thereto) broad under the law, it is complicated. In what follows we further drill down into why the narrow categories of verification used in the Report results in exclusion of legitimate Indigenous peoples—not frauds.

### 1) Exclusion of those entitled to Indian registration

The Report’s verification process requirement of documentary proof of being a Status Indian (e.g., a status card) overlooks the fact that there are individuals entitled to be registered under the *Indian Act*, but for whatever reasons, practical, principled or inadvertent, choose not to be registered. Canada recognizes this as a category of “entitled to be registered” and treats these people akin to having Status.<sup>122</sup>

The number of people who are entitled to be registered is substantial. While legal challenges to discriminatory provisions of the *Indian Act* continue to meet success in court, individuals who are currently entitled to status often belong to families who have been excluded for generations; this may lead to a lack of awareness to newly recognized eligibility:

In 2017, the Parliamentary Budget Officer, based on estimates from independent demographers, calculated that there are 670,450 First Nations women and their descendents who are newly entitled to status as a result of Bill S-3 ‘6(1)(a) all the way’ amendment that came into force on August 15, 2019... Yet, as of March 25, 2021 Canada has completed only 17,500 new registrations since 2017...<sup>123</sup>

Thus, the Report’s proposed verification process would exclude over half a million Indians from recognition by the University.

### 2) Over-reliance on Indian Status under the Indian Act

The Report is highly reliant on forms of federal recognition of Indigenous peoples, particularly the *Indian Act* registration and membership rules. But the history of the *Indian Act* status rules is a long and sordid one and the University ought to be wary of placing much reliance on it. Despite the Supreme Court of Canada telling Canada it has legal obligations to Indigenous

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<sup>122</sup> See *Indian Act*, RSC 1985 c I-5 at s 2: “Indian means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.”

<sup>123</sup> *Sharon McIvor and Jacob Grismer v. Canada*. Petitioner Submission Regarding Implementation By Canada of the 11 January 2019 Decision of the Committee Concerning the Petition of Sharon McIvor and Jacob Grismer (CCPR/C/124/D/2020/2010) at pg 5.



peoples beyond the Indian in *Daniels* in 2016,<sup>124</sup> Canada stubbornly clings to its unilateral power to determine who is an “Indian” under the *Indian Act*. Recent cases show that Canada continues to do so in order to deflect fiscal, as well as other, obligations.<sup>125</sup>

Starting in the mid-1800s, colonial governments (and Canada starting in 1867) determined that defining who is an “Indian” was a very effective way of advancing the goal of assimilation by limiting who is recognized as Indigenous and, consequently, fiscal and legal obligations thereto, including Indigenous claims to restitution and compensation for stolen land and resources.

The process of ‘recognizing’ Indians under the *Indian Act* has always been haphazard. The first efforts to do so were not scientific. Groups of people known or purported to be Indian, persons of mixed Indian-settler unions and non-Indian wives and children who lived among the group were all deemed to be Indians.<sup>126</sup> In this process, some groups were overlooked and were never given Indian status. Others, including some American Indians and Métis, were erroneously registered as Indians in Canada, which is problematic because there is no process for an individual to be deregistered; these American Indians and Métis may be prevented from gaining appropriate recognition in their own tribes or being entitled to live in Métis settlements.<sup>127</sup> Still others, including whole groups as well as individuals, refused to participate in the process. Canada overlooked whole tribes, including the Peskotomuhkati living at the St. Croix River and Passamaquoddy Bay in what is now New Brunswick, and who continue to fight for recognition by the Canadian government.<sup>128</sup> The Mi’kmaq and Innu of Newfoundland are further regional examples of groups who were entirely disregarded when the province joined Confederation in 1949.<sup>129</sup> In addition, in 1951 when Canada adopted a central Indian Registry, significant numbers of people were left off the Registry on account of process. Many were overlooked when the new list was created and they were only given six months to protest errors and omissions. Unsurprisingly, many were not aware of this at all or did not protest in time.<sup>130</sup>

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<sup>124</sup> *Daniels*, *supra* note 110.

<sup>125</sup> See, for example, *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2; *Teslin Tlingit Council v. Canada (Attorney General)*, 2019 YKSC 3.

<sup>126</sup> *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands*, SC 1868, c 42, s 15.

<sup>127</sup> See Crown Indigenous Relations and Northern Affairs Canada, “*Why deregistration is an Important issue*, Indigenous Services Canada,” [online](#).

<sup>128</sup> Peskotomuhkati Nation at Skutik website, [Peskotomuhkati Persistence](#).

<sup>129</sup> Sébastien Grammond, “Equally Recognized? Indigenous Peoples of Newfoundland and Labrador” (2014) 51:2 Osgoode Hall LJ 469 at 488-489.

<sup>130</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) [RCAP Report], vol 1 at 286-287, [online](#).

Over the history of the *Indian Act*, Canada revoked the Indian Status of thousands upon thousands of First Nations people. Examples up to 1985 include the following: (a) women who married men without Indian Status (this could be a non-Indigenous as well as Indigenous Non-Status men, such as Métis men) and their children (called the “marrying out” rule);<sup>131</sup> (b) peoples’ whose maternal mother and grandmother had gained Indian Status through marriage (“the double-mother rule”);<sup>132</sup> (c) illegitimate children of Indian women where the father was known to not be Status Indian;<sup>133</sup> (d) First Nations people who obtained university degrees, became doctors or lawyers, or joined the holy orders;<sup>134</sup> (e) First Nations veterans who enlisted in military service in the First and Second World Wars and Korean War;<sup>135</sup> (f) First Nations people who accept scrip in the western provinces;<sup>136</sup> (g) First Nations people who lived in the United States or another country for over a period of five years without the permission of Indian Affairs;<sup>137</sup> and (g) people who voluntarily enfranchised (for some time this was exclusively offered to male Indians and their wives and children would be automatically enfranchised with them).<sup>138</sup>

In 1985, amendments, known as *Bill C-31*, were made to the *Indian Act* attempting to rectify some of the above wrongs, which has resulted in the reinstatement of many thousands of people as “Indians.”<sup>139</sup> The Indian registration rules were changed and two ‘levels’ of Indian Status were introduced: section 6(1) status and section 6(2) status.<sup>140</sup> Section 6(1) status gives “full” Indian status and the ability to pass on Indian status to one’s children whether or not the other parent has Indian Status. Section 6(2) gives “half” Status, and the children of ‘section 6(2)s’ will only be Status Indian if the other parent is also Status Indian. These amendments introduced what is called the ‘second generation cut-off rule’ (what some have called an effective blood quantum rule<sup>141</sup>), which prevents the passing on of Indian Status to descendants after two successive generations of mixed parenting (“parenting out”). The table below illustrates how the rule works:

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<sup>131</sup> *Indian Act*, S.C. 1876, c. 18, s.3(d); *Indian Act*, S.C. 1951. c. 29, s.11(c).

<sup>132</sup> *Indian Act*, S.C. 1951, c. 29, s.12(1)(a)(iv).

<sup>133</sup> *Indian Act*, SC 1951, c. 29, s. 11(e).

<sup>134</sup> *Indian Act*, R.S.C. 1906, c. 81, s.111 and *Indian Act*, S.C. 1876, c. 18, s.3(b).

<sup>135</sup> See Royal Commission Report on Aboriginal Peoples (1996), Vol. 1, Chapter 12, “Veterans”.

<sup>136</sup> Persons who accepted scrip were excluded from the *Indian Act*: see SC 1876, c 18, s. 3(e).

<sup>137</sup> *Indian Act*, RSC 1906, c. 81, s. 13.

<sup>138</sup> ‘Voluntary enfranchisement’ refers to when a First Nations person could voluntarily renounce their Indian status in exchange for Canadian citizenship, if a board of examiners found they possessed sufficiently “good character”: see *Indian Act*, R.S.C. 1906, c. 81, s.108. This was usually in return for land or compensation, and there are many stories, however, of people feeling coerced or not understanding the implications of this ‘bargain’ or the compensation being insufficient in light of what was being given up.

<sup>139</sup> Bill C-31, *An Act to Amend the Indian Act*, now S.C. 1985, c.27.

<sup>140</sup> *Indian Act*, RSC 1985 c I-5, s 6.

<sup>141</sup> See Pam Palmater, *Beyond Blood – Rethinking Indigenous Identity*, *supra* note 104.

Parents' registration ↓	6(1) + 6(1)	6(1) + 6(2)	6(1) + non-Indian	6(2) + non-Indian
Child's registration	6(1)	6(1)	6(2)	Non-status Indian

The second-generation cut-off rule was applied retroactively to the children of the women who were reinstated to Indian Status, and applied prospectively to all children of Indians born after 1985.

Over the past two decades, several successful legal challenges, primarily framed as gender and family status discrimination, brought by First Nations women who 'married out' and their descendants, has finally resulted in further amendments to the *Indian Act* to address the discrimination caused by the second-generation cut-off's rule retroactive application and the reinstatement of several people who had been arbitrary denied status.<sup>142</sup> Canada's foot dragging in remedying the discrimination, doing only "the bare-minimum" after each court decision and not overhauling the *Indian Act* registration rules was criticized by Quebec Superior Court in *Descheneaux c Canada* in 2018 as an "abdication of legislative power."<sup>143</sup>

The Court's decision in *Descheneaux* spurred the federal government to enact a new set of amendments to the *Indian Act* status rules ("Bill S-3").<sup>144</sup> Although an early draft of Bill S-3 was more limited in scope, it was revised after pressure from Indigenous groups and some Indigenous Senators to include provisions that now purport to address gender discrimination in the *Indian Act* once and for all. It has been dubbed the "s. 6(1)(a) all the way" approach. These laws came into force in August 2019.<sup>145</sup> Although intended to clarify the rules, the *Indian Act* provisions are a byzantine maze that is challenging even for knowledgeable lawyers to

<sup>142</sup> *Mclvor v. Canada (Registrar of Indian and Northern Affairs)*, [2007] 3 C.N.L.R. 72 (BCSC), rev'd [2009] 2 C.N.L.R. 236 (BCCA), leave to appeal refused [2009] S.C.C.A. No. 234.

<sup>143</sup> *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555 at paras 239-240.

<sup>144</sup> *Bill S-3, An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, 1st Sess, 42nd Parl, Canada, 2017 (assented to 12 December 2017), SC 2017, c 25

<sup>145</sup> Krista Nerland in "Significant Changes to Indian Status Rules to Address Discrimination against Indigenous Women" OKT [blog post](#).

comprehend.<sup>146</sup> Given that there are currently over 14 categories by which an individual may be eligible for status, if the Standing Committee uses its discretion to make distinctions based on *how* an individual qualifies for status, there is potential for claims of discrimination.

By relying on Indian status, the University may be replicating and perpetuating discrimination on a large scale, in an attempt to address a smaller scale issue of academic fraud. It should also be clear from even this very brief discussion of the *Indian Act* that determining who qualifies for status is complex and, to some extent, reliant on arbitrary lines that are incongruent with how families and communities actually live. Finally, as discussed further below, it is evident from the registration rules that there will likely be an exponential number of young Indigenous people entering university who do not qualify for Indian status in the coming years.

### 3) Conflating Indian Status with Indigeneity

There is often a conflation between Indian status per the *Indian Act* and Indigeneity. The Government itself has stated that “Individuals identified as members of the Aboriginal peoples in Canada are treated differently by government and have been historically by both successive colonial and later Canadian administrations.”<sup>147</sup> Despite vast differences, there is a prevailing view that status reflects Indigeneity or a greater degree of authenticity, regardless of the nation the status holder is from. This view is often shaped by how individuals living on reserve qualify for service provision via the funding policies of Indigenous Services Canada, and the pantribal application of those policies. As mentioned previously, housing on reserve generally requires an Individual to have status, the same can be said for membership. Membership criteria most often requires status because the funding formulas for membership are calculated on how many individuals have status; if a First Nation accepts members without it, it would be difficult to provide programs and services to those living within the community.<sup>148</sup>

On its own, status only qualifies an individual to: 1) education, 2) non-insured health benefits, and 3) tax exemptions in specific circumstances.<sup>149</sup> It is *membership* with a First Nation that brings access to programs and services (housing, voting rights, child care programs, social programs, culture and language programs, support for secondary students, economic development programs, etc.) which flow through the First Nation.<sup>150</sup> As such, there is a high

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<sup>146</sup> We invite you to read the current rules by clicking [here](#) and see if you can comprehend them.

<sup>147</sup> *Submission of the Government of Canada on the Admissibility and Merits of the Communication to the Human Rights Committee of Sharon McIvor and Jacob GRismer*. Communication No. 2020/2010, para 11.

<sup>148</sup> See Morellato, *supra* note 119.

<sup>149</sup> [About Indian status \(sac-isc.gc.ca\)](#)

<sup>150</sup> Morellato, *supra* note 119.

incentive for Indians living on reserves to register themselves and their children for status. This fiscal reality serves to conflate Indigeneity with status: if everyone who is residing on the reserve who is Indigenous holds status, an inference is drawn that people who do not have status are not Indigenous. People who are Indigenous but do not have status have to find housing off reserve, which reinforces this perception.<sup>151</sup>

The effect is that the possession of status brings intangible benefits not available to those Indigenous people who do not qualify. As explained in the submission of Sharon McIvor and Jacob Grismer to the United Nations Human Rights Committee, “[a]lthough the concept of Indian status was originally imposed on Aboriginal people by the Government of Canada, it has developed into a powerful source of cultural identity for individuals of Aboriginal descent and Aboriginal communities.”<sup>152</sup> The prevalence of this perspective of cultural identity by those living on reserve is another reason why balancing off-reserve engagement is so critical when considering identity issues.

The reality is that, for the federal government and Indigenous Services Canada, the department responsible for implementing the *Indian Act*, status has *never* been grounded in cultural identity. As stated in Canada’s submissions to the United Nations Human Rights Committee:

Canada further submits that Indian status is not a marker of cultural identity. Canada submits that the authors conflate cultural identity and Indian status to too great a degree. There are many First Nations in Canada and each has its own cultural identity, including cultural practices, language and religion. Indian status is not a legislated approximation of any First Nation culture; it is a determinant of eligibility for a range of specific benefits provided by the Government of Canada to individuals.<sup>153</sup>

The Report expresses astonishment that “colonial discourse continues to falsely reposition Indigenous Peoples as the net beneficiaries of state welfare in Canada.”<sup>154</sup> If so, we wonder why the Report relies on status, the method developed by Canada to determine eligibility of benefits of state welfare, as the criteria to determine Indigeneity at the university. Using the

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<sup>151</sup> Some communities allow non-Indigenous spouses to reside on reserve but they are usually easily identified as such. Others do not allow anyone who is not Indigenous to live on reserve, regardless of whether they are married to a status Indian who owns the house. This was the situation in Kahnawa:ke for decades where they codified a “marry out, get out” policy. Other communities may not codify such a policy, relying instead on intimidation to force people to leave.

