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Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's Aboriginal Nation Recognition and Government Act

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Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's *Aboriginal Nation Recognition and Government Act*

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Introduction

Most Indigenous groups in Canada are not self-governing. Currently, there are only about two dozen Indigenous groups in Canada who have concluded self-government agreements, while the vast majority of Indigenous groups continue to operate under the control of a combination of the *Indian Act* and federal policies.[1] While the last two decades have seen an increase in laws and policies that provide some Indigenous groups greater control over their territories and citizens, overall these have been ineffective in achieving transformative change. Although cumulatively broad in scope (as can be seen from the Appendix comparing existing Indigenous jurisdiction under Canadian law with proposals calling for comprehensive Indigenous jurisdiction), many Indigenous groups are not benefiting from these policies and laws for a variety of reasons. Foremost among these are a general lack of awareness of these jurisdictions, significant limitations on accessing them, as well as lack of resource and capacity to implement them.

In 1996 the Royal Commission on Aboriginal Peoples ("RCAP") report advanced a very reasonable proposal for national legislation recognizing the right of Indigenous peoples to organize themselves collectively and govern themselves in core areas of jurisdiction as they see fit. It also mandated the provision of adequate funding and resources for capacity building in order to ensure successful implementation.[2] RCAP proposed this be called the *Aboriginal Nation Recognition and Governance Act* (the "*Recognition and Governance Act*").[3] This self-government enabling legislation was contemplated as an interim step in a broader strategy on self-government and realizing a true nation-to-nation relationship.

RCAP's proposal for this kind of legislation was not new. The Report of the Special Committee on *Indian Self-Government in Canada*, known as the "Penner Report," made a similar proposal for an "*Indian First Nation Recognition Act*" 13 years earlier.[4] Following this, the Liberal government of Pierre Elliott Trudeau introduced draft legislation in the House of Commons, entitled "*An Act relating to self-government for Indian Nations*" in 1984.[5] However, a federal

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[1] *Indian Act*, RSC 1985, c I-5.
[2] *Report of the Royal Commission on Aboriginal Peoples* ("RCAP"), Vol. 2, c 3, pp. 296-321.
[3] *Ibid* at p 297.
[4] Canada, House of Commons, Report of the Special Committee on *Indian Self-Government in Canada*, First Session of the Thirty-Second Parliament, 1980-81-82-83 ("Penner Report") at 53-60. The report was ground breaking. It repudiated Canada's assimilation policy and called on the federal government to entrench Indian self-government in the constitution (at 43-44), and proposed several legislative measures, to occur irrespective of constitutional entrenchment, to immediately begin implementing self-government in a flexible manner and at a pace suitable the needs and capacities of each First Nation (at 46-50).
[5] Bill C-52, *An Act relating to self-government for Indian Nations*, (1984) 2nd Sess., 32nd Parl., 32-33 Elizabeth II, 1983-84 (First Reading, June 27, 1984). Reaction by Indigenous groups to the Bill was mixed; some felt it departed

election and a change in government resulted in the bill's abandonment.[6] Following the release of RCAP, the *Recognition and Governance Act* was similarly sidelined. The Chrétien Liberal government was less than enthusiastic about RCAP's proposals on Aboriginal governance and instead proposed legislation expanding First Nation's by-law making powers under the *Indian Act*.[7] The proposed bills were met with strong resistance from Indigenous leaders and consequently died on the order papers.[8]

Since RCAP, the proposal for formal recognition of Indigenous self-government through national legislation has been ignored by successive Canadian governments.[9] As suggested above, this is not to say there has been no progress towards self-government. Canada has had a policy that recognizes the inherent right to self-government since 1995 and authorizes Canada to enter self-government agreements with Indigenous groups. Canada has also passed some legislation acknowledging Indigenous peoples' decision and rule-making authority over certain matters. In addition, there have been several court rulings supporting Indigenous control over their own affairs in some areas.

Overall, however, what has transpired in Canada over the last twenty years can be characterized as 'piecemeal recognition'—discrete recognition of Indigenous control here and there in a case, policy or statute—and implemented in a patchwork fashion. This paper argues that it is time for Canada to discard its piecemeal approach to self-government and return to RCAP's proposal to implement national legislation modelled on the *Recognition and Governance Act* as one of the first of many steps in transforming the relationship between Canada and Indigenous peoples.

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too much from the Penner Report recommendations: see Assembly of First Nations *A Report on the Self-Government Bill. Ottawa: Assembly of First Nations* (1984); David C. Nahwegahbow, "Recognition of Inherent Right Through Legislative Initiatives" prepared for a Conference held in Toronto, Ontario hosted by the Indigenous Bar Association, October 18, 2002, online:<http://www.indigenousbar.ca/pdf/Recognition%20of%20Inherent%20Rights%20Through%20Legislative%20Initiatives.pdf > at 12.

[6] The Liberals were defeated by the Progressive Conservative government of Brian Mulroney, who came to power in September 1984. Bill C-52 died on the order paper, not having gone beyond First Reading. See Cumming, P.A., and Ginn, D., "First Nation Self-Government in Canada" (1986) Nordic Journal of International Law 55.1-2 86 at 100-107.

[7] First, there was the Bill C-79, the *Indian Act Optional Modification Act* introduced in 1997, which was rejected by First Nations because it was not based on recognition of the inherent right to self government: see Nahwegahbow, *supra* note 5 at 14. Next, there was Bill C-7, *First Nations Governance Act*, 2nd sess., 37th Parl., 2002. The bill was not intended to address the inherent right of self-government, but rather to reorganize and 'modernize' the bylaw powers under the *Indian Act*. See Library of Parliament Legislative Summaries, "Bill C-7: the First Nations Governance Act" (Ottawa: 10 October 2002, revised 18 December 2003); Frank Cassidy, F., "The First Nations Governance Act: A Legacy of Loss" Policy Options – The Public Forum for the Public Good, April 1, 2003; and John Provart, "Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada" (2003) 2 Indigenous LJ 177; and Kent McNeil, "Challenging Legislative Infringement of the Inherent Aboriginal Right of Self-Government" (2003), 22 Winsor YB Access to Just. 329.

[8] See Cassidy *ibid*; Provart *ibid* and Nahwegahbow, *ibid.*

[9] I generally use the term "Indigenous peoples" to refer to all peoples who descend from the original inhabitants of this country as this is the term gaining prominence internationally to refer to first peoples. It is synonymous with the term "Aboriginal peoples" which was the terminology used by RCAP in 1996, and is also the term used in s. 35 the *Constitution Act, 1982*, and defined to include "the Indian, Inuit and Métis peoples of Canada" (at s. 35(2)). When referring to RCAP or the *Constitution Act*, I use the "Aboriginal" and "Indigenous" people interchangeable. Finally, the term "First Nations" is now commonly used instead of "Indian", however, the latter term is still in use given the continued existence of the *Indian Act*.

1. RCAP's approach to self-government and the *Aboriginal Nation Recognition and Governance Act*

Informed by legal opinions from leading constitutional scholars, RCAP's report firmly asserted that the inherent right to self-government was guaranteed in Canadian law based on both s 35 of the *Constitution Act, 1982* and international customary law recognizing a people's right to self-determination.[10] RCAP's recommendations on self-government were not contingent on a constitutional amendment.[11]

RCAP identified that the inherent jurisdiction over Aboriginal self-government comprises "all matters relating to the good government and welfare of Aboriginal peoples and their territories"[12] and delineated the concrete scope of the entire sphere of Aboriginal jurisdiction as including (but not necessarily limited to) the following subject matters:

(1) constitution and governmental institutions;
(2) citizenship and membership;
(3) elections and referenda;
(4) access to and residence in the territory;
(5) lands, waters, sea-ice and natural resources;
(6) preservation, protection and management of the environment, including wild animals and fish
(7) economic life, including commerce, labour, agriculture, grazing, hunting, trapping, fishing, forestry, mining, and management of natural resources in general;
(8) the operation of businesses, trades and professions;
(9) transfer and management of public monies and other assets;
(10) taxation;
(11) family matters, including marriage, divorce, adoption and child custody;
(12) property rights, including succession and estates;
(13) education;
(14) social services and welfare, including child welfare;
(15) health;
(16) language, culture, values and traditions;
(17) criminal law and procedure;
(18) the administration of justice, including the establishment of courts and tribunals with civil and criminal jurisdiction;
(19) policing;
(20) public works and housing; and
(21) local institutions.[13]

[10] RCAP *supra* note 2, Vol. 2, c 3.
[11] *Ibid*, Vol. 5 at 108. Although RCAP was confident in it's position, it did, however, recommend should there be future constitutional amendments, explicitly recognizing the inherent right of self-government in s. 35 of the *Constitution Act, 1982*, would bring desirable certainty to all parties (at 114-115).
[12] *Ibid*, Vol. 2, c 3 at 203.
[13] *Ibid* at 205-206.

On the question of how the inherent right to self-government should be implemented, RCAP rejected the position that the right of self-government could only be exercised with the agreement of the Crown, finding this position inconsistent with the fact that the right is inherent.[14] RCAP also rejected the position at the other end of the spectrum—that Indigenous groups could implement the right to its fullest extent unilaterally. Such a position ignored the fact that the inherent right exists within the framework of Canada and the Canadian constitution, meaning that Indigenous people's right of self-government was constrained to the extent that Aboriginal people could not claim unlimited governmental powers or complete sovereignty akin to what independent states are commonly thought to possess.[15]

RCAP landed in the middle of these positions, finding that within the above-noted concrete list of jurisdictions, there is both a "core" and "periphery" of Aboriginal jurisdictional powers.[16] According to this distinction, Aboriginal people are free to unilaterally implement the inherent right of self-government within core areas; whereas peripheral areas would require agreements with the federal and provincial governments.[17] Core areas were defined by RCAP as matters of "vital concern to the life and welfare of a particular Aboriginal people, its culture and identity" that "do not have a major impact on adjacent jurisdictions" and "otherwise are not the object of transcendent federal or provincial concern."[18] For RCAP, the application of these criteria does not result in an easy breakdown of the above-list as "core" and "peripheral" but is fact-specific. If the Aboriginal nation has an exclusive territory, RCAP identifies that most of the above-listed subjects would be within their core jurisdiction:

> To give a partial list, it seems likely that an Aboriginal nation with an exclusive territory would be entitled as a matter of its core jurisdiction to draw up a constitution, set up basic governmental institutions, establish courts, lay down citizenship criteria and procedures, run its own schools, maintain its own health and social services, deal with family matters, regulate many economic activities, foster and protect its language, culture and identity, regulate the use of its lands, waters and resources, levy taxes, deal with aspects of criminal law and procedure, and generally maintain peace and security within the territory. In particular, the regulation of many substantive Aboriginal and treaty rights protected under section 35(1) would probably fall within the core of Aboriginal jurisdiction.[19]

RCAP suggested that any of the above-listed subjects could become peripheral if their exercise had effects beyond the exclusive territory of the Aboriginal group, possibly requiring intergovernmental agreements or treaties with other governments.[20] Finally, RCAP suggested that

[14] *Ibid* at 201-202.
[15] *Ibid* at 202.
[16] *Ibid* at 203.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid* at 207. RCAP noted that, for groups with no exclusive territory, the exercise of jurisdiction may require negotiation and empowerment by other governments. Nonetheless, self-government for groups without exclusive territory could be achieved through a 'community of interest' model of governance as opposed to a territorial model: see *ibid* at 235-236 and Vol. 4, c 7. Further discuss of this model, however, is beyond the scope of this paper.
[20] *Ibid.* For example, if its exercise potentially posed risks to the health and welfare of people in adjacent jurisdictions, such as storage of hazardous waste on their territory, or if the Aboriginal nation wished to provide services to its members living outside of its exclusive territory in urban areas.

laws passed in core areas of jurisdiction by Aboriginal nations would generally take precedence (i.e., be paramount) in cases of conflict with other governments' laws unless the provincial or federal governments can meet the strict standard of justification of Aboriginal rights set out in *R. v. Sparrow*.[21]

RCAP's transformative vision of a nation-to-nation relationship between Aboriginal people and the rest of Canada included both long-term and interim measures for implementing the above concepts of Aboriginal jurisdiction. The long-term goal was new treaty relationships (or renewed relationships in the case of existing treaties) that would address the full extent of an Aboriginal nation's law-making powers, expand lands and resources over which an Aboriginal nation would have sole control and jurisdiction (beyond existing land-bases), identify subject areas over which there would be shared jurisdiction (and rules to address conflict of laws), and work out the exact nature of a long-term system of fiscal transfer.[22] This long-term vision is similar to that of the Truth and Reconciliation Commission in its 2015 Report.[23] But RCAP was more specific on steps needed to achieve this vision. Measures were to begin immediately, occurring in tandem with each other.

