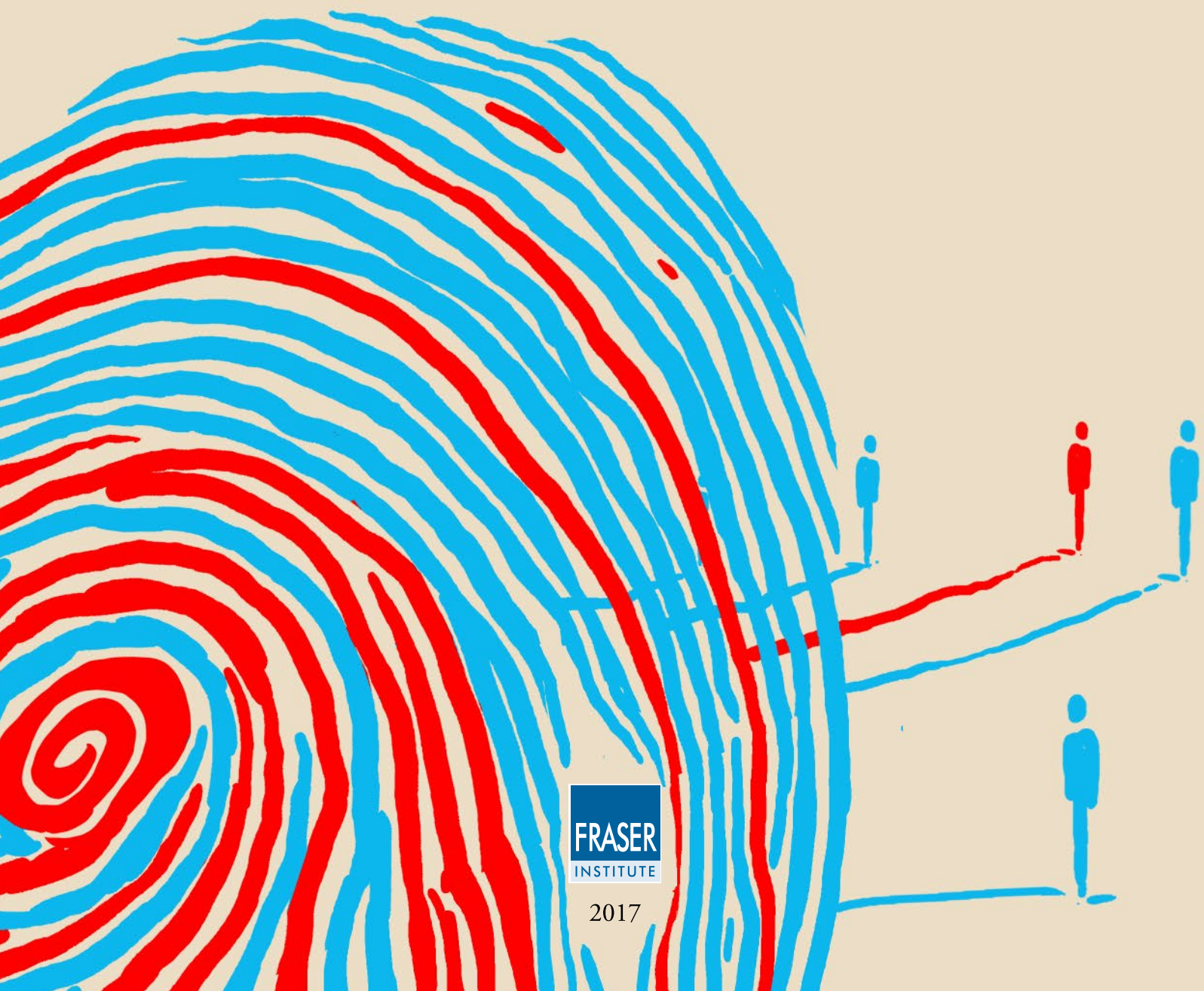


# Incentives, Identity, and the Growth of Canada's Indigenous Population

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by Tom Flanagan



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## Executive summary

Statistics Canada has reported unprecedented growth in Canada's Indigenous population (Indian, Métis, and Inuit). Over the 25 years from 1986 to 2011, it grew from 373,265 to 1,400,685, an increase of 275%, while the population of Canada increased by only 32% in the same period of time. Although Canada's Indigenous peoples have higher birth rates than other Canadian groups, most of this increase resulted from "ethnic mobility"—individuals changing the identity labels they apply to themselves.

By far the greatest growth occurred in the categories of Métis and non-status Indian, which is purely a function of how respondents describe themselves in the census. But the numbers of Registered Indians (a distinct legal status) have also grown much faster than can be accounted for by natural increase. This paper deals with identity issues surrounding Registered Indian status and First Nations membership; a subsequent paper will deal with the Métis.

Ethnic mobility resulting in the growth in the numbers of Registered Indians has been fostered by adoption of equality rights in the Canadian Charter of Rights and Freedoms (1982); court decisions such as *Lovelace* (1981), *McIvor* (2009), and *Gehl* (2017); statutes such as Bill C-31 (1985) and Bill C-3 (2011); and the recognition by order-in-council of landless bands such as the Qalipu Mi'kmak First Nation (2011). The Registered Indian population is now at least 40% larger because of these legal changes than it otherwise would have been.

An important factor in the growth of the status Indian population is the set of positive economic incentives conferred by Registration, including free supplementary health insurance for all Registered Indians and Inuit, and in some circumstances financial assistance for higher education, exemption from taxation on reserve, and special wildlife harvesting rights. Such benefits can be substantial and are particularly attractive now that the former legal disabilities connected to Indian status, such as not being able to vote, have been repealed. The medical insurance plan alone is worth about \$1,200 per person per year. Though social disadvantages of Indian status may still exist, the legal and economic benefits are now substantial enough to create incentives to seek Registered status.

First Nations were established as distinct political communities; but political, judicial, and administrative trends are combining to confer Registered status upon many people who have some degree of Indian ancestry but are not

really part of First Nation communities. Ethnic mobility resulting in growth of the Registered Indian population means upward pressure on federal and provincial budgets, because population counts affect Indigenous programming. But expense is not the only concern; these changes also raise a fundamental question: is it justifiable to offer special government benefits solely on the basis of ancestry?

