LEGAL OPINION
Wahta Mohawks Citizenship Code

TO: Wahta Mohawks
c/o Councilor Teresa Greasley
2664 Muskoka Drive Rd #38
PO Box 260 Bala, Ontario
P0C 1A0

FROM: Alisa R. Lombard, S.S.Sc., LL.L., JD

DATE: June 5, 2017

TABLE OF CONTENTS

I. INSTRUCTIONS

1. The purpose of this analysis is to review Wahta's Membership Code documents and identify areas of inconsistency and potential discrimination on the basis of the protections afforded in the *Canadian Charter of Rights and Freedoms (*the "*Charter*").

2. The relevant documents provided by Wahta include:

- Mohawks of Gibson: Citizenship Code, dated June 20, 1987;
- Wahta Mohawks Citizenship Code, Enacted by Referendum October 20, 2001;
- Wahta Mohawks Citizenship Code, Enacted by Referendum February 22, 2014; ("2014 Citizenship Code")

3. Wahta also provided a copy of Form No. 1 Application for Membership, Wahta Mohawks Citizenship Regulation, a document entitled "Membership MCR" created Friday May 26, 2017 and a "Referendum Report, Saturday February 22nd, 2014".

4. Wahta's Election Code and Residency Code are not included under the purview of this opinion. They affect the democratic and residency rights of citizens of the Wahta Mohawks, and are affected by the impacts of the 2014 Citizenship Code 2014. Their future legal analysis, in so far as they entrench notions contained in the 2014 Citizenship Code, may be helpful in ensuring constitutional compliance and legal consistency in Wahta's governance tools. However, only matters of citizenship are analyzed herein.

5. Council is concerned with determining whether the 2014 Citizenship Code, in its entirety, is discriminatory in law, particularly in regards to the general requirements for blood quantum as a vehicle to obtaining citizenship, and whether specific distinctions made in the Code give rise to inconsistent impacts in application.

II. OVERVIEW

6. Citizenship in the Indigenous legal framework is complex. Though it is subjected to various established legal tests, its nature is greyed by the obscure boundaries of the right to self-determination contained in section 35 of the *Constitution Act, 1985.*

7. The Code is inconsistent in: (1) the impacts resulting from a practical application of its blood quantum provisions; (2) its exclusion of enfranchised individuals contrary to the *Indian Act* and the Code itself; (3) the undefined terminology it uses; (4) the lack of consistency resulting from the absence of a baseline formula to establish entitlement through blood quantum – Mohawk or Indian; and, (5) the means it uses to achieve its stated purposes.

8. The Code makes distinctions based on race that are likely - though not conclusively owing to a lack of evidence - discriminatory because they exacerbate the historic and contemporary disadvantages of the Aboriginal sub-groups, as variously composed, who may advance a claim of discrimination. The discrimination is not justifiable under section 1 of the *Charter* because the measures do not achieve the stated pressing and urgent goals. A section 25 defense of Aboriginal rights, guided by a section 35 analysis, is not likely to prevail.

III. BACKGROUND

A. Membership under the *Indian Act*

9. In 1985, the *Indian Act* was amended by Bill C-31. The amendments delegated authority to bands to create their own membership codes. These changes were prompted by the recognition of discrimination on the basis of gender in the previous provisions.

10. Bill C-31 stripped the *Indian Act* of a single layer of assimilation and rearranged entitlement to registration as a status Indian accordingly. Prior to Bill C-31, status Indian women who married non-status - or non-Indian - men, lost their status, their right to reside on their Band's reserve and many other features of full participation in a Band's cultural, political and social existence. Exclusion from community life and affairs negatively affect those excluded.

11. Sandra Lovelace[1] submitted to the Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, that a person who ceases to be an Indian under the *Indian Act* suffers consequences, including:

1) Loss of the right to possess or reside on lands on a reserve (as. 25 and 28 (1)). This includes loss of the right to return to the reserve after leaving, the right to inherit possessory interest in land from parents or others, and the right to be buried on a reserve;

2) An Indian without status cannot receive loans from the Consolidated Revenue Fund for the purposes set out in section 70;

3) An Indian without status cannot benefit from instruction in farming and cannot receive seed without charge from the Minister (see section 71);

4) An Indian without status cannot benefit from medical treatment and health services provided under section 73 (1) (g);

5) An Indian without status cannot reside on tax exempt lands (section 87);

6) A person ceasing to be an Indian loses the right to borrow money for housing from the Band Council (Consolidated Regulations of Canada, 1978, c. 949);

7) A person ceasing to be an Indian loses the right to cut timber free of dues on an Indian reserve (section 4 - Indian Timber Regulations, c. 961, 1978 Consolidated Regulations of Canada);

8) A person ceasing to be an Indian loses traditional hunting and fishing rights that may exist;[2]

[1] *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981) (*Lovelace*)
[2] *Lovelace, ibid*, at para 9.9.

12. Our analysis is primarily concerned with the last consequence identified by Ms Lovelace's submissions:

> 9) The major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity."[3]

13. In its Report, the Committee spoke to the consequential disadvantages of a pre-Bill C-31 Indian status scheme:

> 7.2 The Human Rights Committee recognized that the relevant provision of the Indian Act, although not legally restricting the right to marry as laid down in article 23 (2) of the Covenant, entails serious disadvantages on the part of the Indian woman who wants to marry a non-Indian man and may in fact cause her to live with her fiancé in an unmarried relationship…[4]

