Evolving First Nations Service Populations:

Challenges, Impacts & Implications

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1 Executive Summary

In 2016, the Assembly of First Nations (AFN) and Indigenous and Northern Affairs Canada (INAC) signed a Memorandum of Understanding (MOU) to comprehensively review existing fiscal arrangements and develop improvements regarding the design of a new fiscal relationship for First Nations in Canada.

A significant aspect of a new fiscal relationship will be the funding and delivery of programs and services to First Nations and the impact both on and of the evolving nature of the First Nation service population. Commissioned by both parties to the 2016 MOU, this report seeks to identify the impacts of utilizing specific service populations for the determination of program funding and the implications of the legal decisions directly affecting First Nation Status and member populations. The report evaluates current approaches to defining the service population for INAC programs including discrepancies between service population and populations requiring services, statistical issues, service responsibility and service definition clarity, and a lack of flexibility in service population determination and program funding.

Additionally, to understand the evolving nature of the legal definition of Status under the *Indian Act* and the impact on the funding and delivery of programs and services to First Nations people, the report reviews several major legislative amendments and legal decisions affecting First Nation populations and the definition of Status under the *Indian Act*. These events have expanded the definition of what it means to be a Status First Nation under the *Indian Act*, increased the number of individuals entitled to become Status and, depending on whether newly proposed legislative amendments to the *Indian Act* are passed, will significantly increase the number of Status individuals in Canada.

The issues created by an expanding service population for federal funding formulas for services provided by First Nations governments are mostly already present. The decisions in the court cases, most recently Descheneaux, and many of the issues and complexities outlined throughout this report simply exacerbates many of them. The report suggests that by developing specific legislation, improving First Nation statistics and data tracking, and linking revenue room with reserve residents, many of the issues associated with the current system can be ameliorated.

2 Introduction

2.1 Purpose

The AFN and INAC signed a MOU in 2016 to comprehensively review existing fiscal arrangements and develop improvements regarding the design of a new fiscal relationship for First Nations in Canada.

This report is intended to help inform the INAC/AFN First Nation fiscal relationship review and new fiscal relationship design processes, specifically related to First Nation service populations. The report provides a background and a review of current programs and services and the service population approach to each. It will review challenges with the current approaches. It will also review major existing legal and Canadian Human Rights Tribunal (CHRT) decisions to qualitatively assess the impact and associated implications on First Nation service populations. Lastly, it will consider the appropriateness of utilizing different service population estimates in different contexts.

During the development of this paper, it became evident there were divergent views on some of the elements related to First Nation service populations, First Nation transfers and, more broadly, a new fiscal relationship. This report will aim to highlight the differing perspectives, where appropriate.

2.2 Perspectives

The primary focus of this paper is the implications of changing definitions of Status on both eligible service populations and the provision of First Nation services in general. There are a number of possible lenses through which to view these implications, and this paper will consider two of those lenses. One lens would include determining the implications of these changes on the costs facing the federal government. Another would be to focus on the implications, financial and otherwise, for services to First Nation individuals, their own governments, and governmental relations. The former perspective better reflects that of INAC or the federal government and the latter better reflects that of the AFN.

2.3 Scope

The scope of the paper also reflects the different perspectives of the federal government and the AFN. The federal preference is to assess the issues of changing legal definitions of Status from the perspective of the cost implications on "federally funded" First Nation services. The AFN preference is to assess the implications on all services, provided to all First Nation individuals, both on and off reserve.

There is some merit to a broader approach given:

- The difficulties in defining any legislated requirements for the federal provision of services;
- The differing views of the federal and provincial governments regarding financial responsibilities for First Nation services that might be exacerbated by the changing legal definitions of Status;
- The political reality that First Nation governments are involved with the management of, or actually funding services to Members off reserve (albeit sometimes with funding provided by other parties such as the provincial government); and,
- First Nation governments are often funding services to non-Status individuals on reserve and/or persons deemed Members who do not have Status.

The first two points suggest the issue may not be as simple as transferring financial obligations from one government to another. Accordingly, this paper will 1) look at the issues from the perspective of cost and service quality implications for federal services and 2) look at the issues based on the implications on individual First Nation persons and First Nation governments.

This paper will also review legal cases and a CHRT decision related to Jordan's Principle and their impacts on service populations.

3 Background

3.1 What are the service population(s)?

There are often many nuances with respect to service populations. At times, only subsets of the total First Nations population are eligible for programs. There are also programs for which a broader population is eligible. There are also many different triggers for determining eligibility such as age, income, health, Status or residency.

The following are different possible populations that are important to be cognizant about because they may be politically significant to First Nation governments and/or may be applicable in determining eligibility for different government funded programs and services[1]:

- On-Reserve Status Members
- On-Reserve Non-Status Members
- On-Reserve Status Non-Members
- On-Reserve Non-Status Non-Members
- Off-Reserve Status Members
- Off-Reserve Non-Status Members

[1] It is important to note this straightforward exercise does not get into the reasoning or circumstances surrounding changes in these populations or possible specific sub-populations at this juncture. It is simply to illustrate the different broad categories of populations that could potentially impact and be impacted by program and service funding and delivery.

3.2 What are the programs and corresponding service populations?

Since 2001, authorities for eligibility for federally funded programs and services have generally followed a residency-based funding approach: Status members, Status Indians[2], or all residents ordinarily resident on reserve. Only two federal programs have followed different funding approaches: Non-Insured Health Benefits (Status-based, ordinarily resident in Canada) and the Post-Secondary Education Program (Status Member-based, ordinarily resident in Canada). In general, the flow of funding is not tied to an individual but rather to their home or originating community.

