

A Critical Look at the New Fiscal Relationship and Contribution Funding Agreements with First Nations

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IN 2017, THE ASSEMBLY OF FIRST NATIONS (AFN) under the leadership of National Chief Perry Bellegarde, entered into a Memorandum of Understanding (MOU) with Canada regarding a new fiscal relationship with First Nations.

Former National Chief Shawn Atleo also had a similar MOU with Canada on Fiscal Relations. Not much has changed since the former National Chief spearheaded that approach. Under Atleo's leadership, the AFN held a special Assembly in Gatineau, Quebec from December 9-12, 2013, regarding fiscal relations with the Crown. At that time, "streamlined funding" was the terminology used by INAC, but the same objectives are included in the current MOU: to remove Indian Affairs from the fiscal relationship and to put an end to further funding once the new 10-year agreements are concluded. No more Indians, no more treaty obligations, no more relationship from a Crown – First Nation perspective.

This should be critically alarming to Treaty Nations, both pre-confederation Treaties and Treaties 1-11, because the fiscal relationship is grounded in our rights in the land.

AFN/Canada – A New Approach: Co-development of a New Fiscal Relationship¹

Perhaps the biggest announcement to come out of the "new fiscal relationship" between the Crown and First Nations is the promise of 10-year funding grants. The new 10-year funding agreement² is asking First Nations to "consider" is a top-down cookie cutter approach. This new funding proposal emerged from the 2017 MOU between the AFN and Canada, which included a commitment to develop "a new fiscal relationship to ensure sufficient, predictable and sustained funding for First Nations governments."³ Since then, the AFN and Canada have held nine sessions across Canada before the commissioning of their "co-development" approach.

Do nine meetings really amount to co-development? Does AFN have the authority to negotiate on behalf of hundreds of bands, tribal councils, and treaty groups? True co-development should be done through a bilateral process between First Nations and the Crown, which respects indigenous governance and systems that are not from an Indian Act approach.

The 10-year agreement itself is between Indigenous Services Canada (ISC) and a First Nation, as defined under the Indian Act. There is no wording change to recognize whether or not a First Nation is a treaty signatory or upholds any traditional form of governance that some First Nations want to include as part of their assertion or reclamation of

sovereignty. In no way does this approach honour the treaty relationship between the Crown and the First Nation.

What is new in the Contribution Agreements?

- **Environmental assessment clause** of the new agreement compels First Nations to comply with the Canadian Environmental Assessment Act, 2012 and any other applicable environmental laws. The 2012 CEAA was literally gutted from water protections, species at risk, and traditional uses on our territorial lands. Therefore, in the absence of protective federal laws, provincial laws will apply. What kind of oversight and protection can provincial bodies provide? Which level of government has the liability? In relation to Bill C-69, new legislation may offer more protection, but it also falls down around the issue of “consent,” retaining final ministerial discretion and failing to uphold the UNDRIP principle of free, prior, and informed consent.
- **Canada cannot be sued for anything** in the agreement and indemnifies itself of any harm it may cause based on decisions of Indian Act elected Chiefs and Councils. This places Chiefs and Councils in a predicament that forces them to make decisions based on the agreement and outcomes that may not be something that the membership of the First Nation may want.
- **Membership issues – on and off reserve** – due to the increase in numbers from the implementation of the Deschaneaux case.⁴ The agreement may include the off reserve population for funding, which begs to question: if the provinces and territories receive monies via transfer payments for all those based on census, including status Indians living off the reserve, will there be a bill-back mechanism to the province or territory for the First Nation to capture that expense back from those entities? How is that determined?
- **The grants are subject to an Act of Parliament**, therefore an exercise of parliamentary authority can cancel funding at any time. If there is a national security issue, our funding may be cut and we could run the risk of cuts to any and all funding included under the umbrella agreement, which includes, education, health services, social development, water and wastewater management – services that are fundamental human rights.
- **Reporting guide changes may happen** any time throughout the year without consultation or consent, a hold-over practice from previous agreements.
- **Outcome-based models have intensified.** Now, the First Nation must undertake additional steps, such as drafting a financial administration law or bylaw, annual reports to band membership, audited financials that include provincial funding, in-kind funding (which was never previously accounted for) and this is how Canada will determine funding levels year-to-year over the 10- year span. Analyzing the reporting requirements tells me that there is additional reporting required to fulfill that agreement.
- **New financial laws are being introduced** involving pilot projects with First Nations and the First Nations Financial Management Board (FNFMB). These new financial laws will be implemented through legislation: the First Nations Fiscal Management Act. This mechanism allows the FNFMB to access First Nations’ books at any time to gauge First Nations’ finances for investors. The objective is economic development. In most instances, the FNFMB requires lands and monies to leverage investment for First Nations and investors want certainty. Will these new financial laws be the gateway into the First Nations Land Management Act? Are the First Nations able to develop a recognized framework outside of the colonial regime for investment to come to the First Nation without losing land if the investment fails?
- **Contracting out:** Service providers can be third parties, but how will this work be delegated and to whom? I can see this being provincial services or independent consultants that are disconnected from the communities and the peoples they serve. Decisions could be made to award the lowest bid to save money and fulfill their deliverables they are now required to provide.
- **Why isn’t there anything about honouring our own languages?** English and French are the official languages of the agreement. This undermines our language and separates us from our identity and land. In addition, it doesn’t uphold that our languages be paramount in our education systems.
- **Taxation** – there is a desire to implement a Taxation Working Group (AFN/Canada report) and that there be mechanisms to review the First Nations Tax Commission to expand its scope. I would question from a Treaty perspective that the taxation piece needs to be discussed around how Canada can through a mechanism return income tax monies to the First Nation rather than taxation of its already impoverished peoples?