14. Canada advanced the following rationale as a justification for the stripping of status:

> 9.3 As to the legal basis of a prohibition to live on a reserve, the State party offers the following explanations:
>
> > Section 14 of the Indian Act provides that '(an Indian) woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band'. As such, she loses the right to the use and benefits, in common with other members of the band, of the land allotted to the band. It should, however, be noted that 'when (an Indian woman) marries a member of another band, she thereupon becomes a member of the band of which her husband is a member. As such, she is entitled to the use and benefit of lands allotted to her husband's band.
> >
> > An Indian (including a woman) who ceases to be a member of a band ceases to be entitled to reside by right on a reserve. None the less it is possible for an individual to reside on a reserve if his or her presence thereon is tolerated by a band or its members. It should be noted that under section 30 of the Indian Act, any person who trespasses on a reserve is guilty of an offence. In addition, section 31 of the Act provides that an Indian or a band (and of course its agent, the Band Council) may seek relief or remedy against any person, other than an Indian, who is or has been
> >
> > (a) unlawfully in occupation or possession of,
> >
> > (b) claiming adversely the right to occupation or possession of, or
> >
> > (c) trespassing upon a reserve or part thereof."[5]

15. The practice of excluding non-members from residing on reserves has its genesis in the *Indian Act*.

---

[3] *Lovelace, supra,* at para 9.9.
[4] *Lovelace*, *ibid*, at para 7.2.
[5] *Lovelace*, *ibid*, at para 9.3.

16. As to the reasons adduced to justify the denial of the right of abode on a reserve, Canada stated:

> …the provisions of the Indian Act which govern the right to reside on a reserve have been enacted to give effect to various treaty obligations reserving to the Indians exclusive use of certain lands.[6]

17. Ultimately, the Committee decided that Canada breached Article 27 of the Covenant when it denied a benefit to Ms. Lovelace. Article 27 states:

> ***Article 27***
>
> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[7]

18. Amendments to the *Indian Act* introduced under Bill C-31 allowed a Band to assume control of its own membership, and maintain its own Band List, subject to certain requirements set out at section 10 of the *Indian Act*.

19. A Band now may make membership rules under section 10 (3) *Indian Act* for itself and must provide for a mechanism for reviewing decisions on membership. The provision in full is:

> **Band control of membership**
>
> **10 (1)** A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.
>
> **Membership rules**
>
> **(2)** A band may, pursuant to the consent of a majority of the electors of the band,
>
> > **(a)** after it has given appropriate notice of its intention to do so, establish membership rules for itself; and
> >
> > **(b)** provide for a mechanism for reviewing decisions on membership.
> >
> > [Emphasis added]

20. The *Indian Act* does impose some limitations on the Band's discretion to make rules regarding membership. In addition to the requirement that a mechanism to review decisions on membership is established, as quoted above, new membership rules may not strip existing

[6] *Lovelace, ibid*, at para 9.4.
[7] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 1 June 2017].

members (as of the date the new rules come into force) of their membership. This is set out by the "Acquired Rights" heading at sub-section 10(4) of the *Indian Act*:

> **Acquired rights**
>
> **10 (4)** Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.
>
> **Idem**
>
> **(5)** For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(c) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

21. The *Indian Act* confers control over the Band list to the Band when it creates its own membership rules. Per section 10(10) and (11), a band may make deletions and additions to its Band list, but must track additions and deletions:

> **Deletions and additions**
>
> **(10)** A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.
>
> **Date of change**
>
> **(11)** A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.

22. Membership codes under the Indian Act must comply with the *Charter*.[8]

[8] *Kahkewistahaw First Nation v Taypotat*, 2015 2 SCC 30 at para 3. Note: all instruments enacted pursuant to the delegated powers of the *Indian Act*, including Election Codes and Membership Codes, must comply with the *Charter*.)

B. History of Wahta Mohawk Citizenship Codes

23. The Wahta Mohawks, an Indian Band under section 2 of the *Indian Act*, have enacted three (3) distinct "Citizenship Codes" presumably intended to serve as membership codes. They are:

(1) Mohawks of Gibson: Citizenship Code dated June 20, 1987

(2) Wahta Mohawks Citizenship Code, Enacted by Referendum October 20, 2001

(3) Wahta Mohawks Citizenship Code, Enacted by Referendum February 22, 2014

24. The 2014 Wahta Citizenship Code is in effect if it has fulfilled ratification and notice requirements under the *Indian Act*. For our purposes, we assume that it has fulfilled these requirements. It is a result of a variation of the 2001 Wahta Mohawks Citizenship Code endorsed by a Referendum on February 22, 2014.

25. According to the *Referendum Report, Saturday February 22nd, 2014* provided by Council on June 1, 2017, the community voted in favour of changing the blood quantum requirement from 50% to 25%. The community voted against eliminating the enfranchisement restriction as an eligibility criterion.

26. Therefore, differences between the 2001 Code and 2014 Codes are minimal. The primary difference between documents (2) and (3) above is the change from a blood quantum requirement of 50% to 25%. It is noteworthy that, throughout the years, the Wahta community has accepted this change. While unconfirmed by Council or any members of Wahta, the rationale behind lowering the blood quantum threshold must at least in part be the realization that fewer and fewer people fulfilled the 50% blood quantum requirement as time went on.

27. The enfranchisement restriction in the current Code at section 5 reads as contrary to the requirements of the *Indian Act* and the Code itself which provide that a person entitled to be registered prior to the coming into force of the Membership Code (in this case, 1987) cannot be stripped of membership in the Band. We explore this point in greater detail in the Analysis portion of this opinion.

i. A Note on Membership and Citizenship

28. The *Indian Act* enables Bands to enact their own *membership* codes. Wahta has enacted a *Citizenship* Code, which is presumably intended to serve the purposes of the *Indian Act*'s provisions on membership codes. However, membership and citizenship are not identical concepts.

29. Membership, under the *Indian Act*, means beaing a member of a Band. A Band is a collective governed by a Band Council under the *Indian Act*. It is a creation of the laws of Canada and often is not associated with an Indigenous Nation's traditional or contemporary

governance structure. An Indigenous Nation's citizenship and its membership under the *Indian Act* do not completely overlap. In other words, not all members are rightfully citizens of the Nation, and not all citizens are rightfully members of the Band. "Right" in this context is determined based on an application of governance practices in respect of citizenship that were in application before contact – traditional laws of belonging. The friction created here has resulted in great challenges across the spectrum for Bands who contend the web of issues raised by belonging.