## Preliminary Note on Terminology

The Liberal government elected in 2015 changed the name of the department previously known as Aboriginal Affairs and Northern Development Canada (AANDC) to Indigenous and Northern Affairs Canada (INAC). This corresponds with contemporary usage in the international sphere, where “Indigenous” is the most common term and “Aboriginal” usually refers specifically to the first inhabitants of Australia. However justified this linguistic change may be, it creates a problem for Canadian researchers and writers because the term “Aboriginal” is entrenched in the *Constitution Act, 1982*, as well as in recent court decisions and scholarly commentary. I use “Indigenous” where possible but sometimes use “Aboriginal” for clarity of meaning.

Even thornier issues are associated with the widespread replacement, starting in the 1980s, of the traditional word “Indian” by the new phrase “First Nations” (Flanagan, 2008: 67-88), to the point where “Indian” is now often considered an offensive slur and many writers avoid it altogether. But it remains anchored in the *Constitution Act, 1867*, all iterations of the *Indian Act*, many earlier court decisions, and a vast body of administrative law. Canada continues to maintain an Indian Register, to be listed on which requires meeting specific legal criteria to obtain a certain legal status. To be a Registered Indian is not the same as being a First Nations person; the two groups overlap, but not perfectly. For purposes of clarity in discussing law and administrative practice, there is often no alternative to using the word “Indian.” Similarly, the phrase “Indian band” is still found in legislation and administrative documents and often must be used, rather than “First Nation,” for clarity when discussing organizational topics.



## By the Numbers

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*"Incentives matter"*  
(Gwartney et al., 2016)

*"Build it, and  
they will come"*  
(Anderson, 2010)

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Statistics Canada has reported an increase in the Aboriginal or Indigenous population from 373,265 in 1986 to 1,400,685 in 2011, an astonishing increase of 275% (table 1). In the same period, the overall Canadian population increased only 32%, from 25,309,331 to 33,476,688. The reported Indigenous population grew about eight times faster than the general Canadian population.

Although this increase has been widely reported in the media, it has been subjected to little critical analysis, except by demographers whose work does not get widely reported (Clatworthy, 2005; Morency, Caron-Malenfant, Coulombe, and Langlois, 2015). Public discussion has mainly centred on the promise of a growing Indigenous work force and the corresponding need for better education and job training to prepare Indigenous youth for the work world (BMO Financial Group, 2012). There is indeed some truth in this perspective: the Indigenous population is much younger than the general Canadian population (Statistics Canada, 2012), many Indigenous young people will become eligible for employment in coming years, and it is important that they find jobs and become self-supporting. But more is involved than simple growth in numbers; much of the reported increase is the result of changes in ethnic labelling, not to growth of the Indigenous population. Rather than seeing an extraordinarily large number of new Indigenous people, Canada is encountering many people who were already here but are now using one of the Indigenous sub-labels to describe themselves.

Table 1: Totals for Canadian and Indigenous populations, 1986–2011

	Total Aboriginal	Status Indian	Non-Status Indian	Metis	Inuit	Other Aboriginal Identity	Canadian
1986	373,265	286,230		59,745	27,290		25,309,331
1991	470,610	365,375		75,150	30,085		27,296,859
1996	799,010	488,045	86,595	178,360	39,480	6,525	28,846,761
2001	976,310	558,175	104,160	262,100	44,150	7,720	30,007,094
2006	1,172,785	623,780	133,155	355,505	49,115	11,235	31,612,897
2011	1,400,685	697,505	213,900	418,380	59,110	11,790	33,476,688

Sources: INAC's Core Tabulations, 1996 to 2006 Censuses and 2011 NHS. Prepared by Statistics Team, Strategic Research and Statistics Directorate, INAC, July 14, 2016. 1986 Census, Catalogue 93-109; 1991 Census, Catalogue 93-315. <<http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=103&S=50&O=A>>.

Part of this growth spurt in the Indigenous population is the result of a change in reporting by Statistics Canada. There was a sudden leap upward starting with the 1996 Census when Statistics Canada began to report numbers for non-status Indians and Aboriginal identity, in addition to the previous categories of Indian, Métis, and Inuit. The questionnaire items behind these new and broader terms elicited positive answers from more respondents than did more tightly focused questions using the terms “Indian” and “Métis.” But, even after allowing for the effect of differently worded questions, the reported growth of the Indigenous population is striking. **Table 2** shows the growth of the six Indigenous categories plus the overall Canadian population from 1996 through 2011, while **figure 1** presents the same data in a different visual format, setting 1996 at 100%.

**Table 3** lists the cumulative growth in all seven categories over this 15-year period, with the addition of female fertility statistics (O'Donnell and Wallace, 2015) where available. The surge in the Indigenous population in these years must have been driven by factors additional to natural increase. The Inuit, the group with the highest birth rate, increased by only 50%, whereas the Métis, with

Table 2: Indigenous populations, 1996, 2001, 2006 Censuses; 2011 National Household Survey

	1996	2001	2006	2011	Change 1996–2011	
					Number	Percentage
Total Aboriginal Population	799,010	976,310	1,172,785	1,400,685	601,675	75.3%
Registered or Treaty Indian	488,045	558,175	623,780	697,505	209,460	42.9%
Non-Status Indian	86,595	104,160	133,155	213,900	127,305	147.0%
Inuit Only, not Registered	39,480	44,150	49,115	59,110	19,630	49.7%
Métis Only, not Registered	178,360	262,100	355,505	418,380	240,020	134.6%
Other Aboriginal	6,525	7,720	11,235	11,790	5,265	80.7%

