

# FIRST NATIONS GOVERNANCE PROJECT: PHASE I

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First Nations  
FINANCIAL  
MANAGEMENT  
BOARD

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DE GESTION  
FINANCIÈRE des  
Premières Nations



Institute on  
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LEADING EXPERTISE

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This report is jointly produced by the First Nations Financial Management Board and the Institute on Governance.





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# Executive Summary

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In February of 2018 the First Nations Financial Management Board (FNFMB) was asked by the Department of Indigenous Services Canada (DISC) to examine the characteristics of First Nations governance, and inter-governmental relationships, to support their transition out from under the *Indian Act* to a renewed Nation-to-Nation relationship. FNFMB established a partnership with the Institute on Governance (IOG), based on their recognized expertise in governance, including Indigenous governance, to help deliver on this important initiative specifically through research and analytical support.

This initiative, entitled “The First Nations Governance Project (FNGP),” is organized into two phases:

- **Phase I (February, 2018-August, 2018):** Defining how, from a governance perspective, Indigenous peoples in Canada envision a renewed Nation-to-Nation relationship with Canada in a post-*Indian Act*, UNDRIP-defined environment, and begin detailing questions about how UNDRIP-defined Indigenous Nations will interact with Canada and other governments;
- **Phase II (anticipated end date of March 2019):** Providing answers on how UNDRIP-defined Indigenous Nations will interact with Canada and other governments, and suggesting support mechanisms and structures to ensure that Indigenous Nations and Canada successfully engage in an UNDRIP-defined relationship.

Ultimately, the goal of the FNGP, in the words of James Anaya, former U.N. Special Rapporteur on the Rights of Indigenous Peoples, is to support First Nations governments to be “*full and equal participants in the creation of the institutions of government under which they live and, further, to live within a governing institutional order in which they are perpetually in control of their own destinies.*”

This Report represents the results of Phase I of the FNGP. In addition to reporting on the objectives and activities outlined above, it will inform Phase II of the project, and provide recommendations for further research in support of more effective governance in the context of nation rebuilding, self-determination, and a principled Crown-Indigenous relationship.

## FNGP Advisory Group

FNFMB and IOG established an Advisory Group (AG) of thought leaders representing a diverse collection of perspectives to provide guidance and advise on the development of this initiative (Appendix A). The AG convened three times throughout Phase I to review and advise on the progress made by the project team. The project team took away many critical lessons and contributions from the AG, including, but not exclusive to the following four themes:

- While good governance is important to transitioning out of the *Indian Act* to advance a Nation-to-Nation relationship, of at least equal significance is the importance of defining the principles of an effective and meaningful Crown-Indigenous relationship.
- Supporting that transition will require a comprehensive and holistic approach that recognizes the interactions between governance, community capability, fiscal and government autonomy, and the principles that guide First Nations’ relationships – internally, with other communities, and other levels of government.
- This work must be grounded in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) – and in particular the imperative of self-determination – and be informed by an understanding of the history of the Crown-Indigenous relationship; from contact, to the Royal Proclamation of 1763, treaty-making, and past efforts aimed at repairing the relationship, such as the Royal Commission on Aboriginal Peoples (RCAP). All First Nations must be able to see themselves in a self-determination and governance framework.



## Indigenous Self-Determination and Governance Framework

Under the above noted guidance of the Advisory Group, the FNGP project team developed a comprehensive and holistic Self-Determination and Governance Framework that can be used for a variety of purposes: assessing a community's present level of self-determination, and what can be done to increase it in transition out of the *Indian Act*; providing the rationale for diversity in First Nations governance formations; guiding federal government policy and program development, and; underscoring the imperative of agreeing on the principles that will underpin a renewed Crown-Indigenous relationship.





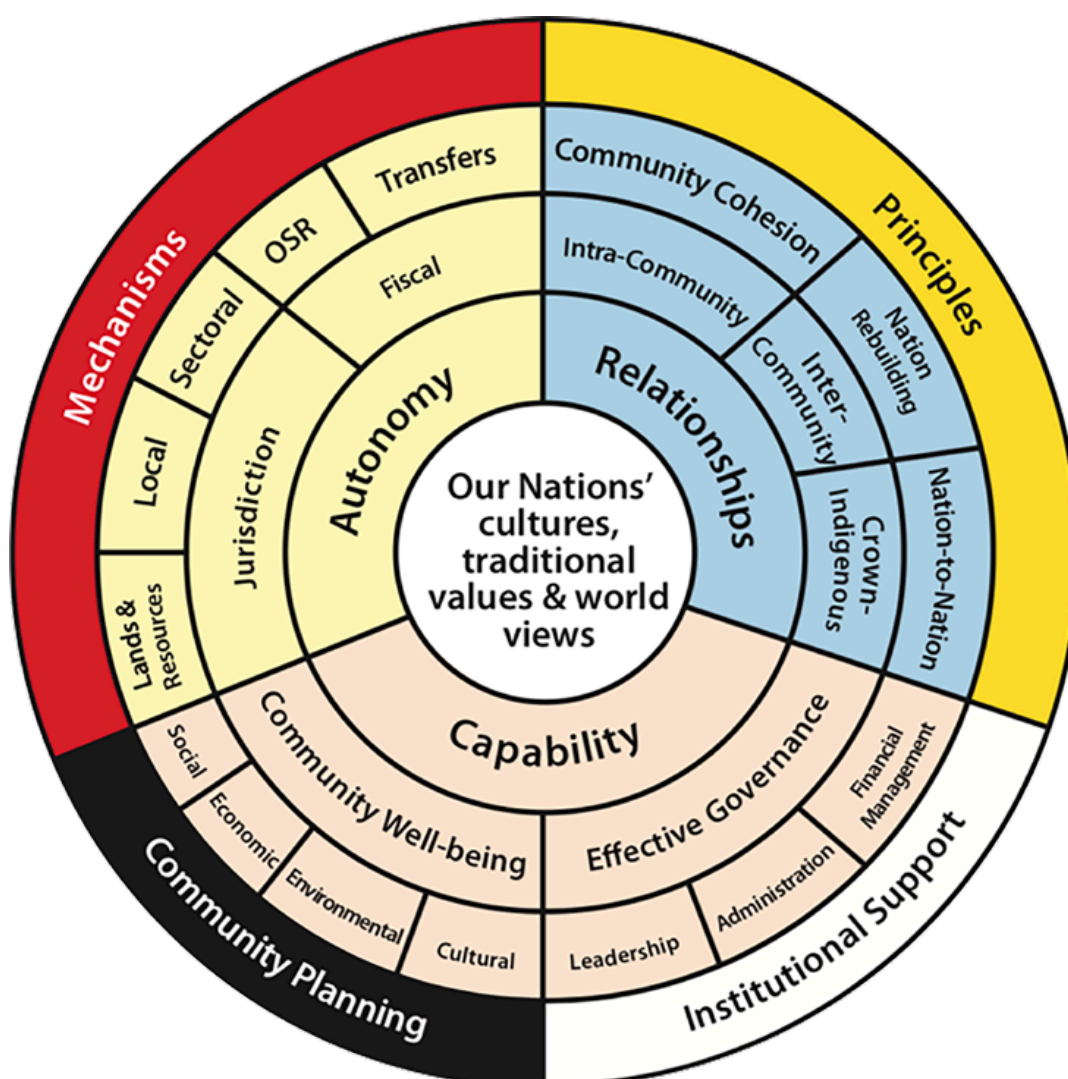
# The Indigenous Self-Determination and Governance Framework

This Report utilizes the framework to situate the role of good governance in a broader context that includes autonomy and relationships by:

Providing an overview of the various components of First Nations' self-determination within the legislative framework of section 91(24) of the Constitution Act;

Examining the state of First Nations' self-determination under s.91(24); and

Suggesting a set of core principles that could form the basis of a renewed Crown-Indigenous relationship, setting the tone for successful Nation rebuilding and governance in transition out of the Indian Act.



## Next Steps

Phase II of the FNGP will leverage the Indigenous Self-Determination and Governance Framework to identify impediments to transitioning out of the Indian Act and nation rebuilding, support mechanisms and structures, and a principles-based governance approach to interactions between Indigenous Nations and Canada.



# Using The Report

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The following Report is divided into seven sections.

**Section 1 — Introduction** presents a background on the United Nations Declaration of Indigenous Peoples (UNDIP) and provides a discussion of governance from an Indigenous perspective.

**Section 2 — Indigenous Nations and Governance Pre-Contact to Present Day** provides an analysis of pre-contact Indigenous Nations and their systems and structures of governance, outlines the impacts of colonialism on those Nations, and presents an overview of the present state of Indigenous Nations and the systems of governance under which they operate. This section informs our understanding of the near, medium and long-term prospects for rebuilding Indigenous Nations, and what kind of support will be required to achieve self-determination along lines that best suit their unique situations, and the present context.

**Section 3 — Indigenous Self-Determination** analyzes Indigenous self-determination as seen through the lens of RCAP, UNDRIP, and contemporary self-determination theory. Guided by the advice of the FNGP AG, it introduces the Indigenous Self Determination and Governance Framework to assist Indigenous communities in achieving self-determination regardless of where they are situated along the continuum of self-government.

**Section 4— Relationships: Principles and Characteristics** provides an overview of the nature, and ideal characteristics of, governance relationships within communities, inter-community, and Crown-Indigenous.

**Section 5 — Autonomy: Self-Determination and Nation Rebuilding within the s.91(24) Crown-Indigenous Relationship** assesses the state of First Nations' government and fiscal autonomy within the s.91(24) framework, and provides recommendations for removing impediments to, and providing support for, greater autonomy, and thus self-determination.

**Section 6 — Capability: Community Capacity-Building and Institutional Support for Self-Determination and Nation Rebuilding within the s.91(24) Legislative Framework** examines the two main components of a community's capacity to effectively exercise self-determination, and the methodologies and institutions in place to support them: community well-being, and effective governance.

**Section 7 —Next Steps** recommends that the Government of Canada work with First Nations to operationalize the self-determination and governance framework in support of greater autonomy for First Nations in transition out of the *Indian Act*.





# 1.0 Introduction

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## 1.1 United Nations Declaration on the Rights of Indigenous People and Implications for First Nations Governance

Defining how, from a governance perspective, Indigenous peoples in Canada envision a renewed Nation-to-Nation relationship with Canada in a post-Indian Act must take into consideration the commitment to implement United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and its implication to First Nations governance moving forward. The Government of Canada has stated its intent to implement UNDRIP both independently, most recently in their support of Bill-C262, and within its promise to implement the Truth and Reconciliation (TRC) Calls to Action (#43 and #44).

UNDRIP was adopted by a majority of UN member states September 13, 2007. The Declaration affirms:

- ▶ Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development (Article 3).
- ▶ Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (Article 4).

The objective of UNDRIP is the protection of individual and collective rights of Indigenous peoples, including the right to self-determination, as well as their rights to culture, identity, language, employment, health, education, and others. UNDRIP also emphasizes the rights of Indigenous peoples to develop, maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations. Originally, Canada was one of four “objectors” to its adoption, but in May, 2016 Canada endorsed UNDRIP without qualification and committed to its full implementation.

In agreeing to implement UNDRIP, Canada has to date:

- ▶ Suggested “10 Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples” based on a recognition of the inherent right to self-determination;
- ▶ Entered into discussions with First Nations on a New Fiscal Relationship that would give effect to certain Articles of UNDRIP related to fiscal autonomy;
- ▶ Adopted the RCAP recommendation to split the Department of Indigenous Affairs into two departments – one delivering programs and services to First Nations, Inuit and Métis, and one centered on the Crown – Indigenous relationship;
- ▶ Instituted measures to support the rebuilding of Indigenous Nations and governments; and
- ▶ Entered into discussions with Indigenous communities and organizations to seek their views on the creation of a new “rights recognition” legislative framework that give effect to UNDRIP articles related to self-determination and self-government.

From a governance perspective, the UNDRIP Articles begin to frame a set of rights recognition principles that have implications for both Government of Canada commitments, and First Nations aspirations. As Canada moves to implement UNDRIP, First Nations are starting to consider how the self-determination rights contained in the Declaration could enable their communities to gain greater autonomy and rebuild their Nations, and which path they may wish to take to do so. This invariably requires a re-examination of existing approaches to governance.



## 1.2 Governance

The term *governance*, as distinct from *government*, has been in widespread use since the 1990s, although it dates back much longer. The distinction between governance and government is important, because governance is a much broader concept that, although critical to good government, is also highly relevant to people and organizations whatever their involvement with government.

Though the governance literature proposes several definitions most rest on three dimensions: authority, decision-making and accountability. At its most fundamental, governance is about how groups organize in the pursuit of collective goals, whether in government, the private sector, or civil society, and effective governance is needed whenever people come together for a common purpose. The core questions of governance are about the exercise of power – making and acting upon decisions:

- ▶ Who makes decisions?
- ▶ What is the decision-making process and who has voice?
- ▶ How are decision-makers held accountable?

Governance takes place concurrently in multiple spheres, sometimes independent of one another but often overlapping. These include the private sector (commercial or otherwise); civil society organizations (public purpose or otherwise); and the public sector (government or otherwise). When we refer to *public sector* governance, we generally include not just government but also a wider ecosystem of public purpose bodies whose linkages to government may vary widely. There are also multiple jurisdictional spheres, from local to national to international.

There is a strong and well recognized correlation between good governance and good societal outcomes. The adoption of recognized good governance practices is closely associated with high levels of human development and both social and economic success. Beyond the demonstration of this correlation in academic research,<sup>3</sup> it is also accepted by civil society, public sector and international institutions. For example, the International Monetary Fund (IMF) has made explicit, in its *Declaration on Partnership for Sustainable Global Growth*, the importance of “promoting good governance in all aspects, including by ensuring the rule of law, improving efficiency and accountability of the public sector, and tackling corruption, as essential elements of a framework within which economies can prosper.”<sup>4</sup> With good governance, organizations perform better, stakeholders and citizens are more engaged, resources are well managed and citizen confidence is enhanced.

The IOG’s definition of governance as set out above is not intended to be normative, or prescriptive; it merely helps to underscore the point that not all governance is equally good, and that some governance arrangements effectively occur by default. It also recognizes that the elements of good governance are not permanently fixed, at least not in their entirety. They are at least partly dependent on context – historical, cultural, technological and so on. For example, certain cultures will value consensus in decision-making more than others, or harmony over efficiency. Seen from a broad historical perspective such distinctions can be profound. However, taken in the context of contemporary democratic life, practical variations determined by culture are likely to be less fundamental, but by no means insignificant.

To minimize overlap and maximize analytical value when applying good governance to practical circumstances, the IOG has long based its research and advisory work on five good governance principles originally derived and distilled from a set of governance characteristics from the United Nations Development Programme (UNDP).<sup>5</sup>

<sup>3</sup> John F. Helliwell has published in academic journals and for the OECD that well-being improves with improvements in governance quality and that this more closely linked to well being than real per capita income. Jan C. Ott has similarly studied and published in multiple journals on the link between level and equality of happiness and its link to technical governance followed by democratic governance. See for example: Helliwell, John F. et al. Good Governance and National Well-Being, OECD Working Paper on Public Governance, no 25, OECD Publishing, November 2014. [http://faculty.arts.ubc.ca/jhelliwell/papers/OECD%20working%20paper\\_Good%20Governance%20and%20National%20Well-being.pdf](http://faculty.arts.ubc.ca/jhelliwell/papers/OECD%20working%20paper_Good%20Governance%20and%20National%20Well-being.pdf).

Ott, Jan C. Good Governance and Happiness in Nations: Technical Quality Precedes Democracy and Quality Beats Size, *Journal of Happiness Studies*, vol. 11, issue 3, June 2010, p. 353-368.

<sup>4</sup> International Monetary Fund. Partnership for Sustainable Growth Interim Committee Declaration, September 29, 1996, <http://www.imf.org/external/np/sec/pr/1996/pr9649.htm#partner>.

<sup>5</sup> John Graham, Bruce Amos and Tim Plumtre, “Principles for Good Governance in the 21st Century,” *Institute On Governance*, Aug 22, 2003, [https://iog.ca/docs/2003\\_August\\_policybrief15.pdf](https://iog.ca/docs/2003_August_policybrief15.pdf).



- ▶ **Legitimacy and Voice:** actors perceive the central governing body to have the power, means and recognition that it governs by right. All men and women have some voice in decision-making.
- ▶ **Strategic Direction:** a strategic perspective on collective development, and what is required to achieve it.
- ▶ **Effective Performance:** collective institutions serve stakeholders effectively and services rendered should be of good quality, responding to the needs of recipients.
- ▶ **Accountability and Transparency:** mechanisms by which leaders answer to citizens on how they exercise their powers and duties and accept responsibility for failure, incompetence or deceit.
- ▶ **Equity and Fairness:** impartial and equitable application of the rule of law, manifested in sound legal and regulatory frameworks, adequate dispute resolution and due process.





## 1.3 Governance from an Indigenous Perspective

There has been a significant body of work on the question of Indigenous governance worldwide and, in particular, what might constitute sound governance from an Indigenous perspective. Given the sheer diversity of the Indigenous peoples in Canada, with their own distinct languages, history and culture, and the varying legal frameworks that Indigenous peoples around the world find themselves operating under, a lack of a consensus on the characteristics of sound governance is hardly surprising. Where there appears to be consensus among leaders and academics is the need for Indigenous groups to develop their own definition of good governance through a judicious blending of traditional and contemporary norms.<sup>6</sup>

First and foremost, any discussion on Indigenous governance must address the fact that prior to colonialization, Indigenous Nations were self-governing within their ancestral lands, and Indigenous laws, reflecting Indigenous legal traditions, applied to these lands and the people living on or moving across them, in the same way that all other peoples of the world have theirs. Many of these legal traditions have survived. This reality re-enforces two important foundations to reviewing governance in an indigenous context:

- ▶ There are many varieties of how specific approaches to legal systems are formed, yet they all speak to the core essence of what governance is: the establishment of dependable rules to coordinate actions and achieve goals. The key questions about the rules that govern any society are whether they are known and understood by the citizens; viewed by those citizens as fair and fairly enforced; and effective at dealing with the issues the community faces.<sup>7</sup>
- ▶ Indigenous legal traditions are much more than simply “evidence” for title and rights cases or speaking to the way Indigenous peoples might have historically organized and controlled land. Rather, they continue to inform how Indigenous societies are organized today in the wake of other legal traditions that may have been imposed.<sup>8</sup>

Within this historical context, themes of re-asserting authority and leadership, emphasizing culture, identity and traditional values, and re-building capable institutions are at the core of much of the literature on Indigenous governance and successful outcomes. For example, the Harvard Project on American Indian Economic Development researched the necessary conditions for successful economic development among Indigenous Nations in the United States. The research showed that many of the keys to success were political, having to do with the powers, organization, and quality of government. Three factors in particular were crucial:

- ▶ **Practical sovereignty** (real decision-making power in the hands of indigenous Nations),
- ▶ **Capable governing institutions** (an institutional environment that encourages tribal citizens and others to invest time, ideas, energy, and money in the Nation’s future), and
- ▶ **Cultural match** (a fit between those governing institutions and indigenous political culture—in short, the institutions had to match Indigenous ideas about how authority should be organized and exercised; otherwise, it would lack legitimacy with the people being governed and would lose their trust and allegiance).<sup>9</sup>

When viewing through the lens of the IOG’s five governance principles, particular emphasis from an Indigenous perspective become initially evident:

- ▶ **Legitimacy and voice** will entail a strong emphasis on consensus rather than simple majority rule. Power comes from the people, usually through electoral processes. But elections are not enough

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<sup>6</sup> Tim Plumptre and John Graham “Governance and Good Governance: International and Aboriginal Perspectives,” The Institute on Governance, Dec 3, 1999, [https://iog.ca/docs/1999\\_December\\_govgoodgov.pdf](https://iog.ca/docs/1999_December_govgoodgov.pdf).

<sup>7</sup> Stephen Cornell “Remaking the Tools of Governance: Colonial Legacies, Indigenous Solutions,” *Rebuilding Native Nations*, Ed. Miriam Jorgensen; 2007; and Stephen Cornell, Catherine Curtis and Miriam Jorgensen, “The Concept of Governance and its Implications for First Nations,” *Joint Occasional Papers on Native Affairs*, No.2004-02.

<sup>8</sup> British Columbia Assembly of First Nations, *Governance Report: 2012*.pg. 4.

<sup>9</sup> Stephen Cornell, Catherine Curtis and Miriam Jorgensen, “The Concept of Governance and its Implications for First Nations,” pg 7.

– leaders will reach out to all elements of society trying to create common ground. Governance systems also will ‘fit’ history, culture, values, and be ‘home grown’, rather than imposed. The institutions should reflect the societal norms and traditions of the community they serve.

- ▶ **Direction, or leadership** will tend to reflect common culture, community identity, a promotion of a collective well-being, and a stable and shared sense of the community’s desired direction. The “strategic vision” then, is the shared, long term pathway that the community or organization can build a plan around, focus scarce resources on specific strategies, and mobilize.
- ▶ **Performance**, particularly in terms of use of natural resources, is based in a holistic view of people’s place in nature and a deep respect for the land and all its creatures. Performance can be described here as “excellence” meaning that our outcomes are sustainable, that processes are professional and transparent.
- ▶ **Accountability** relationships are built in to family, kinship, and community structures and as such may diverge in certain respects from the formal institutions of European cultures. There is an emphasis on expanding the concept of accountability beyond paternalistic reporting, to ensure that the governing body and other bodies with law-making power and decision-making authority are accountable to the community they serve.
- ▶ **Fairness** will involve a unique view of respect and balance throughout the system. The rule of law might be rooted in spiritual learning and oral traditions rather than written legislation. Concepts of non-political dispute resolutions and independent oversight also become evident.<sup>10</sup>

UNDRIP has prompted the Government of Canada, and First Nations, to examine the meaning and implications of a broad approach to self-determination, including self-government. While forms and processes of governance vary across cultures and history, they all have at their core the basic questions: Who has power? Who makes decisions? How do stakeholders make their voice heard? And, How are decision-makers held accountable? The balance of this Report will situate these questions in the context of effecting self-determination in the context of Indigenous Nation rebuilding.



<sup>10</sup> John Graham and Jake Wilson, “Towards Sound Government to Government Relationships With First Nations: A Proposed Analytical Tool” The Institute on Governance, “By Institute On Governance October, 2004.



## 2.0 Indigenous Nations and Governance Pre-Contact to Present Day

### “Nation”

**A large body of people united by common descent, history, culture, or language, inhabiting a particular state or territory.**

**A North American Indian people or confederation of peoples.**

*Oxford English Dictionary*

**Unless Canadian governments are prepared to acknowledge the existence of Aboriginal nations and to negotiate with them, such nations may find it difficult to exercise their rights effectively, so in practice there is a need for the federal and provincial governments actively to acknowledge the existence of the various Aboriginal nations in Canada and to negotiate with them to implement their right of self-determination.<sup>11</sup>**

*Report of the Royal Commission on Aboriginal Peoples*

The Government of Canada, in agreeing to implement UNDRIP, and mindful of the largely unheeded recommendations of RCAP, has committed<sup>12</sup> to encouraging the rebuilding of Indigenous Nations in support of self-determination, including self-government. However, as noted by the FNGP Advisory Group, outstanding questions remain vis-à-vis the nature and composition of Indigenous Nations, their role, as a practical matter, in achieving self-determination, and the associated challenges related to transitioning out of the *Indian Act* to self-government, and nation rebuilding.

As a case in point, UNDRIP and RCAP appear to be diametrically opposed in their views on the “level” at which the right to self-determination rests: whereas Article 4 of UNDRIP states that Indigenous peoples, in exercising their right to self-determination, “have the right to autonomy or self-government in matters relating to their internal and local affairs...,”<sup>13</sup> the Royal Commission viewed the right of self-determination “to be vested in Aboriginal nations rather than small local communities.”<sup>14</sup> This apparent dichotomy, mirrored by divergent views among First Nations on how best to achieve self-determination, and in what form, has the unintended effect of posing an either/or choice when it comes to rebuilding nations: yet the reality is that First Nations are already moving toward self-determination along a continuum of limited local government, to, in some cases, large treaty-level entities that approximate nations – and all points in between.

At the same time, the impact of colonialism on Indigenous Nations, and pre-contact Indigenous structures and principles of governance, has been devastating: the signing of treaties along geographic lines that in most cases do not correspond to cultural, linguistic and pre-contact associations, the impact of provincial and international boundaries in legal and administrative matters, and the imposition of the *Indian Act* and its practical effect of deconstructing Indigenous Nations has resulted in those nations becoming so fragmented that many of them may not realistically aspire to the rebuilding of their Nations, in the conventional sense. What are the near, medium and long-term prospects for rebuilding Indigenous Nations, and to what end? What will this tell us about the need to provide support for the rebuilding of Indigenous Nations from the ground-up, as may be the case for many First Nations, and what kind of support will be required to do so? This section of the Report will inform our understanding of these questions by examining the nature of Indigenous Nations and governance pre-contact.

<sup>11</sup>Report of the Royal Commission on Aboriginal Peoples “Volume 2: Restructuring the Relationship” 1996 pg 158: <http://data2.archives.ca/e/e448/e011188230-02.pdf>.

<sup>12</sup>Government of Canada, “Government of Canada to create Recognition and Implementation of Rights Framework,” Feb 14, 2018, <https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>.

<sup>13</sup>The United Nations Declaration on the Rights of Indigenous Peoples, 2008, [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>14</sup>Report of the Royal Commission on Aboriginal Peoples, “Volume 2” 1996, page 158: <http://data2.archives.ca/e/e448/e011188230-02.pdf>.