<sup>152</sup> *Sharon McIvor and Jacob Grismer v. Canada*, Communication Submitted for Consideration Under the First Optional Protocol to the International Covenant on Civil and Political Rights. 24 November 2010. At 98.

<sup>153</sup> *Supra*, note 147 at 105.

<sup>154</sup> Report, *supra* note 1 at 5.

*Indian Act* in this way can prove to be nothing but detrimental, as eloquently stated by Miigama’gan, a strong Mi’kmaw advocate, at the MMIWG inquiry:

When we deny a woman and her children through the *Indian Act* legislation, you are banishing, we are banishing our family members. ... when you banish a person they cease to exist. ... And so when you disregard a person, a human being, and they cease to exist, that opens the door for the rest of the people to violate those individuals. So we’re back to square one where the women and their children are not entitled to the same quality of life, same identity. ...<sup>155</sup>

We end this section highlighting a University news story from this week celebrating a Non-Status Indigenous student who secured donor-funding for tuition in the veterinary-tech program at the Agricultural campus.<sup>156</sup> The student speaks to the financial hardship she experienced as Non-Status, as well as the stigma she faces as a Non-Status person: “My biggest struggle as a non-status Indigenous person is the fact that my ethnicity will always be up for debate.” This is a sad consequence of colonial impacts of the *Indian Act* and we feel its divisive impact will become more acute at the Dalhousie if the Report is fully implemented.

#### 4) *Conflating past corporate use of Metis name with contemporary Identity Fraud*

It is important to contextualize the struggle for self-determination within the legal confines set out by the federal government over the last 50 years. For Non-Status or unrecognized Indigenous people, there are limited mechanisms for asserting rights, creating a sense of community or providing resources for their members. A common approach has been to provincially incorporate, which would create a legal entity to serve these purposes.

This was the case in New Brunswick, when Letters Patent were issued on August 25, 1972, incorporating the *New Brunswick Association of Non-Status Indians Inc.*<sup>157</sup> The federal government did recognize these organizations under the umbrella of the Native Council of Canada, as the Congress of Aboriginal Peoples was known at the time, which was established in

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<sup>155</sup> *Canada, Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol 1a (Ottawa, 2019) (Chief Commissioner: Marion Buller) [“MMIWG Final Report”], at 251 [emphasis added]. The underlined passage hints at the lateral violence that comes with enforcing distinctions based on Indian status, which we fear the report will exacerbate on campus.*

<sup>156</sup> Dalhousie University, “Entrance Scholarship allowed non-status Indigenous student to achieve childhood dream” (4 December 2023) [online](#).

<sup>157</sup> Letters Patent Incorporating “New Brunswick Association of Non-Status Indians Inc.” (Province of New Brunswick) 1972 (S/684) Ref. No. 72-698.

1971.<sup>158</sup> In order to justify providing funding for programs and services, the federal government urged these corporate entities to identify as “Metis” because their members included people who were non-status and therefore of ‘mixed ancestry’. Thus, Supplementary Letters Patent were issued on November 18, 1977,<sup>159</sup> enabling the corporate name to the *New Brunswick Association of Metis and Non-Status Indians Inc.* However, the corporate name of the organization was not a cultural fit, and on December 4, 1986, further Supplementary Letters Patent were issued changing the name to *New Brunswick Association of Metis and Non-Status Indians Inc.*<sup>160</sup>

This history is extremely problematic and it cannot be overstated how this policy has served to undermine the rights of the Métis nation. Conflating mixed parentage with a Métis identity perpetuates the colonial myth that all that is required to be Métis is to have mixed blood, as opposed to being part of a “distinct Indigenous people and nation in the historic Northwest during the late 18th century.”<sup>161</sup> Despite its use as a general colloquial term for those with mixed Indigenous and European ancestry, in *R v Powley*, the Supreme Court of Canada said ‘Métis’ has a specific legal meaning, referring to persons of mixed European and Indian or Inuit culture that developed their own distinct language and culture through *ethnogenesis* (the process why which a group of people become ethnically distinct).<sup>162</sup> The Court confirmed that ‘Métis’ does not simply mean mixed ancestry.<sup>163</sup>

This conflation was addressed by the late Candy Palmater in her memoir:

When I was about ten, we became involved in the New Brunswick Aboriginal Peoples Council. That was when I first heard the term “non-status Indian.” Finally, I knew what I was. That clarity didn’t last long because a few years later, the government classified anyone mixed race as being Métis. Oh, the poor Métis people. That causes confusion to this day. The Métis people are a separate group with their own culture, language and history. Eventually we went back to being non-status. <sup>164</sup>

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<sup>158</sup> See [About Us - Congress of Aboriginal Peoples \(CAP\) \(abo-peoples.org\)](http://abo-peoples.org)

<sup>159</sup> Supplementary Letters Patent to New Brunswick Association of Non-Status Indians Inc. (Province of New Brunswick) 1977 (S/684) Ref No. 72-698.

<sup>160</sup> Supplementary Letters Patent to New Brunswick Association of Metis and Non-Status Indians Inc. (Province of New Brunswick) 1986 (S/80) Ref. No. 012045.

<sup>161</sup> See [About Us | Métis National Council \(metisnation.ca\)](http://metisnation.ca)

<sup>162</sup> *R. v. Powley*, [2003] 2 SCR 207 at paras 10-14.

<sup>163</sup> *Ibid* at para 10.

<sup>164</sup> Candy Palmater, *Running Down a Dream* (Harper Collins: 2022) at 93-94.

The use of the term “Métis” by corporations in this manner, is different from contemporary organizations such as the Eastern Woodland Métis Nation Nova Scotia,<sup>165</sup> or the Acadian-Métis of New Brunswick which have no cultural claims to Indigeneity.<sup>166</sup> These groups, which until recently did not identify as Indigenous, have claims grounded in the colonial mixed blood mythology, have no evidence of historic Indigenous identity, and are not connected to the distinct Métis Nation or the Mi’kmaq Nation on whose territory they live.<sup>167</sup>

It is critical for any determination of Indigeneity be based on a thorough understanding of each group’s history. There are other groups, such as Nunatukavut Community Council in southern Labrador, who have a similar corporate history. It would be problematic to conflate membership in corporate entities, who at one time fell prey to federal policy based on colonial mythology, with a determination of Indigeneity. It also cannot be assumed that people who are Métis or other Indigenous people have not inadvertently ended up a member of a collective not recognized by the Report; merely looking for the existence of a card or membership does not allow for these nuances to be addressed.

#### *5) Drastically under-estimating the numbers of Non-Status Indians*

The Report and verification process provides that, without a status card, Non-Status Indians will require formal recognition under their First Nation band membership or citizenship rules. While this provides some recognition of the fact that Non-Status Indians are Indigenous, this is inadequate for several reasons. First and foremost, this approach drastically underestimates the large and growing number of Non-Status Indians in Canada (paired with the fact that the vast majority cannot be recognized under First Nation membership codes as the Report assumes - discussed further below). Nationally, the percentage of First Nations who responded to the Census as Non-Status was 28% in 2022,<sup>168</sup> up from 23.8% in 2017.<sup>169</sup>

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<sup>165</sup> See [Welcome to the Eastern Woodland Métis Nation Nova Scotia - Eastern Woodland Métis Nation \(Canada\) \(easternwoodlandmetisnation.ca\)](http://easternwoodlandmetisnation.ca)

<sup>166</sup> See [Mi’kmaq chiefs reject Acadian-Métis as distinct group, oppose Vautour N.B. land claim - New Brunswick | Globalnews.ca](http://globalnews.ca)

<sup>167</sup> Evidence of this lack of support by the Metis and Mi’kmaq is evidenced in the Memorandum of Understanding signed by the Assembly of Nova Scotia Mi’kmaq Chiefs and the Metis National Council. [View of Memorandum of Understanding Between The Métis Nation and The Mi’kmaq of Nova Scotia \(ualberta.ca\)](http://ualberta.ca) online.

<sup>168</sup> Statistic Canada, Table 98-10-0264-01 [Indigenous identity by Registered or Treaty Indian status and residence by Indigenous geography: Canada, provinces and territories](https://www150.statcan.gc.ca/n1/pub/98-10-0264-01/00001-eng.htm) (release date 21 September 2022). The divides the number of total number of First Nations (1,048,405) by the number of non-registered First Nations (295,290).

<sup>169</sup> Dicks *supra* note 2.



Statistics Canada data from 2022 shows that the percentages of Non-Status Indians in the Atlantic provinces is higher than the national average across the board: New Brunswick - 35%; Nova Scotia - 43%; Prince Edward Island - 43%; and Newfoundland and Labrador - 33%.<sup>170</sup> Our discussion below explains why these numbers are as high as they are.

#### a) Continued residual discrimination

Despite the various amendments to the *Indian Act* registration rules discussed above, significant exclusions remain. For example, individuals who voluntarily enfranchised were reinstated, but their descendants have been denied the retroactive relief from the second-generation cut-off that others have received.<sup>171</sup> This includes the descendants of First Nations veterans who were pressured to enfranchise in order to receive the veterans benefits that were received by all other veterans.<sup>172</sup>

#### b) Unrecognized Non-Status communities in the region

Next, only some of the groups and individuals who were overlooked in *Indian Act* registration have succeeded in obtaining formal government recognition in recent years, after fighting for recognition for generations. The two Innu communities in Labrador were only recognized as *Indian Act* bands in 2002.<sup>173</sup>

Some excluded Mi'kmaq groups in the region have been recognized in the last 50 years, including the Mi'gmaq of Gespeg in Quebec in 1973,<sup>174</sup> Miawpukek (Conne River) in Newfoundland in 1982, as well as the Qalipu in Newfoundland in 2007.<sup>175</sup> Such recognition only came as a result of significant legal and grassroots advocacy by these groups.<sup>176</sup> For example, those Mi'kmaq in Newfoundland left without recognition after the official recognition of Miawpukek, provincially incorporated as the Federation of Newfoundland Indians in 1988 to better advocate, as well as bringing a *Charter* and human rights complaint against Canada.

In some cases the new bands did not receive recognition for the same bundles of rights as other First Nation bands. For example, Gespeg and Qalipu were made “landless bands” meaning no

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<sup>170</sup> Statistic Canada, Table 98-10-0264-01 *supra* note 168. We were not able to disaggregate the numbers for Mi'kmaq and Wolastoqey in Quebec.

<sup>171</sup> Bill C-38, *An Act to amend the Indian Act (new registration entitlements)*, 1st Sess, 44th Parl, 2022, cl 4, introduced in December 2022, now at second reading, addresses this problem.

<sup>172</sup> See reconciACTION, “Fighting for Canada’s Rights & Losing Indian Status” (9 November 2022) [online](#).

<sup>173</sup> Grammond, “Equally Recognized” *supra* note 129 at 489.

<sup>174</sup> *La Nation Micmac de Gespeg c. Sa Majesté la Reine du chef du Canada*, 2016 TRPC 10 at para 13.

<sup>175</sup> Grammond, “Equally Recognized” *supra* note 129 at 486-487; 490-495.

<sup>176</sup> *Ibid.*

new reserve lands were set aside from them. Further, in the *Drew* case, the Newfoundland courts held that Mi'kmaq in Newfoundland did not hold any collective s 35 rights within the province, accepting the provincial government's argument that Mi'kmaq were brought to the Island by the French after contact.<sup>177</sup> Thus, only recognizing section 35 rights holders in the verification process, as the Report purports to advocate at times,<sup>178</sup> would adversely affect the Mi'kmaq of Newfoundland and spur further divisiveness within the nation.

The issue of Mi'kmaq identity in Newfoundland remains complex. Following the Qalipu settlement agreement, about 10,000 who were initially accepted as Status Indians had their Status unilaterally revoked by Canada.<sup>179</sup> Due to unexpectedly high numbers of applications (100,000), Parliament passed a Bill in 2014, authorizing it to review all applications and retroactively reject some under stricter membership criteria.<sup>180</sup> Only 18,044 were found eligible for Indian Status.<sup>181</sup> Those whose applications were retroactively rejected, as well as those whose applications were never accepted, argue the new criteria was arbitrary and continue to fight for official recognition. It is highly likely that some of these people are legitimately Non-Status Mi'kmaq. An expert report written for the Canadian Human Rights Commission in 1997 identified a number of communities (not all of which have been addressed through the Qalipu litigation) as "legitimate Mi'kmaq communities,"<sup>182</sup> and evidence was provided by and about Mi'kmaq living in 20 communities within the province during the Royal Commission on Aboriginal Peoples.<sup>183</sup> However, under the Report's verification such communities none of these people would be eligible because they could not show members in a federally-recognized First Nation.

#### c) Post-1985 2nd-generation cut-off of First Nation children and grandchildren

The single biggest and growing source of the Non-Status Indian population, implicating First Nations people living both on and off reserve, is the second-generation cut-off rule's

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<sup>177</sup> *Drew v. Newfoundland and Labrador (Minister of Government Services and Lands)*, 2003 NLSCTD 105 aff'd 2006 NLCA 53. While contested by Mi'kmaq of Miawpukek, and questionable based on existing case law and the standards in the UN Declaration regarding Indigenous rights to land, the case has hamstrung Mi'kmaq in Newfoundland from not only making Aboriginal rights claims, but title and duty to consult assertions.

<sup>178</sup> Report, *supra* note 1 at 10, 13-14.

<sup>179</sup> Justin Brake, "Qalipu enrolment outcome "next big reconciliation issue" in Canada: Chief" *The Independent*, February 24, 2017 [online](#).

<sup>180</sup> *Qalipu Mi'kmaq First Nation Act* SC 2014, c 18.

<sup>181</sup> Brake *supra* note 179.

<sup>182</sup> *The Mikmaqs of Newfoundland: A Report Prepared for the Canadian Human Rights Commission* (Ottawa: Canadian Human Rights Commission, 1997) at 21, cited in Grammond, "Equally Recognized" *supra* note 129 at 493.