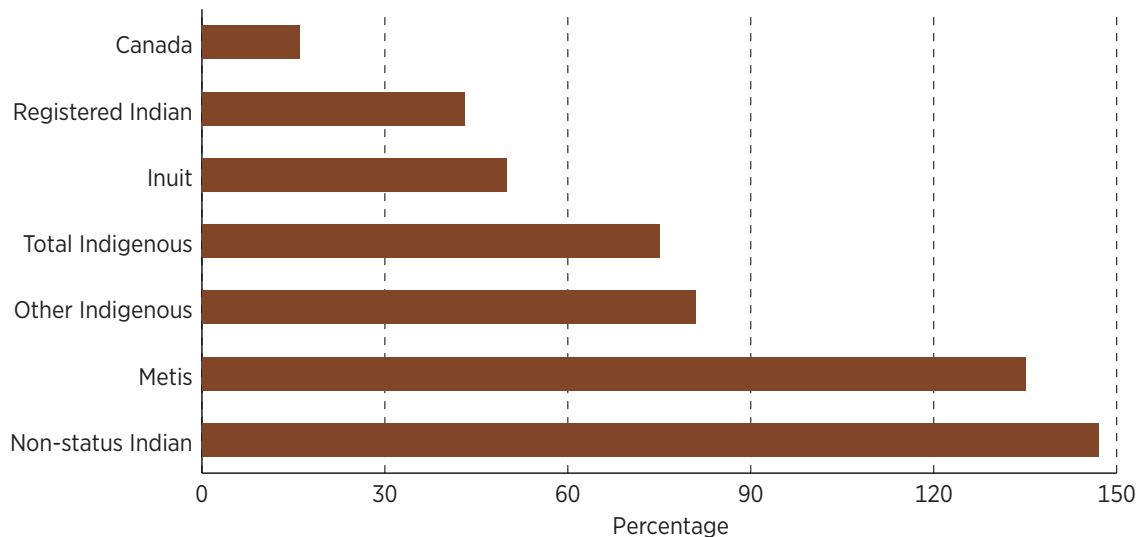
Sources: INAC's Core Tabulations, 1996 to 2006 Censuses and 2011 NHS. Prepared by Statistics Team, Strategic Research and Statistics Directorate, INAC, July 14, 2016. <<http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=103&S=50&O=A>>.

Table 3: Cumulative growth of population categories and lifetime female fertility, 1996–2011

	Cumulative growth (%)	Lifetime female fertility (children)		Cumulative growth (%)	Lifetime female fertility (children)
Total Indigenous	75	2.6	Métis	135	2.2
Registered Indian	43	2.9	Other Indigenous	81	n/a
Non-status Indian	147	n/a	Canada	16	1.5
Inuit	50	3.4			

Sources: O'Donnell and Wallace, 2015.

Figure 1: Cumulative growth (1996 = 100%) of the six Indigenous categories and the overall Canadian population, 1996–2011



Source: Table 2.

a much lower birth rate, grew by 135%. The fertility of Indigenous women in all categories is higher than that of the Canadian average (almost double that of the general population), but not nearly enough higher to account for the recorded differences in rate of population growth. Demographers who have studied the data closely have concluded:

North American Indians and Métis have experienced growth rates which exceed the theoretical maximum rate of natural increase of 5.5% per year. This theoretical rate is obtained from the highest crude birth rate (60 per 1,000 persons) observed in exceptional conditions—a young population, marrying young and practising no form of contraception—from which is subtracted the lowest crude death rate (5 per 1,000 persons). Such a combination of a high birth rate and a low death rate has probably never been observed. Today, the highest national rates of natural increase in the world are about 3.5% per year. (Robitaille, Guimond, and Boucher, 2010: 154)

The authors conclude that the phenomenal rates of increase recently observed in Canada can only be explained by “intergenerational ethnic mobility”—people changing their ethnic identity to labels different from those used by their parents. This is possible because Statistics Canada uses a subjective definition of Aboriginality, different from the objective governmental definitions of Registered Indian and Inuit, and also different from the definition of Métis that is emerging in constitutional jurisprudence.

Such ethnic mobility has multiple causes. One, as already noted, is the greater variety of Indigenous labels offered in the census by Statistics Canada starting in 1996. Another is the impact of the Internet on genealogy. What used to be a hobby for seniors is now a booming enterprise, fueled by many commercial websites. It is easier than ever to locate your ancestors and perhaps find that one of them was an Indigenous person (as recently happened to this author's wife). Not all who find such an ancestor will immediately claim Indigenous identity on the census, but it may be the first step in that direction. There is, moreover, an international trend for Indigenous identities to become not just more acceptable but positively attractive. Researchers in both the United States and New Zealand have found that children of interracial marriages are more likely than not to report their identity as Indigenous (Robitaille, Guimond, and Boucher, 2010: 166).

Beyond these global factors, Canadian public policy offers a growing number of material incentives to identifying oneself as Indigenous. These incentives, arising from the interplay of constitutional change, jurisprudence, legislation, and administrative rules, are rather different for those who become or hope to become status Indians, and for those who are now declaring themselves to be Métis. This publication will discuss the interplay of identity and incentives as applied to Registered Indians; a subsequent paper will attempt to deal with the many different issues surrounding Métis identity.

## Status Seekers

At the time of Confederation, Canada's policy, consolidated in the *Indian Act, 1876*, was to obtain Indian lands for purposes of immigration and settlement while protecting Indians themselves by designating lands on which they could live (Indian reserves); civilize them by encouraging Christian missionary work, including education; and, after civilization had been achieved, enfranchise them by granting the same civil and political rights possessed by other British subjects in Canada.

The land reserves were to be owned by the federal Crown under section 91(24) of the *Constitution (BNA) Act, 1867*, and managed under the *Indian Act, 1876*, for the use and benefit of the bands to which they were assigned. That management included protection of the reserves from the incursions of outsiders who might wish to gain control of the land. One measure for that purpose was the exemption of Indian reserves from taxation, which would prevent local authorities from seizing reserve land for non-payment of property taxes. Another measure was the set of rules defining who was an Indian, of which the essential features were the following:

3. The term "Indian" means: First. Any male person of Indian blood reputed to belong to a particular band; Secondly. Any child of such person; Thirdly. Any woman who is or was lawfully married to such person (*Indian Act, 1876, s. 3*).

An Indian woman who married an Indian man from another band would retain Indian status but become a member of his band. An Indian woman who married anyone other than a legal Indian would lose her Indian status and her children would not be legally considered Indians.

From a contemporary perspective, these rules constitute unacceptable discrimination on the basis of both race and sex. Indian men always retained their status and band membership regardless of whom they married and their children would always inherit their Indian status, whereas an Indian woman's status depended on that of her husband, and her children's status was also determined by her husband's status. However, the rules were in keeping with the era, in which neither Indians nor women possessed full civil and political rights. The rules ensured that non-Indian men could not take over Indian reserves by marrying the women who lived there and becoming members of the band. They also limited the federal government's financial responsibility by limiting the number of people with Indian status.

