



A SPECIAL REPORT

Canada's Emerging Indigenous Rights Framework: A Critical Analysis

by HAYDEN KING and SHIRI PASTERNAK

JUNE 05, 2018

Abstract

The report analyzes the substantial changes to Indigenous policy and legislation in Canada, which are coalescing around the current Liberal Government's proposed Indigenous Rights, Recognition and Implementation Framework legislation. The Prime Minister has announced that the legislation will be introduced sometime in 2018, yet, there is little transparency in the process or accessible information for communities on these dramatic changes. Our analysis considers the emerging Rights Framework from three "perspectives": Relationship Reform charts how the machinery of government is changing, from the creation of new federal departments on Indigenous issues to nation-to-nation bilateral tables. Policy Reform considers the new direction on self-government, fiscal relations, and land claims policies. Legislative Reform examines impending legislation currently before parliament, including changes to impact assessment regulations and implementation of the UN's Declaration on the Rights of Indigenous People. Our analysis reveals that the Rights Framework guides First Nations towards a narrow model of self-government outside of the *Indian Act*, premised on devolution of program and service delivery, fiscal mechanisms that do not address land rights but focus on accountability, a piecemeal approach to Aboriginal title, and an ongoing neglect of treaty obligations or expansive First Nation jurisdiction generally.

Keywords

Rights Framework, Indian Act, Self-Government, Section 35, Fiscal Relations, Title, Reconciliation, INAC Split, Land Claims, Justin Trudeau



This report is licensed under a Creative Commons Attribution-NonCommercial 2.5 Canada License.

Acknowledgements

This report and the Yellowhead Institute itself is not possible without the support of the Faculty of Arts at Ryerson University. A special thanks to our colleagues in the Dean's office including Dean Pam Sugiman, Sharmaine MacKenzie, Allison Urowitz, Suelan Toye, Julia Davydova and Greg Fiordo. We are also indebted to our Board of Advisors for their guidance and feedback, and to the thirty policy and legal analysts who attended a two-day meeting on the emerging Rights Framework held at Ryerson University in March 2018. Thanks also to government officials, expert panel members, and First Nation citizens, activists and leaders who took time to share their insights. We are grateful to our research assistants Athena Bedassigae-Pheasant, Sarah Dennis, Graham Reeder and Sue Collis, copy editor Robyn Letson, Stan Williams for his photography, Anita Sekharan for web support and design, Elise Cotter in Ryerson media relations. And to Yumi Numata for communications support and project management, thank you.

FRONT COVER IMAGE BY STAN WILLIAMS

A Note on Authorship

This report is primarily the work of the Directors of the Yellowhead Institute, Hayden King and Shiri Pasternak. The questions guiding our analysis and shaping our critique arise from a collaborative process that drew from a wide range of participants, including policy analysts, lawyers, consultants, academics, journalists and community organizers, many representing First Nations from across the country, some of whom participated in a two-day meeting organized by the Yellowhead Institute at Ryerson University, March 17-18, 2018.



TABLE OF CONTENTS

Executive Summary	4
Introduction: The Indigenous Rights Framework	6
Part One: Relationship Reform	8
a. Principles Respecting the Government of Canada's Relationship with Indigenous Peoples	8
b. The Nation-to-Nation MOU	8
c. The INAC "Split," Constitutional Obligations & Self-Government	9
Part Two: Policy Reform	12
a. "Re-Constituting Nations": The New/Old Self-Government Model	12
Constitutional Development & Capacity Building	12
Aggregation / Reconstituting Nations	12
Self-Government Lite	13
b. Fiscal Relations & The New Accountability	15
A First Nation Finance Regime	15
Fiscal Relations and Modern Treaty Self-Government	16
Fiscal Relations and Indian Act Bands	17
c. Aboriginal Title, Comprehensive Claims & Rights Recognition Tables	17
Concerns with the Process	18
Incremental & Sectoral Approaches to Aboriginal Title	19
The Future of Aboriginal Title	20
Part Three: Legislative Reform	21
a. Sixteen New Pieces of Legislation	21
Cabinet Committee to "Decolonize" Canada's Laws	21
Consent & The New Regulatory Regime	21
Harmony with UNDRIP: The Saganash Bill	24
b. The Law of Reconciliation	25
Conclusion: Closing the Gap	27

EXECUTIVE SUMMARY

JUSTIN TRUDEAU RAN ON AN ELECTION platform of changing the relationship between the Crown and Indigenous peoples in Canada. Trudeau promised a new nation-to-nation relationship based on respect, cooperation, partnership, and the recognition of Indigenous rights. Over halfway into his mandate as Prime Minister, some clarity is emerging on the scope of that nation-to-nation relationship. In February 2018, Trudeau announced the development of a new and transformational **Indigenous Rights, Recognition and Implementation Framework**.

Since then, a suite of legislation and policy has been rapidly deployed. It includes fiscal policy, omnibus legislation, changes in negotiations for land and self-government, and splitting Indigenous and Northern Affairs Canada (INAC) into two ministries. There is the establishment of the National Reconciliation Council, a Working Group of Ministers to Review Laws and Policies Related to Indigenous Peoples (also known as the Cabinet Committee to “Decolonizing” Canada’s Laws), and the *Principles respecting the Government of Canada’s relationship with Indigenous peoples*.

Yet, comprehensive analysis on the meaning and trajectory of Canada’s approach is scarce.

Any efforts at long-term fundamental change and improvement to the living conditions of Indigenous peoples in Canada are commendable and welcome. But the deeper institutional changes proposed merit caution. In this report, we analyze the Liberal government’s impending reforms to First Nation policy and legislation in relation to one another: as a set of pieces that together comprise the background picture of Canada’s notion of “decolonization.”

In order to assess these changes, we have created a baseline to determine the degree of change, for better or worse. Specifically, we ask a number of related questions about the proposed Framework:

Will the Rights Framework replace the *Indian Act* or simply offer an opt-out process?

How are self-determination, self-government, and “reconstitution of nations” expressed in the Rights Framework?

Will the Rights Framework lead to higher quality of life and alleviation of socio-economic challenges for First Nations?

Has there been genuine engagement with the concept of free, prior and informed consent?

How will the new Rights Framework affect pre-confederation, Numbered, and Modern Treaties?

How does the new Rights Framework address lands and resources off-reserve (i.e. traditional territories or title lands)?

Will the Rights Framework shift the burden of proof for proving title from Indigenous communities to Canada?

Our analysis reveals that the Rights Framework expresses a clear and coherent set of goals, which aim to suppress Indigenous self-determination within Canadian Confederation. These goals have been ordered into legislation and policy in a manner that guides First Nations towards a narrow model of “self-government” outside of the *Indian Act*. And remarkably, though labelled as new and transformational, the model reflects older and largely discredited approaches.

This report describes these apparent changes and offers analysis in three parts.

Part One: Relationship Reform

THE FIRST PART OF THIS REPORT analyzes the Rights Framework from a relational perspective, that is, how the machinery of government is changing to facilitate the new relationship.

We find the foundational *Principles respecting the Government of Canada’s relationship with Indigenous peoples* emphasize the supremacy of the Canadian constitutional framework and significantly constrain the possibilities for self-determination to move beyond the current circumstances. An analysis of the “Ten Principles” reveals that we can expect very little structural change in the existing relationship. If they form the basis for future negotiations, the Principles are a potential threat to Indigenous rights and title.

The nation-to-nation memorandum of understanding (MOU) between the Crown and the Assembly of First Nations (AFN) has resulted in significant confusion regarding the AFN’s role in nation-to-nation processes. Though the AFN insists this bilateral mechanism is not for “decision-making,” surveying the work completed after a year reveals decisions are being made, for example on the impending Languages Act, child welfare reform, fiscal relations and housing. This process largely excludes the individual First Nations, treaty organizations, and Indigenous nations from exercising political authority over their own people and lands. It seems that to Canada, the AFN is the other *de facto* “nation” in this new relationship.

Crucial issues must be addressed regarding the splitting of INAC into two discrete Ministries as well. These include problems that arise from attempting to extract issues of program and service delivery from issues of land. For First Nations to have a healthy economic base to be able to exercise full self-determination, the delivery of services must be linked to land rights. Further, what

are the legal and political implications of this new division? What fiduciary obligations is Canada bound by, and which ministry will dispense them, whether to *Indian Act* bands or self-governing First Nations?

Part Two: Policy Reform

THE SECOND PART OF THIS REPORT analyzes the Indigenous Rights Framework from a policy perspective. Here, we consider existing government literature and statements on “reconstituting nations.” With the new Rights Framework legislation, we can expect to see a certain model of “aggregation” framed as a movement away from the *Indian Act*. But this model of self-government is focused on entrenching a largely reserve-based, administrative governance model with improvements in service delivery, transparency and accountability. It includes nothing of the “transformational” change the government has promised and certainly no indications of jurisdiction over traditional territory.

This is reflected in the new fiscal relationship, which is focused on capacity-building and new ten year funding grants, but does not restructure the existing fiscal relationship to develop a strong economic base for First Nations. Within the new process, lands, territories, and resources outside the reserve are delinked from fiscal relations, except for any own-source-revenue (OSR) from resource extraction on traditional territories. This approach is premised on training First Nations to integrate into the market economy and further erodes federal fiduciary responsibility to First Nations. Finally, the federal government has committed to “replacing” the land claims policy in Canada and moving towards a flexible approach. A range of options are now being tested at over 60 “Rights and Recognition Tables,” and will likely set the preconditions for future negotiation and legislation. Since it has historically been the case, the government’s negotiating mandate will likely be narrower than the court’s interpretation of Aboriginal rights and title. For treaty bands, the “Rights and Recognition Tables” may be leading towards a domestication of their international treaties.

