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Between Membership & Belonging: ***Life Under Section 10 of the Indian Act***

by Damien Lee and Kahente Horn-Miller

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ABSTRACT

In 1985 Canada amended the *Indian Act* to in part enable First Nations to determine their own membership lists. Bands could do so by writing what came to be known as section 10 membership codes. Section 10 has been celebrated as a form of self-governance, yet little research exists that considers the lived experience of such codes – particularly of those who belong with their communities through kinship law but are otherwise excluded due to a band's membership rules. Based on in-person interviews conducted in 2019, this exploratory report shows that negative impacts exist and continue to go unresolved. Impacts fall into four categories: health, kinship, economic stability, and social wellbeing. We argue that while section 10 band membership is an important innovation in band governance, it must also be assessed as a determinant of health that, in some cases, has had long-term effects on those who find themselves caught in the space between membership and belonging. Given the above, further research is necessary to critically analyze section 10's legacy.



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Introduction

All is not well in Indian country when it comes to band membership. In the years since the federal government provided First Nations the opportunity to control their own membership lists, a politics of exclusion has emerged.

While band control over membership has long been touted as a form of self-governance, the way such control has been implemented has at times created opportunities for abuses of power. In other instances, the legislation guiding band-controlled membership left room for vague rules that inadvertently exclude individuals who should otherwise belong with their communities. Such exclusions have had long-term effects on those prevented from coming home.

In 1951, to be a member of a First Nation, one needed to also be a status Indian in accordance with the registration provisions of the *Indian Act*. This changed with the activism of First Nation women who protested the discriminatory aspects of the Act. In response, Bill C-31 was introduced and sought to address their concerns, though poorly (a topic for another Special Report). However, included in this 1985 amendment to *Indian Act* was a change that could empower bands to manage membership.

From that point onward, section 10 of the *Indian Act* enabled First Nations to take control over their own membership lists by writing membership codes.¹ Many did so. However, many of those wrote codes that did not ultimately claim all who rightfully belong; some simply reproduced colonial stereotypes of Indianness found in Indian policy while paradoxically excluding some who meet those stereotypical logics.² Little research exists that is based on the perspectives of individuals who have had

¹ Such communities are often referred to as section 10 bands.

² Such stereotypes include, for example, that Indianness flows most strongly through men, that blood quantum is an accurate measure of Indigeneity, and that Indianness is produced only by heterosexual pairings, among others. In short, Indianness re-imagines Indigenous peoples as racial individuals rather than politics. Many s.10 membership codes reflect these logics.

to fight to belong with their communities in the section 10 era.

This report is based on a series of conversations, and a review of membership codes and other relevant materials. Dr. Damien Lee³ held research conversations with 12 individuals who responded to a call for research participants – all of whom are either members or believe they should be members of section 10 bands. The conversations were held in-person in July–August 2019, and all took place in western Canada. Moreover, while an increasing number of First Nations are moving towards finalizing self-government agreements with citizenship laws that replace the *Indian Act*'s band membership provisions, we did not seek out individuals of such communities – this report focuses on section 10 band membership alone. The membership codes reviewed here were acquired through an access to information request to Crown-Indigenous Relations and Northern Affairs Canada.⁴ The codes are those originally submitted to the federal government as part of the process of a band opting into section 10, which is an important limitation in this report: there is no requirement for a section 10 band to provide the federal government with an updated version of its membership rules. Some bands may have updated their codes since originally submitting them to Canada. After project data was analyzed, Dr. Lee and Dr. Kahente Horn-Miller⁵ authored this report.

This exploratory research shows that section 10 band membership has included many but excluded others who otherwise should belong according to kinship laws. As we show below, impacts of this policy fall into four broad categories: health, kinship, economic stability,

³ Damien Lee is racially white and was adopted into Fort William First Nation as a baby. He identifies as Anishinaabe, is a member of his band, and is entitled to pursue legal rights with respect to band membership matters.

⁴ ATIP #A-2018-00118 requested the following: “A copy of all Indian band membership rules (or codes) approved by the Minister of Indian Affairs or Aboriginal Affairs (as the case may be) in accordance with section 10 of the *Indian Act* since 1985 to present.” This ATIP resulted in a 2,337-page disclosure.

⁵ Dr. Kahente Horn-Miller (Kahente means “she walks ahead”) (Kanien:keha'ka/ Mohawk) received her doctorate in 2009. She is a mother to four daughters and Aksotha (grandmother). Currently she is an Associate Professor in the School of Indigenous Studies and is the inaugural Assistant Vice-President, Indigenous Initiatives.

and social wellbeing. We argue that while section 10 band membership is an important innovation in band governance, it must also be assessed as a determinant of health that, in some cases, has had long-term effects on those who have struggled to belong. For scope, we focus on tracing section 10's impacts rather than recommending detailed alternatives simply because we believe more research is needed to fully understand how band-controlled membership impacts Indigenous peoples and inherent governance systems. We believe that, despite our small sample size, this report raises serious questions about section 10 membership as a determinant of health and hope to see more research on this nexus in the future.

What is section 10?

Section 10 membership refers to a specific form of belonging created under the *Indian Act*. The *Indian Act* has a long history of regulating Indigenous peoples' identity and belonging that stretches back to 1876 and even earlier depending on how one counts.⁶ And while the act was designed specifically to empower the federal government to define who is an Indian, it's history in determining band membership is a little more nuanced. Until 1951, the federal government relied on things like treaty annuity paylists and bands' own membership lists, among other sources, to determine who could be registered as an Indian,⁷ and even this was limited in certain ways.⁸ But when the act was amended that year, control over membership flipped completely: the federal government

⁶ See: Parliament of Lower Canada, "An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada, 1850," in *Pre-1868 Legislation Concerning Indians: A Selected & Indexed Collection*, ed. Thomas Isaac (Saskatoon: Native Law Centre, University of Saskatchewan, 1993), 40–41.

⁷ Larry Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (Scarborough: Carswell, 1996), 131; Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013) at para. 391. The 1951 *Indian Act* centralized control over Indian status by drawing together various lists of names, including names drawn from bands' membership lists. As Grammond (cited here) notes, "Initially, the [Indian Register] was constituted using lists of band members, established by departmental officials at the signing of treaties or upon other occasions. Until 1951, Indian status was equivalent to band member status: one could only be an Indian if one was a member of a band or vice versa." And Gilbert (cited here at p.93) shows that the original Indian Register was compiled by band membership lists developed in 1949–1951.

⁸ See: An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42 in: Gail Hinge, *Consolidation of Indian Legislation*, vol. 2, *Indian Acts and Amendments, 1868–1975* (Ottawa: Department of Indian and Northern Affairs, 1978), 12, http://publications.gc.ca/collections/collection_2017/aanc-inac/R5-158-2-1978-eng.pdf.

created its own centralized list of Indians, and in most cases this became the pre-requisite for membership in bands.⁹ In other words, bands lost their limited control over determining their own membership. This situation remained in place for the next three decades.

The *Indian Act* was overhauled again in 1985, this time in part as a result of Indigenous women challenging gendered discrimination in how Indian status was recognized.¹⁰ But while the Indian registration provisions of the Act needed to change, this amendment created an opportunity for band membership to change as well. Between 1951 and 1985, First Nations' membership provisions were bound up in sections 5 and 6 of the *Indian Act*.¹¹ Band membership and Indian status were basically one in the same: to be a member of a band, one normally needed to be registered as an Indian. However, after the passage of Bill C-31 in 1985 band membership could be regulated under two new sections: section 10, which allowed bands to create their own membership rules, and section 11, which allowed Indian and Northern Affairs Canada (INAC) to continue to control band membership in the way it had done since 1951. Indian bands had a choice between these two sections, and by June 1987 just over one third had opted into section 10.¹² In all, 241 section 10 membership codes have been approved by the federal government, but

⁹ Pamela Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2011), 145; Megan Furi and Jill Wherrett, "Indian Status and Band Membership Issues," 1996, <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp410-e.htm>.

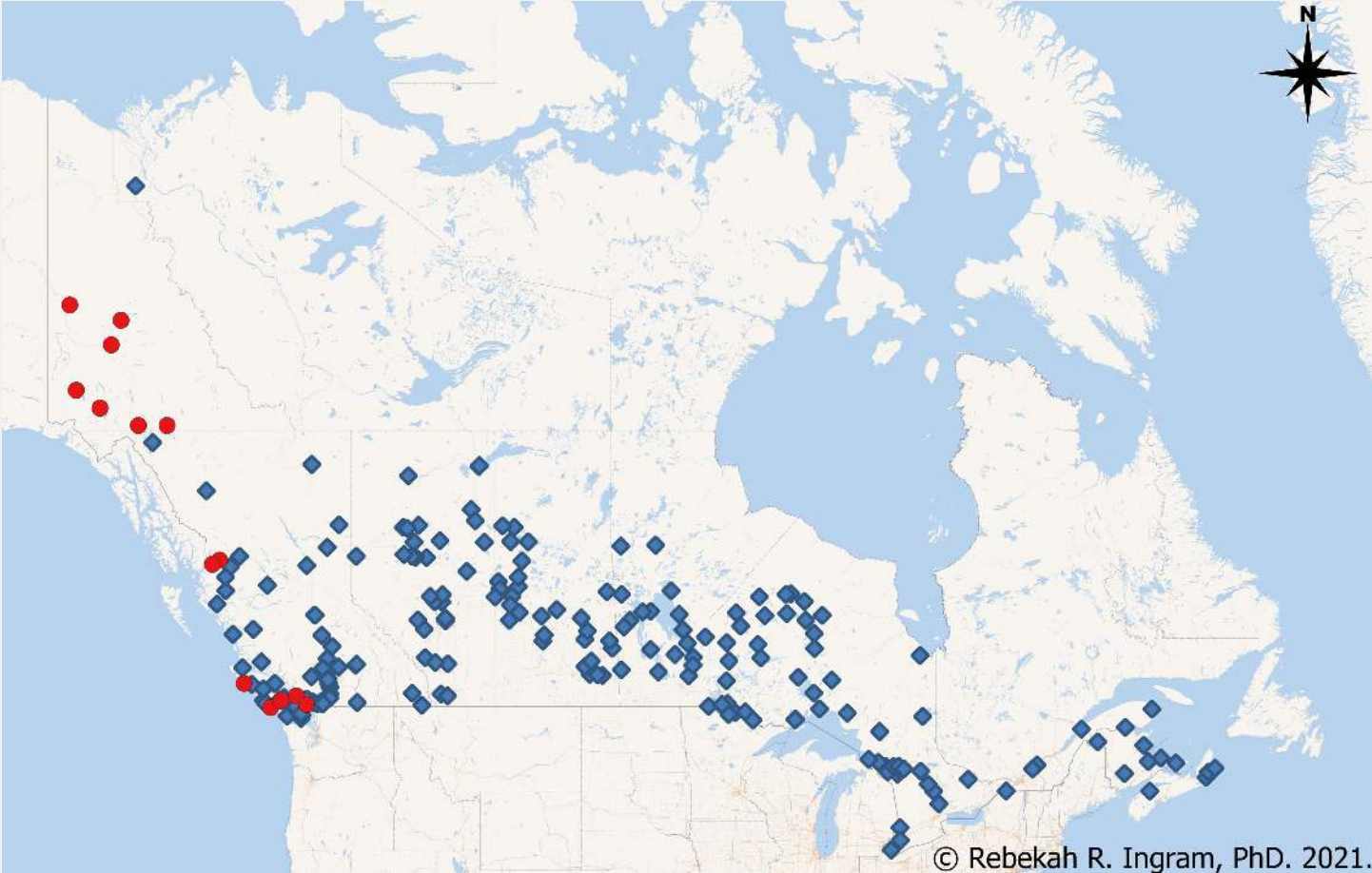
¹⁰ Elizabeth Jordan, "Residual Sex Discrimination in the *Indian Act*: Constitutional Remedies," *Journal of Law and Social Policy* 11, no. 9 (1995): 213–40; Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview," *Hypatia* 18, no. 2 (2003): 3–31, <https://doi.org/10.1111/j.1527-2001.2003.tb00799.x>.