The table below provides an overview of the current approaches to service population determination for federally funded essential services:

Table 1 – Program Service Population Approaches

Area	Program(s)	Approach
Governance	• Band Support Funding (Chief & Council, audit & professional, membership administration, overhead, etc.)	• Residency-based: Status members ordinarily resident on reserve. • Funding is flowed to First Nation government (FNG). Funding for elections is based on membership whether on or off reserve.
Health	• Community Health Promotion and Prevention • Home and Community Care • Environmental Health • Immunization • Communicable Disease Control	• Residency-based: All residents ordinarily resident on reserve. • Funding is flowed to FNG.
Health (NIHB)	• Non-Insured Health Benefits (NIHB)	• Status-based: Status Indians ordinarily resident in Canada. • Generally, funding is flowed directly to individuals or service providers; not the FNG, with the exception of NIHB medical transportation.
Social Development	• Income Assistance • Assisted living • Family Violence • National Child Benefit Reinvestment	• Residency-based: All residents ordinarily resident on-reserve. • Funding is flowed to FNG.

[2] The term "Indian" as in "Status Indian" is used throughout this paper only for the purposes of maintaining clarity and consistency with the terminology used to describe a person defined as such under the *Indian Act*. It is not intended to be insulting or derogatory.

Area	Program(s)	Approach
Children & Families	• First Nation Child and Family Services Program	• Residency-based: Status Indians aged 0-18 ordinarily resident on reserve. • Funding is typically flowed to child and family services agencies which operate at arm's length from FNG's. Where these agencies do not exist, INAC will fund services provided by the province or territory.
Education	• Elementary / Secondary Education Program	• Residency-based: Eligible students (status and non-status)] ordinarily resident on reserve. • Funding is flowed to FNG based on nominal role.
Education	• Post-Secondary Student Support Program	• Status Member-based: Status members ordinarily resident in Canada • Funding is flowed to FNG.
Land Management	• Lands and Economic Development Services Program (lands management component) • Reserve Land and Environment Management Program	• Residency-based: Status members ordinarily resident on reserve. However, population is a small factor in the funding formula. • Funding is flowed to FNG.
Economic Development	• Lands and Economic Development Services Program (economic development component)	• Residency-based: Status members ordinarily resident on reserve. • Funding is flowed to FNG.
Housing	• On Reserve Housing Program • Housing Subsidy Program	• Residency-based: Status members ordinarily resident on reserve. • Funding formula differs across each region. • Funding is flowed to FNG.
Capital Infrastructure	• Capital Facilities and Maintenance Program (operation and maintenance)	• Based on the asset quantity in the Capital Asset Inventory System (CAIS) and adjusted for remoteness • With the exception of education facilities, O&M funding is considered a subsidy (federal share 80%; FNG share 20%). That approach however, is under review. • FNG's are expected to make up the rest of the costs through user fees or other sources. • Funding is flowed to FNG.
Capital projects	• Capital Facilities and Maintenance Program (new community infrastructure)	• Residency-based: Status members ordinarily resident on reserve. • Funding is flowed to FNG.
Policing	• First Nations Policing Program	• Residency-based: All residents ordinarily resident on-reserve • Canada provides 52% of the eligible costs, the provinces and territories provide the other 48%. • Funding is flowed to FNG under self-administered police agreements, or flowed to RCMP under Community Tripartite Agreements.

"Status Indians" refers to individuals who are considered Registered Indians on the Indian Register. "Status Members" refers to the individuals who are considered Registered Indians who have Membership with a particular registry group, or Indian Band.

The addition or removal of a name from the Indian Register is approved by the Registrar as set out in the *Indian Act.* The Indian Registrar is an employee of INAC. The Registered individuals on the Indian Register for a particular registry group may not equate to that First Nation's (Indian Band's) Membership rules.

INAC maintains the Indian Registration System for First Nation governments that reflects the Indian Register and includes population (Registered Members) and residency (on-reserve, off-reserve) for First Nations / registry groups. The Indian Registration System is updated by INAC by Indian Registration Officers within INAC Regional Offices or through required reporting by Membership and Indian Registration administrators within First Nation government offices. Updates usually lag behind reality because of late registration of births, deaths, and mobility. Under Section 10 of the *Indian Act*, First Nation's governments have the ability to legally take control of their membership rules.[3]

3.3 How are programs and services funded?

INAC employs five basic methods for funding First Nation governments: grant, set contribution, fixed contribution, flexible contribution and block contribution. The table below provides a brief description of each mechanism. Some mechanisms are more flexible and require less reporting than others.

Table 2 – Descriptions of INAC Funding Approaches

Approach	Description
Grant	• Pre-established eligibility • Not required to account for the grant, but may be required to report • Any duration of time necessary to achieve program results • Not subject to audits • Require specific Cabinet policy and Treasury Board program spending authorities
Set Contribution	• Subject to performance conditions outlined in funding agreement • Must be accounted for and subject to audits • Unspent funding returned to department annually

[3] This paper will not discuss the different codes by which First Nations determine membership. For a good overview of this topic see Clatworthy, 2007a.

Approach	Description

Fixed Contribution	• Based on previous Flexible Transfer Payment (FTP)
	• Annual funding established by formula
	• Total expenditure is based on fixed-cost approach distributed on a program basis
	• Can keep unspent funding, if:
	  ○ Programs requirements have been met; and
	  ○ Spent on purposes consistent with program objectives or any other purpose agreed to by INAC.

Flexible Contribution	• Funds can be moved within cost categories of a single program during life of the project/agreement
	• Unspent funds returned to department upon project, program or agreement culmination
	• Used if:
	  ○ Assessment criteria are met;
	  ○ Requires two or more years to achieve objectives and can be funded under multi-year funding agreement; and
	  ○ Recipient can redirect funding among cost categories of a particular program (in accordance to the agreement).