First, Canada would issue a new royal proclamation to elaborate on and supplement the original principles set out in the *Royal Proclamation of 1763*. The new proclamation would acknowledge the errors and injustices of the past, recognize Aboriginal nations as possessing the right of self-determination in the form of the inherent right of self-government within the Canadian federation, affirm a continuing commitment to the historical and modern treaties and to the treaty process, and outline a contemporary legislative program to restore the relationship between Aboriginal peoples and the Crown on a foundation of mutual respect.[24] The suite of companion legislation named in the new proclamation, and which RCAP recommended should be implemented on its heels, included an act to commit the Crown to treaty renewal and treaty-making (an *Aboriginal Treaty Implementation Act*), an act to create an independent tribunal to address land claims and disputes arising out of the treaty process (an *Aboriginal Lands and Treaties Tribunal Act*), acts to replace the Department of Indian and Northern Affairs with new departments with objectives consistent with the spirit of a nation-to-nation relationship (an *Aboriginal Relationship Department Act* and an *Indian and Inuit Services Department Act*), and the *Recognition and Governance Act*.[25] RCAP paid particular attention in its chapter on Governance to elaborating what would be included in the *Recognition And Governance Act*, the steps to be taken for its implementation, and its place in RCAP's overall vision for a renewed nation-to-nation relationship.

[21] *Ibid* at 204, 213 and 299.
[22] *Ibid* at 296 and 309-310.
[23] See *infra* notes 150 and 151.
[24] RCAP *supra* note 2, Vol. 2, c 3 at 296.
[25] *Ibid* at 296-297. Two other statutes recommending by RCAP in this suite of legislation included amendments to the *Canadian Human Rights Act* to allow redress of harms to individuals and communities as a result of relocations (for more information see Vol. 1 c 11), and an *Aboriginal Parliament Act* to provide advice to the House of Commons and the Senate on legislation and constitutional matters relating to Aboriginal peoples (for more information see Vol. 2, c 3, 359-363 and Sasha Boutilier, "Free, Prior and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples", (2017) 7:1 UWO J Leg Stud 1.

The most important aspect of the *Recognition and Governance Act*, according to RCAP, would be to set out the criteria for formal recognition of Aboriginal nations and provide a process to enable their formal recognition by Canada.[26] This is based on the principle that Aboriginal peoples have the right to organize themselves as they see fit as self-determining collectives.[27] To be recognized as a nation, RCAP suggested that the nation would have to develop a constitution including rules on citizenship, governing structures and procedures, guarantees of rights and freedoms and a mechanism for a constitutional amendment.[28] Once developed, the group could apply for recognition under the *ANGRA* and its application would be reviewed by an independent panel (operating under the proposed *Aboriginal Lands and Treaties Tribunal Act*) who would make a recommendation to the Governor in Council (the cabinet). Although the government would not be obliged to accept the panel's recommendation, it would have to have compelling reasons not to do so and would be required to state those reasons publicly. Recognition would be accomplished by an order in council published in the *Canada Gazette*.[29]

Once an Aboriginal nation became recognized under the *Recognition and Governance Act*, RCAP foresaw that it would then be able to exercise law-making capacity in core areas of jurisdiction on its existing territory and these core areas would be enumerated within the *Recognition and Governance Act*.[30] RCAP suggested that this list of core-subject matters could be devised by consensus of a gathering of federal, provincial, territorial and Aboriginal leaders, who would be meeting to develop a Canada-wide Framework Agreement containing principles to guide the new nation-to-nation relationship.[31] The *Recognition and Governance Act* would also include a commitment to provide recognized Aboriginal nations with financing commensurate with the scope of the jurisdiction in core areas that they propose to exercis and to help them prepare for renewed treaty negotiations.[32] In addition to exercising and implementing the core jurisdiction identified in the *Recognition and Governance Act*, a recognized Aboriginal nation could also proceed to enter into negotiations with federal and provincial governments for a new or renewed treaty relationship.[33]

RCAP stressed that the *Recognition and Governance Act* would not be creating new rights or delegating federal or provincial/territorial powers to Aboriginal nations, stressing that the inherent right of self-government is an inherent right with its source outside the Canadian constitution,

[26] RCAP *ibid* at 299.
[27] RCAP endorsed broad and flexible guidelines for recognition, suggesting that modern political affiliations, as well as common heritage and territory could influence the make up of the collective. However, RCAP emphasized that it would be important for the collective to a sizeable body as governance exercised by small, local communities would be unworkable. See RCAP *ibid*, Vol. 3, c 2 at 158 and 169-175 and c 3 at 297-298.
[28] *Ibid* at c 3 at 301-303.
[29] *Ibid* at 303-304.
[30] *Ibid* at 298.
[31] Indeed, RCAP suggested that this would be the first order of business. Other agenda items for the Canada-wide Framework Agreement gathering would include providing a policy framework for fiscal arrangements to support the exercise of such jurisdictions and establishing principles to govern negotiations on lands and resources and on agreements for interim relief with respect to land subject to claims, to take effect before the negotiation of treaties. See *ibid* at 296 and 305-309.
[32] *Ibid* at 298.
[33] The principles and laws guiding this longer-term process would be identified in principles arrived at the Canada-wide Framework Agreement, and refined and elaborated within legislation, namely the *Aboriginal Treaty Implementation Act* and the *Aboriginal Lands and Treaties Tribunal Act*. See RCAP, Vol. 3, c 2 and c 4.

though it is recognized and affirmed by it.[34] Rather, the *Recognition and Governance Act* would simply be making this inherent jurisdiction explicit and offering guidance to Aboriginal nations and Canadian governments on how to facilitate the re-emergence of self-governing nations.[35] Finally, RCAP intended that in re-assuming jurisdiction under the *Recognition and Governance Act*, that each Aboriginal nation could proceed at their own pace, opting out of the provisions of the *Indian Act* gradually, if they so wished.[36]

RCAP's final recommendations to facilitate the transition to a nation-to-nation relationship was for federal support for building Aboriginal nations' governance capacity.[37] RCAP identified that throughout the transition process, Aboriginal people would need capacities and strategies that allow them to (1) rebuild Aboriginal nations and reclaim nationhood; (2) set up Aboriginal governments; (3) negotiate new relationships and intergovernmental arrangements with the other two orders of government; (4) exercise Aboriginal governmental powers over the longer term; and (5) support the building of all these capacities.[38] RCAP stressed that these strategies must be designed and directed by Aboriginal people, but with the full support of the Canadian governments, given the central role played by the Crown in attempting to dismantle and weaken Aboriginal nations through colonization.[39] To support Aboriginal nations in capacity building, RCAP recommended the creation of national Aboriginal Government Transition Centre to assist Aboriginal nations in developing government institutions and instruments, to design and develop training and skills programs, and to facilitate information sharing and exchange.[40] Additionally, capacity building would include partnering with other institutions, in particular, institutions of higher learning, who could also play a role in developing programs, projects, etc., to assist Aboriginal people throughout the transition to Aboriginal self-government.[41] In this regard, RCAP recommended that the government provide the centre with operational funding as well as financial resources to undertake research and design and implement programs to assist the transition to self-government, with a financial commitment for five years, renewable for a further five years.[42]

In conclusion, it is clear that RCAP's discussions and recommendations on the transition to self-governance and building a nation-to-nation relationship were extensive, detailed and the product of extensive study.

2. The current piecemeal approach to self-government

a) The Inherent Rights Policy

[34] *Ibid* at 298.
[35] *Ibid.* On this basis, RCAP recommended that the *Recognition and Governance Act* should stipulate that any law-making powers set out therein are "not to be construed as contingent, delegated or limited" unless agreed by an Aboriginal nation through negotiation with the other two orders of government. RCAP also recommended that the *Recognition and Governance Act* should include a non-derogation provision: see *ibid* at 299.
[36] *Ibid* at 303-304.
[37] *Ibid* at 296 and 310-336, especially recommendations 29-36.
[38] *Ibid* at 311.
[39] *Ibid* at 312.
[40] *Ibid* at 314.
[41] *Ibid* at 314-315.
[42] *Ibid* at 315, recommendation 31.

As noted in the introduction, following the release of RCAP's Report, there was little uptake by Canada of RCAP's specific proposal on self-government. There has, however, been some movement on self-government, although RCAP had no influence. Rather, following the failed referendum on the Charlottetown Accord in 1992 that would have led to an amendment to s 35 recognizing Aboriginal peoples' "inherent right of self-government within Canada,"[43] the Liberal party announced that it would recognize "the inherent right to Aboriginal self-government" in the course of its 1993 election campaign.[44] In 1995, the governing Liberals gave effect to this promise by releasing a policy guide entitled "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (the "Inherent Rights Policy" or "IRP").[45] The policy recognizes Aboriginal peoples' inherent right to self-government as an existing Aboriginal right within the meaning of section 35 of the *Constitution Act, 1982*, stating broadly that it encompasses "matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources."[46] The policy further enumerates subject-matters of jurisdiction falling into three separate categories:

(1) "[M]atters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution."
(2) "[A]reas that may go beyond matters that are integral to Aboriginal culture or that are strictly internal to an Aboriginal group [but over which the federal government] is prepared to negotiate some measure of Aboriginal jurisdiction or authority."
(3) "Matters where there are no compelling reasons for Aboriginal governments or institutions to exercise law-making authority."[47]

The first category identified in the policy appears to be aimed at similar kinds subjects as those targeted by RCAP's "core" subjects: matters that are internal to the Aboriginal nation and support their survival as culturally distinct peoples. The subject matters identified under this category are:

(1) establishment of governing structures, internal constitutions, elections, leadership selection processes;
(2) membership;
(3) marriage;
(4) adoption and child welfare;
(5) Aboriginal language, culture and religion;
(6) education;

[43] This amendment would have specified Aboriginal peoples' jurisdiction "to safeguard and develop their languages, cultures, economies, identities, institutions and traditions," and "to develop, maintain and strengthen their relationship with their lands, waters and environment." See Hogg, P. and Turpel, M.E., "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 Can Bar Rev 187 at 189-192.
[44] See Brian A. Crane, Robert Mainville and Martin W. Mason, *First Nations Governance Law*, 2nd ed (Markham: LexisNexis Canada Inc, 2008) at 280.
[45] Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (August 1995) ("Inherent Rights Policy" or "IRP"), online: <http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>
[46] *Ibid.*
[47] *Ibid.*

(7) health;
(8) social services;
(9) administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws;
(10) policing;
(11) property rights, including succession and estates;
(12) land management, including: zoning; service fees; land tenure and access; and expropriation of Aboriginal land by Aboriginal governments for their own public purposes;
(13) natural resources management;
(14) agriculture;
(15) hunting, fishing and trapping on Aboriginal lands;
(16) taxation in respect of direct taxes and property taxes of members;
(17) transfer and management of monies and group assets;
(18) management of public works and infrastructure;
(19) housing;
(20) local transportation; and
(21) licensing, regulation and operation of businesses located on Aboriginal lands.

