



IMAGE BY STAN WILLIAMS

AN OVERVIEW | June 2018

# Canada's Emerging Indigenous Rights Framework: A Critical Analysis

# What is the Rights and Recognition Framework?

## TIMELINE:

# Major Restructuring Initiatives

June 2016	Recognition of Indigenous Rights and Self-Determination Discussion Tables"
Feb 2017	Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples
June 2017	AFN-Canada Memorandum of Understanding on Joint Priorities
July 2017	The "10 Principles"
August 2017	Two new ministries of Indigenous Affairs
Dec 2017	Two new fiscal relationships policies <i>(Indian Act &amp; Self-Government Groups)</i>
Dec 2017	Establishment of National Reconciliation Council
Feb 2018	Omnibus legislation <i>(e.g. Bill C-69, reforms to Environmental Assessment Act)</i>
Fall 2018	Introduction of the Rights, Recognition and Implementation Framework Legislation

# Five Serious Concerns

## *with the emerging Framework*

1. **No meaningful recognition** of Indigenous jurisdiction outside of the reserves
2. **Does not address the spirit** and intent of the historic treaties or the outstanding title question on non-treaty lands. The injustice of land dispossession into reduced to incremental and sectoral approaches of restitution
3. **Maintains the supremacy** of the Canadian Confederation; Indigenous rights are subsumed within the federal and provincial heads of power
4. **Does not open an adequate process for nation-to-nation discussions** → high-level negotiations are taking place between the federal government and the Assembly of First Nations
5. **Lack of transparency**, as most policy is being developed unilaterally and with conflicting federal official statements



# Transitioning from the *Indian Act* to the Rights Framework



# An Overview of Canada's Indigenous Rights Framework

# Goals of the Rights Framework

- **To maintain status quo** of the 1995 Inherent Right policy, incorporating more flexible mechanisms, such as incremental and sectoral agreements;
- **To maintain policies** that do not deal directly with the authority of Indigenous nations to exercise full jurisdiction, ownership, and control over their lands on a territorial basis;
- **To support the “reconstitution of nations” away** from the Indian Act, towards aggregated service-delivery populations, with no additional jurisdictional authority off-reserve;
- **To domesticate UNDRIP** by watering down the free, prior, and consent articles;
- **To build fiscal capacity within First Nations** to transition all *Indian Act* bands into self-government agreements, rather than to expand the land base and deal honourably with First Nations as economic rights-holders.

# **A CRITICAL ANALYSIS**

**Part 1: Relationship Reform**

**Part 2: Policy Reform**

**Part 3: Legislative Reform**



## PART 1: RELATIONSHIP REFORM

# Nation-to-Nation Relationship

### PRINCIPLES RESPECTING THE GOVERNMENT OF CANADA'S RELATIONSHIP WITH INDIGENOUS PEOPLES, AKA, "THE 10 PRINCIPLES"

Released by the Department of Justice in July 2017, these principles "form the basis for all future negotiations"

- Emphasis is on the supremacy of Canadian constitutional framework with little structural change
- Threaten Aboriginal rights by stating Canada will only "aim" to implement FPIC & reasserting Canada's rights of infringement



JODY WILSON-RAYBOULD, MINISTER OF JUSTICE  
and JUSTIN TRUDEAU, PRIME MINISTER

## PART 1: RELATIONSHIP REFORM

# Nation-to-Nation Relationship



JUSTIN TRUDEAU, PRIME MINISTER  
AND AFN NATIONAL CHIEF PERRY BELLEGARDE

### ROLE OF THE ASSEMBLY OF FIRST NATIONS

Consultation and implementation on the Framework is happening through AFN, which is acting as the “nation” in the nation-to-nation relationship, despite not being a “rights-holding” body.

- The AFN-Canada Memorandum of Understanding (MOU) on Joint Priorities lays the groundwork for decision-making on key policy issues.
- The MOU process bypasses Indigenous nations, as well as First Nation bands and many grassroots people.

