Indigenous Peoples in Canada:

Failing to Renew the Relationship

ABSTRACT

The Doctrine of Discovery allowed the Crown to assume sovereignty over Indigenous lands in Canada and to assimilate its Indigenous Peoples. The Crown built a Framework of Colonization from the doctrine to accomplish those goals. That framework empowered the rule of law to protect Crown rights and Crown-Delegated Jurisdictions at the expense of Indigenous sovereignty and Immemorial rights.

The Government of Canada has created a plan to renew its relationship with Indigenous Peoples on a nation-to-nation, Inuit-Crown, and government-to-government basis. If a new relationship is to be successful, the Government of Canada must remove the Doctrine of Discovery and include Indigenous sovereignty, law, Inherent Jurisdiction, and Immemorial rights into the rule of law. The core axis upon which that success would pivot is the meaningful consultation of community-based Indigenous Immemorial rights-holders.

A rights approach is used to provide the reader with a knowledge base on the Framework of Colonization. The plan to renew the relationship is then reviewed demonstrating it retains the Doctrine of Discovery and Framework of Colonization. The Government of Canada’s plan to renew its relationship will continue the colonization of Indigenous lands and the assimilation of Indigenous Peoples.

Dr. J. Richard G. Herbert
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June 18th, 2018
Failing to Renew the Relationship

Preface:

Indigenous is an international term utilized by the United Nations, now adopted by the Government of Canada. However, it is not a name Canada’s First Peoples gave themselves. We believe that Canada’s First Peoples, should, for lack of a better way to put it, name themselves. We have heard people refer to themselves by many names: First Nation, Inuit, Métis, First Peoples, Indigenous, Dene, Cree, Crow, Mi’kmaq, Innu, Kaska, Tlingit, Mohawk, etc. For clarity, we will use the term ‘Indigenous Peoples’ to denote distinct nations of peoples that are First Nation, Inuit, or Métis.

We have focused this report on a finite set of issues that can be used to assess if the Government of Canada’s Plan to renew its relationship with Indigenous Peoples will truly respect Indigenous rights and honour the Report of the Royal Commission on Aboriginal Peoples (1996), United Nations Declaration on the Rights of Indigenous Peoples (2007), and the Truth and Reconciliation Commission of Canada: Calls to Action (2015). Discussed issues find root in the Crown’s dependence on the Doctrine of Discovery to maintain the status quo and continue colonization.

Submitted to:

The Right Honourable Justin Trudeau, Prime Minister of Canada, on June 18th, 2018.

The Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations and Northern Affairs, on June 18th, 2018.

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Indigenous Peoples in Canada: Failing to Renew the Relationship
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Foreword:

In November 2015, the Right Honourable Justin Trudeau, Prime Minister of Canada, gave a mandate to the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, to renew the relationship between Canada and Indigenous Peoples. That renewal is to be a nation-nation relationship based on the recognition of rights, respect, co-operation, and partnership. Included within the renewal is the plan to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

In response to the final report of the Truth and Reconciliation Commission of Canada (TRC) in December 2015, the Government of Canada included the implementation of the TRC’s Calls to Action into its ‘plan’ to renew its relationship with Indigenous Peoples.

The Government of Canada removed its objector status to the UNDRIP at the United Nations in May 2016 and currently supports Bill C-262, legislation to ensure that federal laws in Canada are consistent with the UNDRIP.

In August 2017, The Government of Canada announced it would split Indigenous and Northern Affairs Canada into two departments, Indigenous Services and Crown-Indigenous Relations and Northern Affairs. The Honourable Carolyn Bennett was appointed Minister of Crown-Indigenous Relations and Northern Affairs and two months later given an updated mandate to renew the relationship with Indigenous Peoples and implement the UNDRIP. The Honourable Jane Philpott was appointed Minister of Indigenous Services Canada.

On February 14, 2018, Prime Minister Trudeau, announced Canada will develop a Recognition and Implementation of Rights Framework in full partnership with First Nation, Inuit and Métis Peoples.

In September 2017, we submitted an initiative to Minister Bennett in response to a mandate given to the Minister by the Prime Minister to have constructive dialogue with not-for-profit and charitable sectors to identify ways to find solutions and avoid conflicts in respect to Indigenous Peoples. The initiative contained a quintessential, community rights-based meaningful consultation model for the Government of Canada’s plan to renew its relationship with Indigenous Peoples.

Our analysis of the response to the proposal by the Government of Canada revealed the government’s plan to renew Canada’s relationship with Indigenous Peoples would fail. The imminent failure is rooted in the Crown’s retention of the Doctrine of Discovery and its Framework of Colonization. The Minister’s office and several senior bureaucrats were informed of the ineluctable failure. What ensued was a short series of conversations and correspondences. This report is based on further research, experience, and those conversations.

Take note, we have placed a large number of quotations in the references and citations section to inform the reader and support information within the report. We have also included background information on topics in the text so that more readers can understand concepts and make their own informed decisions.
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I – Introduction

It is hard to see the forest for the trees.

We live in a country that was colonized at the expense of Indigenous Peoples using policies that implemented exploitation, assimilation, and genocide. The goal was to exploit the land and its natural resources for profit. As government policies were gradually exposed over the last few decades, our elected government leaders have thumped their chests and cried out in remorse, vowing they would stop the oppression of Indigenous Peoples. But have they? Can they?

The average Canadian citizen has no vantage point from which to see colonization. People are busy advancing careers, supporting families, and too often, unfortunately, simply struggling to survive. When a person looks out over their urban community, do they see the cost Indigenous Peoples were forced to bear for it all to be there? No, how could they?

How can elected officials and Canadian citizens understand colonization when they can’t see the forest for the trees? Someone created a system in Canada for colonization to occur, it did not suddenly appear through some sort of colonial big bang. Other individuals or groups continued tweaking and adding to the system’s colonizing framework, as needed, to continue the exploitation of lands and resources at the expense of Indigenous Peoples. It is this Framework of Colonization that needs to be seen and dismantled.

Elected officials, Indigenous Peoples, and other concerned groups and individuals cannot dismantle one or two aspects of the Framework of Colonization to end the oppression of Indigenous Peoples in Canada. They need to see the entire framework, pull out its root, and dismantle its branches. The unobscured view will then allow everyone to get their bearings and chart a new course through the forest.

The Government of Canada plans to renew its relationship with Indigenous Peoples, but they cannot see the forest for the tree. The plan leaves the Framework of Colonization intact. Without the framework’s removal, the plan can do nothing but continue colonization and assimilation, albeit differently from before.

The root of the framework is the Doctrine of Discovery. The doctrine allowed for the Crown to assume sovereignty over Indigenous lands, resources, and peoples. Assumed sovereignty gave the Crown a right in Canada to extend its authority through a constitution to protect its new rights to land, resources, and peoples. The Crown’s right and authority are now vested in government and other jurisdictions the Crown, and now its government, delegated it to.

The Framework of Colonization is made of a combination of instruments that allow for the rule of law in Canada to protect and promote the Crown’s rights and its delegated jurisdictions. At the same time, laws, rights, and jurisdictions that flow from Indigenous sovereignty over land, resources, and peoples are excluded from the Canadian rule of law. The Crown used this flow and ebb of protection and exclusion to create an alternate ‘Aboriginal’ rights regime within the Framework of Colonization. This alternate rights regime replaces sovereign-based rights of Indigenous Peoples in a manner that will lead to the final destruction of Indigenous sovereignty, land, jurisdictions, and Peoples in Canada.

This report will introduce the reader to the issues of sovereignty, rights, authority, jurisdiction,
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and meaningful consultation as a background to outline the Framework of Colonization. The Government of Canada’s plan to renew its relationship with Indigenous Peoples will be then outlined and a number of key aspects will be discussed in the context of the framework. These discussions will unequivocally reveal the retention of the framework and the retained goals of colonization and assimilation in the planned new relationship.

First, a short introduction to the Doctrine of Discovery and the rule of law in Canada.

1. Doctrine of Discovery

There was a cataclysmic change in the rights of Indigenous Peoples when the Crown assumed sovereignty\(^9\) in Canada. Sovereign rights of Indigenous Peoples and nations were usurped and replaced by Crown rights. This was done through the Doctrine of Discovery and the doctrine of Terra Nullius.\(^10\)

1. The Doctrine of Discovery allowed the Crown to claim sovereignty over Indigenous Peoples and land by holding that Indigenous Peoples cannot claim ownership of land. It does concede a restricted title (an ‘Aboriginal title’) to rights of occupation and land use\(^11\); and,

2. The legal doctrine of Terra Nullius, land that is legally deemed to be unoccupied or uninhabited\(^12\), allowed for the Crown to grant land to its colonial interests, including 70-80% of Canada’s land mass to the Hudson Bay Company.\(^13\)

The Doctrine of Discovery finds its root in the 1455 papal bull Romanus Pontifex of the Roman Catholic Church.\(^14\) Pope Nicholas V authorized the conquest and enslavement of non-Christian Indigenous Peoples for the purposes of land acquisition and profit from natural resources.\(^15\)

Terra Nullius finds its legal root in eighteenth century European law, but the concept was used to justify the right to colonize Indigenous lands throughout the sixteenth to twentieth centuries.\(^16\)

The Report of the Royal Commission on Aboriginal Peoples (1996) determined the concepts of the Doctrine of Discovery and Terra Nullius were factually, legally, and morally wrong.\(^17\) The Commission stated that these two concepts are the impediments to Indigenous Peoples assuming their rightful place in Canada.

The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes that doctrines such as the Doctrine of Discovery are not legally valid\(^18\) and that continuation of colonialism is a crime which violates the Charter of the United Nations.\(^19\)

The Supreme Court of Canada’s Tsilhqot’in decision (2014) dismissed the argument Canada was Terra Nullius at the time of discovery.\(^20\) However, the Supreme court of Canada left the Doctrine of Discovery in place by granting the Tsilhqot’in Peoples the sovereignty-restricted ownership of ‘Aboriginal title’ to their traditional lands.

The 2015 report of the Truth and Reconciliation Commission of Canada (TRC) called for the Government of Canada to:

1. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples; and,
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2. Renounce the concepts of *Terra Nullius* and the Doctrine of Discovery.

In response to the TRC’s call to action, the Government of Canada committed to a ‘plan’ to renew its relationship with Indigenous Peoples based on the recognition of rights, respect, cooperation, and partnership. However, to do that, the Doctrine of Discovery must be removed.