## 2.1 Indigenous Nations Pre-Contact

Prior to contact with Europeans, Indigenous peoples in the Americas had coalesced into Nation-like groups inhabiting distinct climate and topographic zones. Differences in the natural environment, and techniques for surviving in them, resulted in different histories, languages, world views, and thus different cultures.<sup>15</sup> RCAP defined an Aboriginal Nation as “a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories.”<sup>16</sup> The Department of Justice has suggested a similar definition:

As set out by the courts, an Indigenous Nation or rights-holding group is a group of Indigenous people sharing critical features such as language, customs, traditions, and historical experience at key moments in time like first contact, assertion of Crown sovereignty, or effective control.<sup>17</sup>

The following map below provides an overview of the over 30 major Indigenous language “families” present in pre-contact North America. Many of these major linguistic groups contain sub groups of people who, as a result of sufficiently distinct environments and/or isolation from others, developed variations on language and culture. It was on the basis of these linguistic sub-groups that RCAP suggested “There are 60 to 80 historically-based nations in Canada at present, comprising a thousand or so local Aboriginal communities.”<sup>18</sup>

Indigenous Language “Families” Present in Pre-Contact North America

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<sup>15</sup>Ian Kalman, “Indigenous Self-Governance: An International Perspective” Institute for the Study of International Development, 2013, [https://www.mcgill.ca/isid/files/isid/pb\\_2013\\_03\\_kalman.pdf](https://www.mcgill.ca/isid/files/isid/pb_2013_03_kalman.pdf).

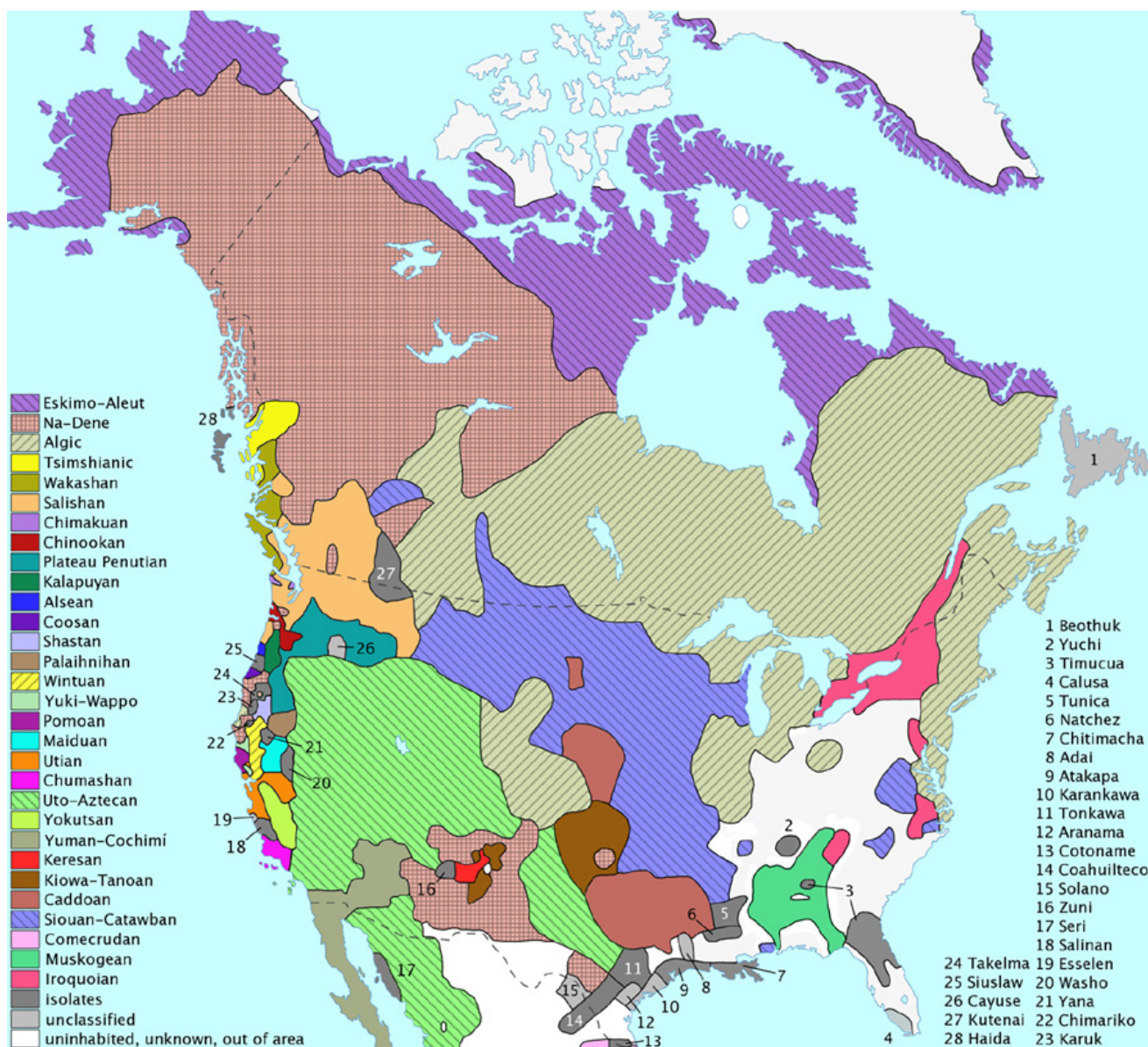
<sup>16</sup>Ibid.

<sup>17</sup>Government of Canada “10 Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples,” July 2017, <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

<sup>18</sup>Report of the Royal Commission on Aboriginal Peoples, “Volume 2” 1996, page 158: <http://data2.archives.ca/e/e448/e011188230-02.pdf>.



# Indigenous Language “Families” Present in Pre-Contact North America<sup>19</sup>



<sup>19</sup>Image taken from Wikimedia Commons, retrieved on July, 2018 <https://commons.wikimedia.org/w/index.php?curid=147033>.

## 2.2 Indigenous Governance Pre-Contact

The Indigenous peoples of Canada exercised sovereignty and jurisdiction prior to contact, enabled by the use of various pre-contact governance systems. These systems supported egalitarian and democratic politics that ensured “each extended family was represented at the decision-making level.”<sup>20</sup>

At a very high-level, some of the pre-contact Nation structures of governance can be variously categorized as:

- ▶ Nomadic versus non-nomadic.
- ▶ Matrilineal versus patrilineal.
- ▶ Hereditary versus elected.
- ▶ Socialist versus capitalist.
- ▶ Family versus membership.

Regardless of which system an Indigenous group used, its system of governance was structured around family and/or the clan-family or extended family. Two general familial systems existed: structured and less structured. Structured systems were often based on rank. Due to the inclusion of extended family members, especially in structured systems, a Chief would be selected to provide direction; the Chief would then select other leaders to create a governance structure.<sup>21</sup>

Structured systems also included matrilineal societies and processes where women were the dominant gender: “Iroquoian woman had a great amount of authority and power in the community.”<sup>22</sup> In numerous Indigenous groups in Canada, a hereditary Chief would be accountable to a matrilineal kin, and/or elected to their post by women.<sup>23</sup> Matrilineal groups focus on the strength of female leadership.<sup>24</sup> Women were the keepers of culture, as well as political, social, economic, and spiritual frameworks.

Where multiple and larger groups were present, a tribe was created and subsequently a tribal council. Members of the tribe would work together under joint-decision making principles, but each tribe member would still be expected to follow the direction of their Chief. Nomadic groups, groups that had to travel distances for resources, such as food, or plains groups that “did not accept that anyone had the right to govern others, except for very short periods of time,” often used less structured systems; this created a process with short-term appointments for those in positions of authority.<sup>25</sup>

“While no governance structure was trouble-free, clan-based hierarchal and egalitarian governance structures worked for First Nations and sustained their communities for centuries.”<sup>26</sup> However, with the arrival of Europeans:

This way of life would be fundamentally changed forever. The first change saw the development of economic, social and political alliances between the First Nations and the Europeans providing new opportunities for both societies. The second fundamental change came with the imposition of British and French colonialism and their desire to occupy First Nations’ land. The Treaty making process and the destruction of the First Nations economies led to European colonial actions against the First Nations people and their lands. The third fundamental change came with the introduction of the newly formed Canadian government’s inimical Indian Policy. It was this policy of assimilation that created the Indian reserves, introduced the residential schools and legislated the *Indian Act* – all precursors for the conditions First Nations find themselves in today.<sup>27</sup>

RCAP noted that, while Indigenous peoples were once strong trading partners with vibrant communities and cultures, by the time the numbered treaties were being entered into, conditions had deteriorated to a relationship of dependence.<sup>28</sup>

<sup>20</sup>Terry Lynn Fox, “Dissertation: Effective First Nations Governance: Navigating the Legacy of Colonization,” University of Victoria, 2017, p. 15.

<sup>21</sup>Ibid.

<sup>22</sup>Katsithawi Ashley Thomas. *Gender Roles Among the Iroquois*. Written by a Mohawk Grandmother, np. Nd. Retrieved on July 2018, <https://www.vaniercollege.qc.ca/tlc/publications/native-circle/native-circle-2003/ashley-thomas3.pdf>.

<sup>23</sup>P. Elias Development of Aboriginal people’s communities. North York: Captus Press, 1991. as seen in Terry Lynn Fox, “Dissertation: Effective First Nations Governance: Navigating the Legacy of Colonization” 2017, p. 13.

<sup>24</sup>Annette J. Browne,, Jo-Anne Fiske, and Geraldine Thomas, *First Nations women’s encounters with mainstream health care services & systems*. Vancouver, BC: British Columbia Centre of Excellence for Women’s Health, 2000, p. 6.

<sup>25</sup>A. Long, “Political revitalization in Canadian native Indian societies” *Canadian Journal of Political Science*, 23(4), 751-773. 1990, p. 764 as seen in Terry Lynn Fox, “Dissertation: Effective First Nations Governance: Navigating the Legacy of Colonization” 2017, p. 15.

<sup>26</sup>Ibid.

<sup>27</sup>Richard Missens, “Sovereignty, Good Governance and First Nations Human Resources: Capacity Challenges,” Research Paper for the National Centre for First Nations Governance 2008. Pg 1.

<sup>28</sup>Report of the Royal Commission on Aboriginal Peoples, “Volume 1: Looking Forward, Looking Back,” 1996, pg 42, <http://data2.archives.ca/e/e448/e011188230-01.pdf>.



## 2.3 Royal Proclamation to the Indian Act

The Royal Proclamation was issued by King George III in 1763 to officially claim British territory in North America after the Seven Years War. It declared overall jurisdiction by the Crown, and recognized Aboriginal sovereignty:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.<sup>29</sup>

For example, the Proclamation made clear that British subjects were required to deal with the Crown in the acquisition of land and not directly with Indigenous peoples, that the Crown had sole authority to secure land from Indigenous peoples, via treaty, which launched over a century of treaty making.<sup>30</sup> In recognizing the existence of Aboriginal title and declaring that the British Crown would first have to obtain land via treaties with Indigenous people before British subjects could acquire it, from a governance perspective, the proclamation portrays Indigenous Nations as autonomous political entities, living under the protection of the Crown but retaining their own internal political authority.

Subsequently, during the discussions around the Treaty of Niagara (1764) and later Confederation, Indigenous leaders were led to believe they could continue to hold territories, function as self-governing entities in their territories and that the Crown would protect their lands. The Two Row Wampum used in the Treaty of Niagara was emblematic of a Nation-to-Nation relationship: a ship representing European culture, religion, government and traditions, and a canoe representing Indigenous government, way of life, spiritual ways, customs and traditions, travelling together down the river of life, neither trying to steer the others' vessel. More than a hundred years later, in 1867, Confederation would also allow for power sharing among diverse peoples and governments, but the first "confederal bargain" was with Indigenous peoples,<sup>31</sup> as negotiated by their governments.

<sup>29</sup>The Royal Proclamation 1763, Retrieved on July 2018 <https://www.thecanadianencyclopedia.ca/en/article/royal-proclamation-of-1763/>.

<sup>30</sup>Indigenous Foundations, "Royal Proclamation, 1763, Retrieved on July 2018, [http://indigenousfoundations.arts.ubc.ca/royal\\_proclamation\\_1763/](http://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/).

<sup>31</sup>Report of the Royal Commission on Aboriginal Peoples, "Volume One," 1996, pg 242, <http://data2.archives.ca/e/e448/e011188230-01.pdf>.

## 2.3.1 Historical Treaties

The historical treaties are comprised of numerous pre and post-confederation treaties entered into between the Crown and First Nations, the objectives and content of which varied substantially (at least in the eyes the Crown, if not First Nations) as they moved from east to west.

For example, the 17th century “Peace and Friendship” treaties in the present-day Atlantic provinces sought merely to establish peaceful co-existence between the parties, and not the surrender of lands, establishment of reserves, or provision of benefits. By the 19th century however, the Upper Canada Land Surrenders, the Douglas treaties on Vancouver Island, the Robinson treaties north of Lakes Huron and Superior and the “Numbered” treaties spanning the rest of Ontario, Manitoba, Saskatchewan, Alberta, northeastern British Columbia, a portion of the Yukon, and a substantial portion of the Northwest Territories were being entered into by the Crown with the objective of securing title to the lands for settlement and access to natural resources. In return, First Nations were offered reserves, security, benefits, and continuity in traditional practices (and as understood by First Nations, continuity in self-government as well). Although treaties were signed with the promise of certain benefits, these promises are still being played out today. Reserves were provided, however, these have caused land issues among growing Indigenous groups who need space for additional housing for families and resource buildings. The reserve system also caused issues of loss of culture as areas outside a reserve became increasingly inhabited and developed by settlers and other non-Indigenous groups.

Finally, to address uncertainties surrounding previous treaties and other agreements entered into with the Indigenous peoples between Georgian Bay and the Ottawa River, and down to Lake Ontario, the governments of Canada, Ontario and the bands implicated entered into what were referred to as the ‘Williams Treaties’ in 1923. Unlike the Robinson and Numbered treaties, the Williams Treaties “preserved the signing bands’ existing reserves, but did not provide for any new reserve lands,” and instead of annuities in the form of annual payments and other benefits, provided only a single cash payment, and the surrender of all rights and title.<sup>32</sup>

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<sup>32</sup>Government of Canada, Indigenous and Northern Affairs Canada, “Historic Treaties and Treaty First Nations in Canada Infographic,” Retrieved June 2018, <http://www.aadnc-aandc.gc.ca/eng/1380223988016/1380224163492>.



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## 2.3.2 British North America Act Section 91(24) and the Indian Act

The Crown-Indigenous relationship took a dramatic turn with the promulgation of the *British North America Act (BNA)* in 1867, and the *Indian Act in 1876*. Sections 91 and 92 of the BNA Act delineated the jurisdictions of the federal and provincial governments, assigning the federal government jurisdiction over Indigenous peoples and their lands in s. 91(24) (“Indians, and Lands reserved for Indians”). Subsequently, Parliament used s.91(24) to pass laws replacing traditional Aboriginal governments with standing band councils, taking control of valuable resources located on reserves, taking charge of reserve finances, imposing an unfamiliar system of land tenure, and applying non-Aboriginal concepts of marriage and parenting.

Such newly passed laws included the *Indian Act*, introduced in 1876 and implemented by the Department of Indian Affairs and its subsequent iterations. The *Indian Act* deliberately split up pre-existing Indigenous governance structures, languages and clan structures, severely restricting the capacity for self-government. The *Indian Act* and its many amendments over the following century sought to fundamentally change Indigenous governance and culture, replacing traditional governments with band councils and even criminalizing<sup>34</sup> practices such as the potlatch and sun dance. As noted by RCAP:

The Nation-to-Nation relationship became unbalanced when alliances with Aboriginal nations were no longer needed, the non-Aboriginal population became numerically dominant, and non-Aboriginal governments abandoned the cardinal principles of non-interference and respectful coexistence in favour of policies of confinement and assimilation — in short, when the relationship became a colonial one.<sup>35</sup>

Rather than use s.91(24) to implement the spirit and intent of the treaties the Crown was entering into at the time, it was used to impose a generic, cookie-cutter approach to the regulation of Indigenous peoples and their lands. Instead of creating Indigenous-driven legal frameworks distinct to each treaty group or Nation, the Crown created one law and system by which all individual communities (‘reserves’) were forced to abide, abruptly shifting the relationship from Nation-to-Nation, to Nation-to-community, sowing the seeds for the decimation of community well-being. Part 4 of this Report will address the role of relationships in reconstituting Indigenous Nations, in the context of the Crown-Indigenous relationship.

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<sup>34</sup>The Bill Ried Centre, Simon Fraser University, “The Potlatch Ban,” Retrieved July 2018, [https://www.sfu.ca/brc/online\\_exhibits/masks-2-0/the-potlatch-ban.html](https://www.sfu.ca/brc/online_exhibits/masks-2-0/the-potlatch-ban.html).

<sup>35</sup>Report of the Royal Commission on Aboriginal Peoples, “Volume 2” 1996, page 17, <http://data2.archives.ca/e/e448/e011188230-02.pdf>.



## 2.3.3 Federal Indigenous Self-Government Policy Initiatives

After nearly two decades of conflict, litigation, deteriorating social conditions on reserves, and failed attempts to extinguish Aboriginal rights and title, Aboriginal rights were recognized and affirmed with the promulgation of *Constitution Act* in 1982. Section 35 of the *Constitution Act* states:

- (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “Aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

With the inclusion of s.35 in the *Constitution Act*, successive federal governments have attempted to give it practical effect through policy initiatives designed to foster self-determination, while reducing the role of the Government of Canada in the day-to-day affairs of First Nations.

The 1983 *Report of the Special Parliamentary Committee on Indian Self-Government*<sup>36</sup> (also known as the “Penner Report,” after its chair, Keith Penner) found that ‘Native’ communities would prefer self-government rather than representation in Canadian legislative bodies, and recommended that the *Indian Act* and the Department of Indian Affairs be phased out over an extended time period and replaced by local governments established by First Nations themselves. In addition, the report recommended the establishment of strong economic foundations for First Nations governments via expansion of land bases, new revenue sharing mechanisms in traditional territories, and other long term enhanced financial arrangements.<sup>37</sup>

While interest in the new “Community Self-Government” model subsequently proposed by the Government of Canada was expressed by some First Nations, doubts about its ability to provide for the guarantee of rights, address issues related to title, the scope of jurisdiction proposed, objections by many of the provinces, and larger national debates over the Constitution resulted in its falling by the wayside.

In the wake of the failure of the Meech Lake Accord (which would have seen at least some of Indigenous peoples’ concerns addressed through a Constitutional amendment), and the Oka crisis in 1990, the government of the day struck the Royal Commission on Aboriginal Peoples, the broad mandate of which was to study the evolution of the relationship between Aboriginal peoples, the Government of Canada and Canadian society as a whole.<sup>38</sup> Recommendations contained in the *Report of the Royal Commission on Aboriginal Peoples*, published in 1996, included:

- ▶ A new Royal Proclamation stating Canada’s commitment to a new relationship and companion legislation setting out a treaty process and recognition of Aboriginal Nations and governments;
- ▶ Recognition of an Aboriginal order of government, subject to the *Charter of Rights and Freedoms*, with authority over matters related to the good government and welfare of Aboriginal peoples and their territories;
- ▶ Replacement of the federal Department of Indian Affairs with two departments, one to implement the new relationship with Aboriginal Nations and one to provide services for non-self-governing communities;
- ▶ Creation of an Aboriginal parliament;
- ▶ Expansion of the Aboriginal land and resource base;

<sup>36</sup>Report of the Special Parliamentary Committee on Indian Self-Government, 1983, <http://caid.ca/PennerRep1983.pdf>.

<sup>37</sup>Ibid. Chapters 6 and 7.

<sup>38</sup>Report of the Royal Commission on Aboriginal Peoples, “Volume 1” 1996, page 12, <http://data2.archives.ca/e/e448/e011188230-01.pdf>.

- ▶ Recognition of Métis self-government, provision of a land base, and recognition of Métis rights to hunt and fish on Crown land; and
- ▶ Initiatives to address social, education, health and housing needs.

In anticipation of RCAP's recommendations, the Government of Canada in 1995 released its *Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (the "Inherent Right Policy") that would provide a vehicle for the negotiation of outstanding land claims and self-government agreements in most of Canada, and the *British Columbia Treaty Commission Act*, to allow for negotiations in British Columbia to follow a unique process overseen by an independent facilitator, the British Columbia Treaty Commission (BCTC). While some progress has been made through both processes (most notably the achievement of constitutionally-protected "modern treaties" covering much of Canada's north, and a handful of agreements in British Columbia) progress has stalled due to a number of issues surrounding the financing of negotiations, and a federal negotiating mandate that limits First Nations jurisdiction over traditional territories, most of which as it stands, fall within the purview of provincial jurisdiction.

Recognizing that the Inherent Right Policy would do little to address the needs of the many 'treaty' First Nations that, for a variety of reasons, would likely remain within the s.91(24) legislative framework for the foreseeable future, in 2002 the Government of Canada introduced Bill C-7, the proposed *First Nations Governance Act* (FNGA). FNGA would amend the *Indian Act* to give First Nation councils the legal capacity, rights, powers and privileges of a natural person, including the ability to: enter into contracts and agreements; acquire, hold and dispose of rights and interests in property; raise, expend, invest and borrow money; and sue or be sued. In addition, bands would have delegated powers to make laws for local and internal purposes. The FNGA would also have repealed the clause that exempts the *Indian Act* from the application of the *Canadian Human Rights Act*. The legislation, which on the one hand would have significantly expanded the powers of band councils over those contained within the *Indian Act*, was nonetheless subject to extensive criticism from First Nations, not least because it would not have been optional, leading to its demise.<sup>39</sup>

Aside from the incremental legislative initiatives examined in section 5, FNGA would be the last attempt by a federal government to address self-determination in 'core' governance for First Nations within the s.91(24) framework for 15 years until, in 2017, Canada declared its intention to implement UNDRIP, and subsequently entered into a dialogue with Indigenous peoples on a new framework for rights recognition and self-determination.

<sup>39</sup>Frank Cassidy, "The First Nations Governance Act: A Legacy of Loss," Policy Options, April 1, 2003, <http://policyoptions.irpp.org/magazines/big-ideas/the-first-nations-governance-act-a-legacy-of-loss/>.



## 2.3.3 Modern Treaties

The historical backdrop leading to the implementation of the federal *Policy on the Inherent Right to Self-government* in 1995 – including the tabling of the “White Paper” in 1969, First Nations’ response to it, a number of key decisions by the Supreme Court of Canada outlining the parameters of Aboriginal rights, the *Constitution Act* of 1982, and the Oka Crisis of 1990 – are well documented and need not be reiterated here. In the interim, the Government of Canada and some First Nations entered into a number of self-government agreements in: Quebec (*James Bay and Northern Quebec Agreement* in 1977, and the *Northeastern Quebec Agreement* in 1978); Yukon (*Council for Yukon Indians Umbrella Final Agreement* in 1993); British Columbia (the aforementioned *Sechelt Indian Band Self-Government Act* of 1986); Northwest Territories (*Inuvialuit Final Agreement* in 1984, *Gwich’in Comprehensive Land Claim Agreement* in 1992, Sahtu Dene and Métis Comprehensive Land Claim Agreement in 1994, and the Nunavut Land Claims Agreement in 1993). Many of these agreements were driven by the confluence of unceded territory (land that had not been ceded through historical treaties) and plans for major resource projects. However, unlike later self-government agreements, these are not “constitutionally-protected,” meaning they can be amended or abrogated without the consent of signatory First Nations.

In contrast, the Inherent Right Policy recognized that all Aboriginal peoples of Canada “have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.”<sup>40</sup> To this end, self-government under the Inherent Right Policy addresses a wide range of jurisdictions and responsibilities, including the structure and accountability of Aboriginal governments, lawmaking powers, financial arrangements, and the provision of programs and services. Despite its shortcomings, the Inherent Right policy “represented a major step forward with the federal government’s general recognition of the right of self-government as an existing Aboriginal right within meaning of s.35 of the *Constitution Act*, 1982.”<sup>41</sup>

Since the introduction of the Inherent Right Policy in 1995, Canada has entered into 11 constitutionally-protected comprehensive (land and self-government), “stand-alone” (governance only), and “sectoral” (one or more of education, health, etc.) self-government agreements, mostly with aggregations of First Nations:

- ▶ *Mi’kmaq Education Agreement* (Nova Scotia) (1997)
- ▶ *Nisga’a Final Agreement* (British Columbia) (2000)
- ▶ *Tlicho Agreement* (Northwest Territories) (2005)
- ▶ *Labrador Inuit Land Claims Agreement* (Newfoundland and Labrador) (2005)
- ▶ *Westbank First Nations Self-Government Agreement* (British Columbia) (2005)
- ▶ *Nunavik Inuit Land Claims Agreement* (Quebec) (2008)
- ▶ *Tsawwassen First Nation Final Agreement* (British Columbia) (2009)
- ▶ *Maa-nulth First Nations Final Agreement* (British Columbia) (2011)
- ▶ *Eeyou Marine Region Land Claims Agreement* (Quebec) (2012)
- ▶ *Sioux Valley Dakota Nation* (Manitoba) (2014)
- ▶ *Anishinabek Nation Education Agreement* (Ontario) (2017)

Again, most of these agreements – including *Sioux Valley Dakota Nation* – were driven by the lack of

<sup>40</sup>Government of Canada, Indigenous and Northern Affairs, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government,” Retrieved July 2018, <http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>.