¹¹ Hinge, *Consolidation of Indian Legislation*, 2, *Indian Acts and Amendments, 1868–1975*:317. Sections 5 and 6 of the *Indian Act, 1951* read as follows:

5. An Indian Register shall be maintained in the Indian Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.

6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band General List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.

¹² Exploring Section 10, "Membership Codes," May 22, 2019, <https://exploringsection10.com/codes/>.



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- Communities with Self-Government Agreements
- ◆ S.10 Communities

several have ceased to apply due to bands concluding self-government agreements that include citizenship criteria. Today, 227 Indian bands determine their membership lists under section 10 of the *Indian Act*. In many cases, the section 10 codes reviewed make band membership contingent on Indian status,¹³ Indian blood,¹⁴ blood quantum,¹⁵ descendance,¹⁶ or whether a person is a member of a “North American tribe” more broadly¹⁷ – and sometimes these discreet concepts are intermixed within the same code.¹⁸ Many of the codes provide for marriage and adoption as grounds for membership in a band, but most often these are restricted by Indian status, Indian blood, or blood quantum.¹⁹ Most codes allow for automatic membership as a result of birth, but sometimes individuals must still apply for membership even if their parents are from their respective band.²⁰ In other cases, individuals not born to members of a band can still apply for membership, such as when someone is seeking to “transfer” their membership. Where applications are required, they are approved or denied by various types of decision-making bodies such as a membership committee, a chief and council, or a membership clerk. Some applicants are required to go through a “conditional” membership period

(often years long) before a final decision is rendered,²¹ which sometimes happens by community vote. In most cases, the codes provide for an appeal mechanism if an individual is denied membership. However, if someone feels that a membership code or a band decision-making body has failed them, they can seek redress in a Canadian court since a section 10 membership code is still an extension of the *Indian Act*.²²

Part of section 10’s effectiveness is that it was a way for First Nations to resist what otherwise would have been a unilateral reinstatement of individuals to band membership lists. Bill C-31’s failed precursor – Bill C-47 – would have given the federal government the power to do so. Tabled in 1984, Bill C-47 was the government’s first attempt at reversing the *Indian Act*’s enfranchisement provisions’ effects on Indigenous women (and their children) who lost Indian status as a result of marriage. However, the bill would also empower Canada to place these reinstated individuals onto bands’ membership lists.²³ First Nations leaders worried that bands’ already-limited resources (e.g., on-reserve housing and infrastructure) would be stretched beyond capacity should a flood of reinstated women and children return to their reserves.²⁴ Together with the Native Women’s Association of Canada (NWAC), the Assembly of First Nations (AFN) challenged the bill on the grounds that it undermined First Nation self-determination – a stark argument given that the government was also presenting new Indian self-government legislation in the same building, at the same time.²⁵ Perhaps not surprisingly, Bill C-47 died in September 1984.²⁶

Where Bill C-47 failed, Bill C-31 succeeded. Bands could now exclude certain individuals from membership,²⁷

¹³ For example, see entry for Boothroyd Indian Band (#700) at: Exploring Section 10. Section 8 therein notes: “Persons making application to the Band for Discretionary Membership must provide: (1) proof of Indian status or entitlement to Indian status from the Registrar; and, (2) independent documentary evidence of direct descendance from a Band member with Indian Blood.”

¹⁴ For example, see entry for Ashcroft Indian Band (#685) at: Exploring Section 10. Section 2(10) states: “‘Indian Blood’ refers to a person who is lineally descended from an Ashcroft Band member or a Canadian Indian who did not acquire Indian status through marriage.”

¹⁵ For example, see entry for Canim Lake Indian Band (713) at: Exploring Section 10. Section 3.(a) therein states: “New Members by Birth: (a) any child of two Canim Lake Indian Band registered members as parents will be automatically registered as a Canim Lake Indian Band member, provided the child has at least 1/4 Indian blood.”

¹⁶ For example, see entry for Mikisew Cree First Nation (461) at: Exploring Section 10. Section 5 states: “Any person who is descended from a Cree Band member is entitled to become a Cree Band member upon application to the Cree Band.”

¹⁷ For example, see entry for Montana Tribe of the Cree Nation (442) at: Exploring Section 10. Section 1.1(e) states: “‘Indian’ means a person who has at least fifty (50%) percent Cree blood quantum or fifty (50%) percent blood quantum of another tribe indigenous [*sic*] to North America.”

¹⁸ For example, see entry for Boothroyd Indian Band (700) at: Exploring Section 10.

¹⁹ For example, see entry for Bloodvein First Nation (267) in: Exploring Section 10. Section 5.(c) states that an individual may apply for membership in the band if they “(i) [have] Indian status under the *Indian Act*; and (ii) [are] the spouse of a member of the Bloodvein First Nation.”

²⁰ For example, see Alexis Indian Band (437), available at Exploring Section 10, s.5.3 a.

²¹ For example, see entry for Muskeg Lake Band (375) at: Exploring Section 10.

²² For example: Cameron v. Canada (Indian Affairs and Northern Development) FC 579 (2012), accessed November 20, 2016, para. 103.

²³ Gerard Hartley, “The Search for Consensus: A Legislative History of Bill C-31, 1969–1985,” *Aboriginal Policy Research Consortium International* 5 (2007): 18.

²⁴ Gary Potts qtd. in “Minutes of Proceedings and Evidence, Issue No. 17, Respecting: Bill C-47, An Act to Amend the *Indian Act*,” June 26, 1984, 17:90, https://library.law.utoronto.ca/sites/default/files/media/Issue%2017%20%28June%2026%2C%201984%29_0.pdf. Potts summed up what some other chiefs had said during this committee meeting with the following statement: “What we are asking to have put into this Bill [C-47] is the ability, the recommended ability, for the councils to control the residency access back into our communities, so that the existing infrastructure of the community is not destroyed.”

²⁵ Hartley, “The Search for Consensus,” 16–18; “Minutes of Proceedings, Issue No. 17,” 17:14–15. Namely, Bill C-52, tabled June 27, 1984.

²⁶ Hartley, “The Search for Consensus,” 19–20.

²⁷ Stewart Clatworthy, “Indian Registration, Membership and Population

thereby quelling the major concerns raised the previous year. Section 10 was touted as an example of First Nation self-government. It put First Nations in a better position to balance the need to protect finite band resources while also including individuals who they felt belonged with them. In this sense, section 10 has been a success: approximately 90% of section 10 bands were implementing their membership codes by 2003,²⁸ and many of these were considering amendments to the same.²⁹

The successes noted above have been reflected in real life. Many section 10 bands have used their membership codes to restrengthen their respective governance systems. This includes incorporating elders and women into membership appeals bodies, and in some cases requiring new members to be familiar with their nation's language and traditions.³⁰ For those who have always belonged with their communities, band-controlled membership has only affirmed their rootedness in kinship and place.³¹ These are good things. That said, section 10 and the decision-making channels it created have not always promoted inclusion and fairness. We turn now to consider some of its more problematic aspects.

Change in First Nations Communities" (Winnipeg: Four Directions Project Consultants, 2005), 5-6, 13, <http://publications.gc.ca/collections/Collection/R2-430-2005E.pdf>.

²⁸ Clatworthy, 8-9, 13.

²⁹ Clatworthy, 11.

³⁰ Leslie Brown, "Community and the Administration of Aboriginal Governments," 1994, Library and Archives Canada, RCAP online collection, <https://data2.archives.ca/rcap/pdf/rcap-25.pdf>, n.p. Brown writes:

Though First Nations band governments struggle with inadequate resources to meet members' needs and must cope with continued federal interference in membership determination, many bands have adopted membership codes and attempt to infuse some customary values and processes into them within the framework of federal guidelines. The Cumberland House Cree Nation of Saskatchewan has instituted an appeal process, using an elders council, for those denied membership. The Sarcee Nation of Alberta requires new members to have knowledge of local community history, language and traditions. Their appeal process involves committees of men, women and elders.

³¹ Conversation with P14, July 23, 2019. From the research conversation cited here:

DL: [F]rom your perspective and in your opinion has section 10 membership been a good thing for [your community]?

P14: In my situation yes. My parents, my whole family is tied to the [First Nation]. I have no outside registration anywhere else. We've always been a part of here, my grandparents on both sides, and even my great grandparents have always been with [this First Nation] and always been in this area. So, yeah.



Barry Ace – Memory Landscape#1 (2016)

Tracing the impacts

It has been more than 30 years since section 10 band membership was passed into law – long enough for an entire generation to be raised under it. And while section 10 offered First Nations a version of self-governance, it has failed some people on an individual level.

The remainder of this report tells the story of section 10 band membership as seen through the eyes of 12 individuals who have direct, lived experience with it. These individuals shared their stories with us in the summer of 2019. Despite best efforts to recruit participants from across Canada, we received responses from people whose bands are mainly based in British Columbia and Alberta.³² Furthermore, we did not interview First Nation government representatives – such individuals were explicitly excluded from this study so that we could hear from grassroots people as much as possible. Recognizing that our sample size alone makes generalizations difficult, we supplemented our interview data with a review of news articles and court cases where section 10 was at issue.

