3-2018

Discussion Paper: Challenges and Successes of Select Federal Initiatives in First Nation Reserve Communities, including the Canada Labour Code, the Canadian Human Rights Act, and the National Building Code

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To

Accessibility Secretariat
Income Security and Social Development Branch
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March 2018

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Executive Summary

This paper is to inform on-going discussions over proposed new federal accessibility legislation, and in particular discussions about whether such legislation should be extended to First Nation reserve communities. This paper is not a part of the consultation process that is being undertaken with various First Nations organizations. It surveys statutory law, reports, literature and jurisprudence. It discusses the legal landscape that must inform any dialogue about extending the federal regime to First Nation communities and assesses successes and challenges associated with three existing federal regimes that apply on First Nation Reserves.

Legal Landscape

The legal landscape requires careful attention. While the Constitution Act, 1867, assigns federal jurisdiction over reserve land, this power must be exercised consistent with section 35 of the Constitution Act, 1982, which requires that Aboriginal and Treaty rights be respected and affirmed. Any federal action that may affect such rights must be consistent with upholding the honour of the Crown. This means any discussion of whether to extend accessibility legislation to reserve communities must include a consultation and accommodation process that meaningfully engages and respects the rights holding communities. While national political bodies may contribute helpfully to the information gathering and consultation process, this does not displace the right of First Nation governments to full participation, unless they grant authority to other bodies to consult on their behalf. Consultation processes should be co-designed with Indigenous governments and organizations from the very beginning.

Matters of accessibility engage standards recognized in the *Canadian Charter of Rights and Freedoms.* While the *Charter* applies to First Nations governments, its application is qualified. In particular, its guarantee of rights shall not be interpreted to abrogate or derogate from section 35 Aboriginal rights. Thus *Charter* rights must be interpreted in light of section 35.

Self-government is recognized by Indigenous governments and the Federal Government as an inherent right of Indigenous peoples that is also protected under section 35. Canada expressly recognizes the right to self-government as including matters "internal" to Indigenous communities such as transportation, housing and zoning, which are all relevant for accessibility. The federal government has committed to supporting a bill under which all Canadian laws are to comply with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP requires recognition of Indigenous autonomy over internal affairs, and support in developing and maintaining Indigenous political, legal and decision-making institutions. It obliges states to take special measures to ensure that disabled Indigenous persons experience a continuing improvement of their economic and social conditions. As UNDRIP requires states to obtain free, prior and informed consent for actions that affect Indigenous peoples, it would require any decision to extend accessibility legislation to First Nation reserve communities to meet this threshold.

Many Indigenous communities in Canada have concluded or are negotiating self-government agreements. These agreements are all unique. They set out jurisdiction as between the First Nations government, the relevant provincial government, and the federal government, as well as

how to address conflicts of laws. Under most of the agreements, citizens of the self-governing First Nation continue to have access to federal services or programs for Aboriginal people, unless the First Nation has assumed responsibility for said service under a fiscal transfer agreement. In some instances, the self-governing First Nation has explicit authority over matters relevant for accessibility. Not surprisingly, the Constitutions of self-governing First Nations are consistent with accessibility goals and values.

Findings from Environmental Scan of Federal Regimes

The paper discusses the *Canada Labour Code,* the *Canadian Human Rights Act,* and the *National Building Code.* Each regime is evaluated for its strengths and challenges. As part of the evaluation, attention is paid to how achieving the regime's objective is supported, whether the regime contemplates incorporating Indigenous laws, practices and culture, and whether there was Indigenous partnership in developing the regime or its tools. These latter issues are key for whether the regime has legitimacy and is effective.

The Canada Labour Code

The strengths of the approach taken with the Code include its making neutral mediation services available, and creating independent boards to investigate complaints. As violations can be addressed through voluntary compliance commitments, the Code supports meeting standards, instead of just punishing those who have not yet met them. It also has significant external programs to support success, including training workshops, and providing facilitators.

Challenges to the success of the Code within First Nation reserve communities include jurisdictional uncertainty, and legitimacy issues because the system was externally designed and imposed on communities. There is cultural incompatibility due to a lack of formal recognition of First Nation dispute resolution practices to address Code issues, capacity and compliance are affected by the lack of dedicated funding to support First Nation human resources staff or others to implement the required standards, and accessibility is impaired due to informational resources not having been customized for First Nations.

The Canadian Human Rights Act

When following a consultation process the Act was changed to apply to all decisions by First Nation governments in 2011, measures were put in place to support success. These included a 3 year grace period for First Nation governments to develop capacity and modify their laws to comply with the Act, allocating funding to support training, commissioning studies to determine readiness, and forming early partnerships with Indigenous organizations who then lead the development of appropriate resources. Resources were also produced in multiple Indigenous languages. The regime refers directly to incorporating First Nations legal traditions, and intends for First Nations to develop their own dispute-resolution processes. It respects aspects of First Nations laws and governance authority.

The Act has encountered challenges. At the end of the three year grace period, a statutorily mandated review was undertaken which determined many communities were not yet in a position to comply with the Act. The statute did not contemplate what to do in such a situation. Compliance issues that were identified in 2011, when the Act came into force, were identified as still present in 2014. This suggested that additional or different supports were needed but do not appear to have been provided. First Nations report being unable to comply with Act requirements, including providing accessible housing to disabled community members and modifying public buildings for accessibility, due to a lack of funding. Inadequate funding also prevented First Nations from being able to perform disability and accessibility audits. A further challenge is a structural one, that many First Nation communities are remote and small, raising concerns about confidentiality, retaliation, and increased costs. In some instances the Act has been rejected by communities as an infringement of self-government rights.

The National Building Code (NBC)

The NBC regime has some promising features. These include First Nations having the ability to incorporate the NBC or its provincial equivalent into their own building by-laws, and modify them appropriately. First Nations who have developed their own building codes, and have own source revenues to enable enforcement mechanisms, and report that their regimes are both locally suitable and often surpass the standards in the NBC.

The NBC has encountered considerable challenges. It is imposed on First Nations communities as a condition of receiving certain types of federal funding, without regard as to whether there may be structural barriers that make compliance unrealistic. For example, remoteness may make the required number of inspections unlikely. Few communities have by-laws supporting compliance frameworks, so inspectors lack legal power to order a builder to make corrections to bring a structure in line with the NBC. Subsequent funding disbursements for projects subject to the NBC are withheld unless proof of compliance with the NBC is provided. Withholding funding for non-compliance may result in the structure simply being abandoned, or completed below Code with other funds. Other challenges include a lack of agreement as between First Nation governments and the federal government on responsibilities and shared responsibilities for the quality of housing. Some communities reject the NBC, and find its supporting resources to be unhelpful. This is in part because they were developed as universal standards, and so insensitive to the on-the-ground training needs, and the situated challenges, of First Nation communities.

Conclusions on the Three Regimes

Financial limitations play a significant role in undermining the ability of First Nations attempts to achieve the standards identified in a regime. It is problematic when regimes impose standards that communities are known to not be able to meet. For all regimes, capacity development was a challenge. The nature of the challenge varied, depending on such factors as remoteness. Distance training initiatives and regional pooling may help address this challenge. Of all the training modules, those deployed to support the Human Rights Code seemed most successful. This is likely due to their being developed in coordination with or by First Nation communities or Aboriginal organizations. The model used for implementing the Human Rights Code also

benefited from the Commission itself undertaking Indigenous law training, and engaging in considerable community outreach and partnering initiatives. Tensions over governance rights, responsibilities, roles and jurisdiction plague the various regimes, to different degrees, and impede the success of the initiatives. It is important to note that where compliance regimes use mechanisms such as withholding funds, there can be severe adverse impacts on communities. Mechanisms that turn on community-designed dispute resolution processes, or mediation, are far more welcome. While reports on readiness for First Nation communities to implement a regime are important, such reports ought to completed in advance of the regime coming into force so that strategies for success can be revised. In all cases, the regimes are vulnerable to lacking legitimacy due to being imposed on communities. This is less so for the Human Rights Code, as it recognizes Indigenous legal traditions and customary laws, and the Commission's practice is to refer complaints back to the community to resolve if the community has its own First Nations dispute resolution process in place.

1) Introduction: Context and Scope

The Government of Canada is dedicated to advancing the full participation of people with disabilities in society. The Office of Disability Issues and Accessibility Secretariat is working on addressing the elimination of systemic barriers and promoting equal opportunities for persons living with disabilities or functional limitations within areas of federal jurisdiction. One tool which the secretariat is pursuing for enabling these changes is legislation. The Office is considering whether the legislative initiative ought to be extended to First Nation reserve communities. The Office notes that such an extension would be a complex undertaking, due to factors such as the continuing evolution of Indigenous rights, the uniqueness of each First Nation, and self-government agreements.

In exploring this option, the Department of Employment and Social Development Canada (ESDC) began direct engagements with several First Nations and Indigenous organizations, including the Assembly of First Nations, the Native Women's Association of Canada, the British Columbia Aboriginal Network on Disability Society, and others. ESDC also funded these organizations to engage their membership. Those engagements are continuing, with representative organizations reporting back on their findings and continuing to dialogue with ESDC. This Discussion Paper is not a part of those consultations.

The Discussion Paper is an environmental scan. It is intended to "address the policy questions examining how analogous legislation within federal jurisdiction is determined and applies on reserves, what it applies to and in identifying key challenges and considerations regarding implementation strategies."

The Discussion Paper briefly sets out the legal context regarding the relationship between the federal government and Aboriginal peoples. It touches on section 91(24) of the *Constitution Act, 1867*, section 35 of the *Constitution Act,* 1982, section 25 of the *Canadian Charter of Rights and* Freedoms, and the *Indian* Act, before discussing the law on consultation, the inherent right of self-government, modern treaties, and implications arising from the federal government's recent commitment to implementing international law concerning the rights of Indigenous peoples. It then turns to three legal regimes which apply, in some instances, to First Nations persons or First Nation governments located on First Nation reserve communities. The three regimes are the *Canada Labour Code,* the *Canada Human Rights Act,* and the *National Building Code.* Each are scrutinized for their method of development, flexibility to incorporate First Nations law and practice, compliance and monitoring methods, and supports and complimentary programs to enable success. Each are evaluated for their success, and in particular the strengths and challenges associated with each approach, to identify lessons to consider if the consultation process results in a decision for the planned accessibility legislation to be extended to First Nation reserve communities. The Discussion Paper closes with a concise assessment of lessons learned and best practices, taking all three surveyed regimes into account. In particular, comments are offered on finances, capacity and training, governance and governance rights, enforcement, and reviews.

2) Overview of the Legal Context

a) Section 91(24), Federal Jurisdiction, and the *Indian Act*

Section 91(24) of the *Constitution Act, 1867* [1] assigns the federal government the head of power for "Indians and Lands reserved for the Indians". The federal government has used this power to enact successive versions of the *Indian Act* as well as other legislation which specifically concerns the rights and interests of First Nations persons. It is this power that the federal government would seek to act under if it was to enact accessibility legislation that applies to First Nation reserve communities.

