AN OVERVIEW | June 2018

Canada’s Emerging Indigenous Rights Framework: A Critical Analysis
What is the Rights and Recognition Framework?
## TIMELINE: Major Restructuring Initiatives

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

**Indigenous Rights and Recognition Framework**

**Historic Treaty & Indian Act Bands**

The Indigenous Rights and Recognition Framework will transition Indian Act bands into a self-government process.

**Transitional Processes**

A number of new processes have been introduced to support this transition of Indian Act bands into self-government frameworks. These include:

- Rights and Recognition Tables
- "Re-constituted nations"
- Comprehensive Community Plans
- New Fiscal Relationship (Financial Capacity Building)

**Rights legislation expected in 2018**

**Result: “Reconstituted Nations”**

While there are some positive elements in what we know about the Framework, there are significant limitations:

- Reserve based self-governments
- Aggregated regional service delivery
- Limited federal financial obligations
- Restricted access to traditional territories
- Truncated jurisdiction

**Indian Act**

As defined by the Federal Government

**Self-Determination**
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

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 AFFAIRS AND JANE PHILPOTT, MINISTER OF INDIGENOUS SERVICES
PART 2:

POLICY REFORM

“RECONSITUTING 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.
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

41 bills passed on Indigenous issues

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

2015–present

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

@Yellowhead_  fb.me/yellowheadinstitute  info@yellowheadinstitute.org

IMAGE BY STAN WILLIAMS