The second category under the policy bears resemblance to what RCAP described as "periphery" areas, not strictly internal to the Aboriginal nation but over which it might have some jurisdictional interests. However, unlike RCAP, which proposed a more contextual approach to what constitutes a periphery area, the policy identifies nine specific matters under this category.[48]

Finally, the third category lists subjects Canada deems off-limits, such as Canadian sovereignty, defence, external relations or other national interests.[49] RCAP did not have a similar category, but there is a conceptual link between this and RCAP's recognition that Indigenous sovereignty exists within the framework of Canada and the Canadian constitution, meaning that Aboriginal self-government would be constrained to the extent that Indigenous peoples could not claim some of the powers that independent states are commonly thought to possess.[50]

Although it recognizes Aboriginal peoples' inherent jurisdiction over several areas, the IRP does not contemplate Indigenous groups' unilateral exercise of these powers, even in relation to 'core' areas of jurisdiction.[51] Instead, it requires that the exercise of these powers must be negotiated and agreed to with both the federal government and provincial/territorial governments, following a

[48] *Ibid.* These are: (1) divorce; (2) labour/training; (3) administration of justice issues, including matters related to the administration and enforcement of laws of other jurisdictions which might include certain criminal laws; (4) penitentiaries and parole; (5) environmental protection, assessment and pollution prevention; (6) fisheries co-management; (7) migratory birds co-management; (8) gaming; and (9) emergency preparedness.
[49] *Ibid.* The main areas listed under 'national interests' are (1) management and regulation of the national economy, (2) maintenance of national law and order and substantive criminal law, (3) protection of the health and safety of all Canadians and (4) federal undertakings and other powers.
[50] See RCAP *supra* note 2, Vol. 2, c 3 at 202.
[51] This stipulation deviates from the amendment proposed in the Charlottetown Accord, which could have allowed Aboriginal groups to unilaterally exercise self-government after five years. See Hogg, P.W., *Constitutional Law of Canada* (5th ed.), 2014 Student Edition, c 28, at 26-27.

process designed by Canada,[52] with Aboriginal groups initiating the negotiations.[53] The policy, although national in its reach, is therefore piecemeal in its approach since it contemplates recognition of self-government one Aboriginal group at a time.

Canada's response to the RCAP, called *Gathering Strength*, did not address any of the crucial or fundamental recommendations from the Report.[54] The IRP was amended after RCAP but only to reflect the Report's recommendations on the size and compositions of nations, but not its more expansive recommendations.[55] The IRP has not since been amended in the last two decades.

Pursuant to the IRP, the negotiation of self-government agreements has generally taken three forms: (1) negotiated in concert with a comprehensive land claim agreement; (2) negotiated as stand-alone agreements that are comprehensive and cover a range of subject areas; or (3) negotiated as stand-alone self-government agreements on one subject area, such as education or child welfare, known as a 'sectoral' agreement.[56] The process of negotiating these claims has been extremely slow. To date, only 22 self-government agreements have been signed: 18 as part of comprehensive land claim agreement (four signed in 1995, three in 1998, one in 2000, one in 2002, one in 2004, four in 2005, one in 2009, one in 2011 and one in 2016[57]); three as stand-alone self-government agreements (signed in 1986, 2004 and 2014, respectively[58]); and one sectoral agreement (signed in 1999[59]).[60] These agreements involve 36 Indigenous communities;[61] however, there are over 600 land-based Indigenous communities across Canada representing between 50 to 70 Nations,[62] and several more without a recognized land base in both rural and

[52] The process for completing self government agreements follow these six steps: (1) Submission of Proposal; (2) Acceptance; (3) Framework Agreement; (4) Agreement-in-Principle (AIP); (5) Final Agreement and Ratification; and (6) Implementation. For more information, see INAC website, "Self-Government" online: < https://www.aadnc-aandc.gc.ca/eng/1100100032275/1100100032276>

[53] IRP *supra* note 45.

[54] Jennifer Dalton, "Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claims Agreements?" 22 WRLSI 29 at 65.

[55] Russel Lawrence Barsh, "Political Recognition – An Assessment of American Practice" in *Who Are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction*, ed. LAH Chartrand (Saskatoon: Purich Publishing Ltd., 2002).

[56] Indian and Northern Affairs Canada, Evaluation, Performance Measurement, and Review Branch Audit and Evaluation Sector, "Final Report Evaluation of the Federal Government's Implementation of Self- Government and Self-Government Agreements - Project Number: 07065" (February 2011) (2011 Evaluation Report") at 41.

[57] *Ibid*, at p 42, and see INAC, "General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations" online: < https://www.aadncaandc.gc.ca/eng/1373385502190/1373385561540>.

[58] These include the Sechelt Indian Band Self-Government Agreement (BC, 1986), Westbank First Nation Self-Government Agreement (BC 2004), and the Sioux Valley Dakota Nation (MB, 2014).

[59] This is the Mi'kmaq Education Agreement (NS, 1999).

[60] See INAC website, "Fact Sheet: Aboriginal Self-Government" online: <http://www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294> and 2011 Evaluation, *supra* note 56 at 42.

[61] "Fact Sheet: Aboriginal Self-Government" *ibid.*

[62] See INAC, "First Nations People in Canada" online: <https://www.aadnc-aandc.gc.ca/eng/1303134042666/1303134337338>, indicating there are 617 First Nation (*Indian Act* "Band") communities; Métis National Council, "Who are the Métis" online: < http://www.metisnation.ca/index.php/who-are-the-metis>, indicating a number of Métis communities, including eight Métis Settlements in northern Alberta comprising close to 9,000 residents on 1.25 million acres of land.

urban areas.[63] Comparing the number of agreements signed to date with the number of communities who may wish to be self-governing (alone or in groups/nations), there is obviously a long way to go in achieving self-government through the IRP.

There are currently 90 ongoing negotiation tables involving self-government claims.[64] A 2011 evaluation report on the IRP found that these agreements are taking longer than expected when the policy was first introduced.[65] On average, self-government negotiated in concert with a comprehensive land claim takes 16 years to negotiate and a stand-alone agreement takes 10 years.[66] However, a fact-sheet released by the Department of Indian Affairs and Northern Development found that as of March 2014, 40% of current negotiations have been ongoing for 16-20 years; 21% have been ongoing for 21-25 years; and 8% have been ongoing for 26 years or more.[67] The length of these negotiations exacerbate the piecemeal nature of this approach, with only one or two Aboriginal groups obtaining self-government every few years. The speed of negotiations can be influenced by many factors, but the political will of the governments in power is a significant one. Under the Harper government, some First Nations perceived progress under these tables to have virtually slowed to a halt.[68]

In addition to the length of time it takes to conclude self-government negotiations, there are other factors that render the IRP a piecemeal—and in some cases, illusory—approach to self-government. First, although the IRP states that it applies to Métis, as well as urban and off-reserve groups, Canada often cites these groups' "lack of unity" or a land base as a basis for rejecting their requests to negotiate.[69] As well, in practice, there are very few of the First Nations with Numbered Treaties (these are primarily First Nations located in the Prairie provinces) who are or have been involved in self-government negotiations. Only one stand-alone self-government agreement was signed in 2014 with a First Nation from Manitoba,[70] and with respect to current negotiations, there is only one table representing one First Nation community in Alberta (out of 45 communities[71]), two tables representing nine communities in Saskatchewan (out of 70 communities[72]), and one table representing one community from Manitoba (out of 63 communities[73]).[74] One of the primary reasons for this relates to the fact that Canada's Comprehensive Claim Policy does not permit

[63] See Métis National Council, "Who are the Métis" online, *ibid*; there are also unrecognized First Nation, such as Ardoch Algonquin First Nation, and 'landless bands' such as the Micmac Nation of Gespeg and the Qalipu First Nation.
[64] INAC, "Comprehensive Land Claim and Self-Government Negotiation Tables" online: < http://www.aadnc-aandc.gc.ca/eng/1346782327802/1346782485058>.
[65] 2011 Evaluation Report, *supra* note 56 at p 59.
[66] *Ibid.*
[67] INAC, "Fact Sheet - A Results-Based Approach to Comprehensive Land Claim and Self-government Negotiations" online: < https://www.aadnc-aandc.gc.ca/eng/1406824128903/1406824211834>.
[68] See Globe and Mail, "Yukon first nation worried self-government will collapse without funding", Sept. 19, 2012; APTN, "PM Harper failing to fulfill Mulroney's Oka promise on modern treaties", April 8, 2015.
[69] 2011 Evaluation Report, p 35-36.
[70] Sioux Valley Dakota Nation (MB) (2014) – for more information see INAC, "General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations", online: < https://www.aadnc-aandc.gc.ca/eng/1373385502190/1373385561540>.
[71] INAC, "Alberta Region", online: < https://www.aadnc-aandc.gc.ca/eng/1100100020655/1100100020659>.
[72] INAC, "Saskatchewan Region", online: < https://www.aadnc-aandc.gc.ca/eng/1100100020587/1100100020591>.
[73] INAC, "First Nation Community Listings: Manitoba Region", online: < https://www.aadnc-aandc.gc.ca/eng/1100100020539/1100100020544>.
[74] INAC, "Comprehensive Land Claim and Self-Government Negotiation Tables" *supra* note 64.

renegotiation or renewal of the Numbered Treaties (which has been criticized as unfair and detrimental to the well-being of First Nations in Prairies[75]). Thus, the Numbered Treaty First Nations can only pursue stand-alone or sectoral self-government arrangements, and there is no recognition within those negotiations of their sovereignty and jurisdiction arising from their pre-existing treaties, a matter of principle for many First Nations with such treaties.[76]

Financial ability to undertake negotiations can also be an issue. Canada provides contribution funding for Aboriginal groups to engage in negotiations, but often those groups involved in comprehensive claim negotiations find they must also borrow against their final settlement funds anticipated at the conclusion of such agreements in order to afford negotiation costs.[77] Such loans can be in the range of tens of millions of dollars and deplete over half of a group's final settlement payment.[78] In addition, agreements under the IRP will usually not involve the allocation of new financial resources forthe implementation of self-governmen but will be limited to the equivalent transfers for existing programs and services already provided or available within the federal government.[79] Finally, some groups are reticent to enter the comprehensive claim process as it currently requires the group to agree to a 'certainty clause' prohibiting them from asserting any further inherent Aboriginal and Treaty rights in the future, which some have likened to an effective extinguishment clause.[80]

As the above paragraph suggests, both comprehensive claim and stand-alone self-government negotiations can be prohibitively expensive. A 2011 Evaluation Report found that the amounts paid out by Canada in contributions towards negotiation and loans totalled over $1 billion.[81] This would be in addition to Canada's own costs for negotiation. For example, the 2006 Auditor

[75] See N. Kleer and J. Rae, "Divided We Fall: Tsilhqot'in and the Historic Treaties" (July 11, 2014), online: <http://oktlaw.com/divided-fall-tsilhqotin-historic-treaties/>.

[76] 2011 Evaluation Report *supra* note 56 at 32-33.

[77] *Ibid* at 59. Such loans are not available to groups involved solely in stand-alone self-government agreements and this may also present a barrier.