Internalized colonialism

Upon reviewing the available materials, we find it hard to come to any other conclusion than many section 10 First Nations' membership codes, to varying degrees, have internalized settler colonial ideas about Indigeneity and belonging. Not all scholars would agree with such a statement.³³ Yet, First Nations are not immune from

³² Of the 12 research participants, one lives in British Columbia but is from eastern Canada. Seven are from bands based in British Columbia. The remaining four are from Alberta-based First Nations.

³³ Kirsty Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (New York: Oxford University Press, 2010), 115; Morris Manyfingers Jr., "Determination of Indian Band Membership: An Examination of Political Will," *Canadian Journal of Native Studies* VI, no. 1 (1986): 65–75. As a good example, Kirsty Gover (as cited here) argues that tribes in the United States are using tribal blood quantum to assert control over tribal citizenship in ways that reflect self-determination. We quote her at length here for full effect:

At first glance, the increase in the use of blood rules might suggest that tribes have converged on the federal category of Indian blood in the absence of any legal obligation to do so.

reproducing colonialism,³⁴ and this was evident in the lead-up to creating section 10 membership.³⁵ Furthermore, while section 10 did provide a degree of self-governance, it did so in part by allowing bands to exclude the children of women who lost their status due to marriage to a non-Indian.³⁶ Our research participants and others pointed to

A standard liberal theoretical explanation would suggest that given the opportunity to choose, tribes opt to perpetuate the racial categories imposed on them by a hegemonic colonial power. However, a closer analysis reveals that in the majority of cases, tribes are not simply replicating the federal category of Indian blood, but instead are refashioning it as a genealogical measure. This is achieved by using the concept of tribal blood (in which only the quanta of tribal ancestors 'counts'), or using Indian blood in tandem with lineal descent, in which case Indian blood serves to qualify a tribe-specific descent rule. Tribal blood quantum serves as a device for counting the number of a person's tribal ancestors. Tribal blood quantum rules lean against the colonial concept of an undifferentiated Indian population organized into tribal communities. ... [W]hile tribes continue to use the blood quantum rules that are strongly encouraged by federal policy, they increasingly refashion these measures to give effect to endogenous tribal genealogy.

³⁴ John Borrows, "Seven Generations, Seven Teachings: Ending the *Indian Act*" (National Centre for First Nations Governance, 2008), 5–6, http://fngovernance.org/resources_docs/7_Generations_7_Teachings.pdf. Borrows writes:

[The] *Indian Act* also captivates some people at home. ... [T]here are too many in our own communities who have also learned how to dominate others by mastering [the *Indian Act*'s] intricate rules. They may not even be our leaders; they may be band employees, aunts or so-called friends. The *Indian Act* gives them a great deal of influence over us, including matters related to: where we live, whether we think we belong, how we elect leaders, how we live under them, and how we learn, trade and attend to spiritual matters. These structures allow others to avoid the harder work of having to engage real participation and consent. Their addictive compulsions to power must end. Those intoxicated by the *Indian Act*'s need to change, both in Ottawa and at home. This change will require healing. It will require us to all be better people.

³⁵ Smokey Bruyere qtd. in "Minutes of Proceedings and Evidence, Issue No. 18, Respecting: Bill C-47, An Act to Amend the *Indian Act*," June 26, 1984, 18:20–21, https://library.law.utoronto.ca/sites/default/files/media/Issue%2018%20%28June%2027%2C%201984%29_0.pdf. Mr. Bruyere's comments shed some light on this:

The difficulty is that, for more than a century, a legislated wedge, called the *Indian Act*, has been driven between aboriginal people. It is no secret that the social, economic, and even political structures of many reserves are structured around this legislated wedge. Many of our constituents are victims, not only of the legislation, but of band councils who took advantage of that legislation to exclude our people from their heritage. The fact that fewer than 100 bands applied for exemption from the old Section 12.1(b) while 500 others clung to the status quo, so to speak, is conclusive evidence of the danger we are addressing.

³⁶ Clatworthy, "Indian Registration, Membership and Population Change," 5–6, 14. Clatworthy sums it this way:

For First Nations that adopted membership rules under Section 10 of the 1985 *Indian Act* prior to June 28, 1987, rights to First Nations membership for those registered under Section 6(2) were not protected. Many (more than 80) First Nations elected

things like gendered and racialized notions of belonging, heteronormativity in membership codes, and perceived greed as reasons why they have been excluded from band membership. Some have described situations in which section 10 has been weaponized against them – a situation where a membership code is written or interpreted in such ways that exclude specific individuals in an attempt to protect some sort of power (e.g., political, financial, etc.).³⁷ In some ways, section 10 band membership codes have mirrored the settler colonial order of things.

However, rather than write-off such reproductions as strictly “bad,” we would argue that they are a natural by-product of Canada’s attempted assimilation of Indigenous peoples. Adapting to the colonial order is one way to survive the onslaught of colonial violence.³⁸ That said, it is a failure of leadership to simply maintain the status quo once conditions have changed.³⁹ And things *have* changed with the introduction of section 10; though not a perfect system, bands can now determine their own membership as they see fit.⁴⁰ Section 10 did not require bands to use Indian status when determining their membership lists.⁴¹ Yet, many did so, either by writing an Indian status requirement into their codes, or by adopting verbatim section 11 of the *Indian Act* (which makes band membership contingent on Indian status) as their interim membership rules.⁴²

to exclude this group from initial membership resulting in a population of Registered Indians who lack the benefits and privileges of First Nations membership. Within the context of the membership rules adopted by these First Nations, the descendants of these individuals will also be ineligible for membership.

³⁷ See: Diabo v. Whitesand First Nation FC 1250 (2009), accessed November 15, 2018; Conversation with P9, July 16, 2019. For example, P9 stated: “There are people that they’re shutting out [while at the same time] keeping people on [the membership list] who are gonna vote for the pipeline and keep the same chief and council in.”

³⁸ Albert Memmi, *The Colonizer and the Colonized* (London: Profile Books, 2021), 165. Memmi argues that when faced with annihilation, internalizing the colonial order can at times be part of the survival strategy. Adopting the ways of the colonizer might thus be a short-term solution – one that allows individuals to live another day.

³⁹ Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations’ Independence* (Halifax: Fernwood, 1999), 25.

⁴⁰ This statement does not deny that other aspects of settler colonization such as an engineered poverty and education gaps do not exist. Nor do we mean that section 10 breaks free of the colonial order. Rather, it affords bands more control than the *Indian Act* did between 1951 and 1985 and thus marks a shift in how Canada oppresses First Nations.

⁴¹ See: “*Indian Act*,” § c. I-5 (1985), <http://laws-lois.justice.gc.ca/eng/acts/i-5/FullText.html>, s.10.

⁴² Clatworthy, “Indian Registration, Membership and Population Change,” 12.

The following are emblematic:

The Seabird Island Band adopts the continuance of Sec. 11.1 of the New *Indian Act* [as its interim membership rules].⁴³

Persons entitled to membership in the Abegweit Band shall be all persons described under section 11.(1) (a) (b) (c) and (d) of the *Indian Act* [1985].⁴⁴

A person is entitled to apply for membership in Bingwi Neyaashi Anishinaabek if that person is a “STATUS INDIAN.”⁴⁵

These clauses, and others like them, may or may not still be a part of section 10 bands’ membership codes today.⁴⁶

However, if bands had (and have) an opportunity to get away from the *Indian Act*’s core logics by writing their own membership codes, then reproducing something like Indian status in those codes says something about how settler colonialism works. It fosters a discourse that is able to reinscribe itself even in attempts to change it – such as reinscribing Indian status into membership codes meant to free First Nations from Canada’s racist, gendered and heteronormative image of who is and is not an Indian. But while adapting to the colonial order may be a valid survival mechanism for a time, change is imperative if the initial adaptation has turned into internalized oppression.⁴⁷ Individual band members have stated as much.⁴⁸ Instead of

Clatworthy reports that, as of 2002, 58 section 10 bands were using *Indian Act*-equivalent membership rules. 26 were using blood quantum.

⁴³ Seabird Island (581), available at Exploring Section 10, “Membership Codes.”

⁴⁴ Abegweit Band (001), available at Exploring Section 10, s.8.

⁴⁵ Bingwi Neyaashi Anishinaabek (196), available at Exploring Section 10, s.6.1. Emphasis original.

⁴⁶ It is important to remind that section 10 bands are not required to submit updated membership codes to Canada, if amendments take place. The bands above may have removed Indian status or section 11 from their membership rules since approved by the minister of Indian Affairs.

⁴⁷ Monture-Angus, *Journeying Forward*, 25, 29.

⁴⁸ Anonymous respondent qtd. in: Serpent River First Nation, “Anishnabe Niigaanziwin: Structures and Procedures of the Serpent River First Nation,” 1994, Library and Archives Canada, RCAP online collection, <https://data2.archives.ca/rcap/pdf/rcap-163.pdf>, n.p. This respondent stated:

As it stands, the people who live off reserve have little or no representation in the [band’s] decision making process. Off reserve or Bill C-31 individuals, are in the position they are in because of racist government policies of the past. Some of these individuals are being denied band membership because they

re-centering Indian status or other colonial logics such as blood quantum,⁴⁹ among others, then, we would argue for membership codes that centre kinship-based approaches to belonging, or approaches based in Indigenous peoples' inherent laws.⁵⁰

To clarify, decisions that exclude some classes of people who otherwise belong with their First Nations are often not narrated explicitly. Few First Nations would state publicly that their band membership codes are based on patriarchy, for example, or heteronormativity. Instead, such decisions tend to be explained in the language of protecting land, funding, or even "culture."⁵¹ The idea here is that each First Nation has limited resources, which need to be protected even if it means excluding family members. For example, one band's former legal counsel was reported as saying the following: "[A]ccepting people in the communities who may have never lived on the reserve could be dangerous. Those band members would have the power to vote and could possibly unite and, if they outnumbered the long-term community members, could vote [to] liquidate band assets and sell the land."⁵² This person has since reversed their position on exclusionary membership practices.⁵³

no longer have a link to the immediate community or they no longer speak the language. By refusing membership under these grounds, [Serpent River chief and council] is merely extending the racist policies of the past.

Note: Serpent River First Nation is a section 10 band.

⁴⁹ This does not mean that Indian status is not important to many, but overreliance upon it risks perpetuating *Indian Act* logics at the expense of inherent Indigenous citizenship laws.