Block Contribution	• Based on Alternative Funding Arrangement (AFA)
	• Funds can be reallocated within a block of programs as long as program objectives are being achieved
	• Unspent funding can be kept as long as:
	  ○ Program delivery standards have been met; and
	  ○ Unspent funding used for purposes consistent with block program objectives or any other purpose agreed to by INAC.

4 Challenges with Current Approaches

This section outlines three broad challenges associated with the current approach to utilizing service populations to determine funding for First Nation governments: 1) discrepancies between service population and populations requiring services, 2) service responsibility & definition and 3) lack of flexibility in service population determination and program funding.

4.1 Discrepancies between Service Population and Populations Requiring Services

Fiscal arrangements require accurate statistics to function appropriately. This starts with population and other demographic data which are incorporated into most funding arrangements at all levels of government.

Unfortunately, even data on total populations living on reserve lands are unreliable. This problem is accentuated by other issues such as the breakdown of Status, Members (non-Status and Status) and non-Status non-members on those lands and is further exacerbated to some degree by the relatively large phenomena of long-term or temporary migration on and off reserve by individuals. Sometimes, individuals may change addresses several times in a single year.

The lack of a single reliable mechanism for tracking populations and their movements to and from reserve means that many funding disputes are intensified; since this is often the trigger for deciding a federal versus provincial funding responsibility. For example, the provision of funding for many programs and services for eligible individuals are transferred to the First Nation government where they are registered, regardless of if they reside elsewhere, even on a different First Nation community's reserve.

There are several associated issues that cause discrepancies and subsequently result in funding issues, including:

4.1.1 Statistical Issues

- **Unreliable Population Estimates** – This is an ongoing issue for First Nations. Simply put, there can be noteworthy differences in population statistics as estimated by Statistics Canada, other agencies, and First Nation communities. There may be considerable degrees of error in many population counts and the variance of these errors is likely not randomly distributed among First Nations.
- **Existing Registration, Membership Population and Residency Figures are Imperfect** – The reliability of these figures depends on staff within First Nation administration offices and/or regional INAC offices. Further, when membership and Indian Registration figures differ, this creates gaps or discrepancies between the funding and service population across a number of programs. Finally, population figures relating to non-member, non-Status residents that may receive services from First Nations governments is not captured by Membership or Indian Registration reporting systems.

4.1.2 Service Population Discrepancies

- **Difference between Total On-Reserve Resident Population and Status Resident Population (Member or Non-Member)** – Another reason for a divergence between the population that is eligible for a service and the population that is considered for the purpose of calculating a transfer is that there can be substantial populations living on reserve who are neither Members nor Status. These populations will still pose substantial costs for some types of services such as policing, environmental protection and community infrastructure.
- **Movement On and Off Reserve Lands as a Result of Service Provision** – Many people move onto reserve lands to receive better quality services and/or to benefit from on-reserve advantages such as the *Indian Act* s. 87 income tax exemption. There are also people who may reside on the reserve for one reason but leave to receive better quality provincial services. For example, there are cases whereby First Nation individuals have left their community because the rates for social assistance from the provincial agency were higher than those their community had been funded to provide. It is also true that many people move from reserve lands to get a mortgage and own a home. Finally, the reserve(s) of some First Nations are not able to accommodate housing or any further housing. This limits the population that can feasibly reside on reserve and therefore limits the ability of the First Nation to receive funding to service a growing membership population. Migration and mobility on and off reserve create issues in regards to defining the service population for evaluating the cost of programs and the transfer amounts and delivering the services First Nation governments are responsible for.

- **Movement between different First Nation Communities** – This is specific to programs that have funding flowed to the First Nation government. If individuals from other bands are living on reserve lands of a different First Nation government, then funding for programs and services for that individual would be flowed to the home band of that individual. This suggests this type of migration or temporary mobility is not accounted for when determining program funding. As programs and services for on-reserve individuals are provided to the band where they are registered, it may be possible to look to the provincial settlement system (e.g. health care) for a solution such as an inter-FNG settlement system.
- **Dissimilarity between Total Membership and Status Membership** – Registered Indian Status and First Nation Membership were the same before 1985. However, when Bill C-31 was passed in that year (discussed in more detail later in the report), First Nations were able to develop their own unique membership codes, and many have since done so. As of 2015, 229 non-self-governing First Nations have opted into s.10 of the *Indian Act* and taken control of their Membership codes.[4] As a result, there are often significant differences between a First Nation's membership list, its on-reserve population and the number of Registered Indians on the Indian Register for that "registry group" (Indian Band) or on that registry group's reserve lands. The implications of this delineation are its contribution to the creation of different "classes of citizens", many of which will have implications on "who does what?" For example, a First Nation government may have a political, or even legal, responsibility to provide a service to all its Members, whether they are Status or not, and may result in funding pressures. However, if this service is funded by a federal contribution, the federal government may not recognize the First Nation's responsibility and hence the service may be underfunded.

[4] INAC, 2015a.

- **First Nation Governments Providing Services to All Members** – Many First Nation governments are required to follow constitutions and other guiding principle documents that commit to providing equal access to programs and services for all of its members. Further, as will be outlined in the next section of the paper, Bill C-31 in addition to the *Corbiere v. Canada (1999)* decision greatly increased the 1) status population and band membership of some First Nations (with a significant portion residing off-reserve), and 2) rights (voting) of off-reserve members, respectively. However, there are times where funding does not account for members living off reserve, regardless of First Nation being politically beholden to those members for services. A good example of this is governance funding through the band support program, which is intended to cover the remuneration and travel for elected leadership, senior management, the finance and human resources functions, reception, insurance, audit and professional fees, elections, janitorial and overhead. Surely the service population for these services extends beyond Status membership on reserve, as all residents on reserve and total membership alike rely on the elected leadership and band office administration to provide core governance services for the First Nation. No funding is provided to enable the delivery of essential services to members residing off reserve (other than post-secondary [only Status Members] and non-insured health benefits), yet the First Nation government is accountable and politically beholden to all its membership.
- **Non-Status Members' Families** – In some cases, there are members of a household who are not Status but have a Status parent and they all reside on reserve. Some service programs include the non-Status members, especially children on the service eligibility rolls. First Nation governments frequently provide services such as housing, health and local government services to non-status individuals within a member's family. Further, First Nation governments provide these services without any additional financial support and if the First Nation government did not perform this function, these individuals would either not have access these services or attempt to receive them from another government, possibly through movement or migration.