<sup>183</sup> Tanner, et al. *Aboriginal Peoples and Governance in Newfoundland and Labrador A Report for the Governance Project, Royal Commission on Aboriginal Peoples*. RCAP October, 1994.

application to all children born after 1985. This occurs now whenever a Section 6(2) Status Indian has a child with someone who is non-Indigenous or Non-Status Indian. The frequency of 'parenting out', especially in communities with nearby non-Indigenous communities, is high. Writing in 2005, demographer, Stewart Clatworthy, found that nearly one-half of all children born to Status Indians since the 1985 *Indian Act* amendments have a non-Indian parent.<sup>184</sup> Loss of Indian Status is expected to be significant both on and off reserve. In the short term, impacts will be most pronounced among off-reserve residents.<sup>185</sup> Clatworthy predicted that within about 100 years (2105), no new child will be entitled to have his or her name added to the Indian Register.<sup>186</sup> As noted by Pamela Palmater, "according to current demographic studies, all Indians will be legislated out of existence as will be their current communities."<sup>187</sup>

Although it has received less attention than the gender discrimination in the *Indian Act* registration provisions, the second-generation cut-off rule itself discriminates on the basis of race, treating First Nations as a racial group instead of distinct political and cultural groups and imposing an effective two-generation 'blood quantum' requirement.<sup>188</sup> By contrast, Canada's own *Citizenship Act* adopts a far more generous one-parent rule (e.g., if you have one parent that is Canadian, you are Canadian).<sup>189</sup> Harry Daniels, the late National Chief of the Congress of Aboriginal Peoples, referred to the amendments that introduced the second-generation cut-off rule as the "Abocide Bill," referring to its near genocidal effects: "This Abocide Bill has the potential over the short span of two generations to do what 500 years of colonization failed to do. That is, the elimination of all status Indians. ..." <sup>190</sup>

The higher than average percentage of Non-Status Indians in the region (NB 35%; NS 43%; PEI 43%; and NL 33%) shows Pam Paul's warnings in 1999 to be born out:

Without a doubt Section 6(2) of the *Indian Act* [e.g., the second-generation cut-off rule] poses the greatest concern for First Nations as a whole, but in the Atlantic provinces where the population numbers are small it poses an even greater concern. As more and

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<sup>184</sup> Stewart Clatworthy, "The Changing Demography of First Nations Populations" (April 2007), and Stewart Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities" (February 2005), cat. no. R2-430/2005E. Ottawa: Minister of Public Works and Government Services Canada.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> Palmater *supra* note 104 at 89. See also Michelle Spolnick "The Second-Generation Cut-Off: Effect on people in Canada" (2021) (Unpublished master's project) University of Calgary, Calgary, AB.

<sup>188</sup> Sébastien Grammond, "Discrimination in the Rules of Indian Status and the McIvor case," (2009) 35 Queen's LJ 421.

<sup>189</sup> *Citizenship Act*, RSC 1985, c C-29 at s 3.

<sup>190</sup> Harry W Daniels, "Speaking notes at Unity for Our Grandchildren Conference", The Native Women's Association of Canada, March 23, 1998.

more people are registered under Section 6(2) more and more of the population base is lost when these people choose non-natives or non-status for partners. When these children reach childbearing age, and, if they do not partner with a status Indian person. Indian status will be lost in the next generation.<sup>191</sup>

Paul refers to these individuals as “Ghost People” because they are not counted as Status Indians.<sup>192</sup> Despite not having Indian Status, in our experience, those who lose status by virtue of ‘parenting out’ continue to be seen as First Nation by First Nations people. As one New Brunswick First Nation Chief commented to us, “These are our children and grandchildren.”<sup>193</sup>

In 2020, the Canadian Human Rights Tribunal, in *Caring Society v Canada*, found that Canada’s use of the *Indian Act’s* second-generation cut-off rule to deny Non-Status First Nations children necessary services under Jordan’s Principle was discriminatory.<sup>194</sup> Its finding was informed by both domestic and international law, including the UN Declaration.<sup>195</sup> The Tribunal held that Non-Status First Nations, living on or off-reserve, with a parent/guardian who is eligible for Indian Status is entitled to services from the government of Canada:

in light of [the Supreme Court of Canada’s decision in *Daniels* and other cases] and international instruments that Canada has accepted, signed, signed and ratified, Canada has positive obligations towards all First Nations children whether they have Indian Act status or not and therefore, Canada must implement specific measures to protect children regardless of status.<sup>196</sup>

The Tribunal also added,

We are not discussing a self-identified First Nations person who had a First Nations ancestor twelve generations ago here. We are discussing First Nations children who, but

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<sup>191</sup> Pam Paul, “The Politics of Legislated Identity - The effect of Section 6(2) of the *Indian Act* in the Atlantic Provinces” prepared for the Atlantic Policy Congress of First Nations Chiefs (28 September 1999) at 4.

<sup>192</sup> *Ibid* at 5.

<sup>193</sup> Email correspondence between Chief George Ginnish, Natoaganeg First Nation, New Brunswick, and Naomi Metallic and Cheryl Simon (7 December 2023).

<sup>194</sup> *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20. Jordan’s Principle is a legal and human rights principles that First Nation children are entitled to substantive equal services and should not be denied these on the basis of jurisdictional disputes between governments and their departments.

<sup>195</sup> See *ibid*, for example, para 19 where the Tribunal refers to the “probable incompatibilities between the UNDRIP and the *Indian Act*... .”

<sup>196</sup> *Ibid* at para 309 [emphasis in original]. See also para 243.

for the discriminatory way in which the *Indian Act* categorizes them, are denied services under Jordan's Principle meant to address substantive equality.<sup>197</sup>

We underscore that, in deciding, the Tribunal specified that its decision was about determining Canada's human rights obligation under Jordan's Principle and not determining who is a "First Nations child" for the purposes of First Nation self-determination.<sup>198</sup> This is consistent with the point made above that the definition of who is Indigenous is not exhausted by section 35, whether that be under the courts' tests for being an Aboriginal rights-holder under section 35, or an Indigenous group's membership or citizenship rules. This was a decision about Canada's discretionary use of the *Indian Act's* provisions to decide eligibility for essential services, not a ruling that section 6(2) of the *Indian Act* is inoperative or unconstitutional per se,<sup>199</sup> but the Tribunal's decision is certainly supportive of such conclusions.

The order sought, and granted, in the *Caring Society* decision was for Canada to provide services to First Nations children not eligible for Indian Status but with a Status Indian parent.<sup>200</sup> However, the Tribunal's analysis supports treating further generations of First Nation status descendents (grandchildren, great-grandchild, etc.) as Indigenous people. Otherwise, the goal of the *Indian Act* and the second-generation cut-off rule to effectively achieve extinction of First Nations people will be realized.

#### 6) Faulty assumptions around access to First Nations membership

The Report's proposed verification process only recognizes Non-Status Indians if they provide "written confirmation of membership within a federally recognized band or tribal authority in in [sic] the US or Canada."<sup>201</sup> This is a reference to band membership under the *Indian Act*. However, if this is intended to mitigate the potential unfairness of exclusion of Non-Status Indians, it drastically overestimates the extent to which band membership is available to Non-Status people or more generally.

A first point, not all Status Indians are registered to a band. When the Indian Register was created in 1951, there were some people who Canada deemed not associated with a band and they were placed on what is called the "General List."<sup>202</sup> Prior to 1985, there were only a limited

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<sup>197</sup> *Ibid* at 244 [emphasis added].

<sup>198</sup> *Ibid* at paras 84, 129; 295ff.

<sup>199</sup> *Ibid* at paras 176-177; 262-263.

<sup>200</sup> *Ibid* at para 273.

<sup>201</sup> Report *supra* note 1 at 19.

<sup>202</sup> Indian and Northern Affairs Canada, *The Indian Act Past and Present - A Manual on Registration and Entitlement Legislation* (1991) Catalogue No. R32110/1191 at 11.

number of people on the General List,<sup>203</sup> but since the amendments in 1985 described below, those not eligible for their band membership are placed on the General List. Those on the General List and their descendants either have no band to be a member of, or have been deemed ineligible under the First Nations' membership code. Under the proposed verification process, any of their Non-Status descendants would be ineligible for verification.

It was only through 1985 Bill C-31 *Indian Act* amendments that Canada recognized First Nations' bands ability to control membership. Before then, Indian registration subsumed both status and membership (with the exception of the General List). During the time that Bill C-31 was being debated, it became clear that the amendments would cause a large increase in the number of status Indians. Many *Indian Act* bands became concerned about the impact this would have on their lands and resources (in some cases insufficient to even meet existing needs) and complained publicly. Canada's response was not to provide additional lands or moneys, but to amend the *Indian Act* to allow Bands the ability to adopt memberships codes.<sup>204</sup>

Next, as of 2017, 229 bands have assumed control over membership under the *Indian Act*, while another 38 control membership through self-government legislation outside the *Indian Act*.<sup>205</sup> This makes for a total 267 out more than 630 First Nations,<sup>206</sup> meaning that only 42% of First Nations have Membership Codes. In addition, only 34% of First Nations in the Atlantic Region have membership codes.<sup>207</sup> The following quote identifies several reasons why not more First Nations adopt membership codes:

[T]he ability of bands to assume control over their own membership does not extend to defining who is an "Indian" under the *Indian Act*, nor does it extend to "citizenship" within a broader Indigenous nation. As a matter of principle, the fact that Canada is only providing a partial power here is a disincentive to engagement. But there are also significant practical disincentives here as well, since a band who adopts membership rules that are more generous than the *Indian Act* rules (which continues to be the

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<sup>203</sup> *Mclvor v Canada*, 2007 BCSC 827 at para 83, citing a DIAND briefing note from 1981 stated there was only approximately 80 people registered on the General List. But RCAP vol 1, *supra* note # at 286 that suggests there was significant discretion exercised over the list: "In addition, a general list of Indians without band affiliations was kept in Ottawa. The registrar could add to or delete names from that list, under his own authority, or from band lists through application of status rules in the new act."

<sup>204</sup> *Indian Act*, RSC 1985, c I-5, s. 10.

<sup>205</sup> Indigenous Services Canada webpage, "[About band membership and how to transfer to or create a band](#)" (accessed 7 December 2023).

<sup>206</sup> Crown Indigenous Relations and Northern Affairs Canada webpage, "[Indians](#)" (accessed 7 December 2023).

<sup>207</sup> Based on consulting Indigenous Services Canada webpage, "[First Nation Profiles](#)" (accessed 7 December 2023). The breakdown is 5 out of 15 in New Brunswick; 2 out of 4 in the Gaspé; 2 out of 2 in Prince Edward Island; 4 out of 14 in Nova Scotia; and 0 out of 4 in Newfoundland and Labrador.

subject of several discrimination and *Charter* challenges) does not receive any additional funding from Canada to service those members.<sup>208</sup>

According to Clatworthy's 2007 research, only 13.7% of those bands with membership codes have registration provisions that are more generous than the *Indian Act* Status rules.<sup>209</sup> The rest have adopted membership codes that either adopt rules that are equivalent to the status rules or more stringent. Clatworthy identifies that 90 bands in Canada adopted membership rules more restrictive than the *Indian Act*.<sup>210</sup> Such rules have—and continue to be—the subject of discrimination complaints against First Nation governments, including based on gender, family status and sexual orientation.<sup>211</sup> There could also be barriers based on age since many membership codes do not permit youth to be registered until they reach the provincial age of majority.

To our knowledge, none of the Atlantic First Nations have membership codes that permit Non-Status Indians to be members. Thus, the large and growing numbers of prospective students, faculty and staff who are Non-Status First Nations (NB 35%; NS 43%; PEI 43%; and NL 33%) and primarily of Mi'kmaq and Wolastoqey descent from the region could not be verified according to the Report. This is deeply concerning.

A more expansive approach, in line with the UN Declaration, would be to adopt the approach taken in the 2020 *Caring Society* case, discussed earlier. There, the Tribunal held that, beyond membership codes authorized by the federal government, children residing on or off reserve who were recognized by a First Nations group, community or people as belonging to that

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<sup>208</sup> Naiomi Metallic, "Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's Aboriginal Nation Recognition and Government Act" in Karen Drake & Brenda L. Gunn, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Center, 2019) at 262; Morelato, *supra* note 119; Damien Lee and Kahente Horn-Miller, "Between Membership & Belonging: Life Under Section 10 of the *Indian Act*" YellowHead Institution Special Report, November 2022, [online](#); "Exploring Section 10" website, *supra* note 107; RCAP vol 1, *supra* note 130 at 279-280.

<sup>209</sup> Stewart Clatworthy, "The Changing Demography of First Nations Populations" (April 2007), with 12.5% having Membership Codes with an unlimited one-parent rule, and another 1.2% with a 25% blood quantum rule.

<sup>210</sup> Stewart Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities", Chapter 5 in "Volume 5: Moving Forward, Making a Difference" in the *Aboriginal Policy Series*, Thompson Education Publishing Inc., 2013 at 6.

<sup>211</sup> See, for example, *Six Nations of the Grand River Band Council v. Henderson*, [1997] 1 CNLR 202 (Ont Ct J (Gen Div)) (justified violation of *Charter*); *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 FC 513 (unjustified violation of *Charter*); *Grismer v. Squamish Indian Band*, 2006 FC 1088 (justified violation of *Charter*); *Raphael v. Montagnais du Lac Saint-Jean Council*, 1995 2748 (CHRT) (unjustified discrimination); *Jacobs v. Mohawk Council of Kahnawake*, 1998 3994 (CHRT) (unjustified discrimination); *Miller c. Mohawk Council Of Kahnawà:ke*, 2018 QCCS 1784 (unjustified discrimination of *Charter*). See also Damien Lee and Geraldine King, "Spirit Family-Making and the Future of Belonging" YellowHead Institute Policy Brief (4 March 2020) [online](#); Lee and King, *supra* note 208.

group, community or people in accordance with the customs or traditions of that First Nations group, community or people were eligible for Jordan's Principle services from Canada.<sup>212</sup> This was so whether or not the child was Status Indian or Non-Status Indian, on or off reserve. The Tribunal affirmed this approach was consistent with the right to self-determination found in the UN Declaration.<sup>213</sup>

Effectively, the Tribunal endorses a flexible and generous approach to acceptance and adoption of individuals into groups, communities and nations through Indigenous law—the customs, traditions, protocols, and legal principles and values of Indigenous peoples.<sup>214</sup> This goes beyond state authorized Membership Codes and negotiated citizenship processes in self-government agreements. There are some provinces where custom adoptions are recognized through state processes.<sup>215</sup> However, to insist on state-approved Indigenous laws only continues colonial violence by failing to recognize Indigenous laws *as laws* in their own right. This means accepting that Indigenous laws can take forms beyond formal, written laws, passed by the centralized governments like a First Nation band council. Indigenous law can also be more informal and exist in the practices of families, clans and other bodies within Indigenous societies.<sup>216</sup>

The Report recommends caution in the treatment of oral and written evidence of Indigenous customs noting that “Indigenous peoples, especially Elders, have been exploited to support fraudulent claims to Indianness in the past.”<sup>217</sup> It notes “such evidence must be tested and considered among all evidence provided to support a claim.”<sup>218</sup> Treatment of Indigenous law with suspicion and relegating it to playing more of a corroborative role rather than having its own force is problematic. There is a long history in Canadian law of Indigenous laws being ignored, denied or treated as a lesser form of law.<sup>219</sup> This is inconsistent with the UN

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<sup>212</sup> 2020 CHRT 20 *supra* note 194 at paras 123ff. “Customs and traditions” is also more commonly referred to Indigenous law of late.