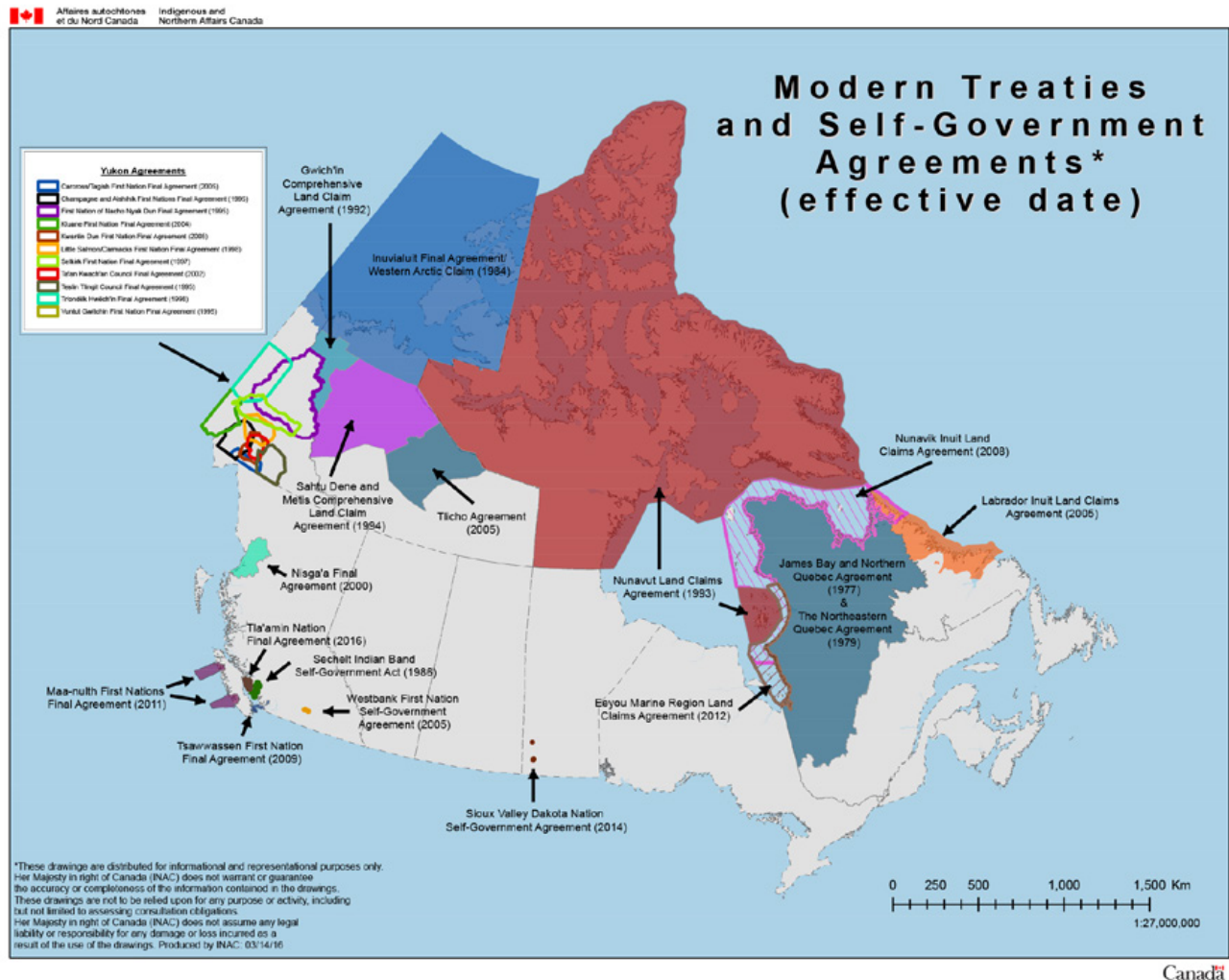
<sup>41</sup>Government of Canada, Indigenous and Northern Affairs, “General Briefing Note on Canada’s Self-government and Comprehensive Land Claims Policies and the Status of Negotiations,” Retrieved July, 2018, <https://www.aadnc-aandc.gc.ca/eng/1373385502190/1373385561540>.

certainty in the absence of historical treaties; only the *Mi'kmaq Education Agreement* and the *Anishinabek Nation Education Agreement* – sectoral agreements with no impact on broader governance – apply to communities descended from signatories to historical treaties. The following map below provides a snapshot of Comprehensive Land Claims and Self-Government Agreements to date (exclusive of sectoral self-government agreements):





# Modern Treaties: Comprehensive Land Claims and Self Government Agreements<sup>42</sup>



While many more self-government and land claim negotiations are ongoing, progress has been slow, and “take-up,” particularly in areas with existing, historical treaties, has been underwhelming, for a variety of reasons, including concerns that the scope of the Inherent Right policy is not sufficient to address issues related to historic grievances, scope of jurisdiction, traditional territories, financial considerations, and implementation. To address these issues, the Government of Canada, as part of its efforts to implement UNDRIP, has entered into discussions with Indigenous communities and organizations to seek their views on the creation of a new “rights recognition” legislative framework that give effect to UNDRIP articles related to self-determination, self-government and, by extension, useful models of governance. It is hoped that Canada and First Nations can agree on a legislative framework that will address the shortcomings of previous self-government initiatives, by providing a mechanism to allow First Nations to opt out not just from the *Indian Act*, but from s.91(24) altogether, once they develop the necessary capacity, community cohesion and inter-community relationships. In the interim, First Nations will continue to explore existing legislative and institutional options that enable them to do so.

<sup>42</sup>Image taken from the Government of Canada, Retrieved May, 2018, [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm\\_pdf\\_modrn-treaty\\_1383144351646\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm_pdf_modrn-treaty_1383144351646_eng.pdf).

## 2.3.4 The Present First Nations Governance System under s.91(24)

Despite some success in establishing modern treaties in the north, Quebec and British Columbia, the vast majority of First Nations (619 of 634) remain under the *Indian Act* and other legislation under section s.91(24). Most of them, in turn, belong to one of approximately 78 tribal councils, which were formed a year after the release of the Penner report and as a precursor to the subsequent Community Self-Government<sup>43</sup> program. The majority of First Nations (those whose predecessors entered in historical and numbered treaties) also belong to one or more of 21 provincial and territorial organizations (PTOs), some of which are treaty-based, and some of which are organized along provincial lines. PTOs have an explicit mandate to advocate for and defend the treaty rights and interests of their members First Nations. Many have also taken on the delivery of programs and services, most notably policing, and support for the management of lands and resources.

It is important to note two key considerations:

- ▶ While existing at a level of aggregation between individual First Nations, and treaty organizations and PTOs, as creations of the federal government funded to deliver federal programs and services to First Nations, tribal councils are not part of the political hierarchy in the current First Nations governance system.
- ▶ While there are instances of overlap between the various levels for the delivery of programs and services and, to a lesser extent, political advocacy, for the most part these organizations have been adapted to suit local preferences.

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<sup>43</sup>Launched in 1985, the goal of the Community Self-Government program was to create a “new relationship” outside of the *Indian Act* through the negotiation of self-government arrangements with First Nations on an opt-in basis. With this approach, agreements would be implemented through self-government legislation delegating a range of jurisdictions to individual First Nations on reserve. While the program has a high initial participation rate, only one agreement was implemented (Sechelt Self-Government agreement) for a variety of reasons, particularly “the delegated nature of lawmaking powers.” <https://www.aadnc-aandc.gc.ca/eng/1373385502190/1373385561540>.



## 2.4 Conclusion: Indigenous Nations and Governance Pre-contact to Present Day

This section of the Report has provided an analysis of pre-contact Indigenous Nations and their systems and structures of governance, outlined the impacts of colonialism on those Nations, and presented an overview of the present state of Indigenous Nations and the systems of governance under which they operate. While many First Nations have begun to reconstitute their Nations (or significant portions thereof), and some have achieved self-government, the vast majority of First Nations remain within the s.91(24) legislative framework, with limited autonomy and a Nation-to-Nation relationship at the community level, rather than at a higher level of aggregation. Nonetheless, while imperfect, many existing aggregations such as tribal councils and PTOs (some of which are based on treaty lines) are already being used as vehicles for nation rebuilding, providing “federal” programs and services and, in the case of PTOs, political advocacy on behalf of their member communities. At the same time, where First Nations have formed organizations along provincial lines (PTOs, AFN Regions) they are working with provinces and territories to deliver “province-like” programs and services (health, education, policing, child and family services etc.) consistent with provincial standards, but culturally-appropriate to their communities.

Despite (or perhaps because of) the history of treaty-making, the impacts of colonialism on the First Nations governance system, and the practicalities of provincial jurisdiction in critical areas, First Nations have for some time been rebuilding their nations, albeit along lines that look different than they did pre-contact. Given this complexity, and the imperative of self-determination, it is both unrealistic and impractical to expect First Nations to re-organize exactly along the lines of pre-contact nations, and adopt systems of governance identical to those used over 500 years in the past. New challenges, and new relationships, are prompting First Nations to graft new models, institutions, and functions onto traditional systems and institutions of governance, in order to meet the challenges of the 21st century global economy.

Thus the definition of ‘Nation,’ in the context of First Nations, is therefore evolving: while the notions of shared language, culture, geography, etc. remain at the core of what it is to belong to a nation, shared *interests* are increasingly driving a reformation of nations in a complex web of jurisdictions, relationships, and governance structures. Shared interests in the potential impacts and benefits of major resource developments are bringing together First Nations from multiple treaty areas and provinces. Similarly, shared interest in community health and well-being have resulted in the creation of First Nations-led institutions delivering a wide range of programs and services at regional, provincial, and national levels. The significance of the emergence of such ‘shared services’ institutions, which this report will explore in more detail in section 6, should not be underestimated in the context of Nation rebuilding. Support for the strengthening of existing institutions in this shared services model, and the creation of new institutions, is an essential component of nation rebuilding on the path to self-determination, including self-government. RCAP said it best:

Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. For an Aboriginal nation to exercise the right of self-determination, it does not have to be recognized as a nation by the federal government or by provincial governments.<sup>44</sup>

One might add that the very definition of Nation can, and should, evolve to allow First Nations to achieve self-determination along lines that best suit their unique situations, and the present context.

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<sup>44</sup>Report of the Royal Commission on Aboriginal Peoples, “Volume 2” 1996, pg. 158, <http://data2.archives.ca/e/e448/e011188230-02.pdf>.

## 3.0 Indigenous Self-Determination

### “Self-Determination”

**Free choice of one’s own acts or states without external compulsion;**

**Determination by the people of a territorial unit of their own future political status.**

**A North American Indian people or confederation of peoples.**

*Merriam-Webster Dictionary*

RCAP suggested that ‘self-determination’ refers to the right of an Aboriginal nation:

To choose how it will be governed — whether, for example, it should adopt separate governmental institutions or join in public governments that embrace Aboriginal and non-Aboriginal people alike. Self-government, by contrast, is one natural outcome of the exercise of the right of self-determination and refers to the right of peoples to exercise political autonomy. Self-determination refers to the collective power of choice; self-government is one possible result of that choice.<sup>45</sup>

It is instructive to note RCAP’s suggestion that self-determination for Indigenous peoples comes in many forms — including “separate governmental institutions or... public governments”— and that self-government is only “one possible result” of their right to choose. If true, the corollary of this assertion is that self-government itself comes in different forms, and indeed as has been the experience in Canada to date, self-government has been expressed comprehensively, incrementally, and on a sectoral basis.

In this manner, RCAPs interpretation of self-determination, in the context of governance, is largely consistent with the definition put forth by UNDRIP. UNDRIP contains 46 articles setting-out the individual and collective rights of Indigenous peoples, including their rights to culture, identity, language, employment, health, education, and autonomy. Foremost is Article 3, which states “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>46</sup>

Similarly, Article 4 states that Indigenous peoples, in exercising their right to self-determination, “have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” With respect to socioeconomic policy, Article 17 declares that, “states shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions.” Finally, with respect to protection of lands, resources and the environment, Article 29 states that Indigenous peoples have “the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”<sup>47</sup>

UNDRIP thus defines “self-determination” for Indigenous peoples as the right to:

- ▶ Governance autonomy in matters relating to internal and local affairs;
- ▶ Fiscal autonomy in relation to the exercise of local jurisdiction and the delivery of programs and services;
- ▶ Social and economic autonomy in relation to communities, lands and territories;
- ▶ Protection of the environment on which Indigenous communities depend; and
- ▶ Benefit from resources on Indigenous lands and traditional territories.

<sup>45</sup>Report of the Royal Commission on Aboriginal Peoples, “Volume 2” 1996, pg166, <http://data2.archives.ca/e/e448/e011188230-02.pdf>.

<sup>46</sup>The United Nations Declaration on the Rights of Indigenous Peoples, 2008, [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>47</sup>*Ibid.*



At this point, RCAP and UNDRIP part company in their conception of self-determination. Where RCAP explicitly states that the right to autonomy rests at the level of the Indigenous Nation (“The Commission considers the right of self-determination to be vested in Aboriginal nations rather than small local communities. Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination,”)<sup>48</sup> Article 4 of UNDRIP states that Indigenous peoples have the right to autonomy or self-government in matters relating to their “internal and local affairs.”<sup>49</sup>

To further muddy the waters, in suggesting that self-determination be limited to internal and *local* affairs, Article 4 of UNDRIP seems to contradict Article 18, which states that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights,” and Article 26, which states that Indigenous peoples have the right to “own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.” This suggests Indigenous peoples have the right to exercise a decision-making, regulatory control, or “jurisdiction,” over their traditional territories, beyond the confines of their communities, such as reserves as delineated under the *Indian Act*.

In any case, neither of RCAP nor UNDRIP’s prescriptions reflect the spectrum of self-determination options available in Canada, including the path taken by many First Nations toward incremental and sectoral self-government under s.91(24). Furthermore, Indigenous ‘Nations’ come in all shapes and sizes – some very large, and some quite small. While it is likely that some of those Nations may at some point in the future decide that they are of appropriate size and geographic scope, and have the political will, to exercise self-government at the Nation level, there are others that may never do so.<sup>50</sup>

The differing views of Indigenous self-determination espoused by UNDRIP and RCAP reflect the many challenges associated with effecting self-determination for Indigenous peoples in Canada, while at the same time rebuilding Indigenous Nations. Chief among these challenges is the tendency to view aspects of self-determination, and thus self-government, in absolute terms, rather than along a relative continuum. Just as individuals must operate with the laws of the land in which they reside, and nation states must operate within international law, absolute autonomy is rare:

- **Governance autonomy** occurs along a continuum; in the case of First Nations, from the basic *Indian Act*, to provisions within the Act that allow for greater autonomy, to legislative authority outside the *Indian Act* under s.91(24) of the Constitution, all the way to comprehensive self-government. The tendency to polarize around one of two perceived forms of self-government e.g. ‘incremental’ under s.91(24) vs. ‘comprehensive’ under s.35, does not reflect the fact that the 600-plus First Nations in Canada have vastly different historical, cultural, social and economic realities, and reserve the right to choose whichever path they will take.
- Similarly, **fiscal autonomy** is primarily a function of the ratio of a community’s own source revenue (OSR), relative to government transfers. Generally-speaking, the less reliant a First Nation is on transfers, the more autonomy it has in fiscal matters. While steps are being taken to explore less onerous reporting requirements and greater latitude in spending and investing, dependency on transfers from other levels of government will always carry a degree of constraint (this is true even of s.35 comprehensive self-government agreements).

Another governance challenge facing policy makers is the tendency to focus efforts on specific components of self-determination without full regard for their inter-relatedness with other aspects. This risk arises most frequently when governments organize themselves around policy and program initiatives that appear to be distinct, but are in fact intricately connected. This problem is compounded as they attempt to work

<sup>49</sup>The United Nations Declaration on the Rights of Indigenous Peoples, 2008, [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>50</sup>The Anishinaabe nation is a prime example. Its communities span multiple provinces, an international border, contain people who speak multiple dialects of Anishinaabemowen, and represent substantially diverse histories, customs and political traditions. This suggests that it may be a considerable amount of time, if ever, before a level of political cohesion is sufficient to effect a centralized governance structure through which all Anishnaabe communities would conduct their relationship with the Crown in a “true” Nation-to-Nation relationship.

collaboratively with Indigenous peoples because the mandate such initiatives receive is often too narrow to meet the comprehensive and holistic set of challenges typically faced by most First Nations.

Fortunately, an emerging body of scholarship is attempting to better understand the meaning of ‘self-determination’ for Indigenous peoples globally. Of particular note is the anthology *Restoring Indigenous Self-Determination*, edited by Marc Woons and Ku Leuven, in which the authors explore such topics as restoring Indigenous Nations, self-identification, the role of self-determination in the extractive industries, the role of technology, and case studies drawn from the Maori of New Zealand, the Sami in Finland, Africa, and Tibet. The most relevant for the purposes of this report may be “Self-Determination and Indigenous Health: Is There a Connection?” by Michael Murphy, of the University of Northern British Columbia.

Murphy argues that “self-determination is a capability that can only be realized in common by the members of a distinct political community, working together within shared political institutions to determine the laws and policies that will shape their individual and collective futures.”<sup>51</sup> His research suggests that self-determination, or autonomy, is perhaps of greatest importance to the health of Indigenous peoples and, by extension, the health of the community itself, in its control and delivery of health services that reflect traditional Indigenous approaches.

While Murphy’s analysis stems from a study of the relationship between community autonomy and health outcomes, it also applies broadly to social, economic, cultural and even environmental health. And while Murphy argues that autonomy is the most critical aspect of self-determination, others such as “competence” and “relatedness” figure prominently. In doing so Murphy has drawn on Self-Determination Theory (SDT), which suggests that self-determination, at an individual level, is centered on the belief that human nature shows persistent positive features, that it repeatedly shows effort, agency and commitment in their lives that the theory calls “inherent growth tendencies”. It follows that people have innate psychological needs that are the basis for self-motivation and personality integration.<sup>52</sup>

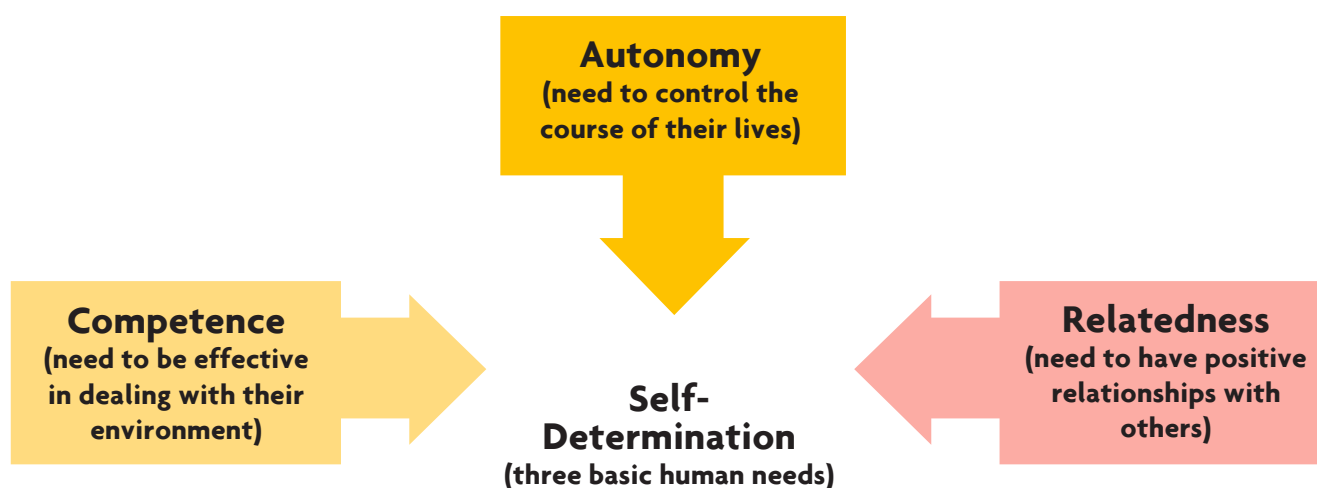
SDT identifies three innate needs that, if satisfied, allow optimal function and growth: autonomy, competence, and relatedness. These needs are seen as universal necessities that are innate, not learned, and are seen in humanity across time, gender and culture:

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<sup>51</sup>Michael Murphy, “Self-Determination and Indigenous Health: Is There a Connection?” *Restoring Indigenous Self-Determination*, E-International Relations (Bristol, UK) May 2014. Woons, Marc and Leuven, Ku eds.: <http://www.e-ir.info/wp-content/uploads/2014/05/Restoring-Indigenous-Self-Determination-E-IR.pdf>

<sup>52</sup>R. M Ryan, and E.L. Deci, “Self-determination theory and the facilitation of intrinsic motivation, social development, and well-being” *American Psychologist*, 55(1),2001, 68-78: [https://selfdeterminationtheory.org/SDT/documents/2000\\_RyanDeci\\_SDT.pdf](https://selfdeterminationtheory.org/SDT/documents/2000_RyanDeci_SDT.pdf).

# Self-Determination Theory<sup>53</sup>



SDT is relevant to this discussion because Indigenous peoples, and communities, differ in at least one key aspect from the prevailing Euro-Western philosophy of individualism; a central tenet of colonialism since the 19<sup>th</sup> century: for many Indigenous peoples in Canada, identity rests not primarily with the individual, but with a combination of family, clan, community, and nation. Indigenous peoples have consistently maintained that their rights, and identity, are collective in nature, a position confirmed by numerous decisions of the Supreme Court of Canada.<sup>54</sup> It has also been suggested that “for many indigenous peoples their identity as an individual is inseparably connected to the community to which that individual belongs.”<sup>55</sup> The collective nature of rights and identity would suggest that First Nation communities are analogous to individuals with respect to their innate desire for autonomy, competence (capability), and relatedness (relationships) and that the significance of those relationships are reflected at multiple levels i.e. community, treaty, and Nation.

In fact, the importance of relationships to deconstructing colonialism, self-determination and, ultimately, reconstituting Indigenous Nations on a foundation of good governance has been echoed by the FNGP Advisory Group. The AG has provided a wealth of perspective, insight and advice to the FNFMB and IOG, ranging from First Nations’ views on rights, self-government, and sections 91(24) and 35 of the Constitution. In particular, the AG has also provided a tremendous amount of wisdom with respect to the importance of *relationships* – between First Nation communities, treaty groups and tribal councils; between Canada’s recognized Indigenous peoples, and between Indigenous peoples and the federal Crown.

<sup>53</sup>Graph developed base on the following sources: Michael Murphy, , M (2014). “Self-Determination and Indigenous Health: Is There a Connection?” 2014; and R. M Ryan, and E.L. R. M., & Deci, , E. L. (2000). “Self-determination theory and the facilitation of intrinsic motivation, social development, and well-being” 2001.

<sup>54</sup>National Centre for First Nations Governance, “Reclaiming Our Identity Band Membership, Citizenship and the Inherent Right” Retrieved May, 2018, [http://fngovernance.org/resources\\_docs/ReclaimingOurIdentity\\_Paper.pdf](http://fngovernance.org/resources_docs/ReclaimingOurIdentity_Paper.pdf). See also Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do?r=AAAAAQAbYWJvcmlnaW5hbCBjb2xsZWNOaXZlIHJpZ2h0AQ>.

<sup>55</sup>The United Nations Regional Information Centre for Western Europe, “Individual vs. Collective Rights,” Retrieved June 2018, <https://www.unric.org/en/indigenous-people/27309-individual-vs-collective-rights>.



## 3.1 Indigenous Self-Determination and Governance Framework

The above analysis of Indigenous self-determination as seen through the lens of RCAP, UNDRIP, contemporary self-determination theory, and the advice of the FNGP Advisory Group suggests a framework for achieving self-determination for Indigenous communities regardless of where they are situated along the continuum of self-government within s.91(24), and respectful of the unique cultural, political and regional diversity of each First Nation. In such a construct, ‘autonomy’ (or ‘self-government,’ in its varied forms), competence (or ‘capability,’ deriving from community well-being and effective governance) and relatedness (or simply, ‘relationships’) form the basis for aligning joint First Nations – Canada initiatives in a manner that is comprehensive, holistic, and does not give rise to either-or, preferential, or sequential debates.