The *Indian Act* itself does not directly address matters relating to accessibility. It establishes a distinct legal regime for matters that are typically within provincial jurisdiction, such as wills and estates, and guardianship. It grants the Governor in Council authority to pass regulations concerning a number of matters, none of which appear to concern accessibility, except perhaps for the power to make regulations "to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof.[2] (No regulations appear to have been passed under the authority of this provision.) The *Indian Act* also establishes Band Councils as the governing bodies of First Nations. It recognizes their authority to pass bylaws on matters that may connect to accessibility, including bylaws "to provide for the health of residents", for the "observance of law and order", and also bylaws concerning the regulation of construction and zoning.[3]

Despite the apparent breadth of s.91(24), questions arise over whether provincial laws apply to First Nation persons living in reserve communities. This is due to provincial governments having authority over "property and civil rights" under section 91(13). As well, section 88 of the *Indian Act*[4] provides that provincial laws of general application are referentially incorporated and apply to "Indians and Lands Reserved to the Lands". The overarching result has been confusion and litigation about what it means for laws to be "of general application". As discussed below, this jurisdictional uncertainty has plagued determinations of whether the federal labour code, or a provincial one, applies to employers in First Nation communities.

One important constraint on federal (and provincial) jurisdiction is that their lawful exercise is subject to Aboriginal and treaty rights which are protected under section 35 of the *Constitution Act, 1982.*[5]

b) Section 35 of the Constitution Act

Section 91(24) of the *Constitution Act 1867* and the *Canadian Charter of Rights and Freedoms* must both be read in light of section 35 under the Constitution Act of 1982. The *Charter* makes this requirement explicit: its guarantee of rights are not to be construed "to abrogate or derogate from any aboriginal, treaty, or other rights or freedoms that pertain to the Aboriginal peoples of Canada."[6] The interpretive relationship between section 35 of the *Constitution Act, 1982,* and section 91(24) of the *Constitution Act, 1867,* is recognized through caselaw.[7]

Section 35 restrains federal power.[8] It is a constitutional codification of a commitment of the federal government to "recognize and affirm" Aboriginal and Treaty rights. It "enshrines" the Crown's duty to act with a "high standard of honourable dealing"[9]. The specific manifestations of the duty vary[10], but the ultimate purpose remains the same. Its purpose "is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty."[11] Part of what is to be addressed is "the impact of the 'superimposition of European laws and customs' on pre-existing Aboriginal societies…. [who] became subject to a legal system they did not share."[12] The law concerning the obligations associated with reconciliation is evolving.

In early cases involving section 35, the legal question was often whether a federal law or regulation, under which an Indigenous person was being charged with an offense, was consistent with recognizing and affirming section 35 rights. For example, one early case overturned the conviction of First Nations persons who had sold a fish product without a license, finding that the licensing regime did not respect their constitutionally protected right to engage in such commercial activities.[13] The jurisprudence requires assessing whether the evidentiary record shows the claimed right is a manifestation of an integral and continuing practice of the relevant Indigenous community, whether the right has pre-contact roots, whether and to what extent the impugned law infringes on the right, and whether any infringement can be justified. The justification analysis considers both whether the objective of the infringing law is pressing and substantial, and whether the process under which the law was developed was responsive to the Crown's fiduciary duty to consult, accommodate and minimally impair any right.[14] More recent jurisprudence has focused on the duty to consult and accommodate in decision-making processes.

c) Consultation & Accommodation

In a trilogy of cases from 2004-2005, the Supreme Court of Canada laid the groundwork for understanding the Crown's duty to consult with and accommodate Indigenous peoples when making decisions.[15] The Federal Government has identified its understanding of the duty to consult and accommodate in a set of publicly available guidelines, which are intended to guide federal officials.[16] However, most of the discussion below is drawn directly from the jurisprudence, which has continued to evolve since the federal guidelines were last updated in 2011.

The threshold for the duty to consult being triggered is quite low. It arises when the Crown has real or constructive knowledge of the potential existence of section 35 Aboriginal rights, and is considering activity that might adversely affect (or "infringe" upon) such rights.[17] Section 35 rights are held by collectives of Aboriginal peoples, including First Nations, Metis and Inuit communities. All communities whose section 35 rights may be impacted by a contemplated decision must be consulted, although as discussed below the depth of the consultation may vary.[18]

While the federal government remains responsible for consultation, it takes the position that procedural aspects of the duty can be carried out by others, and in particular through partner Aboriginal groups who may assist by, for example, gathering information or consulting with its membership.[19] An example of this would be the information gathering processes that NWAC and the AFN are currently engaging in, with regards to how First Nation persons would like to see accessibility issues addressed in First Nation communities. However, as section 35 rights are held by First Nations themselves, the duty to consult with First Nations cannot be deemed filled through such delegated processes, unless the First Nation communities themselves agree to this delegation. In some instances, the governments of First Nations have identified regional bodies who may represent them for consultation purposes. For example, the Assembly of Nova Scotia Mi'kmaq Chiefs has authorized the Kwilmu'kw Maw-klusuaqn Negotiation Office (Mi'kmaq Rights Initiative) to engage in consultations on its behalf.[20]

Consultation processes are situation and context specific, and exist on a spectrum.[21] At one end of the spectrum, where the right is limited, or the potential for infringement minor, then the duty may require the Crown to give notice, disclose information, and discuss any responses. At the other end of the spectrum, where there is a strong prima facie case that the right exists (or the right is established), and the potential infringement is "of high significance", then "deep consultation" is required.[22]

Regardless of where a situation sits on the spectrum, the consultation process must be shaped, from the start, to support the success of the substantive goal of advancing reconciliation. The process must be a meaningful one. Although the definition of "meaningful" is flexible and context and fact specific, the factors discussed below are what courts have looked for when assessing the adequacy of the consultation process.

The process should commence before the Crown makes any decision,[23] and be distinct from any process that is used to consult with the general public.[24] Consultation processes that are co-designed with Indigenous governments from the beginning, where their input has shaped the process itself, are more likely to be found to meet the procedural requirements[25] (and more likely to achieve the substantive goal).

Information must be full and accurate, it needs to be conveyed in a culturally appropriate manner which is also practically accessible, timelines need to be responsive to the realities of the Aboriginal communities, and financial support may be required.[26]

As it rolls out, the process must reflect the "intention of substantially addressing the concerns of the aboriginal people" who may be affected by the contemplated Crown action.[27] This may, for

example, require changing timelines to ensure that Indigenous participants have a meaningful opportunity to be heard and to formulate community-informed responses to new information or concerns. (i.e. The Indigenous community needs the opportunity to consult with its members as new information or concerns arise.) Where contemplated Crown action is likely to infringe on Aboriginal rights, accommodations must be explored with the Indigenous participants.[28] That is, work must be done with the Indigenous community to support their identification of potential responses or accommodations that respect their rights. The Crown must be responsive and flexible, and may be required to change its plans or proposals.[29] The Crown has a "positive obligation … to reasonably ensure that [the Aboriginal participants'] representations are seriously considered and, wherever possible, demonstrably integrated into the proposal plan of action."[30] However, there is "no guarantee that, in the end, the specific accommodation sought will be warranted or possible."[31]

The Supreme Court of Canada recently summarized the obligations on Aboriginal communities during a consultation process. These include "defining the elements of the claim with clarity; not frustrating the Crown's reasonable good faith attempts; and not taking unreasonable positions to thwart the Crown from making decisions or acting, where, despite meaningful consultation, agreement is not reached."[32]

Much of the above discussion concerns cases where the duty to consult was in the context of the Crown making a decision about proposed resource development activities.

The specific question of whether the process of enacting legislation that may affect Aboriginal and Treaty rights must be subjected to consultation is currently before the Supreme Court of Canada.[33] In that lawsuit, the trial judge found the Federal Government ought to have consulted with the First Nation claimant about aspects of omnibus legislation that altered environmental protection laws and which could affect that First Nation's rights. The Court of Appeal found differently, noting that the changes in the legislation were "not specific to them or their territory" while also observing that if the government fails to consult, that any infringement which the law is found to make on Aboriginal rights will be harder for the government to justify.[34]

Regardless of the outcome at the Supreme Court of Canada, the Court of Appeal's finding points to a practical risk. This is that a law which infringes on Aboriginal rights will ultimately be struck down if it is enacted without the support of a consultation process consistent with the honour of the Crown.

d) The Inherent Right of Self-Government

If not developed properly, any federal legislation that affects First Nation communities runs the risk of unlawfully infringing on constitutionally protected Aboriginal rights. An important right to bear in mind during the on-going consultations about whether accessibility legislation ought to extend to First Nation communities is that Aboriginal peoples have the inherent right to self-govern. The jurisprudence on self-governance has been inconclusive as to the scope of said rights,[35] while having required self-government claims to be framed narrowly and with

specificity such as the right to govern election processes,[36] or to regulate high stakes gambling.[37] However, the Supreme Court of Canada has recognized that if a community has an Aboriginal right to engage in a practice, that this right will be coupled with the Aboriginal community also having the authority to regulate that practice.[38]

While the caselaw on self-government is thin, on a political level both Indigenous governments and the Federal government have identified Aboriginal Self-Government as an inherent right that is protected under section 35.[39] Canada takes the position that:

> Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions…[40]

It is Canada's stated intention that self-government agreements be negotiated and set out how self-governance rights will be exercised. Canada identifies many areas of jurisdiction, which may be relevant for accessibility legislation, that it agrees likely fall within the scope of self-government due to being "internal to" Indigenous communities. These include: education, health, social services, administration and enforcement of Aboriginal laws, and land management including zoning, housing and local transportation.[41] Given Canada's acknowledgement that these are internal matters, this suggests that consultation at a deep level should be pursued when exploring whether to extend accessibility legislation to First Nation reserve communities. (A goal could be to identify mutually acceptable principles or rules for shaping how self-government is exercised in these areas, with considerable flexibility to accommodate local jurisdiction. Such an approach is consistent with section 25 of the *Charter*.)

e) Modern Treaties and Self-Government Agreements

As of 2015, four self-government agreements, and 18 comprehensive land claim agreements with provisions relating to self-government, have been signed.[42] There are approximately 100 negotiation tables, where the parties are at different stages. These agreements identify the scope of provincial, federal and Indigenous jurisdiction, and also identify how conflicts of law will be resolved. Each self-government agreement is unique, and should be examined separately to determine how or whether it assigns jurisdiction over matters associated with accessibility. There are also some important commonalities. A key one is that First Nation governments are subject to the Canadian *Charter of Rights and Freedoms.*[43] As noted above, pursuant to section 25 of the *Charter*, its guarantee of rights shall not be interpreted to abrogate or derogate from any Aboriginal or treaty right. Some agreements make explicit reference to section 25, and how it qualifies the application of the *Charter* to the First Nation government.[44]

A specific request was made to consider the Nisga'a Final Agreement, so it is discussed in detail below, as well as brief examples of more recent self-government agreements.

The Nisga'a Final Agreement sets out the relationship between the federal, provincial, and Nisga'a governments. The starting premise is that federal and provincial laws apply, unless the

Final Agreement provides otherwise.[45] Regardless of how powers are assigned under the Final Agreement, the Nisga'a Nation and its citizens have the right to participate in and benefit from federal and provincial public services and programs for Aboriginal people,[46] to the extent that the Nisga'a Nation has not assumed responsibility for such programs or services under a fiscal financing arrangement.[47] They may thus have a right to access any supports the federal government may put into place as part of a federal accessibility regime.