Without the Doctrine of Discovery, the current status quo of colonial control over Indigenous Peoples will no longer exist. Indigenous sovereignty and jurisdiction will need to be defined so that a new relationship can then be established based on the reconciliation of Indigenous sovereign rights with Crown rights.

2. Rule of Law

The rule of law is the principle that laws limit what we do to protect the greater good – they protect rights. For ease of discussion, we will define laws within the rule of law that protect rights in Canada as constitutional, legislative, or common law:

1. Constitutional law: The codified constitution in Canada that defines roles, powers, and structures for the federal and provincial governments;
2. Legislative law: Legislation that is enacted by provincial or federal governments in Canada.
3. Common law: Decisions made by judges on a case by case basis as they rule on Issues brought before them.

Canada’s rule of law is based on the British system and has not been adapted to include Indigenous law. The inclusion of indigenous law and sovereignty into the Canadian rule of law would provide protection for the rights of Indigenous Peoples.

The rule of law does, however, contain Aboriginal law. Aboriginal law:

1. Is a body of Non-Indigenous Canadian law related to Indigenous Peoples;
2. Manages the interaction between Indigenous Peoples and the Crown; and,
3. Interprets Aboriginal title and Indigenous-related Fiduciary, Constitutional, Treaty and Aboriginal rights.

The bulk of Aboriginal law in Canada is contained within common law. Treaty, fiduciary, and constitution-derived Aboriginal rights are defined and protected by Canadian courts. Despite the integrity of those who sit on the bench, common law is biased and retains Crown colonial objectives as judges interpret the rights of Indigenous Peoples based on legislation, regulations, previous court decisions, and a constitution that are essentially devoid of Indigenous law and Indigenous-defined rights. The root of all of this is the Doctrine of Discovery.

Clearly, the removal of the Doctrine of Discovery from Canada and the subsequent inclusion of Indigenous sovereignty, law, jurisdiction, and rights will affect the rule of law. The impact of those effects will be profound but not insurmountable.

If we look at common law, some court decisions will no longer be valid when the Doctrine of Discovery is removed. Two areas that we would expect to see an impact would be with:
1. The Reconciliation of Rights:

Courts have ruled that Treaty and Aboriginal rights recognized in section 35 of the Constitution Act must be based on the reconciliation of pre-existing Indigenous societies with the assumed sovereignty of the Crown. However, reconciliation done this way only includes rights (pre-contact) from past generations, excluding present and future generations. It also excludes rights of the land vested in Indigenous Peoples.

Without the Doctrine of Discovery, reconciliation will be between all of Indigenous society (past, present, and future generations plus the land) and the Crown using Indigenous sovereignty, not Crown sovereignty, as the source of Indigenous rights.

2. Traditional Territory Management Rights:

Courts have ruled that both Crown and corporate interests have a veto over Indigenous law and rights. Interesting though, is the claim that Indigenous Peoples are demanding a veto over Crown and corporate interests as they push for joint decision making on the management of their traditional territories. In fact, it is the Crown and corporate interests vocalizing to maintain their veto.

How can the Government of Canada renew its relationship as a partnership with Indigenous Peoples and recognize the international right to self-determination, if relevant decisions over traditional territories are not made jointly? When the Doctrine of Discovery is removed, no one will have a veto; or, everyone will have a veto.

The removal of the Doctrine of Discovery, will require the recognition and inclusion of Indigenous sovereignty, rights, law, and jurisdiction into the rule of law to renew the relationship between Canada and Indigenous Peoples. All of these are found in the practices of Indigenous rights-holders.

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i See section II, 2.1
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II – The Current Relationship

1. Sovereignty

There are a few words we should define before we delve into the next sections. They are:

• Sovereignty is the power of a nation or monarch to govern itself.\(^{33}\)
• A right is a legal entitlement to do something.\(^{34}\)
• Authority is a right to act in a specified way and can be delegated from one organization to another.\(^{35}\)
• Jurisdiction is the sphere of activity over which the authority of an institution extends.\(^{36}\)

1.1 Indigenous Sovereignty

We believe Indigenous Peoples should speak for themselves in defining their sovereignty. It will therefore suffice to say that they are sovereign and their sovereignty predates the Crown in Canada. In the words of the *Report of the Royal Commission on Aboriginal Peoples* (1996):

> “Sovereignty, in the words of one brief, is ‘the original freedom conferred to our people by the Creator rather than a temporal power.’ As a gift from the Creator, sovereignty can neither be given nor taken away, nor can its basic terms be negotiated. This view is shared by many Aboriginal people, whose political traditions are infused with a deep sense of spirituality and a sense of the inter-connectedness of all things. Such concepts as sovereignty, self-government and the land, which for some Canadians have largely secular definitions, all retain a spiritual dimension in contemporary Aboriginal thinking.”\(^{37}\)

We know Indigenous sovereignty is nation-based and that the definition of nation includes communities with elders, citizens, councils, and leaders plus other dimensions that can be spiritual, regional, temporal, and etc. So, the definition of sovereignty is interspersed with all these facets of nation and community.

While we leave defining Indigenous sovereignty to others, the definition will contain the equivalent of the Crown’s sovereignty. In that, where Indigenous sovereignty lies, so too do rights, authority, jurisdiction, and the power to delegate those.

1.2 Crown Sovereignty

In a simplistic view, Canada is a federal constitutional monarchy, with the Crown at its head. The Crown is:

• Sovereign;
• Legally entitled;
• Has complete authority and delegates authority to groups or organizations; and,
• Has total jurisdiction, giving limited jurisdiction when it delegates its authority.

The Crown’s sovereignty is with the monarchy in Europe. Extending the British Crown’s sovereignty over new territory, such as Canada, could only occur by one of four ways recognized by European powers:
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1. Inheritance;
2. Conquest;
3. Purchase; or,
4. Occupation/Settlement.

Of course, Canada was populated by Indigenous Peoples and their nations at the time of ‘discovery,’ so there was no inheritance, conquest, or purchase. To extend sovereignty, the Doctrine of Discovery was used to remove Indigenous sovereignty and title allowing *Terra Nullius* to open the land for British occupation and settlement. Once British citizens and settlements were legally present in Canada, the Crown had a right to ‘assume sovereignty’ over them and the land.

This ‘assumed sovereignty’ is the basis of the Crown’s right in Canada.

2. Rights

Sovereignty empowers the rights of nations and their peoples.

2.1 Immemorial Rights

What are the rights of Indigenous Peoples? A good word to describe these sovereign rights is immemorial; originating from the Creator, they have always been and will always be. We refer to these sovereign Indigenous rights as ‘Immemorial rights’ in the remainder of this report for that reason. Each nation we have worked with has a different name for ‘their’ rights and we respect that, but for this sharing we will call them Immemorial rights.

It is clear, Indigenous Peoples want their Immemorial rights to be the rights upon which they renew their relationship with Canada. But, Canada has always ignored Immemorial rights and dictated what rights Indigenous Peoples have. Consequently, there is no data base on Immemorial rights from which to build.

The Government of Canada initiated a Recognition and Implementation of Rights Framework to renew their relationship with Indigenous Peoples. For that process to succeed, the Government of Canada must consult true rights-holders. To do that, an in-depth, community-based Immemorial rights consultation process is required.

The nature of Indigenous culture has that Immemorial rights are held by community members. Immemorial rights are independent of, and predate, the Crown in Canada. In an overly simplistic explanation, Immemorial rights have two basic components:

1. Our Rights: - Rights to self-determination and traditional territory.
2. The Land: - Vested rights of land, water, air, and plant/animal life.

Some of what ‘Our Rights’ to self-determination and traditional territory include are rights to:

a) Live on the land and restrict access to it;
b) Hunt, fish, gather, trade, and build to the benefit of families and communities;
c) Own, direct, manage, and benefit from culture-based societal infrastructures.
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(education, health, child care, justice, resource management, trade, and etc.);

d) Govern communities and traditional territories; and,

e) Direct a path forward, including a right to say no.

Some of what vested rights of ‘The Land’ entails:

a) Protect the land and its resources (minerals, water, oil and gas, wildlife, and air); and,

b) Ensure traditional territory use is respectful.

Immemorial rights also have generational components to them and so are rooted at the same time in:

i. Past generations;

ii. Present generations; and,

iii. Future generations.

The successful recognition of Immemorial rights can only occur when the Crown acquires a working understanding of ‘Our Rights’ and ‘The Land’ through consultation. That understanding forms the foundation upon which the Crown can reconcile with Indigenous rights-holding communities, or aggregates of communities (nations), to:

• Respect the Past;

• Provide for the Present; and,

• Maintain for the Future.

Immemorial rights include a right to define and alter consultation processes to ensure they respect Immemorial rights. Results obtained from consultation of Immemorial rights are considered temporal interpretations of the right(s) consulted in the context of that consultation event.

The Chief and Council of the band council system in Indigenous communities do not hold their community’s Immemorial rights. The Chief cannot vote or negotiate on behalf of his or her community unless given a mandate from community rights-holders.

The only way to recognize Immemorial rights and renew the Government of Canada’s relationship with Indigenous Peoples after removing the Doctrine of Discovery, is to provide consultation directly with Indigenous communities and their Immemorial rights-holders.

2.2 Crown Rights

The Crown’s rights are grounded in its sovereignty. The Crown’s right in Canada is grounded in the assumed sovereignty it derived from the Doctrine of Discovery. The Crown’s right in Canada is placed into the jurisdiction of three branches of government: Executive, legislative, and judicial branches. The Constitution Act (1982) limits parliamentary powers and divides legislative authority between federal and provincial governments. Authority over Indigenous Peoples and Indigenous lands falls within the federal government’s jurisdiction through section 91(24)\(^{40}\) of the Constitution Act.

The rule of law in Canada is the societal construct of constitutional rights, legislation, regulations, and their interpretation that gives form to the Crown’s right placed within the
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three branches of government.

Without the Doctrine of Discovery, the Crown’s assumed sovereignty disappears leaving the Crown’s right grounded in its rule of law which can be adapted. At the same time, without the doctrine, Indigenous sovereign rights, grounded in Indigenous law and Immemorial rights, are recognized.

2.3 Indigenous-Related Rights

Indigenous-related rights are both domestic and international rights granted or given to Indigenous Peoples by the Crown or the United Nations. They are not Immemorial rights.