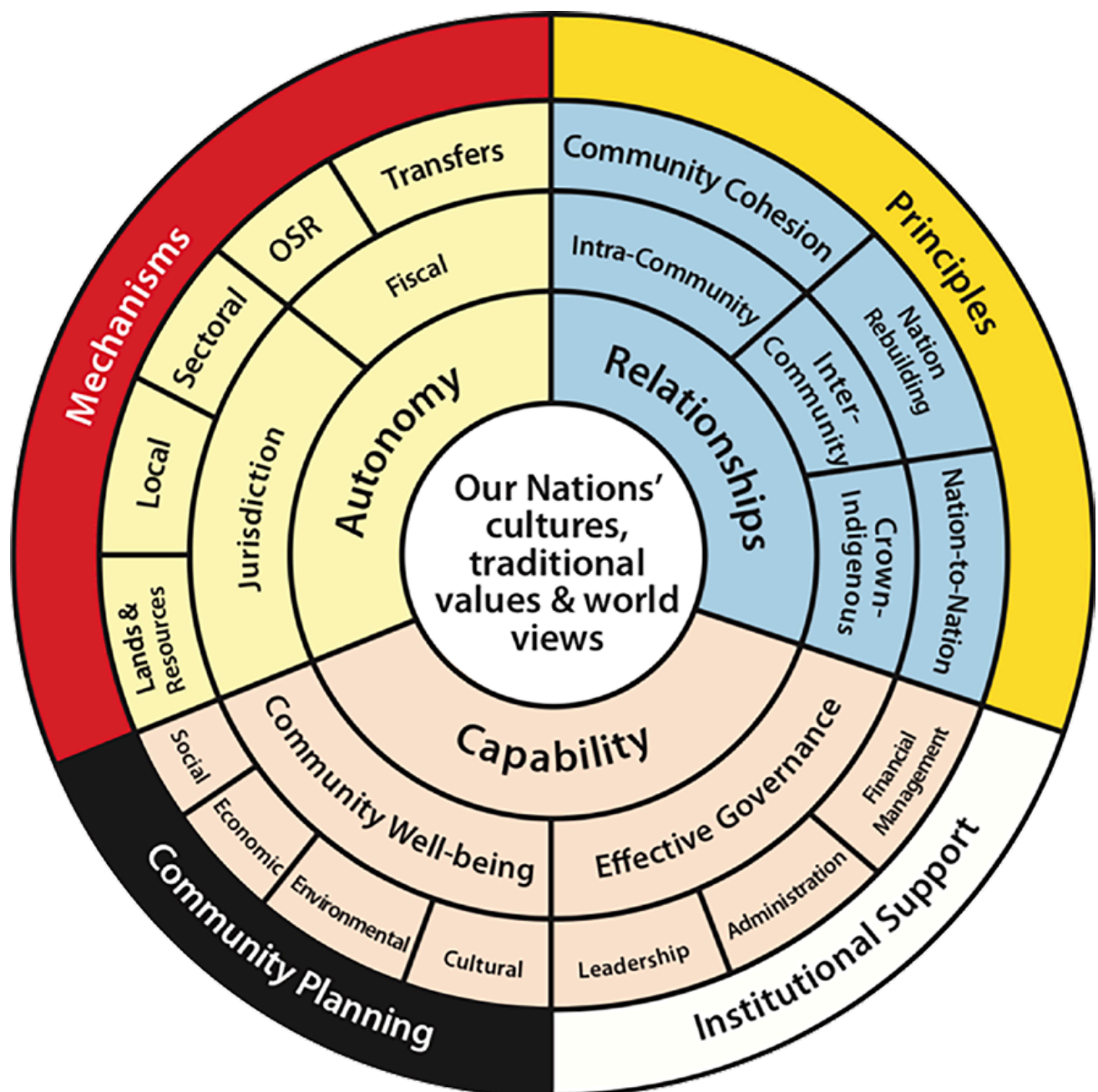
### 3.1.1 Our Nations’ Cultures, Traditional Values and World Views

This construct places the Nation at the centre of a comprehensive and holistic analytical self-determination and governance framework, acting as both the impetus for, and the result of, greater autonomy, increased capability, and more effective relationships. It also argues for an approach to arranging the determinants of self-determination for Indigenous communities in a manner that reflects their interconnected nature and, most importantly, emphasizes the importance of advancing on all fronts in order to ensure success.



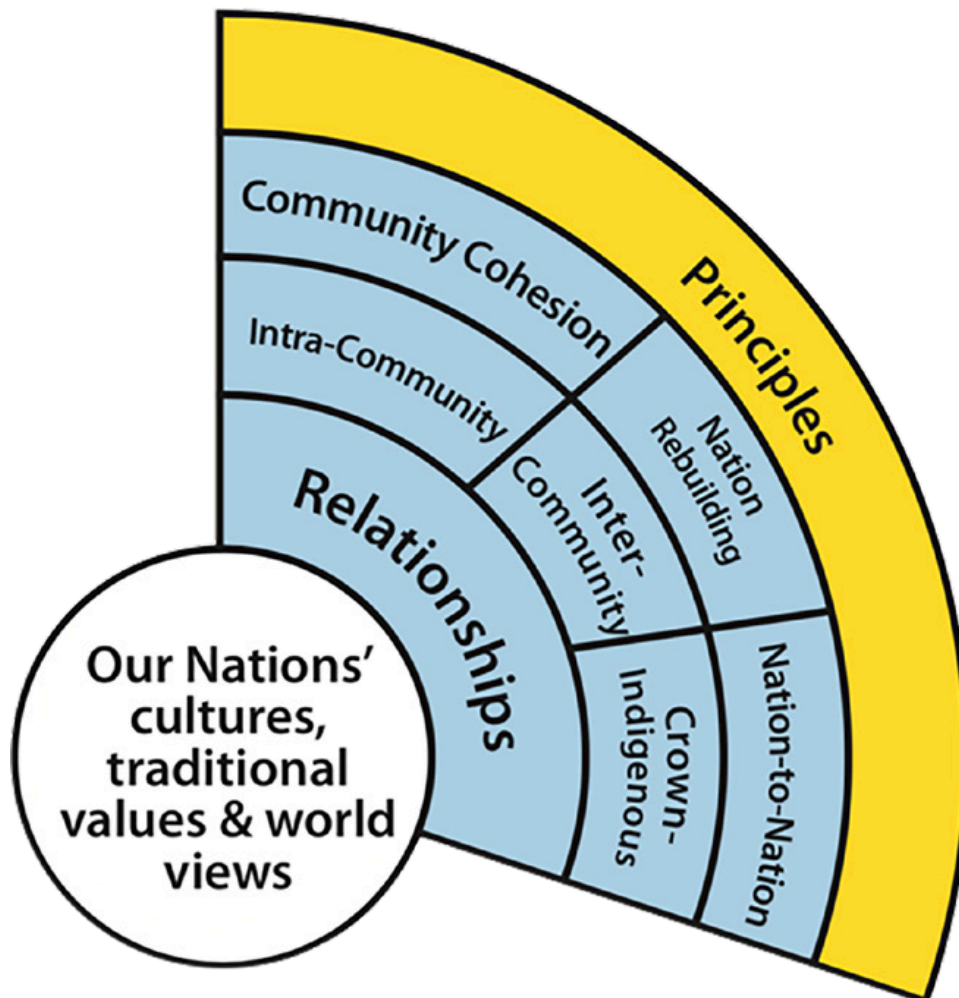


# Indigenous Self-Determination and Governance Framework



### 3.1.2 Relationships

For a First Nation community, **Relationships** exist primarily at three different levels: a) internally, where social cohesion and mutual respect (or lack thereof) can make or break efforts to achieve greater autonomy and increased capability, b) between communities, where the ability to collaborate and share power will effectively determine the degree of autonomy from the Crown, and their net collective capability (particularly so for small communities, where “strength in numbers” can be leveraged), and c) the Crown-Indigenous relationship, which as we have seen becomes more effective (and positive) through nation rebuilding, as the government-to-government relationship moves away from an individual community toward the nation through aggregation. As we have heard repeatedly, efforts in this area should focus on ensuring that the principles under-pinning those relationships are sound, and that parties to the relationship are in agreement with them.





### 3.1.3 Autonomy

The two core components of **Autonomy** – governance and fiscal – are the same regardless of whether Indigenous communities pursue comprehensive, incremental or sectoral approaches self-government, or whether the jurisdiction is local, or extends to traditional lands. It assumes that the vast majority of First Nation communities will depend upon fiscal transfers, to some degree, for the foreseeable future, and recognizes that control over lands and resources will serve to increase own source revenues (OSR) as a proportion of the overall financial requirements of a community over time. Finally, it suggests that the goal of efforts in the area of autonomy are the development of mechanisms (agreements for the co-management of lands and resources, self-government agreements, funding agreements, and legislation) that will promote not only greater autonomy, but increased capability, and more effective relationships.



### 3.1.4 Capability

Finally, the two main aspects of a community's capability, on which its ability to exercise autonomy and enter into effective relationships depend, are **Community well-being** (often expressed as or measured in terms of "sustainability"), and **Governance**. Community well-being (CWB) and its corollary sustainability are often defined and measured by a comprehensive and holistic set of determinants and indicators: social, economic, environmental, and cultural. As with the larger framework itself, these components are interdependent; social health begets economic development, cultural practices and environmental stewardship. Wealth created by economic development can be reinvested in the community, used to protect the environment, and allow more time for cultural practices. This paradigm forms the basis for First Nation-led efforts in Comprehensive Community Planning,<sup>56</sup> which sees all of these aspects of a community's well-being and development operating in tandem to achieve sustainability.

The other aspect contributing to a community's overall capability is effective governance, the implication being that no matter how strong a community is intrinsically, if it is not governed effectively it will not maximize the benefits of greater autonomy, or participate effectively in relationships that contribute to reconstituting nations, and by extension, participating in more effective Nation-to-Nation relationships. Mutually-accountable leadership, cost-effective delivery of high-quality programs and services (administration) and sound financial management are the hallmarks of effective governance, and strengthen community capability while promoting autonomy and positive relationships. The emphasis in this area is the promotion of competence, through training, the development of standards, certification, and institutional support. Again, this remains true regardless of which approach to autonomy a First Nation wishes to pursue.



<sup>56</sup>Government of Canada, Indigenous and Northern Affairs Canada, "Comprehensive Community Planning" Retrieved May, 2018, <http://www.aadnc-aandc.gc.ca/eng/1100100021901/1100100021902>.

## 3.2 Conclusion: Indigenous Self-Determination

In committing to implement UNDRIP, Canada has undertaken a number of initiatives to engage Indigenous communities on their aspirations in the context of self-determination, including self-government, fiscal autonomy, community development, and nation rebuilding. In this manner, and in recognition of the many broken relationship between Indigenous peoples and the federal Crown, and the importance of mending that relationship moving forward, Canada has committed to reconciliation and building a stronger, more effective relationship.

The challenges associated with addressing the many complex and apparently distinct aspects of UNDRIP speak to the importance of developing a comprehensive and holistic, First-Nations-driven framework with which to guide the collaborative efforts of First Nations and the Government of Canada. Understanding the inter-relatedness of fiscal and governance autonomy, their relationship to sustainable development, and finally the importance of relationships - to nation rebuilding, and self-determination generally - is essential if the mutual objectives of First Nations and Canada are to be achieved. Above all, the proposed implies that “self-determination” is multi-faceted, and will require ongoing and parallel investments in all three spheres in order to achieve the overall objectives of all stakeholders. For the purposes of the FNGP, the mandate of which is to identify barriers to, and provide support for nation rebuilding, this will necessitate examining the nature and state of the following aspects of First Nation community self-determination, and their inter-relatedness:

- ▶ Relationships (principles and characteristics)
- ▶ Autonomy (jurisdiction and fiscal)
- ▶ Capability (community well being and governance)

How could this paradigm be used in the context of implementing UNDRIP to support increased self-determination for First Nations, rebuild Indigenous Nations, and establish an effective a Nation-to-Nation relationship? The remainder of this Report will address these questions.



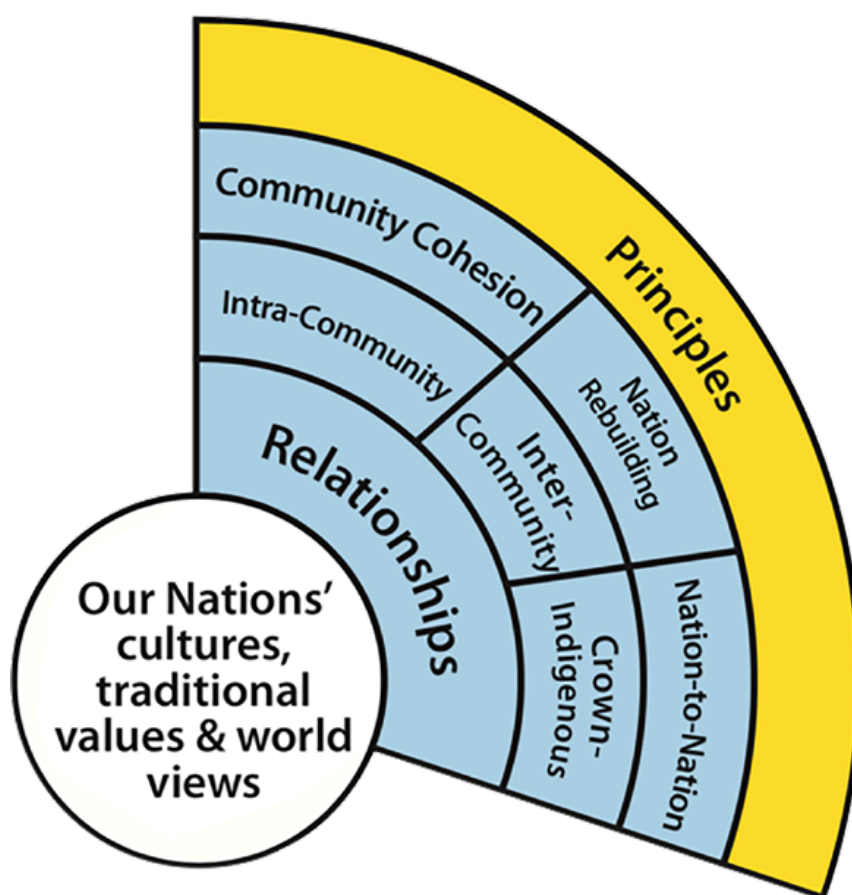
## 4.0 Relationships: Principles and Characteristics

Meaningful, effective and appropriate relationships are an essential characteristic of self-determination. Intra-community relationships - the various relationships that bind a community together, such as within peer groups, between Elders and youth, between leaders and community members – are critical for ensuring that a community's vision for its future, and how to achieve that vision. This is true of all communities the world over, but arguably even more so for many First Nations in Canada, particularly those that are situated in remote areas, and those that have historically struggled with community well being.

Inter-community relationships – those that connect communities to others in geographic proximity, with shared histories, language and cultures i.e. Tribal Councils, Treaty groups, Provincial and Territorial Organizations (PTOs) and, ultimately, Indigenous Nations – are equally important as they provide the basis for achieving the vision of individual communities through collaboration, pooled resources and capacity, shared services delivery, and potentially joint exercise of interest in, and even jurisdiction, over the management of lands and resources. Finally, such aggregations have the potential to serve as a vehicle for transitioning out of the *Indian Act* regime (and s. 91(24) altogether) to a new structure of regional governance that represents its communities collectively in the Crown-Indigenous relationship.

Finally, the Crown-Indigenous relationship, which as we have seen in earlier sections of this Report remains dysfunctional as a direct result of colonialism and in particular the role of the *Indian Act*, must be operating in a manner that accommodates the varied aspirations of First Nations by recognizing their inherent right to self-determination (as emphasized by both RCAP and UNDRIP) in a manner that is effective and meaningful.

Ultimately, relationships, at all levels, in order to be meaningful, effective and supportive of self-determination, must be based on a set of principles that provide the basic operating assumptions of those relationships – a code of conduct – recognized by and adhered to by all parties to that relationship. This section of the Report examines the principles that can provide an effective underpinning of relationships at the intra-community, inter-community, and Crown-Indigenous levels.



## 4.1 Intra-community Relationships: Principles of Good Governance

The relationship between a community's leaders and its members often sets the stage for how people in the community relate to each other, and therefore that community's success in realizing its vision for the future, including the path to self-determination and community well being. It follows that, adherence to a number of essential characteristics of internal relationships, particularly those between a community's leaders, and its members, will have a direct bearing on that community's success (along with autonomy and competence).<sup>57</sup> The key question we wish to address in this section is:

- ▶ What basic principles (as opposed to structures and processes) underpin effective relationships, especially the relationship of governance, in Indigenous communities, in a manner that leads to greater self-determination and community well-being?

As stated in earlier sections of this Report, there are multiple definitions of governance, but at its most fundamental, governance is about how groups organize in the pursuit of collective goals, whether in government, the private sector, or civil society, and effective governance is needed whenever people come together for a common purpose. It has been suggested that governance comes down to a few basic considerations:

- ▶ Who makes decisions?
- ▶ What is the decision-making process and who has voice?
- ▶ How are decision-makers held accountable?

A number of international organizations, including the UNDP, World Bank, and others<sup>58</sup> have set-out the essential principles of good public sector governance in democratic societies. Distilled from these conceptions, the IOG has long based its research on the following set of five governance principles, which have been elaborated on in previous sections of this Report):

- ▶ Legitimacy and Voice
- ▶ Strategic Direction
- ▶ Effective Performance
- ▶ Accountability and Transparency
- ▶ Equity and Fairness

Other organizations have highlighted additional principles that may be particularly effective in application to Indigenous communities. For example, the National Centre for First Nations Governance's (NCFNG) "Five Pillars of Governance" leads with "People," who are "The foundation of our Nations. The People are the citizens of Nations that share language, creation stories, community history and family relationships."<sup>59</sup> The NCFNG identifies three principles that relate to the relationship between a community's leaders and its people, and speak to the expectations the people have of their leaders:

- ▶ Strategic Vision
- ▶ Meaningful Information Sharing
- ▶ Participation in Decision Making

NCFNG notes that "These three principles exist when the People are engaged. Through living these principles First Nations ensure their government rests on a solid foundation." While this short list, on the face of it, seems to capture the key tenets of governance in a universal sense, it does not adequately speak to the more intangible dynamics of governing, nor the challenges. For example, a community (or country, for

<sup>57</sup>See Helliwell, John F. et al. Good Governance and National Well-Being, OECD Working Paper on Public Governance, no 25, OECD Publishing, November 2014. [http://faculty.arts.ubc.ca/jhelliwell/papers/OECD%20working%20paper\\_Good%20Governance%20and%20National%20Well-being.pdf](http://faculty.arts.ubc.ca/jhelliwell/papers/OECD%20working%20paper_Good%20Governance%20and%20National%20Well-being.pdf); and Ott, Jan C. Good Governance and Happiness in Nations: Technical Quality Precedes Democracy and Quality Beats Size, *Journal of Happiness Studies*, vol. 11, issue 3, June 2010, p. 353-368.

<sup>58</sup>John Graham, Bruce Amos and Tim Plumptre, "Principles for Good Governance in the 21st Century," Institute On Governance, Aug 22, 2003, [https://iog.ca/docs/2003\\_August\\_policybrief15.pdf](https://iog.ca/docs/2003_August_policybrief15.pdf).

<sup>59</sup>Centre for First Nations Governance, "The Five Pillars of Effective Governance," Retrieved April, 2018, [http://fngovernance.org/publication\\_docs/Five\\_Pillars-CFNG.pdf](http://fngovernance.org/publication_docs/Five_Pillars-CFNG.pdf).

that matter) can have in place any number of rules, processes and structures in place to select its leaders, define the scope of their decision-making jurisdiction, and mechanisms to ensure accountability, but if only the intent, and not the spirit of those rules is adhered to, the community will not function to its full potential.

At this point it is important to distinguish between principles that underpin governance structures and processes (“government”), and those that underpin relationships within a community, and in particular the relationship between a community’s leaders and its members. For example, “accountability” is usually operationalized and understood in terms of formal standards and processes that are then overseen by governments i.e. as a principle of “good governance.” But accountability is also an essential principle of one’s conduct towards others, in that if one transgresses society’s norms, they will be held accountable one way, or another. Similarly, in the relationship between a community’s leaders and its members, leaders can be, and often are, held accountable informally by members of a community more readily than can leaders of a large municipality, province or country.

The importance of civility (a not too-distant cousin of respect) has been highlighted by the Australian Indigenous Governance Institute (AIGI): While the AIGI defines governance at its most basic as being “about power and authority: who has it (who ‘calls the shots’, making the important decisions and rules) and how those people with power are held accountable within their group,”<sup>60</sup> when broken-down, it’s not simply about terms of authority and accountability, but rather about what the rules (or “organizing tools of governance”) tell us about:<sup>61</sup>

- ▶ How to behave towards each other and what to expect when we don’t
- ▶ How power is shared
- ▶ Who has the authority to make the important decisions
- ▶ How decisions should be enforced
- ▶ How the people who make decisions will be held accountable.

It is the first of these explanations that speaks most directly to the importance of relationships within a community, as a determinant of community well-being, and autonomy: How to behave towards each other, and what to expect when we don’t? Of course, the answer to this question lies in the culture and traditional knowledge of Indigenous peoples world-wide; the principles underpinning personal conduct and inter-personal relations traditionally necessary for community survival. For example, the Anishinaabeg of Canada, whose Nation spans a broad area surrounding the Great Lakes, refer to these principles as the “Seven Grandfathers Teachings,”<sup>62</sup> namely:

- ▶ Respect
- ▶ Love
- ▶ Truth
- ▶ Bravery
- ▶ Wisdom
- ▶ Generosity
- ▶ Humility

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<sup>60</sup>The Australian Governance Institute, “The Indigenous Governance Toolkit; Understanding Governance,” Retrieved May, 2018, <http://toolkit.aigi.com.au/toolkit/1-0-understanding-governance>.

<sup>61</sup>Ibid.

<sup>62</sup>“Ojibwe.net, Teachings of the Seven Sacred/Seven Grandfathers Student Manual” Retrieved June 2018, <http://ojibwe.net/projects/prayers-teachings/the-gifts-of-the-seven-grandfathers/>; [http://www.7generations.org/?page\\_id=2396](http://www.7generations.org/?page_id=2396); <https://onlc.ca/wp-content/uploads/2014/06/7-Grandfathers-Student-Manual1.pdf>.



Similarly, the Maori of New Zealand strive to adhere to a code of *Rangatiratanga*,<sup>63</sup> which revolves around displaying qualities of leadership and being a role model for the community. These qualities may include generosity, bravery, humility (being humble), respect and commitment to the community. Closely related is the Maori concept of *Whanaungatanga*, the importance of relationships, connections and feeling a sense of belonging, developed through shared experiences and working together, and not necessarily about whānau, or blood family connections. *Whanaungatanga* focuses on working together and making decisions for the collective good of all the community, rather than just some individuals.

Finally (and only by way of comparison, because numerous examples are equally valid and could be cited here) there is the traditional African moral and ethical framework, known as Akan.<sup>64</sup> Akan is a highly humanistic doctrine, expressed in maxims (often in the form of proverbs) that emphasize the importance of “the values of mutual helpfulness, collective responsibility, cooperation, interdependence, and reciprocal obligations.”<sup>65</sup> African scholars have compared Akan to the “Golden Rule,” (i.e. Do unto others...), but as one has noted:

The Golden Rule is more than reciprocity; it is also about empathy, understanding and participating. It portrays that no one is an island unto himself – it makes for harmony and interrelatedness in the scheme of things. Hence, the African proverb: ‘if you want to go fast; go alone, but if you want to go far, then go with others, go together, speak together; let your minds be of one accord’<sup>66</sup>

Others have noted that, in the African ethical framework, duty trump rights: “The attitude to, or performance of, duties is induced by a consciousness of needs rather than of rights. In other words, people fulfill—and ought to fulfill—duties to others not because of the rights of these others, but because of their needs and welfare.”<sup>67</sup> Akan is thus an ethics of the collective, rather than the individual; of duty, as opposed to rights.

### 4.1.1 Conclusion: Intra-community Relationships: Principles of Good Governance

In this section of the Report, we have drawn a distinction between government and governance, and between the principles that underpin good government, as opposed to good governance. While similar in some respects (e.g. “accountability”) successful governance rests on the principles and ethical frameworks that underpin the relationships among the members of a community. To this end, we would argue that it is not enough to have election codes, laws, administrative standards and procedures, and mechanisms for administrative and legal redress. In order to be meaningful, “accountability,” “respect,” “transparency,” and “fairness” must apply to relationships at all levels – horizontally and vertically, formally and informally – within a community in order for it to realize its full potential for self-determination, and collective health.

But how does one measure relationships? How does one determine if people in a given community are acting in a respectful manner? Other than anecdotal evidence and observation, one cannot. But what can be done, and is being done by many First Nations today, is instilling the importance of positive, respectful and mutually-accountable relationships in their community planning process. There are many examples among the hundreds of Comprehensive Community Plans (CCP) undertaken by First Nations to date where traditional ethics and teachings form the basis not only for the planning process, but also the commitment of community members in the manner in which they will relate to each other moving forward.<sup>68</sup>

<sup>63</sup>New Zealand Careerforce, “Māori Operating Principles,” Retrieved May, 2018, <https://ilearn.careerforce.org.nz/mod/book/view.php?id=1157&chapterid=330>.

<sup>64</sup>Stanford Encyclopedia of Philosophy, “African Ethics,” 2009. Retrieved June 2018, <https://plato.stanford.edu/entries/african-ethics/#SocNotIndEth>.

<sup>65</sup>Ibid.

<sup>66</sup>Godwin Azenabor, “The Golden Rule principle in an African Ethics, and Kant’s Categorical Imperative,” QUEST: An African Journal of Philosophy, 2008(XXI) 229-240 pg. 239, [http://www.quest-journal.net/volXXI/Quest\\_XXI\\_Azenabor.pdf](http://www.quest-journal.net/volXXI/Quest_XXI_Azenabor.pdf).

<sup>67</sup>Stanford Encyclopedia of Philosophy, “African Ethics,” 2009. Retrieved June 2018, <https://plato.stanford.edu/entries/african-ethics/#SocNotIndEth>.

<sup>68</sup>See in particular Cowichan Tribes 2014 Comprehensive Community Plan: ([http://www.cowichantribes.com/files/2414/2231/1008/Cowichan-CCP\\_v6\\_Final\\_July\\_2014.pdf](http://www.cowichantribes.com/files/2414/2231/1008/Cowichan-CCP_v6_Final_July_2014.pdf)); Pikangikum First Nation 2014 Comprehensive Community Health Plan: <https://www.cip-icu.ca/Files/Awards/Planning-Excellence/Our-Healing-Journey-Pikangikum-First-Nation-s-Com.aspx>; Chippewas of the Thames 2012 Comprehensive Community Plan : <https://www.cottfn.com/wp-content/uploads/2014/03/COTT-CCP-Draft-Final.pdf>.