This double purpose was also visible in the 1951 consolidation and revision of the *Indian Act*, which introduced the “double mother” rule as a further protection of the integrity of reserve communities while also limiting the growth of the Indian population. Section 12 (a) (iv) of the revised *Indian Act* provided that, for marriages entered into after 1951, children “whose mother and whose father’s mother” were not Indians would lose their status upon reaching 21 years of age. In other words, Indian men would lose the right to pass on status to their children only after two generations of marrying out. This discriminated between men and women because the original provisions for women marrying out remained in force; marrying out still caused them to lose their own status immediately as well as the right to pass status to their children. Indian women were still being treated differently from Indian men.

This legal regime, created in 1876 and amended in 1951, came to seem blatantly discriminatory in our own time. As early as 1967, Mary Two-Axe Earley, a Mohawk from Kahnawake who had lost her status by marrying out, brought the issue before the Royal Commission on the Status of Women (Brown, 2003; Royal Commission ... , 1970). Jeannette Lavell and Yvonne Bédard, who had also lost their Indian status by marrying out, challenged the *Indian Act* provisions in court but ultimately lost, when the Supreme Court of Canada ruled that the Canadian Bill of Rights, which was not part of the Constitution, could not be used to invalidate the *Indian Act* (*Attorney General of Canada v. Lavell*, 1973). The legal situation changed, however, in 1982 with the adoption of the *Canadian Charter of Rights and Freedoms*, which included guarantees of equality between men and women. Political pressure had also mounted because Sandra Lovelace, a Maliseet woman who had lost her status by marrying out, subsequently divorced, and wished to move back to her reserve, obtained a favourable decision from the United Nations Human Rights Committee in 1981 (*Sandra Lovelace v. Canada*, 1981). The Lovelace decision was not legally binding in Canada but in 1985 the Conservative government of Brian Mulroney reacted by trying to modernize the *Indian Act* definitions of who qualifies as an Indian.

Bill C-31, *An Act to Amend the Indian Act, 1985*, is quite complex so we will touch only upon the main features here. First and foremost, it restored Indian status to all the women who had lost it by marrying out and to their children as well. Going forward, Indian women would no longer lose status by marrying out, nor would non-Indian women gain Indian status by marrying in. Men and women would be treated the same with respect to the first instance of marrying out.

Some First Nations were happy to accept the women and children who had previously been enfranchised, while others were not. Some poorer First Nations felt they could not provide services to all the new members, and some better-off

First Nations were afraid the newcomers just wanted a share of their wealth. Both poorer and wealthier First Nations often had concerns that women and children reacquiring status would have lost their traditional culture during years of living off reserve (Dick, 2011: 15). Bill C-31, therefore, created a distinction between band membership and Indian status, allowing bands to create their own membership codes if they wished (*Indian Act, 1985*, s. 10). John Crosbie, Minister of Justice at the time, thought this represented an adequate balance between the individual rights of women and the collective rights of First Nation communities. However, that compromise is now coming under pressure as some First Nations who have accepted new members under their own membership codes are now seeking to have these members also receive the status of Registered Indians, which would entitle them to various financial benefits described further on in this paper (Galloway, 2017).

Of the 618 First Nations now officially recognized by Indigenous and Northern Affairs Canada (INAC), 229 had adopted their own membership codes by the end of September, 2016, while an additional 40 First Nations are outside the *Indian Act* because of comprehensive self-government agreements (McGregor, 2016b). The new codes fall into four broad categories, ranging from accepting the *Indian Act* definitions to requiring individuals to have a certain “blood quantum” before being admitted as members. Even when these codes did not grant membership to women and children whose status was restored by C-31, those women and children could still receive Indian status and be listed in the Indian Register (Clatworthy, 2005, 2007). They would be not be members of any particular Indian band and thus not legally entitled to live on a reserve and receive services provided by the band government; but they would be entitled to other benefits, such as the Non-Insured Health Benefits program, discussed in more detail below.

Clatworthy (2005: 1) found that, as a result of Bill C-31, about 114,000 names had been added to the Indian Register by the end of 2002. However, that did not take into account the children born to mothers after they had regained status under C-31. In a more formal analysis combining Indian Register information with statistical data about birth and death rates, Clatworthy (2013: 14) found that the status Indian population had grown by 184,411 by the end of 2004: that population was now 33.6% larger than it would have been if Bill C-31 had not been adopted.

Some restrictions remained, however, due to the introduction of what became known as “the second generation cut-off” to replace the double-mother rule. The new section 6 (2) of the *Indian Act, 1985*, prescribed that children whose Indian status had been restored—that is, children of mothers who had married out—had to marry another status Indian to pass on Indian status to their own



children. In other words, marrying out, if repeated, would prevent offspring of the latter union from receiving status and being listed in the Indian Register. These provisions were gender-neutral on their face, that is, they applied to both men and women, but they perpetuated the inequality of the original *Indian Act* because they applied only to the children (both male and female) of women who had once lost their status through marrying out. This was the core problem, though there were also many related issues arising from divorce and remarriage, births to unwed parents, and adoption.

Put another way, individuals who were Indians before passage of Bill C-31 would continue their Indian status under Section 6 (1). Those who were reinstated under the provisions of C-31 would also be considered Indians, but under Section 6 (2). The consequences of this difference would emerge through subsequent marriages. If a 6 (1) person marries a Registered Indian, either 6 (1) or 6 (2), the children remain status Indians. However, if a 6 (1) person marries a non-Indian, the children become 6 (2) Indians; and if a 6 (2) Indian marries a non-Indian, the children do not receive Indian status. These complex rules were bound to give rise to a new round of litigation.

The key challenge came from Aboriginal lawyer and feminist activist Sharon McIvor (Barker, 2008). McIvor, who was the daughter of a non-Indian man and an Indian woman from the Lower Nicola Band in British Columbia, regained her status under C-31, as did her son, Jacob Grismer. But under the second generation cut-off, Grismer, because his father was not an Indian, held only section 6 (2) status and therefore could not pass status to his own children unless he married a status Indian woman. The second generation cut-off would not have applied to Grismer if he had inherited his status from an Indian father rather than from McIvor, hence the claim of sexual discrimination. In 2009, the British Columbia Court of Appeal agreed with McIvor in part. It held that C-31 was discriminatory but did not, as McIvor had asked, extend its finding of discrimination back to 1867. The Supreme Court of Canada refused McIvor's request for leave to appeal, and the federal government decided to legislate on the basis of the BC Court of Appeal's verdict (Dolha, 2009). The result was Bill C-3, which granted status to applicants in the situation of Sharon McIvor's grandchildren—about 45,000, according to an early estimate (Merchant Law Group, 2011).