Part Three: Legislative Reform

THE LAST SECTION OF OUR REPORT is focused on the pending legislative reform introduced by the Liberal government. With nine pieces of legislation working through first or second reading and four more to come, this is one of the most active legislatures on Indigenous issues in 100 years.

These legislative changes are being informed by the Cabinet Committee to ‘Decolonize’ Canada’s Laws. Though the process has been taking place behind closed doors, two draft bills have been vetted so we can partially discern the direction of “decolonization.”

In the section, *Consent and the New Regulatory Regime*, we examine Bill C-69, which reforms the environmental assessment legislation, and affects how First Nations consent, jurisdiction, and governance will be considered in this critical decision-making process. We have serious concerns about Bill C-69, and specifically, the lack

of attention to First Nation demands for free, prior and informed consent on land and resource decisions in their territories. The draft legislation offers very limited recognition of Indigenous jurisdiction.

While there is also no mention of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in the draft version of Bill C-69, it is the focus of Bill C-262, the United Nations Declaration on the Rights of Indigenous Peoples Act, introduced as a private member’s bill by NDP MP Romeo Saganash. If Bill C-262 becomes law, it may force governments and courts to address UNDRIP’s Articles, though the legislation does leave space for mal-interpretation. At the least, it could offer a powerful tool to hold government accountable on efforts to harmonize federal law and policy with UNDRIP.

While all of the above can be considered “reconciliatory,” there are some discrete changes focused explicitly on reconciliation, such as a new National Council for Reconciliation. And while the Truth and Reconciliation Commission (TRC) defined reconciliation broadly as restitution and the transformation of Canadian institutions, so we might have a future defined by dignity and respect, we have to strain to see those commitments from this government.

Conclusion

CONSIDERING THESE PARTS OF OUR REPORT collectively, we can say the following:

The *Indian Act* is on its way out; the land claims regime and self-government policies are being broken down and re-packaged; and changes to fiscal relations ultimately focus on accountability and avoid addressing questions of land and resources. Indeed, we find that nearly all of Canada’s proposed changes to its relationship with First Nation peoples neglect issues of land restitution and treaty obligations.

Instead, whether relational, policy or legislative reform, they focus on the creation of self-governing First Nations with administrative responsibility for service delivery on limited land bases. Decision-making powers are constrained to the local (including any notion of free, prior and informed consent). Provincial, territorial and federal governments will continue to patronize and intervene in the lives and lands of First Nation peoples.

All of this despite Trudeau’s rhetoric on reconciliation, UNDRIP, the nation-to-nation relationship, or the commitment to “breathing life” into Section 35 of the Constitution. And while there are some welcome changes including resources for program and service delivery, there is also a clear attempt to maintain a modified version of the status quo, and as such, an effort to mislead First Nations on the transformational nature of these changes.

The danger of accepting government messaging, and the Rights Framework as currently articulated, is settling for a very narrow vision of Indigenous jurisdiction over lands, resources and self-determination generally.

INTRODUCTION

The Indigenous Rights Framework

AFTER A DECADE OF A CONSERVATIVE anti-Indigenous governments, and really after 150 years of anti-Indigenous governments, Indigenous activists and leaders are making gains. The Idle No More movement forever changed the discourse in this country, Indigenous women and Two-Spirit organizers intervened forcefully to demand justice, the Truth and Reconciliation Commission brought focus to our collective challenges, and the election of a progressive Liberal government offered the possibility of real change.

After all, it was hard to ignore the campaign promises of Justin Trudeau: the right to say no to development in Indigenous territories, full implementation of the United Nation's *Declaration on the Rights of Indigenous Peoples* (UNDRIP), a federal inquiry into missing and murdered Indigenous women and girls, cleaning up dirty water, repealing laws that infringe on Aboriginal rights, honouring the Truth and Reconciliation (TRC) Calls to Action, keeping land disputes out of the courts, and on, and on.

Certainly we applaud the progress that has been made in some areas. There has been funding for water infrastructure on reserve, resources slowly trickling into communities for education, a supposed end to third party management, an apology to the Tsilhqot'in for colonial atrocities, and while the results have been disappointing, there is an Inquiry on missing and murdered Indigenous women and girls and a settlement for the victims of the Sixties Scoop. However, most of Trudeau's commitments remains unfulfilled and his cabinet routinely raises expectations in public statements while lowering them in policy documents.

This is the context for the **Indigenous Rights Framework legislation**.

Announced on February 14, 2018, on the heels of the unjust acquittal of Gerald Stanley for the murder of Colten Boushie, the Prime Minister outlined "a new Recognition and Implementation of Indigenous Rights Framework that will include new ways to recognize and implement Indigenous Rights."

This will revolve around "recognition and implementation of rights" legislation. Going forward, this legislative interpretation of the "recognition of rights" will guide all government relations with Indigenous Peoples.¹

Our research has revealed that the new legislation will attempt to address the government's outstanding commitments and realize the promise of Section 35 of the Constitution. This necessarily means addressing the *Indian Act*. We also know that these efforts are coalescing around a very narrow view of Indigenous rights and jurisdiction that is far short of what First Nations have been

demanding. Our report will show that the Rights Framework expresses a coherent set of goals, which are to suppress Indigenous self-determination within Canadian Confederation.

There are three important qualifications to consider when reading.

First, the scope and speed of these changes cannot be understated. This government has been the among the most active on Indigenous issues in a century. There are nine government or private member's bills working their way through parliament and four more to come. Not to mention three already passed. Collectively, they will lead to a fundamentally new relationship. Further, the number of new frameworks, MOUs, tables, working groups, tripartite agreements, and departmental directives is dizzying. Many of these processes have multiple names and acronyms in a nearly indecipherable technocratic jargon.

Second, and related, there is much confusion over the content of the the Rights Framework legislation, not only because of the speed at which it is being deployed, the lack of transparency, and the overwhelming amount of new policy, but because many of the pieces are not publically available. Government officials routinely cite "co-development" of the process and a "work in progress". While the details are not yet finalized and subject to consultation, the limits of what is possible are already evident. This report is based largely on what exists in the public domain at the time of writing.

Finally, this is a report focused on the circumstances of First Nations. While the Rights Framework will affect Inuit and Métis, and we express solidarity with them, the research and analysis here addresses implications primarily for on-reserve communities. This means urban communities are also largely absent. As Yellowhead Institute continues work on the Rights Framework, these perspectives will be highlighted.

The report is divided into three parts.

Part One of the report focuses on Relationship Reform.

This section includes analysis of the *Principles respecting the Government of Canada's relationship with Indigenous peoples*, the nation-to-nation memorandum of understanding (MOU) between the Assembly of First Nations (AFN) and Canada, and the split of Indigenous and Northern Affairs Canada (INAC) into two departments, Crown-Indigenous Relations and Northern Affairs (CIRNA) and the Department of Indigenous Services Canada (DISC).

¹ Canada, Prime Minister Justin Trudeau, "Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework" (February 14, 2018).

Part Two of the report focuses on Policy Reform.

This section includes analysis on the likely shape of a new self-government model, outlining and evaluating changes being promised to the *Inherent Right* policy in place since 1995. It also includes analysis of the new fiscal relationship in relation to both *Indian Act* bands and to groups under the self-government policy. We also examine processes underway to replace the land claims policy, including the “rights and recognition tables” rooted in a shift towards sectoral and incremental agreements.

Part Three of the report focuses on Legislation Reform.

Here we examine the cabinet committee to ‘decolonize’ Canada’s laws and one key piece of draft legislation that is currently under review, Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*. We analyze more broadly the incredible pace of legislation that has passed or is pending since the Liberal government took power in 2015. We also look at reconciliation initiatives and consider their link to the Rights Framework.

PART ONE: RELATIONSHIP REFORM

a. Principles Respecting the Government of Canada's Relationship with Indigenous Peoples

PRECEDING MUCH OF the government's shift in approach on Indigenous policy was the Department of Justice's *Principles respecting the Government of Canada's relationship with Indigenous peoples*, released in July 2017. According to the Government, these "Ten Principles" are informed by Section 35 of the Constitution, the TRC Calls to Action, UNDRIP and the *Royal Commission on the Rights of Aboriginal Peoples* (RCAP). Since July, the Ten Principles have appeared in government literature in reference to their role guiding the Cabinet Committee review of Canada's laws and policies, and the "Nation-to-Nation" MOUs with the Assembly of First Nations (AFN).

While the Ten Principles have supporters among some First Nation analysts, and they do represent a shift in rhetoric from previous governments, they nonetheless emphasize the supremacy of the Canadian constitutional framework and constrain the possibilities for self-determination among Indigenous peoples. An analysis of the Ten Principles reveals very little structural change to the existing relationship if the basis for this government's negotiating mandate, and even a potential threat to Indigenous rights and title.

Much of the Ten Principles document attempts to grapple with how best to *incorporate* Indigenous peoples into pre-existing Canadian legal orders (largely neglecting Indigenous pre-existence).² Principle 3 asserts that governments should "ensure that Indigenous peoples are treated with respect and as full partners in Confederation" while Principle 4 motions towards "cooperative federalism" and supports "developing mechanisms and designing processes which recognize that Indigenous peoples are foundational to Canada's constitutional framework." Yet, it is remarkable how inflexible that constitutional framework is regarding Indigenous rights. The Prime Minister has repeatedly said that the Constitution will not be re-opened on this question.