4.2 Service Definition and Responsibility

The federal government has never clearly specified what First Nation services it funds or to what standard, or even whether per capita funding is consistent across First Nations. For example, the language used in Treaties generally does not go beyond a commitment to funding "agreed upon programs and services". It is also not clear whether the federal government believes it funds programs because: (a) it is required by the Constitution; (b) long standing conventions, or (c) funding First Nation programs is good social policy. There is also no reference to a funding formula and First Nations generally are not privy to what the formula is specifically funding and how it is developed.

Instead of a legislated basis for programs and a funding formula, there are conventions about program responsibilities, some of which are detailed in program specific terms and conditions and/or departmental reports on plans and priorities. These responsibilities are policy, as opposed to legislatively, driven. There are typically significant disputes between the federal and provincial governments concerning the party that is financially responsible for many services, the appropriate level of services, or the appropriate delineation of a service. Many questions often arise as a result of the way in which service provision and responsibility has been developed, a few examples of those questions include:

- Does the federal government's funding of K12 education for First Nation children include associated capital costs?
- Does it include other associated programs?
- Does it account for specific characteristics of the eligible population that might cause average operating costs for First Nation populations to differ from the rest of the population (i.e. characteristics such as remoteness)?

In many other jurisdictions off First Nation lands – populations to be served, appropriate service levels and standards for those services are typically based on legislation, except in extenuating circumstances. In the First Nation context, these details are based on the discretion and policies of other governments.

4.3 Lack of Flexibility in Service Population Determination

Current transfer funding is not nuanced or flexible enough to account for the unique cost pressures facing different First Nation governments resulting from distinct historical, cultural, legal, geographic, political, demographic and socio-economic conditions. Many First Nations receive funding for certain programs that do not account for the real and appropriate recipients of the program. Subsequently, these First Nation governments receive insufficient program transfers to provide quality services and infrastructure at national standards to the appropriate service population. The challenge is a result of not building in the flexibility to account for unique service populations within different First Nation communities across all programs and services funded by transfers.

4.3.1 Summary

This section outlined some of the challenges associated with current approaches to estimating and providing funding to First Nation governments for programs and services. The challenges include discrepancies between service population figures utilized for estimating program transfers and populations requiring, and even receiving, services, the current definition and delineation of service responsibility and a lack of flexibility in service population determination. Further, the first challenge can be a result of two major problems: statistical issues related to the various population groups and differing attitudes towards which populations should be included in funding approaches for some programs. The statistical challenge can cause issues related to funding formula accuracy and disputes surrounding funding amounts driven by certain population estimates.

The latter issue highlights various scenarios that occur whereby First Nations are beholden to provide services to members (on or off reserve), however they are normally funded for providing programs and services to registered members on their reserves. Further, First Nations governments often provide programs and services to registered members and other non-registered members and some non-members on reserve (Status or non-Status) and they also provide some services to members off-reserve. An additional issue is that program funding in many cases doesn't follow the individual, but rather are provided to their home First Nation Government despite the possibility they may have migrated or temporarily moved to another First Nation community.

Many of these points highlight an imbalance between First Nations governments' political accountability to provide programs and services to various service populations (depending upon the program and current approach) and their responsibility to deliver programs and services determined and funded by other governments under fiscal arrangements. These challenges often result in the following consequences: a) funds being diverted from other community programs and services, b) an inability to deliver essential programs to the appropriate standard and/or c) inequitable treatment of one First Nation compared to another in relation to transfer funding for the delivery of programs and services within their communities.

5 Selected Legislative Impacts on Service Populations

5.1 Legal Decisions

This section will summarize Bill C-31, three legal decisions and one CHRT decision that have in the past or have the potential in the future to significantly impact First Nation service populations.

5.1.1 Bill C-31, 1985

Prior to 1985, a Registered Indian woman's status was, by law, conditional on the status of her husband upon marriage. Conversely, Registered Indian men were able to pass on their Status to their wives, whether they were Indigenous or not and subsequently to their children.

In 1985, Bill C-31 was passed amending Status and Membership provisions of the *Indian Act*. It reinstated the Registered Indian Status of individuals who had lost their registration through provisions of earlier versions of the *Indian Act* and permitted the first-time registration of many of their children. Bill C-31 included the following:

- New rules regarding entitlement to Status Registration for all children born after April 16, 1985. It revised Section 6, introducing two different classes of Status Indians:

- **Section 6(1)** – Those individuals eligible to pass Indian Status to their children, regardless of the Status of the child's other parent.[5] 6(1)(a) confirmed Status of those already registered; 6(1)(f) provided Status to individuals if both parents were registered; and 6(1)(c) provided Status to those previously removed or omitted and whose mothers and paternal grandmothers are not Indians, who had married non-Indians and who are illegitimate children of Indian women.[6]
- **Section 6(2)** – This was the new subsection created by Bill C-31 and applies to individuals that have one parent registered under 6(1). Status Indians that this section applies to are ineligible to pass status onto their children unless the other parent also has status.[7]

- Repeal of some discriminatory sections of the *Indian Act*:
  - **Section 12(1)(b)** – Known as the "marrying out" rule, this provision removed the Status of any woman who married a non-Status Indian.
  - **Section 12(1)(a)(iv)** – Known as the "double mother" rule, this provision removed the Status of any Indian child whose mother and grandmother obtained Indian Status as a result of marriage, regardless of whether their father or grandfather had Status.
- Repeal of Section 11(1)(f) to remove Status of some individuals (often, non-Indigenous women) who acquired Indian status through marriage to Registered Indian men (Section 7 describes those persons whose Status was rescinded and are not entitled to be registered in relation to the repealed Section 11(1)(f)).
- The addition of Section 10 provided individual First Nations governments the opportunity to create and apply their own rules regarding Membership. This created the distinction between Indian Status and Band Membership.