In addition, as one treaty commissioner stated at time of making treaty, British subjects would be the ones taxed not Indigenous peoples.

- **Own source revenue:** monies generated from own source revenues will be considered to fund programs over the long term. There are talks about repealing the First Nations Financial Transparency Act to replace it with something to ensure “mutual accountability.” In essence, this mechanism will put the First Nation at an unfair economic position, having to choose much needed program or service delivery over being competitive in the market.
- **Monies received from gaming,** Alberta’s green energy incentives, economic development from the provinces or territories must be accounted. This will be part of assessment process to claw back funding from the federal government. For instance, Governments provide incentive programs for resource companies to explore or produce resources, yet when resource companies make a profit or acquire assets, they are not penalized on incentives to operate.
- **Auditing is paid for by the First Nation.** So, if Canada or the membership requires additional audits the First Nation has to reimburse Canada for any expense related to additional audits on the assertion of “Transparency and Accountability.”

Where is it going?

According to the AFN /Canada report, “A New Approach- Co-development of a New Fiscal Relationship Between Canada and First Nations,”⁵ there are several next steps to watch for:

- The establishment of a permanent advisory committee, appointed by Order in Council.
- This committee would submit advise by April 1, 2019 on the following matters:
 - Recommendations for a **new Fiscal Policy Framework** to address sufficiency and identify priority funding areas;
 - Recommendations to **increase revenue generation opportunities** for First Nations, developed in collaboration with provinces and territories;
 - Recommendations to **finalize new funding arrangement policies** to strengthen the commitment to flexible and predictable funding, the reduction of reporting burdens and a shift from program to outcome-based reporting, and the **elimination of General Assessment Scoring of First Nation communities** in favour of First Nations-led tools; and,
 - Recommendations to finalize a **Mutual Accountability Framework**, including a national outcome-based framework based on United Nations Sustainable Development Goals.

From a Treaty and Inherent Rights Perspective

This new fiscal arrangement has not provided options for First Nations to implement their own laws, constitutions and treaty and inherent rights-based funding approaches. This agreement being imposed comes from a purely economic standpoint and does not include provisions of revenue sharing or redress of lands being taken up or revenues derived since the imposition of provincial or territorial control over land and resources and the entering of Treaty.

At the time of treaty making, the monies derived from sales of land, mines and minerals, timber resources, have not been shared equitably nor has there been a mechanism to redress in the Prairie Provinces the Natural Resources Transfer Agreement (NRTA) and that control.

In essence, with a stroke of a pen, the agreement implements a municipalized structure of governance and program and services delivery on First Nation’s communities with a deadline of 10 years for First Nations to become “self-sufficient.”

Self-sufficiency is what many First Nations desire, however the circumstances for doing so aren’t fairly dealt to all the communities in Canada. The imposed disconnect from Indigenous territorial lands to uphold their identities and way of life is not respected nor does it meld with the colonial government’s framework for governance. Treaties and the making of treaties confirmed Indigenous peoples’ sovereignty. Only sovereigns can enter into treaty.

Indigenous peoples did not relinquish jurisdiction over its languages, land, waters, governance systems, education, children, families and nationhood. With the acceptance of this agreement, it imposes their laws and systems on Indigenous peoples and in essence absorbs them into the body politic.

This agreement is a mirror image of the 1969 White Paper's intentions. Grassroots membership are not consulted at large and the AFN has only met with Chiefs and technicians in haphazardly scheduled meetings across Canada in the fall of 2017 without presenting all relevant information.

Free, Prior and Informed Consent is not achieved through this process.

Conclusion

It is imperative that all First Nations fully understand the implications of such agreements and frameworks implemented by Canada, either jointly by the AFN or independently. Communication strategies to membership at large need to be implemented.

We need to critically analyze the systems of First Nations Financial Management Board, First Nations Land Management Act, First Nations Taxation Commission and determine for ourselves if this is the path how First Nations wish to govern themselves and if so, are the membership aware of that desire?

In 10 years-time, under this approach, where will we be?

ENDNOTES

¹A New Approach: Co-development of a New Fiscal Relationship, https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-ACH/STAGING/texte-text/reconciliation_new_fiscal_rel_approach_1512565483826_eng.pdf

²Minister Philpott Welcomes Report on a New Fiscal Relationship with First Nations, https://www.canada.ca/en/indigenous-services-canada/news/2017/12/minister_philpottwelcomesreportonanewfiscalrelationshipwithfirst.html

³Minister Assembly of First Nations Canada Memorandum of Understanding on Joint Priorities, <https://www.afn.ca/uploads/files/canada-afn-mou-final-eng.pdf>

⁴The Government of Canada's Response to the Descheneaux Decision, <https://www.aadnc-aandc.gc.ca/eng/1467227680166/1467227697623>

⁵A New Approach: Co-development of a New Fiscal Relationship, https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-ACH/STAGING/texte-text/reconciliation_new_fiscal_rel_approach_1512565483826_eng.pdf