On Aboriginal title, Canada insists in Principle 5 that it "is prepared to enter into innovative and flexible arrangements with Indigenous peoples...based on the recognition and implementation of rights and not their extinguishment, modification, or surrender." We see how flexible negotiations that focus on sectoral issues that are a priority to First Nations, such as fisheries, could bring about positive changes. That being said, these innovations will be constrained by Canadian sovereignty and tied to never-ending processes that do not resolve the underlying issues of territorial authority over traditional Indigenous homelands.

This issue is reflected, for instance in Principle 6: the Crown will "consult and cooperate in good faith with the *aim* of securing their free, prior, and informed consent" (emphasis added). Further, "[it]

will ensure that Indigenous peoples and their governments have a role in public decision-making *as part* of Canada's constitutional framework" (emphasis added). Aspirational in phrasing, this principle commits Canada only to attempting to honor free, prior and informed consent (FPIC). Indigenous consent is also mentioned in the draft Bill C-69, though it is restricted to the reserve and UNDRIP is never mentioned in the Act.

Related, Principle 7 states that, "any infringement of Aboriginal or treaty rights requires justification in accordance with the highest standards established by the Canadian courts and must be attained in a manner consistent with the honour of the Crown and the objective of reconciliation." Regardless of the high standards referenced here, Canada is clear that infringement can and will happen, as it already has, even in the likely face of First Nation (and Inuit) community opposition. Muskrat Falls, Site C, and the Kinder Morgan Trans-Mountain pipeline expansion are all contemporary examples of so-called "justifiable infringement."

Considering all of this, it is remarkable how little the Ten Principles (and all the policy that follows) deviate from the current status of relations. If there is an appetite to create innovative and novel approaches to rights and title, Principles 8, 9 and 10 all reflect that appetite. Yet, they are innovative insofar as they do not stray far from pre-existing institutions and structures, which entrench the authority of the federal and provincial governments.

b. The Nation-to-Nation MOU

ANOTHER FOUNDATIONAL PROCESS in the Rights Framework is the creation of three Memorandums of Understandings (MOU) to create bilateral tables between the Crown and National Indigenous Organizations (NIO)³ plus a table with self-governing First Nations. This report will focus on the *Canada-AFN table*, which has a mandate to "guide the Government of Canada and the Assembly of First Nations as the parties discuss options to advance shared priorities, assess progress towards goals for First Nations, and facilitate the ongoing work of building a true nation-to-nation relationship between Canada and First Nations."⁴

The Canada-AFN table will meet three times a year (at the time of writing there have been three meetings; the last in March was attended by the Prime Minister). It is to be guided by a steering

² Canada, Department of Justice, *Principles respecting the Government of Canada's relationship with Indigenous peoples*. (July 2017).

³ National Indigenous Organizations include the AFN, Inuit Tarpitrit Kanatami and the Metis Nation of Canada. The Native Women's Association of Canada and the Congress of Aboriginal Peoples are also considered NIOs but do not have a bilateral MOU with the Crown.

⁴ Canada, Prime Minister Justin Trudeau, "The Prime Minister and the National Chief of the Assembly of First Nations sign Memorandum of Understanding on shared priorities" (June 12, 2017).

"The Assembly of First Nations (AFN), as an advocacy body, and any regional organizations cannot negotiate any binding changes to Canada's federal laws, policies and operational practices as part of the Recognition and Implementation of Indigenous Rights Framework."

- Resolution from the Chiefs in Assembly, AFN Special Chiefs Assembly May 2018

committee of senior officials, and it will be financially supported by the federal government.

Nearly immediately after they were signed, the MOUs faced the first test. In the July 2017 First Minister's Meeting, Indigenous leaders asked to attend the meeting (as opposed to holding a separate special session) and were rebuffed. **This resulted in the three NIO leaders boycotting the meeting all together.**⁵ Since then, the AFN has agreed to participate in First Minister's Meeting side-tables and continue work at the bilateral table.

While the **AFN insists that these mechanisms are not "decision-making" bodies**⁶ and that its role is limited to consultation and advocacy, surveying the work completed after a year reveals that decisions are being made on the new Languages Act, child welfare reform, fiscal relations and housing, among others.⁷

Further, the fact that the AFN National Chief is the only Indigenous person to participate as an equal at Confederation-style nation-to-nation meetings makes the "new relationship" seem clearly bilateral between the Crown and the AFN. This is troubling considering the AFN has no inherent or delegated governing authority.

It is also clear the Chiefs-in-Assembly are concerned about this development. During the AFN's Special Chiefs Assembly on Federal Legislation, the most vigorous debate was reserved for a resolution on the AFN's involvement in the process. The Chiefs-in-Assembly declared that the "AFN, as an advocacy body, and any regional organizations cannot negotiate any binding changes to Canada's federal laws, policies and operational

practices as part of the **Recognition and Implementation of Indigenous Rights Framework**."⁸

Perhaps this resolution will lead to a shift in the conceptualization of AFN's role in the nation-to-nation relationship. But at present, it does seem as though the MOUs are the frameworks whereby priority-setting is done with the NIOs as the "Nation." Does this mean that the federal government understands the AFN as a "nation"? Or does the reconstitution of nations process leave the Crown with no other choice with whom partner?

What appears to be the case is that the Cree, Dene, Anishinaabek, and Seneca, etc., will continue to exist, but only be recognized as self-governing after being "reconstituted"—and under the broader umbrella that sees the AFN as the apparent *de facto* nation. In this sense, First Nations might be joining Confederation through an MOU.

c. The INAC "Split," Constitutional Obligations & Self-Government

There is corresponding re-organization on the federal government's side of the relationship, announced in August 2017. Yet, for a government promising a new relationship, the announcement of the dissolution of the Department of Indigenous and Northern Affairs Canada (INAC) into two new departments—the Department of Indigenous Services (DISC) and Crown-Indigenous Relations and Northern Affairs (CIRNA)—took First Nations by surprise (not to mention most in the federal government as well). No Indigenous leaders had been consulted on, or even informed of this major change in the relationship.

According to Ministerial mandate letters, CIRNA will redirect efforts to diplomatic functions like "re-constituting nations," self-government, and land claims, while DISC will manage programs and services required (and owed to) First Nations. Though, strangely, most of the governance capacity-building is counter-intuitively administered by DISC, whereas few funds for governance support are found in CIRNA.

Though this split was recommended in part by the *Royal Commission on Aboriginal Peoples* (RCAP) as a way of moving the relationship forward, there remain crucial issues that must be addressed regarding the "split." In this section, we raise questions

⁵ John Paul Tasker, "Indigenous leaders boycott 'segregated' premiers meeting in Edmonton," CBC News (July 17, 2017).

⁶ AFN, Special Chiefs Assembly on Federal Legislation, March 22, 2018.

⁷ AFN Bulletin, "Meeting on AFN-Canada Memorandum of Understanding on Joint Priorities" (April 9, 2018).

⁸ AFN, Resolution no. 08/2018, "Implementing Canada's Recognition and Implementation of Indigenous Rights Framework and clarifying the role of the AFN" (May 2, 2018).

"It's really a dark curtain approach to the relationship at this time on some of these very fundamental changes. The federal government must do much better in terms of transparency and working with us on a nation-to-nation level."

– REGIONAL CHIEF ISADORE DAY, CHIEFS OF ONTARIO
STANDING COMMITTEE ON INDIGENOUS AND NORTHERN AFFAIRS
SEPTEMBER 29, 2017

about the division of labour between the two new Ministry's mandates, which speak to the fundamental issue of the Crown's obligations to First Nations.

As an example of the confusion this split has caused, treaty First Nations have long insisted that education and health provisions, among other "programs and services" are very much international treaty obligations owed by Canada. Therefore, this responsibility should fall under the CIRNA mandate, i.e. due to the "nation-to-nation" and treaty nature of this responsibility. And yet, education and health fall under DISC's mandate.

Another way to look at this issue is from the perspective of Crown authority. Under Section 91(24) of the *British North America Act of 1867*, "Indians and the lands reserved for Indians" fall under federal jurisdiction. This jurisdiction confers a fiduciary obligation to First Nations and is presumably the source of DISC's authority on service delivery for First Nations. CIRNA's mandate, though, seems to come in part from 1982 constitutional obligations (Section 35) upholding First Nations treaty and rights.

The federal government has been clear that DISC is meant to fade away as bands transition into self-government agreements and begin to administer their own programs and services (there are outstanding questions on who designs these programs and services). As Jane Philpott's mandate letter states, "Over time, one fundamental measure of success will be that appropriate programs and services will be increasingly delivered, not by the Government of Canada, but instead by Indigenous Peoples as they move to self-government."

We are concerned that the federal government will now make a distinction between its constitutional obligations, organizing First Nations into Section 91(24) or Section 35 categories.

While federal "jurisdiction" over Indigenous peoples remains deeply paternalistic, how government divides the labour for these obligations is critically important nonetheless.

What kinds of responsibilities will CIRNA carry if DISC ceases to exist? Will Section 35 rights import and blend 91(24) obligations or is the government relieving itself of those responsibilities?

We can expect clarity on these questions when two pieces of legislation, which will form the statutory basis for the two new ministries, are introduced later this year. The federal government insists that the split will be informed by consultation before those bills are introduced. First Nation leaders might seek clarity on the nature of their constitutional rights, the future status of historic treaties, and the potential shift in Canada's fiduciary obligations that this seemingly innocuous bureaucratic transformation sets in motion.

PART TWO: POLICY REFORM

a. “Re-Constituting Nations”: The New/Old Self-Government Model

ON FEBRUARY 14, 2018, Prime Minister Justin Trudeau used the Gerald Stanley acquittal as an opportunity to discuss broad changes to Indigenous policy. Trudeau **announced a new process** that will “advance self-determination” for First Nations people.⁹ In statements and government literature prior to and since, it is clear that central to the new Rights Framework legislation will be a process to recognize self-determining First Nation governing collectivities and offer alternative(s) to the *Indian Act* once and for all. The government insists this will be open-ended and up to First Nations to determine the shape of their re-constituted nations, yet an image of the negotiating preconditions is beginning to emerge.