[78] Indeed, some First Nations have had to repay upwards of 60% of their final settlement funds to repay their negotiation loans, and this too can be incentive to engage in negotiations. For example, the Sliammon First Nation had to repay $18 million from their $30 million settlement. The Carcross-Tagish had to repay $14 million of their $23.74 million settlement. See Vancouver Media Coop, "Sliammon Treaty Ratified Amid Total Voting Chaos" (July 11, 2012); Whitehorse Star, "CTFN leaders still want claims process" (April 13, 2004).

[79] *First Nations Governance Law, supra* note 44 at 67 and 285.

[80] Extinguishment clauses in treaties are clauses requiring the complete surrender by the Indigenous group of Aboriginal title and Aboriginal rights that are not already specified within the treaty. These appeared in the historic Numbered Treaties and Canada also sought to these bring into the modern comprehensive claim process starting in 1973. Since most self-government negotiations occur within the context of modern treaty / comprehensive claim negotiations, such clauses have an impact on self-government negotiations as well. Canada defends these clause on the basis of the need to achieve certainty and clarity; however, such clauses are very contentions to Indigenous peoples, since such extinguishment represents a fundamental loss of identity. Many Indigenous groups find the policy offensive and it has, at times, resulted in failed negotiations. Although Canada has softened the language in its extinguishment clauses over time (calling them 'certainty clauses'), in response to recommendations from several tasks force, commissions and academics to end blanket extinguishment, the intent of these clauses—to foreclose Indigenous groups from asserting any future rights—remains the same. From the Indigenous perspective, treaties should affirm Aboriginal title and rights as part of an ongoing relationship with Canada and not been dealt with as a one-time transaction. For more on this see, Dalton *supra* note 54 at 50-53.

[81] 2011 Evaluation Report *supra* note 56 at 59. The slow progress and high costs of negotiations were also the subject of an Auditor General of Canada's report: see 2006 November Report of the Auditor General of Canada, "Chapter 7—Federal Participation in the British Columbia Treaty Process—Indian and Northern Affairs Canada".

General Report examining the British Columbia Treaty Process found that from 1993 to 2006 the federal government has spent about $426 million on B.C. treaty negotiations, and B.C. First Nations had borrowed close to $300 million for the same purpose.[82]

In 2012, the Harper government cited the slow pace and high costs of negotiations as the impetus for Canada taking a new "results-based" approach to negotiations, whereby the government would focus its resources on only the most productive negotiation tables so that agreement could be reached sooner.[83] As part of this approach, Canada would promote "effective use of other tools to address Aboriginal rights and promote economic development and self-sufficiency" to the Aboriginal groups involved in less productive negotiations. Although this was an innovation of the Harper government, the Department's website continues to identify this as Canada's approach to self-government now under the Trudeau government.[84] This is a move that appears to be going backwards in terms of recognition of inherent rights and transforming the Aboriginal-Crown relationship, not forward.

b) Recent developments in law recognizing increased Indigenous control

Perhaps to counteract the slowness of self-government negotiations under the IRP, there have been several legal developments in the last two decades that have resulted in greater avenues to permit First Nations to exercise more control over their affairs and the possibility of greater self-sufficiency. This includes developments in the following areas:

Representation / organization

There are court decisions recognizing that Indigenous groups can organize themselves as they see fit to pursue collective rights and are not bound to simply to take actions as isolated or separate *Indian Act* "bands" or local communities.[85]

Establishment of governing structures, internal constitutions, elections, leadership selection processes

The definition of "*council of the band*" at s. 2(1) of the *Indian Act* as "chosen according to the custom of the band" means that bands can choose their leadership through their own processes instead of that set out at ss. 74-80 of the *Act.*[86] There are several cases on s. 2(1) recognizing a band's authority to create its own oral or written constitution and election/leadership selection laws so long as it receives broad consensus from members.[87]

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[82] Auditor General Report *ibid*.
[83] Aboriginal Affairs and Northern Development Canada, Review Report - Review of the Negotiation of Comprehensive Land Claims and Self-Government Agreements (September 2014). See also INAC, "Fact Sheet - A Results-Based Approach to Comprehensive Land Claim and Self-government Negotiations" *supra* note 67.
[84] *Ibid.*
[85] See *The Labrador Metis Nation v Her Majesty in Right of Newfoundland and Labrador*, 2006 NLTD 119, aff'd 2007 NLCA 75; *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 at para. 30; *Martin v Province of New Brunswick and Chaleur Terminals Inc*, 2016 NBQB 138 at paras 48-50.
[86] *Indian Act*, *supra* note 1, s. 2(1), 74-79
[87] See *Jock v Canada (T.D.)*, [1991] 2 FC 355; *Bigstone v Big Eagle*, [1993] 1 CNLR 25; *McLeod Lake Indian Band v Chingee*, 1998 CanLII 8267 (FC); and *Pahtayken v Oakes*, 2009 FC 134, aff'd 2010 FCA 169.

Membership and residency

Section 10 of the *Indian Act* permits bands to assume control over its own membership rules and pass membership laws.[88] Relatedly, ss. 81(1)(p.1) and (p.2) of the *Act* give bands the power to pass by-laws regarding residency on reserve as well as on the rights of spouses and children of members.[89]

Social services, child welfare, health and other essential services

Changes to the *Indian Act* s. 81 bylaw powers in 2014 removed the disallowance power of the Minister of Indigenous Affairs, providing more freedom to bands over their bylaws. INAC's website now states, "[a]s a result [of the repeal], First Nations will have autonomy over the enactment and coming into force of by-laws and the day-to-day governance of their communities."[90] Subsections 81(1) (a), (c) and (d), recognizing bands' jurisdiction over health, law and order, and prevention of disorderly conduct, arguably give First Nations the power to legislate over a number of services that promote community health and well-being.[91] One band has used this power to pass a child welfare bylaw that has been in existence and cited in the courts since the 1980s.[92]

Adoption

The definition of "adoption" at s. 2(1) of the *Indian Act* recognizes that children can be adopted in accordance with "Indian custom" and this jurisdiction is supported by case law.[93] This means that Aboriginal customary adoption under an Indigenous nation's laws can be recognized by the courts in the same way as adoptions under provincial legislation.

Matrimonial Property Law

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* recognizes the power of First Nations to pass their own laws regarding the occupation and division of a family home on relationship breakdown or death of a spouse.[94]

Land management, public works and infrastructure

The *First Nations Land Management Act* allows bands to pass laws on land development, conservation, protection, management, use and possession of First Nation land, environmental

[88] *Indian Act*, *supra* note 1, c I-5, s 10.
[89] *Ibid*, ss. 81(1)(p.1) and (p.2).
[90] INAC, "An Act to amend the Indian Act (publication of by-laws) and to provide for its replacement (C-428)," online: < https://www.aadnc-aandc.gc.ca/eng/1422387592930/1422387686680>.
[91] See Naiomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211.
[92] *Ibid* at 218-222.
[93] See *Adoption – 1212*, 2012 QCCQ 2873 at para. 406 and onward; *Estate of Samuel Corrigan*, 2013 MBQB 77.
[94] *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013 c 20, ss. 7-11.

assessment, matrimonial property, laws to manage natural resources of reserve lands and other land-related issues.[95]

Also, the bylaw powers under the *Indian Act* authorize bands to pass laws over the regulation of traffic, construction and maintenance of local works, zoning, surveying and allotment of land, buildings and public wells.[96]

Economic life, including commerce, agriculture, grazing, hunting, trapping, fishing, forestry, etc.

In addition to law-making power over lands recognized under the *First Nations Land Management Act*, the *Indian Act* s. 81 bylaw powers also recognize bylaw powers of regulating the keeping of animals, control and destruction of noxious weeds, poultry and bee-keeping, the conduct of non-member salespersons on reserve, and the preservation, protection and management of fur-bearing animals, fish and other game.[97] The bylaw powers under s. 83(a.1) recognize the power to pass laws for licensing of businesses, callings, trades and occupations.[98]

There have also been court decisions recognizing that some Aboriginal and Treaty rights include an economic dimension of allowing for a moderate livelihood for the sale of the products of hunting and fishing.[99] There is also law recognizing an included right to manage Aboriginal and Treaty rights of hunting, fishing and gathering.[100] The Supreme Court has also noted that Aboriginal title has "an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put."[101] This means Aboriginal people have a right to manage their hunting, fishing and gathering rights, including those with an economic dimension.

Management of monies and collective assets

The *First Nations Land Management Act* gives power to First Nations to take control back from Canada over Indian monies transferred to bands from Canada,[102] as well as the power to pass laws regarding the financial administration of the First Nation. As well, the *First Nations Oil and Gas*

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[95] *First Nations Land Management Act*, SC 1999, c 24, ss. 6, 18 and 20.
[96] *Indian Act*, *supra* note 1 at ss. 81(1)(b)(f)(g)(i)(h) and (l).
[97] *Ibid* at s 81(1)(e), (j), (k), (n) and (o).
[98] *Indian Act*, *ibid* at s. 83 bylaw (a.1).
[99] See *R. v Marshall*, [1999] 3 SCR 456 and *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56.
[100] This arises from the courts' recognition that Aboriginal rights are communal rights (see *R. v Sparrow*, [1990] 1 SCR 1075 at para 35; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 115; *R. v Bernard*, 2003 NBCA 55 at paras 512-514), implying a collective / governmental right to make decisions regarding those rights: see *R. v Sappier; R. v Gray*, 2006 SCC 54; see also Kent McNeil, "the Jurisdiction of Inherent Right Aboriginal Governments", Research Paper for the National Center for First Nations Governance, Oct. 11, 2007, at 16-17; Constance Macintosh, "Developments in Aboriginal Law: The 2006-2007 Term" (2007) 28 SCLR (2d) 1. As well, in earlier Supreme Court decisions, the Court signaled that hunting and fishing rights include "the particular manner in which that right is exercised" (*Sparrow ibid* at para 69). In *R. v Nikal*, [1996] 1 SCR 1013, the fishing right in question was found to include various 'regulatory rights' (see para 88-89). Included or 'incidental rights' were also found in *R. v Côté*, [1996] 3 SCR 139 at para 56, *Simon v The Queen*, [1985] 2 SCR 387 at para 28 and in *R v Sundown*, [1999] 1 SCR 393 at paras 27-30.
[101] *Delgamuukw ibid* at para 169.
[102] *First Nations Land Management Act*, *supra* note 95 at ss. 6, 9, 18-19.

and Moneys Management Act, allows First Nations to opt out of money management provisions of the *Indian Act* to control their own royalties and revenues from oil and gas.[103]

Taxation

Section 83(1)(a) of the *Indian Act* recognizes the power of Bands to pass bylaws over taxing of interests in the reserve. Also, the *First Nations Fiscal Management Act* recognizes the power to impose real property taxes.[104] The *First Nations Goods and Services Tax Act* allows First Nations to charge HST/GST on goods sold on reserve and receive revenue therefrom.[105]

Administration and enforcement of laws

The *First Nations Land Management Act* provides First Nations with the powers to create enforcement and dispute resolutions regarding their land laws.[106] As well, s. 81(1) bylaw powers in the *Indian Act* also recognize powers over the observance of law and order, the prevention of disorderly conduct and nuisances, removal and punishment of persons trespassing, and the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days.[107]

Despite the seemingly wide reach of these developments, they nonetheless represent a piecemeal approach. First, it is to be noted that the legislation identified above only applies to First Nations (Indian bands as recognized under the *Indian Act*) and other Indigenous groups, such as off-reserve or non-status Indians, Métis or Inuit groups, do not benefit from most of these developments. It also appears that most First Nations are not taking advantage of these developments. Available data on the extent of engagement with these laws is as follows. There are 123 First Nations (out of approximately 600 First Nations - 20%) that are pursuing the development of land laws under the *First Nations Land Management Act* with 51 (9%) who have actually passed their own laws.[108] There are 146 First Nation (24%) that have taxation laws.[109] There are only 11 First Nations (2%) that have passed matrimonial property laws under the *Family Homes on Reserves and Matrimonial Interests or Rights Act* to date.[110] There are 229 First Nations (38%) that have passed their own membership laws,[111] and there are 334 First Nations (56%) that have passed their own custom election / leadership selection laws.[112] Except for custom election laws, engagement with these various legal tools is modest.