⁵⁰ A discussion about what First Nation belonging might look like through a kinship lens lies beyond the scope of this report. But for examples, see: Robert Alexander Innes, *Elder Brother and the Law of the People: Contemporary Kinship and Cowessess First Nation* (Winnipeg: University of Manitoba Press, 2013); Damien Lee, "'Because Our Law Is Our Law': Considering Anishinaabe Citizenship Orders through Adoption Narratives at Fort William First Nation" (Unpublished dissertation, Winnipeg, University of Manitoba, 2017), <http://hdl.handle.net/1993/32277>; Aaron James (Waabiski Ma'iingan) Mills, "Miinigowiziwin: All That Has Been given for Living Well Together: One Vision of Anishinaabe Constitutionalism" (Unpublished dissertation, Victoria, University of Victoria, 2019), <http://hdl.handle.net/1828/10985>.

⁵¹ For example, see: Miller c. Mohawk Council of Kahnawà:ke QCCS 1784 (2018), accessed April 24, 2019 at 158-159.

⁵² Catherine Twinn qtd. in Clint Buehler, "Alberta Bands Continue Court Battle Challenging Bill C-31," *First Nations Drum*, March 28, 2007, <http://www.firstnationsdrum.com/2007/03/alberta-bands-continue-court-battle-challenging-bill-c-31/>.

⁵³ Catherine Twinn qtd. in Tamara Pimentel, "*Indian Act* Used as Weapon to 'Break Families,'" *APTN News*, November 1, 2019, <https://www.aptnnews.ca/investigates/indian-act-used-as-weapon-to-break-families/>. Here, Ms. Twinn states: "These exclusions and divisions and disconnections and separations

Some of our research participants reported being questioned by their band councils on "protectionist" grounds. They felt they are seen as potential burdens on financial resources rather than as kin. As one participant put it, "[W]e are being told it's about land, it's about money. [We had] no concept or idea of the pipeline, of the railway, of land coming [to the community at the time]."⁵⁴ Another noted being questioned about her intentions in seeking membership in her band, and being told "Well if you're thinking of getting anything don't. There's nothing for you here."⁵⁵ Still another recalled his family being called "opportunistic, ill-educated hooligans who will be dissipating the assets of the band" simply because they were seeking membership.⁵⁶ And where such words fail to uphold the protectionist approach, some bands seem willing to threaten would-be band members with legal action if they "trespass" on their reserves.⁵⁷

When asked why they thought their bands were excluding them, participants drew a direct line to natural resource projects or other infusions of large cash flows into their communities, such as land claims. "There was nothing but greed," one noted.⁵⁸ This participant went on to say that various large scale industrial and infrastructure projects run through his reserve, generating wealth for band members. "So they get money all the time. It's supposed to be divided to everybody [but they're] only dividing it up to their family," he argued.⁵⁹ Others made similar claims of bands

have been normalized. And they're being continued by First Nations through membership rules and membership processes. We're participating in our own termination."

⁵⁴ Conversation with P6, July 11, 2019.

⁵⁵ Conversation with P5, July 11, 2019.

⁵⁶ Conversation with P11, July 19, 2019.

⁵⁷ Conversation with P12, July 20, 2019; also see: Angie Ward qtd. in Tamara Pimentel, "'Everyone Needs to Belong Somewhere': Daughter of Late Chief Denied Membership to Her Home Community," *APTN News*, October 25, 2019, <https://www.aptnnews.ca/investigates/everyone-needs-to-belong-somewhere-daughter-of-late-chief-denied-membership-to-her-home-community/> (10:15-10:22). P12 stated: "[W]e were warned [by the band], 'If you set foot in this reserve you're going to go to jail!' They warned us, 'You can't come on this land.' Okay. So you can't even bring your kids there and say, 'Well this is where your great grandfather lived.'" Elsewhere, Angie Ward (as cited in this footnote) stated: "We were always told we are not allowed to go on to the Sawridge First Nation. There were signs put up: no trespassing. And if we do go on Sawridge First Nation, that we could be fined. But I would love to go on. Let my bare foot touch the soil that I believe is part of me that's lost."

⁵⁸ Conversation with P3, July 9, 2019.

⁵⁹ Conversation with P3.

using section 10 to keep per capita payments high for a small group of members. One referred to this as “Pure, unadulterated greed,” noting that their leadership “signed a deal with [an energy company], [and so] they don’t want any more people in the band.”⁶⁰ While it is entirely possible that individuals with no connection or tenuous ties may apply for membership simply out of greed once a land claim or benefit agreement is about to be finalized, if the above participant’s statements are proven to be true it would represent a significant weaponization of federal legislation for the benefit of a few at the expense of others who simply want to belong. This is not a new concern with regard to band-controlled membership.⁶¹

While we agree that bands should not be forced to accept just anyone onto their membership lists – especially those who simply want to “play Indian” – a just approach to band membership should not be determined exclusively by fiscal matters. Doing so renders membership applicants as a burden on the band’s resources rather than being seen as kin who carry responsibilities to people and place. Worse, as the participants noted above suggest, doing so might weaponize band membership against some in the interests of financial gain.

Membership as anchor

The fiscal-centric, protectionist approach noted above is at odds with what our research participants had to say about what band membership means to them personally. For them, membership is not about exploiting their band’s funding, land or benefits, even though they may have a right to access these things.⁶² Rather, it is about identity. One person put it this way:

Being part of the band meant that I was part of a family, part of a community; that I belong somewhere. That there was a heritage there that I didn’t know about and wanted to learn. It’s very important to me that my children have that sense of community. That they,^[Crying] they belong somewhere. Everybody needs to belong somewhere.⁶³

Others noted similar statements. For them, band membership is about being able to walk down the same roads and rivers as their ancestors,⁶⁴ to be buried in their homelands alongside relatives,⁶⁵ to have moose stew, bannock and tea while speaking Cree,⁶⁶ and about finding truth and reconciliation with one’s own people.⁶⁷ None of these things can be bought.

Those currently fighting for band membership feel that it would anchor them in specific peoples, places, and

⁶⁰ Conversation with P9. P9 also stated: “[My membership was] taken away from me through no fault of my own. These are things that I didn’t have a choice about and so many injustices that just didn’t have to happen, and I’m finding out now that it’s all about greed.”

⁶¹ Jenny Margetts qtd. in “Minutes of Proceedings, Issue No. 18,” 18:41-42. A member of the Indian Rights for Indian Women (Alberta Branch), Margetts noted:

We would really like to believe that all bands will be fair and honest and treat everybody equally [in their membership decisions]. Unfortunately, our experience and knowledge of the political, economic, and kinship realities that exist on many reserves tell us that some bands will be incapable of dealing with the issue of membership in a proper and just manner. ... If bands are allowed to establish and enforce their own [membership] criteria, without any reference to a basic criterion to which they must adhere, the government is creating a situation in which discrimination will continue to flourish in some areas across Canada as bands make decisions based on whether they have oil and gas revenues, how large the reserve is, are you related to the chief and councillors, [sic] how outspoken one has been in the past, etc. This is the reality the government must deal with, not the dreams and ideals of theory.

⁶² Conversation with P5; Conversation with P4, July 10, 2019. As P5 noted: “We weren’t even thinking of financial [benefits of membership]. I mean, that was the last thing. It was [about] identity.” Elsewhere, P4 said: “I know [my band has] gotten a lot of money since [their deals with energy and infrastructure companies], but I don’t want that. I just want to be a member.”

⁶³ Deborah Serafinchon qtd. in Pimentel, “Everyone Needs to Belong Somewhere” (18:47-20:05).

⁶⁴ Conversation with P6. As P6 put it: “[Band representatives] questioned us about what we’re doing there or what is our purpose, what do we hope to gain from [seeking band membership]? And mom goes: “Our identity, who we are and where we’re from.” This was where [my mom’s] ancestors were raised and walked and came down the river.”

⁶⁵ Conversation with P11.

⁶⁶ Conversation with P12. P12 put it this way: “We went [to the reserve] and she made supper for us. We had moose stew and bannock and tea! There was a whole bunch of us sitting around the table. Lots of them! Everybody was talking Cree. Oh, that was so nice. And I felt so good. I felt at home. I felt so good. And that’s belonging. That’s what that is. You’re with your people.”

⁶⁷ Conversation with P11. DL: “[W]hen you [say] the band needs also to engage in truth and reconciliation, what kind of truth and what kind of reconciliation are you talking about? P11: Well, being accepted, just being accepted by your own people.”

Being part of the band meant that I was part of a family, part of a community; that I belong somewhere. That there was a heritage there that I didn't know about and wanted to learn.

*

It's very important to me that my children have that sense of community. That they, ^[Crying] they belong somewhere.

*

Everybody needs to belong somewhere.

histories. For them, it is about belonging, stability, and a rootedness in community and land:

For me, [band membership is] purely emotional and I wanna know my family. I wanna know where I came from. Like, where did all of my looks come from, where did all my mannerisms come from? Because I don't know. I'd like to know, and [the band has] pictures of my grandfathers. I wanna see them, too. ... Everybody needs an anchor. It gives a person a little bit of stability and a root to grow from.⁶⁸

If I don't have [my] band, where do I call home? I'm a First Nations, Aboriginal, Indigenous. Where do I call home? Where do I go to explore more of my culture? Go fishing, do ceremonial stuff? ... In the future I just want to have a place to call home and be able to actually go there.⁶⁹

To be welcomed by your people. ... That would be a good feeling, to be able to go back and be with your own people. That's belonging. That's very important.⁷⁰

Not having membership is not having a place to belong. That's what I mean by that.⁷¹

Moreover, membership was linked to spirituality and healing. One person recalled a dream he had while on his home reserve. In the dream he was visited by a relative, who affirmed that he was in the right place.⁷² Elsewhere, another shared that having band membership would be one part in the process of healing from intergenerational residential school trauma. Her father was taken from their reserve at a very young age, and experienced a life of difficulty in trying to return home. In her words, this created a sense of a collective "lost soul" feeling within her family today.⁷³ She wants to return to her community as a band member in part because she feels it would help her family heal from this history.

Perhaps the clearest expressions of how band membership acts as a personal anchor came in response to a particular question. During our research conversations, participants

⁷² Conversation with P11. P11 said:

I was sleeping there one night I was visited by [a relative] and they'd come to say everything's okay. So, it's like that, it was like that I knew that that was where I originated from and I think that that's connection I have with that space, with that area. My ancestors, all of them were buried in that area, all of them. So to me that's what that means, to me it means that connection, that connection.

⁷³ Angie Ward qtd. in Pimentel, "Everyone Needs to Belong Somewhere" (12:50-13:34). As Ward states:

In order for us to heal from what we been through, I think a part of it is knowing where you come from, because my dad was residentially raised, right. He was ripped out of the nation, I believe probably when he was about five or six years old. Coming back, and having children of his own, and trying to feel a sense of belonging, a sense of healing - I think he felt that part of that meant getting his membership. I think that's a lost soul in us in that we don't know who we really are, and where we come from.