While the federal government is pointing to UNDRIP, the TRC, and Chapter Two of RCAP for inspiration, precedents for its vision for self-government may be found in the **previous work of Jody Wilson-Raybould**.¹⁰ The Justice Minister helped draft *Bill S-212 First Nations Self-Government Recognition Act*. Though that Bill never became law in British Columbia (BC), Wilson-Raybould re-packaged these ideas in the 2014 BC AFN Governance Toolkit, *A Guide to Nation Building*. Both emphasized constitution development with authority to legislate reserve-based affairs and established a process for amalgamating bands. Our assumption is that the governance provisions in the Rights Framework legislation will be premised on these efforts to a great extent.

Constitutional Development & Capacity Building

SINCE THE ELECTION OF THE LIBERAL GOVERNMENT, the themes from Wilson-Raybould’s previous efforts are being expanded nationally. In B.C. and Ontario constitutional development is moving rapidly along, supported by a range of discrete federal policy tools, many of these accessible via INAC’s Professional and Institutional Development Program. Funds are made available for the creation of “Governance Strategic Plans” to identify areas of capacity-building and, once complete, First Nations can then apply for funds to create everything from constitution and leadership processes, to membership codes and financial management, and HR regulations.

This process is supplemented by Comprehensive Community Planning (CCP) to “help determine a community’s priorities and make it more engaged and resilient. **These plans will help build stronger Indigenous communities** by identifying their unique vision and priorities, making them better equipped to establish and engage in effective relationships (e.g., nation-to-nation).”¹¹ Despite an absence of formal policy on CCP, it has grown rapidly, with 75 communities entering the process in 2016-2017 alone.

DISC has now struck a working group to inform a National Indigenous Community Development Strategy, committing \$30 million over four years and describing it as “a national priority.”¹²

This process is the mechanism through which the federal government will prepare First Nations for post-*Indian Act*, reserve-based self-government. Opting in will likely be required to qualify for further steps along the self-government path, including access to less rigid fiscal transfer regulations, and link to *Indian Act* exit legislation like the *First Nations Lands Management Act*. When federal officials speak of “removing barriers” to the expression of First Nation self-determination, they seem to mean a lack of capacity and transparency, which are not the barriers First Nations have identified, such as government paternalism, treaty violations, and dispossession of lands and resources.

“To support the expansion of the First Nations Land Management Act and the successful participation of First Nations under the Act, Budget 2018 proposes to invest \$143.5 million over five years, beginning in 2018–19, and \$19 million per year ongoing. This funding will allow an additional 50 First Nations to enter into the Land Management Regime, while providing pre readiness support and capacity development to ensure their successful participation.”

- Budget 2018

Aggregating/Reconstituting Nations

As the federal government decides First Nations are ready to take on more administrative responsibility, a likely solution to service delivery will be via an aggregation model. “Reconstituted nations”

⁹ Canada, Prime Minister Justin Trudeau, “Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework” (February 14, 2018).

¹⁰ Geddes, John, “Jody Wilson-Raybould’s vision to save Canada” MacLean’s Magazine (March 2, 2018).

¹¹ Canada, Indigenous and Northern Affairs Canada, Departmental Plan, 2017-2018: 18.

¹² Canada, INAC, “Canada’s Comprehensive Community Planning Strategy”. (Powerpoint presentation), September 20, 2017.

With a rejection of the White Paper on Indian Policy in 1969 and the shift towards administrative “devolution” for First Nations, disparate policy and legislative tools have been developed to allow First Nations incremental control over local affairs.

On services, First Nations gradually assumed modest management of education and health-care administration on reserve. The amendments to the *Indian Act* in 1985 allowed First Nations to take control of membership. And since then, INAC has quietly created “governance tools” to expand the suite of administrative responsibility, complimented by reserve-based community planning and *Indian Act* exit legislation (for example, the *First Nations Land Management Act*).

Simultaneously, when the Constitution was patriated in 1982, it recognized and affirmed “Aboriginal and treaty rights” though the meaning of these rights was to be determined at a later date through negotiations. But instead, over the intervening decades, Canada’s notion of Aboriginal self-government was determined by the courts and imposed by way of policy and eventually crystallized in the 1995 *Inherent Right Policy*. This policy has linked almost exclusively with the Comprehensive Land Claims Policy and dozens of communities have entered the process, creating modern treaties and self-government agreements. Most modern treaties suffer from implementation challenges, yet there are many more communities in negotiation. In treaty areas, the *Inherent Right Policy* has also guided negotiations on sectoral issues like education and child welfare.

Importantly, under the Policy, self-government must “operate within the framework of the Canadian Constitution” in a “harmonious relationship of laws” that ensures federal and provincial paramountcy in matters of conflict. The right of self-government “does not include a right of sovereignty in the international law sense.” The policy also specifies that the right Indigenous peoples have to govern themselves is a right in relation to “internal” matters. These policies have led to First Nation critics calling this form of self-government “municipalization.”

will mean scaling up along regional, treaty or national lines and then creating new institutions to deliver programs and services. The choice would remain with First Nations as to how they decide to organize as aggregates. In Wilson-Raybould’s Bill S-212, a self-government proposal would then be verified by an independent party and provided a fiscal mechanism to support the new “nation.”

We see this approach in recent government literature (aggregation was also a recommendation of RCAP), in the mandate of CIRNA (to foster the creation of First Nation governing institutions), and in the recent federal championing of variations of these aggregated models, whether the B.C. First Nations Health and Housing Authorities or the Anishinaabek Education System and a number of emerging Child Welfare regimes.

In each of these examples, First Nations are delegated powers to deliver services at the regional level that they may not be permitted to design. This will inevitably include a greater role for provinces to fund and oversee these initiatives, relieving the federal government of obligations. As Jodi Bruhn has pointed out in a recent publication, these tri-partite service delivery models are already well underway and as a sign of their growth, the federal government has created tripartite working groups in every province and territory to work towards devolution of service delivery.¹³

Self-Government Lite

With the Rights Framework legislation, we can expect to see all of the above formalized in legislation and framed as a movement away from the *Indian Act*. But this vision of self-government is limited and focused on entrenching a reserve-based administrative governance model with improvements in service delivery, transparency and accountability, but including nothing of the “transformational” policy the government has promised.

First Nations will not be forced into this process, only encouraged to participate. But what kind of choice is a voluntary process if alternative models—ones that might focus on traditional territories, title lands, or expanded governing authority—are not an option?

For those who object to this process, the *Indian Act* will likely remain in place but with pressure to conform or be labeled “dissidents” or criminalized (in the past a federal strategy has been to withhold or reduce federal transfers as leverage to obtain consent from those who object to policies). As Assistant Deputy Minister of CIRNA, Joe Wild, remarked at the AFN’s Special Chiefs Assembly on the Rights Framework: “this will be the basis of all our relations going forward.”¹⁴

¹³ Jodi Bruhn, “Do Tripartite Approaches to Reform of Services for First Nations Make a Difference? A Study of Three Sectors,” *Aboriginal Policy Studies* 7:1 (2018): 3-33.

¹⁴ Joe Wild, Presentation to AFN Special Chiefs Assembly, “Rights Legislation: Moving Beyond the Indian Act”, May 1, 2018, *olicy Development Process (Dec 2017) Articles* 26.

"We are the Heiltsuk people, descendants of ancestors who exercised sovereign authority and ownership over our land and waters for thousands of years. We reaffirm the continued existence of Heiltsuk title, and our right as a Nation to exercise jurisdiction."

- HEILTSUK NATION, DECLARATION OF TITLE AND RIGHTS, 2015

"This has been the territory of the Tsilhqot'in Nation for longer than any man can say and it will always be our country; the outlying parts we have always shared with our neighbours – Nuxalk, Kwakiutl, Lillooet, Carrier and Shuswap – but the heartland belongs to none but the Tsilhqot'in."

- TSILHQOT'IN NATIONAL GOVERNMENT DECLARATION OF SOVEREIGNTY, 1998

"Our right to self-determination means we have jurisdiction (the right, power and authority) to administer and operate our own political, legal, economic, social and cultural systems."

- CHIEFS OF ONTARIO
"UNDERSTANDING FIRST NATION SOVEREIGNTY"

"Our laws from the Creator do not allow us to cede, release, surrender or extinguish our inherent rights. The leadership of the Dehcho upholds the teachings of the Elders as the guiding principles of Dene government now and in the future...We reaffirm, assert and exercise our inherent rights and powers to govern ourselves as a nation."

- DEHCHO FIRST NATIONS, DECLARATION OF RIGHTS

"Our treaty is the highest law of the land that our nation works from to oversee our responsibility to the land and how we govern our inherent laws."

- YELLOWHEAD TRIBAL COUNCIL, STATEMENT ON THE RIGHTS FRAMEWORK, 2018

"We see our right of self-government as an inherent right which does not come from other governments . It does not originate in our Treaties. The right of self-government and self-determination comes from the Mi'kmaq people—it is through their authority that we govern."

