

Legal Opinion on Wahta Mohawks Citizenship Code

By Alisa Lombard, S.S.Sc., LL.L., JD

Wahta passed its most recent Citizenship Code in 2014. Its stated purpose is to preserve Wahta Mohawk cultural and political integrity and sovereignty, and to establish who has Wahta Mohawk rights and obligations.

Citizenship Rules & Inconsistencies

Under the Code, anyone who was entitled to Indian status before the Code, or with two parents who are entitled to status, is a citizen of Wahta. Otherwise, a combination of blood quantum and ancestry is required: for natural (non-adopted) children, one must have a parent who was entitled to status and at least a quarter of Mohawk blood. Adopted children have different rules. They may acquire citizenship only if they have 25% Indian blood quantum, which need not be Mohawk blood.

The Code also bars citizenship for those who acquired Indian status through marriage and their descendants, and anyone who gave up their status through the voluntary enfranchisement provisions of the *Indian Act*.

There are two important inconsistencies in the membership provisions. First, the rules for blood purity are inconsistently applied. There is a lower threshold of blood quantum for adopted over naturally born children. Second, excluding those who enfranchised is inconsistent with giving citizenship to all those entitled to status before the 1987 Code, as some of those who enfranchised were entitled to have their status restored by Bill C-31 in 1985.

Authorized by and Based on *Indian Act*

The Wahta Citizenship Code is actually a *membership* code that is authorized by the *Indian Act*, section 10. It establishes membership in Wahta, a Band under the *Indian Act*, not an Indigenous Nation. It is still based in part on the criteria for Indian status under the *Indian Act*.

The *Indian Act* is colonial legislation whose purpose was to eliminate tribal governance and sovereignty, and indeed Indigenous culture altogether. In adopting the criteria of the *Indian Act* for membership, Wahta is exercising a delegated power in a manner that mirrors colonial legislation intended to eradicate all forms of tribal governance. This is the opposite of the stated purpose of the Citizenship Code, which is to preserve Mohawk cultural integrity.

Constitutionality

In order to be found discriminatory, a law must distinguish between people on the basis of an un-changeable personal characteristic such as race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. It must also negatively affect the people with that characteristic, increasing their level of disadvantage.

The Code clearly distinguishes on the basis of race, through its blood quantum and ancestry requirements. It disadvantages those people who fall below the blood quantum threshold, that is, people of mixed-race with not enough Mohawk or Indian blood. They are not allowed to be citizens of Wahta, and lose the associated rights of citizenship. Mixed-race Indians could likely claim discrimination, if they can prove their disadvantage with evidence.

However, the purpose of a membership code is to determine membership in a race of people, which is a race-based exercise in its entirety. It is very possible that courts would use a different framework for analyzing a claim of discrimination in this context, and would find the principles of self-governance to allow race-based distinctions to be made. It is very difficult to predict the outcome of a section 15 challenge to the Code.

However, what is clear is that the membership rules in the Code do not actually achieve the stated purpose of the Code. The purpose is to preserve *cultural* integrity and sovereignty. Blood quantum requirements preserve *racial* purity, not cultural purity. Moreover, the Code is an exercise in delegated authority by an *Indian Act* band of *Indian Act* rules, which is not an exercise in sovereignty. Because of this, if the Code was found to be discriminatory, the Band could not likely justify the discrimination on the basis of the section 1 of the *Charter*.

Further, the Code is likely not connected to an Aboriginal right, which would also justify discrimination. Aboriginal rights are practices the Mohawk undertook prior to European contact which were centrally and independently significant to the Mohawk community. Expert evidence suggests that the Mohawk intentionally *included* people of other ancestries to create a sense of common patriotism, strengthen alliances and to ensure the strength of bloodlines, and did not exclude them on the basis of blood quantum. Blood-quantum exclusion is probably not an Aboriginal right.

Recommendations

- Give effect to the Code's purpose, to preserve Wahta's cultural integrity, by replacing blood quantum distinctions with cultural integrity criteria to acquiring membership.
 - Cultural integrity criterion can include ancestry as one factor.
- Define and explain the terms in the Code, such as blood quantum.
- Clarify the community's goals for citizenship and membership, for the Nation and for the Band separately, and whether the focus is racial purity or cultural connection.
- Analyze the residency and election codes to ensure all are consistent and advance the community's goals.

A.R.L.