

# Re-Affirming Indigenous Citizenships: Two Spirit Family-Making and the Future of Belonging

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**IN FEBRUARY 2020**, a **special feature** by APTN called “Perspectives on Band Membership” addressed the seemingly ongoing challenges First Nation community members face around membership and belonging, with a specific focus on two-spirit families.

APTN revealed that families from the Stoney Nakoda and Madawaska Maliseet First Nations are experiencing difficulty in registering their children as members of their respective bands. Both communities control their membership lists under section 10 of the *Indian Act*. This story raises questions about the ways in which band-controlled membership might exclude individuals who otherwise might belong with their communities.

**To date, very little academic literature exists that accounts for how two-spirit people have experienced the *Indian Act* generally, and band membership specifically.**

This brief provides two points of context on two-spirit band membership issues in Canada.<sup>1</sup> First, we look at the legislative framework that First Nations can use to write their own membership codes, specifically focusing on section 10 of the *Indian Act*. We then consider some of the ways that two-spirit and queer family making is challenging not just how belonging is imagined in First Nations, but the concept of Indigeneity itself.

## SECTION 10 OF THE *INDIAN ACT*

Canada’s Indian Act was introduced in 1876. While there have been dozens of amendments to the law, it is still in place today. In 1985, however, it underwent a major amendment in an attempt to eradicate sex-based discrimination. Throughout much of the *Act’s* history, “Indian” women would lose their status if they married a non-Indian man. The 1985 amendment, known as Bill C-31, sought to change this, but failed.

But Bill C-31 also did something else: It gave Indian bands the option to control their own membership for the first time in the *Indian Act’s* history. Somewhere between 220 and 240 bands took this opportunity, using the *Act’s* newly minted “section 10” to write their own membership codes.

**However, while section 10 membership was positioned as giving First Nations more control over their affairs, it also offered bands the chance to exclude certain classes of people.<sup>2</sup>**

As Bill C-31 was rolling out, many bands were worried about an influx of potential new members coming back to reserves. This fear was rooted in economic anxieties. And so section 10 was structured in part to mitigate these fears. To be specific, bands had the power to now exclude some people, so long as they ratified membership codes before June 28, 1987.<sup>3</sup>

**The ability to exclude individuals who would otherwise likely belong to their nations has thus been baked into section 10 from the beginning.<sup>4</sup>**

The majority of section 10 codes made membership contingent on Indian status, lineal parentage, or blood quantum, all of which rely strongly on biology-based notions of identity and belonging. Ironically, this is not dissimilar from historic federal Indian policy.

**But as we can see in the APTN feature noted above, such criteria are also heteropatriarchal: male-female sexual encounters were required to make a child with enough Indian blood to qualify for state-recognition as an Indian.**

From Canada's perspective, historically, this made sense; queer Indigenous families and sexualities were seen as "unproductive," and therefore abhorrent in the emerging capitalist economy.<sup>5</sup> But with Bill C-31, this heteropatriarchy made it into many band-controlled membership codes.

#### **TWO-SPIRIT FAMILY MAKING**

Despite the long history of heteropatriarchy impacting First Nations communities, two-spirit families have always participated in the renewal of their nations. While other less formal kinship practices might have been one way to do so in the past, two-spirit families today have (some) access to a range of options to bring children into their nations. These include surrogacy and an assortment of assisted reproductive technologies (ARTs) such as in vitro fertilization.

Research has shown that with the rise of ARTs, non-Indigenous queer families are claiming their children not just in a custodial sense, as might be the case with adoption, but in biological sense. In other words, when creating families outside of the heteropatriarchal mold, some queer families see ARTs as "creat[ing] biology itself."<sup>6</sup>

**This fluidity around kinship resonates within inherent Indigenous citizenship orders, many of which see identity, biology, and "blood" as malleable or contrapuntal concepts.<sup>7</sup> Indeed, for the Stoney Nakoda and Madawaska Maliseet families noted in the APTN article above, their children are their children. Full stop.**

Possibly more salient, however, is the effect that two-spirit family making has on the larger discourses of First Nations identity and belonging.

Given the fact that Indianness and band membership were contingent on essentialized biological criteria for so long, ARTs and two-spirit kinships challenge the very criteria of "authentic" Indianness that have been inherited from the *Indian Act*. Put another way: they are challenging the commonly held (and in some cases imposed) belief that Indigeneity is something that can only be produced heterosexually. This has significant implications for how Indigeneity and belonging are constructed, considering the *Indian Act's* legacy of instituting biologized Indianness.

#### **THE FUTURE OF BAND MEMBERSHIP**

Section 10 of the *Indian Act* is now 35 years old. And in that time, a number of individuals have brought legal action against their respective bands with regard to how membership is determined.<sup>8</sup> But in light of APTN's recent coverage on these matters, it seems that we're

entering into a new phase of section 10 challenges, this time led by two-spirit families.<sup>9</sup>

And the timing is right: In late 2017, in response to the *Descheneaux Decision*, the federal government was forced to pass Bill S-3 to amend the Indian Act (again), this time extending Indian status to women who lost it upon marriage all the way back to 1869.<sup>10</sup> While preparing for this amendment, Canada considered accepting feedback on “issues surrounding children of same-sex parents and non-cisgender identities as they relate to...band membership.”