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[103] *First Nations Oil and Gas and Moneys Management Act,* SC 2005, c 48.
[104] *First Nations Fiscal Management Act*, SC 2005, c 9.
[105] *First Nations Goods and Services Tax Act*, SC 2003, c 15.
[106] *First Nations Land Management Act*, *supra* note 95 at ss. 6, 20, 22-24.
[107] *Indian Act*, *supra* note 84 at s. 81(1)(c), (d), (p) and (r).
[108] Schedule to *First Nations Land Management Act*, *supra* note 95.
[109] First Nations Tax Commission, "First Nations with Property Tax Jurisdiction" online: < http://fntc.ca/property-tax-fns/>.
[110] INAC, "List of First Nations with Matrimonial Real Property Laws Under the Act" online: <https://www.aadnc-aandc.gc.ca/eng/1408981855429/1408981949311>. There would also be some First Nations under the *First Nations Land Management Act* regime who may have also developed matrimonial real property codes.
[111] INAC, "Transfer of Control of Membership" online: < https://www.aadnc-aandc.gc.ca/eng/1100100032466/1100100032467>
[112] Senate of Canada, "FIRST NATIONS ELECTIONS: THE CHOICE IS INHERENTLY THEIRS Report of the Standing Senate Committee on Aboriginal Peoples" (May 2010), p 6.

One possible explanation for this lack of engagement is a lack of awareness of these different cases and statutes. There is still not significant exposure within legal education and continuing legal education for lawyers and judges on the different laws that apply to Indigenous peoples.[113] Even lawyers advising First Nations might not have full knowledge of all of these developments. Certainly, it is my experience (as someone who often teaches and presents publicly on these issues to both Indigenous and non-Indigenous audiences) that the general public has little awareness of these laws. Even Indigenous peoples have limited awareness of these legal developments and how they might access them. As a result, it may be the case that First Nations are not seizing on the opportunities due to lack of awareness. Having rights that no one is aware of is akin to not having any.

There are also significant restrictions on the exercise of Indigenous control under some of these laws. For example, the ability of bands to assume control over their own membership does not extend to defining who is an "Indian" under the *Indian Act*, nor does it extend to 'citizenship' within a broader Indigenous nation. As a matter of principle, the fact that Canada is only providing a partial power here is a disincentive to engagement. But there are also significant practical disincentives here as well since a band who adopts membership rules that are more generous than the *Indian Act* rules (which continues to be the subject of several discrimination and *Charter* challenges[114]) does not receive any additional funding from Canada to service those members.[115]

Next, many of the laws impose significant oversight over the exercise of control by First Nations. The jurisdiction over taxation under s. 83 of the *Indian Act* and the *First Nations Fiscal Management Act* is overseen, and First Nations laws must be approved by, the First Nations Tax Commission. Also, the *First Nations Goods and Services Tax Act* places restrictions on how GST/HST must be applied by First Nation.[116] Some of the laws noted above impose requirements of having a percentage of the members participate in referendums to approve the First Nations' law, such as having over 50% of voters participate and over a 50% majority approve the proposal

[113] The lack of knowledge of lawyers on the history and legacy of residential schools, Treaties and Aboriginal rights, Indigenous law, Aboriginal-Crown relations and the *United Nations Declaration on the Rights of Indigenous Peoples* led the TRC to issue two Calls to Action calling on the Federation of Law Societies and law schools in Canada to ensure lawyers and law students receive appropriate training in these areas: see Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future - Summary of the Final Report of Truth and Reconciliation Commission of Canada* (2015) [TRC Final Report] at 164-168 and Calls to Action /27 and 28.

[114] See for example, *Descheneaux c Canada (Procureur Général)*, 2015 QCCS 3555, *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, *Renaud, Sutton and Morigeau v Aboriginal Affairs and Northern Development Canada*, 2013 CHRT 30; *Matson, Matson, and Schneider (née Matson) v Indian and Northern Affairs Canada*, 2011 CHRT 14; *Nacey, Rainville, Dennis v Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 20; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2016 FCA 200 (on appeal to the Supreme Court of Canada).

[115] Since the 1980s-1990s, First Nations in Canada have been delivering essential services to peoples residing on reserve pursuant to funding agreements with Canada. Canada's funding formulas only count registered Indians in determining program budgets and does not consider whether a band recognizes additional members or whether the Band also services non-Indigenous peoples living on reserve (which First Nations have been found to have a human rights duty to service: *Shubenacadie Indian Band v Canada (Human Rights Commission)*, 2000 CanLII 15308). For more on this, see: Maria Morellato, "Memorandum on Indian Status and Band Membership" (December 15, 2006) at p 7, prepared for the National Center for First Nations Governance, online:<http://fngovernance.org/resources_docs/MemoIndianStatusBandMembershipTitle.pdf>.

[116] It must be applied to First Nations as well as non-First Nation people.

to develop codes under the *First Nations Land Management Act*,[117] or a majority of voter turnout of over 25% in the case of passing laws under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.[118] Such voter turn-out requirements can present a significant barrier to passing a law, especially to communities with large off-reserve populations. While these restrictions are likely intended to impose protections and oversight, one might question whether they are overly paternalistic in 2017, arbitrary (why 50% in one case and 25% in another), and impose double-standards (we do not impose referendums to ratify laws passed by other governments).

c) The National Center for First Nations Governance

As noted in Section 1, RCAP put significant emphasis on the need for capacity building and support for Aboriginal groups in order to achieve the vision of a renewed nation-to-nation relationship. However, similar to its reaction to other RCAP proposals on governance, the Chrétien government was not receptive.

However, in 2005 the federal Liberal government under Paul Martin committed to funding the National Centre for First Nations Governance, a First Nations-led initiative to assist First Nations in developing and implementing self-government.[119] The Centre was incorporated as a charitable non-profit organization with six offices across Canada, operating with 34 staff. Its mandate was to support First Nations as they seek to implement their inherent rights of self-government and to assist First Nations in the further development of their day-to-day government operations.[120]

In 2006, the Centre commissioned leading academics and lawyers renowned for their work in Aboriginal law and governance to prepare a body of research that could support the governance work required by First Nations. The Centre used this research, along with extensive feedback from First Nations citizens and leadership, to build the foundation for a series of nation rebuilding workshops for delivery in communities. The Centre delivered well over 200 workshops to citizens and leaders, engaging over 300 First Nations in its six years of operation.[121]

At the end of April 2012, the federal Conservative government of Stephen Harper notified the Centre that funding would not be available in 2013. The Centre let go of its staff and closed its doors. However, with some former staff and volunteers, and a modest name change to the "Centre for First Nations Governance," the work of the Centre has continued, though in a far more limited manner as a self-funded entity.[122] The result is to diminish the important work of the Centre in supporting capacity building and research First Nations governance and further slow movement towards self-governance.

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[117] *First Nations Land Management Act*, *supra* note 95 at s. 12.
[118] *Family Homes on Reserves and Matrimonial Interests or Rights A*ct, *supra* note 94 at s. 9(2).
[119] *First Nations Governance Law*, *supra* note 44 at 285; Website of Center for First Nations Governance, "Where we have been" online: < http://www.fngovernance.org/about/where_we_have_been>
[120] Aboriginal Financial Officers Association, Journal of Aboriginal Management (date and issue unknown) online: < https://www.afoa.ca/afoadocs/L3/JAM_Preview/JAM_Issue02.pdf> at 1.
[121] Website of Center for First Nations Governance, *supra* note 119.
[122] *Ibid.*

Regarding capacity building in the Inherent Rights Policy, aside from limited funds provided for negotiation, noted above, the policy stipulates that no separate source of funding will be provided for implementation and transition costs.[123] INAC also provides some capacity building funds within its programming, but this is geared at First Nations operating within the status quo, and not specifically towards capacity building for becoming self-governing.[124] Thus, there are currently very few supports available for capacity building towards Indigenous governance.

3. Returning to RCAP's *Aboriginal Nationhood Recognition and Government Act* is long overdue

It should now be apparent that the approaches taken by Canada to self-government and fostering greater Indigenous control over their affairs are inadequate. Only a small minority of Indigenous peoples in Canada are benefiting from these approaches. If the status quo continues, it could well take another 50 to 100 years before all Indigenous peoples achieve self-government. Meanwhile, most Indigenous groups are exercising little to no meaningful control over their lives and, accordingly, their standard of living (already well below that of other Canadians[125]) is not improving.[126] There is an obvious link between the exercise of meaningful self-government and improvement in Indigenous peoples' living conditions. This is recognized in academic

[123] Inherent Rights Policy *supra* note 45.

[124] See Aboriginal Affairs and Northern Development Canada, Audit and Assurance Services Branch, "Internal Audit Report - Follow-up Audit of Capacity Development - Project #: 13-39" (September 2013) online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/au_cpd_1393010362023_eng.pdf>

[125] While there is little statistical data available beyond 2011, numbers suggest little marked improvement in the socio-economic conditions of First Nations people living on reserve in Canada. While only making up 7% of the population, Aboriginal children make up 48% of children in foster and permanent care. Secondary school completion rate for First Nations students on reserve is only 49%. The number of First Nations adults that live in overcrowded homes is 23.4%. Nearly 32.2% of household water is unsafe to drink and 34% communities still get water by truck, from wells, or collected from rivers, lakes or water plants. 37.3% of First Nation households require major repairs. In 2006, the unemployment rate for First Nations people living on reserve was 25%, approximately three times the rate for non-Aboriginal-Canadians. Suicide rates among First Nation youth are five to seven times higher than other young non-Aboriginal Canadians. See Statistics Canada, Living arrangements of Aboriginal children aged 14 and under, April 13, 2016; Assembly of First Nations, Fact Sheet – Quality of Life of First Nations, July 2011; and Assembly of First Nations, Fact Sheet – Quality of Life of First Nations, July 2011.

[126] Community well-being index scores, tracked by the Department of Indigenous and Northern Affairs Canada, based on the 2011 National Household Survey, indicate that, while national averages have been increasing across all types of communities, the gap between First Nations and non-Aboriginal communities has been persistent over the past 30 years remaining 20 points apart. The gap between First Nations and Inuit communities is also noteworthy. Although, First Nations and Inuit were virtually at the same index score in 1981, Inuit have advanced several points beyond First Nations in the last 30 years. The gap may be attributable to the fact that, unlike First Nations, Inuit groups in Canada have concluded land claim agreements with Canada that include self-government provisions and these have led to improvements in Inuit well-being. See INAC Website, "Ministerial Transition Book: November 2015" online: <https://www.aadnc-aandc.gc.ca/eng/1450197908882/1450197959844>.

literature,[127] by the federal government itself,[128] and is evidenced by those few instances where self-government is occurring in this country.[129] Thus, the practical effect of Canada depriving Indigenous peoples of recognition of their right to self-government—hindering their well-being—is reason enough to call for urgent change.

But beyond this, there are several other reasons mandating a transformative change in the status quo. Most compelling among these is the fact Indigenous people have a free-standing right to self-govern.[130] Although the Supreme Court of Canada has been more than a little timid in its recognition of this right,[131] which in no small measure has enabled Canada's unacceptably slow piecemeal approaches,[132] the fact is there are persuasive arguments for self-government rights

[127] See John H Hylton, "The Case for Self-Government: A Social Policy Perspective" in John H Hylton, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2nd ed (Saskatoon: Purich Publishing Ltd, 1999) 78; John O'Neil, et al, "Community Healing and Aboriginal Self-Government" in John H Hylton, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2nd ed (Saskatoon: Purich Publishing Ltd, 1999) 130; Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children – Protection the Vulnerable Under International Law* (Burlington: Ashgate Publishing Company, 2012) at 11–12.