<sup>213</sup> *Ibid* at paras 136-157.

<sup>214</sup> See the resurgence of Indigenous law in Canada, see generally: John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), Chapter 2, “Sources and Scope of Indigenous Legal Traditions”; Hadley Friedland and Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions.” (2015) 1(1) *Lakehead LJ* 33; Val Napoleon and Hadley Friedland, “An Inside Job: Engaging With Indigenous Legal Traditions Through Stories” (2016) 61 *McGill LJ* 725.

<sup>215</sup> See Celeste Cuthbertson, “Statutory Recognition of Indigenous Custom Adoption: Its Role in Strengthening Self-Governance Over Child Welfare” (2019) 28 *Dal J Leg Stud* 1.

<sup>216</sup> Borrows, *Canada's Indigenous Constitution*, *supra* note 214 at 178–179; see also Lee, “Adoption Constitutionalism” *supra* note 106.

<sup>217</sup> Report, *supra* note 1 at 14.

<sup>218</sup> *Ibid*.

<sup>219</sup> See Borrows, *Canada's Indigenous Constitution*, *supra* note 214, Chapter 1.



Declaration which emphasizes Indigenous peoples right to make decisions based on their traditions and customs in various articles.<sup>220</sup>

Many nations have not established entities (such as tribal courts) to assess claims brought forward under Indigenous law. On the one hand, the Report directs the University not to “determine Indigenous identity, citizenship or membership,”<sup>221</sup> yet empowers the Standing Committee, on behalf of the University, to “disrupt false claims to Indigenous identity, membership, and citizenship.”<sup>222</sup> We cannot comprehend how these two directives are consistent. If the Standing Committee has investigatory powers, weighs evidence, qualifies Elders giving evidence (to avoid exploitation of Elders), and makes findings of fraud, the Standing Committee becomes a de facto quasi judicial body to arbitrate Indigenous identity law. This would constitute a significant intrusion into the internal governance of Indigenous nations, and is an incredible assumption of power for a Standing Committee which operates within a colonial institution. This is especially so considering that the Report proposes that the Standing Committee have only “two external members who hold membership or citizenship with a recognized Indigenous Peoples”<sup>223</sup> and is not accountable to the Indigenous nations.<sup>224</sup>

Rather than usurping the role of Indigenous communities and nations in making determinations on membership and Indigenous law, we propose instead that the University consider Indigenous law, along with Canadian constitutional law and domestic and international human rights law, in prioritizing eligibility for designated seats and positions. (We elaborate on the distinctions between what we propose and the Report’s verification process in our final section.) Today, there are Elders, Knowledge Keepers and a growing body of scholarship by Indigenous law scholars that can be engaged with to assist in understanding and recognizing exercises of Indigenous laws, and to elevate those laws.<sup>225</sup> These will be helpful resources in ensuring that Indigenous law is accorded equal weight in questions of Indigenous identity.

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<sup>220</sup> Brenda Gunn identifies how many of the rights articulated in the UN Declaration specifically mention the role of Indigenous laws: “Many of the rights articulated in the UN Declaration specifically mention the role of Indigenous legal orders and constitutions. For example, Indigenous peoples’ customs, laws and traditions are referenced in relation to identifying and providing redress for violation of cultural rights [article 11], land rights [article 26(3)], and membership [article 33].” Gunn also underscores how Indigenous peoples laws ought to inform Indigenous peoples’ positions in all areas of consultation, cooperation and decision-making recognized in the Declaration. See Brenda Gunn, “The Federal court Aboriginal Bar Liaison Committee as a Mode of Reconciliation: Weaving Together Indigenous Law, Common Law, and International Human Rights Law,” in *Renewing Relationships*, *supra* note 208 at 318-319.

<sup>221</sup> *Ibid* at 13.

<sup>222</sup> *Ibid* at 15.

<sup>223</sup> *Ibid* at 15.

<sup>224</sup> *Ibid* at 16.

<sup>225</sup> See Michael Coyle, “Indigenous Legal Orders in Canada - a literature review (updated to August 2022)” (2022) [online](#).

However, they will not always achieve absolute certainty, which we feel is both an unachievable and dangerous goal to pursue when it comes to the exceedingly complex issue of Indigenous identity. Those who are outsiders to a group may disagree with, and second-guess the group's decision, based on their own ideas of who is or should be Indigenous. But this should be avoided as a form of ethnocentrism. Processes to ensure meaningful respect and defer to Indigenous laws can be developed.

### *7) Harsh exclusion of those who have lost connection to communities*

The Report recognizes that there will be Non-Status people who are unable to gain membership in their home communities due to being disconnected through forms of colonial violence including “the Sixties Scoop, Millennial, Scoop, Indian Residential Schools, Indian Day Schools, incarceration, and enfranchisement.”<sup>226</sup> The Report offers no mitigating measure to address their exclusion from the verification process, except to suggest that the University could encourage these people to investigate whether their nation has membership/citizenship rules.<sup>227</sup> Ultimately, the Report expresses wariness in accepting this category of persons because “[t]hose making false claims have been known to exploit these historical realities to support their otherwise unsubstantiated claims.”<sup>228</sup>

As noted earlier, in *Daniels v Canada*, the Supreme Court of Canada held that the federal government could still have obligations to an Indigenous person under s 91(24) of the *Constitution Act, 1867*, even if the person was not a rights holder under section 35 due to their being disconnected from their community on account of colonial policies like Residential Schools.<sup>229</sup> Otherwise, the objectives the state pursued with such policies—assimilation and the cultural genocide of Indigenous peoples—ultimately succeed. The Report, by excluding disconnected individuals unless they have been accepted by the communities under state-sanctioned membership and citizenship rules, unwittingly endorses this result. This is neither decolonization nor reconciliation. Article 8 of the UN Declaration states that “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture” and the right to effective redress for such harms.<sup>230</sup>

It should also be noted that if the Report is fully implemented, the University risks being a party to the ongoing sense of alienation and disconnect felt by those who have been subjected to colonial policies; responsibility for which the government is most likely to disavow. Canada

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<sup>226</sup> Report, *supra* note 1 at 11.

<sup>227</sup> *Ibid* at 12,16.

<sup>228</sup> *Ibid* at 11.

<sup>229</sup> *Daniels*, *supra* note 110 at para 49.

<sup>230</sup> UN Declaration *supra* note 115 at art 8.

made the following argument, with respect to the communication filed by Sharon McIvor and Jacob Grismer at the United Nations Human Rights Committee regarding the actions of non-governmental actors:

Canada submits, on the evidence of the authors, that the impacts on their social and cultural relationships that the authors perceive or in fact suffer because of the provisions under which they are eligible for status (under the 1985 and 2011 eligibility criteria) should be attributed to the author's family and larger social and cultural communities and not to the State.<sup>231</sup>

The University should therefore tread carefully when implementing a policy that has the potential to cause harm to non-rights holders or Indigenous people who have been disconnected from their communities and are no longer rights holders.

Excluding individuals who lack community connections due to colonial policies is also contrary to domestic human rights standards. The analysis of the Canadian Human Rights Tribunal in the *Caring Society v Canada* case, discussed earlier, confirms this.<sup>232</sup> The Tribunal affirmed that

First Nations children who have lost their connection to their communities, or who may not even know to which community they belong, due to the operation of colonial or discriminatory policies such as Indian Residential Schools, the Sixties Scoop, or the discrimination within the FNCFS Program should not be excluded from Jordan's Principle's reach. Indeed, given the inter-generational trauma of such experiences, these individuals risk facing disadvantage on the basis of their "race and/or national or ethnic origin" that non-Indigenous Canadians do not face.<sup>233</sup>

While the Tribunal did not specifically address the situations of persons who were disconnected due to other colonial policies, it highlighted other decisions that underscore disconnection in other areas:

The Supreme Court of Canada also considered this historic disadvantage in the context of First Nations adults without *Indian Act* status in the criminal justice system in *R. v. Gladue* and *R. v. Ipeelee*. The Supreme Court of Canada supported the inference that, as

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<sup>231</sup> *Supra*, note 147 at 83.

<sup>232</sup> 2020 CHRT 20 *supra* note 194, see especially para 294ff. This part of the decision was advisory since the *Caring Society* had not clearly made this group part of the original claim. Nonetheless, the Tribunal's did a fulsome analysis based on the evidence before it and reasoning is persuasive and aligns with the Supreme Court's decision in *Daniels*.

<sup>233</sup> *Ibid* at para 371 [emphasis added].

compared to Canada's settler population, First Nations persons without *Indian Act* status also have greater needs.<sup>234</sup>

To this we would add the Supreme Court of Canada's decision in *Corbiere v. Canada*, where the Supreme Court recognized how the *Indian Act's* 'marrying out' and other enfranchisement rules had the effect of disconnecting First Nations people from their home community.<sup>235</sup>

It is worth underscoring that these various colonial policies have resulted in two findings of genocide,<sup>236</sup> and impacted thousands upon thousands of Indigenous peoples over decades:

- Over 150,000 people attended residential schools.<sup>237</sup>
- Between approximately 1951 and 1984 (the Sixties Scoop era), an estimated 20,000 or more First Nations, Métis and Inuit infants and children were taken from their families by child welfare authorities and placed for adoption in mostly non-Indigenous households.<sup>238</sup>
- While not able to find exact numbers on those affected by the Millennial Scoop (1985 to the present), the numbers are staggering, representing thousands of Indigenous children, on and off reserve, annually taken from their homes, families and communities. In 2003, it was estimated that there were three times the number of Indigenous children in care than there were at the height of residential school operations.<sup>239</sup> Statistics on the number of days Status First Nations children spent in care out of home, for 2011 alone, was 3,192,290 days.<sup>240</sup>
- About 25,000 Status Indian Women lost their status from the 'marrying out' rule,<sup>241</sup> and while they and their children were reinstated (more than 114,000<sup>242</sup>), most could not or

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<sup>234</sup> Ibid at para 309.

<sup>235</sup> *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203

<sup>236</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future-Summary of the Final Report of Truth and Reconciliation Commission of Canada* (2015) [TRC Summary Report] at 1; *Reclaiming Power and Place – The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls – Supplementary Report, "A Legal Analysis of Genocide"* [online](#).

<sup>237</sup> <https://nctr.ca/education/teaching-resources/residential-school-history/>

<sup>238</sup> University of British Columbia, Indian and Residential School History and Dialogue Center website, "[The Sixties Scoop](#)"

<sup>239</sup> 2016 CHRT 2, *supra* note 125 at para 161.

<sup>240</sup> Canadian Child Welfare Research Portal, "Long-term trends in Out of Home Care for On-Reserve First Nations Children" [online](#) at 4.

<sup>241</sup> Bonita Lawrence "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 182 *Hypatia* 9.

<sup>242</sup> Canadian Encyclopedia, "Bill C-31" (12 May, 2020) [online](#).

did not return to live on reserve, creating the significant off-reserve First Nations population.<sup>243</sup>

- Both Indigenous men and women have been overrepresented in the criminal justice system for decades. This precipitated MacLean's Magazine calling Canada's prisons "the new residential schools."<sup>244</sup>
- Nearly 200,000 individuals submitted compensation for attending Indian Day Schools to date and the claims process is ongoing.<sup>245</sup>

This has, in turn, affected their descendants, including in their sense of identity, whether they are officially recognized in their Indigeneity, their connection to community, language and cultural retention and much more. Dalhousie should not privilege those Indigenous people who have been fortunate to retain their Indian Status or other forms of official recognition, regain it, or maintain their connections to community when the state has invested tremendous efforts to take these things away. Unfortunately, the Report's verification process in the Report inadvertently does just this. It reinforces the forced assimilation and dislocation due to colonialism.

The Report appears to resist any recognition of this group because some of their claims cannot be proven with absolute certainty. This is true. Losing connection due to colonial violence will sometimes include the person not knowing one's specific nation with certainty (possibly due to loss or destruction of documentary records), or knowing one's nation but not being able to reconnect for any number of reasons (geography, poverty, capacity on either the individual's or nation's side, trauma, not eligible for Indian Status and community does not have its membership rules, etc). However, we are firmly of the view that tolerating some level of uncertainty is a far better alternative to summarily denying the identity of all these people.

Moreover, it is possible, when necessary to do so for designated seats and positions, to make inquiries of the individual to assess whether their claims to Indigeneity and losing connection are credible. In *Caring Society v Canada*, the Tribunal endorsed a "case-by-case" approach for determining the needs and specific situation of Non-Status children<sup>246</sup> and said this was consistent with the Supreme Court's suggested approach in *Daniels*:

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<sup>243</sup> *Corbiere supra* note 235 at para 81.

<sup>244</sup> Nancy Macdonald, "Canada's prisons are the 'new residential schools' - A months-long investigation reveals that at every step, Canada's justice system is set against Indigenous people" *MacLean's Magazine* (18 February 2016) [online](#).

<sup>245</sup> Deloitte website, "Indian Day Schools Class Action Claims Administration," (last accessed on 11 December 2023) [online](#).

<sup>246</sup> 2020 CHRT 20, *supra* note 194 at para 306.

The Court acknowledged that there is no consensus on who is considered Métis or non-status Indian, but did not believe this was a bar to issuing the declaration. The Court declined to establish definitional criteria for Métis and non-status Indians, stating broadly instead that “Determining whether particular individuals or communities are non-status Indians or Métis and therefore “Indians” under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future...” (*Daniels* at para. 47).<sup>247</sup>

We end by noting that in 2021, the University took an important step to recognize the challenges faced by those who have experienced the child welfare system by introducing a tuition waiver for students who have been in state care.<sup>248</sup> The news release on this initiative recognizes that it is aimed at groups that have been over-represented in Nova Scotia’s child welfare system, “includ[ing] Indigenous students (especially Mi’kmaq).”<sup>249</sup> It is ironic that, once the Report’s verification criteria are in place, some prospective Indigenous students will be eligible for the tuition waiver, but won’t be able to call themselves Indigenous, avail themselves of resources designed to ameliorate Indigenous-specific barriers, or explore and be who they are at Dalhousie. How this aligns the University’s oft-cited objective of fostering ‘belonging’ is beyond us.