- UNION OF NOVA SCOTIA INDIANS
ADDRESS TO THE RCAP, 1993

Moreover, the scope of the self-government policy will expand in the Rights Framework legislation beyond those First Nations without treaties with the Crown to treaty First Nations who have been largely excluded from comprehensive self-government processes. This means that the old *Inherent Right* policy may be shifting into a more flexible, ad hoc and sectoral process of negotiation that includes multiple tracks for various circumstances.

b. Fiscal Relations & the New Accountability

In the post-White Paper era of devolution, financial stress on bands has been intensifying and the infrastructure deficits on reserves are truly staggering. Indian policy in Canada has decimated most First Nation economies. But funding formulas to address the consequences of this devastation have always fallen well below the needs. Fiscal relations for programs and services have become discounted payment in lieu of compensation for the lands, territories, and resources that were taken and that continue to be taken.

There are two new fiscal policy frameworks currently on the drafting table. One is directed to First Nations and the other to groups under the self-government policy. Both are supported by an emerging First Nation financial regime. And in both cases there are welcome changes on more flexible funding arrangements and less government intervention. Yet, the strong emphasis on accountability endures and there is a frustrating neglect on the importance of a land base to financially sustainable First Nations.

A First Nation Finance Regime

Even before the Ten Principles, in June 2016, the federal government established the First Nations–Canada Joint Committee on the Fiscal Relationship with the AFN. The original mandate for the joint working group was “to develop options for consideration by Chiefs-in-Assembly and federal decision-makers for a new fiscal relationship to ensure sufficient, predictable and sustained funding for First Nations governments.”¹⁵ It set out more specifically to examine socio-economic gaps and models for new fiscal arrangements, identify cost-drivers, and evaluate progress on removing the two per cent cap.

By January 2018, four recommendations for a new fiscal framework were made, subject to further review. These recommendations included establishing a permanent advisory committee to identify funding priorities, the creation of own source revenue tools (OSR), and the development of new First Nation-led funding arrangements; the introduction of ten-year block grant funding arrangements; the repeal of the First Nations Financial Transparency Act (FNFTA); and, the repeal of the much-maligned “third party management” policy.

Budget 2018, apparently reflecting these recommendations, allocates \$189 million to be spent over the next five years on capacity-building and data collection. While the budget does

commit resources to “close the gap” on infrastructure and service deficits on reserve, the future of fiscal relations appears to revolve around a number of “First Nation-led” financial institutions.

Four principle institutions are tasked with undertaking this fiscal relations reform: the First Nations Tax Commission (FNTC), First Nations Finance Authority (FNFA), First Nations Management Board (FNMB), and First Nations Statistical Institute (FNSI). Collectively, these institutions are often referred to as the “First Nations Financial Institutions” (FNFI). They hold a significant amount of power in the implementation of the new fiscal framework and will take a significant share of money allocated for the new fiscal relationship.

While these fiscal institutions are promoted by the government as “First Nation-led” organizations, there are several cautions to issue regarding this designation. First, the leadership of each of these fiscal institutions is appointed by Cabinet, not through a First Nation-led or even democratic process. Second, these institutions

“The proposed First Nations Fiscal Institutions Act, is national legislation,

- 1) which is based upon a municipal model, as well as, delegated authority, not the recognition of our inherent right of self-determination and self-government;
- 2) will lead to increased taxation over our members, while likely decreasing federal ongoing obligations and responsibilities for transfer payments for capital projects to our band;
- 3) will likely lead to assimilation of our Reserves into municipal and provincial taxation and land tenure systems;
- 4) will likely have a negative effect on our band members for generations to come.”

– Allied and Associated Iroquois Nations
Resolution on The First Nations Fiscal
Institutions Act, May 2002.

¹⁵ Canada, INAC, “A new approach: Co-development of a new fiscal relationship between Canada and First Nations” (January 2018).

do not represent the diversity of First Nations communities, yet they have considerable power in determining the direction of new fiscal policies. Finally, their work has been highly criticized for its conservative positions on First Nations' economic rights.

Critics allege that these financial institutions have mimicked and reflected INAC positions on taxation, privatization, and financing bonds on capital markets.¹⁶

Critics have also found that these institutions embody “a strong municipal approach to First Nations governments” because they delegates authority to First Nations but do not expand their fiscal autonomy or land base.¹⁷

Placing the future of fiscal relations in the hands of the FNFI is a strategic investment for the federal government. Like the capacity-building resources available on the core governance side of things, these Institutions will help prepare First Nations to develop policies and tools to implement taxation, strengthen financial management, aggregate for the purposes of service delivery, and ultimately reduce the obligations the Crown owes First Nations. While, once again, participation in these institutions is on an opt-in basis¹⁸ the new regime will quickly set standards and over time, be the only option for First Nations.

Fiscal Relations and Modern Treaty Self-Government

A new fiscal policy for self-government groups will also guide how the federal government funds First Nations that are either under self-government agreements, the Comprehensive Land Claims policy, sectoral self-government, or as a legislated comprehensive self-government arrangement. The draft policy report, *Self-Government Fiscal Policy Proposal for Federal Review Collaborative Fiscal Policy Development Process*, released to communities on December 2017, outlines the new fiscal framework being proposed.

The focus of recent reform to this framework has been two-fold. The first is on addressing real expenditure needs of self-governing Indigenous Governments based on their experience with underfunding during the implementation of agreements. The second, is to provide greater access to other revenues.

The draft fiscal policy demonstrates the slow transition to “fiscal independence.” These arrangements involve a combination of funding generated by the Indigenous governments from own sources, with supplemental funding from federal transfer payments and increasingly support from provinces. Indigenous fundraising, the draft policy states, will also rely heavily on tax revenues. There will still be a role for governments to play in these groups, as stated, this money will include, “additional funding to address socio-economic gaps; and other funding from provincial and territorial governments.”¹⁹

While this policy was being developed, INAC suspended OSR

reporting requirements for Indigenous Governments for three years. It is clear that the current federal government is committed to addressing the fiscal challenges of implementing modern treaties, which has not always been the case. We can expect increased support to “close gaps” and build capacity upfront through a “whole of government” approach that will ease the transition to taxation, OSR funded service delivery, and, eventually, less long-term funding from Canada (after ensuring First Nations can actually deliver services adequately with OSR). Modern treaty signatories may also see some form of debt forgiveness and/or repayment for monies borrowed to negotiate through these government processes.

“A critical element of fiscal autonomy is a fair and just redistribution of lands and resources for Aboriginal peoples. Without such a redistribution, Aboriginal governments, and the communities they govern, will continue to lack a viable and sustaining economic base, which is integral to self-government.”

- RCAP (1996) Volume 2, Restructuring the Relationship

¹⁶ For example, the AFN vigorously opposed the creation of these fiscal institutions in 2002 (AFN Resolution 30/2002), stating that then Prime Minister Jean Chrétien and Indian Affairs Minister Robert Nault were forcing them upon First Nations. They also opposed the labeling of the legislation to create these bodies as “First Nation-led” because they were not representative of the general will of First Nation leadership.

¹⁷ Mary C. Hurley, Marlisa Tiedemann, “Bill C-20: First Nations Fiscal and Statistical Management Act,” Parliament of Canada: Law and Government Division (November 30, 2004).

¹⁸ Canada, Indigenous and Northern Affairs Canada, 2017-2018 Departmental Plan, 2017-2018: 5, 18.

¹⁹ Canada, *Self-Government Fiscal Policy Proposal for Federal Review Collaborative Fiscal Policy Development Process* (Dec 2017) Articles 26.

Fiscal Relations and *Indian Act* Bands (The 10 Year Grant)

In some ways we can think of the draft fiscal policy for First Nation groups under the Self-Government policy as the horizon for First Nations bands under the *Indian Act*. The new fiscal policy framework readies bands for self-government and this revolves around a new ten-year grant. As outlined in a slide presentation by the AFN Chiefs Committee on the new fiscal relationship the ten year grant will ease the “transition to [Self-Government Agreement] SGA.” The fiscal relations process, the Committee states, will be “coordinating with self-government processes.”²⁰

What do we know about these grants? Government correspondence reveals that First Nations will be able to apply for ten years of block funding this year (the application deadline is June 29, 2018). Eligibility will be dependent on their progress on capacity development and accountability. Specifically, First Nations must have a Financial Administration Law (ideally certified by the First Nations Financial Management Board) and a proven track record of five years of strong financial management. Audited financial statements confirming this must be submitted for review.

Importantly, reporting requirements will shift from “compliance-based” reporting to “outcomes-based” and reduce the nearly constant federal oversight that currently exists. In the meantime, if the 2018-2019 funding model is any indication of the interim fiscal relations framework for bands, accountability measures will continue to be onerous, with DISC demanding access to First Nations financial records, the power to audit or review on demand, and determining parameters for how funds are spent.²¹

This approach does not guarantee that funding will actually increase following years of capped funding; it is possible that the ten-year grants may simply deliver ten years of inadequate funding. Indeed almost all of the spending for the new fiscal relationship so far is focused on capacity-building and data collection (i.e. determining the service populations).

More, in the government’s process, lands, territories, resources and restitution for land loss are all delinked from fiscal relations, except for any OSR from resource extraction in traditional territories. On land specifically, the best First Nations can hope for to expand land under their jurisdiction is to purchase it in fee simple, pay taxes to the local municipality and convert to reserve status under revised additions to reserve policy, which is still in development²² but expected to be complete in time for the Right Framework legislation.

Finally, there is an emphasis on partnerships with Industry,²³ and collaborative economic development with municipalities,²⁴ and during a speech at the Economic Club of Canada, Minister of Indigenous Services Jane Philpott also challenged non-government organizations to pitch in.²⁵

As mentioned, currently, there is a three-year suspension on OSR reporting to INAC while a new self-government process is developed.²⁶ Before the moratorium, this reporting allowed the

federal government to reduce transfers to First Nations relative to community revenue generation. When the three years is up, First Nations will effectively start paying the government for services they are owed.