30. The *United Nations Declaration on the Rights of Indigenous Peoples*[9] (the *"Declaration"*) addresses this challenge:

> ***Article 33***
>
> 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
>
> 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures. [10]

31. Wahta's 2014 Citizenship Code seems to aspire to the self-governance and autonomy prescribed by UNDRIP. Its stated purpose is:

> **3. Purpose**
> The purpose of this Code is to
> (1) Preserve the cultural and political integrity of Wahta Mohawks;
> (2) Preserve the sovereignty of Wahta Mohawks through the exercise of inherent rights; and
> (3) Provide the basis for the exercise of the rights and obligations of the citizens of Wahta Mohawks and others under its jurisdiction.

32. Ironically, the Code itself is authorized by the *Indian Act*, which provides only delegated powers to Indian Bands to set rules for the acquisition of membership in a band, and not the recognition of citizenship in an Indigenous Nation. Additionally, as will be discussed further below, the Citizenship Code relies on the same *substantive* qualifications for membership laid out in the *Indian Act*, an assimilationist and colonial piece of legislation by the admission of all parties to it. By virtue of its general application and specific governance rules, the *Indian Act* clearly impedes achieving the stated purpose at section 3 of the Code.

---

[9] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: http://www.refworld.org/docid/471355a82.html [accessed 30 May 2017] (the *"UN Declaration"*)
[10] *UN Declaration*, *ibid*, article 33.

IV. ANALYSIS

A. Wahta Citizenship Code (2014)

33. Wahta's 2014 Citizenship Code entitles individuals who satisfy its conditions to registration as a citizen of the Wahta Mohawks and placement on Wahta's Band list. Per the requirements of the *Indian Act*, everyone who was registered as members of Wahta before the Citizenship Code came into force in 1987 is entitled to stay registered (section 5(1)(2)). After that, the entitlement criteria is a complex mix of parentage and blood quantum, as detailed below:

> **5. Entitlement**
>
> A person is entitlement [*sic*] if:
>
> > (1) That person was registered or entitled to registered as a citizen of Wahta Mohawks on the date this Citizenship Code came into force;
> >
> > (2) That person, both of whose parents are entitled to Citizenship, in accordance with subsection (1);
> >
> > (3) That person, having at least 25% Indian blood quantum, who has been legally adopted or adopted in accordance with Indian custom and the adoptive parent(s) are entitled to citizenship in accordance with subsection (1);
> >
> > (4) That person has one parent who is entitled to citizenship in accordance with subsection (1), and applicant can prove at least 25% Mohawk blood quantum;
> >
> > (5) That person, whose mother is entitled to citizenship in accordance with subsection (1), but was enfranchised under the terms of the Indian Act upon marriage to a non-Indian and the applicant has 25% Mohawk blood quantum;
> >
> > (6) Descendants of persons who enfranchised by application who have 25% Mohawk blood quantum

34. To summarize, anyone who was entitled to be registered before the Code came into effect, or both of whose parents are so entitled, is a citizen of Wahta. Otherwise, a combination of blood quantum and ancestry is required. In general, in order to become a citizen, one must have a parent who was entitled to be registered prior to the Code – that is, under the *Indian Act* – and at least a quarter of Mohawk blood.

35. The exception to these general rules is for adopted children with less than 25% "Indian blood quantum". They are not entitled to citizenship even if both of their adopted parents were members at the time the Code came into effect, unlike natural born children. They may acquire

citizenship only if they have 25% *Indian* blood quantum, which need not necessarily be Mohawk blood, and which is uncertain need be entitled to Indian status under the *Indian Act*.

36. The matrix attached at "Appendix A" shows inconsistencies with respect to entitlement to registration as a citizen under the current Code.

37. Inconsistencies are apparent from the matrix. It is obvious that distinctions between adopted and naturally born children lead to a bizarre and potentially unintended outcome, by establishing a lower threshold of Mohawk blood quantum for adopted over naturally born children. If one parent is at least 25% Mohawk, and the other is not Mohawk but 100% of other Indian (undefined) ancestry, their naturally born child is not eligible for citizenship under the current Code. On the other hand, if adoptive parents, both at least 25% Mohawk, adopt a child who is 25% Indian (not necessarily Mohawk), that child is eligible for citizenship. The clear discrepancy here is that the child with ostensibly more Indian "blood", and some Mohawk blood (less than 25%) is not eligible for citizenship, but the child with no Mohawk blood and at least 25% undefined Indian blood is eligible based on ancestry. Between these two sets of circumstances, the one with Mohawk blood and more Indian blood is not eligible for registration under the current Code, whereas the child with no Mohawk blood and less Indian blood than the first can be registered as a citizen. If the purpose of the Code is to preserve Mohawk blood purity, which is not stated, it fails to do so on its face with the above example.

38. The Citizenship Code also expressly 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.* These rules are laid out in section 7:

> **7. Persons Not Entitled to Citizenship**
>
> The following persons are not entitled to citizenship;
>
> (1) A wife or widow who is not of Indian descent, who was enrolled by virtue of the Indian Act on marriage to a citizen, and whose name was subsequently omitted or deleted from the Indian Register pursuant to that Act before this Code came into force;
>
> (2) The child of a person described in subsection (1), whose other parent is not a citizen nor entitled to be a citizen;
>
> (3) Any person who voluntarily enfranchised under the provisions of the Indian Act for any reason;
>
> (4) Persons not of Indian descent who acquired citizenship through marriage to a citizen under the provisions of the Indian Act, and who have since divorced.