#### *8) Underinclusive approach to a ‘recognized Indigenous People’*

As discussed above, the main approach proposed in the Report is to prioritize those groups who have received federal recognition as *Indian Act* bands or under a modern treaty. However, the verification criteria does have a fall-back question: “Has the applicant claimed membership or citizenship with a recognized Indigenous People?”<sup>250</sup> Presumably this recognizes an alternative form of recognition of an Indigenous People than the *Indian Act* and a modern treaty. But it is vague: recognized by whom? The courts? International bodies? Other Indigenous Peoples?

Very little guidance is provided on the meaning of ‘recognized Indigenous People’ in the Report except the following statement:

Where a collective claims the right to determine Indigenous identity, citizenship, or membership, but there is insufficient evidence to demonstrate that they hold a mandate or authority to do so on behalf of the respective Indigenous nation, Dalhousie

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<sup>247</sup> *Ibid* at para 302 [emphasis added].

<sup>248</sup> Dal News, “Dal launches new tuition waiver program for former youth in care” (5 August 2021), [online](#).

<sup>249</sup> *Ibid*.

<sup>250</sup> Report, *supra* note 1 at 19.

University must not confer such a mandate or authority by recognizing any individual as Indigenous if their claim is based solely on their recognition by such a collective.<sup>251</sup>

This passage suggests that the alternative form of recognition is other Indigenous People, specifically the larger nation of which a small collective might form part. But there are several challenges with this approach. First, practically speaking, and on account of cleavages created by colonialism (displacement, division of nations into *Indian Act* bands, provincial and national borders, etc.) who represents each Nation/People is not clear-cut. In 1996, the Royal Commission on Aboriginal Peoples (RCAP) suggested that in moving to greater self-governance, Indigenous Peoples should cease operating in small groupings, and instead re-organize themselves as Nations. RCAP even proposed a legislative framework to achieve this. However, RCAP's proposal has never been acted on.<sup>252</sup> The reality today is that small Indigenous groups can and do assert self-determination and exercise self-government (including negotiating modern treaties), alone or in larger groupings. Those groupings, however, may not represent all those who might be considered part of the nation. Larger groups tend to be divided along provincial or treaty boundaries. We certainly see this in the Atlantic region with five rights-implementation organizations representing the Mi'kmaq. There are also questions of who speaks for the nation: is it only those with Indian Status or other form of federal recognition? Unfortunately, due to colonialism, at this point in our history, who is and who represents "the Nation" or "the People" is not at all clear.

While recognition by other Indigenous groups, including a group purporting to represent the larger nation, can be important evidence that a collective *is* Indigenous, we must also be alive to the fact that colonialism has often resulted in Indigenous groups feeling pitted against each other in fights over limited funding, land and other resources. One group may contest the claims of another group, less because they have valid evidence to question the actual Indigeneity of the group, but because they feel their own position, land-base or resources would be threatened by recognition of the other group. Care must be taken to engage experts who are able to apply an appropriate cultural lens to the unique history of the group, to peel away political strife and colonial mythology, to contextualize the claims of Indigeneity.

Beyond recognition by other Indigenous groups, there are other legitimate forms of recognition the Report overlooks. One of these is the courts. As noted earlier, Canadian courts have developed legal tests for identifying Aboriginal rights holders when other official forms of state recognition are absent in cases of Métis and Non-Status peoples seeking to exercise section 35

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<sup>251</sup> *Ibid* at 14 [emphasis added].

<sup>252</sup> Metallic, *supra* note 208.

rights.<sup>253</sup> While elements of the *Powley* test, and how courts apply it in certain situations, has been subject to scholarly critique,<sup>254</sup> the test is, nonetheless, an important framework for weighing relevant evidence for the existence of a modern Indigenous community linked to a historic Indigenous community, and whether a person is accepted as a member of that community. A legal finding by a court that a group has met this test is a strong confirmation they are Indigenous. Likewise, a finding that a purported group has not met this test is a strong repudiation of the group's claim to being Indigenous. Such has been the case with claims for Métis identity in Quebec, New Brunswick and Nova Scotia, where courts have failed to find credible evidence of historic rights-bearing Métis communities.<sup>255</sup>

There are additional forms of recognition that ought to be considered, short of a court ruling and formal state recognition, that are indicative of there having been a favourable assessment of evidence of a group's Indigenous identity. This can include reports by experts prepared for human rights (as was the case with the Innu and Mi'kmaq in Newfoundland and Labrador<sup>256</sup>), recognition by international bodies, evidence of the group being targeted by assimilative policies such as residential schools, evidence of historical treaties (oral or written) with colonial governments, and modern governments entering negotiations with a Indigenous group towards a land claim or self-government agreement. Regarding this last category, it can be assumed that governments in Canada do not entertain such negotiations unless there is credible evidence to back up the group's claim to Indigeneity.

We propose that all of these indicators of a 'recognized Indigenous People' should be used in assessing whether a group without federal recognition as *Indian Act* bands or under a modern treaty is Indigenous, applying care in the treatment of some of these indicia, such as recognition by other Indigenous people (or lack thereof).

#### a) Unsupported exclusion of NunatuKavut

This brings us to the Report's treatment of members of the NunatuKavut Community Council (NCC), representing a collective of communities in South and Central Labrador that assert Inuit

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<sup>253</sup> See *Powley supra* note 112.

<sup>254</sup> See, for example, Karen Drake, "A Right Without a Rights-Holder Is Hollow: Introduction to OHLJ's Special Issue on Identifying Rights-Bearing Aboriginal Peoples," (2022) 57:1, Osgoode Hall LJ iii; Paul Chartrand, "Rethinking the Doctrine of Aboriginal Rights; The Métis Cases" (2021) 57:1 Osgoode Hall LJ 173; Naomi Metallic, 'Superchief' and Other Fictional Indians: Case Comment on *R v Bernard*, 2017 NBCA 48" (2020) 57:1 OHLJ 230.

<sup>255</sup> See, for example, *Corneau c Procureure générale du Québec*, 2018 QCCA 1172; *R v Castonguay*, 2003 NBPC 16; *R v Chiasson*, 2004 NBQB 80; *Vautour et al. v R.*, 2017 NBCA 21; *R v Babin*, 2013 NSSC 434; *R v Hatfield*, 2015 NSSC 77.

<sup>256</sup> Grammond, "Equally Recognized?" *supra* note 129 at 20-21, 23-26.



identity.<sup>257</sup> While the Report does not specifically list any groups for whom the claim Indigenous identity is outright rejected, we are aware that members of NCC have been informed that they do not meet the verification criteria. According to our sources, the reasoning provided includes that NCC's Memorandum of Understanding (MOU) to enter land claim negotiations with the federal government is not seen as sufficient proof of NCC being beneficiaries of s 35 Aboriginal rights especially amid objections to NCC's assertions by other Indigenous groups in Labrador. It is extremely concerning that predetermined decisions regarding NCC have been communicated, given that the Report has yet to be fully implemented. This raises considerable procedural fairness questions.

Without explaining what reliance it places on it, the Report cites a report prepared by a non-Indigenous former academic turned consultant, notorious for authoring reports outing purported 'pre-tendians' regardless of which nation they come from or his own knowledge of those nations, Darryl Leroux.<sup>258</sup> The report, "Examining the NunatuKavut Community Council's Land Claim" was prepared for the Nunatsiavut Government in 2021<sup>259</sup> and seeks to discredit NCC's claims to Aboriginal title to parts of Labrador, primarily by comparing language used in NCC's Statement of Claim document submitted to Canada and the province and pointing out perceived inconsistencies as it related to territoriality. It is not a report about the genealogy of members of NCC and Leroux recognizes that "[t]here's no doubt that some of the NCC's membership has Inuit ancestry...".<sup>260</sup>

The Task Force Report also cites a well-sourced and detailed rebuttal report to Leroux' paper, prepared by NCC member and Dalhousie professor, Dr. Debbie Martin, entitled, "We Have Always Been Here," but does not indicate that weight or implications they draw from it.<sup>261</sup> However, based on the position taken by the University and Task Force members regarding NCC related above, it would appear that it was Leroux' report that carried favour. Based on our discussion above regarding the relevant indicators of a 'recognized Indigenous People,' this position is unreasonable.

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<sup>257</sup> See <https://nunatukavut.ca>.

<sup>258</sup> Report, *supra* note 1 at 22.

<sup>259</sup> Darryl Leroux, "Examining the NunatuKavut Community Council's Land Claim" prepared for the Nunatsiavut Government (2021).

<sup>260</sup> *Ibid* at 17, though he proceeds to undercut this claim stating, "though without access to their membership records it's impossible to verify to what extent," when he was not purporting to undertake a genealogical analysis or sought information from the NCC in this regard.

<sup>261</sup> Report, *supra* note 1 at 22; Debbie Martin, "We Have Always Been Here - Rebuttal to the 2021 Nunatsiavut Government report entitled "Examining the NunatuKavut Community Council's Land Claim" (10 May 2022).

Most significantly, this position entirely ignores that the members NCC have been found to be beneficiaries of s 35 Aboriginal rights by the highest court in Newfoundland and Labrador. In a 2006 decision about whether the provincial government had a section 35 duty to consult with NCC over a proposed highway expansion that threatened to affect NCC members fishing rights, the NL Supreme Court Trial Division found NunatuKavut had a credible assertion to s 35 Aboriginal rights.<sup>262</sup> (At this time, NCC was going under the name the 'Labrador Metis Nation' - see above our comments about why some groups felt compelled to use 'Metis' in the past. However, in the case, it asserted section 35 rights on the basis of either being Métis or Inuit.) The Court's conclusion in this regard was based on the explicit recognition of the group in the 1991 RCAP report, the Supreme Court recognition of the NCC in *Powley*, and a review of archaeology and anthropological evidence put forward by NCC that support a historic rights-bearing communities with manifestations as several modern day communities.<sup>263</sup> The judge conclude his review of the evidence as follows:

[49] Whatever the date of full occupation by the Inuit it is the conclusion of this court that there is a very high probability that the Inuit people emerged along the southern coast of Labrador prior to and continuous with the gradual appearance and introduction of the Europeans for at least two hundred years before effective control by the British. Admittedly there does not appear to be a great wave of migration of the Inuit people from north to south. There would have been no major reason for a mass exodus of northern Inuit to the south. It was simply a natural migration. However it can equally be said that during that period neither were the numbers of European fishermen sufficient to gain effective control over the region. The history of that coast at that time recounts numerous aggressive encounters with the Inuit (as well as harmonious encounters) in which the Europeans did not always come out unscathed, and it was well into the mid-1700's before sufficient force was brought to bear on the southern coast of Labrador to accept that European control had begun. During that interval it is highly likely that the seeds of many European fishermen had been implanted into the Inuit culture as happened in all circumstances in Canada where Europeans first encountered the native peoples. I am satisfied therefore on the evidence that there is a high degree of probability that early control between the Europeans and Inuit people resulted in a mixing of the two cultures which continued over the period of British control and which is now manifest in the present day people of southern Labrador who call themselves Metis. These are the Labrador Metis referred to in the Royal Commission on Aboriginal Peoples and the same people referred to by the Supreme Court of Canada in the *Powley* case (supra). In present day Labrador there are two distinct first nations people, the

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<sup>262</sup> *The Labrador Metis Nation v. Her Majesty in Right of Newfoundland and Labrador*, 2006 NLTD 119.

<sup>263</sup> *Ibid* at paras 7-54.

Inuit, and the Innu. As well, there are people of European descent who have no Inuit or Innu ancestry. Then, there are those people who have both Inuit and European ancestry. There are also to a lesser degree people of mixed European and Innu ancestry. The Labrador Metis people of mixed Inuit and European descent represent the people who now call themselves the Labrador Metis Nation (LMN).<sup>264</sup>

The finding that NCC members have a credible assertion of being section 35 Aboriginal rights holders was upheld on appeal to the NL Court of Appeal in 2007 and the province's bid to appeal the decision to the Supreme Court of Canada was dismissed with costs.<sup>265</sup> On appeal, the Court of Appeal agreed with NCC they did not need to definitely identify as Métis or Inuit before the Crown consulted with them, and it was in error for the trial judge to slot them into the Métis category only:

[37] Whether the present day LMN communities are the result of an ethnogenesis of a new culture of aboriginal peoples, that arose between the period of contact with Europeans and the date of the effective imposition of European control, is not yet established, although it is possible that such an ethnogenesis occurred. If so, the members of the LMN communities could be, in law, constitutional Métis.

[38] However, it is also possible that the LMN communities are simply the present-day manifestation of the historic Inuit communities of south and central Labrador that were present in the area prior to contact with the Europeans. ...

[39] The LMN communities have not refused to self-identify with a specific constitutional definition but they reasonably say they are unable, at the present time, to do so definitively. This position may change as further historical, archeological, anthropological and other information is obtained and as the law provides further guidance on these complex issues. In any event, definitive and final self-identification with a specific aboriginal people is not needed in the present circumstances before the Crown's obligation to consult arises. All the respondents had to do was establish, as they did, certain essential facts sufficient to show a credible claim to aboriginal rights based on either Inuit or Métis ancestry. The situation might be different if the right adversely affected only flowed from one of the Inuit or Métis cultures. But that is not

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<sup>264</sup> *Ibid* at para 49.

<sup>265</sup> *Newfoundland and Labrador v. Labrador Métis Nation*, 2007 NLCA 75 at paras 43-45; *Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Environment and Conservation and the Minister of Transportation and Works v. Labrador Métis Nation, a body corporate under the laws of the Province of Newfoundland and Labrador and Carter Russell, of Happy Valley Goose Bay, Labrador*, 2008 CanLII 32711 (SCC)

the case. Here fishing rights are in issue. Those rights are not dependent upon whether the claim is Inuit or Métis- based. Fishing rights flow from both types of claims. The applications judge did not need to determine the issue of ethnicity.