⁶⁸ Conversation with P9.

⁶⁹ Conversation with P4.

⁷⁰ Conversation with P12.

⁷¹ Conversation with P3.

seeking membership were asked *What would it mean to you if your membership was confirmed tomorrow?*, or a version thereof. Without fail, participants responded emotionally, such as crying or laughing while speaking:⁷⁴

I never even thought of the possibility.^[Crying] I never thought of it.^[Sobbing] I'm sorry, I don't know, I'd have to deal with it emotionally I guess. It would mean everything to me.^[Crying] Yeah it would.⁷⁵

Acceptance. Basically, it would be, well, finally, acceptance. And I could say well this is where I come from, this is who I am. And that's all I wanted. That was all I was asking for.⁷⁶

Oh, my gosh.^[Laughing] The stress level, obviously; the anxiety; the fact that I have to deal with this on a day-to-day basis would be gone. I would finally feel like my family's worthy enough, at the end of the day. ... For me it would be finally getting the acknowledgement, my family's good enough.⁷⁷

I could just finally, just be happy. Just have huge, huge relief. Finally. Wow. If I got it tomorrow I'd probably cry happy tears. That's the way I would feel, it would be an emotion that I can't really describe. I would be speechless. It would mean the world to me. I've been fighting for ten years, so it would just be a big sigh of relief, really. It would be huge, huge.⁷⁸

Freedom! Like I'm done from [*sic*] this shit! I mean! I don't have to deal with this shit anymore!⁷⁹

The emotional points noted above are nothing new. Band membership's importance to identity formation and personal stability has been evident since at least 1984 when Bill C-31's precursor (i.e., Bill C-47) was being discussed in Ottawa.⁸⁰ What *is* new, however, is that people are sharing stories about how section 10 membership has impacted their lives. These stories have remained largely untold. Until now.

⁸⁰ Judy Erola qtd. in "Minutes of Proceedings and Evidence, Issue No. 19, Respecting: Bill C-47, An Act to Amend the *Indian Act*," June 28, 1984, 19:17, https://library.law.utoronto.ca/sites/default/files/media/Issue%2019%20%28June%2028%2C%201984%29_0.pdf. Ms. Erola paraphrased Mary Two Axe Early as saying "it is not necessarily a matter of wanting to return to the reserves or to gain back the financial benefits of Indian status that has spurred so many women on. It is instead simply the right to regain their Indian identity."

⁷⁴ We believe that accounting for our participants' emotional responses when quoting them is important. Such responses anchor their statements more deeply than merely quoting their transcripts in simple black and white text. Emotion here can show how much something means to them (such as crying), or how unhopeful they are about having their claims dealt with fairly (such as a laugh or scoff). We use [*Superscripted italicized brackets*] to show participants' emotion throughout this report.

⁷⁵ Conversation with P9.

⁷⁶ Conversation with P5.

⁷⁷ Conversation with P10, July 17, 2019.

⁷⁸ Conversation with P4.

⁷⁹ Conversation with P13, July 22, 2019.



Barry Ace – Abinoojiyens Ogichidaa Baby Warrior (2016)

Impacts of exclusion

If I don't have membership, I don't know what's in store in the future for me.^[Pause]

*I've always just wanted to be a member 'cause that is my land, that is my dad's land, and my grandpa's land.*⁸¹

While many of our research participants narrated band membership as part of rooting their identity in the future, the way that they experience it in the present is far different. For those actively seeking membership,⁸² the struggle has left them with a variety of negative impacts – many of which remain on-going.

Our research shows that section 10's impacts fall into four major categories: 1. Health (*emotional and physical*), 2. Kinship (*separation of families*), 3. Economic stability (*legal costs, loss of land, access to band resources*), and 4. Social wellbeing (*social and political ostracization, discrimination based on gender and sexual orientation*). This section covers each in turn.

1. Health

(TW: Sexual violence)

Section 10 band membership is impacting people's sense of emotional, mental, and physical health.⁸³ Our research participants reported various forms of emotional disruption, such as "lack of self-esteem," feelings of not belonging,⁸⁴ and lack of healthy boundaries.⁸⁵ One reported that fighting for his son's band membership has

⁸¹ Conversation with P4.

⁸² Three of the individuals we spoke with were formal members of their communities; they reported experiencing no negative impacts with section 10 membership. However, the others – nine – spoke of being negatively impacted by not having membership in their respective bands.

⁸³ Palmater, *Beyond Blood*, 177. Palmater draws links between membership exclusion (and the denial of Indian status) and youth suicide and First Nations health more generally.

⁸⁴ Conversation with P11. P11 stated: "I felt really, really bad once I started to know and understand more [about my membership issue]. And it kinda ... helped explain some of my behaviors as well, lack of self-esteem, felt like I didn't belong, all of that stuff that kind of."

⁸⁵ Conversation with P9. P9 related her struggles with band membership to a willingness to accept abusive behaviour elsewhere in her life. She noted: "Yeah so I wanted to be accepted from someone. And even if they were abusive I wouldn't lash back because it would jeopardize being accepted."

caused "a lot of anxiety on my end, a lot of restless nights, [and] a lot of anger."⁸⁶ Another felt an extreme sense of despair knowing that it is his own people that have decided to exclude him from membership:

How do I express my Indigenous side more when I don't have a band? It's been very hard to grasp, the fact that [my band leadership is] pretty much saying, "No, we have the power and we don't want you." And that's just a whole other episode of emotional damage to me. It's pretty hard, actually.⁸⁷

It seems that just as much as band membership can anchor identity formation, it can also cause "emotional damage" when it is withheld.

It is therefore not surprising that some people spoke about feelings of anger and injustice with regard to their membership struggles. One participant shared a story about how their band is treating his children differently due to their membership status, which has caused turmoil:

Obviously, the impact is significant. Because we don't live [on the reserve], my son doesn't really feel the impact now, but will definitely feel it because [my other child] has a trust fund, [and he] doesn't. [My one child] can benefit from programs and services in my community [and he] can't. [Our] community sends [gifts] to all members. So not this past December but the other one before [my one son] didn't get a [gift]. [He] looked at me and said, "Where's mine?" That just broke my heart and reinforced the fact that this [membership issue] was not right, what they're doing to my family.⁸⁸

Elsewhere, one person reported feeling angry that their band wrote a membership code that resulted in the exclusion of family members.⁸⁹

⁸⁶ Conversation with P10.

⁸⁷ Conversation with P4.

⁸⁸ Conversation with P10.

⁸⁹ Deborah Serafinchon qtd. in Pimentel, "Indian Act Used as Weapon" (18:52-19:25). Ms. Serafinchon said: "It's sad. It really is sad. It infuriates me that people have to fight to be part of their community; that you even have to apply. I get it, but that you even have to apply to say 'Yes, I'm Indigenous.' That's what the concept of being part of the band should be: that you are all a family. You're all together."

There is a link between long term stress and emotion exhaustion, otherwise known as “burn out.”⁹⁰ Such exhaustion is linked to emotional and mental health issues such as “depression, ... extreme fatigue, loss of passion, and intensifying cynicism and negativity” and sense of strangled self-worth.⁹¹ These impacts are evident in First Nations contexts, particularly where Indigenous women have had to fight to be recognized as Indians (or for their grandchildren to be recognized as such).⁹²

Our research participants reported feeling similar impacts of exhaustion as a result of fighting for band membership in their own communities. As one put it, “the door’s being shut on us continually.” She described that “door” as being “solid” and made of “steel,”⁹³ thus suggesting a hopelessness in ever having her membership issue resolved in her favour. Others described their exhaustion more directly:

I’ve been in court [with my membership issue] for so long.^[Sighs] I know I don’t wanna give up, but it’s getting to that point where it’s just so much and it’s draining.⁹⁴

I think, is it even worth it? A lot of times you think, is it even worth it? Just to say this is who I am.⁹⁵

I didn’t wanna fight it anymore, at that point I was done.⁹⁶

Some participants argued that they experience long term emotional impacts as a result of their band membership struggles. One noted feeling “fragmented and disconnected” in their identity.⁹⁷ “I was lost,” he said.

⁹⁰ Alexandra Michel, “Burnout and the Brain,” *APS Observer* 29, no. 2 (January 29, 2016), <https://www.psychologicalscience.org/observer/burnout-and-the-brain>; Jacquelyn Cafasso, “Emotional Exhaustion: What It Is and How to Treat It,” ed. Timothy Legg, *Healthline*, July 23, 2018, <https://www.healthline.com/health/emotional-exhaustion>.

⁹¹ Michel, “Burnout and the Brain.”

⁹² For example: Jo-Anne Fiske and Evelyn George, *Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalization through Customary Law* (Ottawa: Status of Women Canada, 2006), 40–53, <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.455.1145&rep=rep1&type=pdf>.

⁹³ Conversation with P6.

⁹⁴ Conversation with P4.

⁹⁵ Conversation with P5.

⁹⁶ Conversation with P13.

⁹⁷ Conversation with P11.

“Totally lost. I had no idea who I was, what I was doing.”⁹⁸ He went on to say that these impacts are coming “home to roost more and more and more all the time,” by which he was referring to the state of his mental health.⁹⁹ Or as another person put it, “What I’ve struggled with, is [do I] have the right to claim half of my identity [as an Indigenous person]?”¹⁰⁰ Yet another reported negative feelings that continue to affect her today: “I still am completely disconnected from [my First Nation]. I’ve never been accepted, so...^[Crying] Why can’t I even say that [without crying]?”¹⁰¹

This same participant drew links between her membership exclusion and the state of her physical health. For her, being excluded was partly a result of her mother losing her Indian status (and therefore band membership) upon marriage to a non-Indian before 1985. She spent her childhood living in an economically depressed part of a major Canadian city. As an adult, she developed an autoimmune disease, which she argued was partly the result of the stress and violence she faced growing up off-reserve, away from her family and cousins.¹⁰² She linked these things together like this:

Yeah, so I grew up wishing I was blonde haired and blue-eyed and tried to wash the brown off of me so I could be accepted at the school. I just wanted to have a friend and I never had friends growing up. I didn’t really have a safe place to go and play. I do remember a couple of rapes. I remember other abuses. And as a result of that, I was taught at a very young age to not express anger. So today I struggle with expressing any kind of anger.¹⁰³

Later, when asked if she felt that she would have been safer growing up and living on her reserve, she stated unequivocally: “The only ones that ever inflicted pain on me were white people.”¹⁰⁴

⁹⁸ Conversation with P11.

⁹⁹ Conversation with P11.