39. An important and complex inconsistency arises. Individuals who were enfranchised - voluntarily or involuntarily - were entitled to reinstatement as a status Indian under the scheme of Bill C-31, regardless of whether they registered, in fact. This means that they were entitled to citizenship before the Mohawks of Gibson Citizenship Code came into force in 1987. Section

10 (4)(5) of the *Indian Act*, a notion reflected in section 5(1) of the 2014 Citizenship Code requires that the people excluded by section 7(3) of the Citizenship Code be given access to citizenship. Therefore, it seems section 7(3) of the Citizenship Code 2014 is inconsistent with its section 5(1), and contrary to sub-sections 10(4)(5) of the *Indian Act*.

40. Through section 6, Wahta also welcomes those who are registered with another band, provided they satisfy Mohawk blood quantum requirements or if they marry (undefined) a citizen and have a quarter of Indian (not Mohawk) blood. Ostensibly, they too could have less Indian blood, and no Mohawk blood, when compared to the example above:

> **6. Transfers**
>
> The following Indians may transfer citizenship to Wahta Mohawks with the consent of council;
>
> (1) Any Indian who becomes the spouse of a citizen and who has 25% Indian blood quantum, or
>
> (2) Any Mohawk who has 25% Mohawk blood quantum

41. Finally, citizens lose their citizenship if they renounce it, transfer to another First Nation, or had obtained citizenship in error or under false pretenses:

> **8. Loss of Citizenship**
>
> (1) A person ceases to be a member when that person
>
> (a) Renounces citizenship in Wahta Mohawks; or
>
> (b) Becomes a citizen of another First Nation community; or
>
> (c) Was subsequently determined on an appeal not to be entitled to enrolment as a citizen; or
>
> (d) Obtains citizenship by providing information that the person knows to be false.

B. Interplay with the *Indian Act*

42. In theory, where a Band that determines its own Band list, membership is separate and distinct from Indian status under the *Indian Act*. A Band that determines its own membership may set criteria independently from the requirements of the *Indian Act,* but is required to grant citizenship to those entitled to Indian status prior to the Bill C-31 scheme, with a few exceptions for those acquiring citizenship through marriage and their progeny – natural, subsumed and/or adopted - depending on the circumstances and whether the marriage creating entitlement endures. A practical challenge here is that Indigenous and Northern Affairs Canada will only consider status bearing members in their calculation of per capita transfer payments for programs and services to members, regardless of how a Band may define its rights bearing membership.

The result is a nudge towards streamlining the *Indian Act* registration scheme and the Mohawk citizenship scheme, born out of financial necessity.

43. The 2014 Wahta Citizenship Code is still based in part on the criteria for Indian status under the *Indian Act*. It requires individuals to be descended those who were on the band list at the time the Code came into force, and who were status Indians on the band list administered by the Department of Indian Affairs. It grants citizenship to those whose parents both had such status, or to those with one parent with status and with 25% blood quantum, Mohawk or Indian, or a combination of the two depending on if the applicant is the natural or adopted child. This distinction creates inconsistencies to entitlement to registration among children in the same family.

44. While the *Indian Act* does require that membership codes not strip individuals of status, it does not require that membership codes give membership to their descendants and follow the ancestry requirements for status set by the *Indian Act*. These provisions of the Wahta Citizenship Code are voluntary.

45. Registration or entitlement to registration under section 6 of the *Indian Act* is based on a model of ancestry and whether one's parents are entitled to registration. Over the years, this section has been the subject of much dispute and subsequent court ordered amendments due to discrimination issues, mainly relating to gender and marital status.[11]

46. The *Indian Act*, in its entirety, continues to further the goals of its founders: assimilation and/or extermination. Sir John A MacDonald said:

> The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change.[12]

47. The *Indian Act,* enacted 9 years prior to MacDonald's memorandum, is the legislation to which the former Prime Minister and Superintendent of Indian Affairs was referring. The aim of the legislation remains unchanged and is ill-suited to an era in which the resurgence of Indigenous identity aspires to cultural survival. Contemporary aspirations of self-government and sovereignty, as expressed in the Code's purpose, are simply irreconcilable with the nefarious and harmful goals of the *Indian Act.*

48. In the years that followed, Duncan Campbell Scott, Deputy Superintendent of Indian Affairs from 1913-1832 expanded on his vision for the future of the "Indian race":

---

[11] *Re Lavell and Attorney-General of Canada*, [1972] 1 OR 390; 22 DLR (3d) 182; *McIvor v Canada (Registrar of Indian and Northern Affairs),* 2009 BCCA 153; *Sarrazin c Canada (Procureur General)*, 2012 QCCS 6072; 2016 QCCS 2458; *Gehl v Canada (Attorney General)*, 2015 ONSC 3481; 2017 ONCA 319; *Landry c Canada (Procureur General)*, 2017 QCCS 433.

[12] Sir John A MacDonald writing as Superintendent General of Indian Affairs in a Memorandum to the Privy Council on January 3, 1887 regarding a claim by Six Nations to land along the Grand river. The Governor in Council approved MacDonald's memorandum in full on January 6, 1887.

> The happiest future for the Indian race is absorption into the general population, and this is the object of the policy of our government. The great forces of intermarriage and education will finally overcome the lingering traces of native custom and tradition.[13]

49. It is clear that the treatment of enfranchisement and inter-marriage in the *Indian Act* was explicitly intended to erode "native custom and tradition". Applying the same exclusionary notions in an attempt to preserve that which the so-called Fathers of Confederation had intended to erase is contradictory and harmful. The means will not achieve the ends desired by the Wahta Mohawk. Rather, the results envisioned by the drafters of the *Indian Act* are sure to manifest.

50. Membership Codes adopting entitlement schemes with the same objective impacts as the *Indian Act* prior to 1985 advance the goals of Sir John A. MacDonald. It is contradictory and self-defeating self-governance to exercise a delegated power in a manner that mirrors colonial legislation intended to eradicate all forms of tribal governance. Tribal governance is imbued with notions of the preservation of cultural integrity – the very purpose of the Citizenship Code – which is directly contrary to the purposes of the *Indian Act*.