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[5] A 6(1) Status Indian who has a child with 6(1) or 6(2) Status Indian will have a 6(1) Status Indian child. A 6(1) status Indian who has a child with a non-Status person will have a 6(2) Status Indian child.

[6] Ratcliff & Company LLP, 2009.

[7] A 6(2) Status Indian who has a child with a 6(1) or 6(2) Status Indian will have a 6(1) Status Indian child. However, a 6(2) Status Indian who marries a non-Status person will have a non-Status Indian child (known as the "second generation cut-off").

It is estimated that in the 20 years following the amendments associated with Bill C-31 approximately 233,000 applications were submitted with 127,000 individuals having Status restored and 106,000 individuals not having Status restored.[8]

5.1.2 McIvor v. Canada (Registrar of Indian & Northern Affairs), 2009 & Bill C-3 – Amendments to the Indian Act, 2010

McIvor v. Canada was a challenge to the Bill C-31 *Indian Act* amendments. Although the 1985 amendments sought to reinstate many women who lost Status as a result of past provisions of the *Indian Act*, the implementation of Bill C-31 led to different eligibility rules for men and women.

Specifically, the McIvor case involved the children of women previously disentitled to Status as a result of marrying and having a child or children with a non-Status individual. As a result of Bill C-31, these women were subsequently entitled to Status under section 6(1)(c) and their child(ren) under 6(2). However, if that child had a child with a non-Indian individual, that child would not be entitled to Status. The consequence being that Status is passed down to only two generations (two generation cut-off). Conversely, a man (previously entitled to Status prior to Bill C-31) and his non-Indian wife (if married prior to Bill C-31) would have had their Status confirmed under 6(1)(a) after Bill C-31. Their child would also be entitled to Status under 6(1)(a) (if born before Bill C-31) or 6(1)(f) (if born after). If that child had a child with a non-Indian individual, that child would be entitled to Status under 6(2), resulting in Status being passed down to three generations.

[8] UBC Indigenous Foundations, 2009.

In 2009, the BC Court of Appeal decision forced the federal government to amend the *Indian Act* to address this discrepancy. The result was Bill C-3, which came into force in 2010. The intention of Bill C-3 was to restore the ability of those women who had married out and were reinstated under Bill C-31 (two generations) and those persons who lost Status under the double-mother rule and were reinstated under Bill C-31 (three generations) to pass on Status to their children. It is estimated that about 45,000 individuals were newly entitled to Status as a result of Bill C-3, with the majority residing off-reserve.[9]

Although this decision was an important step in identifying and attempting to equalize some of the inequities resulting from Bill C-31 and previous registration provisions in the *Indian Act*, it focused solely on the issue discussed above, excluding other discriminatory elements, particularly the second-generation cut-off. According to Mandell Pinder LLP (2016),

"Bill C-3 amended the registration sections of the Act to bring the legislation into compliance with the McIvor decision, but did so narrowly. As a result, there continues to be on-going discrimination, carried forward by the descendants of female Indians who lost their Status through various other provisions of the pre-1985 Act that were not before the Court in McIvor. This discrimination is what brought the plaintiffs in Descheneaux before the Quebec Superior Court."[10]

5.1.3 Descheneaux v. Canada, 2015 & Proposed Bill S-3

In 2015, the Superior Court of Quebec made its decision relating to a case brought forward in 2011 known as *Descheneaux v. Canada*. The Descheneaux decision involved "the continued residual sex-based inequities" relating to Indian Registration carried forward post-Bill C-31 and not fully addressed by Bill C-3 in 2011.[11] Specifically, the court declared sections 6(1)(a), 6(1)(c) and subsection 6(2) of the *Indian Act* inoperative and provided a deadline of February 3, 2017 (18 months) for Parliament to remedy the provisions. Additionally, the court cautioned that amendments to address registration not be limited to the specific facts of the case.

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[9] Hurley & Simeone, 2010.

[10] Mandell Pinder LLP, 2016a.

[11] INAC, 2017.

In response to the decision, the federal government announced a two-staged approach:

Stage I – Focus on the elimination of not only the sex-based discrimination that was raised in Descheneaux but also all known sex-based discrimination in the *Indian Act*'s registration provisions; and

Stage II – Engage in a process to examine broader issues related to Indian Status and Band Membership with First Nations and other Indigenous groups to identify future potential changes.

In regards to Stage I, the federal government introduced Bill S-3, *An Act to amend to Indian Act (elimination of sex-based inequities in registration*. According to INAC (2017), Bill S-3 proposes to address the following:

- **Cousins Issue** – The differential treatment of first cousins whose grandmother lost Status due to marriage with a non-Indian, where that marriage occurred before April 17, 1985.
- **Siblings Issue** – The differential treatment of women who were born out of wedlock of Indian fathers between September 4, 1951 and April 17, 1985.
- **Omitted Minors Issue** – The differential treatment of minor children, who were born of Indian parents or of an Indian mother, but lost entitlement to Indian Status because their mother married a non-Indian after their birth, and between September 4, 1951 and April 17, 1985.

If the issues above are addressed, it is estimated that between 28,000 and 35,000 individuals will become newly eligible for Indian Status Registration.[12]

[12] Ibid.