2.3.1 Fiduciary Rights

A fiduciary duty involves trust. In the case of the Crown and Indigenous Peoples, the fiduciary duty is a holding in trust of Indigenous rights, land, resources, and peoples on behalf of Indigenous Peoples. The Crown’s fiduciary duty includes an element of ensuring actions undertaken by the Crown and its subjects which affect Indigenous rights, lands, resources, or peoples are honourable.

The Crown’s fiduciary duty first arose with the Royal Proclamation of 1763 when the Crown placed itself between settlers and Indians with regard to the acquiring of land. Section 91(24) of the British North America Act (1867), and then section 91(24) of the Constitution Act (1982), gave control of Indians (Indigenous Peoples) and Indian lands to the federal government transferring the Crown’s fiduciary duty to the Government of Canada. Parliament later gave the Government of Canada sole discretion to decide where Indigenous interests best lie for Indigenous lands through the Indian Act.

This created an exclusive federal jurisdiction in which the federal government is responsible for providing programs and services to Indigenous communities that most communities in Canada receive from provincial and municipal levels of government. These program and services include education, health and social services, roads, housing, water and waste management, governance, and more. The federal government’s responsibility includes funding for Indigenous services and programs.

Fiduciary duties became enforceable in 1984 with the Supreme Court of Canada’s Guerin decision. When that occurred, fiduciary duty also became an Indigenous right to the fiduciary duty, a Fiduciary right. These duties, and subsequent Fiduciary rights, are not limited to the Crown’s management of reserve lands and resources. They extend to the Crown’s decision making and legislative authority over all lands and resources subject to Aboriginal rights and title. Further, fiduciary duties and the right to fiduciary duties are present when any Indigenous interest is involved and the Crown is exercising its discretionary authority.

The Crown’s fiduciary duties and Indigenous Fiduciary rights are defined by and found in common law. We know the Canadian rule of law excludes Indigenous sovereignty while protecting Crown sovereignty, raising Crown rights above Immemorial rights. As a result, for example, the Crown’s right to develop land almost always takes priority over the Indigenous Fiduciary right to have the Crown ensure an Indigenous decision to preserve the land is respected. Consequently, Fiduciary rights granted to Indigenous Peoples are

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i see section 1, 2
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‘less-than’ Immemorial rights.

When the Doctrine of Discovery is removed, assumed sovereignty will end and fiduciary duties will we taken up by Indigenous nations to provide services, programs, and land management for their peoples. These Indigenous fiduciary duties are found within sovereign Immemorial rights held by Indigenous community members. To successfully recognize and reconcile with Indigenous fiduciary duties, consultations of community-based rights-holders must be undertaken.

2.3.2 Constitutional Rights:

Rights in Canada are protected by their inclusion into the rule of law (constitutional, legislative, and common law). When the Government of Canada included section 35 into the Constitution Act in 1982, they created constitutional law that recognized Aboriginal peoples, Treaty rights, and Aboriginal rights. The protection of section 35 rights was placed within section 25.

At the same time in 1982, the Government of Canada retained section 91(24) in the Constitution Act, which does not recognize Indigenous sovereignty and the Immemorial right of Indigenous Peoples to manage their traditional territories, resources, or peoples. The exclusion of Indigenous sovereignty and Immemorial rights in Canada through section 91(24) extends to the rest of the Constitution Act, including section 25 and 35.

To be clear, section 35 excludes Indigenous sovereignty, Immemorial rights, law, and jurisdiction.

Treaty Rights:

Section 35 creates Treaty rights that are not Indigenous sovereignty or Immemorial rights-based. Treaty rights exclude pre-existing Indigenous sovereignty and limit Immemorial rights to traditional territories. In this regard, Treaty rights under section 35 are ‘less than’ Immemorial rights. Treaty rights are protected and treaty limitations are enforced by the Canadian judiciary system which excludes Indigenous law, Immemorial rights, and sovereignty.

Aboriginal Rights:

Since section 91(24) does not recognize Indigenous sovereignty or Immemorial rights, by definition Aboriginal rights created in section 35 are based on Crown sovereignty and rights to the exclusion of Indigenous sovereignty and Immemorial rights. Aboriginal rights under section 35 are a ‘new class’ of rights introduced into Canada in 1982. In fact, there were no Aboriginal rights in 1982 and the class was empty. Aboriginal rights must be proven in court by something called the ‘integral to the distinctive culture test’ before they are a recognized section 35 Aboriginal rights. The rule of law that defines and protects new Aboriginal rights has evolved in Canada’s court system that is biased against Immemorial rights.

There are a number of Aboriginal rights now guaranteed under section 35, including self-
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government. However, all Aboriginal rights under section 35 are ‘less-than’ Immemorial rights because they are created to the exclusion of Indigenous sovereignty, Immemorial rights, laws, and jurisdiction.

Alternate Rights Regime:

When the Crown delegated its authority into section 35, it created an ‘alternate rights regime’ containing Aboriginal and Treaty rights. The true rights regime of Indigenous Peoples is Immemorial rights which contains ‘Our Rights’ and rights of ‘The Land’. The alternate rights regime in section 35 replaces Immemorial rights domestically and works outside of international concepts of self-determination.

Aboriginal Citizens:

Section 35 has one more important caveat to mention, it defined Indigenous Peoples in Canada as First Nation, Inuit, and Métis ‘Aboriginal’ peoples. In doing so, the Government of Canada created a three-group distinction of peoples. However, these distinctions of Aboriginal peoples are not based on the pre-existing sovereignty of Indigenous nations who already had their ‘distinct peoples’. This is important since these distinctions of First Nation, Inuit, and Métis are not recognized by international law as sovereign Indigenous Peoples entitled to the international right of self-determination.

If we put the whole of section 35 together with its Treaty rights, Aboriginal rights, and three-group peoples distinction of Aboriginal peoples, section 35 created a new class of ‘Aboriginal citizen’ with an alternate rights regime. New citizens are called Aboriginal peoples and have three ethnic groups, First Nations, Inuit, and Métis peoples. Rights of these new citizens are protected by section 25. These new Aboriginal citizens have:

- A right to self-government in place of the international right to self-determination;
- Treaty rights and Aboriginal title in place of Indigenous sovereignty over land and resources; and,
- Aboriginal rights in place of Immemorial rights.

At some point in the future, non-Indigenous and Indigenous Peoples will need to renew the Constitution Act to reflect a relationship based in self-determination, a relationship without the Doctrine of Discovery and sections 25, 35, and 91(24). When that time comes, Indigenous Peoples in Canada may choose an option for internal self-determination. If they do, Indigenous Peoples and Canada will need to work together to constitutionally include ‘Indigenous citizens’ and their Immemorial rights to sovereignty, law, and jurisdiction. Immemorial rights must be defined by Indigenous Peoples. To receive that definition, community-based rights-holders will need to be consulted by the Government of Canada.

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i see section III, 2.1
ii see section III, 11.2
iii see section III, 11.1
iv see section III, 11.2
v see section III, 11
vi see section II, 2.1

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2.3.3 Treaty Rights

The making of treaties created Treaty rights for Indigenous Peoples apart from the residual (or permanent) rights to sovereignty over land and peoples. Treaty rights are ‘pencilled’ into a treaty. They are guaranteed in section 35 of the Constitution Act and defined by common law.

Canada recognizes its treaties with Indigenous Peoples as domestic agreements with no international status – no grounding in Indigenous sovereignty. As such, Treaty rights under section 35 are restricted to what is pencilled into the agreement with the extinguishment of all other residual sovereign-based Immemorial rights. Treaties remove Immemorial rights with this extinguishment, resulting in Treaty rights that are ‘less-than’ sovereign Immemorial rights to land and resources. All treaties are interpreted by, and Treaty rights are defined by, the Canadian rule of law.

For simplicity, Canada’s treaties with Indigenous Peoples can be loosely put into 4 groups:

1. Pre-confederation Treaties;
2. Post-confederation Treaties;
3. Modern Treaties; and,
4. Unsettled Claims.

Treaties can be further categorized as:

1. Friendship Treaties;
2. Surrender Treaties;
3. Land Claims with Self-Government Agreements; and,
4. Bilateral Agreements (Right-specific).

In words from the Report of the Royal Commission Aboriginal Peoples (1996), the intent of the Treaty process was:

“The Crown asked First Nations to share their lands with settlers, and First Nations did so on the condition that they would retain adequate land and resources to ensure the wellbeing of their nations. The Indian parties understood they would continue to maintain their traditional governments, their laws and their customs and to co-operate as necessary with the Crown. There was substantive agreement that the treaties established an economic partnership from which both parties would benefit.”

The Crown has always understood treaties as the instrument by which ‘Aboriginal title’ to land is voluntarily extinguished. Aboriginal title should not be confused with Indigenous sovereignty over land and resources. Most Indigenous Peoples in Canada do not understand the Crown removed their sovereign right to control their traditional territories with the Doctrine of Discovery ‘before’ Canada was confederated in 1867. The Aboriginal title that can be claimed by Indigenous Peoples after confederation is the right to occupy and use the land, not resources, until it is developed by the Crown.

“Although Canadian law allows for the surrender of Aboriginal title [under section 35] to the Crown, this does not mean that it is surrenderable under Aboriginal law

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i see section I, 2
ii see section II, 2.3.5
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[Indigenous law]. Leroy Little Bear has explained that Aboriginal peoples generally did not have a concept of land ownership that would have included authority to transfer absolute title to the Crown. They received their land from the Creator, subject to certain conditions, including an obligation to share it with plants and animals. Moreover, the land belongs not just to living Aboriginal persons, but to past and future generations as well.

The Treaty process has a number of fundamental problems. Some of which are:

1. Only the Crown's version of Treaty negotiations and agreements was recorded in accounts of negotiations and in the written texts. One of the exceptions to this is a pencilled copy of the verbal account of Treaty 3 called the Paypom Treaty.
2. The Crown failed to establish the necessary laws to uphold most pre- and post-confederation treaties;
3. Most pre- and post-confederation Treaty promises were unfulfilled and legislation frequently overwrote Treaty promises; and,
4. For most of Canada's history, no effective office in government was given responsibility for fulfilling Crown Treaty commitments.

All of Canada’s treaties were made under the Doctrine of Discovery. Treaties were negotiated by the Crown from a position in which the Crown ‘controlled’ everything and attempted to give as little control or benefit as possible to Indigenous Peoples. As a result, we have a myriad of treaties and agreements that have created wildly inconsistent Treaty rights from one Indigenous nation to the next.