In another branch of litigation, Lynn Gehl, an Algonquin woman, attempted to obtain Indian status that was denied because the identity of her paternal grandfather is unknown (Vincent, 2014). She lost at trial level but won in the Ontario Court of Appeal (LEAF, 2017). According to legal scholar Pamela Palmater, as many as 50,000 people might be able to regain status because of this decision (Porter, 2014). A more conservative estimate by Clatworthy (2013: 26) is a short-term increase in the status population of 14,735.



## Twofold effect on the status Indian population

The interaction of constitutional change, court decisions, and legislation described above has had a twofold effect on the status Indian population. The first effect is an increase in the status Indian population far above what it would have been in the absence of legislative change. Combining Clatworthy's formal estimate of the impact of C-31 with less formal estimates of C-3, the increase by the end of 2016 must be at least 40% even without including any possible impact of the Gehl appeal.<sup>1</sup>

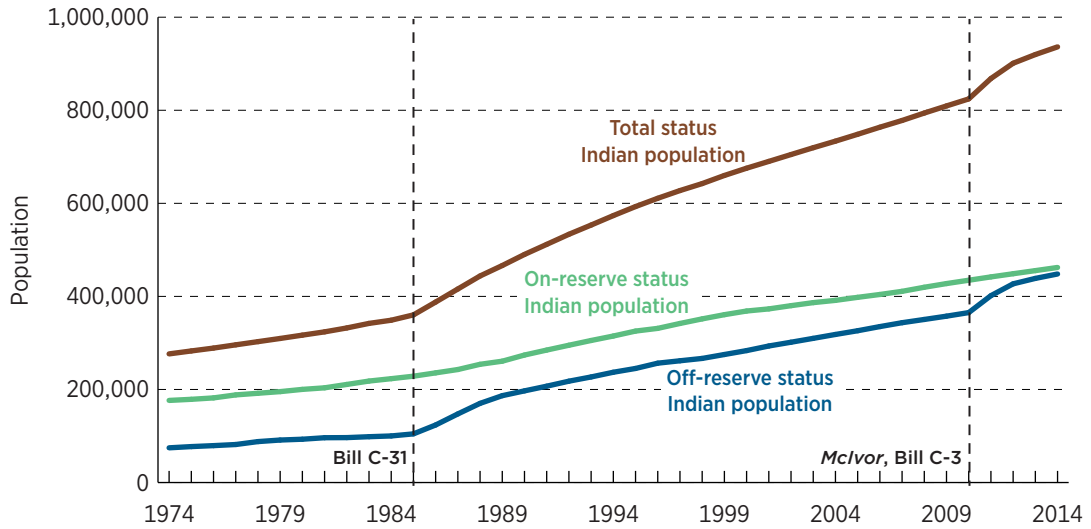
The second effect has been to increase the percentage of Registered Indians who live off reserve. **Figure 2** illustrates both the increase in the total status population and the increase in the population of status Indians living off reserve. Figure 2 is based on the Indian Register compiled by Indigenous and Northern Affairs Canada (INAC), not on the quinquennial census conducted by Statistics Canada. The Indian Register always shows a higher total of status Indians than the census because of under-enumeration of First Nations in the census and possible lags in reporting of deaths to the Indian Registrar. Although there are some imponderables, the Indian Register should probably be considered more authoritative than Statistics Canada's total because the Register is based on objective information, whereas Statistics Canada reports subjective claims to identity.

Figure 2 shows the growth in the population of status Indians over the 40-year period from 1974 to 2014. Until the legislative changes of Bill C-31, passed in 1985, the on-reserve and off-reserve populations grew at the same rate. After 1985, there was a small increase in the rate of growth of the on-reserve population but a sharp jump in the rate of growth of the off-reserve population, as many formerly enfranchised women and their children regained Indian status. There was another sharp inflection in the growth rate of the off-reserve status population after 2010, reflecting the impact of the *McIvor* decision and Bill C-3 (and the creation of the landless Qalipu band, discussed below, pp.11-12). These legislative changes caused the rate of growth of the off-reserve status population to increase because most of these people were already living off reserve but had not previously been legally defined as Indians. Some may have wanted to become status Indians but did not want to return to the reserves from which they had been expelled or on which they had never lived. Others may have wanted to return but came from a First Nation that had adopted a membership code preventing them from becoming band members, so they had to be content with getting onto the Indian Register.

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1. Bill C-31 added over 100,000 names to the Indian Register, which, with subsequent child births, increased the number of Registered Indians by 33.6%. Bill C-3 may have added another 45,000 registrants. The numbers cover different time periods and so cannot simply be added, but an overall increase of 40% seems like a conservative estimate.

Figure 2: Increase in population of status Indians, 1974–2014



Note: "Total status Indian population" also includes includes status Indians living on Crown land.  
 Sources: data prepared by Indigenous and Northern Affairs Canada, Policy and Strategic Direction Sector, Planning, Research and Statistics Branch, Statistics and Measurement Directorate; Bains and Ishkanian, 2016.

In 1974, the on-reserve status Indian population was almost three times the size of the off-reserve population but off-reserve numbers had almost caught up to on-reserve numbers by 2014 (figure 2). This fundamental change in the situation of First Nations is often misrepresented in public discussion as being the result of people leaving reserves to find a better life, whereas it is more the result of granting Indian status to women and their children who had lost status and left their reserves because of marriage. First Nations were originally small, compact communities living apart from the larger society in territorial enclaves. Those communities still exist but now there is an equally large number of First Nations people, generated by ongoing out-marriage, who do not live on those reserves and probably never will. Some are members of particular First Nations, others have only an ancestral relationship but are not members of any Indian band. For some, being a status Indian is more a matter of racial descent, as ratified in the Indian Register, than of belonging to an actual community. For others, being a band member is still very important for participation in community ceremonies.