## 4.2 Inter-community Relationships: Balancing Local Autonomy with “Strength in Numbers”

As noted in section 2 of this Report, colonialism (primarily through the *Indian Act*) had a devastating effect on pre-contact structures of Indigenous governance, at the local, tribal and nation level. By creating individual bands with which the federal Crown would conduct its relationship with First Nations, restricting travel and undertaking other measures that severely limited interaction among many communities (with a few notable exceptions in British Columbia, the prairies and southern Ontario), the *Indian Act* regime can only be viewed as having been detrimental to Indigenous inter-community relationships for many decades after Confederation. The emergence of Indigenous rights and advocacy organizations in the latter half of the 20<sup>th</sup> century would provide the impetus for the numerous treaty, provincial and finally national organizations that formed in the 1970s, 1980s, and beyond. However, with the restrictions entrenched by the *Indian Act* that only gradually gave way during this period, smaller regional groupings of the type that might have assembled on a seasonal basis to engage in trade, intermarriage and activities related to survival on a regional/tribal basis, fell by the wayside.

With the exception of a few examples of First Nation-driven aggregations in the 1970s, it was not until 1984, with the introduction of the Tribal Council Funding Program, that First Nations re-aggregated in large numbers at the local level to address common interests in the delivery of programs and services. In fact, in addition to the objective of enabling efficiencies of scale and greater local control over the delivery of programs and services, one of the explicit early objectives of the Tribal Council Policy was to encourage greater aggregation not only for the delivery of programs and services, but for self-government more broadly.<sup>69</sup>

In practice, First Nations have used tribal councils for a variety of purposes, ranging from mechanisms for the “flow-through” of funding to individual bands to enable them to deliver their own services with a minimum of centralized administration and capacity-development, to active shared services providers of a wide range of technical and social programs and services, to vehicles for assertion of collective rights and political interests. The Tribal Council program has not been without its critics though, with some citing the same concerns that have followed the funding of First Nations – short-term funding windows, an excess of reporting, inflexibility, and comparability.<sup>70</sup> Nonetheless, in recent decades numerous Tribal Councils have established themselves as essential, centralized providers of programs and services, and in some cases, political advocacy,<sup>71</sup> a potential precursor to aggregated structures of governance. Examples include:

**Sto:lo (British Columbia):** In 2004, eight villages created the Sto:lo Tribal Council (STC). The STC is an “Aboriginal organization” – a non-profit society – run by an eleven-member Board of Directors: eight of which are appointed by each respective village and three elected Tribal Chiefs. The Sto:lo Nation is made up of the remaining eleven First Nation or Village communities or bands. The Nation is governed by the Sto:lo Nation Chiefs Council that focuses on constitutional and self-governance rights and the Sto:lo Service Agency (run by a Board of Directors) that delivers services to members.

**File Hills Qu’Appelle (Saskatchewan):** The mission statement of the File Hill Qu’Appelle Tribal Council (FHQTC) is “Committed to being a leader and an advocate for the delivery of quality services for sustainability, self-sufficiency and autonomy of our First Nations membership.”<sup>72</sup> In addition to the typical suite of services provided by Tribal Councils, FHQTC is guided by the following objectives:

- ▶ to protect the governing jurisdiction of the First Nations;
- ▶ to speak and act as a common voice on matters of mutual interest;
- ▶ to promote and protect the Treaties and basic rights of First Nations people;

<sup>69</sup>Government of Canada, Indigenous and Northern Affairs, “Evaluation of DIAND’s Tribal Council Policy,” June 1997, <http://publications.gc.ca/Collection/R3-23-1997E.pdf>.

<sup>70</sup>Assembly of First Nations, Government of Canada “Co-Development of a New Fiscal Relationship Between Canada and First Nations,” 2018. [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-ACH/STAGING/texte-text/reconciliation\\_new\\_fiscal\\_rel\\_approach\\_1512565483826\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-ACH/STAGING/texte-text/reconciliation_new_fiscal_rel_approach_1512565483826_eng.pdf).

<sup>71</sup>The Tribal Council Funding policy outlines programs and services that a Tribal Council may receive funding for, and expressly forbids any of the funding be used for political advocacy: <https://www.aadnc-aandc.gc.ca/eng/1452105267433/1452105343369>.

<sup>72</sup>File Hills Qu’Appelle Tribal Council, Retrieved May 2018, <http://fhqtc.com/>.

- ▶ to develop policies and programs which promote and protect common interest of the 11 First Nations; and
- ▶ to promote and protect First Nations self-determination and self-government.

Despite the fact that Tribal Councils are not permitted to use funding received under the Tribal Council Program for the purposes of political advocacy (PTOs are provided funding for this purpose) it would appear that some have been able to find the resources, and the concurrence of their member First Nations, to do so. While little research is available on the full extent to which Tribal Councils and other local aggregations have begun to take on a more political role, traditionally the purview of PTOs, obtaining a clearer picture of the strengthening of local, inter-community relationships among First Nations, would be instructive in determining the implications for nation rebuilding, and self-determination.

## 4.3 The Crown-Indigenous Relationship: Reconciling Indigenous and Crown Principles

The Crown-Indigenous relationship is the third collective relationships central to achieving self-determination for First Nations. Section 2 of this Report provided an overview of the troubled history of that relationship. The critical importance of mending that relationship has been highlighted by First Nations and the federal government alike.<sup>73</sup> This section will briefly examine the coalescing consensus on the principles that could underpin that relationship, an essential early step toward reconciliation.<sup>74</sup>

<sup>73</sup>Joanna Smith, "Trudea Commits to Nation-Nation Relationship with First Nations," Dec 8, 2015 <http://www.cpac.ca/en/programs/public-record/episodes/56224684>; <https://www.thestar.com/news/canada/2015/12/08/trudeau-commits-to-nation-to-nation-relationship-with-first-nations.html>.

<sup>74</sup>Truth and Reconciliation Commission, "Calls to Action Findings" [http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf).



### 4.3.1 Government of Canada Principles

In July of 2017 Canada released 10 “Principles Respecting the Government of Canada’s relationship with Indigenous peoples,” intended as starting point for turning the page “in an often troubled relationship by advancing fundamental change whereby Indigenous peoples increasingly live in strong and healthy communities with thriving cultures.”<sup>75</sup>

The 10 principles are summarized here:

- ▶ The right to self-determination.
- ▶ Reconciliation is a fundamental purpose of s.35 of the Constitution Act, 1982.
- ▶ The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.
- ▶ Indigenous self-government is part of Canada’s evolving system of cooperative federalism and distinct orders of government.
- ▶ Treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown...are acts of reconciliation based on mutual recognition and respect.
- ▶ Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.
- ▶ Respecting and implementing rights is essential and that any infringement of s.35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown’s fiduciary obligations.
- ▶ Reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous Nations, that promotes a mutually-supportive climate for economic partnership and resource development.
- ▶ Reconciliation is an ongoing process that occurs in the context of evolving Crown-Indigenous relationships.
- ▶ A distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

More policy statements than principles, the “10 Principles” nonetheless provide a significant starting point for a dialogue between Canada and Indigenous peoples on the core principles that will guide their relationship over the long-term.

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<sup>75</sup>Government of Canada “10 Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples,” July 2017, <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

## 4.3.2 Report of the Royal Commission on Aboriginal Peoples

**Our report proposes... that the relationship between Aboriginal and non-Aboriginal people in Canada be restructured fundamentally and grounded in ethical principles to which all participants subscribe freely.<sup>76</sup>**

### *The Royal Commission on Aboriginal Peoples*

The RCAP report, at five volumes and over 3,000 pages, contains a wealth of information about the history of the Crown-Indigenous relationship in Canada, and hundreds of recommendations as to how that relationship can be repaired and strengthened moving forward. But it could be argued that RCAP's greatest contribution to the current effort to implement UNDRIP and rebuild Indigenous Nations is its recommendation of four basic principles that should underpin the Crown-Indigenous relationship, which we quote at length below:

► **Mutual recognition:** The RCAP report's statement on mutual recognition stands on its own:

This calls on non-Aboriginal Canadians to recognize that Aboriginal people are the original inhabitants and caretakers of this land and have distinctive rights and responsibilities that flow from that status. At the same time, it calls on Aboriginal people to accept that non-Aboriginal people are also of this land, by birth and by adoption, and have strong ties of affection and loyalty here. More broadly, mutual recognition means that Aboriginal and non-Aboriginal people acknowledge and relate to one another as equals, co-existing side by side and governing themselves according to their own laws and institutions.<sup>77</sup>

► **Mutual respect:** RCAP stated that mutual respect flows from mutual recognition. It noted that Indigenous peoples, especially those adhering to traditional ways, "Accord respect to all members of the circle of life — to animals, plants, waters and unseen forces, as well as human beings." But of course it is not only Indigenous people who value respect:

In the larger Canadian society as well, respect is a valued aspect of relationships. Under the Canadian Charter of Rights and Freedoms, for example, individuals are recognized as warranting respect simply by virtue of their humanity. As human beings, individuals are of equal dignity and essential worth and should be valued as ends in themselves, not as means to other goals.<sup>78</sup>

In a final word on the importance of mutual respect, RCAP noted that it is "the essential precondition of healthy and durable relations between Aboriginal and non-Aboriginal people in this country."<sup>79</sup> For RCAP, the principle of mutual respect is the key determinant of an effective – healthy, and durable – Crown-Indigenous relationship.

► **Sharing:** The RCAP report defined "sharing" as the "giving and receiving of benefits." It noted that sharing, and the similar notion of reciprocity, are important components of many Aboriginal world views, "which see all living beings as striving for harmony, within themselves and with their surroundings."<sup>80</sup> It also noted that the notion of sharing, and more to the point, "reciprocity," was the basis of the treaties, whereby Aboriginal parties agreed to "share their lands with the new arrivals... maintain peace and friendship, engage in trade, furnish military support, or provide educational and medical benefits. However, the sharing of the land was at the heart of the relationship."<sup>81</sup>

And finally, in remarks that echo the importance of fiscal autonomy in achieving self-determination as emphasized both by UNDRIP and the FNGP Advisory Group, are the words of Grand Chief Jocelyne Gros Louis, of the Huron-Wendat Nation, testifying before the Commission in Wendake, Quebec, in November of 1992:

What we want Canada to do is to give us the support we need in order to regain our own strength so that we can once again walk the right path under our own steam. This means sharing with us the renewal of our self-respect and our pride in our heritage. This means paying attention to the use of language, symbols and cultural opinions so that our peoples are not offended. This also means letting us take care of ourselves through equal access to the revenues generated on our traditional lands and working with us as partners on these vast expanses of land. [translation].<sup>82</sup>

In the view of the RCAP, sharing, and reciprocity, must be the principles that lay at the heart of fiscal autonomy.

► **Mutual responsibility:** The principle of mutual responsibility between the Crown and Indigenous peoples harkens back to the communal ethos at a personal level examined earlier in this section of

<sup>76</sup>Report of the Royal Commission on Aboriginal Peoples, "Volume 1" 1996, page 12, <http://data2.archives.ca/e/e448/e011188230-01.pdf>.

<sup>77</sup>Ibid pg 645.

<sup>78</sup>Ibid 649.

<sup>79</sup>Ibid.

<sup>80</sup>Ibid 651.

<sup>81</sup>Ibid.

<sup>82</sup>Ibid 653.

the Report: “This responsibility to life is coupled with a strong sense of personal responsibility. A person learns to assume responsibility for others and the environment through an individual quest to achieve awareness of one’s place in nature.”<sup>83</sup> This notion of balance, harmony and not only mutual responsibility but mutual accountability, points to the need for the “transformation of the colonial relationship of guardian and ward into one of true partnership”<sup>84</sup> in order for there to be a just and effective Crown-Indigenous relationship. It also speaks to the importance of a third party to the Crown-Indigenous relationship: the natural environment. RCAP argues that the relationship between the Crown and Indigenous peoples cannot operate on a sound footing unless both parties’ relationship is harmonious:

This broader vision of Canada as a place of cultural and ecological diversity and of Canadians as stewards of this dwelling-place is an increasingly prevalent one...the shift away from an exploitative approach to nature goes even deeper than this for many Canadians. It is rooted in the sense that to act irresponsibly is not just short-sighted but a spiritual failure.<sup>85</sup>

In short:

The renewed relationship between Aboriginal and non-Aboriginal people will flourish only if it is infused with this dual sense of responsibility to one another and to our environment and dwelling-place.<sup>86</sup>

In four simple, straightforward and self-evident principles, the RCAP report not only captures the essence of the *Royal Proclamation* and UNDRIP, it explores in great detail the meaning behind and implications of those principles for the Crown-Indigenous relationship.

### 4.3.3 FNGP Advisory Group Principles

The importance of relationships, and in particular the Crown-Indigenous relationship, was raised consistently in meetings of the FNGP Advisory Group. While cognizant of the mandate of the FNGP – support for First Nations’ governments in transition out of the *Indian Act* and rebuilding their Nations – the AG nonetheless stressed the importance of Crown – Indigenous relationships in setting the tone for all interactions, at every stage of transition, and the need to ensure that the principles underpinning that relationship are sound.

With a general consensus that the AG should focus on providing First Nations perspectives on the nature, principles and characteristics of a Crown-Indigenous relationship, participants split into three groups to brainstorm on what those principles should be, and emerged with reports of striking consistency:

- ▶ Recognition of rights
- ▶ Recognition of the impact of colonialism
- ▶ Reconciliation
- ▶ Self-determination
- ▶ Fiscal sustainability
- ▶ Reciprocity (mutual accountability)
- ▶ Integrity
- ▶ Transparency
- ▶ Equity

Finally, the AG was of a consensus view that the Crown-Indigenous relationship should be based, above all, on mutual respect. Having said that, the AG recommended that previous work be examined to obtain further guidance and validation of the principles they have suggested. The content and role of the *Royal Proclamation* of 1763 has already been mentioned in this report, as have the historical treaties, s.35 of the *Constitution Act* of 1982, and UNDRIP. However, while reference has been made to the RCAP report, its contribution to our understanding of the nature and characteristics of a Crown-Indigenous relationship have not been fully explored.

<sup>83</sup>Ibid 656.

<sup>84</sup>Ibid 657.

<sup>85</sup>Ibid.

<sup>86</sup>Ibid.



## 4.4 Conclusion: Relationships – Principles and Characteristics

This section has provided a brief overview of the nature, and ideal characteristics of, relationships within communities, inter-community, and Crown-Indigenous. With respect to the latter in particular, the relationship principles enunciated by RCAP and the FNGP Advisory Group provide guideposts for moving beyond debates over, for example, consent and veto in the context of resource development, by introducing principles such as ‘respect,’ ‘sharing,’ ‘reciprocity,’ ‘mutual responsibility,’ and ‘fiduciary’ – and not just toward a people, but toward the natural environment as well – that point to their usefulness as starting point for a renewed, principles-based dialogue on the Crown-Indigenous relationship. Whether internal to a community, between communities (and Indigenous Nations) or between the Crown and Indigenous peoples, the critical importance of ‘getting relationships right’ can no longer be discounted.



## 5.0 Autonomy: Self-Determination and Nation Rebuilding within the s.91(24) Crown-Indigenous Relationship

Section 2 of this report concluded with an overview of modern treaties, and the residual governance system under which the vast majority of First Nations still operate i.e. within the s.91(24) legislative framework. While negotiations toward concluding agreements within s.35 (i.e. under the Inherent Right Policy) continue, those talks have essentially stalled while the Government of Canada engages in dialogue with First Nations on exploring new approaches to self-government under s.35.

In parallel, First Nations have expressed a desire to maintain and augment the options available for greater self-determination (“autonomy”) within the s.91(24) regime until such a time as they are confident that an alternative exists that meets their needs. Autonomy within the s.91(24) legislative framework (just as under s.35) necessarily encompasses both **Governance** (in this context, synonymous with “jurisdiction”) and **Fiscal** (or “financial”) autonomy.

The scope of jurisdiction that a First Nation (or regional aggregations) could be expected to assume is quite broad, encompassing most of but not all of the jurisdictions subject of negotiations under the Inherent Right Policy, and fall under three main categories: a) local (all matters relating to a communities internal affairs – broadly speaking those provided for in the *Indian Act*); b) lands and resources (in traditional territories, outside of reserves); and c) sectoral - or jurisdiction over “province-like” programs and services such as health, education, child and family services, and policing.

This Section of the Report will assess the state of First Nations’ government and fiscal autonomy<sup>87</sup> within the s.91(24) framework, and provide recommendations for removing impediments to, and providing support for, greater autonomy, and thus self-determination.



<sup>87</sup>For the most part First Nations within the 91(24) legislative framework do not have jurisdiction over lands and resources outside of their communities. Bill C-69, the proposed Impact Assessment Act, “provides for cooperation with certain jurisdictions, including Indigenous governing bodies, through the delegation of any part of an impact assessment, the joint establishment of a review panel or the substitution of another process for the impact assessment.” However, as currently defined by Bill C-69, a single First Nation under the Indian Act does not qualify as an “Indigenous governing body” for the purposes of exercising jurisdiction over environmental assessment: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/third-reading>.



## 5.1 Government: Incremental Self-Government Initiatives within the s.91(24) Framework

The *Indian Act* (1876) consolidated of pre-confederation legislation under federal jurisdiction for “Indians, and lands reserved for Indians,” within s.91(24) of the *British North America Act*. Still in force today, the *Indian Act* provides for Crown control over almost every aspect of the lives of “status,” or Registered Indians (First Nations), including:

- ▶ Leadership selection
- ▶ Land management
- ▶ Membership
- ▶ Band monies, trusts, wills and estates
- ▶ Bylaws and administration
- ▶ Education

Following the recommendations of the Penner (1983) and RCAP (1995) reports, and the realization that not all First Nations will be ready and willing to enter into comprehensive self-government agreements in the foreseeable future, a number of initiatives were undertaken to provide for incremental self-government, either by way of providing for enhanced responsibility within the *Indian Act*, or by way of legislative initiatives outside of the *Indian Act*.

Incremental self-government initiatives providing for greater self-determination within s. 91(24) date back to 1974, when the *Indian Oil and Gas Act* came into force during the first global energy crisis, to provide the tools necessary to operate in a heavily regulated oil and gas industry.<sup>88</sup> Since that time, numerous other legislative initiatives have been undertaken to provide for greater self-determination over leadership selection, land management, taxation, membership, and the management of band moneys within the *Indian Act* (“custom” elections, land management, membership, and taxation). These initiatives, which are optional and First Nation-specific, are supported by either Indigenous Services Canada, or First Nation-led institutions. Similarly, fiscal arrangements have evolved to accommodate demands for greater autonomy when it comes to the use of funds, reporting, and renewal intervals, while at the same time addressing First Nations’ concerns related to “default management.” Finally, First Nations are taking over the design and delivery of “province-like” programs and services on a sectoral basis by aggregating along nation, treaty, cultural and geographic lines.

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<sup>88</sup>Government of Canada, Canada Gazette “Canada Gazette, Part I, Volume 152, Number 20: Indian Oil and Gas Regulations” May 2018, <http://www.gazette.gc.ca/rp-pr/p1/2018/2018-05-19/html/reg2-eng.html>.



## 5.1.1 Leadership Selection

For First Nations not signatory to a comprehensive self-government agreement, there are three options for leadership selection under s.91(24):

### **Indian Act Elections**

Sections 74-77 of the *Indian Act* provide the basis for First Nation leadership selection, and the corresponding *Indian Band Election Regulations* the process by which leadership selection shall take place. For First Nations operating under the *Indian Act* election regime, the Minister responsible:

- ▶ Approves the appointment of electoral officers.
- ▶ Trains and supports electoral officers during the election to ensure that election rules are followed.
- ▶ Approves the First Nation council's choice of electoral officer or appoints the electoral officer when there is no First Nation council in place.
- ▶ Receives, investigates and decides on election appeals.

Under the *Indian Act*, elections must be held every two years. Approximately 200 First Nations in Canada hold elections under the *Indian Act* and the *Indian Band Election Regulations*.<sup>89</sup>

### **Custom Elections**

Under subsection 74(1) of the *Indian Act*, a First Nation can seek a Ministerial order removing it from the *Indian Act* election provisions upon approval of the First Nations' "custom" election code. In the case of First Nations operating under custom election codes, the responsible Minister has no role in elections i.e. he/she does not interpret, decide on the validity of the process, or resolve election appeals. Rather, the Minister's role is limited to recording the election results provided by the First Nation. When a dispute arises concerning a community or custom election process, it must be resolved according to the related provisions in a community's election code, or by the courts.<sup>90</sup> Approximately 330 First Nations currently operate under custom election codes, outside of the *Indian Act*, an option that has been available since 1988.

### **First Nations Election Act**

Under the *First Nations Elections Act* (2015), which is optional for First Nations wishing to remove themselves from the *Indian Act*'s election provisions or go beyond what is possible in a custom election regime, First Nations may:

- ▶ Establish a term of office for Chief and Council up to four years;
- ▶ Decide by resolution to reduce the number of councillor positions;
- ▶ Reduce the minimum election period to 65 days from the 79 required under the *Indian Act*; and
- ▶ Establish various procedures and penalties related to nominations, balloting, and removal from office.

Currently there are 48 First Nations operating under the *First Nations Elections Act*,<sup>91</sup> the vast majority of which are to be found in Atlantic and Western Canada, with only three in Ontario. Section 6 of this Report will explore the role of First Nations-led institutions in supporting First Nations' efforts to achieve self-determination incrementally through s.91(24) legislative initiatives related to leadership selection, and governance more broadly.

<sup>89</sup>Government of Canada, Indigenous and Northern Affairs Canada, "Leadership Selection in First Nations," Retrieved April, 2018, <https://www.aadnc-aandc.gc.ca/eng/1323195944486/1323196005595>.

<sup>90</sup>Ibid.

<sup>91</sup>First Nations Elections Act, Schedule: Participating First Nations, Retrieved June 2018, <http://laws.justice.gc.ca/eng/acts/F-11.65/page-5.html#h-22>.

## 5.1.2 Land Management

Sections 18 through 37 of the *Indian Act* provide for Ministerial authority of the management of reserve lands. Land management generally includes activities related to the ownership, use and development of land for personal, community and economic purposes. For the First Nations operating under the *Indian Act* land management regime, Indigenous Services Canada works with First Nations<sup>92</sup> to:

- ▶ Approve the allotment of reserve land to individuals;
- ▶ Prepare transactions for reserve surrenders and designations;
- ▶ Manage proposals for additions of land to reserves;
- ▶ Review and approve transfers of land between band members; and
- ▶ Approve and enforce leases, licenses and permits on reserve lands.

Most First Nations (approximately 450) are still operating under the *Indian Act* land management regime.

### **First Nations Land Management Act**

The *First Nations Land Management Act* (FNLMA) provides signatory First Nations the authority to make laws in relation to reserve lands (including create their own system for making reserve land allotments to individual First Nation members), resources, and the environment. FNLMA also provides the authority to address matrimonial real property interests or rights “in cases of breakdown of marriage, respecting the use, occupation and possession of First Nation land and the division of interests in First Nation land.”<sup>93</sup>

Approximately 130 First Nations are in the operational or developmental stages of managing their lands under FNLMA,<sup>94</sup> the vast majority of them in the western provinces (BC, Alberta, Saskatchewan and Manitoba), although in terms of percentage take-up by region, Ontario is second only to BC, with 32 of its 124 First Nations (approximately 25%) taking-up jurisdiction, as opposed to one-third of First Nations on BC.

Section 6 of this Report will explore the role of First Nations-led institutions in promoting good governance, and First Nations’ efforts to achieve self-determination through incrementally through s.91(24) legislative initiatives related to land management.

### **First Nations Commercial and Industrial Development Act**

The *First Nations Commercial and Industrial Development Act* (FNCIDA) was introduced in the House of Commons on November 2, 2005, and came into force on April 1, 2006. The First Nation-led legislative initiative was developed in cooperation with five partnering First Nations (Squamish Nation of British Columbia; Fort McKay First Nation and Tsuu T’ina Nation of Alberta; Carry the Kettle First Nation of Saskatchewan and Fort William First Nation of Ontario), all of which passed Band Council Resolutions in support of the legislation.

Because neither the *Indian Act* nor any other piece of legislation with the s.91(24) legislative framework provides regulations for commercial or industrial development on reserve lands, FNCIDA was created to provide First Nations with the ability to mirror off-reserve regulatory regimes on a province-by-province basis. Known as ‘incorporation by reference,’ FNCIDA ensures that projects on-reserve are subject to regulatory regimes similar to those off-reserve, levelling the playing field for investment. Regulations are project-specific, developed in cooperation with the First Nation and the relevant province, and are limited to the specific lands related to the project. Additionally, the regulations allow the federal government to delegate monitoring and enforcement of the new regulatory regime to the province via an agreement between it, the

<sup>92</sup>Government of Canada, Indigenous and Northern Affairs Canada, “Land Management” Retrieved June 2018, <https://www.aadnc-aandc.gc.ca/eng/1100100034737/1100100034738>.

<sup>93</sup>First Nations Land Management Act, Retrieved June 2018, <http://laws-lois.justice.gc.ca/eng/acts/F-11.8/>.

<sup>94</sup>Land Advisory Board Resource Centre, “Member Communities,” Retrieved June, 2018, <https://labrc.com/member-communities/>.

First Nation, and the province.