51. By continuing to use the criteria imposed by the *Indian Act* for citizenship, and imposing additional requirements of blood quantum as a *stand-alone* criterion to acquiring citizenship, Wahta ensures an ever-shrinking membership that is based purely on ancestry rather than on culture and community, which defies the goals set out in the Code's "purpose" of preserving Wahta's cultural integrity. The outcome is the realization of the 1969 White Paper, implemented "piece meal" - self-determined assimilation and cultural erosion by choice instead of by imposition.

C. The Right to Equality under the *Charter*

i. The Equality Test at Law

52. As noted above, the Wahta Citizenship Code is subject to the *Charter of Rights and Freedoms* (the "*Charter*"). Under the *Charter*, every person has the right to equality before and under law and equal protection and benefit of the law. Section 15 (1) of the *Charter* provides:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

53. Jurisprudence has considered all grounds of discrimination and augmented legal guidance on the topic significantly. A legal test is in place to provide guidance on whether a law is discriminatory.

54. The applicable test for equality was set out by the Supreme Court of Canada in *Law*[14]. It contemplates a three-stage analysis:

[13] Duncan Campbell Scott, Deputy Superintendent of Indian Affairs from 1913-1932.

> A. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> B. Is the claimant subject to differential treatment based one or more enumerated and analogous grounds?
>
> and
>
> C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[15]

55. The test was applied to a Band's electoral code in *Kahkewistahaw*[16]. There, the Court offered less technical and more straightforward language, which is worth quoting:

> [19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. …
>
> [20] The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:…
>
> [21] To establish a prima facie violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group.[17]
>
> [Emphasis added]

56. In other words, in order to be found discriminatory: (1) a law distinguishes on the basis of one of the characteristics laid out in section 15, race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, or an analogous basis; and, (2) on the basis of the distinction, the law negatively affects people with that characteristic, increasing their level of disadvantage – which must be proven.

57. The disadvantage need not be historical[18]. The relevant comparison is to the current comparator group – in *Corbiere*, on-reserve versus off-reserve Indians. As in *Corbiere*, by drawing a distinction between mixed-blood Mohawks (or the result of mixed-marriages, analogous to the ground of "sex" under the guise of "marital status") who meet the threshold and

---

[14] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 (*Law*)
[15] *Law, supra,,*at para 548-549.
[16] *Kahkewistahaw First Nation v Taypopat* 2015 SCR 548, 2015 SCC 30. (*Kahkewistahaw*)
[17] *Kahkewistahaw, ibid, at paras 19-21*
[18] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

Indigenous people, Mohawk or not, who do not meet the threshold, the Code implicates, in a direct way that does not affect other Canadians, the interests of two groups who have generally experienced "pre-existing disadvantage, vulnerability, stereotyping, or prejudice."[19]

58. The Court has emphasized that context and flexibility are important in section 15 analyses. The claimant – the one seeking to have a law found to be discriminatory – must prove that it is, having the onus of proof. Finally, evidence must show the disadvantage; there must be objective support for the contention that something negatively impacts the claimant and others with the characteristic at issue, not just "a web of instinct".[20]

ii. Application of the Equality Test to the Wahta Citizenship Code 2014

59. The question to ask regarding the first part of the test is **whether, on its face (*prima facie)* or in its impact, the Citizenship Code creates a distinction on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability that results in differential treatment for members of that group**.

60. The Wahta Citizenship Code uses many distinctions to determine who may be a citizen of Wahta and who may not. As mentioned above, it distinguishes between people based on (1) their ancestry, which is based on their Indian and Mohawk "blood quantum" (however undefined); (2) based on whether they are adopted or naturally born to their parents; and, (3) based on the nature – voluntary or involuntary - of their enfranchisement under the pre-1985 *Indian Act* scheme.

61. Ancestry and blood quantum both appear to be clear proxies for race. The Code does not establish how the percentage of blood purity is calculated and does not define the term "Mohawk Blood" or "Indian Blood", whether or not couched in "quantum" as a qualifier. Nonetheless, it is obvious that Wahta is trying to ensure that its citizens are part of the Aboriginal or Mohawk race, clearly an enumerated ground under section 15.

62. Naturally born versus adopted children seems to be another potentially discriminatory ground. The Code draws a distinction between those who are born of a Mohawk parent with less than 25% "blood quantum" and those adopted by citizens of the Wahta with at least 25% "Indian blood quantum". However, this ground is not listed in section 15 and would have to be found to be an "analogous ground" on which people have suffered disadvantage in order to successfully challenge the Citizenship Code. Evidence to prove that this group experiences disadvantage based on the distinction is necessary.

63. The nature of an individual's enfranchisement must be viewed contextually to determine the status of its threat to discriminate. However, this analysis is unnecessary since the relevant provisions of the Code is clearly problematic from a clean application of the membership rules under the *Indian Act* and the entitlement provisions of the Code itself.

---

[19] *Law, supra,* at para 63; *Corbiere*, supra, at para 66., cited in *Corbiere*, *ibid*, at para 66.
[20] *Kahkewistaha, supra,* at para 34.

64. Finally, on its face and in its impact, the law distinguishes based on a clear analogous ground of mixed-race, which is analogous to the enumerated ground of "race". Historically, people of mixed ancestry, or the product of indigenous / non-indigenous unions (which may attach to the analogous ground of "marital status") were treated differently under the *Indian Act*. There is evidence in the public record that discrimination in the status provisions of the *Indian Act* were intended to encourage assimilation through assimilation and inter-marriage, as explored above. These policies are no longer espoused by the State, but their impacts prevail by virtue of the *Indian Act*.

65. Within the category of the protected group (Aboriginal People), the distinction applicable to the potential claimant group invariably results in a differential treatment for people of mixed ancestry, or adopted people of mixed parentage – even where a parent has above threshold non-Canadian Indian blood quantum.