A reasonable question to ask would be, when the hard bargaining allowed under assumed sovereignty during a consultation process resulted in less Treaty rights to one Indigenous nation than another, was there discrimination or a violation of rights? If the answer is no, does it result in discrimination or a violation of rights when the Doctrine of Discovery is removed? Keep in mind, the exercise would need to be done using provincial, federal, and international rights instruments. The answer is, “Yes.”

“...the spirit of the treaties, by contrast, is the spirit of a time when the ancestors of today's Canadians needed friends and found them.”

When the Doctrine of Discovery is removed, the Government of Canada will need to reassess treaties and Treaty rights in the context of Indigenous sovereignty. That sovereignty will need to be defined by Immemorial rights, international rights, and self-determination. However, there is no data base on the Immemorial rights of Indigenous Peoples within various Indigenous nations in Canada.

The TRC’s final report calls on the Government of Canada to renew or establish Treaty relationships with Indigenous Peoples. To accomplish this, the Government of Canada will need to consult community-based Immemorial rights holders to ensure treaties respect and affirm these rights equally between treaty groups.
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2.3.4 Aboriginal Rights:

We have already seen that Aboriginal rights created by section 35 are defined by a system based on the Doctrine of Discovery and are part of an alternate rights regime that replaces Immemorial rights. Aboriginal rights under section 35 are therefore by definition ‘less-than’ their counterpart Immemorial rights. However, this does not diminish the importance of the protection section 35 provides to Aboriginal rights in the interim as Indigenous Peoples move toward the Doctrine of Discovery’s removal from a new relationship with the Crown.

The duty of the Crown to consult and accommodate Indigenous Peoples flows from the Crown’s assumed sovereignty over lands and resources. The duty is now an Aboriginal right under section 35. It was defined by common law and the bulk of Aboriginal law governing it is still in common law. We will use the Aboriginal right to consultation as an example of the disconnect between Aboriginal and Immemorial rights:

Right to Consultation:

Indigenous Peoples understand their right to consultation in terms of Immemorial rights where, among other things:

1. ‘Our Rights’ and ‘The Land’ will be protected; and
2. There will be an agreement.

However, common law for the Aboriginal right to consultation indicates:

1. Aboriginal rights recognized under section 35 can be infringed upon or denied when required; and,
2. The Aboriginal right to consultation is the Crown’s commitment to a process with no duty to reach an agreement.

As an Aboriginal right, the constitutional right to consultation is ‘less-than’ its counterpart Immemorial right to consultation. The same is true for other section 35 Aboriginal rights including: Self-government, fishing, hunting, and etc.

Extinguishing Aboriginal Rights:

Immemorial rights are given by the Creator and have no end. Aboriginal rights can be removed (extinguished) from Indigenous Peoples by the Crown in one of four ways. Through:

1. The removal of section 35 from the Constitution Act. This can be done without First Nation consent following resolutions from the House of Commons, the Senate, and two-thirds of provincial legislatures representing more than fifty percent of Canada’s population;
2. The Indian Act provides a mechanism to extinguish First Nation status, and therefore Aboriginal rights, through bloodline dilution;
3. Treaties and land claims execute a voluntary surrender of Aboriginal rights and title, and,

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i see section II, 2.3.2
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4. Legislation prior to 1982.⁶⁶⁶⁷

When the Doctrine of Discovery is removed, assumed sovereignty will end. The Government of Canada and Indigenous Peoples will need to renew their relationship with the inclusion of Immemorial rights into the Constitution Act and the rule of law to replace Aboriginal rights.

2.3.5 Aboriginal Title

Indigenous Peoples in Canada are sovereign and that sovereignty predates the Crown in Canada. The authority of that sovereignty extends over their communities and traditional territories. That jurisdictional authority is defined by their Immemorial rights, including rights to land. Indigenous Peoples have a sovereign, underlying title to their traditional territories, an ‘Indigenous title’.

The Crown assumed sovereignty in Canada through the Doctrine of Discovery. At the time sovereignty was assumed, the Crown acquired underlying title to Indigenous land but it was burdened by the pre-existing legal right of Indigenous Peoples to use and occupy their land.⁶⁸⁶⁹ This is referred to as ‘Aboriginal title.’ Aboriginal title is an Aboriginal right protected under section 35 of the Constitution Act:

“Where title is asserted, but has not yet been established, s. 35 of the Constitution Act, 1982 requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests;” and,

“Once Aboriginal title is established, s. 35 of the Constitution Act, 1982 permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown’s fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.”⁷⁰

The following quote places the Doctrine of Discovery and Aboriginal title into perspective.

“The land rights of Indigenous peoples have never been recognized by the European-based system of international law as having priority over the rights of colonizing states; and although international law has undergone dramatic shifts in terms of recognizing human rights, there has never been an attempt to revisit the injustice inherent in the notion of sovereignty based on the Doctrine of Discovery. Consequently, Indigenous peoples have been forced to deal with judicial systems that are wedded to an archaic and racist principle of papal law…. Sovereignty is presumed to reside in the Crown, and thus the Crown has the right to own Native land. Native peoples are regarded as having an Aboriginal claim on land, but this claim is not equivalent to ownership. Aboriginal title relates to rights of occupation and use, not underlying title. Thus, all Aboriginal land rights are limited in Canada. Any land right can be contravened if the government deems such a move necessary for economic or other reason…. Regardless of the negotiations and payment of compensation that are now by convention considered to be necessary components of the process of extinguishing Aboriginal rights, the fact that extinguishment is possible, and that limits on alienability continue to be imposed on Native peoples, underscore the Crown’s preemptive rights that are founded in
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The Doctrine of Discovery.”\textsuperscript{71} [emphasis added]

The Crown’s underlying title to land, under assumed sovereignty, will end with the removal of the Doctrine of Discovery. The Crown must consult Indigenous communities on Immemorial rights to recognize and reconcile with Indigenous sovereignty over traditional territories.

2.3.6 Inherent Rights & the UNDRIP:

Many Indigenous and Non-Indigenous groups use the term, ‘Indigenous rights’ and ‘Inherent rights’ interchangeably. In this report, we have chosen to use the descriptive term, Immemorial rights, for Indigenous rights defined by Indigenous Peoples, and Inherent rights, for Indigenous rights defined in the 2007 UNDRIP.\textsuperscript{72}

Inherent is defined as, “Existing as an inseparable part; intrinsic.”\textsuperscript{73} In this, Immemorial rights are ‘inherent’ to Indigenous Peoples. In the discussion before us, Inherent rights contained within the UNDRIP are part of Immemorial rights, but only a part.

The UNDRIP recognizes Indigenous Peoples are entitled to the international right of self-determination. It includes a variety of Inherent rights associated with self-determination that are now recognized as international rights of Indigenous Peoples. While the declaration did not create new or special Inherent rights for Indigenous Peoples, it contains Indigenous-specific expressions of international rights already guaranteed by international human rights instruments,\textsuperscript{74} instruments the Government of Canada is a signatory to.

The UNDRIP includes Inherent rights to:\textsuperscript{75}

- Self-determination and Indigenous Institutions;
- The enjoyment of human rights and equality;
- Life, integrity, and security;
- Culture, religious, and linguistic identity;
- Education, public information, and employment;
- Participate in decision making and free, prior, and informed consent;
- Economic and social institutions;
- Land, territories, and resources;
- Treaties and other constructive agreements; and,
- Indigenous women’s rights.

Limits to UNDRIP Rights:

Inherent rights outlined in the UNDRIP:

1. Are based in the present generation only;
2. Include redress of the present generation for wrongs against past generations; and
3. Include compensation of the present generation for ongoing colonization – wrongs against future generations.

Inherent rights outlined in the UNDRIP are ‘less-than’ Immemorial rights as Immemorial
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rights consider the rights of past, present, and future generations equally.\(^i\)

Inherent rights contained within the UNDRIP are not influenced by the Doctrine of Discovery. However, they are influenced by state efforts to maintain an international status quo. In this regard, there are two Inherent rights’ limitations in article 46\(^76\) of the UNDRIP that are important. They are referred to as the:

1. Safeguard Clause:
   - The safeguard clause requires the decolonization of self-determination to maintain the existing territorial boundaries and political unity of the sovereign host colonial state;
   - The clause essentially removes the right to external self-determination (creating a sovereign independent state) for Indigenous Peoples.\(^77\) As it does so, it negatively affects the expression of Immemorial rights for past, present, and future generations by:
     - Ignoring the rights of past generations to have pre-existing sovereign nations reconstituted;
     - Ignoring the rights of the present generation to meaningfully participate in a process to create or change government institutions so that they can freely pursue their economic, social, and cultural development in a manner that leads to reconstituting or creating sovereign independent nations; and,
     - Ignoring the rights of future generations to create sovereign independent nations by aggregating their peoples in a manner of their choosing.

2. Repugnant Clause:
   - The repugnant clause requires the practice of UNDRIP Inherent rights and self-determination not conflict with principles listed in the clause: Principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance, and good faith.
   - Aspects of Indigenous Immemorial rights, law, and jurisdiction can be defined as repugnant by the eurocentric principles in the clause. If this occurs, the Indigenous law, Immemorial right, or jurisdiction is invalidated.\(^78\)
   - Examples: Indigenous Peoples forfeit the right to a traditional governance system using inherited Chiefs since it is not a democracy; Matriarchal societies with female leadership roles would be discriminatory against men and disallowed.

The Government of Canada does not recognize Indigenous Peoples as peoples under international law.\(^ii\) As such, the Crown does not recognize that Indigenous Peoples in Canada are legally entitled to Inherent rights contained within the UNDRIP. When the Doctrine of Discovery is removed and Indigenous Peoples move towards self-determination under international law, the Crown will need to recognize Indigenous Peoples in Canada internationally. To understand the Immemorial rights base to that self-determination, the Government of Canada will need to consult community-based

\(^i\) see section II, 2.1
\(^ii\) see section III, 11.1

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Immemorial rights-holders.

3. Authority

To renew their relationship, both the Government of Canada and Indigenous Peoples must work within their lines of authority. Rights are grounded in sovereignty. The authority to act on those rights rests in the sovereign person or group who holds those rights.