¹⁰⁰ Shelby Twinn qtd. in Pimentel, “*Indian Act Used as Weapon*” (4:32-5:05).

¹⁰¹ Conversation with P9.

¹⁰² Conversation with P9.

¹⁰³ Conversation with P9.

¹⁰⁴ Conversation with P9.

“I’ve been in court [with my membership issue] for so long.^[Sighs]
I know I don’t wanna give up, but it’s getting to that point where
it’s just so much and it’s draining.”

*

“I think, is it even worth it? A lot of times you think,
is it even worth it? Just to say this is who I am.”

*

“I didn’t wanna fight it anymore, at that point I was done.”

This participant later gained her Indian status as a result of Bill C-31. However, her band wrote a membership code that excluded her, despite having status. She felt that this on-going exclusion is related to her developing an autoimmune disease:

P9: My Aunt died of scleroderma which is a sister illness to lupus and I have an uncle that had rheumatoid arthritis, so this is all autoimmune disease stemming from section 10.

DL: Tell me more about this. You’re saying that you’re curious about whether or not there’s a link between [band membership] and the health issues that you and other people in your family have?

P9: Yeah there has to be. If I had grown up on [my First Nation] and there were other people there with like maybe brown skin too, that if there were people there I could identify with and felt safe with then I wouldn’t feel like the odd person out all the time.¹⁰⁵

Scholars have shown that Indigenous peoples’ social determinants of health include spiritual, environmental, and political factors – all of which relate directly to belonging.¹⁰⁶ P9’s claim that her physical health issues

are related in some way to her band’s refusal to accept her into the community is not without merit when we consider the central roles that kinship and togetherness play in Indigenous communities. Indeed, banishment is the absolute worst thing that could happen to a person in many Indigenous nations, and was reserved only for the most extreme transgressions. Here, though, she speaks of being excluded only because she or her mother lacked Indian status. In other words, the implementation of section 10 membership may have broader impacts on people’s health, broadly defined. We offer her words above as a way to open a conversation on this matter.

2. Kinship impacts

*It’s sad. It really is sad. It infuriates me that people have to fight to be part of their community. That’s what the concept of being part of the band should be: that you are all a family. You’re all together.*¹⁰⁷

Participants and others also reported that section 10 is impacting their families. They expressed concern over how differential treatment within families may lead to tension between siblings, resentment towards family members and community, and a realization that merely seeking

¹⁰⁵ Conversation with P9.

¹⁰⁶ Charlotte Reading, “Structural Determinants of Aboriginal Peoples’ Health,” in *Determinants of Indigenous Peoples’ Health: Beyond the Social*, ed. Margo Greenwood, Sarah de Leeuw, and Nicole Marie Lindsay, Second Edition

(Toronto: Canadian Scholars Press, 2018), 3–17; Chantelle Richmond, “The Relatedness of People, Land, and Health: Stories from Anishinabe Elders,” in *Determinants of Indigenous Peoples’ Health: Beyond the Social*, ed. Margo Greenwood, Sarah de Leeuw, and Nicole Marie Lindsay, Second Edition (Toronto: Canadian Scholars Press, 2018), 167–86.

¹⁰⁷ Deborah Serafinchon qtd. in Pimentel, “Indian Act Used as Weapon” (18:52-19:25).

membership may paradoxically fragment their kinship relationships.

In terms of tension between siblings, one participant noted that his band recognizes one of his children as a member but not another. He is worried that this differential treatment will lead to sibling conflict down the road. His band creates trust funds for minor band member children, which means the one child will not have access to such funds:

What's gonna happen at 19 when [one of my kids] doesn't [get a trust fund]? Is that gonna cause a rift between [them]? Money can do strange things to people. I hope it doesn't.¹⁰⁸

While future concerns are one thing, this participant noted that his children's differing membership status is already affecting their lives in significant ways.¹⁰⁹

The concern about familial tensions noted above is already the reality for some. Participants who have been fighting for membership for years noted feelings of resentment toward not just their community, but also their family members. In one case, a participant knows that at its core his exclusion from membership is a result of his band's membership code and the way his band is interpreting it. Yet, he has at times also experienced feelings of resentment towards his family members for not passing on language and culture to him, which he felt would have been easier to do had they been members of their band and thus been able to participate more fully in community life. "I spent all my life trying to figure out who I was and trying to be somebody else and pan-Indian this and whatever else," he said. "[S]ometimes I had a resentment towards my own grandma and my own mom and my own aunts and uncles for not taking the time to teach me my own language."¹¹⁰ Yet, this person also recognized that this resentment is misdirected:

I don't want to suffer with resentments and anger towards other people. They're my relatives. They're

my blood. They're my people. I don't wanna be angry with them.¹¹¹

Others noted that being excluded from membership by family members who are in positions of power disintegrates family bonds altogether.¹¹² Put differently, some experience section 10 band membership as a form of alienation.¹¹³

The resentment and familial tensions raised above are resulting in kinship fragmentation. One person fighting for membership in her band noted that simply seeking membership might be enough to cause her to lose connection with her family members (who are already members). She has been made to feel that membership and familial connection are mutually exclusive:

What I wanted was a relationship with my family. And I knew that if I pursued band membership, then I wouldn't get a relationship.¹¹⁴

Yet, she emphasized her strong kinship connections to her community and to band membership: "I don't care that you guys like me or want me [*sic*] or whatever. I am still [the former chief's] daughter. Why do you get [membership] and not me? Why do your children get [membership] and not mine?"¹¹⁵ This tension between membership and kinship is concerning to the extent that the process of seeking membership itself can at times be enough to damage the very basis of why people want to belong with their communities.

¹¹¹ Conversation with P11.

¹¹² Conversation with P6. At times, P6 struggled to place said family members in either a kinship category, or merely as administrators who run her band: "I think it's just the disconnection we've had from that family. The community, it's not family. Well they are family but community forever and that sense of belonging or being attached. The attachment comes through the status but it isn't an acceptance that's come through that status, it's always been fraught with conditions and who are they and what do they want? And 'How do we keep them off and we don't want them?'"

¹¹³ Conversation with P11. P11 stated: "To me personally myself, based on the way my mom and my aunts and uncles ... were treated, I don't know if I really wanna be involved in a community that won't accept you"

¹¹⁴ Deborah Serafinchon qtd. in Pimentel, "Everyone Needs to Belong Somewhere" (1:58-2:08).

¹¹⁵ Deborah Serafinchon qtd. in Pimentel (13:50-14:20).

¹⁰⁸ Conversation with P10.

¹⁰⁹ Conversation with P10. P10 noted: "And then also just programs and services. ... There's a number of different impacts across the board whether it's personal or financial or emotional."

¹¹⁰ Conversation with P11.

3. Economic stability

Participants raised several concerns about how section 10 has impacted them economically. Those fighting to be recognized as members noted that section 10 has created a drain on their finances, while others noted economic impacts related to not being able to access reserve lands and band resources.

Section 10 membership codes have been the subject of a number of legal challenges since Bill C-31 became law in 1985. Such challenges address a number of issues dealing with how a membership code is written and/or how section 10 bands interpret their codes when making membership decisions. At times, plaintiffs have been successful,¹¹⁶ while other times they have not.¹¹⁷ Section 10 membership challenges continue to be announced even as this report is being written.¹¹⁸

The costs of taking any dispute to court can be immense.¹¹⁹ This is no less true for those seeking to have their band membership claims affirmed by the courts. As one research participant put it, “I think I owe over 300,000 [dollars in legal fees]” due to having to fight his band for membership in court.¹²⁰ Yet, the participants often saw no other options: “[Its] like your hands are tied.”¹²¹ “The only reason why we even went to the route of the court system,” said one participant, “was because that’s how [the band] dealt with things.”¹²² The experience of going to court with limited resources is “very frustrating; very stressful.”¹²³ This stress was compounded for those who have had to go through two or even three rounds of court proceedings with regard to their membership issues.¹²⁴

¹¹⁶ For example: *Cameron v. Canada; Diabo v. Whitesand First Nation*.

¹¹⁷ For example: *Grismer v. Squamish First Nation FC 1088* (2006), accessed May 7, 2019.

¹¹⁸ For example: APTN News, “Peters First Nation Is a Family Divided with No End in Sight,” *Nation to Nation*, April 29, 2021, <https://www.aptnnews.ca/nation-to-nation/peters-first-nation-is-a-family-divided-with-no-end-in-sight/>.

¹¹⁹ Michael McKiernan, “The Going Rate,” *Canadian Lawyer*, 2015. McKiernan, cited here, notes that as of 2015 the national average cost of a two-day court trial was more than \$30,000.

¹²⁰ Conversation with P3.

¹²¹ Conversation with P12.

¹²² Conversation with P11.

¹²³ Conversation with P12.

¹²⁴ Conversation with P3. As P3 put it: “We went to court again the third time.”

Participants expressed trepidation about taking their membership issues to court due to the power imbalances at play. They perceived their bands as having unlimited financial resources, whereas they had limited financial capacity. One person noted:

It’s pretty hard to appeal or to do anything. So that was not good at all. So that was it, we couldn’t appeal. And that’s the first thing they want you to do is, “Go to court! Why don’t you go to court?” Well how are you gonna go to court? You see because [the band has] all these resources; and endless resources. And we don’t. So that was it, you know. But [my family member] still wanted to continue, you know.¹²⁵

Sadly, this person noted that such fiscal power imbalance had deeper implications for her family. She noted that her band basically waited-out several people’s membership claims until they passed away.¹²⁶ One of those who passed away was her uncle:

He wanted to keep right on. And he did actually go [to court over his membership claim] but [the band] just raked him over the coals. And he didn’t even have a lawyer. He was representing himself. He passed away on Easter Sunday, and that was terrible. That was so sad. He fought for [his membership for] many years.¹²⁷

Given the fiscal imbalances between bands and individuals, it is not hard to understand why some might feel hesitant to go the route of the courts.

Yet, despite the financial risks involved, some participants noted that taking their bands to court had to be done nonetheless. They perceived such work as a matter of social justice. One noted that his family wanted to support his and others’ membership claims in the courts because of a matriarch’s dying wish to do so:

¹²⁵ Conversation with P12.

¹²⁶ Conversation with P12. P12 noted: “So when we first started out with [our membership claim] there were six involved with this lawsuit. Now there’s just two [of us].”

¹²⁷ Conversation with P12.