66. There is great diversity among Indigenous Peoples across the world. The Mohawk Nation straddles the American/Canadian border. Prior to contact, Nation States did not create distinctions between those nations and their place in other nations when there was inter-marriage. In an over simplification of sophisticated Indigenous citizenship values and laws, those people were generally absorbed into the host Nation's body politic as long as they espoused the Nation's values and contributed to the Nation's wellbeing. Anecdotal evidence exists to suggest that the Mohawk Nation was particularly astute at adopting non-Mohawks – Indigenous or non-Indigenous. Such adoptions did not preclude an individual's belonging to the Mohawk Nation based on blood quantum. Commitment and contribution were once the cornerstones of citizenship in the Mohawk Nation as evidence supports that those qualities over blood purity *alone*, in fact, lead to the preservation of cultural integrity.

67. The second part of the section 15 analysis requires us to ask, **does the distinction on race or marital status impose a burden or deny a benefit that has the effect of reinforcing, perpetuating or exacerbating the Claimant's disadvantage.** The Supreme Court has stated:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.[21]

68. It seems obvious that the distinctions on race and adoption confers a disadvantage: those not meeting the criteria do not obtain citizenship in Wahta, and are denied the rights only citizens have, such as voting in Band elections, residence and general participation in the Band's political, social and cultural life. The disadvantage in question must "reinforce, perpetuate or exacerbate" the disadvantage of that group. It is not clear at first glance that the Citizenship Code does that. Evidence - which I do not have - is required to conclusively decide this point.

[21] *Quebec (Attorney General) v. A*, 2013 SCC 5, 2013 1 SCR 61 at para. 332.

69. The Code grants citizenship to those meeting certain criteria of Indian ancestry and blood; those excluded, and disadvantaged by the Code, are those who necessarily have less of a claim to Indian and Mohawks bloodlines and ancestry. That is, the racial distinction that is made is between "more" and "less" Mohawk; "more" and "less" Indian – based on an undefined determination formula heavily influenced by the pre-1985 Indian status scheme under the *Indian Act.* It is parsing race, and creating divisions within an enumerated ground, benefitting those with a stronger bloodline claim, though not necessary a stronger bloodline *in fact,* than others who are entitled to membership. Those excluded by the Code include all non-Indians as well as those Indians and Mohawk who cannot establish a lineage meeting the threshold set by the Code. It cannot be said that denying a privileged non-Indigenous male, for example, the benefits of citizenship in a Mohawk band "exacerbates their disadvantage" – they cannot establish a general disadvantage meeting the *Law* test to begin with. However, might an individual with some Mohawk blood and ancestry but not enough to meet the Code's criteria have their disadvantage reinforced by being excluded from citizenship by the Code? Evidence is needed to drive that inquiry.

70. If the evidence supports it, an argument could be made that the answer is yes, and that the Code is discriminatory against those individuals who otherwise would have had citizenship but have been denied on the basis of undefined blood quantum by the Wahta Mohawks. These individuals are akin to, or would become, non-citizen Indians with some Mohawk heritage. They could argue that occupying an "in-between" space between Indian and non-Indian peoples has caused historical and current hardship and disadvantage which the Code perpetuates and exacerbates in its impacts and denial of benefits. They could also argue that they are culturally Mohawk in all aspects – however defined – and highlight the Code's purpose as pointing to cultural integrity as the imperative, and not an arbitrary and undefined blood quantum formula.

71. However, Wahta could argue that these people simply are not Mohawk, and that the racial distinction in the Code serves to benefit the disadvantaged group – an Aboriginal community – and that any disadvantage accrues to those who are not part of a "historically disadvantaged group", not the claimant sub-group. They could argue that the community can and must have the power to determine its membership, and that they have endorsed this distinction based on blood quantum. They could argue that a line establishing race needs to be drawn somewhere, that not everyone with Mohawk ancestry should be entitled to citizenship, and that allowing anyone who claims Mohawk identity to claim disadvantage if excluded by the community stretches the equality test beyond usefulness and into the delegated self-governing powers of the Wahta Mohawk.

72. However, the Code criteria is largely based on the *Indian Act*, and its status provisions have been repeatedly challenged on the basis of discrimination, as detailed above. Contextually, people of mixed Indian and non-Indian ancestry, and people in or the products of mixed Indian and non-Indian unions, within larger Aboriginal groups, have been disadvantaged by the provisions of the *Indian Act*. Prior to 1985, if the father of a mixed child was an Indian, his child

was eligible for the same category of status his/her father held, regardless of the mother's ancestry. The same was not true if an Indian mother had children with an individual who didn't have status, regardless of whether they were Indigenous or not. She lost her status, and her children were not eligible to obtain it. This arbitrary and discriminatory distinction has resulted in the enfranchisement of tens of thousands of people, not all of whom have registered for status since 1985.

73. The matter at hand turns on blood quantum as a valid distinction and whether those under the threshold of citizenship can prove their experience of historical disadvantage, if it is not obvious. Statistical evidence is not required to meet the threshold of proof, but more than a web of suggestion must be made out by the claimant. The onus of proof is with the claimant and their burden of proof is not onerous.

74. It must be noted that the purpose of a membership code is to determine membership in a race of people – it is a race-based exercise in its entirety. There is little guidance on how the test of equality applies in a context such as this. Moreover, rules such as these implicate principles of self-governance and potentially section 35 Aboriginal rights. 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.

75. However, on its face, the Code draws a distinction based on race that has the impact of exacerbating disadvantages to a historically disadvantaged sub-group, however defined and variable. In other words, on its face, the Code is discriminatory. The wrinkle here is that in the case of membership, racial distinctions may need to be made. Some people will be left out and disadvantaged always.