[128] See 2011 Evaluation Report, *supra* note 56 at 41: "Empirical research shows that taking control of selected powers of self-government and capable governance institutions are indispensable tools to successful long-term community development in Aboriginal communities."

[129] Regarding the one completed sectoral agreement—on education in Mi'kmaq communities in Nova Scotia—the Mi'kmaq of Nova Scotia have experienced high school graduation rates of First Nations students on reserve double (and in some cases triple) the graduation rates of First Nations students in schools on reserves in the rest of the country: See *Education Canada Magazine* "In Nova Scotia, a Mi'kmaq Model for First Nation Education" (date unknown) online: <http://www.cea-ace.ca/education-canada/article/nova-scotia-mi%E2%80%99kmaw-model-first-nation-education>. As well, Martin Papillon also raises statistics showing that Indigenous groups in modern land claim agreements fare better in terms of well-being in terms of income level, employment, housing and education than First Nations who remain in the current system of program delivery on reserve: "Aboriginal Quality of Life under a Modern Treaty" IRPP Choices, Vol. 14, no. 9, August 2008, ISSN 0711-0677, p 12. However, he also raises that inadequate funding of some land claims had resulted in those Indigenous groups only being in marginally better situations than other Indigenous groups at 14.

[130] This is a free-standing right because, as emphasized by RCAP in its report, this right is <u>not</u> contingent on the prior approval of the Crown in core areas of jurisdiction.

[131]In *R. v Pamajewon*, [1996] 2 SCR 821 at para 24, the Supreme Court held "without deciding that s 35(1) includes self-government claims" that if self-government was included in s 35, any such rights would have to be proven by the same test used to prove other Aboriginal rights, established in *R. v Van der Peet*, [1996] 2 SCR 507. The restriction placed on the right of Aboriginal self-government in *Pamajewon* has been roundly criticized as unduly limiting First Nations' ability to self-govern: see, for example, B.W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v Pamajewon*" (1997), 42 McGill LJ 1011; Vicaire, P.J., "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013), 58 McGill LJ 607 at 656-657; Dalton, J.E., "Exceptions, Excuses and Norms: Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006), 21 No. 1 Can JL & Soc'y 11 at 19-20. However, the Court has yet to revisit its ruling, although it has had at least two opportunities to do so. In 2008, the Court denied leave to hear a case which would have required it to squarely reconsider its decision in *Pamajewon: see Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) et al.*, 2008 CanLII 18945 (SCC). In 2011, it denied leave to hear a case that would have allowed it to directly address the right of self-government again: see *Chief Mountain et al. v Attorney General of Canada, et al.*, 2013 CanLII 53406 (SCC).

[132] See Senwung Luk, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" (2010) 41 Ottawa LR 101 at 114.

under both Canadian common law[133] and the Constitution.[134] Moreover, the right to self-determination is explicitly recognized under international law, including under instruments that Canada has ratified.[135] In addition, the right to self-determination is now widely acknowledged as international customary law, meaning it is binding on Canada irrespective of ratification through a convention or a treaty.[136]

In addition, the 2015 Report of the Truth and Reconciliation Commission ("TRC") has highlighted that policies and laws aimed at denying Indigenous groups effective control over essential areas of their daily lives—pursued by Canada since Confederation—are acts of assimilation and colonialism that can no longer continue.[137] The TRC has placed significant emphasis on the role of self-government in reconciliation. This can be seen in the TRC's cornerstone recommendation that the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") should be the framework for reconciliation.[138] This is because the right of self-determination is one of *the* central principles informing UNDRIP,[139] and the right to self-government is a key expression of the right to self-determination.[140] Notably, articles 3 and 4 of UNDRIP provide:

> Article 3 - Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Article 4 - Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[141]

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[133] *Conolly v Woolrich*, (1867) 17 RJRQ 76; *Worcester v State of Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Calder v Attorney-General of British Columbia*, [1973] SCR 313; *R. v Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All ER 118; and *R. v Sioui*, [1990] 1 SCR 1025.

[134] See *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 81, which held that "[A]boriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867." See Hogg, P. and Turpel, M.E., "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 Can Bar Rev 187 at 192. See also "The Generative Structure of Aboriginal Rights" in *From Recognition to Reconciliation* (Toronto: University of Toronto Press, Scholarly Publishing Division, 2016) at 100-134.

[135] Article 1 of the *International Covenant on Civil and Political Rights*, ratified by Canada on May 19, 1976, recognizes that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[136] See Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation" (2010) 26 Nat'l J Const L 121 at 200-208.

[137] See TRC Final Report, *supra* note 113 at Chapter 1.

[138] *Ibid* at 188-191 and Calls to Action 43-45.

[139] At *ibid* at 190, the TRC Final Report states: "Aboriginal peoples' right to self-determination must be integrated into Canada's constitutional and legal framework and civic institutions, in a manner consistent with the principles, norms, and standards of the Declaration."

[140] See RCAP *supra* note 2 at Vol. 2, c 2, 158-161.

[141] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., arts. 3-4.

As well, the TRC Report's support for Indigenous self-government can also be seen in its discussion for the need to revitalize Indigenous laws and the *Call to Action* for the federal government to fund the establishment of an Indigenous Law Institute.[142]

Justin Trudeau's Liberal majority government came to power promising to implement all 94 Calls to Action of the TRC,[143] including implementing UNDRIP.[144] In the mandate letters to his Cabinet Ministers, the Prime Minister instructed each of them that no relationship is more important to him and to Canada than the one with Indigenous Peoples - underscoring the need for a renewed nation-to-nation relationship.[145] As well, in his letter to the Minister of Indigenous and Northern Affairs, the Hon. Carolyn Bennett, the Prime Minister identified her top priority as supporting the work of reconciliation "to implement recommendations of the Truth and Reconciliation Commission, starting with the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*."[146] Both the Minister of Indigenous and Northern Affairs and the Minister of Justice, Jody Wilson-Raybould, have both since indicated that Canada will be implementing UNDRIP through a combination of policies, legislative changes, actions, and an interpretation of s. 35 of the *Constitution Act, 1982*, as containing a "full box of rights" supplied by UNDRIP.[147] Speeches by the Minister of Justice, in particular, have touched directly on the need to move from the form of imposed governance under the *Indian Act* to rebuilding Indigenous nations.[148] She has called the *Indian Act* "the antithesis of self-government as an expression of self-determination."[149] She has counselled caution, however, of moving too quickly towards self-government, stressing the need for a controlled and ordered

[142] TRC Final Report *supra* note 113 at 202-207.
[143] In a speech dated June 2, 2015, Justin Trudeau stated in part, "As the TRC's report and recommendations note, it is time to act, without delay, to advance the process of reconciliation, and rebuild Canada's relationship with First Nations, Inuit, and Métis Peoples based on rights, respect, cooperation, and the standards of the United Nations Declaration on the Rights of Indigenous Peoples. Meaningful reconciliation will only come when we live up to our past promises and ensure the equality of opportunity required to create a fair and prosperous shared future. On behalf of the Liberal Party of Canada and our Parliamentary Caucus, I affirm our unwavering support for the TRC's recommendations, and call on the Government of Canada to take immediate action to implement them." See "Liberals Call For Full Implementation of Truth And Reconciliation Commission Recommendations," June 2, 2015, online at: <www.liberal.ca>.
[144] In a speech to the Assembly of First Nations General Assembly on July 7, 2015, Justin Trudeau stated in part, "[T]o support the work of reconciliation and continue the necessary process of truth telling and healing, we will work with you to enact the recommendations of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples." See "Real Change: Restoring Fairness to Canada's Relationship With Aboriginal Peoples - Justin Trudeau's remarks at the Assembly of First Nations 36th Annual General Assembly on Tuesday, July 7, 2015," online at: <www.liberals.ca>.
[145] See online: <http://pm.gc.ca/eng/mandate-letters>. In May 2016, Canada announced that is now a full supporter, without qualification, of UNDRIP.
[146] See Mandate Letter to Minister of Indigenous and Northern Affairs, Carolyn Bennett, from Prime Minister Justice Trudeau, November 13, 2015.
[147] At a speech before the United Nations Permanent Forum on Indigenous Issues, Minister Bennett, spoke of Canada's intention to adopt and implement the declaration in accordance with the Canadian Constitution, the effect of which would be to "[breath] life into Section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada." See Minister of Indigenous and Northern Affairs (Carolyn Bennett), "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10", May 10, 2016.
[148] Minister of Justice and Attorney General of Canada (Jody Wilson-Raybould), "Special Statement at the Opening Ceremonies of the United Nations Permanent Forum on Indigenous Issues, 15th Session", UN General Assembly, New York, May 9, 2016.
[149] *Ibid.*

transition phase with supports for Indigenous groups in that regard.[150] RCAP's proposals on governance are responsive to these concerns as they specifically countenance the importance of capacity building at every stage and provide that in re-assuming core jurisdictions under the *Recognition and Governance Act*, each Aboriginal nation can proceed at their own pace, opting out of provisions of the *Indian Act* gradually when they are ready.

Very recently, on July 17, 2017, Canada released a policy setting out ten principles it intends to honour in respect of its relationship with Indigenous peoples.[151] The very first principle recognizes that relations with Indigenous peoples need to be based their right to self-determination, including the inherent right to self-government. The fourth principle recognizes that Indigenous self-government is a part of Canada's evolving system of cooperative federalism and distinct orders of government. Other principles emphasize the importance of reconciliation, maintaining the Honour of the Crown and recognizing treaties like acts of reconciliation based on mutual recognition and respect. All of these principles compel Canada to end its current piecemeal approach to self-government and move towards transformative change.

Another reason compelling the urgent need for Canada to embrace a more robust approach to self-government is the fact that it lags well behind its neighbour to the South in this regard. The United States is significantly more advanced than Canada in recognizing Indigenous peoples' inherent right to self-government. The U.S. has had nation recognition legislation since the 1934 *Indian Reorganization Act*,[152] and, since the mid-1970s, has passed numerous federal statutes transferring control over a number of internal matters over to Indian tribes, including over education, child welfare, primary and secondary schools, tribally controlled colleges and universities, housing, social assistance, policy, health care, some areas of criminal law, and gambling.[153]

Finally, and perhaps most compelling from the perspective of Indigenous peoples, is the fact that we possessed inherent rights of sovereignty, with our own laws and legal systems, before contact with Europeans. As the Truth and Reconciliation Commission has emphasized, the theory that Indigenous sovereignty was somehow extinguished or diminished simply by the assertion of sovereignty on behalf of the British Crown is now completely discredited in international law.[154] The sovereignty of the state of Canada to these lands and over its peoples can therefore only be

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[150] *Ibid.* In another speech, on the need to proceed at a cautious pace, she states, "What we need is an efficient process of transition that lights a fire under the process of decolonization but does so in a controlled manner that respects where Indigenous communities are in terms of rebuilding. As was described to me by one chief when I was B.C. Regional Chief, rather than popping the balloon that is the *Indian Act*, we need to let the air out slowly in a controlled and deliberate manner - slowly until it is all gone and when it is all out what replaces it will be strong and healthy First Nation governments - governments that design and deliver their own programs and services." See the Honourable Jody Wilson-Raybould, PC, QC, MP, "Speech to Assembly of First Nations Annual General Assembly, Scotiabank Convention Centre, Niagara Falls, ON," July 12, 2016.