In 2010, FNCIDA was amended by Bill C-24, the *First Nations Certainty of Land Title Act*. The amendments allow First Nations to request that commercial real estate developments on-reserve (retail, industrial parks, etc.) are supported by a recognized land title system and assurance fund, identical to the provincial regime off-reserve. The certainty of land title granted by such a regime increases investor confidence, making the value of the property comparable to similar developments off-reserve.<sup>95</sup>



<sup>95</sup>Government of Canada, Indigenous and Northern Affairs Canada, "First Nations Commercial and Industrial Development Act," Retrieved Aug 2018, <https://www.aadnc-aandc.gc.ca/eng/1100100033561/1498848820817>



### 5.1.3 Taxation and Financial Management

First Nation tax authorities levy and collect taxes in the same manner as other local governments throughout Canada. First Nation tax systems base taxation on a property assessment, use market value assessment methods, use professional assessors, and set rates based on a budget. Procedures for assessment appeals and tax enforcement in First Nation tax systems are also similar to other local governments.<sup>96</sup>

#### **Indian Act Section 83**

Section 83 of the *Indian Act* states, in part:

83 (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;<sup>97</sup>

A First Nation wishing to levy property taxes pursuant to section 83 of the *Indian Act* must establish their property taxation system by passing property taxation and assessment by-laws, as well as by-laws dealing with the setting of annual tax rates and the expenditure of property taxation revenues. These by-laws must comply with all requirements under the *Indian Act* and any policies developed by the First Nations Tax Commission (FNTC) (see section 6).

#### **First Nations Fiscal Management Act**

The *First Nations Fiscal and Statistical Management Act* (FNFSMA) came into force on April 1, 2006. The objective of the optional FNFMA was to enable First Nations to participate more fully in the Canadian economy, while meeting local needs, by:

- ▶ Strengthening First Nations real property tax systems and First Nations financial management systems.
- ▶ Providing First Nations with increased revenue raising tools, strong standards for accountability, and access to capital markets available to other governments.
- ▶ Allowing for the borrowing of funds for the development of infrastructure on-reserve through a co-operative, public-style bond issuance.

FNFSMA was developed to address economic development and fiscal issues on-reserve so as to improve certainty, confidence and infrastructure for participating First Nations, taxpayers and investors. The FNFSMA legislative framework established four national institutions:

- ▶ First Nations Tax Commission
- ▶ First Nations Financial Management Board
- ▶ First Nations Finance Authority
- ▶ First Nations Statistical Institute

In March 2012 the federal government tabled Bill C-38, “An Act to implement certain provisions of the budget,” which among other provisions amended FNFSMA to rename it the “First Nations Fiscal Management Act”, and repeal sections of the FNFSMA to remove the FNSI. Bill C-38 came into force in June 2012, and on April 1, 2013 FNFSMA was renamed *First Nations Fiscal Management Act*, eliminating the First Nations Statistical Institute. As of July, 2018, 229 First Nations have been added to the FNFMA Schedule.<sup>98</sup>

<sup>96</sup>First Nations Tax Commission, “Section 83 of the Indian Act, Retrieved July, 2018, <http://fntc.ca/s-83-toolkit/>.

<sup>97</sup>Indian Act, Retrieved July 2018, <http://laws-lois.justice.gc.ca/eng/acts/i-5/FullText.html>.

<sup>98</sup>Government of Canada, Indigenous and Northern Affairs Canada, “First Nations Fiscal Management Act, Retrieved June 2018, <https://www.aadnc-aandc.gc.ca/eng/1393512745390/1498849002682>.

## 5.1.4 Indian Moneys

“Indian Moneys” refers to moneys collected, received or held in trust by Indian and Northern Affairs Canada (INAC) for the use and benefit of First Nations. There are two types of Indian moneys: individual moneys (moneys are managed by DISC on behalf of Status Indian minors and dependent adults under sections 51-52 of the *Indian Act*), and band moneys (“capital” and “revenue” moneys managed by DISC under sections 61-69 of the *Indian Act*).

Capital moneys include oil and gas royalties, the sale of a First Nation’s reserve lands, or other proceeds from the sale of timber, oil and gas or gravel. Revenue moneys include all band moneys other than capital moneys, usually from the sale of renewable resources, reserve land activities such as leases, permits and rights-of-way, and fines and interest earned on capital. Historically, the Minister responsible for the *Indian Act* has exercised total control over individual and band moneys, a substantial volume of transactions and a significant amount of money, on an annual basis. The exercise of this fiduciary duty has at times been contentious, and the source of significant litigation.<sup>99</sup> This perhaps points to a demand for options that retain the Crown’s fiduciary role while removing the day-to-day management of moneys.

### ***Indian Oil and Gas Act***

The *Indian Oil and Gas Act* (IOGA), passed in 1974 and updated in 1985 and 2009<sup>100</sup>, provides both First Nations and the Government of Canada with modern legislative and regulatory tools to manage oil and gas activities on designated First Nation reserve lands south of the 60th parallel, providing First Nations with a modern regulatory framework for the management of oil and gas (and resulting capital Moneys) outside of the *Indian Act*. The IOGA, and associated *Indian Oil and Gas Regulations*, apply all potential oil and gas producing First Nations, setting-out terms, conditions and procedures for exploration, discovery, licensing, operation, environmental protection, fees and royalties. The operation of the regulatory framework is supported by Indian Oil and Gas Canada (IOGC), a special operating agency within DISC.<sup>101</sup> In fiscal year 2016-2017, IOGC managed the oil and gas resources of 57 First Nations.

On May 14, 2009, amendments to modernize the Indian Oil and Gas Act (received royal assent, resulting in a new Indian Oil and Gas Act (2009) The IOGA (2009) is not, however, currently in force, as it is dependent upon the coming into force of new regulations that would replace the existing Indian Oil and Gas Regulations, 1995.<sup>102</sup>

### ***First Nations Oil and Gas and Moneys Management Act***

The *First Nations Oil and Gas and Moneys Management Act* (FNOGMMA) came into force in 2006. FNOGMMA is optional legislation that allows a First Nation to opt out of the capital and revenue moneys management provisions of the *Indian Act* and provide for the release of those moneys to the management and control of participating First Nations. First Nations wishing to participate in the FNOGMMA regime are required to develop a financial code specifying, but not limited to: the mode of holding moneys; the manner of expending moneys; accountability for the expenditure of those moneys; procedures for disclosing conflicts of interests in the expenditure of those moneys, and; provisions for the amendment of the code by the First Nation. Once these requirements are met, and the First Nation and Minister enter into a payment agreement setting-out how capital and revenue moneys will be paid out to the First Nation, the First Nation conducts a community vote to ratify its financial code and approve the payment of capital and revenue moneys to the First Nation. FNOGMMA is supported by two regulations: *First Nations Oil and Gas and Moneys*

<sup>99</sup>See “Recommendations on First Nations Access to Indian Moneys” (<http://www.naedb-cndea.com/reports/recommendations-on-first-nations-access-to-indian-moneys.PDF>) and “Evaluation of Indian Moneys, Estates and Treaty Annuities” (<http://www.aadnc-aandc.gc.ca/eng/1428673130728/1428673159469>).

<sup>100</sup>The 2009 Act is not currently in force because regulations, authorized under that statute, need to be completed to provide a complete framework for managing oil and gas activity on First Nations reserve lands: <http://www.pgic-iogc.gc.ca/eng/1517345045654/1517345086235>.

<sup>101</sup>Government of Canada, Oil and Gas Canada, Retrieved July 2018, <http://www.pgic-iogc.gc.ca/eng/1100110010002/1100110010005>.

<sup>102</sup>Government of Canada, “Indian Oil and Gas Regulations” Canada Gazette,” Part I, Volume 152, Number 20, May 19, 2018, <http://www.gazette.gc.ca/rp-pr/p1/2018/2018-05-19/html/reg2-eng.html>.

<sup>103</sup>“The First Nations Oil and Gas and Moneys Management Act is both an instrument for economic development on Indian reserves in Canada, and a significant milestone in First Nation self-government over the oil and gas sector on Indian reserves in Canada.” Alberta Law Review: <https://albertalawreview.com/index.php/ALR/article/download/258/258>.

*Management Voting Regulations*, and the *First Nations Oil and Gas Environmental Assessment Regulations*.<sup>103</sup> To date, one First Nation has taken up authority for moneys under FNOGMMA, and none for oil and gas.<sup>104 105</sup>

The legislative initiatives outlined above have provided First Nations with the necessary tools to exercise greater autonomy in decision-making in matters that had previously been the purview of the Minister responsible for Indigenous affairs. Section 6 of this Report will explore the role of First Nations-led institutions in supporting First Nations' efforts to achieve self-determination incrementally through these s.91(24) legislative initiatives.

<sup>104</sup>First Nations Oil and Gas and Moneys Management Act (S.C. 2005, c. 48) Schedule 2  
<http://laws-lois.justice.gc.ca/eng/acts/F-11.9/page-8.html#docCont>.

<sup>105</sup>Government of Canada, "Kawacatoose First Nation Becomes First Community to Take Full Control over its Land and Resource Moneys" March 20, 2014,  
<https://www.canada.ca/en/news/archive/2014/03/kawacatoose-first-nation-becomes-first-community-take-full-control-its-land-resource-moneys.html>.



## 5.2 Fiscal Autonomy within the s.91(24) Framework

The latitude to determine how financial resources are to be used (fiscal autonomy) is an essential component of a community's self-determination. A First Nation community has two sources of revenue: government transfers (primarily federal, given the Government of Canada's jurisdiction for "Indians, and Lands reserved for Indians" under s.91(24)), and own source revenues (OSRs). Federal transfers consist of "core" funding to support band operations, and program or project-based funding that may vary from year-to-year e.g. economic development funding. Transfers can also come in the form of payments as a result of out-of-court settlements for land and other claims. OSRs most often consist of revenues from commercial operations, taxation, investments, and agreements with the private sector related to resource development on traditional territories ("impact benefit agreements").

While the specifics of fiscal autonomy fall outside the scope<sup>106</sup> of the FNGP, a brief overview of various aspects of OSR as it relates to First Nations under the *Indian Act* is provided here in order to further situate its significance in the context of the broader self-determination analytical framework being proposed in this report.

<sup>106</sup> A separate, Government of Canada-First Nations working group – New Fiscal Relationship - is examining options related to federal transfers) <https://www.sac-isc.gc.ca/eng/1499805218096/1521125536314>.

## 5.2.1 Federal Transfers

The Government of Canada provides funding to First Nations to cover a range of basic operating costs, infrastructure; programs and services for band members, and health, including:

- ▶ “Indian Government Support”
  - Band Support Funding
  - Employee Benefits
  - Professional and Institutional Development
  - Tribal Council Funding
- ▶ Housing & Capital Infrastructure
- ▶ Economic Development
- ▶ Health
- ▶ Social Services
- ▶ Operations and maintenance

DISC uses five types of authorities to disperse funding to First Nations governments, listed here in accordance with the requisite level of flexibility:

- ▶ A **Grant** is the most flexible form of transfer payment, as it is not subject to a detailed accounting or normally subject to audit by DISC. Eligibility and entitlement is established in advance of distributing the grant, and the recipient may need to meet certain pre-conditions for its receipt, as well as being required to report on results achieved, but the funding can generally be distributed according to the needs of the individual First Nation.
- ▶ **Block Contribution Funding** provides funding over a period of up to ten years, as well as the flexibility to transfer funds across programs and retain surpluses. This flexibility comes with the responsibility for deficits. Eligible First Nations and Tribal Councils can design programs and allocate funds to meet community needs and priorities provided that certain minimal program requirements are met.
- ▶ **Flexible Contribution Funding** is an option available to First Nations governments allowing funds to be moved within cost categories of a single program during the active lifetime of the relevant funding agreement. The recipient can redirect funding among the various cost categories of the specific program being funded, as established in the funding agreement. Unspent funds must be returned to INAC at the end of the project, program, or agreement.
- ▶ **Fixed Contribution Funding** is provided as an option to First Nations governments where annual funding is based on predictable formulae or fixed costs. It is distributed on a program basis with incentives to ensure that programs and services are managed effectively within a fixed budget. Surpluses can be retained for use at the discretion of the First Nation or Tribal Council, provided that certain minimum program requirements are upheld. Reporting requirements are supposed to assess program performance, rather than assessing for how each dollar was spent.
- ▶ **Contributions** are conditional transfer payments dispensed for specific purposes that cannot be altered, subject to performance conditions outlined in a funding agreement, account and audit. There is provision for advances to be paid, but no provision for the retention or carry forward of surpluses at the end of the fiscal year, with unused monies returning to INAC. This is the basic funding unit INAC uses to fund First Nations, and the most commonly used.

DISC uses these five authorities as building blocks to construct various funding arrangements for First

Nations and Tribal Councils. Since 2011, the principal funding arrangements currently in use are:

- ▶ First Nations and Tribal Councils National Funding Agreements
- ▶ Streamlined Funding Agreements for First Nations (Optional)
- ▶ Canada Common Funding Agreements for First Nations and Tribal Councils (which are similar to First Nations and Tribal Councils National Funding Agreements, except that they consolidate programs and funding available from departments other than DISC)

In 2016 the Fraser Institute undertook a comparative study of transfers (federal and provincial) to Aboriginal governments, and OSR.<sup>107</sup> Data for federal transfers was drawn from Indigenous Affairs departments spanning the period 1946 to 2014. The study found that transfers to Aboriginal peoples (including to self-governing First Nations and Inuit peoples) rose from \$82 million annually in 1946/47 to over \$7.9 billion in 2013/14 (inflation-adjusted to 2015 dollars). It grew from \$939 per registered First Nation individual in 1949/50 to \$8,578 in 2013/14—an increase of 814%.

A separate study<sup>108</sup> was conducted of spending by Health Canada, which delivers health-care benefits to First Nations and Inuit peoples that other Canadians normally receive from an employee benefit package or must purchase extra insurance for, or purchase out-of-pocket, such as dental and vision care, pharmaceuticals, mental health counseling, and medical transportation. In inflation-adjusted terms, Health Canada spending on First Nations/Inuit health care increased from just under \$1.4 billion in 1994/95 to \$2.6 billion as of 2013/14. On a per-capita basis, the amount spent per First Nations/Inuit person by Health Canada rose from \$2,358 in 1994/95 to \$2,823 in 2013/14. Included in the \$2.6 billion figure for 2013/14 is the \$1 billion cost of supplementary health-care benefits for 808,686 First Nation and Inuit people, the Non-Insured Health Benefits Program.<sup>109</sup>

Federal transfers to First Nations have come under criticism in recent years for a number of reasons, including the reporting burden they place on First Nations, in some cases the short-term nature of funding agreements, and evidence that funding has not kept pace with that provided by provinces, particularly with respect to education. To this end, in 2016 the Government of Canada and the Assembly of First Nations (AFN) embarked on a joint examination of the fiscal relationship between Canada and First Nations in order to identify outstanding issues and develop new approaches to funding First Nations' governments. The resulting report identified a common understanding between the two parties of the challenges faced by First Nations operating under the auspices of the *Indian Act*, and the current fiscal relationship:

- ▶ Insufficient transfers
- ▶ Insufficient and under-utilized revenue generation opportunities
- ▶ Inflexible and unpredictable funding arrangements
- ▶ Excessive administrative and reporting burdens
- ▶ Excessive focus on compliance rather than results

While all of these issues speak in some way, both directly and indirectly, to fiscal autonomy and thence self-determination, “inflexible and unpredictable funding arrangements” is perhaps the greatest impediment to self-determination as it speaks to a First Nations' government's ability to decide how it wishes to allocate finite financial resources. In an effort to address this issue on a priority basis, the federal government announced in December of 2017 that it would introduce 10-year funding grants.

The 10-year grant is a funding mechanism that will be made available as early as April 1, 2019<sup>110</sup> to First Nations that provide a written request and that meet the eligibility requirements. These requirements, co-developed with the AFN and the FNFMB, assess the financial governance and performance of recipients. To continue to receive grant funding, recipients will have to demonstrate that they continue to meet these eligibility requirements during the entire term of the grant.

<sup>107</sup>Fraser Institute, “Government Spending and Own-Source Revenue for Canada's Aboriginals: A Comparative Analysis,” March 10, 2018, <https://www.fraserinstitute.org/studies/government-spending-and-own-source-revenue-for-canadas-aboriginals>.

<sup>108</sup>Health Canada's First Nations and Inuit Health Branch was transferred to Indigenous Services Canada in 2017 with the reorganization of Indigenous and Northern Affairs Canada.

<sup>109</sup>Ibid.

<sup>110</sup>Government of Canada, Indigenous Services Canada, “10-Year Grant” Retrieved July, 2018, <https://www.sac-isc.gc.ca/eng/1527080791657/1527080813525>.



It is expected that 10-year grants will address a number of First Nations' concerns vis-à-vis current funding models by providing:

- ▶ A 10-year term (most contribution agreements have shorter terms)
- ▶ Flexibility to allocate, manage and use funding to better accommodate local needs and changing circumstances and priorities
- ▶ Ability to retain unspent funds
- ▶ Reduced administrative and reporting burden

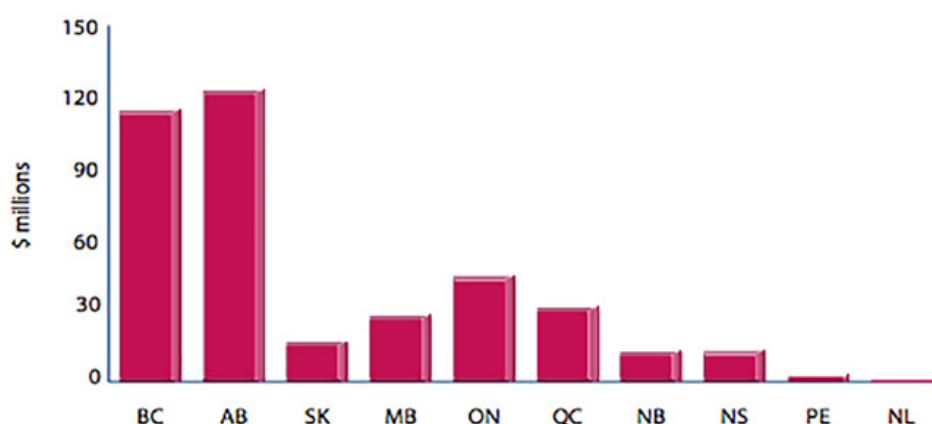


## 5.2.2 Own Source Revenue

The same Fraser Institute study referenced above extracted from First Nations' publicly-available audited financial statements to determine that First Nations generated over \$3.3 billion dollars in claimed own-source revenue for the year 2013/14.<sup>111</sup> Only 11% (\$386.6 million) was identified as natural resource revenue, the rest being classified as from other sources. Highlights include:

- ▶ Alberta First Nations generated the highest levels of own-source revenue, cumulating to over \$711 million, of which \$122 million was classified as natural resource revenue.
- ▶ While Alberta, BC (\$687 million), and Ontario (\$648 million) all raise significantly more own-source revenue than the other provinces, as a share of the overall revenue First Nations communities receive (i.e. relative to federal transfers) Maritime First Nations generated the highest rate of OSR, with 51 percent of New Brunswick's, 60 percent of Nova Scotia's, and 50 percent of Prince Edward Island's revenue coming from OSR.
- ▶ Over 100 First Nations communities in Canada were generating more own-source revenue for their communities than they received in government transfers. For example:
  - Tsuu T'ina Nation in Alberta was the top earner of own-source revenue in 2013/14. In that year, the community generated over \$113 million in own-source revenue—over five times the amount Tsuu T'ina Nation received in government transfers;
  - Frog Lake First Nation in Alberta generated the most natural resource based own-source revenue in the country—over \$45.6 million; and
  - Yale First Nation in British Columbia generated the largest natural resource revenue, per capita, in the country—\$45,557 per person.

**Own Source Revenue (OSR) by Province, 2013/2014**<sup>112</sup>



Notes: To access individual statements, go to community profiles at INAC.  
Sources: INAC, 2015b.

Unlike OSRs derived by self-governing First Nations, OSRs earned by First Nations under the *Indian Act* are not 'clawed-back.'

<sup>111</sup>Fraser Institute, "Government Spending and Own-Source Revenue for Canada's Aboriginals: A Comparative Analysis," March 10, 2018, <https://www.fraserinstitute.org/studies/government-spending-and-own-source-revenue-for-canadas-aboriginals>.

<sup>112</sup>Graph taken from, Fraser Institute, "Government Spending and Own-Source Revenue for Canada's Aboriginals: A Comparative Analysis," March 10, 2018, <https://www.fraserinstitute.org/studies/government-spending-and-own-source-revenue-for-canadas-aboriginals>.



## 5.3 Sectoral Self-Government Initiatives within the s.91(24) Framework

In parallel to legislative initiatives designed to provide for greater self-determination in local matters within the s.91(24) framework, First Nations are assuming control of “province-like” programs and services on a “sectoral,” or jurisdiction-specific basis that had previously been delivered directly by the federal government, the provincial government, or a combination of the two, with little clarity in terms of jurisdiction, accountability, and financing.





### 5.3.1 Education

The numbered treaties contain a variety of education provisions, agreements which were subsequently recognized and affirmed by s.35 of the *Constitution Act*, 1982. For example, the treaties variously require the government to provide “a school in each reserve” (Treaties 1 and 2), or to “maintain schools for instruction” (Treaties 3 and 5) or “to pay such salaries of teachers to instruct the children of said Indians, and also to provide such school buildings and educational equipment as may seem advisable to His Majesty’s Government of Canada” (Treaty 9)<sup>113</sup>. In practice, the *Indian Act* has been used to deliver educational services, but as noted by the Standing Senate Committee on Aboriginal Peoples, the legislation “deals largely with truancy and makes no reference to substantive education issues or the quality of education to be delivered.”<sup>114</sup> It is estimated that there are currently 530 schools on reserve, funded by DISC, but the exact number is not known because DISC’s Integrated Capital Management System does not definitively identify which assets are schools and which are other types of education facilities assets (i.e. main school building versus a shed).<sup>115</sup>

However, while the *Indian Act* has long (and notoriously) contained provisions requiring the Minister to authorize the construction of schools, compel First Nations children to attend those schools, it has also always contained provisions allowing the Minister to enter into agreements with provinces, territories or school boards for the delivery of education services. The last two decades have seen the emergence of a number of agreements between First Nations the Government of Canada (and in most cases the provinces as a tripartite signatory) that transfer jurisdiction for the delivery of education to First Nation Boards of Education.

In 1997, nine of Nova Scotia’s 13 First Nations and the Governments of Canada and Nova Scotia signed “**An Agreement with Respect to Education in Nova Scotia**,”<sup>116</sup> which was enshrined in legislation the following year by the Governments of Canada and Nova Scotia. The Agreement and legislation provide participating First Nations with jurisdiction over primary, elementary and secondary education on reserve, through the creation of the Mi’kmaq Kina’matnewey (MK) school board, with funding from both the federal and provincial governments. The Agreement also stipulated that the primary, elementary, and secondary programs and services offered by MK would be comparable to those provided by other education systems in Canada, allowing for the transfer of students between education systems without academic penalty. Bear River, Paqtnkek and Glooscap First Nations joined the Agreement in 2005, 2011 and 2014, respectively.

Because the Agreement with Respect to Education in Nova Scotia was enshrined in legislation, it is considered to be a self-government agreement, the only one to date outside of comprehensive self-government agreements of the type in effect in Quebec, NWT, Yukon, and British Columbia. However, First Nations, the provinces and Canada have since entered into Memoranda of Understanding and other agreements that, though not legislated, none the less provide First Nation school boards with funding and autonomy over curricula and the day-to-day management of their education systems. Examples include:

- ▶ New Brunswick Memorandum of Understanding (2008): 15 First Nations
- ▶ Manitoba Letter of Understanding (2009): 46 First Nations
- ▶ Alberta Education Memorandum of Understanding (2010): 48 First Nations
- ▶ Saskatoon Tribal Council Memorandum of Understanding (2010): 6 First Nations
- ▶ Prince Edward Island Memorandum of Understanding (2010): 2 First Nations
- ▶ British Columbia Tripartite Education Framework Agreement and BC First Nations Education Steering Committee (2012): 113 First Nations
- ▶ First Nation Education Council Quebec Memorandum of Understanding (2012): 17 First Nations

<sup>113</sup>Government of Canada, Indigenous and Northern Affairs Canada, “Treaty Texts”, Retrieved on July 2018, <http://www.aadnc-aandc.gc.ca/eng/1370373165583/1370373202340>.

<sup>114</sup>Senate of Canada, “Reforming First Nations Education, Dec 2011, <https://sencanada.ca/content/sen/committee/411/appa/rep/rep03dec11-e.pdf>.

<sup>115</sup>Government of Canada, Indigenous and Northern Affairs Canada, “Summative Evaluation of the Education Facilities and Other Community Infrastructure Sub Programs” Retrieved on July 2018; <http://www.aadnc-aandc.gc.ca/eng/1467300208069/1467300319443>.

<sup>116</sup>Government of Canada, “Agreement with Respect to Mi’kmaq Education in Nova Scotia,” Retrieved April, 2018 <https://www.canada.ca/en/news/archive/2014/06/agreement-respect-mi-kmaq-education-nova-scotia.html>.

- ▶ Nishnawbe Aski Nation Memorandum of Understanding (2013): 49 First Nations
- ▶ Mamu Tshishkutamashutau – Innu Education (2015): All Innu First Nations
- ▶ Agreement to Support the School Attendance and Academic Success of Innu Youth (2016): 7 First Nations
- ▶ Tripartite Education Memorandum of Understanding with the Association of Iroquois and Allied Indians, Ontario and Canada (2017): 5 First Nations
- ▶ Maskwacis Cree School System Agreement – Alberta (2018): 5 First Nations

As a result, in most provinces the vast majority of First Nations (excepting Saskatchewan and Ontario) are now in control of their education systems, though in most cases funding is not guaranteed by legislation.