The Nisga'a Lisims Government has considerable jurisdictional space to make laws,[48] with its jurisdiction and authority evolving over time.[49] Important for the purpose of accessibility legislation, the Nisga'a Constitution is to "recognize and protect rights and freedoms of Nisga'a citizens,[50] and the Nisga'a Lisim's Government has authority to establish Public Institutions, "including their respective powers, duties, composition and membership."[51]

There are several areas of law that engage accessibility issues, where the Nisga'a Lisim's Government has authority to pass laws, but any conflicting federal or provincial laws will prevail to the extent of the conflict. [52] This is the case with regards to laws concerning the design and construction of buildings,[53] and laws pertaining to traffic and transportation.[54]

Social services and human resources are treated differently. The Final Agreement expects negotiations over their delivery. The social services section authorizes the Nisga'a Lisims Government to make laws, with any conflicting federal or provincial laws prevailing to the extent of the conflict. However, either party can make a request which will result in the parties negotiating and attempting to reach agreement for the Nisg'a Government to administer and deliver the federal and provincial social services programs. Similarly, with regards to human resources, either party can trigger negotiations for agreements for the Nisga'a Lisims Government to deliver and administer federal or provincial programs that are intended to:

> (a) improve the employability or skill level of the labour force and persons destined for the labour force; or
> (b) create new employment or work experience opportunities.[55]

Health services introduce a new variation. The Nisga'a Lisims Government has authority to pass laws concerning health. Provincial and Federal laws will prevail to the extent of any conflict. However, if the inconsistency is with regard to the "organization and structure for the delivery of health services," then Nisga'a Law prevails.[56] There is also a clause for triggering negotiations to reach agreements for the Nisga'a Lisims Government to administer and deliver provincial and federal health services.

As to workplace accommodations, the Nisga'a Lisims Government has authority to identify aspects of Nisga'a culture which should be accommodated by employers who have a duty to accommodate employees, such as taking a cultural leave from employment.[57]

The Nisga'a Government's overarching legal framework is supportive of accessibility measures. With regards to the Nisga'a Constitution, it frames the rights that it recognizes as expressions of the "fundamental values of the Nisga'a Nation, which cherishes the unique spirit, respects the dignity, and supports the independence of each individual living together in a community of

shared resources and responsibilities."[58] The Constitution mandates the Nisga'a Government to pursue the social and economic goals of all citizens having access to education at standards prevailing in Canada, access to housing, nutrition, shelter, and to health care and social services.[59] It further sets out the expectation that public services be administered consistent with various principles including "impartial and equitable provision of services"[60]

Unlike more recent modern treaties, the Nisga'a Agreement states that it "exhaustively" sets out Nisga'a section 35 rights, including the jurisdiction of its government.[61]

Westbank First Nation's Self-Government Agreement presents a contrast to the Nisga'a Treaty. It is only between Canada and Westbank First Nation. It explicitly reflects a "government to government relationship" and is intended to set out "certain arrangements" for the implementation of the inherent right of self-government by Westbank, while leaving open how the inherent right may be "defined at law."[62] Its terms cannot restrict either parties' position regarding Aboriginal rights or jurisdiction, or to abrogate or derogate from Constitutionally protected Aboriginal rights.

As to matters that may be relevant for accessibility legislation, the Agreement recognizes Westbank's jurisdictional authority over zoning, construction and maintenance of buildings[63], landlord and tenant[64], and education including 'special needs or other arrangments'[65]. For these areas, if Westbank law conflicts with federal law, Westbank law prevails to the extent of the conflict.

Westbank has jurisdiction over public works and local services including those in relation to "services for pleasure, recreation and other community use, including art galleries, museums, historic sites, arenas, theatres, sports complexes and other public buildings and facilities". Its laws concerning these areas will prevail to the extent of a conflict with federal law as long as health and safety standards and technical codes concerning community infrastructure and local services are at least equivalent to federal standards and codes.[66]

By way of a brief third example, the Deline Self-Government Agreement, from 2015, has similar provisions to those found in Westbank, but is more extensive. It too sets out that the First Nation citizens can benefit from Federal or territorial programs and services unless funding for those services has been incorporated into an agreement[67]. Unlike Westbank, the agreement is between three governments, being Canada, the Northwest Territories and the Deline. It assigns jurisdiction over several matters which may be relevant for accessibility legislation to the Deline Government. These include jurisdiction over social housing, including repairs and renovations, but not building codes.[68] In some cases, the Deline laws must be consistent with Northwest Territory goals and objectives.[69]

f) International law, the Rights of Persons with Disabilities, and Indigenous Self-Government Rights

The United Nations Convention on the Rights of People with Disabilities (UNCRPD) is an international legal instrument that supports the promotion and protection of full and equal enjoyment of human rights by all persons with disabilities.[70] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) identifies the inherent rights of Indigenous peoples, and state obligations to recognize and enable the realization of those rights.[71]

Scholarship on the intersection of the UNDRIP and the UNCRPD is scant, with Indigenous persons with disabilities having been "largely invisible in the work of the various United Nations entities that address the rights and situation of indigenous peoples and persons with disabilities."[72]. Writing produced in the New Zealand context, on how these two instruments come together, has emphasized that Indigenous peoples may understand disability differently than non-Indigenous peoples, and that Indigenous perspectives must be recognized when creating policies to support disabled persons.[73] Similarly, in its brief comments on the UNCRPD and its intersection with the UNDRIP, the United Nations Economic Council observed that "the measures foreseen in the Convention will need to be applied in a way that is sensitive to the culture and world vision of indigenous peoples in order to best protect the rights of indigenous persons with disabilities"[74]

The UNCRPD makes one direct reference to Indigenous peoples. It acknowledges in its preamble that Indigenous disabled persons are subject to multiple or aggravated forms of discrimination due to being Indigenous.[75] The UNDRIP can be read as complementing and extending upon rights which are recognized in the UNCRPD, while bringing some specificity to state obligations to disabled Indigenous persons. It is important to note that Justice Minister Jody Wilson-Raybould announced in November 2017[76] that the federal government will support private members Bill C-262 which requires "taking all measures necessary" to make Canadian laws consistent with the UNDRIP.[77]

The UNDRIP makes several references to disabled Indigenous persons. One reference is with regard to implementation. In particular, it requires states to pay "particular attention" to the rights and special needs of disabled Indigenous persons when implementing the UNDRIP.[78] The UNDRIP further specifies that particular attention is to be paid to Indigenous persons with disabilities as states fulfil their obligation to "take effective measures, and where appropriate, special measures, to ensure continuing improvement of their economic and social conditions".[79] Thus a key obligation on Canada, pursuant to UNDRIP, is to ensure that measures to improve the social and economic conditions of Indigenous persons with disabilities are actually effective. This suggests a requirement to monitor plans for success, and to modify plans to the point of taking special measures if required.

As to self-governance issues, UNDRIP requires the recognition of many self-governance rights that are relevant for any discussion about extending the proposed new federal accessibility legislation to First Nation reserve communities.[80] These include the rights of Indigenous peoples to freely pursue economic, social and cultural development, to autonomy or self-government in

matters relating to their internal and local affairs[81], to maintain and strengthen distinct political and legal institutions,[82] to maintain and develop indigenous decision-making institutions[83] and to develop and maintain institutional structures and practices, in accordance with international human rights standards.[84]

Finally, UNDRIP requires consultation and consent for legislative action to be legitimate. Specifically, it requires that the state obtain from Indigenous peoples "free, prior and informed consent before adoption and implementing legislative or administrative matters that may affect them."[85] Thus if Bill C-262 is passed, the proposed accessibility legislation would likely be measured against this rubric, for it to be found lawful for it to also be extended to First Nation communities.

3) Environmental Scan of Select Federal Legislation/Policies

Three contrasting regimes were identified by the Accessibility Secretariat for the environmental scan. The first one is the *Canada Labour Code,* which was developed without particular concern for First Nations interests. The second is the *Canadian Human Rights Act.* It recently came to apply to all decisions by First Nation governments. (It also binds the federal government for decisions made under the *Indian Act*, but this is not discussed in this paper.) The final regime is the *National Building Code.* It only applies to First Nation communities through contractual assignment, as a condition of receiving certain types of funding, or by referential incorporation by First Nation communities through their by-laws.

Each regime is described for its purpose, whether it has flexibility to incorporate First Nations laws and governance rights, its methods for monitoring compliance, and its supports for enabling success. After describing these matters, each regime is evaluated for its actual success, and what may be learned from the respective regimes for the purposes of contemplating extending accessibility legislation to First Nation reserve communities. At the end of each section, there is a bullet point list, summarizing strengths and challenges associated with each regime

a) Canada Labour Code

i) Purpose.

The *Canada Labour Code* addresses labour relations in federally regulated workforces. It is divided into three parts. Part I concerns industrial relations. It is intended to promote "common well-being" through "free collective bargaining and constructive settlement of disputes". This in turn is intended to promote "good working conditions and sound labour-management relations".[86] Part II concerns occupational health and safety. Its stated purpose is "to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment"[87] . Part III recognizes and protects the right of workers to have fair and equitable workplaces. It creates minimum standards for employment such as permissible hours of work, holidays, and minimum wages. It also addresses termination, severance, and unjust dismissal.

As discussed below, the *Canada Labour Code* applies to *some,* but not all, First Nation employers on reserves.

ii) Flexibility to incorporate First Nation laws, perspectives, and governance rights

No evidence has emerged to suggest that the concerns and conditions of First Nation reserve communities or their self-governance interests and rights were specifically considered when the *Canada Labour Code* was drafted or revised.

In contrast with the *CHRA*, there is nothing on the face of the Code to require that it be interpreted to incorporate First Nation laws, perspectives and governance rights. A potential exception exists in so far as some of the informal dispute resolution processes described below could be inflected with First Nation laws, processes, or cultural practices. This is not required by the *Code*, and so on the face of the instrument would be at the discretion of the conciliator or other official.

iii) Compliance and Monitoring

Compliance is supported by a variety of means. For Part 1 of the Code, a duty is imposed on trade unions and employers to meet and negotiate "in good faith and make every reasonable effort to enter into a collective agreement."[88] The Canada Labour Relations Board has authority to investigate complaints of non-compliance with the duties and obligations under Part 1, which can be brought by the trade union or employer.[89] Importantly the Board can seek to negotiate a mutually acceptable settlement to the complaint, or may determine the complaint. The Board has broad powers to order remedies, including making orders for compensation, to rescind actions and to take actions.

With regards to Part III of the Code, it authorizes workplace inspections, and the investigation of complaints. [90] Inspectors have extensive powers to require disclosure of documents, and question employers and employees. Where violations are identified, the employer will be requested to take corrective action, and may provide an "Assurance of Voluntary Compliance". If the violation is not corrected, then prosecution may follow. As to employee complaints about matters such as unjust dismissal, the first step is providing neutral mediation for ADR sessions. If the parties do not resolve the matter, it may advance to an adjudicator making a determination.

iv) Supports and Complimentary Programs to Enable Success

There is a large network of programs that are intended to support the success of the Code, all of which appear to be offered at no charge. Key complimentary supports are described below. It is important to note that none of these supports or programs appear to have been specifically designed to serve First Nations. This stands in contrast to the CHRA and the Canada Building Code, where government websites have fairly easily accessible materials that have been designed for First Nations. This issue is taken up in 'Evaluation of Success', below.