Bill S-3 has yet to be passed. The original deadline of February 2017 was later extended to July 3, 2017. The Senate Committee on Aboriginal Peoples urged the federal government to seek the extension to conduct more consultation with those affected and reconsider the scope of the bill to put an end to all sex-based inequalities in *the Indian Act*. Subsequently, the federal government returned the Bill to the Senate with minor adjustments. The Senate eventually passed the Bill in June 2017, however, with significant amendments that broadened its application. As a result, INAC estimated that approximately 80,000 to 2 million people could become newly entitled to Status under the new version of the bill.[13]

Consequently, the federal government once again asked the Quebec Superior Court to grant another extension of six months. The Superior Court refused, at which time the federal government would have had to shut down the Indian Status Registration system. This would have the consequence of leaving many Status Indians potentially without access to programs and services as the sections specified in Descheneaux would have been deemed inoperative. However, days later, the Court of Appeal allowed this appeal and extended the suspension of the declaration of invalidity to December 22, 2017.

In spite of years of litigation and a number of subsequent amendments to the *Indian Act*, the Descheneaux case demonstrates that lingering issues continue to impact the question of who is a Status Indian. The decision also raises the ongoing broader issues relating to Indian registration, Band Membership and Citizenship including the federal legal authority to define Indian Status and Band Membership under the *Indian Act*.

Stage II of the approach will be to discuss with First Nations and other Indigenous groups some of these issues and potential reforms in the future. Some of the issues identified in the 2011-2012 Exploratory Process on Indian Registration, Band Membership and Citizenship and acknowledged by INAC as subject matters which require further discussion include:

- Other distinctions in Indian Registration;
- Issues relating to adoption;

[13] Galloway, 2017.

- The 1951 cut-off date for eligibility to registration specific to Bill C-3;
- The second-generation cut-off;
- Unstated/unknown paternity;
- Cross-border issues;
- Voluntary deregistration;
- The continued federal role in determining Indian Status and Band Membership under the *Indian Act;* and
- First Nations authorities to determine Membership under the *Indian Act.*

5.1.4 Daniels v. Canada (Indian Affairs and Northern Development), 2016

This case related to whether the federal or provincial governments hold legislative jurisdiction over Metis and non-status Indians. As such, the following three declarations were sought:

i. Métis and non-Status Indians are "Indians" under s. 91(24) of the Constitution Act, 1867;

ii. The federal government owes a fiduciary duty to Métis and non-Status Indians; and

iii. Métis and non-Status Indians have the right to consultations and negotiations with the federal government respecting all of their rights, interests and needs as Indigenous peoples.

In this case, the first declaration was confirmed and the second two were not. The Supreme Court declared that both Métis and non-Status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*. It was clarified that the federal government has the authority to legislate with respect to Métis and non-Status Indians; however, Métis and non-Status Indians are not currently entitled to receive Status under the *Indian Act* as a result of the case. It was also noted the federal government has no obligation to exercise its legislative authority over Métis and non-Status Indians. However, according to Mandell Pinder LLP (2016b):

"What the decision does provide is clarity to Métis and non-Status Indians that it is the federal government from whom they should seek redress with respect to material benefits they have been historically denied. This is likely to be the subject of extensive negotiations and possibly litigation with the federal government in the future."[14]

5.1.5 Canadian Human Rights Tribunal – Jordan's Principle

In December 2007, the House of Commons unanimously passed a motion that the federal government immediately adopt a policy based on Jordan's Principle to resolve jurisdiction disputes relating to the care of First Nations children. It is based on the case of Jordan River Anderson of Norway House Cree Nation in Manitoba who spent more than two years unnecessarily in hospital while the Province of Manitoba and the federal government debated over who was responsible to fund his at-home care.

Jordan's principle is a child-first needs-based principle to ensure First Nations children living on and off reserve have equitable access to all government funded services. It was designed to ensure First Nations children do not experience delays, disruptions or denials of services ordinarily available to other Canadian children. Services can include education, health, early childhood services, recreation and culture & language.[15] Under this principle, the government of first contact is to pay for the services without delay and seek reimbursement to ensure delays are mitigated. The following are some of the events related to Jordan's Principle and the Canadian Human Rights Tribunal (CHRT):

- **January 26, 2016** – The CHRT ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement its full meaning and scope.
- **April 26, 2016 & September 14, 2016** – The CHRT issued two remedial orders against Canada for failure to adhere to the Principle and the previous ruling.
- **November 2016** – The Caring Society, Assembly of First Nations (AFN) and other parties filed motions citing Canada's failure to comply with the ruling and remedial orders.

[14] Mandell Pinder LLP, 2016b.

[15] First Nations Child & Family Caring Society of Canada, 2017.

- **May 26, 2017** – After three days of hearings held in March 2017 the CHRT ruled that "Canada has repeated its pattern of conduct and narrow focus with respect to Jordan's Principle" and issued a third set of compliance orders.

The implications of implementing Jordan's Principle are that, if a jurisdictional dispute arises between two government parties or between two departments of the same government regarding payment for services guaranteed to First Nations children, the "agency" of first contact will be responsible for the up-front cost of the service. First Nations generally have younger populations than other Canadians. Further, younger populations have different service preferences than the population as a whole. Implementing Jordan's Principle will mean more service responsibilities for governments in Canada related to First Nations children and potentially greater obscurity and a greater number of disputes among different orders of government relating to service responsibility and, consequently, reimbursement.