Considering the myriad strategies outlined here—capacity building, de-linking fiscal relations from land, and leveraging external partnerships—it is clear to us that the federal government is renovating the fiscal relationship to achieve a long-term vision of reducing Crown obligations to First Nations.

c. Aboriginal Title, Comprehensive Claims & Rights Recognition Tables

The movement away from the comprehensive claims and modern treaty model is already underway. In June 2016, INAC revealed the 20 “exploratory tables” on land claims and governance matters, but refused to reveal the list of communities with whom it was negotiating. A year later, the number of tables had jumped to 50 (now at 60), and the “exploratory tables” were renamed as “Recognition of Indigenous Rights and Self-Determination Discussion Tables.” Joe Wild, Senior Assistant Deputy Minister for Treaties and Aboriginal Government in Crown-Indigenous Relations, stated that these new tables would inform the direction of national policy reforms on land claims and self-government rights.²⁷

Today, there are 60 discussion tables involving 320 communities affecting 700,000 Indigenous people in Canada: this is a tremendous number, nearly half the total population. This includes approximately 265,000 Métis represented by five provincially-organized groups.²⁸ There is one Inuit group. And nearly half of the First Nations groups at the table are advocacy organizations, such as Political Territorial Organizational (PTOs) and tribal councils.

²⁰ AFN Chiefs Committee on the new Fiscal Relationship, “Presentation to Assembly of First Nations, Quebec-Labrador, on Fiscal Relations” 36 March 14, 2018.

²¹ Canada, INAC, Streamlined Funding Agreement Model for First Nations 2018-2019 (December 2017)

²² Canada, INAC, 2017-2018 Departmental Plan, p. 34.

²³ Canada, INAC, 2018-2019 Departmental Plan, p. 10.

²⁴ Canada, INAC, 2017-2018 Departmental Plan, p. 34.

²⁵ Marc-André Cossette, “Feds could look to private sector to help close First Nations infrastructure gap” (April 13, 2018)

²⁶ Canada, INAC, “Own-source revenue for self-governing groups” (September 2016)

²⁷ James Munson, “Nation-to-nation relationship taking shape” (June 4, 2016)

²⁸ This number is calculated based on the stated memberships of the Métis Nation of B.C., Métis Nation of Alberta, Métis Nation of Saskatchewan, Manitoba Métis Federation and Métis Nation of Ontario.

Rights Recognition Tables

60

Discussion Tables

320

Communities

700,000

Indigenous people represented,
including approximately,

265,000

Métis

One

Inuit Group

The tables involve interpretations of every kind of Crown-Indigenous relationship in Canada: historic treaties, *Indian Act* bands on treaty and title lands, Métis groups previously left out of land grievance processes, and an Inuit group seeking compensation for community relocation.

The federal government has not made transparent the rationale for approaching these particular First Nations or the scope of negotiations. But there are some observations we can make here to understand the interpretation of Aboriginal title through these processes.

Concerns with the Process

It is important to note there are positive aspects of the rights and recognition tables. These include funding opportunities available to negotiating groups that are not loan-based. Unlike in litigation, groups do not have to undertake the significant risk of indebting themselves through a lengthy and costly process with uncertain outcomes; by all accounts, the discussions are wide ranging and not binding. Still, there are reasons to be cautious.

First is with the lack of transparency of the process. There is significant confusion about the tables because the federal government insists on confidentiality. This prevents information sharing among First Nations and limits an awareness among First Nations citizens about the change in trajectory of their claims or even the subject of negotiations. Responding to this confusion, the [Standing Committee on Aboriginal Affairs recently recommended](#) INAC “make information on Recognition of Rights Tables publicly available, including the policy and focus of the discussions.”²⁹ Second, and another reason information may not be circulating, is that political organizations vastly over-represented at the tables

are not title and rights holders. They can represent the interests of their constituents, of course, and tribal council politics differ from organization to organization, but questions must be raised about how information is being circulated to members and what processes are in place to ensure decisions are consensual.

Third, leaders from historic treaty territories have reported that when Minister Bennett was undertaking consultation in the prairies she referred to the rights and recognition tables as “treaty tables.” Analysts in the Prairies feel that the direction of “treaty implementation” is pushing them towards sectoral agreements that domesticate their treaties, rather than engaging in the spirit and intent of the treaties as meaningful, international land-sharing agreements between nations.

Fourth, historically INAC has used funding as an incentive to help induce First Nations to adapt to unwanted shifts in policy. With these tables informing the future of the Rights Framework legislation, there may be an expectation that to continue exploratory talks and related capacity building, support for the legislation may be encouraged.

“Only through treaties is Canada a part of our territories. I’m not here to ask for jurisdiction.”

- Regena Crowchild, Tsuut’ina Councilwoman, AFN Special Chiefs Assembly on the Rights Framework, May 2018

Finally, a significant number of groups at the rights and recognition tables are involved in litigation against the Crown. With these tables, the federal government has shifted the space of contestation away from courts to negotiation, something First Nations have long been encouraging. But the timing is interesting, given the increasingly progressive interpretation of Aboriginal title at the Supreme Court (notably the *Tsilhqot’in* decision).³⁰ If the federal government’s negotiating mandate is narrower than the court’s interpretation of Indigenous rights—and historically it has been—

²⁹ Standing Committee on Indigenous and Northern Affairs, “Indigenous Land Rights: Towards Respect and Implementation” (February 2018).

³⁰ Supreme Court of Canada, *Tsilhqot’in Nation v British Columbia* (2014): paragraph 44.

this is very likely a risk management strategy that has consequences for the future of Aboriginal title.

Land claim disputes also figured highly into the selection of groups for the process, along with sectoral issues like child welfare, fisheries, and housing.

Of the 60 Recognition of Indigenous Rights and Self-Determination Discussion Tables public information is available for just seven: the Coastal First Nations, Heiltsuk Nation, Tsilhqot'in, Tsleil-Waututh, Ocean Man, White Bear and Pheasant Rump Nakota First Nations, Whitecap Dakota First Nation, and Williams Treaties First Nations.

The majority of First Nations at a Recognition of Indigenous Rights and Self-Determination Discussion Tables are also involved in litigation against Canada. First Nations currently have 45,000 legal claims against the Crown.

Incremental & Sectoral Approaches to Aboriginal Title

The sectoral and incremental approaches to Aboriginal title were devised almost two decades ago within the BC Treaty Process as a solution to the lack of interim measures for bands during lengthy, decades-long processes. (They are also called “slim AIPs [Agreements in Principle] or “pre-treaty” agreements).

British Columbia has since then been setting the precedents and agenda on the modern treaty and land claim process for the rest of Canada. “Incrementalism” as a policy is almost 20-years old and has been a mechanism within the BC Treaty Process for about as long. The BC Treaty Commission has been recommending that First Nations, Canada, and BC shift the emphasis from final agreements to building treaties gradually over time, setting in place all the pieces to ensure the success of the broader agreement, once ready to be signed.³¹

There are also a range of “outside” modern treaty measures, known as sectoral agreements, that have been tried in BC for a number of years. These include Forest Consultation and Revenue Sharing Agreements, Strategic Engagement Agreements, and Economic and Community Development Agreements (such as mining revenue sharing).

These fall under the umbrella of “Reconciliation Agreements” with the provincial government, which produce “certainty” for

natural resource investment in the province “without prejudice” to Aboriginal title.³²

This movement away from land claims settlements towards more sectoral, incremental certainty over particular issues and resources was also emphasized by former Prime Minister Stephen Harper, his last government commissioning a special report, *A New Direction: Advancing Aboriginal and Treaty Rights*, by Douglas R. Eyford. Eyford reviewed the comprehensive land claims policy in Canada and recommended that Canada should “develop an alternative approach for modern treaty negotiations, one informed by the recognition of existing Aboriginal rights, including title, in areas where Aboriginal title can be conclusively demonstrated.”³³

Key questions arose in response to this strategy that should now be posed to Trudeau’s government, such as: what guidance does the Rights Framework give as to the legal criteria for making a claim acceptable or unacceptable? Will these tables “test positions” for the Crown that they wish to advance in litigation? Is the Crown pushing positions that have failed in litigation or through the comprehensive land claims policy?³⁴

Furthermore, do sectoral agreements erode broader claims for Aboriginal title and rights of Indigenous nations? Will the Crown governments obtain license to argue that nations have consented to various forms of infringement through these incremental agreements that might ultimately undermine Section 35 rights?³⁵

³¹ British Columbia Treaty Commission, “Looking Back – Looking Forward”, B.C. Treaty Commission (2001): 14.

³² Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State*, University of Minnesota Press, 2017.

³³ Canada, Douglas R. Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (2015): 46.

³⁴ Joint Submission of the Coalition on the UN Declaration on the Rights of Indigenous Peoples, “Renewing the Federal Comprehensive Land Claims Policy”, Amnesty International Canada; Assembly of First Nations; Canadian Friends Service Committee (Quakers); Chiefs of Ontario; First Nations Summit; Grand Council of the Crees (Eeyou Istchee); Indigenous World Association; Inuit Tapiriit Kanatami; KAIROS: Canadian Ecumenical Justice Initiatives; Native Women’s Association of Canada; Québec Native Women/Femmes Autochtones du Québec; Union of British Columbia Indian Chiefs (November 2014).

³⁵ Russell Diabo, “Briefing Note to the Algonquin Nation Secretariat: Aboriginal Title / Rights v. Federal Comprehensive Claims Policy” (February 11, 2013): 4.