Part 1 of the Code establishes the Federal Mediation and Conciliation Service ('FMCS'), which is staffed by the Department of Employment and Social Development, under which a conciliator can be appointed.[91] This service can be called upon by either the employer or the trade union to support the negotiation and renewal of collective bargains.[92] The Minister of Labour also has discretion to trigger the service. In 2016-2017, 4.4% of the caseload – or 8 cases - involved disputes where there were Aboriginal entities.[93]

As noted above, when a complaint is brought regarding Part III, the Canada Labour Board may assist the parties in negotiating a resolution. The Code supports workers and employers being responsible for its implementation, and monitoring its application, by requiring workplaces with more than 20 employees to have Safety and Health Committees.[94] These committees consider and address health and safety complaints, educate employees, develop policies, maintain records of issues, and implement changes. They thus both respond to unique situations as they arise, and are proactive.

The relationship between workers and management is supported through the FMCS's Labour Program, and in particular the "Relationship Development Program". Supports include

facilitation services, mediation, and a wide variety of training workshops and courses that range from informational (i.e. learning workplace standards), to general skills development (i.e. learning how to improve communication skills, how to operate effective committees) to regime specific skill development (i.e. learning how to engage in interest-based negotiation, or how to restore workplace relationships after a work stoppage).[95]

Employers are required to post a description of *Code* requirements and any notices, along with information for how employees can obtain more information.[96] They are responsible for training employees with managerial roles in health and safety[97]. There is a toll-free number that people can call for information. The Labour Program has separate pamphlets concerning the various statutory rights of workers, and the processes for bringing complaints, which are available through the internet.

v) Evaluation of Success: Lessons for Accessibility Legislation for First Nation Reserves

On the face of it, the regime appears to have a structure to support success. It has devoted considerable resources to education and training. Its first interventions tend to be based on negotiating a resolution or facilitating the parties themselves in reaching a resolution. It creates structures within workplaces (committees) that both respond to issues as they arise and also create workplace specific policies. The Code enables the independent inspection of workplaces, so it is not just complaint driven.

Research revealed little in the public records concerning the *Code's* success or challenges in the specific context of First Nation communities. In his 2006 evaluation of Part III of the Code, Commissioner Harry Arthurs expressed a general concern that employers violate the Code, and workers fail to claim their rights, out of ignorance.[98] Cmn Arthurs recommended increasing resources for education and information, such a toll-free number and website with accessible information, commenting that such resources "*should be customized to fit the needs of specific sectors or constituents, such as First Nations*" and should be available in languages other than English and French.[99] Unfortunately the Arthurs report does not discuss First Nations further, but the comment suggests that the regime required modifications to be effective for First Nations communities and governments.

Only one submission for the 2006 evaluation from a First Nation organization was located.[100] It appears to have been forwarded by the Assembly of First Nations (AFN) from Krista Brookes of the Atlantic Policy Congress of First Nations Chiefs Secretariat (APCFNC). It flags funding and capacity as concerns. The APCFNC observed that some First Nation communities have many employees but do not have funding for human resources managers/staff "to support the implementation and enforcement" of the Code. They further observed that given the nature of First Nations governments funding agreements, that there is "little, if any, funding available to ensure that the minimum standards" of the Code are being met. The APCFNC urged funding to be provided so that First Nations communities can meet the standards.

There is an unevenness in ancillary support measures. For example, recognizing the essential work of federal public sector employees, the federal government enacted specific legislation to

address collective bargaining and grievances in such workplaces.[101] While there is comparable legislation for provincial governments, there is none for First Nation governments. Although there are currently relatively few First Nation governments that have been certified,[102] this gap may cause problems in the future as First Nation governments also provide essential services. (Although communities may have internal mechanisms or Indigenous laws to address such gaps.)

There has also been considerable litigation concerning the application of the *Canada Labour Code.* On its surface, much of the litigation has been about whether federal or provincial labour codes bind a First Nation employer, and thus what regime applies when an application is made for certification. That is, the legal question has turned on whether the organization is a 'federal undertaking'. A recent decision from the Supreme Court of Canada, *NIL/TU,O* has lent some clarity, finding that if the First Nation organization's function is within an area of provincial jurisdiction, then the provincial code applies.[103]

Although it is presumed that labour activities associated with First Nation governance fall within federal jurisdiction, communities and boards continue to be surprised by court findings over jurisdiction and what it means for an activity to be associated with governance. For example, in the 2015 case of *Nishnawbe-Aski Police Service Board v Public Service Alliance of Canada,* the Aboriginal police service board had already been certified by the Canada Industrial Relations Board (CIRB) acting under the Labour Code. Following *NIL/TU,O,* the police agency believed they were likely a provincial undertaking, and applied to have the certification set aside. The CIRB denied the application. They found the certification order stood, on the basis that policing is a part of Aboriginal government and thus under federal jurisdiction. The Federal Court of Appeal disagreed with the CIRB. They set aside the order, on the basis that police services are usually regulated by the province, despite the fact that this service served Aboriginal communities and enforced First Nation Band Council by-laws.

These cases point to a failing of the *Canada Labour Code vis-à-vis* First Nation communities, which is the uncertainty as to whether or not it – or provincial or territorial legislation – applies to any given First Nation entity or employer. This uncertainty exists at all levels, as shown by the CIRB's own decisions being overturned. Such uncertainty is cost-ineffective, and may result in an entity acting in good faith violating the terms of the appropriate regime due to the belief that the other regime applies. This situation obviously does not support the success of the regime.

A related point of tension is whether the federal regime is an unlawful interference with section 35 rights. One community brought such a challenge, which was dismissed by the Federal Court of Appeal.[104] Commenting on the *NIL/TU,O* case above, and the cases which preceded it, Indigenous legal scholar and practitioner Maggie Wente suggests that much of the litigation may not be driven by concerns over whether a provincial or federal regime applies, or an interest in 'union busting', but rather are rooted in "Aboriginal parties' own views about their places in Canadian federalism, and … a possible scepticism of settler dispute resolution mechanisms."[105] Wente observes that in *NIL/TU,O,* the Aboriginal organization emphasized that it fell under federal jurisdiction because its governance practices were "in accordance with Aboriginal

'culture, traditions and teaching'".[106] She further observed that many Aboriginal organizations have Aboriginal dispute resolution processes, which often draw upon the knowledge and experience of Aboriginal elders.

Thus a barrier to the success of the *Canada Labour Code* in First Nation communities, which has nothing to do with its merits, per se, is its legitimacy as an externally created and imposed legal regime which does not expressly contemplate the flexibility to incorporate or respond to local Indigenous laws, traditions and cultural practices.

This concern is reflected in the APCFNC Submission. It states there are many instances of the Code not reflecting First Nations cultures or traditions, and calls for the federal government to support First Nations in developing their own Code if the Canadian Code cannot be changed to accommodate or support the application of First Nation practices.

(1) Strengths of the approach taken with the *Canada Labour Code*

- An independent board can investigate complaints, and make determinations
- Complaints can be resolved through mutually acceptable settlements
- There is authority for workplace inspections (even if no complaint has been made)
- Inspectors can enter the workplace, and have broad powers to require disclosure and question persons
- Violations may be resolved by a voluntary commitment to comply
- Neutral mediation services are available
- Workers and employers take responsibility for their workplace by being required to have committees, which may both hear complaints and develop policies
- A dedicated external program to provide supports including facilitation, mediation, training workshops, courses, and informational pamphlets.
- Where a remedy is ordered, there is broad scope to make orders for compensation, to rescind actions or to take actions
- Code requirements or other notices must be posted, with contact telephone numbers.

(2) Challenges associated with the approach taken with the *Canada Labour Code*

- Jurisdictional uncertainty as to whether federal or provincial legislation applies to any given First Nation employer or entity resulting in costs, delays and unintentional violations of the relevant code
- Externally designed and imposed system raises legitimacy concerns for First Nations, and may inspire resistance to the regime
- No explicit recognition of First Nations dispute resolution practices and so no resources to enable the strengthening of such practices
- Tension over whether the regime violates section 35 rights

- No dedicated (additional) funding for First Nations human resources staff, or other funding to successfully implement the required standards
- Informational and educational resources may not have been customized to be accessible to First Nations persons
- Resources appear to only be available in English and French

b) Canadian Human Rights Act ("CHRA")

i) Purpose

The Canadian Human Rights Act (CHRA)[107] was passed in 1977, and applies to areas of federal jurisdiction. Its purpose is to enable equal opportunities and ensure freedom from discrimination in employment and the provision of goods and services customarily available to the public.[108] The CHRA identifies prohibited grounds of discrimination[109] and what constitutes a discriminatory practice[110]. It establishes a duty to accommodate, and also creates exceptions such as where the practice is part of a special program to provide opportunities to disadvantaged persons.[111] The CHRA creates a Commission as well as a Tribunal. As discussed below, these entities play roles in addressing, investigating and acting on complaints. These entities operate independently of each other, and are independent of government.

The CHRA applies to some but not all entities on First Nation reserves. It applies to First Nation governments, but does not, for example, apply to entities such as a private business which operate on reserve land, even if it is run by members of the First Nation. These other entities are governed by provincial or territorial human rights codes.

ii) Method of Development/Procedural Measures to Support Success

The CHRA was created without substantial input from First Nation communities. As originally drafted, section 67 provided it did not apply to decisions made pursuant to the *Indian Act* by First Nations Band Councils or the Federal Government.[112] This exemption was defended as appropriate as consultations were taking place about amending or repealing the *Indian Act.*[113] The exemption was controversial, and was objected to by the Advisory Council on the Status of Women, Indian Rights for Indian Women, and others. In practice, the exception was read narrowly, and the CHRA was found to apply to decisions taken by First Nations under other powers.[114]

In 2000, the Canadian Human Rights Review Panel recommended supporting Aboriginal governments in creating their own human rights law, "in keeping with Aboriginal values."[115] The proposal was to have federal and Aboriginal governments negotiate the basic standards for such laws. As a temporary measure, they recommended repealing section 67 while requiring the introduction of an interpretive provision that recognized "important Aboriginal interests".

In 2007, draft legislation to repeal the exemption was tabled. However, as there had been a failure to consult, and the draft lacked the recommended interpretive clause, debate was

suspended for 10 months.[116] Ultimately an interpretive clause and a non-derogation clause were settled upon and section 67 was repealed in 2008.

While the Federal Government was immediately bound, First Nation governments would not be held liable for acts or omissions which occurred within the first 36 months after the repeal. This grace period was to enable First Nation governments the opportunity to build internal capacity, review their laws for compliance, and develop community-based systems for dispute resolution and for redress.

iii) Flexibility to Incorporate First Nations Laws, Perspectives and Governance Rights

As noted above, when section 67 was repealed, a non-derogation clause was introduced. It affirms that the CHRA shall not be construed to abrogate or derogate section 35 rights. A second clause requires the CHRA to be interpreted and applied with due regard to First Nations laws and culture. Its specific language is:

> 1.2 In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.[117]

The CHRC engaged in considerable research and consultations with First Nation communities and elders to understand how best to interpret these provisions. A particular focus was understanding the referenced balancing of individual and collective rights, and what it meant to give "due regard" to Indigenous legal traditions and customary laws when considering the requirements of the CHRA. The CHRC drew upon those consultations to create operational guidelines to ensure the interpretive provisions are applied consistently during dispute resolution processes.[118]

iv) Support Measures to prepare First Nation Governments for complying with the CHRA when acting under the *Indian Act*

The CHRC produced a report on the work it had done during the three year grace period, to support First Nations being ready. The CHRC recognized that many First Nations persons "harbour a historical distrust of government and government bodies".[119] Much of their work focused on building relationships of trust and mutual respect.