INAC does not know exactly how many status Indians are listed in the Indian Register but are not members of any Indian band because First Nations with their own membership codes are not required to report the names of their members to INAC. However, in the 2006 census about 32,000 people reported Indian status without membership in any First Nation. For 2011, the corresponding number was 55,700 (McGregor, 2016a). This is probably an underestimate because Statistics Canada never succeeds in completely enumerating

First Nations people (INAC, n.d.). Whatever the precise number may be, there is clearly a large and growing number of people who have Indian legal status in virtue of their Indian ancestry but are no longer members of a First Nation community, though not necessarily by their own choice.

### Lingering inequalitites

Ironically, Sharon McIvor opposed Bill C-3, even though it resolved her own family's problems, because it did not deal with all issues of Indian status going back to 1867. For example, inequalities still lingered based on marriages and births that had occurred under the double mother rule that had been part of the *Indian Act* between 1951 and 1985. In 2015, Stéphane Descheneaux won a decision in Quebec Superior Court granting status to his three children. Descheneaux, whose grandmother and mother had married non-Indians, had had his own status restored under C-31 but his children were deemed non-Indians because his wife was not an Indian. The Court gave the federal government 18 months to review residual sexual discrimination in the registration rules, and the government has introduced a bill in the Senate in response (Bill S-3, 2016). However, INAC Minister Carolyn Bennett has admitted that the bill is rushed and imperfect, and that further consultations will be necessary (*Canadian Press*, 2016). The number of new status claimants may be much smaller than the numbers that emerged following Bill C-31 in 1985 and C-3 in 2011, but it is hard to be certain. "Who knows how many people will be affected by this latest ruling. Is it 3,000? Is it 5,000? Whenever we try to guess, the actual number ends up far exceeding our estimates," said University of Ottawa law professor Sébastien Grammond (*Curtis*, 2015).

Apart from these broad national struggles over the definition of Indian status, there have been localized attempts of people to gain status, based on arguments that their ancestors had been overlooked when governments first dealt with the aboriginal population. The largest and most important of these cases to date arose in the province of Newfoundland & Labrador. The Beothuks, the Aboriginal people of the island of Newfoundland, died out early in the nineteenth century; but Mi'kmak people based in Canada had been visiting the south and west shores of Newfoundland since the seventeenth century and established both temporary and permanent settlements there. The colonial government of Newfoundland did not attempt to deal with them nor was any special provision made when Newfoundland entered Canadian Confederation in 1949.

The official position was that, once the Beothuks had ceased to exist, there were no more Aboriginal people on the island. Over hundreds of years, there had been a great deal of intermarriage between Mi'kmaks and other Newfoundlanders; but many people of partially Mi'kmak lineage still thought of themselves as Indians, even if they were not publicly recognized as such. In the

1970s, the Federation of Newfoundland Indians and other Aboriginal organizations began to work for recognition. After decades of agitation and threatened litigation, the federal government agreed in 2007 to recognize a landless band in Newfoundland & Labrador, the Qalipu First Nation (“Qalipu” represents the Mi’kmaq pronunciation of the English word “caribou,” derived through French from the Algonquian languages, of which Mi’kmaq is one). Members would get their names on the Indian Register and the new First Nation would get some program funding but no land reserves.

Enrolment in the new band would require Canadian Indian ancestry by birth or adoption, self-identification as a member of the Mi’kmaqs of Newfoundland, and acceptance by the same group (*Agreement, 2007*). Based on census data, civil servants estimated that fewer than 10,000 people would apply for enrolment; but 103,000 applications ensued, many from people no longer living in Newfoundland, before the government called a halt (*CBC News, 2013*). An additional agreement reached in 2013 limits the numbers by requiring objective evidence of self-identification as a Newfoundland Mi’kmaq prior to September 22, 2011, the date of the Order-in-Council recognizing the Qalipu Nation (*INAC, 2013*). In other words, status claimants had to show evidence, such as membership in a Mi’kmaq organization, proving that they had thought of themselves as Indians before creation of the Qalipu Nation. Even under this new, more restrictive criterion, more than 24,000 Qalipu members were initially enrolled, although the number was later reduced to about 18,000 by striking many applicants who no longer lived in Newfoundland (*Thomson, 2017*). Qalipu is now the second most populous First Nation in Canada. Litigation seems inevitable as many of the 80,000 rejected applicants will not give up easily (*CBC News, 2013; Thomson, 2017*).

The Qalipu criteria for enrollment are being imitated in the *Proposed Agreement-in-Principle among the Algonquins of Ontario, and Ontario, and Canada* (*Algonquins of Ontario, 2015: 24*), which was recently endorsed in a referendum for which the voters list consisted of 7,540 people, 90% of whom are now non-status Indians (*Algonquins of Ontario, 2016; Gehl, 2016*). Probably many on the voters list will obtain status in the future, although the negotiations are far from over. It is also likely that there will be future settlements elsewhere in Canada of this type, substantially increasing the number of Registered Indians, as Qalipu has done.

# Incentives to Become Indian

Why have so many people been seeking Indian status? While it is true that all Indigenous identities, including that of Indian, have taken on greater social cachet in recent decades, that cannot be a sufficient explanation. Being a Registered Indian is not just a personal identity or a social label, it is a legal status recognized by the federal government. At one time, the status of being Indian had many legal disadvantages, such as the inability to leave the reserve without permission of the Indian Agent, to conduct a potlatch or a sun dance, to possess alcohol, and to vote. But those legal disadvantages were abolished years ago, leaving the legal advantages to dominate the decision calculus of individuals. What, then, are the present advantages of being legally Indian that create incentives for seeking status?

## Health benefits

First, all Registered Indians are eligible for coverage by the Non-Insured Health Benefits (NIHB) plan, which includes several categories of service not generally covered by provincial health insurance plans (Health Canada, 2016): [1] dental care; [2] eye and vision care; [3] medical supplies and equipment; [4] drugs and pharmacy products; [5] mental health counselling; and [6] assistance with transportation to medically necessary services.

Other Canadians may receive coverage in these areas as part of their employment benefits, in which case it is part of compensation and presumably traded off against foregone elements of the pay package. People who do not receive such employment benefits must purchase private insurance or pay out of pocket. The coverage provided by the NIHB has a substantial value: in fiscal 2012/13, the cost of the program was \$1.1 billion for 926,000 clients, of whom 883,000 were First Nations people (the others were Inuit) (Health Canada, 2014); that is, \$1,188 per year for each man, woman, and child. This non-taxable benefit, aggregated for multi-member families, creates a tangible and substantial incentive to seek Indian status for those who have the right ancestry.