As the federal government has not yet provided many details as to how it will implemented, it is unclear whether a First Nation government can be considered the agency of first contact for the provision of services under Jordan's Principle.[16]

[16] If First Nation governments can be considered the agency of first contact, it may provide some cost alleviation for First Nation governments. When a Band Member (no matter where they reside) has, for example, a health emergency or troubles they will often turn first to their Band for support. In many cases, the First Nation does not receive funding for these individuals. The implementation of Jordan's Principle may enable First Nations to get reimbursed for providing support/services, if the particular service is eligible for reimbursement. Further, it is possible the application of Jordan's Principle would also enable First Nation governments to get reimbursed for providing services to those residents or neighbors that are not covered by current service population calculations in transfer funding formulas (e.g. members residing off reserve and non-status non-members). This may require an additional degree of coordination by the First Nation to track the costs and recipients of services, but it does raise the question as to whether First Nation governments themselves can be considered the government of first contact for the provision of services under Jordan's Principle.

5.1.6 Summary

The court decisions described in this section have expanded the definition of what it means to be a Status Indian, increased the number of individuals entitled to become Status Indians and depending on whether newly proposed legislative amendments to the *Indian Act* are passed, will significantly increase the number of Status Indians in Canada. The following table summarizes the increases in Status entitled individuals as outlined in this section.

Table 3 – Summary of Legal Decision Impact on Status Entitlements

Decision	Amount of Newly Entitled Status Individuals
Bill C-31	127,000
McIvor; Bill C-3	45,000
Descheneaux; Bill S-3	Post-1951 – 28,000 - 35,000 Post-1869 – 80,000 – 2 million

As is evident in the warning by the court in Descheneaux for Canada to address Indian Status Registration beyond the facts of the case, there still exists the strong possibility of increases to the Status population over time. As of November 2017, the federal government has announced it will grant full legal Status to all First Nations women and their descendants born before 1985, expanding the scope of its originally planned amendment that would have limited the timeframe to those born after 1951. The expanded scope would result in a possible 80,000 – 2 million individuals becoming newly entitled as opposed to 28,000 – 35,000 individuals under the originally proposed amendment.

6 Conclusion

This paper was intended to identify issues arising from expanding definitions of Status. It was to consider the implications of expanded populations on both costs and appropriate methods of service delivery. The first goal is met by determining the likely cost implications of expanded Status populations on and off reserve, assuming no change in service delivery. The second goal requires a deeper assessment. It should address the following:

i. Will, or should, an expansion of the service population have an impact on how services are delivered to off-reserve Members and Status individuals?

ii. Will, or should, an expansion of the service population have an impact on how First Nation governments are funded?

iii. Does it have implications on how nuanced ongoing federal funding formulae should be?

On the surface, the expansion of Status should not be a complex or costly issue, especially if it is looked at from the perspective of government as a whole. Some estimates suggest a fairly large number of people will gain Status. However, most projections are more modest and hence a relatively modest increase in the costs of federal programs where service eligibility is based on Status. The expansion of Status will mostly just *shift* financial responsibility from provincial governments to the federal government and so from the perspective of the costs of government as a whole, it is less significant. First Nation programs that are not generally available to all Canadians are relatively small compared to the full range of services (e.g. non-insured health benefits and some access to higher education).

The shift will, for the most part, only apply to those newly entitled individuals who are currently living on reserve, or those who choose to move to reserve as a result of gaining Status and/or becoming eligible for services. The extent of this is difficult to estimate because there do not appear to be accurate estimates of what percentage of the potentially newly entitled individuals are currently living on reserve.

If we view the issue from the broader perspective of its impact on government relations and on services provided to First Nation individuals, some additional complexities emerge:

i. **Shift in Responsibility** – The shift of individuals from provincial to federal responsibility is not as straightforward as the movement of persons from one province to another. There are several key differences:

- **Service Provision** – The federal government is not in the business of directly providing a lot of the services for which responsibility is transferred. Instead, they may be provided by First Nation governments that are partly funded by the federal government or they may be provided by provincial governments who are then compensated by the federal government.

- **Service Mix** – Most provinces provide the same set of services and hence the transfer is complete. The transfer is not as complete in this case. The newly entitled First Nation individuals will continue to receive some provincial services, such as those that are generally available from the provincial government or services that the federal government chooses not to provide. In other cases, they may leave the reserve to seek provincial services because they are of a higher standard.
- **Migration & Mobility** – The migration of individuals from one province to another is accompanied by a transfer of revenues. These include those individuals' income tax payments and portions of federal transfers, such as the Canada Health and Social Transfer (CHST). There is a large degree of compensatory revenue transfers that is not going to take place with the transfer from provincial to federal responsibilities. Also, the scale of migration on and off reserve will likely greatly exceed the relative scale of migration between provinces. In fact, in some cases, people may move several times over the course of a year to take advantage of provincial services that are often of better quality than those available on reserve lands.
- **Multiple Triggers for Eligibility of Program Funding** – Eligibility for most provincial services is geographically based. If a person is resident in a different province for a required period of time (i.e. three months for health care) then that province assumes the associated service costs (which is determined by common policies agreed to by all of the provinces and territories to deal with migration within Canada). However, the reality is that eligibility for First Nation services have multiple triggers. Some are residency based, some are Status based, and some are strictly Member based.
- **Money does not always follow individuals** – In many cases, the revenues that are assigned to individuals flow to the band of which that person is a Member rather than the band where they may actually be resident.

- **Legislation** – Most provincial services have a legislative base that defines their service responsibilities. This base makes it very clear what services are to be provided and at what standard. This legislative base is largely absent with respect to the federal government delivering these services to First Nation populations. It is often up to Ministerial and Departmental discretion.