For example, they consulted with First Nations and identified five guiding principles for their partnership.[120] These were:

> 1. Respect for self-government, particularly through the development of appropriate First Nations community-based dispute resolution processes.

2. Respect for Aboriginal and treaty rights, and giving due regard to First Nations legal traditions and customary laws.

3. Discrimination prevention through the promotion and protection of human rights, including education and training to help people understand their rights and responsibilities.

4. Freedom from discrimination on grounds such as sex, age, family status and disability, consistent with section 2 of the Canadian Human Rights Act.

5. Adequate resources for First Nations governments to fulfill their obligations under the Canadian Human Rights Act and increase their capacity to develop the necessary human rights protection policies and processes.[121]

Also as a part of their strategy for building trust and relationships between Canadian and Indigenous government bodies, the CHRC established the National Aboriginal Initiative (NAI). Through the NAI, the CHRC met with and trained First Nation governments, and developed guidance on investigative and community-based dispute resolution processes. The CHRC also trained its own staff and Commissioners about Indigenous legal traditions and customary laws, Indigenous history, and the *Indian Act.*[122] The CHRC received an additional 5.7 million over the span of 2009 to 2014, [123] of which 5.1 million was for implementation, and 0.6 million was for awareness raising activities.[124]

The legislation called for the Government of Canada, together with representative First Nations organizations, to determine "the extent of preparation, capacity and fiscal and human resources that will be required" for First Nations to comply with the CHRA. The "Readiness Report" was due before the end of the three year grace period,[125] and was tabled in June 2011.[126] The Readiness Report's conclusions are discussed below, in the section entitled "Evaluation of Success".

v) Compliance and Monitoring

The CHRC independently monitors federal laws and programs for compliance. It also responds to complaints. Individuals or groups contact the CHRC with their concern. The CHRC can attempt an early resolution, or preventative mediation. If the dispute remains unresolved, or if the CHRC felt these interventions were not appropriate, then the CHRC will provide the complainant with the materials needed to prepare a complaint. All parties have the opportunity to make submissions. The CHRC may at this time offer voluntary mediation. If the mediation is not successful (or agreed to), then the Commission will investigate. Investigative powers include interviewing the parties and reviewing supporting documents. The Investigator prepares a report, which the parties can comment on, and in which the Investigator recommends the complaint be dismissed, sent for conciliation, or sent to the CHRT for a hearing. The CHRC makes the decision about what action to take. If ordered, conciliation is mandatory.

The CHRT is independent from the CHRC, and is a quasi-judicial body. It conducts hearings, assesses evidence, makes decisions and has broad authority to order remedies.

The CHRC can decide that a compliant should be dealt with at the community level, if a dispute resolution process has been put in place.[127] As discussed below, the CHRC has put considerable efforts into supporting First Nations in designing community-based dispute resolution processes and so the First Nation being the entity which ensures compliance and monitoring. Several communities have developed such processes, and in some instances have developed regional bodies.[128] For example, the Anishinabek Nation has 39 communities, with only a few hundred people in each community. They decided to create 4 regional dispute resolution processes, and a single national process. After 2.5 years of community consultations, the working groups were able to present models that they were confident reflected a system that was developed from the ground up, and not just the importation of a foreign system.[129] A different approach was taken by the Southern Six Nations Secretariat, under which 6 of its member communities partnered with a Commission facilitator to develop six draft dispute resolution models.[130] Ultimately the working groups found they could all share the same model. The Southern First Nations Secretariat now offers free dispute resolution services, according to the protocol which the communities developed, to its member nations.[131] These include the Aamjiwnaang First Nation, Caldwell First Nation, Chippewas of Kettle & Stoney Point First Nation, Chippewas of the Thames First Nation, Delaware Nation – Moravian of the Thames. Munsee-Delaware Nation and the Oneida Nation of the Thames.

vi) <u>On-Going Supports and Complimentary Programs to Enable Success</u>

The CHRC monitors federal programs and laws for compliance with the CHRA, and works with organizations to prevent discrimination.[132] It engages in research and projects to educate the public about the CHRA. It has commissioned research specifically about Aboriginal issues.[133] They also retained mediation practitioners with experience in First Nations communities, to address concerns about accessibility.[134]

The CHRC created a number of resources for First Nations. As noted above, they established the National Aboriginal Initiative (NAI) to do in-person outreach, host a web-page with Indigenous specific materials, partner with Indigenous organizations, and run webinars and sessions with Indigenous communities.[135] For example, in 2015-2016 they did 15 training sessions for Indigenous organizations, and participated at 17 Indigenous out-reach events.[136] The NAI has developed the following instruments:

1. A handbook for First Nation governments and administrators, which addresses how the CHRA is to apply to First Nations.[137]
2. A toolkit to support First Nations in developing community-based dispute resolution processes.[138] It was developed in collaboration with a number of First Nations, the Treaty Four Governance Institute, and the Tsiel-Waututh Nation and the British Columbia Aboriginal Human Rights Project. It also addresses supporting First Nations in

developing human rights policies, and provides examples of communities that have developed processes.

3. A First Nations specific guide to understanding the CHRA. It was developed in collaboration with the Native Women's Association of Canada.[139] This document is available in Cree, Inuktitut, and Ojibwe, as well as in English and French.

The CHRC recently entered into a five year agreement with the National Association of Friendship Centres. [140] (These Centres provide a wide variety of on-the-ground supports to Indigenous persons in urban settings.) The Agreement is to identify strategies and develop a work plan for increasing awareness of and access to human rights justice, share information, and educate all "public-facing service staff" at both entities about the services of the other.[141] The agreement will be reviewed annually to ensure continuing relevance.

Self-Government Agreements are also relevant in the context of the CHRA. The Westbank First Nation Self-Government Agreement, for example, expressly provides that the CHRA applies, and that its interpretation and implementation must take into account the "nature and purpose" of the Self-Government Agreement, the entitlement of Westbank to provide programs and services on a preferential basis to members, where justificable, and the entitlement of Westbank to give preferential treatment in hiring decisions to members, where justifiable.[142]

vii) Evaluation of Success: Lessons for Accessibility Legislation for First Nation Reserves

The CRHA regime has been modified to reflect First Nations being legally, culturally and politically distinct, and with attention to developing capacity and training as the reach of the CRHA extended further into First Nation government processes. The interpretive clause is likely key to its acceptance within some First Nation communities. The decision to delay implementing the repeal of section 67 for three years was clearly necessary for communities to have any chance of being compliant with the CHRA.

What success has been experienced may be grounded in collaborative relationships that were formed between the NAI and First Nations communities and organizations. As noted, the NAI sought to learn from First Nations as it developed its on-the-ground training and support: the relationship appears to have been a two-way street. Thus the NAI resources were generated in close consultation or collaboration with representative First Nations or Aboriginal organizations. This work was presumably made possible by the extra infusion of funding by the federal government.

However, success has not been experienced across the board. The 2011 Readiness Report concluded that while many First Nations were at different levels of preparedness, that the three year grace period was insufficient for First Nations to become compliant with the legislation.[143] It suggested the work of the CHRC during the grace period, described above, was insufficient.[144] One issue was a general lack of awareness of the CHRA. A second issue was a lack of resources and capacity for First Nations to review their own laws for compliance with the CHRA. They

also identified a lack of adequate training for First Nation government staff, a lack of reliable information to assess the accessibility of the existing infrastructure in First Nation communities, and the need to further support First Nations in the development of community-based dispute resolution mechanisms.[145] The AFN submissions for the 2011 Readiness Report emphasized how insufficient funding had undermined the ability of First Nations to meet the needs of their disabled citizens. Their consultations revealed that only 22% of communities identified their public community buildings as accessible.[146] The AFN commented:

> All First Nations are concerned about meeting the needs of persons with disabilities in regard to public buildings, as well as band-owned homes. Participants in regional sessions spoke of poor condition of infrastructure in general in way too many First Nation communities. Identified needs included the following: wheelchair accessibility buildings and washrooms, electronic controls on doors, ramps, signage, and telecommunications devices for the deaf (TDD), and phone services for hard of hearing and deaf individuals. The participants also spoke about the need for disability and accessibility audits; however the cost for such audits has historically been too high to access.[147]

The 2011 Readiness Report does not appear to have resulted in any particular changes to the strategy or additional funding being allocated to addressing the gaps. This brings into question the purpose of the Readiness Report. The logic appears to have been that non-complying First Nation laws and practices would be identified and addressed through both on-going pro-active efforts and also through complaints. Identifying non-complying laws through complaints, instead of supporting communities to review their laws and voluntarily modify them, is deeply problematic. It means that individual community members bear the burden of identifying discriminatory laws and then bringing a complaint, and it means that non-compliant laws are only identified one-at-a-time. This does not support a positive relationship between First Nation governments and their citizens.

Indigenous women and girls have faced particular and on-going challenges. In a 2010 meeting with the CHRC, Aboriginal women described having "experienced retaliation for trying to access their rights". They also identified concerns about the relationship between a community-based dispute resolution process and Commission processes, and in particular whether being referred to a community-based dispute resolution processes could limit their right to access Commission complaint processes.[148]

In 2013-2014, the CHRC held 8 roundtable follow-up meetings across Canada. They identified 21 barriers for Indigenous women, girls and other persons in vulnerable positions in accessing human rights justice. The 21 barriers were: awareness, leadership, accessibility of human rights information, re-victimization, fear of retaliation, intercultural understanding, human and financial resources, accessibility of justice system processes, the scope of the CHRA, power imbalances, historical and ongoing colonization, education, linguistic barriers, mental health, confidentiality, economic barriers, trust, advocacy and legal supports, jurisdictional confusion, normalization of discrimination and systemic discrimination. The nature of these barriers, and suggestions for overcoming them, are described in detail in the CHRC roundtable report.[149]

When section 67 was repealed, the legislation required a comprehensive review on the effects of the appeal within five years, to be undertaken jointly by Aboriginal Affairs and Northern Development Canada (AANDC) and representative First Nations organizations. The report was tabled in Parliament in 2014.[150] It appears to lack substantial input from the AFN. A resolution, passed at the 2014 AFN AGM, resolved to reject the one month timeframe which they had been given to prepare comments, to seek adequate time and resources, and to call for a jointly prepared comprehensive report.[151] While the Native Women's Association of Canada prepared a report, they too indicated concern that the review was not the 'comprehensive' review that the legislation required, as well as concern about having been granted just a six week period to collect their comments.[152]

The CHRC reported that between 2011 and 2014, 344 complaints had been filed against First Nations governments, of which 60 complaints had been settled while others were working their way through the system. Many of the settlements involved mediation. The mediation process is identified as having in turn enabled new policies or commitments for training and education.[153] Only three complaints against First Nation governments were ultimately referred to the Tribunal and were outstanding when the report was published[154]. According to AANDC, the majority of the complaints identified family status or national or ethic origin as the ground of discrimination, and related to employment, retaliation, or the provision of services.[155]

The CHRC also reported that since the repeal of section 67, between 2008 and 2014, that 173 complaints were filed against the federal government, and that it had referred 26 complaints against the federal government to the Tribunal.[156]

In the 2014 report, AANDC identified the following concerns as ones that were generally held by all those who commented:

- The lengthy and costly process to defend against and adjudicate CHRA complaints
- The lack of preparation, training, capacity and resources of First Nation governments to implement the changes to the *CHRA* for compliance.
- The need for resources to update community buildings in order to accommodate the access needs of disabled community members.
- The need for government support to First Nations in the development of their own laws in accordance with their indigenous ways, traditions and cultures, including the development of First Nations-specific human rights protections and mechanisms.[157]

The Native Women's Association of Canada identified additional but related challenges. These include jurisdictional uncertainty (whether the federal, provincial or territorial human rights legislation applies in a given instance), regular turn-over of Chiefs and Council meaning challenges with continuity of training/corporate knowledge, and that punitive measures were insufficient to make Band Councils change discriminatory practices.[158]

The CHRC also produced a report in 2014.[159] The report details positive impacts, as well as barriers. Recall that complaints can be brought both against the federal government as well as against First Nations government entities. A key barrier was the continuing low level of awareness of the human rights protections in the CHRA. Additional barriers or disincentives

were (1) a lack of access to the internet, where in some communities the only internet connection is at the Band Office, (2) low literacy and language barriers making it hard for people to understand their rights or how to file a complaint, (3) poverty and the general consequences of inadequate housing, food, water, etc leaving people without "the time, money or energy to file" a complaint, (4) lack of confidentiality due to communities being small and remote, creating concerns about negative repercussions, (5) power imbalance, (6) fear of retaliation in that a complaint might result in family members being denied housing or health and social services, (7) the process for filing a complaint not feeling culturally safe, being perceived as lengthy and complex, having bureaucratic requirements, the need to self-represent or the inability to recover legal costs, and (8) a general lack of legal and non-legal assistance due to communities being geographically remote.[160]

The report notes that only some First Nations are willing to work with the CHRC on enabling compliance with the CHRA.[161] Others do not agree that the CHRA applies to their communities. This is based on the position that First Nation governments have jurisdiction over human rights, as human rights are a matter of internal First Nations governance.[162] This may or may not mean that there is a gap in human rights protections as communities may have independently addressed these matters.

(1) Strengths of the approach taken with the *Canada Human Rights Act*

- First Nation governments had three years to build capacity and review their laws before their decisions under the *Indian Act* were to be scrutinized under the CHRA
- Implementation and training by CHRC was supported by additional funding
- Studies were mandated to assess readiness of First Nations to be able to comply
- Interpretive clause recognizes First Nations laws and culture
- Aboriginal-specific outreach initiative, which educates, trains, designs resources, partners with Aboriginal organizations, runs webinars, training sessions and attends outreach events
- Resources specifically crafted to address the capacity, knowledge and training needs of First Nation governments and citizens, including guidance on developing First Nation dispute resolution processes.
- Partnerships formed early with recognized national Aboriginal organizations to design resources
- Resources published in several common Aboriginal languages
- The interpretation and application of the CHRA is explicitly addressed in some self-government agreements
- Regime intends for First Nations to design their own dispute resolution processes. This respects First Nation laws, practices and culture, makes it more likely the process will be culturally accessible and that the outcomes will be culturally appropriate. It also supports First Nations self-governance interests and rights.
- CHRC regime offers mediation and conciliation as front line responses
- Mediation has been associated with supporting First Nations develop new policies to address human rights issues

- Regime includes quasi-judicial tribunal with broad authority to order remedies
- Mandatory comprehensive review that includes First Nations organizations was ordered for five years after regime comes into force.

(2) Challenges associated with the approach taken with the Canada Human Rights Act

- The CHRC's actions during the grace period were found insufficient to prepare First Nations to be able to act consistent with the CHRA, and ensure that First Nation governments and citizens were aware of the regime and its requirements. The report did not determine why the CHRC's actions were insufficient.
- The legal regime did not identify remedies or actions to be pursued if First Nations were not ready when the grace period came to an end.
- Compliance or implementation issues identified in 2011 were still present in 2014-2015 reviews/roundtables, including First Nations lacking capacity and resources to review and address their own laws, policies and infrastructure practices to enable compliance. These findings mean First Nations are in breach of the Code, and are apparently unable to remedy the situation without further or different supports.
- Indigenous women, girls and other vulnerable persons were determined to have particular barriers to realizing their rights. The 21 identified barriers included lack of awareness of rights, fear of retaliation, power imbalances, and the lack of human and financial resources in communities. It is not clear whether or how proposals are being developed to address the known barriers.
- The request for input for a mandated review five years after implementation appears to have only given First Nation organizations 4 to 6 weeks to comment. This brings the comprehensiveness and legitimacy of the review into question.
- The CHRC and CHRT processes are experienced as lengthy and costly
- First Nations report lacking resources to renovate existing buildings to address disabled community members' access and other needs, so being unable to comply with the CHRA.
- On-going insufficient support for developing First Nation human rights protections and mechanisms.
- Jurisdictional uncertainty as to whether federal or provincial codes apply
- Chief and Councils being elected on three year terms undermines continuity in terms of the First Nations government being trained.
- The regime has been rejected by some communities as an infringement of First Nation self-government rights, as human rights are an internal matter.
- Unique features of remote First Nation communities create additional barriers to success. These include:
    - Lack of access to internet. (Many resources are only available via the internet. In some communities internet is only in the band council office.)
    - Literacy challenges
    - The small size of communities raises confidentiality concerns and fear of repercussion against individuals or their extended families
    - There is a general lack of access to legal assistance

c) National Building Code

i) Purpose

The National Building Code of Canada 2010 (NBC)[163] is a model code that sets minimum standards for designing, building, renovating or retrofitting buildings. It is one of the instruments that comprise the National Model Construction Code of Canada. (Other instruments include the National Fire Code and the National Plumbing Code.) As a model code it has no force in-and-of itself, but rather has been developed to be adopted by government bodies with jurisdiction over construction.

Although recommendations have been made for the NBC or equivalent standards to apply to all First Nation reserve communities, in practice the NBC (or equivalent standards) apply in First Nation reserve communities in limited circumstances, and may not be consistently enforced.

ii) Application and Enforcement

The NBC has no force in-and-of itself. There are two ways it may come to be applicable in First Nation communities. One is by referential incorporation. First Nations have jurisdiction over "the construction, repair and use of buildings."[164] About 20 First Nation governments have passed by-laws which adopt the NBC[165] or the provincial variation of the NBC (or an equivalent)[166] as a part of their building codes.[167] For example, the Tzeachten First Nation has adopted the NBC[168], while the Tsawwassen First Nation has referentially adopted the British Columbia Building Code (which introduces modest variations on the Canada Building Code) through its own laws.[169]

Where First Nation communities have incorporated the NBC or provincial building codes, their by-laws address enforcement and contravention, with building permits requiring the applicant to acknowledge liability for compliance with the applicable code.[170] For example, the Tswwwassen First Nation's *Building Regulation* prohibits certain types of construction work without a permit, allows building officials to deny permits if the provincial building code is not complied with, to order corrections and to issue stop work orders. Where the planned building is complex, then the building official can require assurances from registered professionals regarding compliance with the building code. Contraventions are addressed by the Tsawwassen *Land Use Planning and Development Act*[171] or the Tsawwassen *Laws Enforcement Act.*[172] Violations can result in considerable fines. These enforcement practices are similar to those used by municipalities, and hold the builder accountable for quality and compliance.

The second way that the NBC may come to apply to First Nation reserve communities is as a requirement of receiving funding. AANDC's newly revised protocols for funding infrastructure require the Chief and Council to ensure housing capital construction projects are inspected and found to comply with the NBC at four identified stages of construction as a condition for subsequent funding being released.[173] AANDC also administers the Ministerial Loan Guarantee Program (MLG). The MLG provides loan security to Canada Mortgage and Housing

Corporation (CMHC), which in turn provides loan financing to First Nations to support construction or renovation under the On-Reserve Non-Profit Housing Program and the On-Reserve Residential Rehabilitation Assistance Program (RRAP). MLGs and CMHC Loan Agreements require conformity to the NBC or its equivalent.[174] Starting in 2014, CMHC specifically requires code compliance inspections, by persons with qualifications or certification from a recognized professional industry organization, to be performed at three stages of construction.[175] Compliance with NBC standards is enforced by withholding funding from First Nation governments if First Nations fail to report, or if inspectors reveal the builders have failed to meet the required standards

Where First Nations have not themselves referentially incorporated the NBC or equivalent through by-laws, or infrastructure is not funded by CMHC or directly by AANDC, the NBC does not apply. Without housing related bylaws requiring compliance with a building code, a community cannot require the inspection of construction, and inspectors or other qualified individuals would lack authority to shut down a site or order corrections, so as to bring infrastructure up to NBC criteria.[176] There may be no means of enforcement short of a lawsuit for breach of contract, if the building contract itself included a requirement to meet code requirements.

iii) Flexibility to Incorporate First Nations Laws, Perspectives and Governance Rights

Pursuant to the *Indian Act*, First Nations have authority over building codes. They thus can adopt the NBC if they so chose, and/or make modifications to their code to reflect their local conditions, laws and traditions. This flexibility is, of course, limited to those communities which have the resources and capacity to take such actions. Where the NBC is imposed on a community through a funding agreement, there is no flexibility, except in so far as the NBC is a minimum set of standards which they can build upon.

iv) Supports for Success

Federal Supports

CMHC has created initiatives to help train persons to inspect First Nation reserve community infrastructure. In particular, they created the Native Inspection Services Initiative.

CMHC conducts on-site Physical Condition Reviews once every five years. They sample a number of units to identify potential improvements to capital repair and maintenance practices, and to give communities support in planning capital repair activities.[177] CMHC also does community visits once every three years to review the community's housing program and give feedback or recommendations for improvements.

The federal government committed $300 million to finance the First Nations Market Housing Fund (Fund) in 2008. The Fund is an independent trust, with its trustees chosen from First Nations, the federal government and the private finance sector.[178] The Fund supports the development of more market housing in reserve communities, and as a part of this agenda its Capacity Development Program provides funds for "Planning, developing and operationalizing

institutional structures, legislative and regulatory regimes, policies and programs and other related elements including but not limited to: housing policies, systems, and planning; financial management policies, systems, and practices; and compliance with building codes."[179] Eligible communities - which means that they are already close to having capacity - receive financial assistance for their staff to obtain relevant education and certifications.[180] Data was not located to assess its success with capacity development. It has fallen far short in terms of its expected funding of housing, having only enabled the construction of 55 homes between 2008 and 2015, despite the expectation of enabling 25,000 homes over its first ten years.[181]

Although not a building code issue, per se, there are specific funding sources that First Nations can apply to when seeking to address building accessibility. These sources include:

- On-Reserve Residential Rehabilitation Assistance Program for Persons with Disabilities (CMHC)
- Home Adaptations for Seniors Independence Program (CMHC)
- Capital Facilities and Maintenance Program (AANDC)
- Enabling Accessibility Fund (HRSDC – Office for Disability Issues)
- Public Works and Government Services.[182]

This may provide a route for infrastructure to be renovated to meet code requirements. The RRAP also grants forgivable loans to modify existing housing to meet the needs of disabled community members.[183]

Support from non-Government Bodies

The public education sector has also supported capacity building. CMHC collaborated with Vancouver Island University(VIU), for VIU to offer certificate programs for First Nations building inspectors, and for First Nations housing managers.[184] Some programs are available through online courses, which makes it accessible for persons across the province of British Columbia. North Bay's Native Education and Training College similarly offers an online program on housing management.[185]

A few provincial builders associations have designed training programs specificly for First Nations building officers,[186] and CMHC has published a list of building code training providers in Canada.[187] The First Nations National Building Officers Association, a non-profit organization which seeks to represent those working in First Nations communities on construction and renovation services, has received modest funding from the federal government to make presentations on developing building codes and permitting processes, and has also engaged in consultations concerning why First Nations do not build in compliance with the NBC.[188]

v) Evaluation of Success: Lessons for Accessibility Legislation for First Nation Reserves

The Federal Government identified First Nations as the government, since 1983, which has jurisdiction for housing and thus is responsible for passing and enforcing by-laws for building codes on reserves. However, "[t]his understanding is not widely shared among First Nations"[189]

Some First Nation communities reject the claim that they bear responsibility for matters such as the quality or infrastructure of on-reserve housing, because a treaty right to housing "imposes an obligation on the Crown to provide housing" to First Nations persons.[190] The federal government, on the other hand, takes the position that it provides financial and other support for housing "as a policy decision, not out of any legislative or treaty obligation."[191] It is predicted that results would improve if agreement was reached on responsibilities and shared responsibilities.[192] This is an important lesson for accessibility legislation.