Since these decisions, there have been at least five further cases where NCC members have brought duty to consult claims or challenges to injunctions and their status as an Indigenous group has been taken for granted.<sup>266</sup> NCC has also sought leave and was accepted to appear before the Supreme Court of Canada as an intervener in high-profile section 35 rights cases as an Indigenous group.<sup>267</sup>

There can be no question Canada's decision to enter a MOU with NCC was influenced by the numerous court decisions in NCC's favour finding it to be a s 35 rights-bearing group. In addition, over the years, NCC continues to produce research reports supportive of its claims as Indigenous peoples, including research regarding how its members were taken to Residential Schools and its having a history oral treaty with the Crown (1765).<sup>268</sup> The provincial government of Newfoundland and Labrador recently issued an apology to the NCC survivors of the Cartwright Residential school; the school was run by Newfoundland prior to confederation.<sup>269</sup> The NCC has also been recognized by the UN as an Indigenous People's Organization and has participated in and presented at the UN Permanent Forum on Indigenous Issues.<sup>270</sup>

As for opposition to the NCC's claim by the Innu of Labrador, the Inuit of Nunatsiavut, and their National Indigenous Advocacy Organization, Inuit Tapiriit Kanatami, this must be assessed with a contextual lens. Newfoundland and Labrador's history of colonialism is unique compared to other parts of the country, specifically in how, following the province's entry into Confederation, the official policy was to deny the existence of Indigenous people in the province.<sup>271</sup> This history of erasure results in its own peculiar impacts on the public and the different Indigenous peoples in the province, and their relationship with each other. It has and

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<sup>266</sup> *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46; *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981; *Nunatukavut Community Council Inc. v. Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)*, 2011 NLTD 44; *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2012 CanLII 73234 (NL SC); and *Nalcor Energy v. Nunatukavut Community Council Inc.*, 2012 CanLII 61265 (NL SC).

<sup>267</sup> *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani Utenam)*, 2020 SCC 4 (CanLII), [2020] 1 SCR 15; *Attorney General of Québec, et al. v. Attorney General of Canada, et al.*, SCC Ref No 40061 (Heard December 7-8, 2022).

<sup>268</sup> *The British-Inuit Treaty of 1764-1765*, (NunatuKavut Our Land) 2022 (anonymous). See [British-Inuit Treaty Of 1765 | Nunatukavut](#)

<sup>269</sup> Smellie, Sarah. "We are Sorry: Newfoundland and Labrador makes first apology for Residential Schools" Canadian Press. 29 September 2023. Online.

<sup>270</sup> NCC website, "NunatuKavut delegation participates in the United Nations Permanent Forum on Indigenous Issues" (19 April 2023) [online](#).

<sup>271</sup> For an excellent account of this, see Grammond, "Equally Recognized?" *supra* note 129.

continues to breed political disputes between different Indigenous groups in the province. Unlike the opposition we see in Mi'kma'ki to claims of Metis-identity groups (which have yet to be successful in the courts), opposition to NCC by other Indigenous groups in the face of credible indicators of NCC's Indigeneity speaks to political disputes between the groups, especially in light of province's history.

In light of the above, Dalhousie cannot, in good conscience, deny that members of the NCC are Indigenous peoples.

#### b) Inadvertent exclusion of the Peskotomuhkati Nation at Skutik

Although giving attention to the Peskotomuhkati nation in general, the Report does not acknowledge the fact that, as noted above, that there is a group of unrecognized Peskotomuhkati living at the St. Croix River and Passamaquoddy Bay in what is now New Brunswick, who continue to fight for recognition by the Canadian government for decades upon decades.<sup>272</sup> Although they have yet to receive official recognition, the Peskotomuhkati are now in comprehensive claim negotiations with Canada since 2016.<sup>273</sup> Their website also speaks to their historic treaty relationship with the Crown.<sup>274</sup>

While not specifically considering the Peskotomuhkati Nation at Skutik, it would seem the group would not pass the Report's verification criteria since their nation has yet to receive formal recognition by Canada (despite being in negotiations on this). Rather, for their members to be verified, they would require a letter from a US tribal authority if allowed by the parameters of American law.<sup>275</sup> This would require Canadian Peskotomuhkati to get an authorization letter from a US Perkotomuhkati tribal group; which may present a barrier that other Canadian Indigenous people do not face and runs counter to self-determination efforts.

Relying instead on the relevant indicators of a 'recognized Indigenous People' we outlined earlier, we believe the Peskotomuhkati Nation at Skutik possesses sufficient indicators of an 'Indigenous People' to be considered as such by Dalhousie. This includes the history of the group, their Treaty relationship with the Crown, as well as their current negotiations with Canada. This is a fairer outcome for our fellow Wabanaki-Confederacy members.

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<sup>272</sup> Peskotomuhkati Nation at Skutik website, [Peskotomuhkati Persistence](#).

<sup>273</sup> Peskotomuhkati Nation at Skutik website, [Peskotomuhkati Persistence](#).

<sup>274</sup> Peskotomuhkati Nation at Skutik website, [At the Root of the Relationship: the 1725 Treaty](#).

<sup>275</sup> Report, *supra* note 1 at 19. Some American Indian Tribes do not recognize Canadian Indians, so it cannot be said with certainty that this option is available.

## G. Dalhousie's potential legal and human rights liability

We believe the University faces significant legal exposure based on the problems with the Report and its verification process that we have outlined herein. We see potential grounds for liability in contract law based on the terms Dalhousie's collective agreements with different bargaining unit (we leave this for further analysis by others); tort law on the basis of intentional infliction of emotional distress (we undertake no analysis of this, but conceive it as possible ground given how denials based on the verification processes might affect already traumatized individuals); and administrative and constitutional law (breach of procedural fairness, denial of *Charter* rights (ss 2(d) rights to associate, s 7 life, liberty and security of the person, s 15 equality rights) and denial of s 35 Aboriginal rights) though we recognize the question of when a University is acting as government is a tricky one.<sup>276</sup>

We will therefore focus only on the obligations the University clearly has under Nova Scotia's *Human Rights Act*.<sup>277</sup> The *Act* prohibits discrimination on the ground of "ethnic, national or [A]boriginal origin" in the areas of provision of services (e.g., education), employment as well as membership in employees' organizations (such as the Indigenous Advisory Council).<sup>278</sup> Our analysis above has shown the definition of who is an Indigenous person or group under the verification process excludes a significant number of people with legally-supported claims to Indigeneity.

Applying underinclusive definitions of "Indigenous," "Aboriginal" or "Aboriginal residency" can constitute discrimination in the provisions of services, employment and other benefits. In *Corbière v. Canada*, the *Indian Act*'s total exclusion of off-reserve band members from voting in elections on-reserve was found to violate section 15(1) of the *Charter*.<sup>279</sup> Similarly, the *Indian Act*'s provision preventing off reserve members from running in on reserve elections was found to violate the *Charter* in *Esquega v. Canada*.<sup>280</sup> The exclusion of several Non-Status First Nation communities from a federal human resource development program targeted for Indigenous people was similarly deemed in violation of the *Charter* in *Misquadis v. Canada*.<sup>281</sup> In *Catholic Children's Aid Society of Hamilton v. H. (G.)*, the exclusion of Métis people from protections for First Nations children in child welfare legislation was found to violate the *Charter*.<sup>282</sup> In addition

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<sup>276</sup> See our comments at note 96.

<sup>277</sup> *Human Rights Act*, RSNS 1989, c 214.

<sup>278</sup> *Ibid* at 5(1)(a), (d), (g) and (q).

<sup>279</sup> *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

<sup>280</sup> *Esquega v. Canada (Attorney General)*, 2007 FC 878, aff'd 2008 FCA 182.

<sup>281</sup> *Ardoch Algonquin First Nation v. Canada (Attorney General)*, 2002 FCT 1058 (sub nom. *Misquadis v. Canada*) aff'd 2003 FCA 473.

<sup>282</sup> *Catholic Children's Aid Society of Hamilton v. H. (G.)*, 2016 ONSC 6287.

to this, there are the cases that have found the definition of “Indian” in the *Indian Act* to be discriminatory under the *Charter*, such as *Mclvor*, *Ghel*, and *Deschenaux*.<sup>283</sup>

Based on these cases, we believe that students, staff or faculty who self-identify as Indigenous will likely be able to establish that the verification criteria in the Report makes a distinction based on “[A]boriginal origin” under the *Human Rights Act* by being underinclusive. There is also a further argument for discrimination in that Indigenous people at the University are the only equity-seeking group that has to show more in order to have their identity accepted for purposes of employment. Self-identification remains the standard in the federal *Employment Equity Act* and federal contractors program.<sup>284</sup>

There are cases under section 15(1) of the *Charter* where the Supreme Court of Canada has found underinclusion to be non-discriminatory in certain situations.<sup>285</sup> The Court’s analytical approach to such situations has evolved over the years. Pursuant to the decisions in *R v Kapp* and *Cunningham v. Alberta*,<sup>286</sup> the question of whether an underinclusive program, law or policy is discriminatory focuses on section 15(2) of the *Charter* (which promotes affirmative action initiatives<sup>287</sup>) and whether the exclusion is ‘necessary’ to an ameliorative purpose and the program, law or policy seeks to benefit the advantaged group “in a general sense serves or advances the object of the program.”<sup>288</sup>

A more recent decision from the Supreme Court on section 15(2), *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, provides more clarity on when governments can rely on section 15(2) to shelter underinclusion from

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<sup>283</sup> *Mclvor*, *supra* note 142; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319; *Descheneaux*, *supra* note 143.

<sup>284</sup> *Employment Equity Act*, SC 1995, c 44, s 9(2).

<sup>285</sup> See *Lovelace v. Ontario*, 2000 SCC 37, where the exclusion of Métis and non-status groups from a project intended to provide casino revenues to First Nations groups was found not to be discriminatory because it was designed with the particular needs of First Nations groups in mind. See also *Alberta (Indigenous Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, where the exclusion of Status Indians from the *Metis Settlement Act* was found to be for an ameliorative purpose for Métis communities.

<sup>286</sup> *Cunningham ibid*; *R. v. Kapp*, 2008 SCC 41.

<sup>287</sup> Section 15(2) of the *Charter* states, “Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

<sup>288</sup> *Cunningham*, *supra* note 285 at para 41: “Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.”

scrutiny.<sup>289</sup> The case involved a challenge to changes to Quebec's *Pay Equity Act* that were alleged to discriminate against women. It was argued that because the overall purpose of the scheme was to ameliorate conditions for women, section 15(2) barred a more fulsome s. 15(1) analysis. The majority rejected this argument on the following basis:

[31] Section 15(2) protects ameliorative programs for disadvantaged groups from claims by those the program was not intended to benefit that the ameliorative program discriminates against them.

[32] In the case before us, on the other hand, the argument is that parts of an ameliorative scheme violate s. 15(1) because they have a discriminatory impact on women, the disadvantaged group the scheme was intended to benefit. Section 15(2) cannot bar s. 15(1) claims by the very group the legislation seeks to protect and there is no jurisprudential support for the view that it could do so.<sup>290</sup>

There is an affirmative action exception to discrimination at section 6(i) of the *Human Rights Act* and there is provincial precedent applying the *Kapp* and *Cunningham* analysis in the human rights context in *IAFF, Local 268 v. Adekayode*.<sup>291</sup> That being said, we doubt that Dalhousie could take advantage of it in the circumstances.

First, this would require showing that the program/service in issue is a genuinely ameliorative program with the purpose of improving the situation of a group that is in need of ameliorate assistance in order to enhance substantive equality.<sup>292</sup> If the verification process will be applied across the board to students, faculty and staff who self-identify as Indigenous, it strains logic to call access to general education programs or employment affirmative action. General access to education and employment are not directly related to enhancing substantive equality. The question may be different in the case of program seats or positions that are designated for Indigenous people, as this could be a form of ameliorative programming.

That said, for designated seats or positions we run into a similar situation as in *Quebec (Attorney General) v. Alliance* where the identity of those excluded from the ameliorative program is not readily distinguishable from those the program is intended for. Part of the group that is excluded (Indigenous people with legitimate legal claims to being Indigenous) is the same group the verification process is advanced to protect (Indigenous people with legitimate

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<sup>289</sup> *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Quebec v Alliance*].

<sup>290</sup> *Ibid* at paras 31-32.

<sup>291</sup> *IAFF, Local 268 v. Adekayode*, 2016 NSCA 6.

<sup>292</sup> *Ibid* at 118.



legal claims to being Indigenous).<sup>293</sup> Of course, the same cannot be said of those self-identifying people without legitimate claims to be Indigenous .

The above suggests that the proposed verification process applied broadly, and excluding Indigenous peoples with legitimate legal claims to being Indigenous, would be discriminatory. If the verification process were to focus only on ameliorative programs such as designated seats or position, and protected all Indigenous peoples with legitimate legal claims to Indigeneity from those that do not, it is possible it would be protected as an affirmative action initiative under the *Human Rights Act*.

Dalhousie could also raise a more general justification defense permitted under the *Human Rights Act*.<sup>294</sup> This takes slightly different forms depending on the type of discrimination in issue (employment versus service versus policy/law), but since the verification process is a more of a general policy change, this might fall to an ‘Oakes-like’ proportionality analysis based on a policy/law being a reasonable limit, which the *Human Rights Act* contemplates.<sup>295</sup> Generally, this requires weighing whether the policy is based on a pressing and substantial objective, the discriminating measure is rationally connected to it, it is minimally impairing and there is proportionality between the benefits of the policy and the discriminatory harms it will cause.<sup>296</sup> We did not have time to do an in-depth review of all current case law, but based on the leading jurisprudential principles, we see potential problems with each of the steps for the verification process. Failing on any one of these steps results in a finding of unjustified discrimination.

Pressing and substantial objective. The verification process is proposed to address settler misappropriation of Indigenous identity. This is in reaction to the current climate where we have seen high-profile cases of Indigenous identity frauds. Some might argue this is an overreaction akin to a “moral panic” and a “big cases make bad law” situation. Clearly, there are some who see this problem being at a crisis level, and the Task Force speaks about it as if

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<sup>293</sup> This would be informed by the stated [mandate of Dalhousie](#) to “achieve inclusive excellence through continually championing equity, diversity, inclusion, and accessibility” including building “reconciliation and continued work to build integrity in Dalhousie’s relationship with Canada’s First Peoples, especially the Mi’kmaq on whose lands we are privileged to share.”

<sup>294</sup> *Human Rights Act supra* note # at s 6(f)(i), (ia) and (ii).

<sup>295</sup> *Ibid* at s 6(f)(iii) which states that a denial, refusal or other form of justification can be “a reasonable limit prescribed by law as can be justified demonstrably justified in a free and democratic society,” which mirrors the language of s 1 of the *Charter*. We take for granted here that a university policy is “law” for the purposes of this analysis: see *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paras 58-66.

<sup>296</sup> *R. v. Oakes*, [1986] 1 SCR 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37. The fact that this analysis is carried out under a human rights legislation, and not the *Charter*, and to a University and not government, supports arguments for some variance in elements of the typical analysis, such as giving significant deference to governments in matters of public policy.

the problem were endemic at the University.<sup>297</sup> We question that and think that the perceived problem at the University (based on looking at applicants for the Health Pathways program<sup>298</sup>) may largely be as a result of conflating settler fraud with situations of persons self-identifying with only distant ancestry and cases of complex identity where the person has a legitimate legal claim to Indigenous identity. As we discussed above, the complex reasons an Indigenous person does not have access to the required documentation in the verification process are demonstrably endemic, documented and longstanding. These are distinctively different issues that require different solutions. However, deference is often shown to the respondent at this stage of the analysis. Objectives that are discriminatory on their face have been held to not be pressing and substantial.<sup>299</sup> In this regard, it may be an issue that the verification process' purpose is to eliminate the self-identification policy which results in direct discrimination by treating Indigenous people at Dalhousie differently than all other equity-seeking groups for whom self-identification will still continue to be the standard.