3.1 Indigenous Authority:

Indigenous rights are grounded in Indigenous sovereignty which is held by the community, community-based rights-holders. The community can delegated its authority to engage with the Crown but the authority that is delegated is not done so permanently. In this regard, the recipient of the authority must bring the engagement issue back to the community for discussion, guidance, and ratification before a further delegation of authority on the issue. This process should not be misconstrued as consultation or meaningful consultation of community-based rights-holders, it is the process of Indigenous authority delegation.

Indigenous authority generally flows bottom-up from the community. The community delegates authority to its leaders to engage, but it does not delegate its final decision-making authority. Final decisions generally rest with the community.

3.2 Crown Authority

The Crown’s right in Canada is grounded in assumed sovereignty derived from the Doctrine of Discovery. The distribution of the Crown’s right and authority in Canada is detailed in the Constitution Act. Authority over Indigenous Peoples and Indigenous lands was given to the federal government through section 91(24). The authority was allocated into a bureaucratic department and its Minister. That department is currently Indigenous and Northern Affairs Canada (INAC). However, INAC is transitioning into two federal departments, Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada.

The federal government has not devolved, permanently delegated, its section 91(24) authority over Indigenous Peoples and Indigenous land to provincial governments, territorial governments, or third party interests (corporations, partners, other groups, or individuals). In areas where provinces have legislated authority, the constitutional duty to consult and accommodate extends to the province. The Crown can delegate its authority to, among other things, engage in consultation. However, recipient third parties, including municipal governments and other Crown partners, do not have a duty to consult and accommodate without that delegation.

The Crown’s authority flows ‘top-down’ from the Crown. The Crown delegates authority to a department, committee, working group, team, or some other functional group to engage with Indigenous Peoples, but it does not delegate its decision-making authority. Final decisions rest with the Minister or senior department officials.

4. Indigenous Jurisdiction
Jurisdiction is the sphere of activity over which authority extends. Jurisdiction can either be inherent or delegated.\textsuperscript{82}

The Crown assumed sovereignty through the Doctrine of Discovery and delegated its authority over Indigenous Peoples to the federal government through section 91(24). That Crown Jurisdiction extends over all Indigenous traditional territories, resources, and peoples in Canada.

Indigenous Peoples are also sovereign. Sovereignty over land was given to them by the Creator and predates the Crown in Canada. The Inherent Jurisdiction of that authority extends over their communities (peoples) and their traditional territories (land and resources).

Both Indigenous sovereignty and Crown-assumed sovereignty claim jurisdiction over Indigenous communities and land, through ‘Inherent Jurisdiction’ and ‘Crown Jurisdiction’ respectively. There is a continuous battle in Canada between Inherent and Crown Jurisdictions to see which will own and direct existing and developing Indigenous cultural, social, political, and economic institutions in Canada. However, the Doctrine of Discovery allows Crown Jurisdiction to replace Inherent Jurisdiction.

\textbf{4.1 Inherent Jurisdiction}

Indigenous Jurisdiction generally does not have its decision making delegated due to the communal nature of Indigenous sovereignty. It is inherent.

The Inherent Jurisdiction of Indigenous governments arises from the existence of Indigenous Nations in North America prior to the arrival of Europeans; from pre-existing sovereignty.\textsuperscript{83} From an Indigenous perspective, Inherent Jurisdiction is the Indigenous governance expression of Immemorial rights over traditional territories (land and resources) and communities (societal institutions and people).

\textbf{4.2 Crown-Delegated Jurisdiction}

The Government of Canada delegates authority and jurisdiction to organizations to empower them to function as part of Canada’s infrastructure (Crown corporations, health and education authorities, environmental assessment boards, human rights commissions, and etc.). When the Crown delegates authority, with it comes the sphere over which the jurisdiction of that authority extends. The Crown’s authority replaces all other authority (jurisdictions) within the sphere of authority creating a Crown-Delegated Jurisdiction.

Crown-Delegated Jurisdictions are created through varied combinations of legislation, signed agreements, and funding contributions. They give authority to a group or organization to engage in a defined activity. The use of the Crown’s authority in the organization is controlled by terms laid out in the legislation, bilateral agreements, and contribution agreements that were used to create the Crown-Delegated Jurisdiction. Let it be clear, these organizations become an extension of the Crown and its government in Canada.

The Crown creates Crown-Delegated Jurisdictions with authority over Indigenous lands, resources, or peoples through section 91(24) of the \textit{Constitution Act}. Indigenous communities and organizations often exercise authority that has been delegated to them by the Crown. To receive Crown-delegated authority, changes are mandated within the Indigenous organization.
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replacing laws, policies, and practices previously used by the organization under the authority of Indigenous sovereignty. The new Crown-Delegated Jurisdiction in the Indigenous organization replaces its Inherent Jurisdiction counterpart to effectively assimilate the sovereign Indigenous version of the organization. The resulting indigenous organization no longer retains its Immemorial rights base. The Crown’s ability to do this comes from the Doctrine of Discovery which gives assumed sovereignty and Crown rights higher authority than Indigenous sovereignty and Immemorial rights.

If left to run its course, the Crown’s continued delegation of jurisdiction will completely replace pre-existing Indigenous governance and its Inherent Jurisdictions.

“Many First Nations maintain that any form of delegated authority is inconsistent with an inherent right of self-government.”

The following are examples of Crown-Delegated Jurisdictions.

4.2.1 Chief and Council

The most profound example of Crown-Delegated Jurisdiction is the Indian Act (1985) which was first brought into force in 1876. The band governance system in sections 74 to 86 of the Indian Act replace the Immemorial right to Indigenous government. It does so by delegating Crown authority to create an Indian band jurisdiction which excludes the Inherent Jurisdiction of the nation’s pre-existing governance. The result is that band councils (Chief and Councillors) do not have the same authority over their traditional territory as did their pre-contact nation’s leaders, they have less. Band councils administer in-community programs under the direction of the Department of Indigenous and Northern Affairs Canada (INAC). They are accountable to INAC for the use of funds and administratively considered to be a part of INAC.

The Crown developed alternate legislation for elections and governance for First Nations who want to move away from the Indian Act. However, it too creates a Crown-Delegated Jurisdiction for First Nation governance.

Some First Nation communities are moving away from the Indian Act governance system towards self-government. Self-government is recognized by the Government of Canada as an Aboriginal right under section 35. Unfortunately, section 35 is an alternate rights regime with Aboriginal rights that are less-than their Immemorial rights counterparts. Consequently, self-government under section 35 replaces self-determination but is less-than self-determination under Inherent Jurisdiction.

4.2.2 Indigenous Partners

The Indian Act began a process of re-making the Indigenous political landscape by influencing how Indigenous political organizations were structured.

“Perhaps less well appreciated is the way the Indian Act, because of its separation of status and non-status Indians, has influenced how national Aboriginal political organizations are structured. The legislation helped institutionalize divisions between Aboriginal political organizations. This is not to suggest that Aboriginal
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peoples do not have divisions and differences of their own. However, the Indian Act legislated key divisions and helped create Aboriginal political structures that made divide-and-conquer politics an easier game to play.”

This process of remaking the Indigenous political landscape was advanced when section 35 of the Constitution Act (1982) recognized and affirmed existing, and future, Treaty and Aboriginal rights. In doing so, the governments in Canada needed policy input on Treaty and Aboriginal rights. Crown-Delegated Jurisdiction partnerships were created to receive policy input. These new jurisdictions are now referred to by the Government of Canada as ‘Indigenous partners.’ We will mention three basic types of Indigenous partners:

1. Treaty Partners;
2. National Partners; and,
3. Institution Partners.

Indigenous partners are empowered by legislation, agreements, and funding arrangements with the Crown that community rights-holders are not party to. The Crown-Delegated Jurisdiction vested in Indigenous partners gives the partner authority to work with the Government of Canada in place of community-based rights-holders, bypassing the consultation of Immemorial rights-holders.

It is highly unlikely Indigenous partners are aware of Crown-Delegated Jurisdiction and how it is undermining the Inherent Jurisdiction of communities and Indigenous sovereignty. Most Indigenous partners simply see agreements and funding contributions as a way to keep their staff working and organizations afloat.

4.2.2.1 Treaty Partners

Through funding arrangements and Memorandums of Understanding, the Crown delegated authority to Treaty organizations transforming them into institutions of Treaty governance, replacing traditional Indigenous nation governance systems. These Crown-Delegated Jurisdictions are placed between the Crown and signatory communities; they are Treaty Partners.

The Government of Canada consults Treaty Partners on policy issues affecting signatory communities. Treaty Partners consult community leaders, provide guidance to the Crown, deliver programs for the Crown, and negotiate with the Crown.

The Crown has no legal duty to consult Treaty Partners and it did not delegate its authority to consult Indigenous communities to Treaty Partners. Treaty Partners do not themselves hold Immemorial, Fiduciary, Aboriginal, Treaty, or Inherent rights. These rights belong to community rights-holders do.

The Crown has a constitutional obligation to discharge its duty to consult Indigenous community rights-holders or a group delegated with their Inherent Jurisdiction as rights-holders. To date, the section 35 right of Indigenous Peoples to consultation has not been discharged for every federal policy affecting, or potentially affecting, any Fiduciary, Treaty, or Aboriginal right that the Crown consulted Treaty Partners in regard to.

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i see sections II, 2.1 and 2.3.1 to 2.3.6
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The Crown-Delegated Jurisdiction given to Treaty Partners is based on assumed sovereignty and the Doctrine of Discovery. Treaty Partners do not realize they are eroding the Inherent Jurisdiction of communities and Indigenous sovereignty. When the Doctrine of Discovery is removed, the Crown will be obligated to consult community treaty signatories or with treaty organizations delegated Inherent Jurisdiction by community rights-holder through agreements and funding contributions with Indigenous communities.

4.2.2.2 National Partners

Section 35 resulted in, among other things, the Crown delegating authority to Aboriginal rights organizations. This did not happen instantly, especially when the section 35 Aboriginal rights box started empty in 1982. As common law definitions of Aboriginal rights began to accumulate and fill the rights box, so did the complexity of issues surrounding those rights. As the complexity increased, so did the need for dialogue. Adding to the dialogue complexity at that time were discussions towards the Indian Residential Schools Settlement Agreement,93 work leading toward the Kelowna Accord,94 and work anticipated in the follow-up to the accord.

In 2005, the Government of Canada entered into political accords, referred to as bilateral accords, with five Indigenous rights organizations to create policies on Aboriginal rights, promote Aboriginal rights, and, in one case, negotiate Aboriginal rights. These organizations are the:

- Assembly of First Nations;
- Congress of Aboriginal Peoples;
- Inuit Tapiriit Kanatami;
- Métis National Council; and,
- Native Woman’s Association of Canada.