76. If the purpose of the distinction is to preserve *racial* integrity, it may well be that a Court would find it justifiable in an application of the *Oakes* test discussed below. But, if the goal is cultural integrity, as explicitly stated in the purpose of the Code, cultural criteria instead of blood quantum criteria may more minimally impair the right to protection from discrimination than the current arbitrary and undefined blood quantum criterion, which itself is largely drawn from *Indian Act* status baselines.

iii. Justification for Discrimination (*Oakes* Test)

77. If discrimination is established, it may be justified per section 1 of the *Charter*, by the so-called *Oakes* test. This test is concerned with whether the discrimination, as found, is a justifiable limit on the exercise of a right and freedom under the *Charter* in a free and democratic society. The burden of justifying limitations on constitutional rights is upon the government, therefore, the Wahta Mohawk Council, in this case.

78. Section 1 of the *Charter* states:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

79. Thus, a law may be discriminatory, but may be valid if the discrimination can be demonstrably justified. The test for such demonstrable justification is laid out in full below:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance". [22]

80. To summarize, to be rescued from invalidity by the *Oakes* test, an impugned law: (1) must have a sufficient important objective (must relate to "societal concerns which are pressing and substantial in a free and democratic society"); (2) must advance that objective in a rational and fair way; (3) must be minimally discriminatory; and (4) its discriminatory effects must be proportional to the importance of the objective.

81. The first question to ask of the Citizenship Code, then, is whether it has a pressing and substantial objective. Its stated purposes are, as quoted above, to:

> (1) Preserve the cultural and political integrity of Wahta Mohawks;
> (2) Preserve the sovereignty of Wahta Mohawks through the exercise of inherent rights; and
> (3) Provide the basis for the exercise of the rights and obligations of the citizens of Wahta Mohawks and others under its jurisdiction.

[22] *R v Oakes*, 1986 1 SCR 103, at paras 69-70 (*Oakes*)

82. At first glance, these appear to be worthy goals. However, it is not necessary to fully analyze whether they meet the standard of the *Oakes* test, because, as noted above, the provisions of the Code do not advance its objectives. In the language of *Oakes*, the means employed by the Code are not rationally connected to its objectives.

83. The preservation of cultural and political integrity of the Wahta Mohawk community is obviously a worthwhile and important goal. However, the Code seeks to achieve it by imposing criteria unrelated to culture and political integrity. It determines membership on the basis of status under the *Indian Act* and an obscure blood quantum formula, neither of which determine cultural connection. Simply because someone has Mohawk blood in a sufficient quantity does not mean that they are *culturally* Mohawk; culture is separate and apart from bloodline. While having Mohawk blood and Mohawk parents are likely single markers for being culturally Mohawk, they are distinct concepts that are not necessarily rationally connected. They do not stand *alone* as definitive markers of culture.

84. Similarly, for the second stated purpose of the Code, the preservation of Wahta Mohawk sovereignty is important and pressing. However, it is again not clear how the membership requirements as stated in the Code advance that goal. In fact, they incorporate and build on colonial legislation designed to undermine, and eventually do away with, Indian sovereignty. Moreover, the Code as a whole is enacted pursuant to delegated authority under the *Indian Act*, to *Indian Act* bands, which are an entity created by the *Indian Act* that undermines the traditional governance structures, however composed today if at all, of Indigenous nations. It is difficult to see how such a law, authorized by and perpetuating colonial legislation aimed at subjugation and assimilation, could ever be shown to preserve a nation's sovereignty.

85. The final stated purpose is largely descriptive: the Code aims to determine who has the rights and obligations of citizenship. Setting the parameters of membership is important as a practical measure, but it may not be compelling. In the absence of the Code, the *Indian Act* would apply, so there would be no vacuum in defining the membership of Wahta. Arguably, without the other purposes, this rationale for the Code does not meet the requirement of being "related to societal concerns which are pressing and substantial in a free and democratic society."

86. Thus, if the Code was found to be discriminatory, it would not be saved under the *Oakes* test. Section 1 does not add support to Wahta's case for the constitutionality of its Code; rather, it shows the weaknesses of the law.

87. The main issue for Wahta remains whether the Code could survive the section 15 analysis, which though unlikely, is not clear absent evidence going to the historical disadvantage of the claimant group.

D. Aboriginal Rights Defense

88. If the Code was found to be discriminatory under section 15, Wahta has one more possible recourse to save it: to assert a section 35 Aboriginal right to distinguish based on blood quantum. As will be shown below, however, it would be an uphill battle, and perhaps counterintuitive, to demonstrate that discrimination on the basis of blood quantum formed an integral part of the Mohawks' distinctive culture prior to European contact.

89. Aboriginal rights and freedoms are not subject to the *Charter*:

> **25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

90. In other words, to displace an application of the *Charter* to its Citizenship Code invoking the protection of section 25 and 35 of the *Charter* as the vehicle to asserting an Aboriginal right to defend its membership law, Wahta must make a case that the discriminatory practice is:

- An aboriginal right;
- A Treaty right;
- A right afforded by way of the Royal Proclamation; or,
- A right existing in a land claim agreement.

91. To prove an Aboriginal right, the group asserting the right must prove that the practice meets the "Integral to the Distinctive Culture Test":

(a) Courts must take into account the perspective of Aboriginal peoples themselves
(b) Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right
(c) In order to be integral a practice, custom or tradition must be of central significance to the Aboriginal society in question
(d) The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact
(e) Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims
(f) Claims to Aboriginal rights must be adjudicated on a specific rather than general basis
(g) For a practice, custom or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists
(h) The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct

(i) The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.
(j) Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.[23]

92. In other terms, Wahta must demonstrate that the determination of its membership on the basis of ancestry and blood quantum: (1) was a practice or has continuity with a practice the Mohawk undertook prior to European contact; and (2) that this practice of membership determination was centrally and independently significant to the Mohawk community. Whata's task is made more difficult by its acceptance of those with at least 25% Indian blood quantum – which does not contribute to the preservation of Mohawk bloodlines.