Other communities seek to build to code or its equivalent, but are operating in very different circumstances. For example, some First Nations have a suite of by-laws and enforcement mechanisms which reflect or go above the NBC's requirements. They have the capacity and resources to ensure inspections are carried out by qualified professionals, and that inspectors have authority to require remedial action. Their infrastructure can be presumed to be safe, and their policies, protocols and bylaws can be drawn upon by other First Nations as models for success. These First Nation communities tend to be located in or near more urban areas, have independent revenue streams, and have already taken considerable steps towards self-governance.

Other communities do not have the resources, capacity or political will to enact by-laws requiring compliance with building codes. If a building or renovation project is not supported by a funding agreement with CMHC or directly by AANDC, which could happen if it is built from alternate revenue streams such as business income or treaty land entitlement payments, or if a community member decides to build themselves a structure or undertake their own renovations, then no code will apply unless the community has enacted its own by-laws.[193]

In many instances even if a community passed such a by-law they could not enforce it. Without the by-laws (or meaningful enforcement powers), homes may not be designed or built to code, inspectors may not be able to require corrections, and homes may be unsafe or poorly built.[194] The cost of having inspectors visit the building site four times may also not be viable due to factors such as remoteness.[195]

This disparity between conditions in different communities reflects the fact that First Nations are very differently resourced, and that remoteness can be a controlling factor for the decisions that a First Nation is able to make or act upon. One of the key recommendations coming out of a 2015 Senate review was measures had to be put in place to support First Nations developing the human resource capacity to adopt and enforce building codes.[196]

As to situations where the NBC applies through a funding agreement, First Nation communities report that the legislation, criteria, and supporting programs were developed without an understanding of community needs and challenges, and so supporting programs do not necessarily meet their actual needs.[197] In a 2013 consultation with First Nations which considered why many do not adhere to the NBC, points that were raised (which appear to still be outstanding) included: the NBC does not necessarily reflect appropriate minimum standards for northern communities which may experience extreme weather; remoteness coupled with little competition result in some contractors being able to insist on cash up-front, which results in techniques like hold-backs pending passing inspections being ineffective; funds allocated by AANDC and CMHC for inspections are below market rates and do not cover travel costs; and few communities have by-laws supporting compliance frameworks, so inspectors have no legal power to order work to stop or for corrections to be made.[198] The lesson here is that it is essential that legislation and policy reflect community needs and interests, and are developed in light of actual on-the-ground situations that can only be understood through consultation.

Prior to fairly recent changes to federal policies and practices, evidence suggests a norm of non-compliance. A 2003 report from the Auditor General flagged the lack of compliance and effective monitoring.[199] These concerns were echoed in the 2011 independent audit of the housing situation in Attiwapisat which included examining the practices and policies of the federal government. The audit determined that suitably qualified professionals were not certifying compliance with the NBC because federal policy did not require such credentials. It also identified the problem that completion and compliance reports did not need to be supported by a declaration from an independent and qualified professional, unlike usual industry practices.[200]

The audit also found that identified deficiencies were not being shared between CMHC and AANDC, that remedial actions were not taken in the face of non-compliance,[201] and that AANDC was not requesting or reviewing inspection reports. Three years after the audit was released, AANDC and CMHC were still being described as operating in separate "silos"[202] It is essential that any accessibility legislation has an effective strategy to bridge the work of participating departments and agencies.

Evidence of whether the recent changes are effective has not yet been collected. Concerns were raised that new reporting standards (ie 3 or 4 inspections to verify compliance with the NBC) were put in place before determining if enough trained inspectors were available. This apparently resulted CMHC needing to subsidize a new training program, after the changes were already supposed to be being complied with.[203]

Even where proper inspections do take place, communities may lack by-laws to authorize inspectors to require changes or stop work, or correct deficient work, and the builder may have already been paid. There are thus continuing and systemic challenges associated with the fact that First Nation communities operate in unique conditions. These challenges have not necessarily been reflected in the NBC or federal policies.

Current consultations on housing and infrastructure reform recognized the need for a full partnership between First Nations and Canada, and an agreement on vision, with the federal government's role focusing on supporting funding for capacity development, and supporting communities' aspirations.[204] The government has been urged to coordinate carefully with First Nations, because imposing legislated standards which communities cannot comply with is bound to fail.[205]

There are a variety of government and non-government industry bodies – several of which are Indigenous organizations – seeking to enhance capacity and generate 'buy in' by First Nation communities. For example, the Aboriginal Firefighters Association of Canada explicitly supports the FNBOA's objectives, and seeks to partner with them to support First Nations in developing of community building codes along with by-laws to enforce them.[206]

Overall, there is a great disparity between First Nations when it comes to building codes and whether infrastructure is built to code. The patchwork situation may reflect insufficient planning when the federal government deemed First Nations responsible for building quality in First Nation communities in 1983. It certainly reflects a historic lack of consultations with First Nations to determine the best ways to make the infrastructure in their communities safe, and the continuing reality that First Nations have very different resources at their disposal and are very differently situated.

In their review of the challenges about building codes on reserves, the Senate Standing Committee on Aboriginal Peoples heard support for addressing the regulatory gap in building codes. They heard some support for federal legislation applying to all First Nation communities, while also hearing that mandating minimum building code requirements when First Nations lack the human resource capacity to enforce them, including access to qualified professionals, was problematic. Witnesses emphasized consulting with communities about how to close the regulatory gap.[207] They also found a lack of dedicated funding for housing management positions, and that smaller First Nations face challenges when enforcing by-laws if the responsibility rests solely on the elected officials and not a housing authority or dedicated housing staff.[208]

The key recommendations of a senate committee in 2015 were to consult with First Nations to identify capacity needs to adopt and enforce building codes, address those capacity needs as a precondition for any legislation framework, and develop building code legislation in consultation with First Nation communities.[209] It is not clear that these recommendations have been acted upon.

(1) Strengths of the approach taken with the *National Building Code*

- First Nations can incorporate the NBC or its equivalent into their own laws. As it only creates minimum standards, First Nations are not restricted in how they build upon the NBC and can modify it to reflect local conditions and practices
- The NBC is based on basic standards for safe and reasonably built infrastructure
- First Nations with their own building code have robust enforcement and compliance mechanisms, which place liability on the builder

- Initiatives are in place to train more inspectors to work on First Nation reserve communities
- Documentation regarding compliance must now come from qualified inspectors
- Non-profit builder organizations have filled some of the training gaps
- Colleges and professional organizations are able to provide training
- First Nations are recognized by the Federal Government as having jurisdiction over on-reserve housing and building
- Recent reviews have recognized flaws in how the system was developed, and recommended addressing capacity development and collaboration on developing a solution to the regulatory gap
- CMHC visits communities every three years to give feedback and suggestions for improvements
- First Nation communities can, in theory, apply for funding to address specific building deficiencies, including addressing making buildings accessible for disabled members.
- Reports have led to proposals to bring about significant changes to the regime that are developed through a robust consultation process

(2) Challenges associated with the approach taken with the *National Building Code*

- The NBC is imposed on First Nations as a condition for receiving certain streams of funding without recognition that the community may be unable to comply due to structural factors. (For example, lacking reliable access to qualified inspectors, or not having by-laws and enforcement capacity.)
- AANDC and CMHC enforce compliance by withholding funding from First Nations governments, with the regime appearing to be insensitive to the reason for the lack of compliance. (For example, if the builder misled the community.)
- The regime is arbitrary in its application. No code requirements apply if a First Nation does not have relevant by-laws and the building is done without funding from AANDC or CMHC.
- First Nations do not necessarily have the capacity to create and enforce their own building code by-laws.
- There are fundamental disagreements between First Nation governments and the federal government as to roles and responsibilities. This perpetuates gaps and undermines the potential for good relations.
- CMHC and AANDC often operate as siloed entities, leading to unduly complex administrative relationships which have considerable room for gaps and lack of information sharing
- Changes have been introduced to the regime without first assessing if the changes can realistically be complied with by First Nations.
- Funding to pay for inspections is reported to be below market price and not necessarily reflect travel costs
- First Nations are very differently situated in terms of their own resources, capacity and required supports.

4) Lessons learned and best practices for success

The three different regimes that were discussed in the environmental scan operate very differently within First Nation reserve communities. They reflect quite different visions of the roles, responsibilities and authorities of First Nation governments and those of the federal government. In some ways the three regimes document the changing relationship between First Nation governments and the federal government, and illustrate the problematic premises that historic regimes bring with them. All of the regimes have strengths and weaknesses.

Finances

In many cases, financial support was identified as insufficient for the First Nations to successfully implement the regimes. This does not appear to have been the case for those few First Nations who have developed and implemented their own building codes (who also seem to have independent revenue streams) but was a factor for non-compliance with the Canada Labour Code, the Canadian Human Rights Act, and for the National Building Code for most communities. In particular, this scan identified unmet needs for financial support for specialized staffing (such as a human resources manager or a housing officer), for paying for reviews and revisions of existing by-laws and policies, for enforcement and for both auditing infrastructure for compliance and for modifying infrastructure to address those accessibility issues which had been identified by First Nations. Financial support alone, however, would not be enough for the communities to succeed.

Capacity & Training

For all three regimes, capacity development was an issue. Once again, different First Nation communities had different types of challenges, with the challenges being at different scales. Remote communities experienced far more challenges with capacity. The development of distance training initiatives, where First Nation governments and employees can learn via webinars or on-line courses, helps to address this issue to some degree. Pooling resources and working on a regional level may also assist.

The training modules to support Band Councils and First Nation community members when the CHRA came to apply to all Band Council decisions appear to model best practices. They were developed, from the start, in coordination or collaboration with Aboriginal organizations and First Nation communities. The materials reflected the information and capacity development issues that First Nations identified as relevant for their success, such as developing First Nation human rights policies and procedures for dispute resolution. Generated from the communities, these training resources should reflect the needs which communities have identified, and be culturally appropriate. Importantly, these resources are available in common Indigenous languages.

The CHRC model is also notable for recognizing that the federal Commission itself was in need of training and capacity development. To this end, the Commission had its staff trained in

Indigenous law, culture and history. Finally, the CHRC model illustrated considerable and continuing community outreach activities, and a commitment to forming new partnerships with Aboriginal organizations as opportunities arise.