[151] Canada, "Principles respecting the Government of Canada's relationship with Indigenous peoples" (July 19, 2017), online: <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

[152] See Barsh *supra* note 55.

[153] See John Borrows, "Legislation and Indigenous Self-Determination in Canada and the United States" in *From Recognition To Reconciliation: Essays On The Constitutional Entrenchment Of Aboriginal And Treaty Rights*, University of Toronto Press, 2015; Peter Scott Vicaire, "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013), 58 McGill LJ 607; *First Nations Governance Law*, *supra* note 44 at c 1.

[154] TRC Final Report *supra* note 113 at 191-195.

justified if it is consented to by the descendants of the original peoples of these lands through treaty.[155] This is the long hard work of reconciliation and rebuilding a nation-to-nation relationship that both the RCAP and TRC envisioned.[156] Such agreements will address the thorny issues Canada has been trying to ignore for the last 150 years, including the equitable sharing of this country's lands and resources and reconciling co-existing sovereignties. But in the meantime, while new treaty relationships are being forged and existing treaties renewed, Canadians can no longer act as though the Indigenous peoples of this country lost their sovereignty and their right to be self-governing by virtue of European 'discovery', or that they must wait until their jurisdiction is delegated by or agreed to by the Canadian state. While there are areas of overlapping jurisdiction that will need to be agreed upon through negotiations as found by RCAP, there are several areas of jurisdiction over which there are no persuasive reasons why Indigenous people should not have a free-standing right to exercise self-government.

If we compare the core areas that RCAP recommended to (1) the areas Canada was prepared to recognize in the proposed *An Act relating to self-government for Indian Nations* in 1984, (2) the areas "internal to the group" identified in the IRP, and now (3) the areas where recent legal developments have recognized Indigenous law-making power, as I have in the **Appendix**, some strong similarity is apparent. What constitutes 'core' jurisdiction for Indigenous people, therefore, seems relatively uncontentious and Canada now recognizes (or at least has been prepared to recognize) a unilateral right to exercise such powers in many cases. Therefore, for Canada to continue to insist on negotiating *all* areas of jurisdiction under the IRP is a significant waste of time and resources (especially considering the length of time self-government negotiations are taking and their exorbitant costs) and it undermines the goal of reconciliation. It makes no sense to require Indigenous people in Canada to submit to long and costly negotiations that include haggling over issues that no one disagrees Indigenous peoples should have jurisdiction over.[157]

It also makes no sense to offer only half measures to Indigenous people in the form of discrete statutes that offer greater control but still with many restrictions (leaving a lot of the control to the federal government). This approach was preferred by the Harper government in 2012, and it still appears to be the current Trudeau government's approach. Having a legislated approach is preferable to simply having a policy like the IRP because a non-binding policy provides too much discretion for the government of the day to interpret, deviate or even ignore it as they see fit.[158] However, the current legislative measures are intended only to provide greater control to First Nations, not self-government, and they do not recognize that the law-making powers of Indigenous groups arise from the inherent right, but rather are based on delegated powers. This is not consistent with RCAP's proposals for the *Recognition and Governance Act*, international law or reconciliation as conceived by the TRC and committed to by the current Trudeau government.

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[155] *Ibid* at 195 to 200.

[156] TRC *ibid* and RCAP *supra* note 2.

[157] In the Inherent Rights Policy, *supra* note 45, Canada obliquely cites the need to ensure harmonization of Indigenous laws with similar provincial and territorial laws as the potential reason to submit all internal subject matters to negotiation. Harmonization can be worked out over time (as it has since 1867 in conflicts between provincial law and federal laws) and it is unnecessary and a double-standard to make this a precondition of recognizing Indigenous law.

[158] See Janna Promislow and Naiomi Metallic in "Realizing Administrative Aboriginal Law" in *Administrative Law in Context*, 3rd ed., ch 3 (Emond Publishing: Toronto, 2017).

Canada has not been clear on why it sticks to its current piecemeal approach and has not considered alternatives like returning to RCAP and the *Recognition and Governance Act*. Perhaps RCAP's proposals have been forgotten over time or were never seriously examined in the first place? The IRP suggests that a negotiated approach to self-government is preferable because it does not impose a one-size-fits-all model on Aboriginal people.[159] However, it is difficult to see how broad legislation like *Recognition and Governance Act* recognizing the inherent right to self-govern over a number of core areas, and allowing Indigenous nations to implement self-government as they see fit, actually imposes a prescriptive model on nations. Instead, it seems to allow significant flexibility to nations to develop in the direction and at the pace that suits them.

Perhaps Canada's slow and piecemeal recognition of self-government relates to concerns about Indigenous peoples' capacity—that a gradual approach is needed in order to ensure that Indigenous groups are growing capacity in the meantime? If so, one would expect Canada to currently be investing more resources and placing greater emphasis on capacity building towards self-government. However, Canada's response to RCAP's proposal to create a center on governance to build capacity (the National Centre for First Nations Governance ("FCFNG")) was realized almost a decade late, half-hearted and short-lived as the Harper government pulled the plug on it after only 6 years of operation. Beyond this, capacity building does not figure into the IRP policy and the capacity that First Nations may glean from participating in the legislative initiatives like the *First Nations Land Management Act* is limited to a small minority of First Nations. Perhaps the real barrier is the cost of funding capacity-building? If true, there is an obvious solution. Settling Indigenous nations' core areas of jurisdiction through *Recognition and Governance Act* will avoid the costs and time currently spent negotiating these within the comprehensive claim and self-government process, freeing up millions of dollars that can be redirected towards funding a national governance center (possibly the NCFNG, though its mandate would have to be expanded) and offering incentives to post-secondary institutions through grants to develop programs and initiatives to support Indigenous governance capacity building. We might also expect costs saving arising from the reduction in the staff complement at the Department of Indigenous and Northern Affairs that would gradually occur as Indigenous groups assume greater control over their own affairs under the *Recognition and Governance Act* and through their treaty negotiations.[160] Investing in capacity building will be crucial to transitioning to a new nation-to-nation relationship.

There are some scholars who do not see recognition of inherent rights from the Crown as a path to decolonization or justice.[161] Some have argued that Indigenous nations should simply exercise their sovereignty with or without recognition from other governments, or in other words "just do it".[162] However, there are risks to Indigenous groups in following such an approach, including the

[159] Inherent Rights Policy, *supra* note 45.
[160] The Department currently has a staff complement of 4,582 employees and in 2016, the Department spent over $1.5 Billion on operational costs, including staff salaries: see Treasury Board of Canada, "Population of the Federal Service by Department", available online: <http://www.tbs-sct.gc.ca/psm-fpfm/modernizing-modernisation/stats/ssa-pop-eng.asp> and INAC, Financial Statements for the Year Ended March 31, 2016 (Unaudited), available online: <http://www.aadnc-aandc.gc.ca/eng/1474032869075/1474032938144#rep3>.
[161] See, for example, Glen Coulthard, Red Skin White Masks – Rejecting the Politics of Recognition (Minneapolis: University of Minnesota, 2014) and Mariana Valverde, "The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty" (2012) 21 Social & Legal Studies 3.
[162] See McNeil, *supra* note 100.

possibility of litigation.[163] In addition, recognition from other governments often comes with funding and other resources which, for many First Nations who lack significant own-source revenue, is vital for effective governance. John Borrows has written, in the context of violence against women, that attempting to exercise jurisdiction in the absence of such supports could backfire on the group in a number of ways:

> [I]f Indigenous peoples attempted to assume fuller legal responsibility related to violence against women, a lack of official recognition would leave them without the resources and broader support necessary to realize tangible change related to actual on-the-ground attitudes, activity, and service delivery. Resulting failures would further fuel negative perceptions of Indigenous justice and diminish government and community willingness to support official recognition of jurisdiction in the future. Understanding the vital connection between active, supportive recognition of Indigenous jurisdiction and its proper implementation should reinforce our awareness of the fact that law and politics are not distinct fields.[164]

A former federal Department of Justice (DOJ) lawyer has recently written that without recognition of Indigenous peoples' jurisdiction in legislation, many of his colleagues are reticent to accept that s. 35 of the *Constitution Act, 1982* provides a sufficiently firm legal foundation for inherent rights and will counsel their client against executive initiatives supporting the exercise of greater Indigenous control unless clearly authorized by a statute.[165] Leaving aside the questions of whether such a position is defensible or in keeping with the Honour of the Crown or reconciliation, it is clear that an unequivocal and robust recognition of Indigenous peoples' inherent jurisdiction from the Parliament of Canada through legislation such as proposed by the *Recognition and Governance Act* would provide DOJ lawyers with the peace of mind that inherent rights have a statutory foundation. It may even have the added benefit of facilitating partnerships and initiatives that serve to promote and advance nation-to-nation relationships. More generally, it would ensure greater awareness of inherent rights throughout the country, which at this point is largely lacking.[166]

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[163] For example, one First Nation which exercised its inherent right to develop a taxation scheme with revenues benefitting community members, had the courts reject the existence of such a right and the First Nation was left having to repay a hefty bill to the Canada Revenue Agency: see *Acadia First Nation v Canada (National Revenue),* 2007 FC 259, aff'd 2008 FCA 119.

[164] John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50 Osgoode Hall LJ 699 at 705.

[165] See Kerry Wilkins, "Reasoning with the Elephant – The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13/1 Indigenous LJ 27 at 46-49.

[166] I acknowledge that a constitutional amendment recognizing the inherent right would have even greater and more lasting effect than legislation, but I agree with RCAP and others that a constitutional amendment to ground the inherent right is not necessary. With the failures of both the Meech Lake and Charlottetown Accords, the prospect of reopening the constitution soon is remote. It also clear at present that Justin Trudeau's government has no interest in amending the Constitution as part of rebuilding the nation-to-nation relationship (for fear of inviting "constitutional squabbles") and the government is confident that the current tools at its disposal are sufficient to do the work. See Aboriginal Peoples Television Network, National News, "Trudeau quashes call from AFN's Bellegarde to begin Constitutional talks on Indigenous rights" (Dec. 12, 2016). Finally, it is possible that legislation, by hastening and normalizing the recognition of inherent right jurisdictions over core areas, may in fact enhance the prospect for eventual constitutional change, as suggested by the Penner Report *supra* note 4 at 46.

Finally, in addition to its other virtues, it is important to emphasize the importance of RCAP's proposal that the *Recognition and Governance Act* include a commitment by Canada to provide nations with financing commensurate with their scope of jurisdiction. Recent human rights challenges brought by First Nations against Canada have revealed the extent to which the federal government has been knowingly underfunding services for First Nations.[167] The Inherent Rights Policy does not require Canada to ensure its transfer payment to self-governing groups is commensurate with the level of services provided by the nation; in fact, the policy suggests Canada will fund no more than what was previously spent on the group prior to their becoming self-governing.[168] Inserting a legislated commitment on the part of the government within the *Recognition and Governance Act* to fund an adequate level of services for self-governing nations will go a long way to ensuring Canada's accountability in this regard.[169]

Conclusion

There are perhaps other reasonable pathways to achieving recognition of Indigenous nations and self-government than that suggested by RCAP, but it is one that deserves serious consideration. RCAP contains some of the most comprehensive, consultative, and deliberate thinking on how to transform the Crown-Indigenous relationship to date. It has never been given a chance and certainly deserves one.[170] RCAP's proposal on governance should appeal to the current Trudeau government as it is consistent with the government's commitment to implement the TRC Report and UNDRIP and recognize the right to self-determination, including the right to self-government. In particular, RCAP's proposal provides precisely the kind of flexibility Minister Wilson-Raybould has said is needed in order to allow Indigenous groups to transition to self-government at a pace suitable to their needs and capacity. Finally, the prospect of implementing RCAP should

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[167] *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 267 refers to an internal Department of Indian Affairs document, entitled *Explanation on Expenditures of Social Development Programs*, that describes all of the Department's social programs as "…limited in scope and not designed to be as effective as they need to be to create positive social change or meet basic needs in some circumstances." The document goes on to say that if it's current social programs were administered by the provinces this would result in a significant increase in costs for INAC.