## Tax benefits

Second, there may be tax benefits, though these will vary from highly significant to negligible, depending on circumstances. For those who live on reserve, section 87 of the *Indian Act* provides an exemption from income tax (for income earned on the reserve) as well as from sales and excise taxes (for purchases made

on reserve). But there may also be tax exemptions for status Indians living off reserve. Employment income of non-residents may be tax exempt if the income is earned on reserve, and sales and excise taxes may be waived for non-resident status Indians making purchases on reserve (Canada Revenue Agency, 2015). For example, a member of the landless Qalipu Nation can be exempt from HST on a new car if the dealer will ship the car to the Conne River reserve for pick-up (Crocker, 2012). The value of avoiding the Newfoundland & Labrador's 15% HST on a new car will far outweigh the cost of transporting that car to Conne River and paying a service fee to an agent on the reserve.

### Support for advanced education

A third potential benefit of Indian status is conferred through INAC's support for advanced education, which delivers about \$340 million annually to some 22,000 Aboriginal students for study in university or college (INAC, 2015). During the 2015 federal election campaign, Liberal Leader Justin Trudeau promised to add \$200 million over four years to that amount, although that promise has not yet been implemented (Press, 2016). Most recipients of aid under the program will be members of Indian bands because selection is made by band governments, but some indigenous organizations are authorized to grant support to Registered Indians who are not members of First Nations (INAC, 2017). Unlike the Non-Insured Health Benefits program, the Post-Secondary Student Support program is not a universal benefit of Indian status. Many First Nation students do not receive support and must fund their education in other ways. But it is a significant amount for those who receive it and is thus an important incentive for seeking Indian status.

### Hunting and fishing rights

A fourth area of potential advantage are hunting and fishing rights. Rules vary across the country because federal jurisdiction over "Indians and lands reserved for Indians" intersects with treaty provisions as well as with provincial jurisdiction over wildlife as part of natural resources. However, Registered Indians will often be able to fish and hunt in areas and seasons that are closed to others, without purchasing a license and without having to abide by normal bag limits (see, for example, Manitoba, 2015). This can be a valuable privilege for those able to take advantage of it: the several hundred pounds of meat from one large moose, for example, are equivalent to beef purchases worth several thousand dollars. Beyond the hunting and fishing rights extended to status Indians as individuals, there may also be an opportunity for some to participate in special harvesting programs, such as food fisheries, managed by particular First Nations.

### Benefits for band members

Finally, there may be a range of benefits accruing to new status Indians who also become members of Indian bands, though this will depend greatly on the location and prosperity of the First Nation and the individual's degree of connection with that Nation's political authorities. Benefits could include free or subsidized housing; band backing for a home mortgage; a job in band administration or a band-owned enterprise, where income might be tax-exempt; and selection for the Post-Secondary Student Support program, as mentioned above. Living on reserve, however, may also bring some economic liabilities. Housing and schools are often of substandard quality, as are social services such as health care and child protection.

No one has attempted to measure all the possible economic benefits of obtaining Indian status but it is obvious that they can be considerable. The absolute minimum is supplementary health insurance worth an average of about \$1,200 a year for each person covered. Beyond that everything will depend on the person's situation and whether membership in an Indian band is obtained in addition to being listed on the Indian registry, and whether the person lives on reserve and incurs benefits or liabilities from that choice of residence. But there may be many individuals who will obtain substantial advantage from one or more of the benefits described above—tax exemptions, student support, special hunting and fishing rights, subsidized housing, or jobs controlled by the First Nation. When such benefits are summed across family units, the total could easily be thousands or sometimes even tens of thousands of dollars a year. Even at the low end, these incentives are large enough to encourage people with the right lineage to seek status, given that there are no longer any counterbalancing legal disincentives to being legally defined as an Indian.



## Implications

It seems likely that the numbered of Registered Indians will continue to grow more rapidly than the general population, not just because of a higher birth rate but also because of ethnic mobility. It is unlikely that bills C-31, C-3, and S-3, plus the Lynn Gehl litigation, will resolve all issues based on claims of gender discrimination. Also, enrolment of 18,000 members into the Qalipu Nation and onto the Indian Register has left 80,000 dissatisfied applicants in Newfoundland & Labrador, many of whom will not easily give up their quest for status. And then there are the people who have obtained membership in a First Nation and now would also like to become Registered Indians.

Beyond that, there are numbers of people across Canada, such as the Algonquins of Ontario, who have some Indian ancestry but who, for various historical reasons, have neither Registered Indian status nor First Nation membership. When the Numbered Treaties were signed in the Canadian West and northern Ontario, tens of thousands of people of mixed race were classified as Métis and given scrip rather than being admitted to treaty (Flanagan, 1990). In subsequent years, many people of mixed ancestry were discharged from treaty either voluntarily or involuntarily. All of these people together constitute a large pool of possible litigants seeking legal changes in order to obtain Indian status and the benefits that go with it.

A rough indication of the size of this pool is furnished by the 2011 census, which reported 213,900 non-status Indians and 418,380 Métis. Remarkably, these are the fastest growing groups of Indigenous people according to the census. As shown in table 2, Métis numbers grew by 135%, and non-status Indians by 147%, between 1996 and 2011. During the same period, the category of Registered Indians in the census increased by only 43%—faster than the general population increase of 16% but much slower than the rate for either non-status Indians or Métis. The spectacular increase of these two groups must be due largely to ethnic mobility.

Neither group has a clear legal definition, so the lines between them are blurry. Together, however, they constitute 632,280 people of partly Indian ancestry who might conceivably seek legal status. Some may not be interested and others may prefer to continue labelling themselves as Métis in expectation of benefits yet to be defined; but there are surely enough potential status-seekers to keep up political and legal pressure for the expansion of the rules surrounding eligibility for status.