“Cooperation and negotiations can prove beneficial but, at the same time, First Nations have an alternative to a negotiated agreement, that is, to act on their own understanding of their inherent rights and title which are already recognized and have immediate legal effects. The Crown’s failure to accept this reality underscores why the current policy and related negotiating mandates have failed to produce very many modern Treaties.”

- AFN Annual General Assembly
(Comprehensive Claims Policy
Renewal Panel), 2015

In this process the government can insist it is no longer extinguishing or modifying title, yet, there are still “certainty” clauses that prevent First Nations from exercising jurisdiction over their lands and resources. First Nations temporarily suspend claims in exchange for financial compensation and/or a co-management regime. These agreements may then be re-visited and re-negotiated on a regular basis, offering some flexibility for First Nations but also convenience for Canada, since none of these agreements have recognized a substantive form of First Nation jurisdiction.

For existing land claims organizations, lobbying through the [Land Claims Coalition of Canada \(LCAC\)](#) has resulted in the federal government creating new measures to address long-standing criticisms of modern treaty implementation issues.³⁶ It remains to be seen if these processes will offer redress.

³⁶ Canada, INAC, Cabinet Directive on the Federal Approach to Modern Treaty Implementation (July 2015)

The Future of Aboriginal Title

Rather than move towards a recognition of First Nation territorial authority, the federal government might be moving towards the “postage stamp” or a resource-specific approach that avoids the issue of Aboriginal title in any fulsome way.

Information on this approach is hard to glean, given federal officials’ confusing statements. Government literature encourages more comprehensive claims, while also moving away from them. Moreover, the federal government insists the title aspects of the Rights Framework legislation will be “co-developed,” while contacts participating in the rights and recognition tables report frustration, little space for substantive dialogue, and apparent status quo federal mandates when it comes to Aboriginal title and self-government. It does seem clear that the Comprehensive Claims Policy will be revised significantly. The era of wholesale, modern treaties may be over. In their place, as Douglas Eyford recommended in 2015 and BC has been practicing for some time, will be the sectoral Reconciliation Agreement. It is unclear what that means for those who have been negotiating for ten, fifteen or twenty years already.

Part Three: Legislative Reform

a. Sixteen New Pieces of Legislation

MUCH OF THIS REPORT IS BUILT UPON government literature, existing and draft policy, informal conversations with federal and First Nation officials, and our best guesses. With the rapidly evolving landscape, there is a chance that some of the assertions in this report may not actually appear in the Rights Framework legislation. However, the federal government has been active on related legislation as well and we have a number of Bills or Acts to review, which have significant ramifications for First Nations and indicate a likely direction of the Rights Framework Legislation to come.

At the outset, it is important to say that this government has been among the most active in the history of Canadian government on Indigenous issues.

Part of the reason for the century long hiatus has been the refusal of First Nations to accept more federal intervention. But it is here again, whether in the form of a new resource regulation regime, UNDRIP, or Orange Shirt Day. Below we consider what this legislation means for First Nations.

Cabinet Committee to “Decolonize” Canada’s Laws

During the 2015 campaign, Justin Trudeau promised to review all laws and policies that violated Aboriginal rights. Nearly a year later, a cabinet committee to “decolonize” Canada’s laws was announced. This committee includes Ministers of Justice, INAC (both), Natural Resources, Environment and Climate, Transportation, Fisheries and Oceans, and Families, Children and Social Development.³⁷

This work extends beyond this committee. In many of Cabinet’s Ministerial Mandate Letters, a process of reform was instructed to each: the Minister of the Environment and Climate Change was directed to review the CEAA; the Minister of Natural Resources was directed to review the National Energy Board (NEB) and its enabling statutes; the Minister of Fisheries was directed to review the Fisheries Act; and finally, the Minister of Transport was directed to review the federal navigation legislation. (It should be added that these reviews were taking place regardless of the urge to decolonize and there is a matter of convenience here).

Yet, the process of decolonization will not be a collaborative one. Canada surprised First Nations with the announcement of the committee. The committee was formed with no Indigenous input or representation, except for that of the Justice Minister.

“Decolonization” would be driven largely by non-Indigenous Canadians and in what has become an established pattern of

unilateral imposition across the Rights Framework. Moreover, there is little to add here on the committee because its deliberations are unknown, protected by Cabinet secrecy.

Consent & The New Regulatory Regime

The two most substantive bills discussed here were submitted by the Minister of the Environment and Climate Change for first reading in February 2018 – Bills C-68³⁸ and C-69. These sought to replace former Prime Minister Harper’s Canadian Environmental Assessment Act (CEAA) of 2012 and other components of his omnibus Bill C-38 and C-45, *The Jobs, Growth, and Long Term Prosperity Act*, and *The Jobs and Growth Act*.

The review process for this draft legislation has been substantive. It was informed by two Expert Panels, two parliamentary committees, and consultations with Indigenous peoples, industry, provinces and territories and the public over a period of fourteen months.

We will say that on Bill C-68—the bill to amend the Fisheries Act—there appears to be some agreement among First Nation policy analysts that the government has largely crafted a sound bill with respect to fish and fish habitat (less consensus on protections for Indigenous rights). Yet, on Bill C-69, which includes changes to the Environmental Assessment Act (now the Impact Assessment Act), Navigable Protection Act, the National Energy Board Act (now the Canadian Energy Regulator Act), and other consequential amendments, there are serious questions revolving around the federal government’s commitment to “decolonizing”. Primarily, there are very narrow interpretations of UNDRIP, and more broadly, the meanings of First Nation governance, jurisdiction, law, and consent are vague and problematic.

On UNDRIP, the Expert Panel tasked with reviewing the Environmental Assessment Process was actually very progressive. It is, after all, the assessment process that triggers the Duty to Consult. The Panel offered a direction that moved us towards free, prior and informed consent (FPIC), stating, “to reflect FPIC, all Indigenous Peoples who are impacted by a project have the right to provide or withhold consent.”

Yet, this recommendation does not appear in the legislation. Indeed, not only is FPIC non-existent in draft Bill C-69, UNDRIP is not referenced, either. The federal government has explained to some groups in consultation that the integration of UNDRIP principles will be made in the forthcoming Rights Framework legislation, but the Impact Assessment (IA) is a central mechanism—if not the

³⁷ Canada, “Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples” (Feb. 22, 2017)

³⁸ For analysis of the proposed Navigable Water Act, see Pamela Palmater and Maude Barlow, “Toss Bill C-69 overboard and protect our water, Mr. Trudeau,” *Ottawa Citizen*. April 19, 2018.

Pending Legislation

LEGISLATION RECEIVING ROYAL ASSENT		
Bill S-208 National Seal Products Day Act	May 2017	Private member's bill (LPC)
C-17 An Act to amend the Yukon Environmental and Socio-economic Assessment Act	December 2017	Government bill
S-3 An Act to amend the Indian Act in response to Superior Court of Quebec decision in Descheneaux c. Canada	December 2017	Senate bill
INTRODUCED LEGISLATION		
S-212 Aboriginal Languages of Canada Act	December 2015	Senate bill (LPC)
C-262 United Nations Declaration on the Rights of Indigenous Peoples Act	April 2016	Private member's bill (NDP)
C-318 An Act to establish Indian Residential School Reconciliation and Memorial Day	October 2016	Private member's bill (LPC)
C-332 United Nations Declaration on the Rights of Indigenous Peoples Reporting Act	December 2016	Private member's bill (LPC)
C-369 National Indigenous Peoples Day	October 2017	Private member's bill (NDP)
C-386 An Act to establish Orange Shirt Day	November 2017	Private member's bill (LPC)
C-391 Aboriginal Cultural Property Repatriation Act	February 2018	Private member's bill (LPC)
C-68 An Act to amend the Fisheries Act and other Acts in consequence	February 2018	Government bill
C-69 An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act	February 2018	Government bill
PROPOSED LEGISLATION		
An Act to Establish the Ministry of Crown – Indigenous Relations and Northern Affairs (CIRNA)	Proposed for 2018	Government bill
An Act to Establish the Department of Indigenous Services Canada (DISC)	Proposed for 2018	Government bill
Indigenous Languages Act	Proposed for Fall 2018	Government bill
An Act to Establish an Indigenous Rights, Recognition and Implementation Framework	Implementation Proposed for Fall 2019	Government bill

*For the purposes of this table, "Legislation Receiving Royal Assent" means bills that have or will soon become law. "Introduced legislation" means bills working their way through Parliament. Some of these may never become law, the private member's bills in particular. Proposed legislation are bills the federal government has announced for introduction. This table does not include modern treaty specific legislation.

"A new Impact Assessment [IA] process should "more accurately and holistically assess impacts to Aboriginal and treaty rights and interests and identify appropriate accommodation measures. This IA process should contribute to a meaningful nation-to-nation relationship. Therefore, the Panel recommends that...a Decision Phase be established wherein the IA authority would seek Indigenous consent."

-EXPERT PANEL REPORT, "BUILDING COMMON GROUND:
A NEW VISION FOR IMPACT ASSESSMENT IN CANADA", 2017

"States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

-UNITED NATIONS, DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 2007, ARTICLE 32 (2).

"Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."

-SUPREME COURT OF CANADA, TSILHQOT'IN DECISION, 2013, PARAGRAPH 97

"By bailing out Kinder Morgan's investment in the Trans Mountain pipeline, Canada has announced its ongoing intention to violate Indigenous title, law and jurisdiction, as well as the constitutional rights of Indigenous peoples, and all protocols of international law protecting Indigenous peoples' homeland and right to consent to development on their lands."

-SECWEPEMC WOMEN'S WARRIOR SOCIETY, MAY 31, 2018

central mechanism—where Indigenous rights will be material. The largest conflicts around Indigenous rights in Canada tend to take place regarding resource extraction and development.