Governance and Governance Rights

The *Canada Labour Code* is resisted by some communities, which may reflect its apparent complete lack of recognition of First Nation governance rights or interests over the workplace, and its development without regard to the unique character of their communities and their needs. The *National Building Code* has been forced on communities via funding agreements, and raises tensions over treaty rights and the nature of responsibilities and shared responsibilities for infrastructure on reserves. Where communities have sufficient resources and capacity to develop their own building codes, they are proud that their governance standards often surpass the NBC standards and have put effective enforcement mechanisms into place. The CHRA aligns with aspects of First Nation governance rights. It expressly recognizes First Nations laws. It also has structures to support First Nations capacity and institution building, by supporting First Nations in designing their own human rights policies and dispute resolution processes. It is essential that such support not be in name only, but also be accompanied by sufficient resources so that the promise of promoting First Nation self-governing opportunities can actually be realized.

Enforcement

Both the CHRA and the National Building Code regimes raise questions about the value and appropriateness of the federal government or its agencies imposing standards which First Nation communities are known to be unable to meet. Enforcing building codes by withholding funding installments may result in the infrastructure simply not being completed. Some of the approaches from the *Canada Labour Code* are helpful for thinking about such situations. For example, the *Canada Labour Code* emphasizes mediation and commitments for voluntary compliance, which may address some compliance issues but obviously not those caused by structural factors. The apparent decision to determine which First Nation bylaws are non-compliant with the CHRA via complaints, instead of ensuring First Nation communities have the required supports to review all of their own laws and revise them voluntarily, is deeply problematic. It is cost-ineffective, turns on community members realizing they may be being discriminated against and bringing the complaint, and only addresses one law at a time. This is not consistent with supporting good governance practices or a healthy relationship between First Nations governments and their citizens.

The CHRA supports First Nation community designed dispute resolution processes. This means that where such processes are in place, concerns about compliance can be addressed in a culturally meaningful fashion. Unfortunately only a handful of communities seem to have developed these processes for community mediation and enforcement.

Reviews

The on-going story of attempts to have building codes be effective within First Nation communities is a story of frustration. It is important that meaningful dialogue has started on the issue, and that the regime may be reviewed in collaboration with First Nations. The story of reviews associated with the CHRA is an uneven one. With regards to the repeal of section 67 of the CHRA, the timing of the readiness review was puzzling. In particular, having the review ordered completed just before the time when First Nations would be bound to CHRA standards meant the review could not be used to actually help communities be ready to comply. A better practice would be for such reports to be completed well in advance of such changes coming into force, so that strategies for success can be revised and other remedial action taken. It was also unfortunate that the mandated five year review of the repeal coming into force had a very quick consultation period, lasting less than two months. This brought into question the legitimacy of the review and whether it created the valuable tool, which it could have been, for supporting First Nations going forward. That said, other reviews seem to have been well-developed. In some cases, reports seem to have had little actual uptake on their recommendations for improvement, which often centered around inadequate finances, capacity building, and enhancing opportunities for First Nation governance practices. This places a cloud over the reviews. It would be preferable for reviews to be accompanied by a clearly communicated set of expectations or commitments as to how the reviews will in fact be used or acted upon.

ENDNOTES

[1] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s. 91(24), reprinted in R.S.C 1985, App II, No 5.
[2] *Indian Act,* R.S.C. 1985, c.I-5, section 73(1)(i), (Regulations)
[3] *Indian Act,* R.S.C. 1985, c.I-5, section 81 (Powers of the Council – By-laws)
[4] *Indian Act,* R.S.C. 1985, c.I-5.
[5] *Tshilhqot'in Nation v British Columbia,* 2014 SCC 44 at para 69.
[6] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act* 1982 (U.K.), 1982. C. 11 at section 25.
[7] *Daniels v Canada,* 2016 SCC 12 at para 34.
[8] *Tshilhqot'in Nation v British Columbia,* 2014 SCC 44 at para 69.
[9] *Tshilhqot'in Nation v British Columbia,* 2014 SCC 44 at para 69, citing with approval *R v Sparrow* [1990] 1 SCR 1075 at p 1009. See also *Manitoba Metis Federation v Canada (Attorney General,)* 2013 SCC 14 at para 66 citing *Taku River Tlingit First Nation v British Columbia (Project Assessment Director,)* 2004 SCC 74 at para 24.
[10] *Manitoba Metis Federation v Canada (Attorney General),* 2013 SCC 14 at paras 73-74
[11] *Manitoba Metis Federation v Canada (Attorney General),* 2013 SCC 14 at para 66.
[12] *Tshilhqot'in Nation v British Columbia,* 2014 SCC 44 at para 67.
[13] *R v Gladstone,* [1996] 2 S.C.R. 723.
[14] See, for example, *R. v. Van der Peet,* [1996] 2 SCR 507; *R v Sparrow,* [1990] 1 SCR 1075.
[15] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69.

[16] Government of Canada, "Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult", (Ottawa: Minister of the Department of Aboriginal Affairs and Northern Development, 2011). (Online at << http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf>>
[17] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 35.
[18] *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12 at para 34.
[19] Government of Canada, "Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (March 2011)", (Ottawa: Minister of the Department of Aboriginal Affairs and Northern Development at page 14. (Online at << http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf>>
[20] "Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process" (August 2010) (Online at << http://mikmaqrights.com/uploads/TORdocument.pdf>>
[21] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 43-44.
[22] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73at para 43-44.
[23] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 67.
[24] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 64
[25] Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saksatoon: Prurich Publishing Ltd, 2014) at pages 57-58
[26] Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saksatoon: Prurich Publishing Ltd, 2014) at page 71. See also *Clyde River (Hamlet) v Petroleum Geo-Services Inc* 2017 SCC 40
[27] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 40, quoting with approval from *Delgamuuk'w v British Columbi,a* [1997] 3 SCR 1010 at para 158.
[28] Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23:1 Canadian Journal of Administrative Law and Practice 93 at page 103. See also *Clyde River (Hamlet) v Petroleum Geo-Services,* 2017 SCC 40 at paras 49-51.
[29] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74; at para 25
[30] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 64, citing *Halfway River First Nation v British Columbia (Ministry of Forests),* 1999 BCCA 470 at paras 159-60.
[31] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54 at para 79.
[32] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations,)* 2017 SCC 54 at para 80.
[33] *Mikisew Cree First Nation v Canada (Minister of Aboriginal Affairs and Northern Development),* leave to appeal granted, [2017] SCCA No. 50.
[34] *Mikisew Cree First Nation v Canada (Minister of Aboriginal Affairs and Northern Development),* [2017] 1 CNLR 354 at para 56.
[35] E.g. *Delgamuuk'w v British Columbia,* [1997] 3 SCR 1010.
[36] *Bone v Sioux Valley Indian Band No 290,* [1996] 3 CNLR 54 (FCTD)
[37] *R v Pamajewon,* [1996] 2 SCR 821
[38] *R v Sappier; R v Gray,* 2006 SCC 54. In this case, the court recognized that the First Nation community had the right to harvest timber on Crown land. This in turn meant the community had to right to regulate how the right would be exercised by its members.
[39] See, for example, Indigenous and Northern Affairs Canada "The Government of Canada's Approach to Implementing the Inherent Right and the Negotiation of Aboriginal Self-Government" Online at << https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>>
[40] Indigenous and Northern Affairs Canada "The Government of Canada's Approach to Implementing the Inherent Right and the Negotiation of Aboriginal Self-Government" Online at << https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>>
[41] Indigenous and Northern Affairs Canada "The Government of Canada's Approach to Implementing the Inherent Right and the Negotiation of Aboriginal Self-Government" Online at << https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>>

[42] Indigenous and Northern Affairs Canada, *Comprehensive Claims* (page last modified: 2015-07-13). Online at <https://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578>
[43] See, for example, Para 9 of the *Nisga'a Final Agreement* (signed by British Columbia and the Nisga'a Nation on 27 April 1999, and by Canada on 4 May 1999, and as enacted by the *Nisga'a' Final Agreement Act*, SBC 1999, c.2, and the *Nisga'a Final Agreement Act*, SC 2000, c7.((April 27, 1999); and para 2.9.1 of the *Deline Self-Government Agreement (*April 2015), as enacted by the *Deline Self-Government Agreement Act* S.C. 2015, c.24.
[44] Westbank First Nation Self-Government Agreement (2003), sections 1,3. Online at << https://www.aadnc-aandc.gc.ca/eng/1100100031766/1100100031768>>. *Westbank First Nation Self-Government Agreement,* SC 2004, c.17)
[45] Nisga'a Final Agreement, Chapter 2, Para 13 (Application of Federal and Provincial Laws)
[46] Nisga'a Final Agreement, Chapter 2, para 16 (Other Rights, Benefits, and Programs)
[47] Nisga'a Final Agreement, Chapter 15, para 6 (Fiscal Financing Agreements)
[48] Nisga'a Final Agreement, Chapter 11 (Nisga'a Government).
[49] Nisga'a Final Agreement, Chapter 11, Para. 4 (Recognition of Nisga'a Lisims Government and Nisga'a Village Governments)
[50] Nisga'a Final Agreement, Chapter 11, Para 9(o) (Nisga'a Constitution)
[51] Nisga'a Final Agreement, Chapter 11, Para 34 (Nisga'a Government)
[52] Nisga'a Final Agreement, Chapter 11, Para 71 (Buildings, Structures, and Public Works) and para 74 (Traffic and Transportation).
[53] Nisga'a Final Agreement, Chapter 11, Para 69 (Buildings, Structures, and Public Works)
[54] Nisga'a Final Agreement, Chapter 11, Para 72 (Traffic and Transportation).
[55] Nisga'a Final Agreement, Chapter 11, Para 68 (Human Resource Development)
[56] Nisga'a Final Agreement, Chapter 11, Paras 82-84 (Health Services).
[57] Nisga'a Final Agreement, Chapter 11, Para 63 (Duty to Accommodate)
[58] The Constitution of the Nisga'a Nation, Ratified October, 1998, section 9. Online at << http://www.nisgaanation.ca/sites/default/files/legislation/Constitution%20of%20the%20Nisga%27a%20Nation%20-%201998-10-01.pdf>>
[59] The Constitution of the Nisga'a Nation, section 24 (Social and economic goals of the Nisga'a Nation)
[60] The Constitution of the Nisga'a Nation, section 60 (c) (Public Administration: Values and Principles)
[61] Nisga'a Final Agreement, Chapter 2, para 23 (Nisga'a Section 35 Rights)
[62] Westbank First Nation Self-Government Agreement (2003), sections 1,3. Online at << https://www.aadnc-aandc.gc.ca/eng/1100100031766/1100100031768>>. *Westbank First Nation Self-Government Agreement* (S.C. 2004, c.17)
[63] Westbank Agreement, Para 103 (Governance of Westbank Lands)
[64] Westbank Agreement, Para 133-4 (Landlord and Tenant)
[65] Westbank Agreement, Para 186-7 (Education)
[66] Westbank Agreement, Para 212-216 (Public Works, Community Infrastructure and Local Services)
[67] Deline Self-government Agreement, para 2.4 (Rights, Benefits and Programs)
[68] Deline Self-government Agreement, para 15.1 (Jurisdiction)
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