Purposes of these bilateral accords included:

- “Establishment of a Joint Steering Committee with representation from the Parties. The Committee will undertake and oversee joint action and cooperation on policy change, including the establishment of a framework or frameworks, to promote meaningful processes for the recognition and reconciliation of section 35 rights, including the implementation of First Nation governments.”95
- “…to enhance the involvement of the Congress of Aboriginal Peoples in the development of federal policies which focus on, or have a significant specific impact on the Congress of Aboriginal Peoples’ constituency, particularly policies in the areas of health, lifelong learning, housing, negotiations, economic opportunities, and accountability;96
- “…to advance the development and delivery of Inuit-specific policies, programs and services, within the Government of Canada, that are responsive to the specific priorities of Inuit and, where appropriate and possible, to coordinate these efforts with provincial and territorial policies, programs and services;”97
- “…to develop and establish manageable negotiation and discussion processes,
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as appropriate, that will address any Aboriginal and Treaty rights of the Métis, including the inherent right of self-government; and, \(^{98}\)

- “...to enhance the involvement of the Native Women’s Association of Canada in the development of federal policies which focus on, or have a significant impact on the Native Women’s Association of Canada constituents. Particularly in the areas of health, lifelong learning, housing, negotiations, economic opportunities, and accountability...”\(^{99}\)

These accords created a ‘National Partner’ Crown-Delegated Jurisdiction for these organizations placed between the Crown and Indigenous communities. The National Partner jurisdiction allowed for governments in Canada to consult accord-holders to create policies that affected the Immemorial, Fiduciary, Treaty, Aboriginal, and Inherent rights of community rights-holders; effectively bypassing the Inherent Jurisdiction of sovereign Indigenous communities and nations. Funding provided to these five organizations and their Provincial/Territorial Organizations approximates $200-300 million per year.

The Crown has no legal duty to consult National Partners and it did not delegate its authority to consult Indigenous rights-holders to National Partners. National Partners do not themselves hold Immemorial, Fiduciary, Treaty, Aboriginal or Inherent rights.

The Crown has a constitutional obligation to discharge its duty to consult Indigenous community rights-holders or a group delegated with their Inherent Jurisdiction as rights-holders. The constitutional right of Indigenous Peoples to consultation has not been discharged for every federal policy affecting, or potentially affecting, any Fiduciary, Treaty, and Aboriginal right that the Crown consulted its National Partners regarding. This right to consultation is protected by section 35 of the Constitution Act.

AFN Example:

Using the Assembly of First Nations (AFN) as an example:

The AFN’s general assembly of members is called the ‘First Nations-in Assembly’.\(^{100}\) All First Nation Chiefs in Canada have a right to be a member, but not all First Nations Chiefs are members. The AFN therefore does not represent all First Nations in Canada.

AFN member Chiefs are not rights-holders, their communities and citizens are. AFN member Chiefs do not have the Inherent Jurisdiction to be consulted on policies affecting community-based rights. However, if the Crown provided meaningful consultation to community-based rights-holders, communities could then provide direction for their Chiefs to contribute and vote on policies at AFN member meetings. Unfortunately, the Crown recognizes the Crown-Delegated Jurisdiction of Chiefs granted under the Indian Act, or through federal legislation, and does not provide a meaningful consultation mechanism to recognize and respect the Immemorial rights of First Nation communities.

The AFN, with the Crown-Delegated Jurisdiction granted to it in the bilateral accord, consults Chiefs, with the Crown-Delegated Jurisdiction granted to them, to create policies that modify or potentially modify the rights of First Nation community-based rights-holders.
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Summary:

In the example, the Crown never provides consultation to First Nation communities to recognize and respect Immemorial rights or section 35 rights. Like Treaty Partners, these National Partners erode the Inherent Jurisdiction of communities and their rights-holders. Also like Treaty partners, National Partners are unaware of this.

Without the Doctrine of Discovery, governments in Canada will need to partner with and consult, Indigenous communities and nations on rights-based policies. National organizations will continue to be needed by Indigenous communities, but they must be directed by, and held accountable to, Immemorial rights holders through agreements and funding contributions with communities or an Inherent Jurisdiction delegated by rights-holders.

4.2.2.3 Institution Partners

It was first suggested that Indigenous Peoples had an Aboriginal right to self-government in 1983.101 In 1995, the Government of Canada recognized the inherent right of self-government as an existing Aboriginal right under section 35.102 That right includes jurisdiction over services that benefit citizens and communities. Service jurisdiction areas include: Agriculture, health, education, government, policing, social services, and child welfare.

Many Indigenous communities lack the population base to justify, and human resource capacity to develop, societal institutions for service delivery jurisdiction. As a consequence, regional ‘Indigenous’ institutions are created by governments in Canada to provide services. Frequently, the new regional Indigenous institution has the same problems as its predecessor, non-Indigenous, institution. This occurs because the new institution was founded on the rule of law and Crown authority,103 not on Immemorial rights, Indigenous laws, or the Inherent Jurisdiction of Indigenous rights-holders.

These regional Indigenous institutions are created by the Crown delegating authority through provincial and federal legislation coupled with funding contribution agreements.104 The new regional institution becomes a Crown-Delegated Jurisdiction founded on colonial law with an Indigenous facade. The Government of Canada includes these regional institutions into their list of Indigenous partners, Institution Partners.

Institution Partners are consulted by the Crown to create policies related to services they deliver. The Crown has not delegated a duty to consult to its Institution Partners and the Crown has no legal duty to consult Institution Partners. Consequently, the Indigenous right to consultation under section 35 has not been discharged for every Crown policy affecting, or potentially affecting, any Fiduciary, Treaty, and Aboriginal right that the Crown consulted its Institution Partners in regard to.

Like Treaty and National Partners, the involvement of Institution Partners in Crown

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i It should be noted that under the international right of self-determination, Indigenous Peoples have the right to develop their societal institutions free from the limitations of alternate rights regimes such as the section 35 right to self-government (see section III, 11).
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Policy formulation eats away at the Inherent Jurisdiction of community rights-holders. Bear in mind, that a certain level of input on services and service delivery will always be needed from Institution Partners. However, that input should come from an institution that was given the Inherent Jurisdiction from community rights-holders to provide those services. These Inherent Jurisdictions would then be accountable to Indigenous communities.

4.3 Jurisdiction Disparity

Indigenous Peoples are sovereign. Indigenous sovereignty provides legal entitlement to Immemorial rights and the authority to extend those rights into a jurisdiction. Indigenous Peoples have Inherent Jurisdictions that extend over their communities and traditional territories.

The Crown’s sovereignty provides legal entitlement to Crown rights and the authority to extend those rights over the Crown’s jurisdiction. However, the Doctrine of Discovery allowed the Crown to assume sovereignty over communities and land in Canada for which Indigenous sovereignty and Inherent Jurisdictions apply.

Diagram 1: The disconnect of jurisdictional disparity. The Crown does not consult Inherent Jurisdictions or Immemorial rights-holders on policy, legislation, or practices that affect section 35 rights. The Crown consults Crown-Delegated Jurisdictions created by the Crown under section 91(24) who are not rights-holders. (Tr., Treaty; Na., National; In., Institution) © CAID 2018
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The Crown used the power of its assumed sovereignty to delegated jurisdiction through legislation and agreements to Indigenous leaders and organizations to create societal institutions that replace their sovereign Indigenous counterpart. The result is a relentless, progressive replacement of Inherent Jurisdictions for political, governance, and service delivery organizations with Crown-delegated organizations that are accountable to the Crown and the Crown’s rule of law.

At the present time, the Crown consults Indigenous governance leaders and partners given Crown-Delegated Jurisdiction to formulate policies, legislation, and practices that affect section 35 rights. The Crown does not consult an Inherent Jurisdiction created by community-based Immemorial rights-holders or rights-holders themselves as required by the rule of law. This creates a disparity, or disconnect, between the Crown and the group holding the rights that should have been consulted (see Diagram 1). As a result of the jurisdiction disparity in consultation, the Crown implements policies that are rejected or fail at the community and traditional governance levels.

An example of jurisdiction disparity occurred in 2014 with the failure of the First Nations Control of First Nations Education Act. The act was negotiated by the AFN with Aboriginal Affairs and Northern Development Canada (INAC). The AFN operated under a mandate given to it by the Chiefs in Assembly in 2013. Community concerns over the need for nation-to-nation consultation on legislation affecting Treaty rights to education, rights held by community-based rights-holders, was the primary reason for the catastrophic failure. The failure resulted in the forced resignation of the AFN’s National Chief and the withdrawal of the act from before the House of Commons.

The Government of Canada has publicly committed to implementing the UNDRIP and the TRC’s Calls to Action, both of which call for an end to the Doctrine of Discovery. To accomplish this, the Crown will need to recognize Immemorial rights and the Inherent Jurisdiction of Indigenous sovereignty through consultation of community-based rights-holders.

5. Meaningful Consultation

To successfully remove the Doctrine of Discovery and recognize Immemorial rights, consultations of community-based rights-holders must be undertaken. Under the doctrine, ‘meaningful consultation’ has a dramatically different meaning for Indigenous Peoples versus the Crown.

5.1 Indigenous Perspective

We believe Indigenous communities should define consultation processes for themselves, but there are several components that experience has shown should be included.

To recognize Immemorial rights, consultations of community-based rights-holders must be undertaken. Many Indigenous communities we have worked with have understood that ‘meaningful consultation’:

1. Is culture-based;
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2. Is nation-to-nation, recognizing Indigenous sovereignty
3. Recognizes Inherent Jurisdiction over community, Indigenous institutions, and traditional territory;
4. Recognizes Indigenous stewardship over traditional territory;
5. Consults Immemorial rights and Indigenous law;
6. Recognizes Immemorial rights as equal to Crown rights;
7. Includes the sovereign right to say, “no;” and,
8. Ensures Immemorial rights remain intact for past, present, and future generations.

Indigenous communities see the basic goal of meaningful consultation as a bilateral sharing of rights and culture to establish a relationship for sharing the land based on the recognition of Indigenous sovereignty, Immemorial rights, law, and Inherent Jurisdiction. In that, Indigenous Peoples see basic objectives of meaningful consultation as:

- Cultural inclusion (Immemorial rights, Indigenous law, traditional knowledge, and etc.);
- Acquiring the consent of Indigenous rights-holders on rights-based or land-based issues (land claim settlements, resource agreements, legislative changes affecting Immemorial, Fiduciary, Treaty, Aboriginal, and Inherent rights, societal institutions for health, education, child welfare and more, and etc.);
- Correcting the wrongs of colonization and cultural genocide; and,
- Creating agreements.