## 5.3.2 Health

While some of the numbered treaties contain provisions<sup>117</sup> for a “medicine chest,” unlike education, the legislative base for which was established by the *Indian Act*, the s.91(24) framework does not contain legislation explicitly providing for health care and services for “Indians and Lands Reserved for Indians.” Rather, the Government of Canada has provided health services, including clinical, emergency, and non-insured health benefits since the 1950s by way of policy only. However, while many First Nations have nursing stations on reserve, and some larger First Nations have hospitals, in practice most First Nations rely on provincial health services, particularly for emergency, specialized, surgical and long-term care. Provinces then bill the Government of Canada for services provided to Registered Indians.

### **Health Transfer Policy**

The Health Transfer Policy<sup>118</sup>, introduced in 1989, ushered in ways for *individual* Indigenous communities to take control of community-based services and negotiate with the federal government directly for community-based services, and some regional programming. The objectives of the Health Transfer Policy were to:

- ▶ Permit health program control to be assumed at a pace determined by the community;
- ▶ Enable communities to design health programs to meet their needs;
- ▶ Ensure that certain mandatory public health and treatment programs be provided;
- ▶ Strengthen the accountability of Chiefs and Councils to community members; and
- ▶ Provide communities the financial flexibility to allocate funds according to community health priorities and to retain unspent balances.

The Health Transfer Policy was optional for all First Nation communities south of the 60th parallel, and provided for multi-year (three to five year) agreements. Take-up on the Health Transfer Policy was lackluster.<sup>119</sup> While some communities entered into agreements to access funding and take greater control over their health care, the program was set-up to transfer funding to individual First Nations, rather than aggregations, and partly as a result few were willing to take on the responsibility of delivering health care. In 1994, Treasury Board approved the Integrated Community-Based Health Services Approach as a second transfer option for communities to move into a limited level of control over health services. With the introduction of the Inherent Right to Self-Government policy in 1995, First Nations could avail themselves of yet another vehicle for assuming jurisdiction for health care.

### **First Nations Health Authority**

In 2013, the First Nations Health Authority (FNHA) in British Columbia became the first province-wide body of its kind to assume programs and services once delivered by Health Canada’s First Nations Inuit Health Branch (health promotion and protection, environmental health, Non-Insured Health Benefits) and other health program and service funding arrangements for 203 recognized First Nations communities in BC.

In its Fall 2015 report, “Establishing the First Nations Health Authority in British Columbia,”<sup>120</sup> the Office of the Auditor General of Canada found that: “The sustained commitment of leaders from British Columbia First Nations, the Government of Canada, and the Government of British Columbia was important to establishing the First Nations Health Authority, as was the identification of a single First Nations point of contact to negotiate with the federal and provincial governments.” Additionally, the report noted that the establishment of the FNHA was successful in part because the Tripartite Framework Agreement on First Nation Health Governance and the Canada Funding Agreement adequately addressed challenges related to:

<sup>117</sup>See in particular Treaty 6: <http://www.aadnc-aandc.gc.ca/eng/1100100028710/1100100028783>.

<sup>118</sup>Government of Canada, Indigenous Services Canada, “Ten Years of Health Transfer First Nation and Inuit Control,” Retrieved Aug, 2018, <https://www.canada.ca/en/indigenous-services-canada/services/first-nations-inuit-health/reports-publications/funding/years-health-transfer-first-nation-inuit-control-health-canada-1999.html>.

<sup>119</sup>Ivana Spasovska “On-Reserve First Nations and Health Transfer Policy” Retrieved June, 2018, <https://hpsj.journals.yorku.ca/index.php/hpsj/article/download/36245/32987>.

<sup>120</sup>Government of Canada, Auditor General of Canada, “Report 7—Establishing the First Nations Health Authority in British Columbia,” 2015 Fall Reports, [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201602\\_07\\_e\\_41064.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201602_07_e_41064.html).



- ▶ Establishing service levels;
- ▶ Legislation to guide activities and the need to explore how legislation may change as circumstances evolve;
- ▶ A long-term funding mechanism; and
- ▶ Support for local capacity for program delivery in communities.

### **Charter of Relationship Principles Governing Health System Transformation in Nishnawbe Aski Nation (NAN) Territory**

In July of 2017, the governments of Canada, Ontario and the Nishnawbe Aski Nation signed a Charter of Relationship Principles Governing Health System Transformation in Nishnawbe Aski Nation (NAN) Territory. The Charter sets out common objectives and commits the three partners to working together to transform the delivery of healthcare to First Nations communities.

The primary objective of the NAN health Charter is to strengthen relationships among service delivery stakeholders to improve access to, and the quality of, existing health care infrastructure and programs and services. Although it does not explicitly contemplate the transfer of jurisdiction<sup>121</sup> or responsibility for the delivery of health programs and services to First Nations, it does mandate the signatories to consider “whether legislative changes may be required, to design a new health care system for First Nations in NAN Territory that includes sustainable funding models within a new fiscal arrangement; decision making structures that provide First Nations with authority, control and oversight; and enable multi-sectoral approaches,” with an emphasis on “local control and authority over health care services.”<sup>122</sup>

### **Manitoba Keewatinowi Okimakanak**

Manitoba Keewatinowi Okimakanak (MKO) and DISC entered into a Memorandum of Understanding in March of 2018 that will see the parties work together in a First Nation-led transformation of health care in the Keewatinowi territory. MKO is a political advocacy PTO representing 30 First Nation signatories to Treaties 4, 5, 6 and 10. The objectives of the MOU<sup>123</sup> are to:

- ▶ Improve integration of health and wellness programs by eliminating duplication, closing gaps and improving the co-ordination and efficacy of the health care systems;
- ▶ Improve the recruitment, retention and participation of professionals in the northern health system, with physicians and allied professionals as a priority; and
- ▶ Establish and define a collaborative and coordinated, bi-lateral partnership for a jointly articulated vision for a renewed relationship between the parties as it relates to health.

<sup>121</sup>The Charter is not an Agreement. Rather, it is a “relationship-strengthening document, and not intended to create or alter legal obligations on the part of NAN, First Nations, Canada, or Ontario, or to be a treaty.” <https://www.canada.ca/en/news/archive/2014/06/agreement-respect-mi-kmaq-education-nova-scotia.html>.

<sup>122</sup>Ibid.

<sup>123</sup>Government of Canada, Indigenous and Northern Affairs Canada, “A First Nation-led transformation will mean better health care services in the north” March 28, 2018, <https://www.newswire.ca/news-releases/a-first-nation-led-transformation-will-mean-better-health-care-services-in-the-north-678179483.html>.

### 5.3.3 Child and Family Services

As is the case with education, health care and policing, child and family services have historically been provided to First Nations by provinces, which then seek reimbursement of the costs from the federal government. In recent years, as the delivery of child and family services to First Nations by provinces has been criticized as being variously substandard, inconsistent, and/or culturally inappropriate, First Nations have moved to take control, albeit through a complex patchwork of jurisdiction, programs, agreements and funding arrangements with Canada and the provinces:

#### Roles and Responsibilities: First Nations Child and Family Services (FNCFS) Across Canada

Province	Take-up	Delegation of Protection
British Columbia	20 FNCFS agencies deliver services to 114 First Nations, with the province providing services to the 84 remaining communities.	A phased and graduated system of granting provincial delegation to FNCFS agencies, with levels of delegation going from prevention services only, to a full range of prevention and protection activities.
Alberta	17 First Nation-run agencies deliver child and family services to 37 of the 46 First Nations, with the provincial government providing services to the nine remaining First Nation communities.	All First Nation agencies are fully delegated by the province and provide both prevention and protection services to First Nations children and families ordinarily resident on reserve.
Saskatchewan	16 delegated FNCFS agencies deliver services to 66 of the 70 First Nations in Saskatchewan with the Province providing services to the 5 remaining communities	FNCFS agencies are fully delegated by the province and provide protection and prevention services to First Nation children and families ordinarily resident on reserve.
Manitoba	15 delegated FNCFS agencies deliver services to all 63 First Nation communities.	All 15 FNCFS agencies are fully delegated and provide protection and prevention services to all First Nation children and families on and off reserve.
Ontario	47 provincially-approved service-providers in Ontario deliver child protection and prevention services covering all First Nation communities. This includes 9 Aboriginal Child and Family Services Authorities and 38 Children's Aid Societies.	Ontario governs all aspects of funding and delivery of child and family services whether they operate on reserve, off reserve or both, and is reimbursed by the federal government pursuant to the Memorandum of Agreement Respecting Welfare Programs for Indians of 1965.
Quebec	15 FNCFS Agencies funded by INAC deliver child and family services in 19 First Nation communities, while three provincially-run Centres jeunesse serve eight other First Nation communities.	FNCFS Agencies in Quebec may be fully delegated (full range of protection and prevention services) or partly delegated (provision of prevention services only) by the Province of Quebec. Some First Nation communities therefore receive prevention services from one agency (usually a FNCFS agency) and protection services from another (usually a provincially-run Centre jeunesse).

Province	Take-up	Delegation of Protection
New Brunswick	10 child and family services delivery organizations (9 band-run programs and 1 FNCFS agency) in New Brunswick provide child and family services to 15 First Nations. The FNCFS Agency (Four Directions) provides aggregate service delivery to five communities. Madawaska First Nation receives services from Tobique child and family services, funding for which is flowed through the province of New Brunswick.	Unknown.
Nova Scotia	Mi'kmaq Family and Children Services Agency serves all 13 First Nation communities.	Mi'kmaq Family and Children Services Agency is fully delegated by the Province and provides protection and prevention services to First Nation children and families ordinarily resident on reserve.
Prince Edward Island	FNCFS funding flows to the Mi'kmaq Confederacy of Prince Edward Island (MCPEI) which provides prevention services to the two on-reserve First Nation communities in PEI.	INAC has an agreement with MCPEI through which MCPEI purchases protection services from the Province who delivers the protection services to the two First Nation communities.
Newfoundland and Labrador	Provincial government provides all child and family services directly to the two Innu communities (Natuashish and Sheshatshiu) in Labrador	INAC reimburses the Province for the costs of these services through a funding agreement. In addition, INAC provides direct funding to the Miawpukek First Nation to deliver prevention child and family services in that community and purchases protection services from the province.



### 5.3.4 Policing

The bulk of policing on First Nation reserves, much like the rest of Canada, was historically delivered by the Royal Canadian Mounted Police. In Ontario and Quebec, the Ontario Provincial Police (OPP) and the Sûreté du Québec (SQ) started to play a more active role on reserves as their capability and reach expanded to the more northerly portions of each province to meet economic and population expansions post-World War II. But an increasingly challenging policing environment, and the emergence of the Indigenous rights movement (the two most significant flashpoints of which were armed conflicts between First Nations, and the OPP and SQ) have been the driving force behind the emergence of First Nations policing services.

The First Nations Policing Program (FNPP) is a contribution program administered by Public Safety Canada. Through the FNPP, Public Safety provides financial support to First Nations policing services that are “professional, dedicated and responsive” to the First Nation and Inuit communities they serve. The FNPP operates pursuant to the First Nations Policing Policy, introduced in 1991. Under the FNPP, the Government of Canada provides funding towards 52% of eligible costs, with the provinces or territories providing the remaining 48%.<sup>124</sup> There are two main types of policing agreements under the FNPP:

- ▶ Self-administered Police Agreements, where policing services are managed by a First Nation or Inuit community, or group of communities pursuant to provincial policing legislation and regulations.
- ▶ Community Tripartite Agreements, where police officers from the RCMP provide dedicated policing services to a First Nation or Inuit community.

Currently there are 186 FNPP agreements in place in Canada, providing policing services to roughly 65% of First Nation and Inuit communities nation-wide. A total of 1,299 police officer positions receive funding under the FNPP, serving a population of approximately 422,000 in 453 communities across Canada.<sup>125</sup>

Beginning with First Nation health transfer initiatives in the 1980s and 1990s, to policing initiatives beginning in the 1990s, education in the 2000s and 2010s, to the more recent child and family services agreements, considerable progress has been made in rebuilding Indigenous Nations for the purposes of delivering province-like programs and services.

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<sup>124</sup>See First Nations Policing Program (Public Safety Canada) at: <https://www.publicsafety.gc.ca/cnt/rsrcls/pblctns/vltm-frst-ntns-plcng-2015/index-en.aspx>.

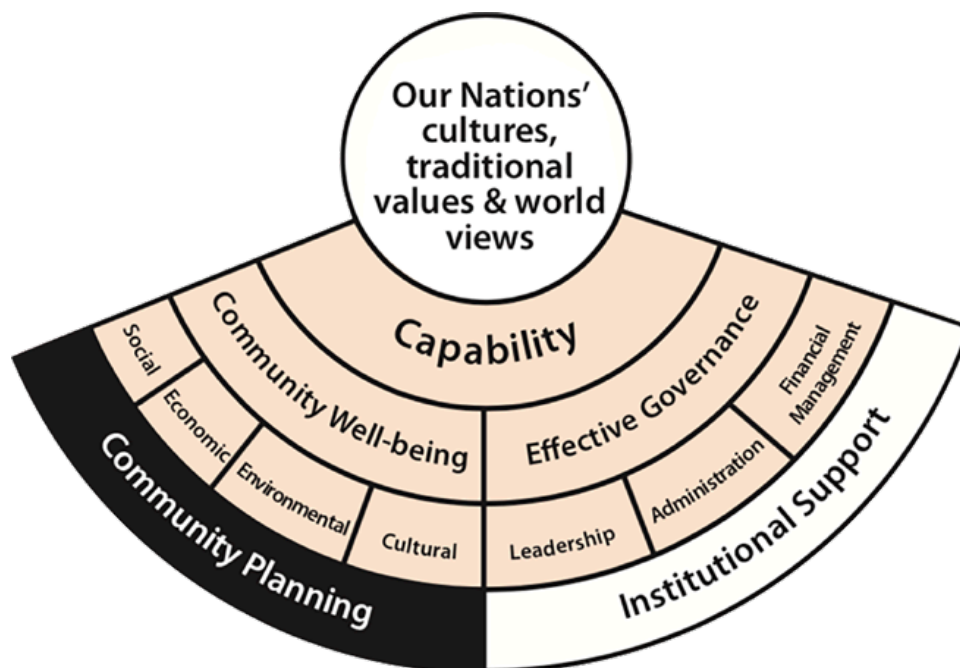
<sup>125</sup>Ibid.

## **5.4 Conclusion: Self-Determination and Nation Rebuilding within the s.91(24) Crown-Indigenous Relationship (Autonomy)**

Overall, efforts to encourage greater self-determination among First Nations under the s.91(24) legislative framework have met with qualified success. While strong minorities of First Nations have availed themselves of legislative initiatives within and outside of the *Indian Act* to take greater control of the management of their elections, revenues, finances, and lands, the majority of First Nations have not. At the same time, progress is being made in funding arrangements that enable greater First Nations' control over spending, debt management, and investment decisions. Finally, and in particular in the last decade, First Nations across Canada have overwhelmingly taken control of social programs and services such as health, education, child and family services, and policing, to the point where First Nations operating outside of such regimes are now the exception, rather than the rule.

## 6.0 Capability: Community Capacity-Building and Institutional Support for Self-Determination and Nation Rebuilding within the s.91(24) Legislative Framework

The third component at the core of community self-determination is “Capability.” As the framework suggests, a community’s capability (much like an individual’s “competence”) will have a direct bearing on the extent to which it is able to exercise its autonomy and enter into meaningful and effective relationships with other communities, and other levels of government. In other words, even if a given community has achieved relative autonomy – fiscal and jurisdictional – and strong relationships, it will not achieve any significant measure of self-determination. “Capacity” is a term often used in this context; however, Capability goes beyond the often quantitative measure associated with capacity (e.g. financial and human resources) and speaks more broadly to the systems, standards, and a comprehensive and holistic (or “sustainable”) approach a community takes to ensuring it is capable of exercising autonomy and entering into a stronger and more effective relationships with other communities, within a Nation and, by extension, as an integral part of a Crown-Indigenous relationship. This section will examine the two main components of a community’s capacity to effectively exercise self-determination, and the methodologies and institutions in place to support them: **Community Well-being**, and **Effective Governance**.





## 6.1 Community Well-being

An appreciation of the critical importance of community well-being to self-determination and Nation rebuilding has emerged in recent decades. While a detailed examination of community well-being is outside the scope of the FNGP's mandate, and is being examined elsewhere, its importance as it relates to self-determination will be provided here in order to further situate its significance in the context of the broader analytical framework being proposed in this Report.



## 6.1.1 Comprehensive Community Planning

Comprehensive Community Planning (CCP), a First Nations-driven model for the strengthening of First Nation community capability, was developed approximately 15 years ago. Collaboration between First Nations in British Columbia and the Atlantic, respective DISC regional offices, and schools of planning at the University of British Columbia and Dalhousie University resulted in a grass-roots, community-driven approach to planning that has at its core the objective of achieving community well-being, often in terms of social, economic, environmental and culture well-being. But, as noted by the *Comprehensive Community Planning for First Nations in British Columbia Handbook*, a CCP “addresses key planning areas, all of which are interrelated and interdependent: governance, land and resources, health, infrastructure development, culture, social issues and the economy. Consideration of all key planning areas through one unified process defines community planning as a holistic and integrated exercise that can lead to sustainable development.”<sup>126</sup> This model of community planning allows a First Nation to determine for itself the components (social, economic, health, infrastructure etc.) that determine its community well-being, and the indicators (income, language, traditional use etc.) it wishes to use as a baseline to measure improvements over time.

In part as a result of this early focus on both coasts, the vast majority of CCPs undertaken by First Nations in Canada to date have been in BC and the Atlantic. Dalhousie was contracted to undertake CCPs in Saskatchewan, and to date a few have been done in Quebec, Ontario, Manitoba and Alberta. While little comprehensive research has been done on the results of CCP vis-à-vis gains in community well-being, anecdotal evidence suggests that it produces positive results in the communities that have committed to the process over the long-term. What is not clear, partly because every CCP is different, is the extent to which:

- ▶ The indicators communities use to measure improvements in community well-being are of sufficient comparability so as to allow for a comparative analyses of gains in well-being, and thus the evidenced-based approach to the identification of impediments to community development;
- ▶ The scope and methodology of CCP is being adjusted to accommodate communities at different stages in development. For example, communities experiencing a high rate of social dysfunction, economic challenges and cultural pressure may be better served by scope of planning that is more immediate in nature, whereas those First Nations that have addressed such challenges and are ready to think about self-government may require a longer-term planning horizon; and
- ▶ Communities undertaking community planning incorporate a vision of operating outside of the Indian Act, or the goal of Nation rebuilding. “Gaining Momentum: Sharing 96 Best Practices of First Nations Comprehensive Community Planning” suggests as one best practice that communities agree on “what self-government looks like,”<sup>127</sup> which in this context may be considered analogous to “what self-determination looks like.” However, a cursory examination of a number of completed and ongoing First Nation CCPs suggests that few of them have considered moving beyond the *Indian Act*, or Nation rebuilding.

The Government of Canada has committed, in Budget 2018, additional funding to support ongoing First Nation community planning.<sup>128</sup>

<sup>126</sup>Government of Canada, Indigenous and Northern Affairs Canada, “CCP Handbook,” 2016, [http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/ccphb2013\\_1378922610124\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/ccphb2013_1378922610124_eng.pdf).

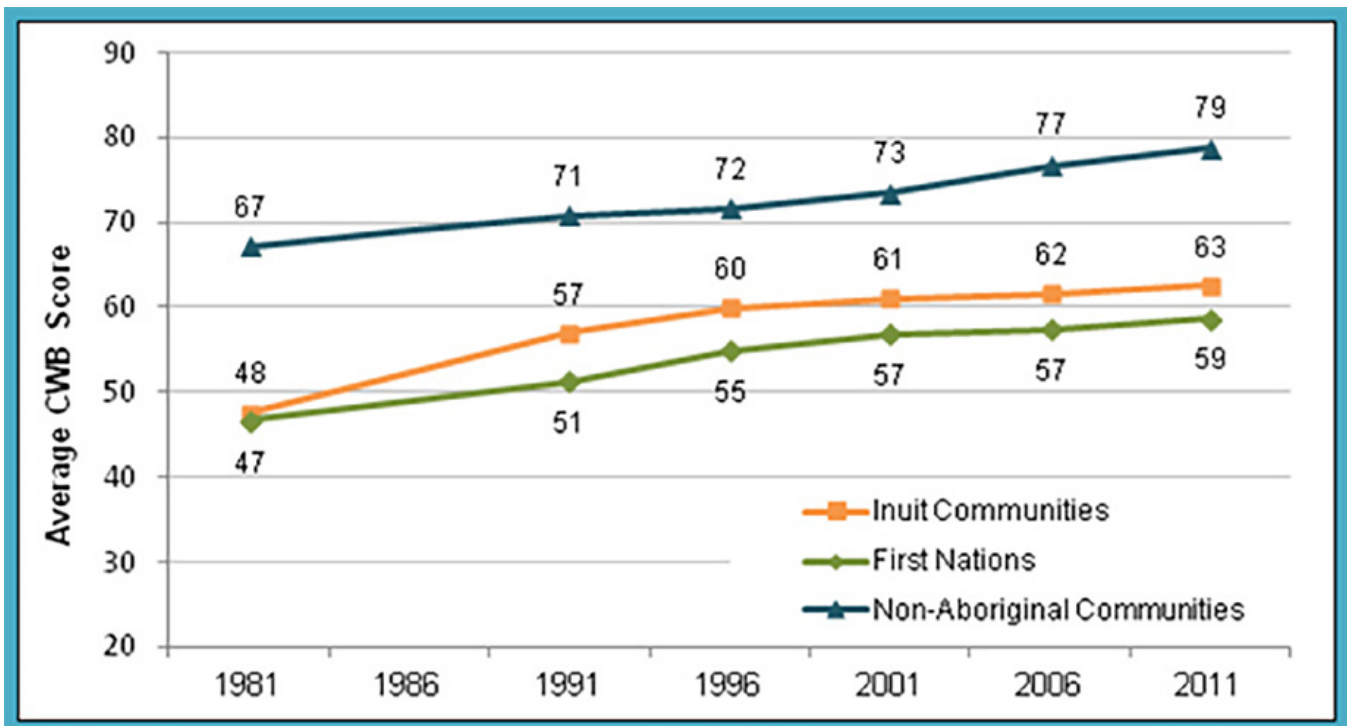
<sup>127</sup>New Relationship Trust, “Gaining Momentum, Sharing 96 Best Practices of First Nations Comprehensive Community Planning,” 2009, <http://www.newrelationshiptrust.ca/wp-content/uploads/2017/04/comprehensive-community-planning-long-version.pdf> page 75.

<sup>128</sup>Government of Canada, “Budget 2018” page 142 <https://www.budget.gc.ca/2018/docs/plan/budget-2018-en.pdf>.

## 6.1.2 Community Well-Being Index

The Community Well-Being (CWB) index is a statistical tool for examining the well-being of individual Canadian communities. Various indicators of socio-economic well-being, including education, labour force activity, income and housing are combined to give each community, including First Nation communities, a well-being “score.” These scores can also be used to compare well-being across Indigenous communities with well-being in non-Indigenous communities over time. The graph below demonstrates the persistent gap in community well-being between non-Indigenous, and First Nation and Métis communities in the three decades spanning 1981-2011.

**Community Well-Being Averages Over Time, Inuit, First Nations and Non-Aboriginal Communities, 1981 to 2011<sup>129</sup>**

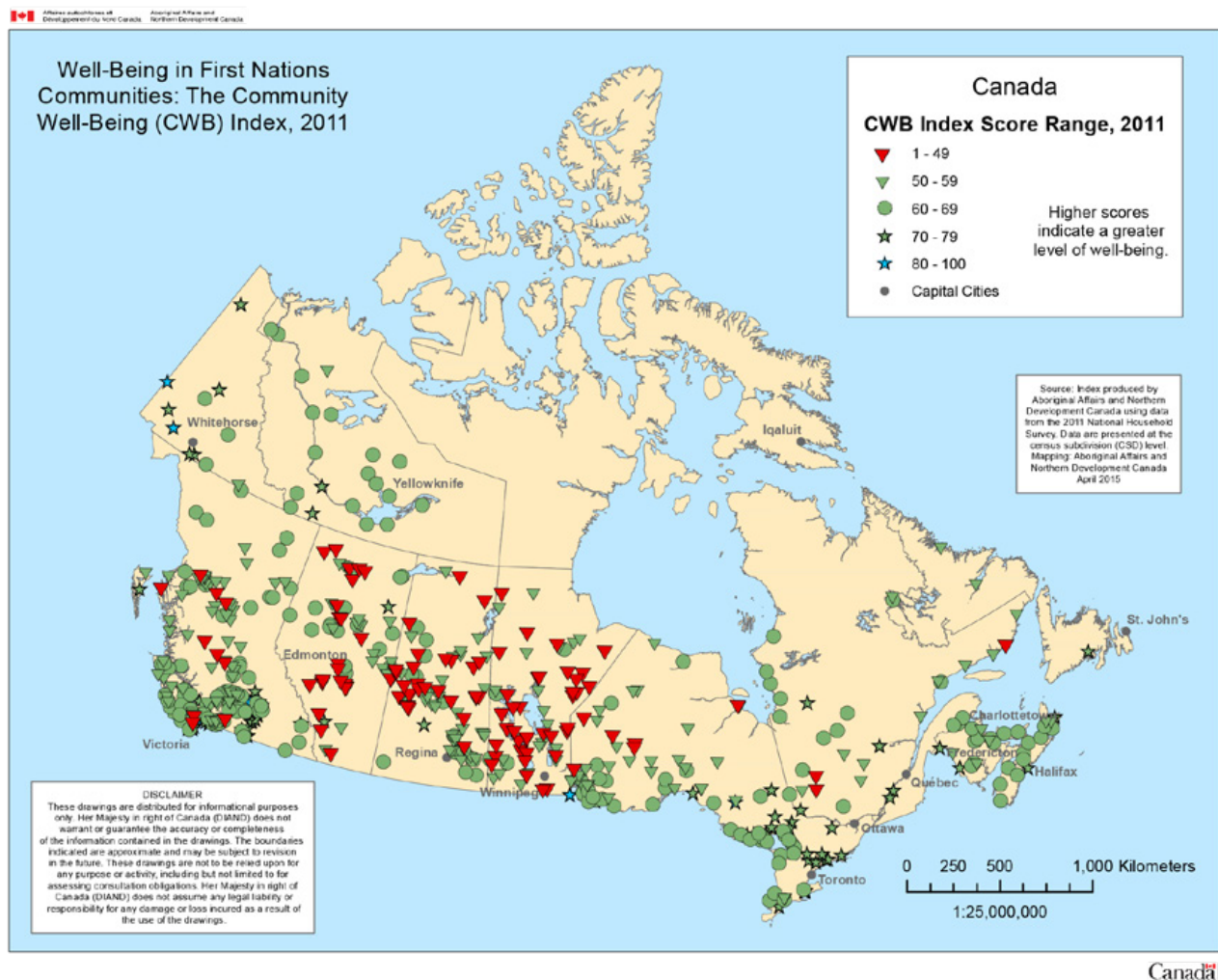


<sup>129</sup>Government of Canada, Indigenous and Northern Affairs Canada, “Community Well-Being: Report on Trends in Inuit Communities, 1981-2011” <http://www.aadnc-aandc.gc.ca/eng/1421175988866/1421176016084.zz>



The map below provides an overview of First Nation CWB scores across Canada, based on data from the 2011 National Household Survey.