## PART 1: RELATIONSHIP REFORM

# Nation-to-Nation Relationship

### STRUCTURAL CHANGES

INAC split into CIRNA (Crown Indigenous Relations and Northern Affairs) and DISC (Department of Indigenous Services) in August 2017, creating confusion around divisions of jurisdiction.

- Are First Nations delivering programs *for Canada* or taking over program areas on their own terms with independent funding?
- CIRNA goal of devolution of governance to “re-constituted nations” raises questions about First Nation constitutional rights, the future status of treaties, and potential shifts in federal fiduciary responsibilities and the role of the provinces.



CAROLYN BENNET, MINISTER OF CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFIARS AND JANE PHILPOTT, MINISTER OF INDIGENOUS SERVICES

# PART 2: POLICY REFORM

## “RECONSTITUTING NATIONS”

- This is a vague process that forms the centerpiece of Liberal promises of recognition, *but* important precedents exist in legislation and reports in the BC context.
- “Reconstituting nations” emphasizes establishing a process for amalgamating bands, which can take on regional service delivery
- Key to this process by Canada is the national prioritization of Comprehensive Community Planning to “build capacity” and accountability in a municipal-style governance model



# PART 2: POLICY REFORM

## INCREASED INDEPENDENCE WITHIN THE STATUS QUO

The New Fiscal Relationship repeals two of the worst fiscal mechanisms - third party management policy and the Transparency Act

However, the focus on capacity building at the expense of restructuring the fiscal relationship around treaty and title obligations stalls real transformative progress.

For *Indian Act* bands, the key fiscal issue has been underfunding. While there is a commitment to 10-year grant models for predictability, there is not yet a commitment to address chronic underfunding.



# PART 2: POLICY REFORM

## THE NEW FISCAL RELATIONSHIP

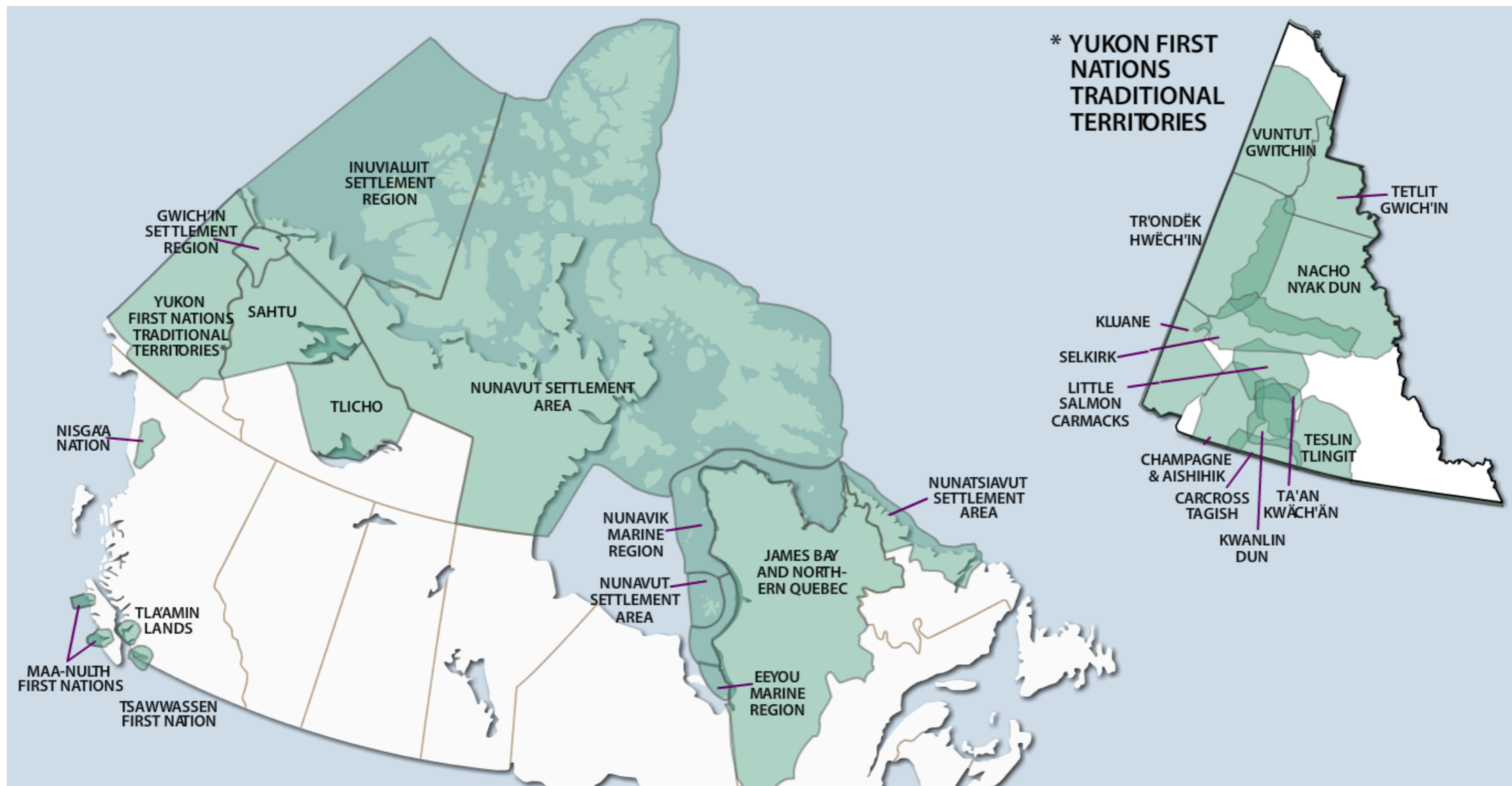
The New Fiscal Relationship for bands under the self-government policy is meant to better address expenditure needs of groups and also to provide greater access to other revenues, with the long-term goal of largely self-funded groups.