Community Immemorial rights-based meaningful consultations include, but are not limited to:

1. Consultation of rights related to self-determination and traditional territory:
   a) Living on the land, sharing it, and managing it;
   b) Hunting, fishing, gathering, trading, accessing other resources, and building to the benefit of families and communities;
   c) Owning, directing, and managing societal institutions (education, health, child welfare, justice, land, etc.);
   d) Governing communities, traditional territories, and relationships with outside jurisdictions; and,
   e) Directing individual, community, and nation destinies.

2. Consultation for vested rights of land, water, air, plants, and animals within the traditional territory:
   a) Protecting the land and its resources; and,
   b) Monitoring the use of traditional territory.

5.2 Crown Perspective

The Crown’s understanding of ‘meaningful consultation’ is defined in Aboriginal law. More specifically, it is defined in the dearth of common law that has accumulated as Indigenous Peoples turned to courts to protect their rights. Meaningful consultation:

1. Is the Crown’s legal, common law, duty to consult when advancing its colonial
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interests in land over which Indigenous Peoples claim Aboriginal or Treaty rights that are protected under section 35 of the Constitution Act (1982):\textsuperscript{121} 122

a) It is grounded in the honour of the Crown.\textsuperscript{123} 124
b) It is the Crown’s commitment to a meaningful ‘process’, not a commitment to agree.\textsuperscript{125}
c) It applies to settled and unsettled claims.\textsuperscript{126}
d) It has a defined ‘trigger’ that engages the Crown.\textsuperscript{127} 128 129 130

e) The nature and ‘scope of the duty’ to consult must be determined in each case:\textsuperscript{131}
   i. Both the strength of the support for the right and the impact of potential adverse effects are taken into account for this determination.\textsuperscript{132}
f) Consulted rights are recognized and affirmed under section 35 but are not absolute and can be infringed upon:\textsuperscript{133}
   i. The infringement of a right can be justified before a court by answering, ‘Can you and should you.’\textsuperscript{134}

2. Is part of a negotiation process to reach an agreement in regard to the Crown taking up of Indigenous lands;\textsuperscript{135}
   a) There is no duty to reach an agreement.\textsuperscript{136}

3. Has both consultation and, if appropriate, accommodation components;\textsuperscript{137}
   a) The Crown determines if there is a duty to accommodate.\textsuperscript{138}
   b) The Crown may not accommodate Indigenous Peoples after a duty to accommodate is established.\textsuperscript{30}

4. Is assessed by the Crown’s offer of accommodation in regard to the potential impact of the infringement on the right under consultation.\textsuperscript{139}

The Crown’s overarching goal of meaningful consultation is the, “… reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown.”\textsuperscript{140} The Crown uses meaningful consultation processes:

1. To discharge its legal duty to consult;
2. To plan the exploitation of Indigenous lands;\textsuperscript{141}
3. To infringe on Aboriginal rights while pursuing objectives for Indigenous land and resources;\textsuperscript{142}
4. To accommodate Indigenous Peoples for infringement on their rights.\textsuperscript{143}

The Crown’s perspective on meaningful consultation, negotiation, and land use planning will need to change when the Doctrine of Discovery is removed and Immemorial rights and Indigenous law take their place in Canada. The Crown needs an appropriate process to meaningfully consult Immemorial rights and Indigenous law for the reconciliation of Crown rights with Immemorial rights of Indigenous Peoples for past, present, and future generations plus rights of the land.

6. Framework of Colonization

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Canada’s first Prime Minister, the Right Honourable Sir John A. Macdonald, informed parliament that Canada’s goal would be:

“... to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion.”

In that regard, the historical perspective for the relationship of the Crown with Indigenous Peoples is one of colonization. As we mentioned in our introduction, the system Canada used for the colonization of land did not suddenly appear in a blinding flash of light supported by a colonial big bang theory. Colonization started, then bits and pieces of its machinery were added along the way.

Colonization started with the Doctrine of Discovery removing Indigenous sovereignty over lands and resources. The Crown then assumed sovereignty over Indigenous lands, resources, and peoples. In 1867, the Crown vested its rights into governments in Canada through the British North America Act (constitution). Those rights were divided between federal and provincial governments with control over Indigenous lands, resources, and peoples falling to the federal government. Legislation was enacted and policies developed to take up lands and resources while assimilating Indigenous Peoples. The rule of law protected Crown rights.

![Diagram 2: The Framework of Colonization. See Table 1 for details. © CAID 2018](image)

“Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian
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Colonization underwent a facelift of sorts with the repatriation of the Constitution Act and inclusion of sections 25 and 35 in 1982. Legislation and policy, protected by the rule of law, further developed after 1982 to what is in place today.

The constitutional, legal, legislative, and bureaucratic framework that currently empowers assumed sovereignty over Indigenous lands, resources, and peoples is referred to as the Framework of Colonization. With the Government of Canada choosing to renew its relationship with Indigenous Peoples, the Crown will need to base the new relationship on something other than the Doctrine of Discovery. No matter what that new base is, the Framework of Colonization will need to be replaced.

There are a number of ways the current relationship can be portrayed. We will focus on areas we have already discussed using the flow of Crown rights as an organizational axis (see Diagram 2).

Table 1 provides a brief description of the Framework of Colonization in Canada’s current relationship with Indigenous Peoples.

<table>
<thead>
<tr>
<th>Table 1: Canada’s Framework of Colonization</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Doctrine of Discovery:</strong></td>
</tr>
<tr>
<td>i. The doctrine removed Indigenous sovereignty over lands, resources, and peoples replacing it with Crown-assumed sovereignty.</td>
</tr>
<tr>
<td><strong>2. Assumed Sovereignty:</strong></td>
</tr>
<tr>
<td>i. Assumed sovereignty replaced Indigenous authority with Crown authority; and,</td>
</tr>
<tr>
<td>ii. Assumed sovereignty provided the authority to create a constitution for Canada that entrenched Crown rights and objectives while excluding rights and objectives of Indigenous Peoples.</td>
</tr>
<tr>
<td><strong>3. Constitution Act 1867-1982:</strong></td>
</tr>
<tr>
<td>a) Section 91(24): Section 91 (24) is the constitutional instrument for the Government of Canada’s authority to colonize Indigenous lands and people.</td>
</tr>
<tr>
<td>i. Section 91(24) created a Crown Jurisdiction to replace Indigenous Inherent Jurisdictions over lands, resources, and peoples:</td>
</tr>
<tr>
<td>• The authority in section 91(24) is located in the executive branch of the federal government. It is currently vested in the Minister and Department of INAC.</td>
</tr>
<tr>
<td>ii. Section 91(24) also created a fiduciary duty for Indigenous lands, community infrastructure, services and programming, community</td>
</tr>
</tbody>
</table>
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| b) Section 35: | Section 35, with the support of sections 25 and 91(24), is the constitutional instrument for the Government of Canada’s authority to assimilate Indigenous Peoples. Section 35 created Treaty rights, Aboriginal Rights, an alternate rights regime and Aboriginal citizens all of which are used as modern assimilation tools in Canada.  

i. Section 35 created Treaty rights to replaced Immemorial rights for land and resources:  
  - Treaty rights translate nation-to-nation treaties and Land Claim Agreements into domestic agreements with no international status;  
  - Treaty rights under section 35 extinguish Immemorial rights to Indigenous sovereignty that were retained with treaties signed prior to 1982;  
  - Land Claim Agreements entered into under section 35 after 1982 leave no residual Indigenous sovereignty for lands and resources with the Indigenous signatories; and,  
  - Section 35 rights can be unilaterally removed from the Constitution Act ending Treaty rights.  

ii. Section 35 created Aboriginal rights that replaced the ‘Our Rights’ component of Immemorial rights:  
  - Aboriginal title, self-government, consultation, hunting, fishing, and etc. are now all Aboriginal rights under section 35; and,  
  - Section 35 rights can be unilaterally removed from the Constitution Act ending Aboriginal rights.  

iii. Section 35 created a three-group distinction of First Nation, Inuit, and Métis peoples replacing pre-existing Indigenous nations of ‘distinct peoples’:  
  - The three-group peoples distinction in section 35 does not meet the international definition of peoples or Indigenous Peoples;  
  - The three group distinction disqualifies Indigenous Peoples for the international rights to self-determination and permanent sovereignty over lands and resources;  
  - The three-group distinction disqualifies Indigenous Peoples’ eligibility for international Inherent rights described in the UNDRIP;  
  - Indigenous Peoples under section 35 are a new class of Aboriginal citizen, called Aboriginal peoples, with Aboriginal and Treaty rights defined by the rule of law; and,  
  - Section 35 rights can be unilaterally removed from the Constitution Act permanently ending the domestic recognition of Indigenous Peoples in Canada. |
iv. Section 35, together with section 25, created an alternate rights regime that replaces both Immemorial and international rights as the basis of Indigenous self-determination:

- The alternate rights regime is created outside of the international concept of self-determination and excludes Immemorial rights;
- The alternate rights regime interferes with developing cultural, political, social, and economic realms under the international right to self-determination;
- The alternate rights regime interferes with developing self-determination, societal institutions, and land management regimes based on Indigenous sovereignty and Immemorial rights; and,
- The alternate rights regime provides the illusion of recognition and respect for Indigenous sovereignty, Immemorial rights, and Inherent rights in the UNDRIP.

c) Section 25:

i. Section 25 created a separate stream in the Canadian Charter of Rights and Freedoms that protects Aboriginal and Treaty rights for Indigenous Peoples while preventing non-Indigenous people from enjoying these rights:

- Section 25 works together with section 35 to create a new class of Canadian citizen, Aboriginal citizens, whose rights are an alternate rights regime.

d) Schedule:

i. There are a number of documents contained within the Schedule to the Constitution Act, 1982 that are instrumental in assuming sovereignty over Indigenous land and resources, including the Royal Proclamation of 1763, 1870 Order, and the 1880 Order:

- These documents are part of the historical extension of assumed sovereignty and remain in force in Canada’s rule of law.