[168] See note 77.

[169] Assembly of First Nations, *Transforming the Relationship – Sustainable Fiscal Transfers for First Nations*, Pre-Budget Submissions, 2010, August 13, 2010.

[170] It is possible that some deviation from RCAP's proposal may be warranted given the changes that have occurred over the past 20 years. For example, RCAP had proposed that the constitutions of Indigenous groups seeking recognition under *Recognition and Governance Act* should adhere to the Canadian Charter of Rights and Freedoms. This recommendation may have been a product of events happening in the early 1990s (including high profile cases about First Nations seeking to exclude Indigenous women who had been reinstated under Bill C-31 under membership codes), which are perhaps less acute today. There has also been greater consideration of the question of the Charter and whether Indigenous legal traditions and principles can provide comparative individual rights protections. See Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34 Osgoode Hall LJ 61, Kent McNeil, "Aboriginal Governments and the Charter: Lessons from the United States" (2003) Vol. 7 Citizenship Studies 481; John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).Another area for reconsideration would be whether final decisions on recognition of nations ought to go to Cabinet or whether they ought to instead be delegated to an independent tribunal. Finally, asking Canada to only fund a national governance center for capacity-building for 10 years may have underestimated how much time will be needed to support Indigenous peoples' capacity building. The length of time such a center needs to be supported should be revisited, as well as the question of whether the Center should receive legislative protection in order to make it more difficult for the center to have all of its funding cut when a new government comes in, as happened in the case of the National Center for First Nations Governance.

not strike fear in the hearts of non-Indigenous Canadians of the 'unknown'. As illustrated by the chart in Appendix, Canadian law already recognizes Indigenous jurisdiction in most, if not all, of the jurisdiction identified by RCAP. What the *Recognition and Governance Act* will do differently, however, is make the path to self-government much clearer and accessible.

It is apparent that the Inherent Rights Policy is failing; it is taking too long and costing too much while most Indigenous peoples continue to be hindered by poverty and inability to assert meaningful control over their destinies. Piecemeal, opt-in legislation giving greater control over some areas will not result in the change that is needed. The relationship between Canada and Indigenous peoples is in dire need of transformative change to a nation-to-nation relationship and RCAP provides us with a reasonable roadmap for getting there.

APPENDIX – COMPARISON OF INDIGENOUS JURISDICTIONS

RCAP (1996)[171]	Bill C-52 (1984)[172]	IRP (1996)[173]	Indigenous jurisdiction under existing law[174]
• constitution and governmental institutions • elections and referenda	• eligibility for voting in, and procedures for the holding of, referenda to authorize changes in the constitution of the Indian Nation • the establishment of institutions and offices for the purposes of the government	• establishment of governing structures, internal constitutions, elections, leadership selection processes	• Section 2 of *Indian Act* allows bands to choose their leadership through their own custom processes. Court have interpreted this to mean that bands have the jurisdiction to have oral or written constitutions and election / leadership selection laws • The *Indian Act* gives bands the bylaw power to appoint officials to conduct the business of the council, prescribing their duties and providing for their remuneration
• citizenship and membership • Access to and residence in the territory	• applications for membership in the Indian Nation and matters incidental to the such applications;	• membership	• Section 10 of the *Indian Act* allows bands to control of membership and the *Act* also authorizes bylaw powers over residency on reserve and rights of spouses and children of members.
• lands, waters, sea-ice and natural resources	• the management and administration of lands • construction within the boundaries of the lands of the Indian Nation* • zoning and land use planning in respect of the lands of the Indian Nations*	• land management, including • zoning • service fees • land tenure and access • expropriation of Aboriginal land by Aboriginal governments for their own public purposes	• The *First Nations Land Management Act* authorizes laws in relation to development, conservation, protection, management, use and possession of First Nation land • The *Indian Act* authorizes bylaws in relation to regulation of traffic, zoning, surveying and allotment of land.

[171] Tentative list of areas that RCAP saw accruing to recognized nations under *Recognition and Governance Act*: see RCAP, *supra* note 2 at 306-307 – this is similar to the list provided at 205-206.
[172] Bill C-52, *An Act relating to self-government for Indian Nations*, *supra* note 5 at ss 16-20. Powers marked with an asterisk "*" are those powers set out in ss 18-19 requiring agreement with Canada in order to exercise the power.
[173] IRP *supra* note 45. Powers marked with an asterisk "*" are those the IRP indicated were not integral to Aboriginal culture or internal to the group, but over which the federal government was prepared to negotiate some measure of Aboriginal authority.
[174] This is an abbreviate version of Section 2(b), but it also includes failed bills in which Canada was prepared to delegate additional jurisdictions for First Nations (not discussed in aforementioned section). It also does not discuss any restrictions on these powers. For more on this, see Section 2(b).

		• local transportation	
• preservation, protection and management of the environment, including wild animals and fish	• the environment, within the boundaries of the lands of the Indian Nation*	• environmental protection, assessment and pollution prevention* • fisheries co-management* • migratory birds co-management*	• The *First Nations Land Management Act* authorizes First Nations to develop their own environmental protection regime.
• economic life, including commerce, agriculture, grazing, hunting, trapping, fishing, forestry, mining, and management of natural resources in general	• economic development of the Indian Nation; • agriculture within the boundaries of the lands of the Indian Nation* • the exploitation of land and of renewable and non-renewable resources, including wildlife, within the boundaries of the lands of the Indian Nation*	• natural resources management • agriculture, • hunting, fishing and trapping on Aboriginal lands • labour/training* • gaming*	• The *Indian Act* authorizes bylaws in relation to keeping of animals; control and destruction of noxious weeks, poultry and bee-keeping, conduct of non-member salespersons on reserve, preservation, protection and management of fur-bearing animals, fish and other game, and public games and other amusements. • The *First Nations Land Management Act* authorizes laws in relation to manage natural resources of reserve lands. • Section 35 jurisprudence recognizes the right to manage Aboriginal and Treaty rights of hunting, fishing and gathering recognized by jurisprudence.
• the operation of businesses, trades and professions	• licensing of trades practiced within the boundaries of the lands of the Indian Nation*	• licensing, regulation and operation businesses located on Aboriginal lands	• The *Indian Act* authorizes bylaws in relation to the licensing of businesses, callings, trades and occupations.
• transfer and management of public monies and other assets	• Funding and transfers*[175]	• transfer and management of monies and group assets	• The *First Nations Land Management Act* authorizes the control of Indian monies transferred to the Band from Canada. • The *First Nations Fiscal Management Act* authorizes the

[175] Bill C-52, *An Act relating to self-government for Indian Nations*, *supra* note 5 at s 55.

			power to pass laws for the financial administration of First Nation. • The *First Nations Oil and Gas and Moneys Management Act* authorizes First Nations to opt out of the money management provisions of *Indian Act* to control royalties / revenues from oil and gas).
• taxation	• taxation for local purposes levied on real property situated within the boundaries of the lands of the Indian Nation, subject to the regulations;	• taxation in respect of direct taxes and property taxes of members	• The *Indian Act* authorizes bylaws in relation over taxing of interests in the reserve. • The *First Nations Fiscal Management* gives Bands the power to impose real property taxes. • The *First Nations Goods and Services Tax Act* allows Bands to charge HST/GST on goods sold on reserve and receive revenue therefrom.
• family matters, including marriage, divorce, adoption and child custody	• family laws in relation to members of the Indian Nation permanently resident within the boundaries of the land of the Indian Nation, including marriage, separation, divorce, legitimacy, adoption, child welfare and guardianship of minors and incompetents*	• adoption and child welfare • divorce*	• The *Indian Act* authorizes bylaws over health of the community and law and order, which at least one First Nation has used to develop a child-welfare.[176] • The *Indian Act* recognizes that children can be adopted in accordance with "Indian custom" and this is supported by case law. • The *Family Homes on Reserves and Matrimonial Interests or Rights Act* authorizes laws on the occupation and division of family home on relationship breakdown or death of spouse.
• property rights, including succession and estates	• Property within the boundaries of the lands of the Indian Nation, including rights in property, descent of property, expropriation, and access to and residence on lands of the Indian Nation*	• property rights, including succession and estates	• The *First Nations Land Management Act*, authorizes laws in relation to use and occupancy and rights as well as the procedures that apply to the transfer, by testamentary disposition or succession, of any interest or right in First Nation land.

[176] See Metallic, *supra* note 91.

			• *Family Homes on Reserves and Matrimonial Interests or Rights Act* authorizes laws in relation to occupation and division of family home on death of spouse.
• education	• primary and secondary education in relation to members of the Indian Nation within the boundaries of the lands of the Indian Nation • the establishment and operation of education facilities and the provision of educational services	• education	• The failed *Bill C-33, First Nations Control of First Nations Education Act* (2014) contemplate some bylaw powers of Bands over attendance and start of school year.[177]
• social services and welfare, including child welfare	• the provision of social services, including without restricting the generality of the foregoing, housing, child care and welfare	• social services	• The *Indian Act* bylaw power, through a combination of provisions, arguably give jurisdiction to First Nations over a range of services that promote community health and well-being.[178]
• health	• Public health, hygiene and safety within the boundaries of the lands of the Indian Nation*	• health	• The *Indian Act* authorizes bylaws over health of residents on the reserve and to prevent spreading of contagious diseases.
• language, culture, values and traditions	• Matters of a purely local or private nature for the good government of the Indian Nation	• Aboriginal language, culture and religion	• The failed *Bill C-7, First Nations Governance Act* (2003) would have provided law-making power to Bands for "the preservation of the culture and language of the band."[179]
• criminal law and procedure • policing	•	• administration of justice issues, including matters related to the administration and enforcement of laws of other jurisdictions which might include certain criminal laws*	• The *Indian Act* authorizes bylaws over the observance of law and order; the prevention of disorderly conduct and nuisances; removal and punishment of persons trespassing; the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days. The *Act*

[177] See INAC, "Working Together for First Nation Students: A Proposal for a Bill on First Nation Education" (2014), online: <https://www.aadnc-aandc.gc.ca/eng/1358798070439/1358798420982>. As noted in Section 2(a), there has also been one-sectoral self-government agreement recognized jurisdiction over education on reserve to the Mi'kmaq of Nova Scotia: see notes 58 and 126.
[178] See Metallic, *supra* notes 90 and 91.
[179] Bill C-7, *First Nations Governance Act*, 2nd sess., 37th Parl., 2002, s. 17(1)(c).

		• penitentiaries and parole* • policing	also authorizes a bylaw on the banning intoxicants.
• the administration of justice, including the establishment of courts and tribunals with civil and criminal jurisdiction	• enforcement & fines & penalties of laws • public order within the boundaries of the lands of the Indian Nation* • The administration of justice within the boundaries of the lands of the Indian Nation including ○ The constitution, maintenance and organization of judicial and quasi-judicial bodies with jurisdiction in relation to laws of the Indian Nation, and ○ The establishment and maintenance of jails, the provision of police services and prosecutions*	• administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws	• The *First Nations Land Management Act* provides First Nations with the powers to create enforcement and dispute resolutions regarding their land laws.
• public works and housing	• public works and community facilities	• management of public works and infrastructure, housing	• The *Indian Act* authorizes bylaws over construction and maintenance of local works; buildings; and public wells.