No it wasn't easy [to get a lawyer]. My cousin asked me about it, if I wanted it to go that way [of the courts]. And I never even thought of doing that. But she wanted to help. See, her mother passed away, and my grandma [was] trying to figure things out to get us all back [onto the membership list]. And they all passed away. And before [my cousin]'s mom passed away, she told [her]: make sure that they get us on [the membership list]. So, she was just doing that for her wishes. So she helped me and [others] to do this. So that's how that went.¹²⁸

Fulfilling kinship responsibilities emerged as a key mitigating factor in how some participants managed the financial impacts of taking their bands to court. In order to carry the legal costs, some relied on family members' willingness to support them. They did so in a variety of ways: from simply pooling together spare cash, to conducting long term small scale weekly fundraisers:

So [I] went and hired a lawyer. Everybody scraped up a few bucks that they could. We even did some fundraising things and whatever else to make the money to see what would happen.¹²⁹

[My cousin] only wanted like 100 bucks every month. Out of my paycheck or whatever. My girlfriend she turned around and did this, what do you call those things? It's a card game. "Find the Jack," something like that. And we do that every Sunday. I'm up to almost 10 grand anyways on that. We've been giving her [money]. But all the money that we're making now that goes to the lawyer.¹³⁰

Kinship's role in mitigating the impacts of fighting for membership recognition should not be overlooked. We would argue that, for many Indigenous nations, fulfilling kinship responsibilities in the ways noted here reflects what belonging is all about. Kinship draws a circle around individuals that a section 10 membership code might otherwise exclude. Belonging is affirmed through kin fighting for other kin. This is why some have said that

¹²⁸ Conversation with P3.

¹²⁹ Conversation with P11.

¹³⁰ Conversation with P3.

"being part of the band" should mean that "you are all a family."¹³¹ At times, kinship challenges and stretches the boundaries defined by membership codes.

Despite support from family members, however, financial impacts remain. For some, lawyer bills and associated legal costs have created long-term liabilities:

This is the thing, I'm still paying it off. [My relatives] put up 50 thousand for us - up front to our lawyer. She's amazing. So, we're slowly paying them back. The deal with [my lawyer is] she'll do it *pro bono*, but when we win whatever the band has to pay goes directly to her. That's the plan.^[Laughs]¹³²

But all the money that we're making now that goes to the lawyer. [It] doesn't even go to [my cousin], but she got some of it anyways. And when I do [win] - I'm pretty sure I'm gonna get on there sooner or later - I'll give [my cousin] the rest of the money. What I owe her.¹³³

Yet, these were not the only negative economic impacts reported. Loss of access to land and band resources also figured strongly in some participants' concerns.¹³⁴

Finally, some participants spoke about the relationship between band membership, perceptions of greed, and accessing fiscal resources. Some expressed concern over the fact that they are not allowed to participate in band decision-making with regard to things like entering into impact benefit agreements with natural resource companies.¹³⁵ Others expressed concern that, due to being excluded from membership, they will not be able to enjoy the financial benefits arising out of such agreements, or from successful land claim negotiations. These agreements and negotiations can result in significant sums:

¹³¹ Deborah Serafinchon qtd. in Pimentel, "Indian Act Used as Weapon" (18:52-19:25).

¹³² Conversation with P4.

¹³³ Conversation with P3.

¹³⁴ e.g., Conversation with P4. P4 stated "I'm not trying to sound possessive, but my grandpa, his vision is to pass [his land] down to me. If I'm not a member [he] can't pass [it] to me. And you know where his land will go?"

¹³⁵ Conversation with P9. "They don't allow people on the reserve that'll fight the pipeline, too. There are people that they're shutting out. They're keeping people on [the membership list] who are gonna vote for the pipeline and keep the same Chief and Council in."

And the band said that they're gonna give us \$12,000 out of it and every three months they're gonna give [band members] \$3,000 or something. But I don't know if they're gonna give the full [amount] out to the reserve. There's like [less than 60] people on the band list. I'm not sure how much but each one should get like \$300,000 out of that.¹³⁶

[S]ince then the band made a deal with [an energy company]. [T]hey've gotten loads of money. So all the members, they got about 50 grand [each].¹³⁷

The payments noted above, known as per capita distributions (PCDs), are limited to band members. Because of this, some have noted that PCDs and other types of payments create an incentive for bands to use section 10 to keep their membership lists short.¹³⁸ Doing so would enable bands to disperse greater sums of money to fewer people.¹³⁹

4. Social Wellbeing

The costs noted above tell only part of the story about how section 10 has impacted those who are fighting for membership in their bands. In addition to loss of money and time, participants noted that merely seeking

membership justice comes with social costs in the form of ostracization and familial tension. Other people reported experiencing discrimination based on sexual orientation when pressing for membership recognition. This section relays these experiences in turn.

Many First Nations are socially tight knit communities, which can raise unique challenges when someone decides to take legal action against their own band. Leaders and community members have critiqued their own people for taking legal matters to non-Indigenous courts.¹⁴⁰ Moreover, our interviews show such participants' legal actions can offend their own family members. One participant explained that his legal challenge against his band is producing tension within his family:

I told my family, if I have to go to the Supreme Court of Canada to get this [membership issue] resolved, I will. It's gonna cost me an arm and a leg. It's not what I want. And in fact when I was home [on the reserve], unbeknownst to me my older brother is not happy with what I'm doing because I'm, in his words, "Suing the reserve."¹⁴¹

The participant's brother expressed concern despite the participant's claim that his band is excluding members of their family from membership.

Such tensions suggest that membership justice and good relations are perceived to be mutually exclusive. Others reported similar dilemmas. For example, a 2019 APTN News story about section 10 band membership issues quoted someone who feels the same tensions between family acceptance and membership recognition. "What I wanted was a relationship with my family," she said. "And I knew that if I pursued band membership, then I wouldn't get a relationship [with them]."¹⁴² Another reported a

¹³⁶ Conversation with P3.

¹³⁷ Conversation with P4.

¹³⁸ For example: Kenneth Jackson, "Money and Power: Why a Band Council in B.C. Wants to Keep Their Extended Family in Exile," *APTN*, December 14, 2017, <http://aptnnews.ca/2017/12/14/money-power-band-council-b-c-wants-keep-extended-family-exile/>; Conversation with P11; Jenny Margetts qtd. in "Minutes of Proceedings, Issue No. 18," 18:41-42; Catherine Twinn qtd. in Buehler, "Alberta Bands Continue Court Battle Challenging Bill C-31"; Gover, *Tribal Constitutionalism*, 154. Twinn (as cited here) was paraphrased in 2007 as saying: "[A]ccepting people in the communities who may have never lived on the reserve could be dangerous. Those band members would have the power to vote and could and could possibly unite and, if they outnumbered the long-term community members, could vote liquidate band assets and sell the land." P11 recalled: "[The chief] called my aunt and uncles and their cousins 'opportunistic ill-educated hooligans who will be dissipating the assets of the band [just for seeking membership]'" For a U.S.-based example, see Gover (as cited here).

¹³⁹ Assembly of First Nations, "An Act Respecting Membership," Discussion Paper, Canada's Collaborative Process on Indian Registration Reforms, February 19, 2019, 18, <https://www.afn.ca/wp-content/uploads/2020/01/00-19-02-06-Discussion-Paper-Citizenship.pdf>; Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993), 213. AFN notes:

[I]f a First Nation has membership rules that are more prohibitive than those depicted in the *Indian Act* [sic], and if that same First Nation has significant own-source revenues, it will have a lesser number of people to share those revenues with or even to spend these revenues on. ... Basically, from a financial point of view, First Nations have a good reason to have its membership more stringent.

¹⁴⁰ CBC News, "Kahnawake's Controversial 'marry out, Get out' Policy Violates Charter, Judge Rules," *CBC News*, May 1, 2018, <https://www.cbc.ca/news/canada/montreal/kahnawake-membership-law-charter-1.4642770>. For example, Kahnawake's Grand Chief Joe Norton is quoted in the CBC News article cited here as saying "Obviously, we maintain the position that matters that are so integral to our identity have no business in outside courts." The article goes on to say that "many people in the community are also upset the issue went to an outside court." It is important to note, however, that the Mohawks of Kahnawake do not control their band membership list under section 10 of the *Indian Act*. It is controlled outside of s.10 and s.11 of the act.

¹⁴¹ Conversation with P10.

¹⁴² Deborah Serafinchon qtd. in Pimentel, "Everyone Needs to Belong Somewhere" (1:58-2:08).

“It was just an interrogation. In a sense, that [would be] appropriate if [I were] a stranger and I’ve never been to the reserve. [But these people] are all my family. These are all my cousins and my aunts and uncles. Nobody else that wanted band membership has ever went through that process. They would have got accepted right away. That whole process, it was pretty brutal.”

similar situation, referring to the split between membership and family as a form of ostracization.¹⁴³ For her, band membership tensions have even given rise to bullying and harassment.¹⁴⁴

Possibly more striking, some participants shared that, from their perspective, bands can weaponize section 10 against them for political reasons. These include using it to neutralize political opponents, or to neutralize dissent.

Regarding neutralizing political opponents, one person currently fighting for membership in her band believes that her exclusion is due partly to the fact that she comes from a family with legitimate claims to hereditary leadership. “[My] grandfather was the chief, and his father and his father,” she noted. “[And] my grandmother was the next chief in line, and then their first born was my mother and then there’s me. So technically I would be hereditary [leadership].”¹⁴⁵ She believes that her band’s current leaders are interested in maintaining their power under the imposed *Indian Act* governance system (i.e., chief and council), rather than giving space to their hereditary

governance system – a move that would directly implicate this participant has a powerholder. This would not be the first time section 10 was used to undermine political opponents in a First Nation context.¹⁴⁶ However, if true, this participant’s band’s behaviour would represent an internalization of the colonial order: the *Indian Act* was designed in part to eliminate inherent Indigenous governance systems.

The participant noted immediately above also perceived her community’s use of section 10 as a tool to quell dissent against band decisions. Such conflict might arise in the form of opposing large business partnerships, or raising questions about band office financial transparency, among others. “They don’t allow people on the reserve that’ll fight the pipeline,” she argued. “There are people that they’re shutting out [while at the same time] keeping people on [the membership list] who are gonna vote for the pipeline and keep the same chief and council in.”¹⁴⁷ Another said that her band removed her from the membership list because she was raising questions about band spending practices. “I was on the [membership] list in May or April,” she said. “[There] was gonna be an election, and they got scared because we started asking questions. So, they changed the elections list four times. I was always off [of it] afterwards. And my family.”¹⁴⁸

¹⁴³ Conversation with P6. P6 noted:

And we’re fortunate we’re not in the fray of things on the reserve, [de-identified] are in the midst of it and they’re the ones that are suffering as well as other family members that are there. Because they have to drive right past those people’s place every day, and [they] have been ostracized now - their mom wasn’t part of the moneys. They kind of put her off to the side and so now she’s off of their list and the kids. So they’re dealing with a lot of bullying and harassment and in a sense we are too.