**For the first time in the *Indian Act's* history, then, it seems there is room to imagine band membership in ways that refuse heteropatriarchal family formations.**

But any new membership regime will need to carefully consider how to include all who rightfully belong, regardless of sexual orientation and family status.

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## END NOTES

<sup>1</sup>For an excellent toolkit addressing similar issues in the US context, see: Edmo, Se-ah-dom and Aaron Ridings, eds., *Tribal Equality Toolkit 3.0: Tribal Resolutions and Codes to Support Two Spirit and LGBTQ Justice in Indian Country* (2017), <https://www.thetaskforce.org/wp-content/uploads/2014/09/TET3.0.pdf>

<sup>2</sup>Clatworthy, Stewart and Anthony Smith, “Population Implications of the 1985 Amendments to the Indian Act - Final Report” (Four Directions Project Consultants; Living Dimensions Limited, 1992), 20-21. Clatworthy and Smith write:

The context for the decisions that many First Nations made was, of course, the impact of [Bill] C-31 registrants and the deadline for membership decisions set by the Act [sic]. A large concern centered on the potential consequences of admitting to membership people who had become entitled to registration as a result of C-31 (so-called “C-31 registrants”). In the two years following the enactment of C-31, membership codes were seen as a way of controlling the impact of these registrants or of postponing this impact until it could be fully evaluated. Thus one motivation for passing a code was to exclude from membership a portion of the C-31 registrant population. To achieve this communities had to take action before June 28th, 1987. After this date Section 11 of the Act [sic] dictated that any starting membership list for a community adopted code include all C-31 registrants.

<sup>3</sup>Clatworthy, Stewart. “Indian Registration, Membership and Population Change in First Nations Communities” (Winnipeg: Four Directions Project Consultants, 2005), 5, <http://publications.gc.ca/collections/Collection/R2-430-2005E.pdf>. Clatworthy identified three classes of people who could be excluded in the two-year window between April 17, 1985, when Bill C-31 took force, and June 28, 1987, those being 1) individuals who voluntarily enfranchised before 1985, 2) individuals registered or entitled to be registered under section 6(2) of the Indian Act, and 3) individuals with two parents registered as Indians, but who have only one (or no) parent eligible for membership in a band.

<sup>4</sup>Indian and Northern Affairs Canada. *Indian Band Membership: An Information Booklet Concerning New Indian Band Membership Laws and the Preparation of Indian Band Membership Codes* (Ottawa: Minister of Supply and Services Canada, 1985), 16, <http://bit.ly/37kHYz2>. For example, in 1985 Indigenous and Northern Affairs Canada encouraged First Nations to a certain extent to make section 10 band membership contingent on “blood degree,” even though the Indian Act had been silent on Indian blood for some time, and where the Bill C-31 amendments did not require bands to do so.

<sup>5</sup>Cannon, Martin, “The Regulation of First Nations Sexuality,” *Canadian Journal of Native Studies* XVIII, no. 1 (1998): 1–18; Cannon, Martin, “First Nations Citizenship: An Act to Amend the Indian Act (1985) and the Accommodation of Sex Discriminatory Policy,” *Canadian Review of Social Policy* 56 (2006); Carter, Sarah, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008).

<sup>6</sup>Courduriès, Jérôme and Cathy Herbrand, “Gender, kinship and assisted reproductive technologies: future directions after 30 years of research,” *Enfances Familles Générations*, 21 (2014), 24. Also see Franklin qtd. in Courduriès and Herbrand, “Gender, kinship and assisted reproductive technologies,” 23; Clare, Stephanie. “Reimagining Biological Relatedness: Epigenetics and Queer Kin.” *Signs: Journal of Women in Culture and Society* 45, no. 1 (2019): 51-73.

<sup>7</sup>Garrouette, Eva Marie, *Real Indians: Identity and the Survival of Native America* (Berkeley: University of California Press, 2003); Doerfler, Jill, *Those Who Belong: Identity, Family, Blood, and Citizenship among the White Earth Anishinaabeg* (East Lansing: Michigan State University Press, 2015), Chapter 1.

<sup>8</sup>See, for example, *Cameron v. Canada* 2012, *Grismer v. Squamish First Nation*, 2006, *Engstrom v. Peters First Nation*, 2020, and *Peters v. Peters First Nation*, 2018, among others. Of note, *Miller c. Mohawk Council of Kahnawà:ke*, 2018 is also important, but Kahnawà:ke does not control its membership under section 10 of the *Indian Act*.

<sup>9</sup>Indeed, Wayne Wallace of Madawaska Maliseet First Nation noted that he has launched a Human Rights complaint against his band. See: APTN News, *InFocus*, February 13, 2020, 6:30-8:00, <https://aptnnews.ca/2020/02/13/who-is-eligible-to-be-registered-in-your-band-and-who-gets-to-decide/>

<sup>10</sup>Geens, Jennifer, “Indian Status Could Be Extended to Hundreds of Thousands as Bill S-3 Provisions Come into Force,” *CBC News*, August 15, 2019. <https://www.cbc.ca/news/indigenous/bill-s-3-indian-act-sex-discrimination-1.5249008>