It will simply not be possible to manage the shift of responsibilities from provincial to federal governments, the same way as inter-provincial migration is currently managed. Existing federal-provincial issues will be exacerbated. Further, the implementation of Jordan's Principle will undoubtedly add another layer to these issues.

ii. **Expansion of the Service Population and Federal Spending** – The notion that an expansion of the service population will be met by an equal and compensatory increase in federal spending on related programs is simply an assumption. There is an absence of legislative basis to much of the current federal funding and programming. Hence, it is possible that, over time, the expansion of the service population could result in a gradual diminishment of real federal per capita support for the services that First Nation governments provide. Additional research, including collaborative work with provincial and territorial governments, should be undertaken to address this issue. It could include the development of more appropriate compensatory mechanisms, such as more comprehensive service agreements pertaining to off-reserve populations, a reassignment of federal and provincial tax room and improved transfers from both orders of government. There is also an opportunity to include First Nations governments and First Nation institutions in the collaborative work to facilitate the development of localized options and solutions.

iii. **Increased Political Pressure on First Nation Governments** – As discussed in the challenges section, the expansion of the service population for certain services may lead to increased political pressure on First Nation governments to either provide services to potential new off-reserve individuals or to influence their development by other governments. This could lead to substantial distortions in relative per capita funding between different First Nations if the extent of these pressures differs considerably among them. It will also lead to a "watering down" of on-reserve services.

iv. **Migration to First Nation Communities** – If there is migration to reserves by Status individuals seeking to take advantage of the s.87 income tax exemption, it is going to result in a modest revenue hit on both federal and provincial revenues. It is also going to exacerbate pressure on programs related to housing and infrastructure.

v. **Diverse Triggers** – The fact that there are different triggers for determining eligibility for services in a First Nation context cannot be ignored. It has implications for how the expansion of the service population and/or the definition of Status will be accommodated, and these implications will differ considerably depending on the development of any new type of fiscal relationship.

It is going to be challenging to develop a new or modified system by which the federal government contributes to the cost of First Nation governments. Beyond simply a demand for increased funding, a new or modified system must address the following, sometimes conflicting, demands:

- **Stable Funding** – A system must provide some assurance of stable funding over the medium term.
- **Equitable Treatment** – It must provide equitable treatment of different First Nations in different circumstances.
- **Clarity** – A system should clearly specify what services are supported by federal funding. Ideally through legislative means.
- **Transparent Mechanism** – Federal funding should be determined through a transparent mechanism that is consistent across all First Nations.

- **Scaling Back Priorities and Conditions** – A system should recognize there is an expectation by First Nations that the federal prerogative of setting priorities and funding conditions will be reduced as First Nation contributions increase.
- **Encourage Own Source Revenue** – A system should not unduly penalize First Nations for developing their own revenues.
- **Flexibility** – A system should provide sufficient flexibility so that First Nations are able to respond to local priorities and circumstances as they see and experience them.
- **Reduce Administrative Burdens** – A system should reduce the "red tape" posed on First Nations by funding arrangements. This often leads to a large strain on First Nation administrations that typically have capacity constraints to begin with.
- **Responsiveness to Future Service Population Changes** – Allows a determination of the cost implications of expanded service populations.

6.1 Models to Consider

Two different generalized models for a new approach to transfers should be considered.

i. A block transfer that would consolidate all federal funding, for all programs, and be based on total Member population; or
ii. A more nuanced approach that would maintain separate approaches for programs where eligibility is: (a) residency based; (b) Status on-reserve based; (c) Member on-reserve based; and, (d) Member based.

The first approach has considerable merit, as it:

a) Implies a reduction in the administrative burden posed on First Nation governments;

b) Is equitable as the criteria is per capita funding;

c) Reduces discretion and, hence, politics over funding; and

d) Can promote greater innovation in terms of how funding is expended.

However, there are corresponding issues. First, if there are substantial differences in the population shares accounted for by non-Member residents, then First Nations with substantial non-Member populations may see residency-based programs underfunded. Second, if there are substantial differences in demographic profiles then, again, this may create distortions as many important programs have age eligibility triggers. Third, if there are substantial program costs associated with non-population driven responsibilities, such as resource management and fire protection then there will be distortions in relation to funding received by different First Nation governments. Finally, if there are substantive differences between the number of newly entitled Members who live off-reserve across different First Nation communities this is going to create different pressures to provide services off-reserve or vice versa.

The issues created by an expanding service population for federal funding formulas for services provided by First Nations governments are mostly already present. The decisions in the court cases, most recently Descheneaux, and many of the issues and complexities outlined throughout this report simply exacerbates many of them. However, they can be ameliorated through the following:

- **Developing Specific Legislation** – The development of a formal legislative base for many of the federally supported responsibilities towards First Nation individuals. This would specify program requirements and eligibility for programs. Specific legislation would ensure that handoffs of responsibility are clearer. It would better guarantee service standards. It would protect First Nations and provincial governments from a gradual reduction of service support and thus promote better relations.

- **Improving First Nation Statistics and Data Tracking** – The improvement of First Nation statistics should be a high priority. In particular, a better understanding is needed of total populations on First Nation core jurisdictions, Member populations and Status populations. In addition, a better understanding is needed of Member populations residing off-reserve in general, and also within broader service eligibility catchment areas. A national First Nations statistical institute could provide an independent authority that could assist First Nations governments to collect, manage and maintain data regarding their members and communities. It could also function to collect other necessary administrative data to encourage own source revenues and support the new fiscal relationship. Further, this statistical institute could support a possible inter-band settlement system that could be useful in more appropriately allocating funding in cases where mobility occurs between communities. This type of system could potentially adopt aspects of the provincial health care settlement system.
- **Linking Revenue Room with Reserve Residents** – Some programs might be best funded by attaching revenue room to residents on reserve lands. This might include a portion of tax revenues and/or a portion of the CHST attached to every individual. This would support programs that are most efficiently delivered on a residency basis. This would be similar to how property tax works with local services and infrastructure under the *First Nations Fiscal Management Act* (FMA). Under that system, property tax revenues are transparently linked to specific service expenditures determined annually and set out by annual laws made by each First Nation community. However, this system would be broader than that of the FMA. It would mean automatic adjustments and it would reduce the incentives that are otherwise created by both governments to drive First Nation persons to the other government's jurisdiction.

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