Sophisticated demographic projections (Clatworthy, 2005; Morency, Caron-Malenfant, Coulombe, and Langlois, 2015) show an expected rapid increase in the numbers of both Registered Indians and First Nations people for at least the next 50 years. But such projections can only be based on existing law and policy; they cannot take account of future legal and political trends—judicial decisions not yet rendered and legislation not yet passed. It seems evident that both legal and political trends, absent some unforeseen change in public opinion, will continue to favour expansion of the criteria for status. Hence future population increases for First Nations and Registered Indians may even be larger than the already large increases forecast by demographers. In the longer term, social trends of intermarriage continuing over the next century and refracted through Sections 6 (1) and 6 (2) of the *Indian Act* could theoretically result in the disappearance of the Registered Indian population. But the legal and political trends that have been leading to an increase in the number of Registered Indians will probably prevent that outcome.

Population increases will exert continuing upward pressure on government budgets, as population counts affect Indigenous programming. For example, adding 18,000 people to the Indian Register by the creation of the Qalipu Nation could add about \$21 million to the annual cost of the Non-Insured Health Benefits program, because the program has a statutory obligation to cover all applicants listed on the Indian Register.<sup>2</sup> In other cases, such as the Post-Secondary Student Support program, where there is not a specific statutory entitlement, greater numbers create political pressure upon the federal government to increase its budgetary allocation.

In short, growth in the numbers of Registered Indians due to ethnic mobility creates both legal obligations and political pressures for increased spending in the Indigenous area, which is already a large and growing component of both federal and provincial spending. In its 2016/17 budget, the newly elected Liberal government promised to add \$8.4 billion in spending over the next five years to the Indigenous envelope, most of which will go to First Nations programming (Government of Canada, 2016); yet there are still many complaints from First Nations leaders that various programs are underfunded. An unmeasured but substantial part of that alleged underfunding must be due to the large increase in the Registered Indian population that has already taken place due to legislative changes.

Beyond its impact on the budget, the expansion of status is also changing the very nature of the relationship between Canada and First Nations. Canada's

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2. A rough estimate based on the overall cost of the program is \$1200/member × 24,000 new members = \$28,800,000 in 2016 dollars. A more accurate estimate would require knowing the likely claims behaviour of the new members, which is dependent on age and health factors.

original Indian policy was assimilationist, but it recognized that First Nations were not just a separate race. They had a racial basis, to be sure, but they were also communities. Hence the negotiation of treaties and the creation of land reserves where these communities could be protected while they acquired the arts of civilization on the way to complete enfranchisement. Membership in Indian bands, as they were then termed, was never defined totally by race; people who were not Indian by descent could become legally Indian through marriage in the case of women, adoption in the case of children, or direct enrolment in exceptional circumstances.<sup>3</sup> Measures such as loss of status for women through marrying out, the double-mother rule, and the second generation cut-off were adopted not to create racial purity but to protect Indian communities from take-over by outsiders thought to be more sophisticated and aggressive, while also limiting the numbers of Indian people to whom Canada had financial obligations.

That original intention is no longer politically acceptable. First Nations are now recognized, at least to a degree, as continuing communities within Confederation, not subject peoples on the way to assimilation; and Indian reserves and other First Nation lands are understood as a permanent land base, not transitional sanctuaries. The rules that sustained the original vision are now considered violations of racial and gender equality. But as Canada has outgrown and discarded the original vision, Parliament has not formulated a replacement—hence the seemingly endless litigation, and the confusion and contestation surrounding new rules of First Nation membership and Indian registration.

As the former rules and restrictions are challenged and fall, the only factor that remains constant is racial descent. We are moving towards a system in which the only qualification for Indian registration is to prove some degree of Indian ancestry. The Canadian government drew back when that led to 103,000 applications for Qalipu membership and accompanying Indian status, and it negotiated stronger identity criteria; but it is unknown how that will work out in the long run, given the inevitable administrative appeals, legal challenges, and political pressures.

There would be no objection to using racial descent as the membership criterion if we were talking about purely voluntary organizations; many organizations, such as the United Empire Loyalists' Association of Canada, use lineage criteria for membership. People who do not like lineage criteria do not have to join and do not lose anything by not joining. But being listed in the Indian Register or being a member of an Indian band is not a purely private affair. Both

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3. James Gladstone, Canada's first Aboriginal senator, was of mixed white and Métis ancestry, yet was placed on the Blood membership roll in 1920 (Dempsey, 1986: 60). He had attended a residential school on the Blood reserve and later married a Blood woman.

are anchored in law and bring economic benefits paid for by other citizens. First Nations can claim to be continuing communities, but those who gain status by alteration of lineage rules or by joining an artificially created entity such as the Qalipu Nation are more like a racial than a political community.

The number of Registered Indians who are not members of Indian bands seems likely to grow, and perhaps also the number of First Nation members living off reserve. The numbers of Métis and non-status Indians, as reported in the census, have been growing even more rapidly. If Canada starts to grant economic benefits to Métis and non-status Indians (to be discussed in [Flanagan, forthcoming](#)), the numbers of Indigenous people receiving benefits solely on the basis of lineage may become larger than the First Nations population. Canadian policymakers may have to openly confront the question of whether it is justifiable to tax some Canadians to pay benefits to other Canadians solely because of ancestry.

Maybe the debate is already beginning. Two overlapping groups in Quebec—the “Mikinak Tribe” and the “Confederation of Aboriginal Peoples of Canada”—are recruiting members based solely on DNA tests or other proof of ancestry. The Mikinaks are issuing membership cards that look somewhat like Indian status cards and are encouraging their members to seek tax exemptions—so far unsuccessfully. These groups have been repudiated by leaders of nearby Mohawk communities, who argue that Indian status must mean more than Indian ancestry and that it must entail community membership ([Mohawk Council of Akewasasne, 2016](#); [Hamilton, 2016](#)). These small groups in Quebec may fail, but the question they pose will not go away as long as Canada keeps recognizing new groups of status Indians based largely on ancestry.

The government of Canada offers monetary payments or other benefits to many groups defined in various ways. Some group definitions are based on the human life cycle—pregnancy, childhood, education and training, retirement and old age. Other definitions presuppose some harm suffered as a result of public policy—wrongful conviction of a crime, attendance at Indian residential school—or because of a natural disaster such as fire or flood. Affirmative action programs are structured to remediate a history of discrimination, offering jobs and educational opportunities to disadvantaged groups so that their members may improve their own situation. But the benefits offered to growing numbers of Registered Indians regardless of whether they are part of territorially based First Nation communities seem to be based only on ancestry, not on anything the recipients have done or suffered, or any unfortunate circumstances beyond their control. Ancestry is a dubious basis for public policy in a liberal democracy.

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