### Community Well-Being Index 2011<sup>130</sup>



While useful to an extent, the CWB Index, by definition, does not include a number of indicators of a comprehensive and holistic understanding of First Nation community well-being (e.g. language use, traditional harvesting, cultural and spiritual health, etc.) and therefore limits its usefulness in making comparative analysis between First Nations, and of progress made in individual First Nations.

As stated at the outset of this section, a detailed analysis of the role and current activities related to community well-being as a determinant of community self-determination are outside the scope of the FNGP and the role of the Advisory Group. However, as is often the case when working with a comprehensive and holistic framework of analysis such as the one proposed here, it has a direct bearing on subjects that are within the mandate of the FNGP Advisory Group, such as Nation rebuilding, and the emergence of a shared services model and institution-building.

<sup>130</sup>Graph taken from Government of Canada, Indigenous and Northern Affairs Canada "Canada - Well-Being in First Nations Communities: The Community Well-Being (CWB) Index, 2011" <https://www.aadnc-aandc.gc.ca/eng/1321883955297/1321884166104>. Note that the ranges "50-59," and "60-69" are both coloured green, and the ranges "70-79," and "80-100" are both denoted by stars, making it difficult to distinguish among them at a glance.



## 6.2 Effective Governance: Emergence of the Shared Services Model and Institutional Support

The many aspects of effective governance fall into three main categories: core **governance**, or leadership; **administration** of jurisdiction (combined, the structures, standards and processes in place to exercise government autonomy) and **financial management** (the structures, standards and processes in place to exercise fiscal autonomy). Section 5 of this Report examined a number of legislative and regulatory initiatives undertaken in the past two decades to provide options to First Nations to secure greater self-determination both within the *Indian Act*, and outside the *Indian Act*. This Section will examine the emerging “shared services” model of institutional structures developed to support First Nations seeking to do so.

### 6.2.1 Governance

DISC provides a limited level of support to First Nations governance, and organizations such as the now defunct National Centre for First Nations Governance have provided generic Election Code templates<sup>131</sup> and other tools, and electoral officer training is available through private sector providers. Also available to First Nations are various governance toolkits<sup>132</sup> intended to support First Nations’ incremental transition out of the *Indian Act*, and Nation rebuilding. But other than these tools, and unlike the support provided for First Nations administration of jurisdiction and financial management, there is currently no institutional support for the exercise of core governance for First Nations.

The FNGP Advisory Group was emphatic in its recommendation that the Government of Canada support the development of a First Nations-led institution that would provide advisory services, leadership development, standards, training, accreditation of election officers, support to the development of election codes, bylaws, and constitutions, and the implementation of self-government under a new rights recognition legislative regime.

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<sup>131</sup>Centre for First Nations Governance, “Election Code Template,” Retrieved on June 2018, [http://fngovernance.org/resources\\_docs/CustomElectionCode\\_Template.pdf](http://fngovernance.org/resources_docs/CustomElectionCode_Template.pdf).

<sup>132</sup>See in particular British Columbia Assembly of First Nations Governance Toolkit: A Guide to Nation Building: <http://bcafn.ca/wp-content/uploads/2016/06/Governance-Toolkit.pdf>.

## 6.2.2 Administration

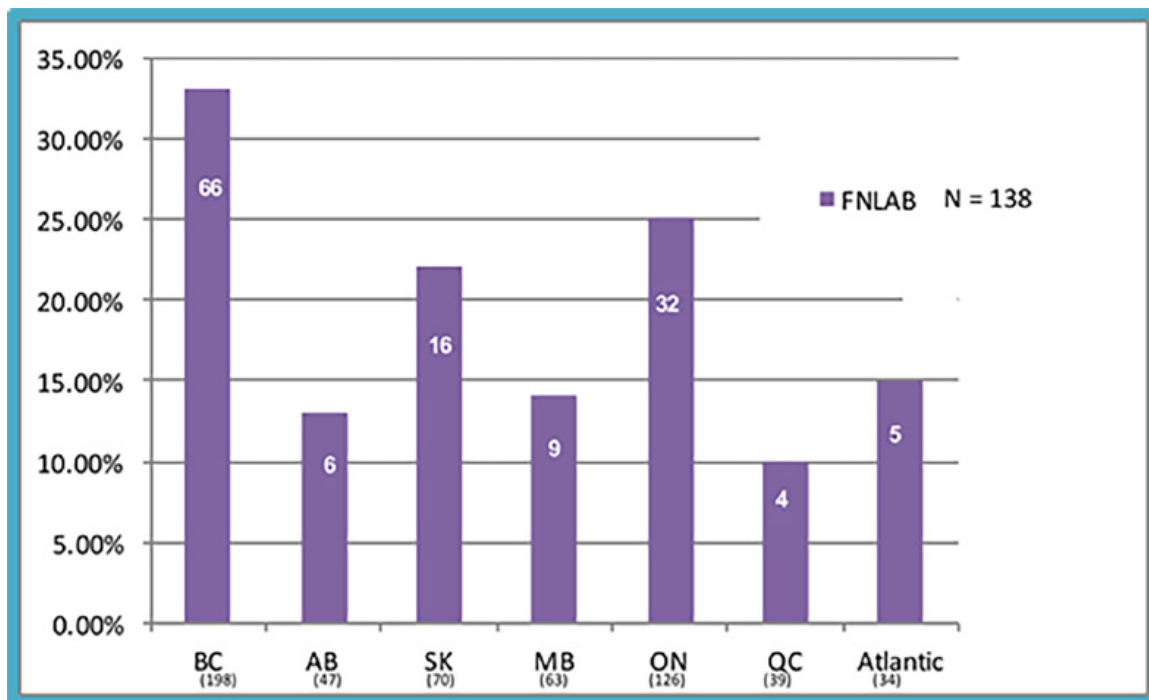
### Land Management

While the FNLMA does not provide for the establishment of institutional support for First Nations operating under its regime, the Framework Agreement on First Nation Land Management established the Lands Advisory Board (LAB) to assist First Nations in the development and implementation of their land codes. The LAB is responsible<sup>133</sup> for:

- ▶ Providing strategic direction to the Resource Centre;
- ▶ Proposing to the Minister (DISC) such amendments to the Framework Agreement and the federal legislation as it considers necessary or advisable;
- ▶ (in consultation with First Nations), negotiating a funding method with the Minister; and
- ▶ Performing such other functions or services for a First Nation as are agreed to between the Board and the First Nation.

The LAB's Resource Centre is the service delivery organization and delivers a wide range of technical support functions including training, code development, capacity-building, and policy development.<sup>134</sup>

Percentage FNLMA Take-up, By Region<sup>135</sup>



<sup>133</sup>The Land Advisory Board, Retrieved, July 2018, <http://landsadvisoryboard.ca/us/>.

<sup>134</sup>The Land Advisory Board Resource Centre, Retrieved June 2018, <https://labrc.com/about-us/>.

<sup>135</sup>Graph sourced from First Nations Lands Advisory Board and Resource Centre, 2018.

## 6.2.3 Financial Management and Taxation

### First Nations Finance Authority

The First Nations Finance Authority (FNFA) is a “non-profit corporation that permits qualifying First Nations to work co-operatively in raising long-term private capital at preferred rates through the issuance of debentures, and also provides investment services to First Nations and First Nation organizations.” As is the case with the FNFMB, and unlike the FNTEC, the FNFA does not support the take-up of a jurisdiction per se, but provides tools and access to capital that would not have been available to a First Nation under the *Indian Act*. Borrowing from the FNFA allows First Nations to:

- ▶ Access below prime lending rates, with amortization periods of up to 30 years;
- ▶ Borrow without collateral, based on revenue streams; and
- ▶ Refinance existing debt.

Capital projects eligible for FNFA financing include infrastructure, social and economic development, land purchases, independent power projects, community housing and rolling stock/heavy equipment.<sup>136</sup> All 214 First Nations scheduled to the FNFMA are eligible to borrow through the FNFA. The FNFMA is governed by a Board of Directors elected by borrowing First Nations, of which there are 19 as of 2017. As of the end of fiscal year 2016/17 loans issued by the FNFA had exceeded \$300 million, and were expected to exceed \$400 million by fiscal year 2017/18.<sup>137</sup>

### First Nations Financial Management Board

The First Nations Financial Management Board (FNFMB) is a “shared-governance corporation that assists all First Nations in strengthening their local financial management regimes and provides independent certification to support borrowing from First Nations Finance Authority and for First Nation economic development.” FNFMB programs include:

- ▶ Training in financial management
- ▶ Strategic planning
- ▶ Standards-setting
- ▶ Default management prevention services
- ▶ Possible infrastructure participation options via the First Nations Major Projects Coalition
- ▶ Certifying First Nations’ governance and finance practices

The FNFMB offers three certification programs:

- ▶ **Financial Administration Law (FAL):** The first step toward certification is setting out the broad areas of good governance and finance practices in law.
- ▶ **Financial Performance Certification:** Provides an independent stamp of approval of a First Nation’s good financial health, and allows them to apply to FNFA for a loan at low cost.
- ▶ **Financial Management System Certificate:** Establishes policies and procedures to implement a community’s FAL.

As of July 2018, 148 First Nations<sup>138</sup> have had their FAL approved by the FNFMB and of those, 122 had received their Financial Performance Certification, and 15 their Financial Management Systems Certification.

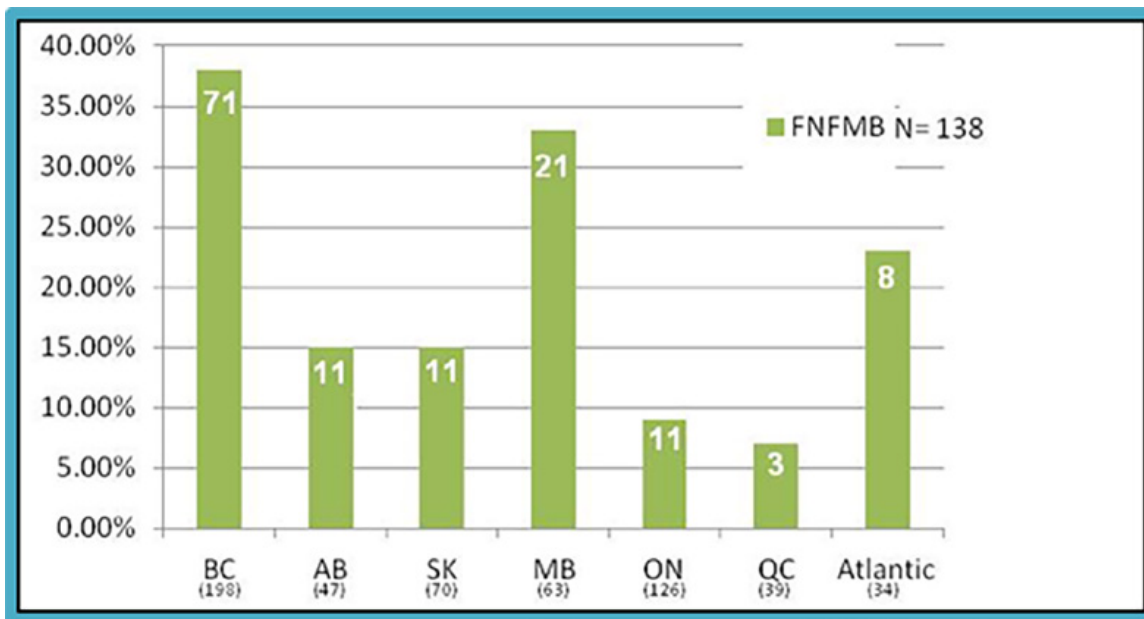
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<sup>136</sup>First Nations Finance Authority, Retrieved June, 2018 <https://fnfa.ca/en/fnfa/>

<sup>137</sup>First Nations Finance Authority, “Annual Report 20156-2017,” <https://fnfa.ca/wp-content/uploads/2013/10/2017-report.pdf>

<sup>138</sup>Includes three First Nations not included in subsequent analysis: <https://fnfmb.com/en/client/client-liste>

Percentage FNFMB Take-up, By Region<sup>139</sup>



### First Nations Tax Commission

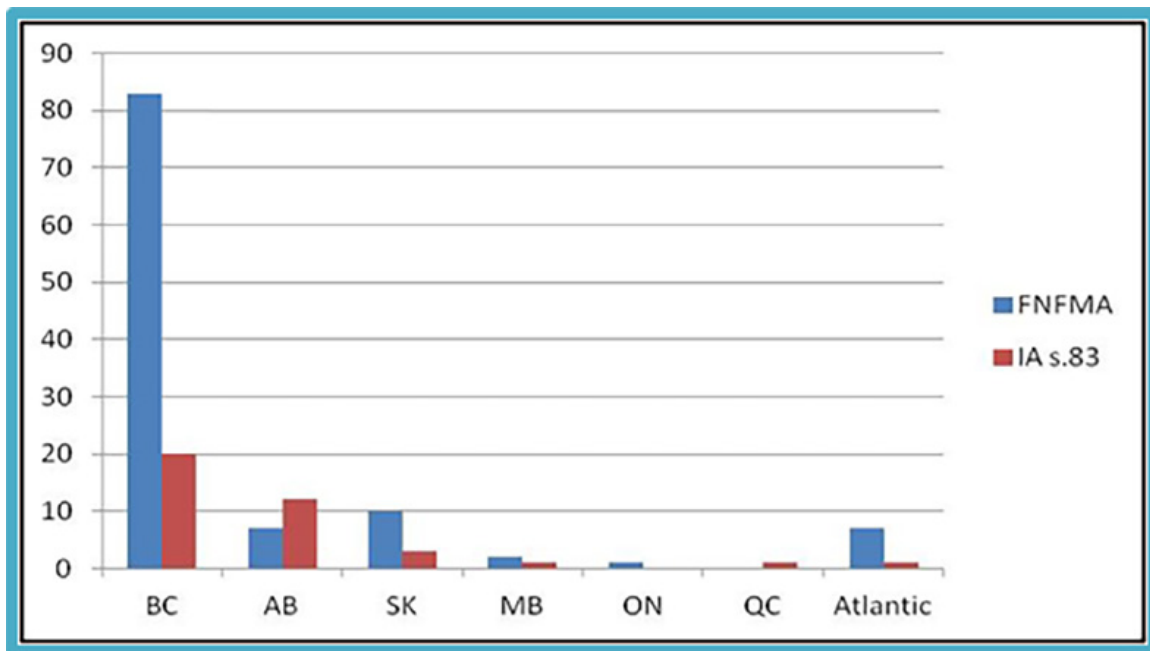
The First Nations Tax Commission (FNTC) is a “shared-governance corporation that regulates and streamlines the approval of property tax and new local revenue laws of participating First Nations, builds administrative capacity through sample laws and accredited training, and reconciles First Nation government and taxpayer interests.”<sup>140</sup> The *First Nations Fiscal and Statistical Management Act* (FNFSMA), which provided for the creation of the FNTC, was originally intended to replace the property tax authority (section 83) under the *Indian Act*. However, as the Bill made its way through Parliament, a decision was made to retain the *Indian Act* property taxation authorities and make the FNFSMA an optional alternative authority, creating two separate systems for collecting property taxes on reserve, with differing levels of oversight and government involvement. As a result the FNTC, a creation of the FNFSMA (later amended to *First Nations Fiscal Management Act*, or FNFMA), supports First Nations operating under both regimes.<sup>141</sup> Thus, while all First Nations have the authority to pass by-laws related to the taxation of land under the *Indian Act*, the FNFMA provides First Nation governments with authority over:

- ▶ Financial management
- ▶ Property taxation and local revenues
- ▶ Financing for infrastructure and economic development

As of 2018, a total of 149 First Nations had accessed FNTC’s services: 114 under FNFMA, and 39 under s.83 of the *Indian Act*:



### FNTC Take-up by Legislation and Region<sup>142</sup>



### Indian Moneys Institutional Support

IOGC operates under the direction of an Executive Director and Chief Executive Officer (CEO) who participates as a member of the IOGC Co-Management Board. The Board was established in 1996 by the signing of a Memorandum of Understanding between the Minister of Indian Affairs and Northern Development and the Indian Resource Council (IRC), an Indigenous organization that advocates on behalf of approximately 189<sup>143</sup> member First Nations (primarily in Alberta and Saskatchewan) with oil and gas or the potential for such resources. The Board is comprised of the IRC Chair and five other members appointed by the IRC. Two additional positions are reserved for DISC: the Assistant Deputy Minister of Lands and Economic Development, and the Executive Director and CEO of IOGC. One position is appointed by the Minister from the oil and gas industry, for a total of nine Board members.

IOGC's main functions are to:

- ▶ Negotiate, issue and administer agreements with oil and gas companies;
- ▶ Conduct environmental reviews;
- ▶ Monitor oil and gas production and sales prices;
- ▶ Verify, assess and collect moneys such as bonuses, royalties, and rents; and
- ▶ Ensure legislative and contract requirements are met.

While the IOGA and associated regulations provide First Nations with somewhat greater control and autonomy in the management of their resources (e.g. all oil and gas agreements require the approval of Chief and Council, with the day-to-day role of the Minister primarily limited to adjudication of disputes), funds are still held in trust by the federal government. As well, the IOGA/IOGC regulatory regime is limited in its scope to the First Nations which could conceivably produce hydrocarbons on reserve lands, all of which are

<sup>142</sup>Graph sourced from First Nations Tax Commission, 2018.

<sup>143</sup>Indian resource Council, "Members," Retrieved July, 2018, <http://www.irccanada.ca/members>.

likely already identified and on the Schedule for the legislation. Finally, the institution supporting the regime – IOGC – is not a First Nations-run institution, but rather a branch of the Government of Canada, overseen by a Board with both federal government and industry representatives. These considerations suggest that the significance of the IOGA/IOGC regulatory regime with respect to broader trends toward jurisdictional draw-down, nation building and self-determination are limited.



## 6.3 Conclusion: Community Capacity-Building and Institutional Support for Self-Determination and Nation Rebuilding within the s.91(24) Legislative Framework

Tremendous progress has been made by First Nations in the last two decades in developing tools to support community development and well being (e.g. Comprehensive Community Planning) and institutional support for governance. While a number of First Nations-led institutions have enjoyed a degree of success in engaging First Nations, as suggested in section 5, more work needs to be done to better understand First Nations' reasons (or lack thereof) for availing themselves of incremental legislative initiatives under s.91(24), and the institutional support that accompanies them. Finally, gaps in institutional support for community planning and statistics need to be addressed in order for First Nations to achieve a meaningful degree of self-determination, on the path toward Nation rebuilding.



## 7.0 Next Steps: Phase II - Operationalizing the Self-Determination Framework in Support of Greater Autonomy for First Nations in Transition out of the *Indian Act*

The second phase of research will focus on disseminating, validating, and developing a path towards operationalizing the UNDRIP-responsive Self-Determination and Governance Framework developed in Phase I with interested First Nations to ensure that it provides a path towards exiting the *Indian Act*.

This will provide the opportunity to test and revise the Framework to develop and recommend criteria and guidelines that First Nations and governments can use to devise mutually recognized self-determination standards and procedures.

Building upon the work in Phase I, Phase II will utilize these research activities to address additional research topics, which may include:

- ▶ Identifying impediments to greater take-up of incremental governance initiatives under S. 91(24) including:
  - Providing an overview of the state of First Nation-initiated aggregation efforts vis-a-vis Tribal Councils and Treaty groups;
  - Identifying the needs of First Nations and the appropriate methods to support the structure and functions of First Nations Governance;
  - Identifying optimal size for aggregated interest and service delivery.
- ▶ Defining options for potential shared interest and political organizations.
- ▶ Outlining inter-First Nations shared jurisdiction options including land management, resource revenue needed for governance support, inter-community relations, and Crown relations.
- ▶ Examining desired Crown-Indigenous engagement options with Canada (Crown, parliament, government departments, etc.).
- ▶ Defining parameters for possible traditional territory-wide Community Well-Being analyses.
- ▶ Examples of UNDRIP Article 19 Free Prior and Informed Consent mechanisms.
- ▶ Development of mutually-acceptable skills recognition criteria including possible training and delivery options.

This phase of the project will involve direct visits with First Nations, tribal councils, and political or advocacy organizations that have demonstrated successful self-determination and governance standards and practices that could be emulated by other Indigenous communities. Communities and organizations selected for visits will respect the diversity of First Nations' size, regional, government structure, treaty/non-treaty, and political situations. In addition, the community engagement process may include telephone conference dialogues, and the use of surveys to ensure that the process is as inclusive as possible. Additional back-end research, including literature reviews and environmental scans, may also be required in particular research areas.

Research will be conducted to identify where there might be opportunities for First Nations to work together, in collaboration with the Government of Canada, to achieve their objectives via new models of service aggregation, external training partners, skills development, principled Crown-Indigenous engagement, and other means of realizing greater self-determination within the Canadian federation. A full itemization of the proposed work including timelines will be submitted separately.



## APPENDIX A: First Nations Governance Project Advisory Group Mandate and Membership

### FNGP Advisory Group Mandate

The FNGP Advisory Group is mandated to:

- ▶ Provide expert review, advice and guidance on the FNGP research to determine how recognized and wise practices in governance could apply in the current context and a post-Indian Act environment;
- ▶ Identify risk and opportunities;
- ▶ Support engagement with Indigenous communities in designing, testing and implementing new forms of governance; and
- ▶ Build understanding, support and advocacy for the FNGP initiative.

### FNGP ADVISORY GROUP MEMBERS

NAME	TITLE
Charlene Bearhead	First Education Lead at the National Centre for Truth and Reconciliation at the University of Manitoba. Education Lead for the National Inquiry in to Missing and Murdered Indigenous Women and Girls, Education Advisor: National Film Board, Indigenous Education Working Group Member: Canadian Museum for Human Rights, Indigenous Education Advisory Circle member pathways to education Canada
Dan Bellegarde	FSIN/Treaty 4
Thomas Benjoe	President/CEO, FHQ Developments Ltd.
Crystal Fafard	Associate Lawyer, Maurice Law
Howard Grant	Executive Director of the First Nations Summit
David Joe	Former Chief Negotiator Council of the Yukon First Nation
Grand Chief Ed John	First Nation Summit Task Group Member
Dawn Madahbee Leach	General Manger, Waubetek Business Development Corporation and Interim Chairperson, the National Indigenous Economic Development Board
Koren Lightning-Earle	Indigenous Lawyer, Thunderbird Law & Indigenous Initiatives Liaison at Law Society of Alberta
Ovide Mercredi	Former National Chief of the Assembly of First Nations
Naiomi Metallic	Dalhousie University
Joe Miskokomon	Former Grand Council Chief of the Anishinaabek Nation and former, Chief of Chippewa of The Thames
John Paul	Executive Director, Atlantic Policy Congress

Steven Point	Former Lieutenant Governor, BC
Bob Rae	21st Premier of Ontario, Former leader of the Liberal Party of Canada, Lawyer, Mediator, Speaker and Writer
Scott Serson	Former federal Deputy Minister; and former Board of Directors, Canadians for New Partnerships
Dana Soonias	Former CEO, Wanuskewin Heritage Park Authority and Director, FNFMB
Riley Yesno	Prime Minister Youth Council





First Nations  
**FINANCIAL  
MANAGEMENT  
BOARD**

**LE CONSEIL  
DE GESTION  
FINANCIÈRE** des  
Premières Nations



**Institute on  
Governance**

LEADING EXPERTISE

**Institut sur  
la gouvernance**

EXPERTISE DE POINTE

**West Vancouver Head Office:**

100 Park Royal, Suite 905  
West Vancouver, BC  
V7T 1A2

**Winnipeg Office:**

93 Lombard Avenue, Suite 305  
Winnipeg, MB  
R3B 3B1

**Ottawa Office:**

170 Laurier Ave W, Suite 608  
Ottawa, ON  
K1P 5V5

**Montreal Office:**

1410 rue Stanley, Suite 1015  
Montreal, QC  
H3A 1P8