Rational connection. Arguably there is a rational connection between adopting a verification process to suss out and deny opportunities to those engaging in Indigenous identity fraud. But there is no rational connection to take punitive action against those who self-identify as Indigenous in good faith, whether they are Indigenous with distant ancestry or those with legitimate legal claims to Indigenous identity. There are severe problems of overreach in these situations. There is also potential overreach in that verification may be applied to all self-identified Indigenous people at Dalhousie, not just those who are seeking designated seats, positions, grants, etc.

Minimal impairment. It is clear from our analysis that the verification process will result in the exclusion of several categories of people with legitimate claims to Indigenous identity. There is some inclusion of forms of proof in the verification process that seek to mitigate the bluntness of an approach largely based on recognition through settler forms of recognition, for example, the Non-Status people gaining verification if they can show membership in a First Nation, and unrecognized collectivities gaining verification if recognized by the larger 'Nation.' But as we analyze above, such accommodations are woefully inadequate as they are practically nonexistent to most. The accommodations will not address the barriers and circumstances faced by those most impacted by discriminatory laws and policies. Something far more tailored to protect the human rights of those with legitimate Indigenous identity is needed.

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<sup>297</sup> Report, *supra* note 1 at 7-8.

<sup>298</sup> *Ibid* at 8.

<sup>299</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 142.

Overall proportionality. While some might see the problem of settler misappropriation of Indigenous identity as a serious problem, juxtaposed with the problems and harms that can arise when actions taken to deal with this are blunt and swift, and without accounting for the complex history of colonial harm to Indigenous identity, the problem is relatively small. What Dalhousie is proposing to do to its current and prospective students, faculty and staff with legitimate claims to Indigenous identity (and their nations and communities) through the verification process is much worse. In our assessment, the harmful impacts to various groups of Indigenous people, including loss of education and professional opportunities, stigma and emotional and psychological stress, far outweigh the benefit of the approach outlined in the *Understanding our Roots* Report.

We have heard the Task Force and members of the administration repeat that there are ‘no perfect solutions’ in this situation. Certainly, this is a highly complex issue. But the extent of complexity is not a license to embrace an over simplistic, blunt solution that will cause significant harm. We feel there are better approaches, and we turn to these next.

## **H. Alternatives**

There are alternative solutions other than the process set out in the Report.

### *1) Identity misappropriation categorized as Academic Fraud*

The University currently has processes to investigate and discipline academic fraud under existing policies, procedures and collective agreements that can be utilized. Clear direction could be given that misappropriation of Indigenous identity is academic fraud. This would contextualize the problem in a manner that settlers are familiar with, and therefore be more easily able to see themselves as part of the solution, which would in turn reduce the burden placed on Indigenous peoples.

### *2) Lay a solid foundation for work on Indigenous Issues*

If, as the Report suggests, the University intends to create an Associate Vice Provost Indigenous Relations (AVPIR), there should be a pause on the implementation of the Report until a qualified Indigenous individual, well versed in the historical and legal complexities of Indigenous Peoples, fills the role. The University would then be poised to assess the recommendations set out in the Report, determine whether or not they should be accepted, ensure legal issues are accounted for, and plan how implementation should occur. If implementation does occur, the University should clearly communicate how and when, prior to taking action.

The University should be mindful that the issue of Indigenous identity fraud is a result of settler action; care should be taken to ensure that Indigenous peoples, already victims of genocide, are not (re)traumatized by being treated as “white until proven indigenous.” A trauma informed approach will be critical when addressing this issue.

### *3) Work with existing programs*

As identified in Table 1 of the Report,<sup>300</sup> there are several programs within faculties that currently verify Indigenous identity. This occurs where the University offers designated seats and positions—with the purpose of taking ameliorative action to address historic exclusion of Indigenous peoples. This illustrates when verification is legally appropriate; when we are dealing with instances of ameliorative and targeted programs, not access to the University more generally.

The University should carefully identify when there is a need to verify in advance, and ensure a properly inclusive definitions of Indigenous people are crafted, in conjunction with the staff who already have expertise in the programs. If additional expertise is required, such as those with knowledge in the complexity of Indigenous identity claims, it should be obtained with careful consideration given to appropriate qualifications.

### *4) For Indigenous identity*

The University should have reasonable expectations when determining who is Indigenous. The areas of uncertainty are far greater than those that are clear. As a result, there will always be a degree of uncertainty that must be managed, the key will lie in addressing this uncertainty with the appropriate tools. Attempts to create blunt and simplistic definitions of who is Indigenous has been the approach taken by settler governments and is what has created the complex problem we face today.

The tools we have to consider this difficult question are Indigenous law and processes, state-recognition (in its appropriate context), Canadian constitutional, human rights law and international law including the UN Declaration. Compassion must also be at the heart of this. All these tools must be considered, though they will not always provide clear or consistent answers, necessitating careful and reasoned determinations that defy insistence on absolute certainty.

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<sup>300</sup> Report, *supra* note 1 at 20.

The University should be prepared to address the issue on a case by case basis. As stated by the Supreme Court of Canada in the *Daniels* decision, “Determining whether particular individuals or communities are non-status Indians or Métis and therefore “Indians” under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future.”<sup>301</sup>

**Chart: Categories of Indigenous Peoples and Supporting Evidence**

While we are somewhat reluctant to provide anything that could be perceived as an easy ‘checklist,’ we recognize that, given the complexity of these issues, people appreciate more concrete tools to think through issues. To this end, we provide the following chart of categories of Indigenous Peoples and evidence that can be considered in evaluating their claims to Indigeneity. We caution care in using this, however. We are not presenting binaries. These categories are intended to reflect the complexity of Indigenous identity, focused primarily on Dalhousie’s obligations under Canadian law and are not intended to capture the nuances of Indigenous laws at this time (more work needs to be done on this front). People might fall under more than one category, or not fit one but fall under another.

These categories are proposed in order to bring Dalhousie’s proposed verification criteria into better alignment with its human rights obligations under both domestic human rights and the *UN Declaration on the Rights of Indigenous Peoples*. We feel that these are the minimum categories of Indigenous people that Dalhousie needs to recognize in order to be compliant with its human rights obligations. Respecting human rights obligations is consistent with—and not contrary to—respecting the right to self-determination recognized in the *UN Declaration*. The additional categories we proposed are in gray boxes.

Such categories must be considered alongside our recommendation that verification should only be used when legally appropriate—when we are dealing with instances of ameliorative and targeted programs, not access to the University more generally. Broader application of verification to situations of ‘material gain’—which is vague and potentially expansive to anyone who outwardly holds themselves out as Indigenous where Indigeneity factors into their work in some way—like raises proportionality challenges.

	<b>Category</b>	<b>Supporting Evidence</b>	<b>Notes</b>
1	First Nation person registered under the	- Copy of a status card issued by the government of Canada	- There are concerns about non-Indigenous women who married Status Indian men before 1985.

<sup>301</sup> *Daniels*, *supra* note 110 at 306.

	<i>Indian Act</i> (Status Indian)		<p>Since these women are 60 years of age and older, the chances of them attending Dalhousie as a student or working here are low as they are close to retirement age and have been legally recognized as Indians for decades.</p> <p>- It is possible that such women could be Indigenous per categories 4 and 8.</p>
2	First Nation person entitled to be registered under the <i>Indian Act</i> <sup>302</sup>	<ul style="list-style-type: none"> <li>- Copy of application materials submitted to the government of Canada for Indian status.</li> <li>- Failing the above, a reasonable explanation about why materials are not submitted and corroborating documents of eligibility for status.</li> </ul>	<ul style="list-style-type: none"> <li>- There are thousands of people eligible for membership on Bill S-3, passed in 2019, which introduced the “s. 6(1)(a) all the way”. The registration process can take years.</li> <li>- If Bill C-38 passes (now at Second Reading), more people will be entitled to registration.</li> <li>- Review of any genealogical material documents should be undertaken with someone with expertise in the Indian status rules. Assessment made on the balance of probabilities (more likely than not).<sup>303</sup></li> </ul>
3	First Nation person born after 1985 affected by the <i>Indian Act</i> second-generation cut-off rule <sup>304</sup>	<ul style="list-style-type: none"> <li>- Date of birth after April 1, 1985 and evidence that a descendent was a section 6(2) Status Indian (e.g., copy of parent’s or grandparent’s, etc, status card, community membership list etc.)</li> </ul>	<ul style="list-style-type: none"> <li>- This addresses the ongoing discrimination by the <i>Indian Act</i> second-generation cut-off rule and would be relatively easy to prove.</li> </ul>
4	A person recognized under the membership or citizenship rules of a recognized First Nation band	<ul style="list-style-type: none"> <li>- Copy of membership card issued by a First Nation recognized by the government of Canada</li> <li>- Written confirmation of membership with a federally</li> </ul>	<ul style="list-style-type: none"> <li>- The majority of First Nations bands in Canada do not have membership codes or issue membership cards at this time.</li> </ul>

<sup>302</sup> Based on discussion at section F(1) above.

<sup>303</sup> Some categories will require some judgment calls to be made on a case-by-case basis. We recommend that the civil burden of proof, a balance of probabilities—that it is more likely than not that the person is Indigenous—would be the appropriate standard.

<sup>304</sup> Based on discussion at section F(5(c) above.

		recognized band or tribal authority in in the US or Canada	- A person could otherwise be recognized under the customs of the First Nation group, community or people as per category 8.
5	An person recognized under the membership or citizenship rules of a modern Inuit treaty organization or government	- A copy of an Inuit enrolment or beneficiary card issued by a modern Inuit treaty organization or government (Inuvialuit Regional Corporation, Nunavut Tunngavik Incorporated, Makivik Corporation, Nunatsiavut Government) - Written confirmation of Inuit identity provided by any of the aforementioned Inuit bodies	- the university should take great care not to involve itself in political disputes regarding Inuit identity.
6	A person recognized under the membership or citizenship rules of one of the established Métis organizations	- A copy of a card provided by one of the Métis National Council governing members (Métis Nation - Saskatchewan, Métis Nation of Alberta, Métis Nation British Columbia, and Métis Nation of Ontario) - A copy of a card provided by the Manitoba Métis Federation or one of the Métis Settlements of Alberta - Written confirmation of Métis identity provided by any of the aforementioned Métis bodies	-training for admissions staff will be required as some organizations take pains to replicate the look of recognized cards or have names that are similar to established Métis organizations.
7	A person recognized under the membership or citizenship rules of any other Indigenous people (not noted in categories 4-6) that have a credible claim to being section 35 Aboriginal rights-holders <sup>305</sup>	- Evidence of membership in a group that can demonstrate legitimate forms of recognition as an section 35 rights-holding group, including: a. Court rulings of having Aboriginal / treaty rights; b. Recognition by other Indigenous groups c. Recognition by human rights and international bodies;	- So that burden is not entirely on applicants, the Standing Committee should undertake its own legal research and analysis of the group’s claims. - Evidence of court recognition under section 35 should carry significant weight. - Other factors could be considered together on a

<sup>305</sup> Based on discussion at sections F(4) and F(8) above.

		<p>d. Evidence of the group being targeted by assimilative policies such as residential schools;</p> <p>e. Evidence of historical treaties (oral or written) with colonial governments;</p> <p>f. Evidence the group is in negotiations with settler governments over section 35 rights</p>	<p>balance of probability (more likely than not)</p> <ul style="list-style-type: none"> <li>- Lack of recognition or opposition by other Indigenous groups must be considered carefully, applying an appropriate cultural lens to the unique history of the group, the region in which they are situated, and contextualize the claims of Indigeneity.</li> <li>- A list of groups recognized under this category should be publicized so that after an initial determination of the group, subsequent applicants need only furnish a card or other written documentation of inclusion in the group.</li> <li>- Two regional groups that already appear to meet this criteria are the NunatuKavut Community Council and the Peskotomuhkati Nation at Skutik.</li> <li>- There are likely some non-recognized Mi'kmaq communities in Newfoundland that meet the criteria. Further research and analysis on this question is needed.</li> </ul>
8	A person recognized by an Indigenous people (per categories 4-7), or a subset of such peoples, as belonging to them accordance with the customs or traditions of that Indigenous people <sup>306</sup>	- Evidence of adoption or acceptance into the group based on the group's Indigenous laws, customs and traditions.	- To be developed further in consultation with Indigenous peoples, in accordance with the UN Declaration on the Rights of Indigenous peoples and Indigenous law.
9	A person who has Indigenous ancestry, but who has become	- Provide a narrative of their claims to Indigeneity and how specific colonial policies impacted this (e.g.,	- The Standing Committee, taking a trauma-informed approach, could establish

<sup>306</sup> Based on discussion at section F(6) above.



	disconnected from their Indigenous people (per categories 4-7) due to colonial policies and laws <sup>307</sup>	Residential and Day Schools, Sixties and Millennial Scoops, Incarceration, Enfranchisement and discriminatory membership rules, etc), providing any supporting or corroborating evidence, or explaining why such evidence is not available.	guidelines on sensitively evaluating this category of claims. - Determinations could be made on a balance of probabilities (more likely than not).
10	Indigenous peoples from outside Canada or the United States	TBD	- To be developed further in consultation with Indigenous peoples, in accordance with the UN Declaration on the Rights of Indigenous peoples and Indigenous law, and persons with relevant expertise. - This may include, but is not limited to, Indigenous peoples from central/south America, the circumpolar region, Aboriginal Australians, polynesians (ie Maori) and African tribes.

<sup>307</sup> Based on discussion at F(7) above.

## BIBLIOGRAPHY

### INTERNATIONAL INSTRUMENTS

*United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) 15.

### LEGISLATION

*An Act providing for the organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands*, SC 1868, c 42.

*An Act to Amend the Indian Act*, now S.C. 1985, c 27.

*Bill C-38, An Act to amend the Indian Act (new registration entitlements)*, 1st Sess, 44th Parl, 2022, cl 4.

*Bill S-3, An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, 1st Sess, 42nd Parl, Canada, 2017 (assented to 12 December 2017), SC 2017, c 25.

*Citizenship Act*, RSC 1985, c C-29.

*Employment Equity Act*, SC 1995, c 44.

*Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20.

*Human Rights Act*, RSNS 1989, c 214.