- We can expect increased support to “close gaps” and capacity building upfront to ease the transition to taxation, OSR funded service delivery, less long-term funding from Canada.
- Modern treaty and self-government signatories may also see debt forgiveness measures and/or repayment for debts incurred through negotiation.



# PART 2: POLICY REFORM

## MODERN TREATY MAP



# PART 2:

# POLICY REFORM

The "Rights and Recognition Tables" have been kept secret since first introduced as "exploratory tables" in 2016 - now there are over 60 tables involving 320 communities but little information exists on nature of talks

## WHAT WE KNOW

- Negotiating parties are not all title and rights-holders, but mostly PTOs, tribal councils, and advocacy organizations.
- Aboriginal title and treaties are being reinterpreted at tables in a sectoral approach.
- Funding incentives may deter groups for making broader territorial claims.
- A vast number of tables appear to be out-of-court settlements for ongoing disputes with the Crown.



JOE WILD,  
ASSISTANT DEPUTY MINISTER, CIRNA



## PART 3:

# Legislative Reform

The Trudeau Government is among the most active parliament in the history of the Canadian government on Indigenous issues.

- 3 bills already passed, one senate bill, 6 private members bills, 2 government bills introduced affecting First Nations, and 4 government bills specific to Indigenous issues to come. (including INAC split, rights and recognition framework)

### "DECOLONIZING CANADIAN LAW"

- The "decolonization" process has not been collaborative → little Indigenous representation on the 'decolonizing law' committee, no prior consultation on the INAC split, and no mention of UNDRIP in new environmental legislation, despite repeated demands from Indigenous peoples for FPIC