¹⁴⁴ Conversation with P6.

¹⁴⁵ Conversation with P9.

¹⁴⁶ See: *Diabo v. Whitesand First Nation*.

¹⁴⁷ Conversation with P9.

¹⁴⁸ Conversation with P13.

In other cases, those seeking membership said that their bands made things uncomfortable for them. Some noted that their respective bands threatened them with legal action,¹⁴⁹ while others noted that their leaders used membership application processes to alienate them publicly. In terms of trespassing, one participant noted that she and her family were met with threats when they went to their reserve to protest being excluded from membership. “We did demonstrate,” she said, “we had placards and everything. That’s when [the band] said, ‘You step foot on this land and you’re gonna [be fined].’ But I don’t know if they would have or not, but they just warned us I guess.”¹⁵⁰ Elsewhere, this participant said that her band threatened her with jail time if she went onto her reserve.¹⁵¹

Another participant reported that the process of having his membership request heard was “humiliating.” Under his community’s membership code, applicants are required to attend a community meeting to justify their claim. He experienced said meeting as confrontational:

It was just an interrogation. In a sense, that [would be] appropriate if [I were] a stranger and I’ve never been to the reserve. [But these people] are all my family. These are all my cousins and my aunts and uncles. Nobody else that wanted band membership has ever went through that process. They would have got accepted right away. That whole process, it was pretty brutal.¹⁵²

The First Nation declined this latter participant’s membership claims.¹⁵³ He has since taken his membership issue to the courts.

Finally, some participants felt that they or their family members are being excluded from membership due to discrimination on the basis of sexual orientation.

¹⁴⁹ Angie Ward qtd. in Pimentel, “Everyone Needs to Belong Somewhere” (10:15-10:22). Here, Ms. Ward stated the following: “We were always told we are not allowed to go on to the Sawridge First Nation. There were signs put up: no trespassing. And if we do go on Sawridge First Nation, that we could be fined. ... But I would love to go on. Let my bare foot touch the soil that I believe is part of me that’s lost.”

¹⁵⁰ Conversation with P12.

¹⁵¹ Conversation with P12. She said: “[W]e were warned [by the band], ‘If you set foot in this reserve you’re going to go to jail!’”

¹⁵² Conversation with P4.

¹⁵³ Conversation with P4.

Specifically, we found evidence that Two-Spirit and queer Indigenous families face unique barriers when seeking to have their children registered as members of their bands. This would not be surprising considering that not a single section 10 membership code on file with the federal government explicitly makes space for Two-Spirit, queer or trans individuals or their families.¹⁵⁴ Marriage sections of the codes tend to be a useful place to assess for how a band might imagine sexual and gender diversity within its vision of belonging. The following are reflective of what many section 10 codes state:

In these Rules, “marriage” means a legal union between a man and a woman.¹⁵⁵

In this document, “spouse” means either of an Indian man and woman who, are married to each other.¹⁵⁶

If Indigenous governance is gay,¹⁵⁷ so are Indigenous citizenship orders. Belonging is not bound by heterosexual relationships.¹⁵⁸ Yet, this is not readily apparent in most of the section 10 membership codes on file. At best, publicly accessible membership codes might include members of Two-Spirit, queer, or trans individuals/families through the interpretation of generic marriage or parent clauses, such as “In this by-law, “spouse” does not include common law spouse,”¹⁵⁹ or “A child, both of whose parents are members of the band, is eligible to apply for membership.”¹⁶⁰ But does “spouse” or “parent” here include Two-Spirit individuals, for example? Updated versions of these membership codes, if they exist, might clarify these gray areas.

Two real world examples will help to explain how some Two Spirit families experience section 10 membership.¹⁶¹

¹⁵⁴ See: Exploring Section 10, “Membership Codes.”

¹⁵⁵ Little Shuswap Indian Band, available at Exploring Section 10, s.2.(10).

¹⁵⁶ Onegaming Indian Band (#131), available at Exploring Section 10, s.2.

¹⁵⁷ Emily Riddle, “(Indigenous) Governance Is Gay,” *GUTS Magazine*, December 10, 2018, <http://gutsmagazine.ca/indigenous-governance-is-gay/>.

¹⁵⁸ Mark Rifkin, *When Did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty* (New York: Oxford University Press, 2011).

¹⁵⁹ The Gambler Band (294), available at Exploring Section 10, “Membership Codes”, s.3(g).

¹⁶⁰ Alexis Indian Band (437), available at Exploring Section 10, s.5.3 a).

¹⁶¹ We focus on Two Spirit families here only because we have not yet been able to find news stories or academic literature on trans people’s experiences with section 10 membership.

In the first instance, Mr. Wayne Wallace – a member of the Madawaska Maliseet First Nation – has argued that his band’s membership code discriminates based on sexual orientation. With the help of a surrogate and assisted reproductive technology, Mr. Wallace and his partner had twin sons – one biologically his, and the other biologically his partner’s. However, Mr. Wallace’s band allegedly relies in part on DNA testing when making membership decisions, specifically when a child’s membership claim is based only on the father being a member.¹⁶² This means that only one of Mr. Wallace’s twin boys is a member of the band, while the other is not. In 2018 it was reported that Mr. Wallace was pressing for his son’s band membership at the Canadian Human Rights Tribunal.¹⁶³

A second recent case also demonstrates how section 10 creates challenges for children of Two-Spirit and queer couples. In February 2020, APTN reported that an eight-year-old boy named Leelith Lefthand is not a member of his parent’s First Nation despite his mothers’ insistence that he is entitled to it under their nation’s membership code.¹⁶⁴ Leelith’s mothers - Danielle Mark and Ava Lefthand - allege that their band is refusing to recognize his membership claims due the fact that they are a same sex couple.¹⁶⁵ “The majority of the community [is] very supportive [of us],” noted Danielle Mark. “It’s just, when it comes to politics, or the tribal council, it seems like we’re not considered a family.”¹⁶⁶ “We feel very discriminated against,” she said. “And we’re very hurt. We feel very belittled.”¹⁶⁷

Leelith’s other mother, Ava Lefthand, also said that she feels her band is discriminating against her family. “[We] should see each other equally, and not based on what gender we like or whatever.”¹⁶⁸ She also noted:

It just hurts [to know] that [Leelith] is treated different because of me. And, I don’t know, I’m just sometimes...^[Sighs] I feel like I shouldn’t be in the picture so that he can get what he deserves. It feels like it’s because of me that he’s pushed aside, and he doesn’t deserve that.¹⁶⁹

For Lefthand, Leelith’s band membership is not something that she feels her band should deny due to her sexual orientation. “We have feelings, too.”¹⁷⁰

In sum, despite section 10’s ability to provide bands with a degree of self-governance, it is not a perfect tool. It has at times allowed First Nations to marginalize some individuals for a variety of reasons. Section 10 does not end colonization in and of itself, and may have at times created new channels for internalized colonialism to flow through First Nations communities. At best, it may simply be one more incremental step that First Nations have used to restrengthen themselves. To better understand how it might inform future membership or citizenship developments, we need to see not only its successes but also its failures.

¹⁶² Lenard Monkman, “Two-Spirit Father Says First Nation’s Membership Code Requiring Paternity Testing Is Discriminatory,” CBC News, August 9, 2018, <https://www.cbc.ca/news/indigenous/two-spirit-father-madawaska-membership-paternity-test-discrimination-1.4778466>.

¹⁶³ Monkman.

¹⁶⁴ Tamara Pimentel, “Perspectives on Band Membership, Part 1: Leelith Lefthand,” APTN, February 10, 2020, <https://www.aptnnews.ca/bandmembership/>.

¹⁶⁵ Pimentel.

¹⁶⁶ Danielle Mark qtd. in Pimentel.

¹⁶⁷ Danielle Mark qtd. in Pimentel.

¹⁶⁸ Ava Lefthand qtd. in Tamara Pimentel, “Perspectives on Band Membership, Part 2: Wayne Wallace,” APTN, February 11, 2020, <https://www.aptnnews.ca/bandmembership/>.

¹⁶⁹ Ava Lefthand qtd. in Pimentel, “Perspectives, Part 1.”

¹⁷⁰ Ava Lefthand qtd. in Pimentel, “Perspectives, Part 2.”

Conclusion

Conversations on membership and belonging are difficult, even more so today with news about Pretendians making headlines on almost a weekly basis.¹⁷¹ While First Nations are justified to be skeptical about dubious identity claims, the pendulum can swing too far the other way as well: those who rightfully belong can be excluded by upholding colonial narratives about Indianness. As our research participants' stories have shown, section 10 of the *Indian Act* has at times been used as a vehicle for some bands to do just this.

Throughout this report, we gestured towards the concept of kinship as a key alternative to section 10 band membership. For us, kinship is a key part of many Indigenous nations' inherent governance systems. It is based on maintaining good relations through upholding mutual responsibilities. It is about accountability to community and its people. Under a kinship approach to membership, for example, family members would not be excluded from full participation in community life simply because they do not have Indian status, lack sufficient blood quantum, or due to some other immutable characteristic of their being. Kinship is a circle of responsibilities. It does not mean that just anyone can belong, and thus it provides a basis to exclude those who are outside the circle. What might kinship-based band membership look like? The answer to this question will be specific to each Indigenous nation, but

we believe it would not reproduce the identity regulation logics we have learned after more than 145 years of live lived under the *Indian Act*.

And we have learned a lot in that time. As a matter of survival, First Nations have been forced to accept the race-based notions of Indianness crafted by the Canadian state. This report has gestured towards the fact that reproducing colonialism is sometimes a part of surviving it. Some of section 10's impacts reviewed here are emblematic of that survival technique. That said, when section 10 is seen through stories of those excluded from their communities, it is clear that the *survival-through-internalization* approach has created long-lasting effects on First Nations individuals and their families. We found that these impacts fall broadly within the categories of health, kinship, economic stability, and social wellbeing, which are detailed above. But we also believe that more research is needed on section 10's long-term impacts, with particular focus on its relevance as a determinant of Indigenous peoples' health. Whereas section 10 was sold as an expression of self-governance, no legislation is decolonizing if it undermines kinship and the social, physical, and political benefits it provides.

¹⁷¹ e.g., "The Pretendians," *The Passionate Eye* (CBC, September 30, 2022), <https://gem.cbc.ca/media/the-passionate-eye/s02e03>.

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Conversation with P10, July 17, 2019.

Conversation with P11, July 19, 2019.

Conversation with P12, July 20, 2019.

Conversation with P13, July 22, 2019.

Conversation with P14, July 23, 2019.



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