93. The practice of excluding mixed-race people, or progeny of mixed-race people, from community life cannot be said to satisfy the pre-contact and continuity test. This defies logic – one cannot exclude people who were not present. Some 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. This was a popular practice among many Indigenous nations prior to contact. Mohawks were reknown warriors who sometimes forced others, Indian and non, into their body politic. Blood purity and the isolation of a single pool of DNA cannot logically achieve the results once pursued by the Mohawk Nation. In fact, these approaches accomplish the opposite outcomes and only secure the success of the *Indian Act*'s nefarious goals as described by the so-called Fathers of Confederation. There is wisdom in accommodating genetic otherness – at least the Mohawks once thought there was wisdom in such a practice in a time where the Nation was so sophisticated and organized that the State relied on its military power and regarded alliances as essential.

94. It is unlikely a specific right defending the current blood quantum regime in the Code, if found discriminatory, could satisfy the Aboriginal rights defense test. The evidentiary burden is onerous, notwithstanding that such evidence would likely prove the opposite of the position advanced. Therefore, the crucial issue remains whether the Code violates section 15 of the *Charter*; if it does, it is unlikely to be saved by either section 1 of the *Charter*, or sections 25 of the *Charter* and 35 of the *Constitution Act*, 1985.

[23] *Van der Peet*, 1996 2 SCR 507, 1996 CanLII (SCC) "Factors to be Considered in Application of the Integral to a Distinctive Culture Test", at paras 48 and following. (*Van der Peet*)

V. CONCLUSION AND SUMMARY

95. The key question, and the one that is most difficult to answer, is whether the Code could sustain a *Charter* challenge on the basis of equality. It clearly distinguishes on the basis of race, an enumerated ground under section 15 of the *Charter*. If a claimant had a strong Mohawk identity, were otherwise eligible for citizenship under the Code, but was excluded from Wahta citizenship based on insufficient blood quantum, they may be able to challenge the Code. For the Code's race based distinctions to be considered discriminatory, the claimant group would have to demonstrate that those so excluded constitute a disadvantaged group within Aboriginal society and Canadian society at large, a group with a history of disadvantage and who stands to have their disadvantage reinforced by the distinctions in the Wahta Code.

96. This presents a novel and difficult case. After all, the Code discriminates in order to set the boundaries of a race, a practice that is *necessarily* discriminatory. Setting the boundaries of Aboriginal racial groups is a long-standing practice in Canada that has largely escaped Court censure. The difference here is that it is an Aboriginal group, rather than the government, which is establishing the criteria.

97. Therein lies the friction. Wahta has seized the delegated power to determine its own membership, and has asserted the preservation of its sovereignty as a goal, and yet has adopted largely the same criteria as the government to establish its membership. It has internalized *Indian Act* restrictions on membership, made them more onerous, and held them out as an expression of sovereignty.

98. The Code clearly contains some inconsistencies and does not advance its stated objectives of preserving Mohawk cultural integrity and sovereignty. Those inconsistencies, explored above, are summarized below:

a. Adopted children with threshold Indian blood quantum (25%) and no Mohawk blood quantum are eligible;

b. Natural children with under threshold Mohawk blood quantum and up to 50% Indian blood quantum are not eligible;

c. Those voluntarily enfranchised are not eligible to register, contrary to the Code and the *Indian Act*;

d. Blood quantum formulas are undefined and arbitrary depending on the applicant's circumstances and their parent's marital status;

e. "Indian blood" and "Mohawk blood" are undefined, whether couched in "quantum" as a qualifier; and,

f. The means of blood quantum *alone* do not meet the goal of preserving the *cultural* integrity or Mohawk sovereignty through the exercise of inherent rights.

VI. RECOMMENDATIONS

99. Several recommendations flow out of the discrimination analysis above, particularly concerning the citizenship requirements of the 2014 Citizenship Code. In particular:

a. 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. This would serve the minimal impairment test in *Oakes* in circumstances where there is another option to adopt an alternative and less discriminatory scheme to achieve the stated purpose.

b. The cultural integrity criterion can include ancestry as *an indicia*, but would not have it act as a stand-alone access point, creating contemporary circumstances in which discrimination against historically disadvantaged Aboriginal Peoples are exacerbated, if such disadvantages are proven (the hurdle to prove in the equality test).

100. Independently, the Code and the community at large would benefit from several other exercises to clarify their aspirations and criteria for membership:

c. Define and explain the terms in the 2014 Citizenship Code such as blood quantum – how is bloodline established? Where ancestry is complicated and involves Indian and Mohawk blood, it is important to know precisely how blood quantum distinctions are made and the clear and predictable formula attaching to their calculation.

d. Clarify the community's ambitions in respect of citizenship versus membership, which are different concepts, and whether the focus is racial purity or cultural connection, to achieve cultural integrity.

e. Finally, an examination of the residency and election codes to determine the extent of the discrimination in the 2014 Citizenship Code and its impact on democratic rights, showing precisely what is at stake for the citizens of Wahta and the impact discriminatory laws have.

Respectfully submitted for your consideration.

A.R.L.
Alisa R. Lombard, S.S.Sc., LL.L., JD

"APPENDIX A"

	Entitled to Citizenship	**Not Entitled to Citizenship**
A. **Naturally Born**	1. Both parents with 25% Mohawk Blood quantum or more. 2. One parent with at least 50% Mohawk blood quantum.	1. Both parents with less than 25% blood quantum. 2. One parent with less than 50% Mohawk blood quantum. *3. One parent with less than 25% Mohawk blood quantum and the other parent with 25% Indian blood quantum or more.* *4. Any person who voluntarily enfranchised under the provisions of the Indian Act for any reason (7(3)).*
B. **Adopted**	1. Both adoptive parents with at least one parent having at least 25% Mohawk Blood quantum. Child with at least 25% Indian Blood quantum	1. Regardless of adoptive parent's blood quantum, child with less than 25% Indian Blood quantum.