As the draft legislation currently stands, there are a number of provisions that actually limit fulsome Indigenous participation. For instance, opportunities for Indigenous consultation are cited throughout the process, but there is no requirement for the industry proponent or government to alter or modify the process according to this feedback. Indigenous knowledge will be ‘taken into account,’ but decisions do not have to be based on that knowledge and the industry proponent is not required to provide public or Indigenous considerations to the application process.

There is one mention of First Nation consent in C-69. It can be found in the *Canadian Energy Regulator Act*, a piece of legislation that dissolves the National Energy Board and replaces it with the Canadian Energy Regulator (CER). This piece of legislation must factor Section 35 Aboriginal rights, recognizes the jurisdiction of “Indigenous governing bodies”³⁹ and requires consent should a pipeline or pipeline infrastructure cross a reserve boundary (or in the case of modern treaties, “settlement” lands). While not new in the policy sense as there are no recent cases of reserve lands being appropriated in this way, it is the first time “consent” has appeared in legislation regarding First Nations.

There is an important implication from this use of consent in law: it is bound to the reserve or settlement lands, but not to traditional territories or title lands. This is an incredibly small percentage of Indigenous lands and tells us that Canada’s conceptualization of First Nation jurisdiction continues to be restricted to the reserve.

More, consent will be in the domain of federally recognized Indigenous governments. As the Justice Minister noted, “where land-use decisions are being made that affect Indigenous peoples, the legitimate and recognized governments of those peoples must be able to participate in shared decision-making with other levels of government. For me, this is how free, prior and informed consent is operationalized.”⁴⁰ This is an implicit message to community activists or those who may disagree with First Nation band councils or “governing bodies” that their consent is not required.

It is likely that future legislation will also include “consent” in this form. Though it must be forcefully stated, this is not FPIC, as envisioned by the UN *Declaration* or many First Nations.

Harmony with UNDRIP: The Saganash Bill

We have addressed very few of the impending Bills. There is important new Language Legislation from the Government, a private member’s bill on Indigenous cultural property, changes to gender discrimination in the *Indian Act*, and two Bills seeking recognition for residential schools. Throughout the summer and

fall Yellowhead Institute will issue stand-alone policy analysis on most of these pieces of legislation. But while discussing UNDRIP, it is important to briefly mention Bill-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*.

In the Spring of 2016, NDP MP and James Bay Cree Romeo Saganash introduced the Private Member’s Bill in the House of Commons. The Bill “requires the Government of Canada to take all measures necessary to ensure that the laws of Canada are in harmony with the United Nations *Declaration on the Rights of Indigenous Peoples*.” Initially the Liberal Government opposed the Bill, asserting that UNDRIP would be implemented through their own processes and so Saganash’s Bill was unnecessary. But after intense criticism and lobbying from Saganash, they changed course and have since offered support for the Bill.

While this is good news, if the UNDRIP Harmony legislation is eventually passed and made law, we are uncertain of the tangible consequences. The legislation requires three things of government, in collaboration with Indigenous peoples: 1) to ensure Canadian laws are consistent with UNDRIP, 2) to create a national action plan on enabling consistency, and, 3) a report every Spring on the progress of these processes. The legislation could also require something of courts: the use of UNDRIP to interpret Section 35, which they have avoided doing to date.

Like the UNDRIP itself, the legislation is quite general. This could lead to some implementation challenges and allow this government or future government’s to slip out of obligations. For instance, federal officials have already stated UNDRIP is largely satisfied by Section 35 of the constitution. This provides an escape from actually addressing UNDRIP. (We are also concerned, given the court’s generally conservative views on Aboriginal rights, that UNDRIP will be diluted there, too).

This highlights the interpretive problem of the proposed legislation: while it will be a powerful tool to hold governments accountable, there is nothing in the text of the bill that prevents officials from a narrow interpretation of UNDRIP, as has been the case to date. That includes references to free, prior and informed consent.

³⁹ Indigenous Governing bodies is a new term in Bill C-69 and related government literature. It is unclear at this point what the rights and responsibilities of Indigenous Governing bodies are. It appears Indigenous Governing bodies are entities created post-self government agreement. In previous legislation the term “Aboriginal Government” notes self-governing entities.

⁴⁰ Jody Wilson-Raybould, “Notes for the Honourable Minister of Justice and Attorney-General of Canada” AFN AGA (July 12, 2016).

Members of the Interim National Council on Reconciliation

Wilton Littlechild (Chair)
Max FineDay
Mike DeGagné
Clint Davis
Edith Cloutier
Jean Teillet

b. The Law of Reconciliation

Almost all of these changes have been informed by the reconciliation process currently underway in Canada. Or, at the least, there is reference to the process of reconciliation. The Truth and Reconciliation Commission's definition of reconciliation, in part, identifies *restitution* and the *transformation of Canadian institutions* as integral so that we might have a future defined by dignity and respect.⁴¹ We have to strain to see those commitments from this government, though there have been preliminary steps.

On the Calls to Action, there are conflicting accounts of progress. The federal government suggests action underway on two-thirds of the Calls under the their mandate⁴² while a CBC report takes a more skeptical account, suggesting that there is little to no progress on most of the federal government's responsibilities.⁴³

The official body that will monitor progress on the Calls is presumably the National Council on Reconciliation. In December 2016, the Prime Minister announced the creation of an interim board of directors for the Board to "begin an engagement process to develop recommendations on the scope and mandate of the National Council."⁴⁴ Not much else is known about the proposed board except what we can glean from the TRC itself, which envisions a body that holds the federal government accountable for the Calls to Action.

Coincidentally, there is very similar language in the TRC Call for a National Council and Romeo Saganash's private member's bill. Both include provisions for annual reporting and a national implementation plan. We can imagine the government bringing Bill C-262 into dialogue with the National Council, perhaps even using the National Council as the collaboration mechanism on UNDRIP legislation. If this is the case, attention must be paid to the future composition of the National Council for Reconciliation to ensure there are community voices present.

Finally, there are currently two bills before Parliament on reconciliation, both private member's bills: C-318 *An Act to establish Indian Residential School Reconciliation and Memorial Day* and C-386 *An Act to establish Orange Shirt Day: A Day for Truth and Reconciliation*. While not government bills, they are in some ways reflective of the government's approach to reconciliation to date. That is, they are largely symbolic.

It is too early to determine how reconciliation works through or within the impending Rights Framework legislation, aside from serving as the general motivation. As the final eighteen months of this government's mandate runs its course, we do expect some movement on the core of the TRC's Calls to Action. The question remains how genuine its efforts will be.

⁴¹ The Truth and Reconciliation Commission, "Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (2015): 16-21.

⁴² INAN Committee Report, "Government Of Canada Response To The Standing Committee On Indigenous And Northern Affairs: Breaking Point: The Suicide Crisis In Indigenous Communities" (June 2017).

⁴³ CBC News, "Beyond 94: Truth and Reconciliation in Canada" (26 March 2018).

⁴⁴ "Statement by the Prime Minister of Canada on advancing reconciliation with Indigenous Peoples" (December 15, 2016).

**"We have obligations to the
land and to future generations.
We cannot give up because we
are not allowed to give up."**

—SHARON VENNE, NEHIYAW LEGAL SCHOLAR, NAISA CONFERENCE, MAY 2018

CONCLUSION

Closing the Gap

THIS REPORT HAS BEEN WRITTEN FOR First Nation citizens, and community and national leaders. With so many changes to the machinery of government, terminology, federal policy, and legislation, it is difficult even for a team of researchers with a network of supporters to keep up. But we hope to have brought some clarity to the emerging Rights Framework that is useful to communities. Over the next 12 to 18 months the federal government will continue to shape the legislation, and we believe there is much to prepare for.

The *Indian Act* is on its way out; the land claims regime and self-government policies are being broken down and re-packaged; and changes to fiscal relations ultimately focus on accountability and avoid addressing questions of land and resources. Indeed, we find that nearly all of Canada's proposed changes to its relationship with First Nation peoples neglect issues of land restitution and treaty obligations. Instead, whether relational, policy or legislative reform, they focus on the creation of self-governing First Nations with administrative responsibility for service delivery on limited land bases. Decision-making powers are constrained to the local (including any notion of free, prior and informed consent). Provincial, territorial and federal governments will continue to patronize and intervene in the lives and lands of First Nation peoples.

All of this despite Trudeau's rhetoric on reconciliation, UNDRIP, the nation-to-nation relationship, or the commitment to "breathing life" into Section 35 of the Constitution. And while there are some welcome changes including resources for program and service delivery, there is also a clear attempt to maintain a modified

version of the status quo, and as such, an effort to mislead First Nations on the transformational nature of these changes. This has consequences. As the **Auditor General remarked**, "there are so many discussions about the need to close the socio-economic gaps between Indigenous people and other Canadians in this country and we don't see those gaps closing."⁴⁵

The danger of accepting government messaging, and the Rights Framework as it is currently articulated, is entrenching these gaps for the long-term and settling for a very narrow vision of Indigenous jurisdiction over lands, resources and self-determination generally.

There is still time to influence the Framework. And much more work to do.

This Report has focused on the broad strokes for First Nations specifically. Over the course of this government's mandate, Yellowhead Institute will publish follow-up analysis on the progress of the Framework that will include urban perspectives, centre the voices of youth, Two-Spirit individuals and women, and engage with Métis and Inuk analysts to comprehensively map the coming changes and offer alternative visions for Indigenous futures.

⁴⁵ Lucy Scholey, "‘Incomprehensible failure’: Auditor general says federal government not improving life for Indigenous people". APTN National News (May 29, 2018).



www.yellowheadinstitute.org