*Indian Act*, 1876. S.C. 1876, c.18 (39 Vict).

*Indian Act*, R.S.C. 1906, c 81.

*Indian Act*, S.C. 1951, c 29.

*Nisga'a Citizenship Act* and Schedule.

*Qalipu Mi'kmaq First Nation Act*, SC 2014, c 18.

*Part 1 of The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, "Canadian Charter of Rights and Freedoms"

*Part II of The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, ss 35-35.1.

*United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

### JURISPRUDENCE

*Alberta (Indigenous Affairs and Northern Development) v Cunningham*, 2011 SCC 37.

*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

*Ardoch Algonquin First Nation v Canada (Attorney General)*, 2002 FCT 1058 (sub nom. *Misquadis v Canada*) aff'd 2003 FCA 473.

*Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817  
*Catholic Children's Aid Society of Hamilton v H. (G.)*, 2016 ONSC 6287.  
*Clark v. Abegweit First Nation Band Council*, 2019 FC 721  
*Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203  
*Corneau c Procureure générale du Québec*, 2018 QCCA 1172.  
*Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (CanLII), [2016] 1 SCR 99.  
*Daniels v Canada*, 2013 FC 6.  
*Descheneaux c Canada (Procureur Général)*, 2015 QCCS 3555.  
*Drew v Newfoundland and Labrador (Minister of Government Services and Lands)*, 2003 NLSCTD 105 aff'd 2006 NLCA 53.  
*Esquega v Canada (Attorney General)*, 2007 FC 878, aff'd 2008 FCA 182.  
*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20  
*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.  
*Gehl v Canada (Attorney General)*, 2017 ONCA 319.  
*Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31.  
*Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Environment and Conservation and the Minister of Transportation and Works v Labrador Métis Nation, a body corporate under the laws of the Province of Newfoundland and Labrador and Carter Russell, of Happy Valley Goose Bay, Labrador*, 2008 CanLII 32711 (SCC).  
*IAFF, Local 268 v Adekayode*, 2016 NSCA 6.  
*La Nation Micmac de Gespeg c Sa Majesté la Reine du chef du Canada*, 2016 TRPC 10  
*Mclvor v Canada*, 2007 BCSC 827.  
*Mclvor v Canada (Registrar of Indian and Northern Affairs)*, [2007] 3 C.N.L.R. 72 (BCSC), rev'd [2009] 2 C.N.L.R. 236 (BCCA), leave to appeal refused [2009] S.C.C.A. No. 234.  
*Nalcor Energy v NunatuKavut Community Council Inc.*, 2012 CanLII 73234 (NL SC).  
*Nalcor Energy v Nunatukavut Community Council Inc.*, 2012 CanLII 61265 (NL SC).  
*Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani Utenam)*, 2020 SCC 4 (CanLII), [2020] 1 SCR 15.  
*Newfoundland and Labrador v Labrador Métis Nation*, 2007 NLCA 75.  
*Nunatukavut Community Council Inc. v Canada (Attorney General)*, 2015 FC 981.  
*NunatuKavut Community Council Inc. v Nalcor Energy*, 2014 NLCA 46.  
*Nunatukavut Community Council Inc. v Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)*, 2011 NLTD 44.

*Pridgen v University of Calgary*, 2012 ABCA 139.

*Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17.

*R v Babin*, 2013 NSSC 434.

*R v Castonguay*, 2003 NBPC 16.

*R v Chiasson*, 2004 NBQB 80.

*R v Hatfield*, 2015 NSSC 77.

*R v Lavigne*, 2005 NBPC 8, aff'd 2007 NBQB 171.

*R v Powley*, 2003 SCC 43.

*R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295.

*R. v Kapp*, 2008 SCC 41.

*R. v Oakes*, [1986] 1 SCR 103.

*Reference as to whether "Indians" includes in s. 91 (24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, 1939 CanLII 22 (SCC), [1939] SCR 104.

*RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311.

*Simon v Canada (Attorney General)*, 2013 FC 1117 rev'd 2015 FCA 18.

*Teslin Tlingit Council v Canada (Attorney General)*, 2019 YKSC 3.

*The Labrador Metis Nation v Her Majesty in Right of Newfoundland and Labrador*, 2006 NLTD 119.

*Vautour et al. v R.*, 2017 NBCA 21.

#### SECONDARY MATERIALS: ARTICLES AND MONOGRAPHS

Clatworthy, Stewart. "Indian Registration, Membership and Population Change in First Nations Communities" (February 2005), cat. no. R2-430/2005E. Ottawa: Minister of Public Works and Government Services Canada.

——— "The Changing Demography of First Nations Populations" (April 2007).

——— "Indian Registration, Membership and Population Change in First Nations Communities", Chapter 5 in "Volume 5: Moving Forward, Making a Difference" in the Aboriginal Policy Series, Thompson Education Publishing Inc., 2013.

Chartrand, Paul. "Rethinking the Doctrine of Aboriginal Rights; The Métis Cases" (2021) 57:1 Osgoode Hall LJ 173.

Coyle, Michael. "Indigenous Legal Orders in Canada - a literature review (updated to August 2022)" (2022). Law Publications. 92.

Celeste Cuthbertson, "Statutory Recognition of Indigenous Custom Adoption: Its Role in Strengthening Self-Governance Over Child Welfare" (2019) 28 Dal J Leg Stud 1.

Dicks, Heather. "Beyond Binaries: mixed-blood inequalities" (2023) 19(2) *AlterNative: An International Journal of Indigenous Peoples*.

- Drake, Karen. "A Right Without a Rights-Holder Is Hollow: Introduction to OHLJ's Special Issue on Identifying Rights-Bearing Aboriginal Peoples," (2022) 57:1, Osgoode Hall LJ iii.
- Erueti, Andrew. *The U.N. Declaration on the Rights of Indigenous Peoples: A New Interpretive Approach* (New York, New York: Oxford University Press, 2021).
- Friedland, Hadley and Val Napoleon. "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions." (2015) 1(1) *Lakehead LJ* 33.
- Grammond, Sébastien. "Discrimination in the Rules of Indian Status and the *Mclvor* case," (2009) 35 *Queen's LJ* 421.
- "Disentangling 'Race' and Indigenous Status: The Role of Ethnicity" (2009) 33 *Queen's LJ* 487.
- "Equally Recognized? Indigenous Peoples of Newfoundland and Labrador" (2014) 51:2 *Osgoode Hall LJ* 469.
- Gunn, Brenda. "The Federal court Aboriginal Bar Liaison Committee as a Mode of Reconciliation: Weaving Together Indigenous Law, Common Law, and International Human Rights Law," in Karen Drake & Brenda L Gunn, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Center, 2019).
- Lawrence, Bonita. "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 182 *Hypatia* 9.
- Lee, Damien "Adoption Constitutionalism: Anishinaabe Citizenship Law at Fort William First Nation" (2019) 56:3 *Alta LR* 785.
- McKay, M. Celeste and Craig Benjamin. "A Vision for Fulfilling the Indivisible Rights of Indigenous Women" in? in Jackie Hartley, Paul Joffe, and Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing Ltd, 2010).
- Metallic, Naiomi. "The Door has a Tendency to Swing Shut: The Saga of Aboriginal Peoples' Equality Claims" in Patrick Smith, ed, *Aboriginal Law Bench Book*, 2nd ed (Ottawa: National Judicial Institute, 2017).
- "Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's Aboriginal Nation Recognition and Government Act" in Karen Drake & Brenda L Gunn, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Center, 2019).
- "'Superchief' and Other Fictional Indians: Case Comment on *R v Bernard*, 2017 NBCA 48" (2020) 57:1 *OHLJ* 230.
- Morellato, Maria. "Memorandum on Indian Status and Band Membership" for the National Center for the First Nations Governance (15 December 2006)
- Napoleon, Val. "Extinction by Number: Colonialism Made Easy" (2001) 16:1 *Can J Law & Soc'y* 113.
- Napoleon, Val and Hadley Friedland, "An Inside Job: Engaging With Indigenous Legal Traditions Through Stories" (2016) 61 *McGill LJ* 725.

- Palmater, Pamela. *Beyond Blood: Rethinking Aboriginal Identity and Belonging* (Doctor in the Science of Law, Dalhousie University, 2009) [unpublished]
- Simon, Cheryl and Judy Clark, "View of Exploring Inequities Under the Indian Act" (2016) 64 UNBLJ 201.
- Spolnick, Michelle. "The Second-Generation Cut-Off: Effect on people in Canada" (2021) (Unpublished master's project) University of Calgary, Calgary, AB.

#### SECONDARY MATERIALS: REPORTS

- Dalhousie University, Task Force on Settler Misappropriation of Indigenous Identity, *Understanding our Roots - Nestimuk tan wtapeksikw* (2023, October).
- Metallic, Naomi, Hadley Friedland and Shelby Thomas, *Doing Better for Indigenous Children and Families: A Report on Jordan's Principle Accountability Mechanisms*, March 31, 2022.
- National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada). (2019a). *Reclaiming power and place: The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Vol. 1a*. (Catalogue No. CP32-163/2-1-2019E-PDF).
- — — "Supplementary Report - A Legal Analysis of Genocide" (2019).
- Paul, Pam. "The Politics of Legislated Identity - The effect of Section 6(2) of the Indian Act in the Atlantic Provinces" prepared for the Atlantic Policy Congress of First Nations Chiefs (28 September 1999).
- Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) Volume 1.
- Tanner, et al. *Aboriginal Peoples and Governance in Newfoundland and Labrador A Report for the Governance Project*, Royal Commission on Aboriginal Peoples. RCAP October, 1994.
- Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future-Summary of the Final Report of Truth and Reconciliation Commission of Canada* (2015).

#### SECONDARY MATERIALS: WEBSITES

- Bora Laskin Law Library, "Collection of Documents on Gender Discrimination and the Indian Act"
- Canadian Child Welfare Research Portal, "Long-term trends in Out of Home Care for On-Reserve First Nations Children."
- Canadian Encyclopedia, "Bill C-31" (12 May, 2020).

Congress of Aboriginal Peoples, "About Us."

Crown Indigenous Relations and Northern Affairs Canada, "Why deregistration is an Important issue, Indigenous Services Canada."

Dal News, "Dal launches new tuition waiver program for former youth in care" (5 August 2021)

Deloitte website, "Indian Day Schools Class Action Claims Administration," (last accessed on 11 December 2023).

Exploring Section 10: Narrating Three Decades of Indian Band Membership Policy, 1985 to Present.

Gouvernement du Quebec, "Profile of the Nations" (2023).

Indigenous Law Revitalization Unit project, "Secwépemc-kt ell k'weselktnéws-kt ("we are all Secwépemc and we are all related"): Secwépemc Citizenship Law," 2017-2019.

Indigenous Services Canada webpage, "About band membership and how to transfer to or create a band."

Interview of Cheryl Simon by Jeff Douglas (6 November 2023) on Mainstreet, CBC, Halifax.

National Center for First Nations Governance, "Residential School History."

NunatuKavut Community Council website, "NunatuKavut delegation participates in the United Nations Permanent Forum on Indigenous Issues" (19 April 2023).

NunatuKavut Community Council website, "The British-Inuit Treaty of 1764-1765."

Peskotomuhkati Nation at Skutik website, "At the Root of the Relationship: the 1725 Treaty." — — — "Peskotomuhkati Persistence."

Statistics Canada, Data Table: "Indigenous identity population by gender and age" (2021).

University of British Columbia, Indian and Residential School History and Dialogue Center website, "The Sixties Scoop."

#### SECONDARY SOURCES: NEWS, BLOGS, ONLINE ARTICLES

Brake, Justin. "Qalipu enrolment outcome "next big reconciliation issue" in Canada: Chief" The Independent, February 24, 2017.

Lee, Damiel and Geraldine King, "Spirit Family-Making and the Future of Belonging" YellowHead Institute Policy Brief (4 March 2020).

Lee, Damien and Kahente Horn-Miller. "Between Membership & Belonging: Life Under Section 10 of the *Indian Act*" YellowHead Institution Special Report, November 2022.

Macdonald, Nancy. "Canada's prisons are the 'new residential schools' - A months-long investigation reveals that at every step, Canada's justice system is set against Indigenous people" MacLean's Magazine (18 February 2016)

Nerland, Krista. "Significant Changes to Indian Status Rules to Address Discrimination against Indigenous Women" OKT blog post.

reconciACTION. "Fighting for Canada's Rights & Losing Indian Status" (9 November 2022)

Simon, Cheryl. "Fraudulent claims of indigeneity: Indigenous nations are the identity experts"  
The Conversation, 22 November 2021.

Smellie, Sarah. "We are Sorry: Newfoundland and Labrador makes first apology for Residential  
Schools" Canadian Press. 29 September 2023

#### SECONDARY MATERIALS: OTHER

Attorney General of Québec, et al. v. Attorney General of Canada, et al., SCC Ref No 40061  
(Heard December 7-8, 2022).

Dalhousie University, "Entrance Scholarship allowed non-status Indigenous student to achieve  
childhood dream" (4 December 2023).

Daniels, Harry W. "Speaking notes at Unity for Our Grandchildren Conference", The Native  
Women's Association of Canada, March 23, 1998.

Indian and Northern Affairs Canada, The Indian Act Past and Present - A Manual on Registration  
and Entitlement Legislation (1991) Catalogue No. R32110/1191.

Leroux, Darryl. "Examining the NunatuKavut Community Council's Land Claim" prepared for the  
Nunatsiavut Government (2021).

Martin, Debbie. "We Have Always Been Here - Rebuttal to the 2021 Nunatsiavut Government  
report entitled "Examining the NunatuKavut Community Council's Land Claim" (10 May  
2022).

New Brunswick. Letters Patent Incorporating "New Brunswick Association of Non-Status Indians  
Inc." (Province of New Brunswick) 1972 (S/684) Ref. No. 72-698.

New Brunswick. Supplementary Letters Patent to New Brunswick Association of Non-Status  
Indians Inc. (Province of New Brunswick) 1977 (S/684) Ref No. 72-698.

Sharon McIvor and Jacob Grismer v. Canada. Petitioner Submission Regarding Implementation  
By Canada of the 11 January 2019 Decision of the Committee Concerning the Petition of  
Sharon McIvor and Jacob Grismer (CCPR/C/124/D/2020/2010).

Statistic Canada, Table 98-10-0264-01 Indigenous identity by Registered or Treaty Indian status  
and residence by Indigenous geography: Canada, provinces and territories (release date  
21 September 2022).

Submission of the Government of Canada on the Admissibility and Merits of the  
Communication to the Human Rights Committee of Sharon McIvor and Jacob GRISMER.  
Communication No. 2020/2010, para 11.

Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans, TCSP2, (2022).