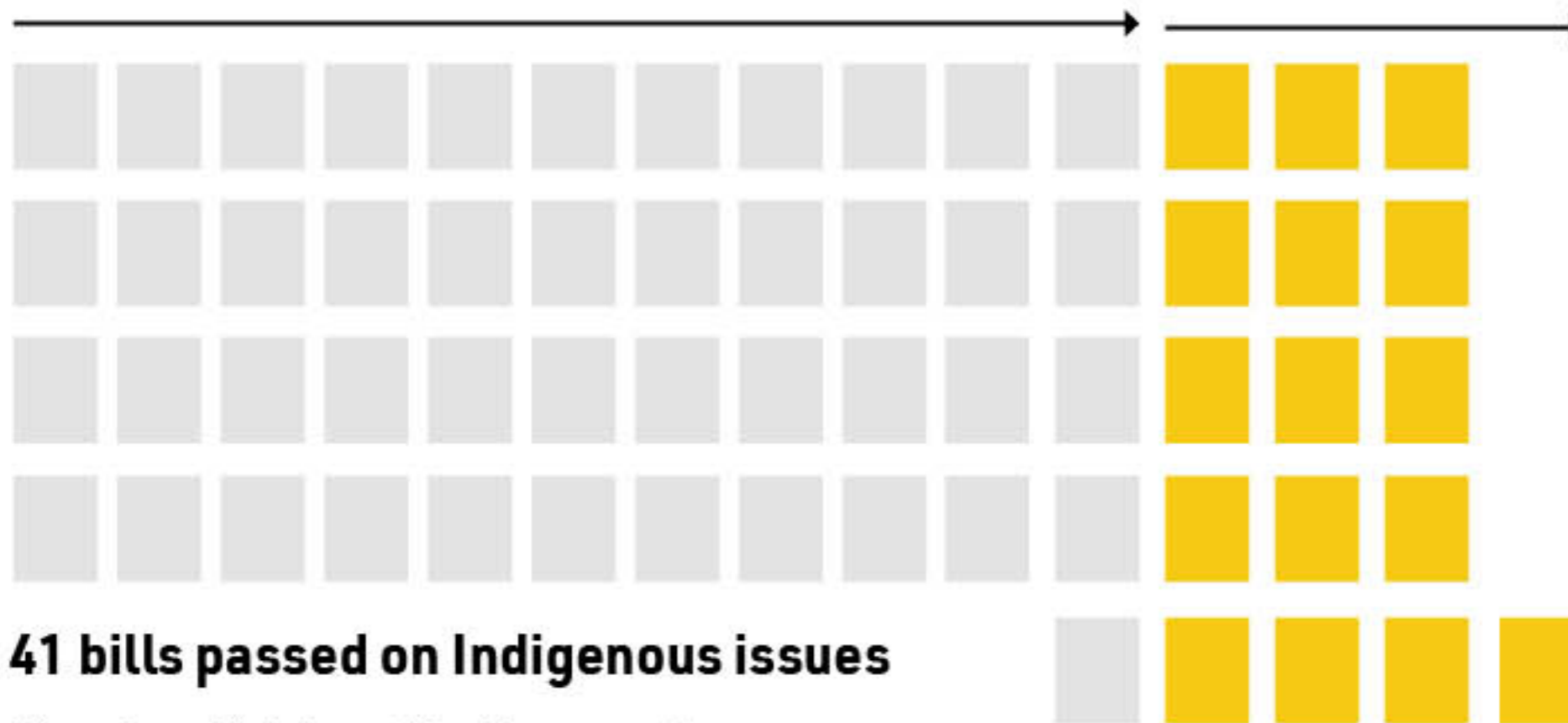


JODY WILSON-RAYBOULD,  
MINISTER OF JUSTICE

# LEGISLATION ON INDIGENOUS ISSUES

1867 to 2015

2015-present



**41 bills passed on Indigenous issues**

Figure does not include specific self-government and land claim settlement legislation

**16 bills passed or proposed under Trudeau's government**

**If all bills become law, 40% of all legislation concerning Indigenous peoples will pass under this Liberal government.**

This infographic is from Part Three of the report, *Canada's Emerging Indigenous Framework: A Critical Analysis*, by the Yellowhead Institute

# Pending Legislation

SEE CHART



IMAGE BY STAN WILLIAMS

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**Yellowhead Institute generates critical policy perspectives  
in support of First Nation jurisdiction**