4. Judicial Branch: The judicial system enforces the Crown’s rule of law. The judicial system:

i. Excludes Indigenous law;
ii. Defines and protects Crown rights and jurisdiction while excluding Immemorial rights and Inherent Jurisdiction; and,
iii. Defines and protects Indigenous-related Fiduciary, Treaty, and Aboriginal rights.

5. Legislative Branch: The legislative system creates legislation (laws) that empower Crown rights, jurisdiction, and objectives:

i. Laws exclude Indigenous law, Immemorial rights, and Inherent Jurisdiction; and,
### Failing to Renew the Relationship

**ii. Laws include Crown rights and will include Indigenous-related Fiduciary, Treaty, and Aboriginal rights in the near future.**

<table>
<thead>
<tr>
<th><strong>a) Indigenous-Directed:</strong></th>
<th>Indigenous-directed legislation is legislation that is specifically directed to interfere with Indigenous sovereignty or replace sovereign Immemorial rights.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Legislation generally involves governance models, land ownership, land use and resource revenues;</td>
</tr>
<tr>
<td></td>
<td>• Most of this legislation is at the federal level. The end result of this legislation is the derailment of self-determination, the colonization of Indigenous lands and the assimilation of Indigenous Peoples; and,</td>
</tr>
</tbody>
</table>

The *Indian Act* (1985):

i. Defines who is eligible to be First Nation (sections 5-13);

ii. Creates Crown-owned land reserves for First Nation communities (sections 18-29) that allow land use and occupation under the Doctrine of Discovery;

iii. Defines a number of First Nation societal parameters (sections 34-73, 87-122) in lieu of self-determination; and,

iv. Creates a Crown-Delegated Jurisdiction for First Nation band governance with a Chief and band council (sections 74-86) that replaces the Inherent Jurisdiction of Indigenous government:

- The band governance system is considered by many to be a departmental extension of INAC into First Nation communities;
- All by-laws created by a band council must be approved by INAC before coming into force; and,
- The Crown’s purpose for the Chief and band council is to distribute funds, deliver fiduciary-related community programming, and represent the community’s signing authority in dealings with Crown officials.

<table>
<thead>
<tr>
<th><strong>b) Indigenous-Related:</strong></th>
<th>Indigenous-related legislation is legislation that affects a specific Immemorial right by exclusion of that right.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Legislation is this group is found in both modern and historic legislation;</td>
</tr>
<tr>
<td></td>
<td>• Legislation generally involves resource and economic-related activities such as hunting, fishing, logging, and mining; and,</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>c) Indigenous-Omitting:</th>
<th>Almost all other legislation in Canada fails to somehow consider Indigenous sovereignty and Immemorial rights.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• This legislation has the potential to infringe on Indigenous sovereignty or Immemorial rights; and</td>
</tr>
<tr>
<td></td>
<td>• Legislation in this group includes health, education, municipalities, domestic animals, wildlife conservation, farming and <em>etc.</em></td>
</tr>
</tbody>
</table>

#### 6. Executive Branch:

<table>
<thead>
<tr>
<th>a) Delegated Jurisdiction:</th>
<th>Crown-Delegated Jurisdictions created with the authority in section 91(24) replace their Indigenous Inherent Jurisdiction counterparts;</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Crown-Delegated Jurisdictions have a competitive advantage over Indigenous Inherent Jurisdictions:</td>
</tr>
<tr>
<td></td>
<td>◦ They have funding, legislative support, access to training, and bureaucratic support that Indigenous Inherent Jurisdictions do not receive.</td>
</tr>
<tr>
<td></td>
<td>• Crown-Delegated Jurisdictions are created through a combination of legislation, bilateral agreements, and funding contributions with organizations, service delivery institutions, and Indigenous communities; and,</td>
</tr>
<tr>
<td></td>
<td>• Examples of Crown-Delegated Jurisdictions include:</td>
</tr>
<tr>
<td></td>
<td>◦ Band council governance under the <em>Indian Act</em>;</td>
</tr>
<tr>
<td></td>
<td>◦ Self-government under section 35; and,</td>
</tr>
<tr>
<td></td>
<td>◦ Indigenous partners.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>b) Agreements:</th>
<th>i. Treaties:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Treaties are permanent bilateral agreements that originated under international law. Treaties in Canada are recognized in section 35 of the Constitution Act turning them into a domestic agreement, a Crown-granted right and a Crown-Delegated Jurisdiction (Treaty Partners);</td>
</tr>
<tr>
<td></td>
<td>• Treaties, modern treaties, and land claims are different names for the same instrument used by the Crown to garner the surrender of Aboriginal title for Indigenous lands.</td>
</tr>
<tr>
<td></td>
<td>◦ Aboriginal title to land is the restricted title to rights of</td>
</tr>
</tbody>
</table>
Failing to Renew the Relationship

occupation and land use that is left to Indigenous Peoples after the Doctrine of Discovery striped away their sovereignty, Immemorial rights, Indigenous law, and Indigenous Jurisdiction;

• Treaties create Treaty rights that are recognized and affirmed under section 35 and protected under section 25 of the Constitution Act. However, Section 35 recognizes only the pencilled-in Treaty rights within the document:
  ◦ Section 35 does not recognize, and therefore the treaty or land claim extinguishes, pre-existing Immemorial rights and sovereignty to land and resources;
  ◦ Treaties under section 35 are domestic agreements that are not recognized internationally as nation-to-nation agreements; and,
  ◦ Treaty rights can be unilaterally removed from the Constitution Act by the federal government.

ii. Self-Government Agreements:

• Self-government is an Aboriginal right under section 35 which when empowered by a bilateral agreement becomes a Crown-delegated Jurisdiction replacing self-determination’s Inherent Jurisdiction of government;
• These agreements create a Crown-Delegated Jurisdiction of Indigenous government with an authority level somewhere between a municipality and province:
  ◦ The authority of these Indigenous governments is less-than it would be under Indigenous sovereignty.
• These agreements include funding contributions and legislation to bring them into force; and,
• These agreements are made under Canadian law:
  ◦ They exclude Indigenous law and infringe on Immemorial rights.
  ◦ These agreements, and the governments they create, are subject to the Crown’s rule of law.

iii. Indigenous Partnerships:

• Indigenous partners are organizations given Crown-Delegated Jurisdiction that replace organizations governed by the Inherent Jurisdiction of Indigenous rights-holders:
  ◦ Indigenous communities are not Indigenous partners.
• Indigenous partnerships are created with a combination of bilateral agreements, funding contributions, and
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| legislation (where applicable): | • Crown engagements with Indigenous partners are used to consult Aboriginal rights and create policy affecting Indigenous Peoples:  
| | ○ Examples include: Treaty, National, and Institution Partners.  
| | ○ These engagements bypass the consultation of community-based Immemorial rights-holders, affect community services, influence legislation, engage Treaty rights, and affect Aboriginal rights.  
| iv. Sectoral Agreements: |  
| | • Sectoral agreements are bilateral agreements that can be permanent or expire needing renewal. They are used in place of treaties and comprehensive land claim agreements to create agreements over particular issues (hunting, fishing, logging, and etc.) or resources (mines, pipelines, and etc.).  
| | • These agreements are made under, and enforced by, the Canadian rule of law which excludes Indigenous law and infringes on Immemorial rights. These agreements promote Crown objectives and rights while replacing Immemorial rights with Aboriginal rights.  
| c) Policy: |  
| | The responsibility of creating policy and making policy decisions rests with elected Ministers:  
| | • Policies reflect objectives of the elected government, but must align with a bureaucracy that is bridled with Crown rights and objectives – which in turn are entrenched in assumed sovereignty and the rule of law; and,  
| | • These policies are expressed in departmental mandates, funding, and programming.  
| i. Mandates: |  
| | • Federal and provincial Ministerial mandates promote programming and funding that advance government objectives while remaining grounded in Crown rights and jurisdiction;  
| | • In general, ministerial mandates exclude Indigenous objectives grounded in Immemorial rights and Inherent Jurisdiction; and,  
| | • Senior government bureaucrats can deny Indigenous projects support citing the department or ministry has, ‘No mandate’:  
| | ○ Most Indigenous proposals are focused at closing
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| gaps in service delivery and healing programs, or resolving poor socio-economics (poverty). The fact a gap exists indicates that services or programs are provided to non-Indigenous Peoples but not to Indigenous Peoples;\textsuperscript{156} and, |
| ○ A policy of ‘no mandate’ is discriminatory\textsuperscript{157} and can violate the rule of law.\textsuperscript{158} Claiming ‘no mandate’ to close these gaps, by definition, is a reflection of continued colonial objectives. |

ii. Operational Practices:

Funding:

• In general, the Crown denies funding to projects that promote Inherent Jurisdictions and Immemorial rights while providing funding to Crown-Delegated Jurisdictions that promote Crown rights or Indigenous-related Fiduciary, Treaty, or Aboriginal rights; and,

• Funding models are developed that fund non-Indigenous jurisdiction-based projects, programs, and service delivery organizations but exclude funding for projects, programs, and service delivery organizations that promote Immemorial rights and Inherent Jurisdiction.\textsuperscript{159}

Programming:

• The Crown uses its rights and objectives, its values, to define and evaluate needed programming and programming levels for Indigenous Peoples and their communities;\textsuperscript{160} and,

• The Crown consults Indigenous partners on programming needs but not Indigenous communities. In doing so, the Crown recognizes Crown-Delegated-Jurisdictions while excluding the Inherent Jurisdiction of community-based rights-holders and their Immemorial rights.

While the Framework of Colonization has evolved since confederation, its goals of colonization and assimilation remain the same. At the root of this resiliency, lies the Doctrine of Discovery. The doctrine forms the base of the Crown’s sovereignty, rights, authority, and jurisdiction in Canada.

As long as the Doctrine of Discovery remains, Indigenous sovereignty, laws, Immemorial rights, and Inherent Jurisdiction will remain excluded from Canada.
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III – Plan to Renew the Relationship

1. The Plan:

The Government of Canada’s work on its plan to renew its relationship with Indigenous Peoples has evolved since the federal Liberal government came to power in November 2015. However, there is little published detail. What detail we have within this section derives from statements released from the Prime Minister’s Office, published federal minister mandates, government websites, and federal budgets.1 2 3 4 5 161 162 163 164 165 166

The overall goal of the plan is to renew the relationship between Canada and its Indigenous Peoples. That renewal will be a nation-to-nation relationship based on:

- The recognition of rights;
- Respect;
- Co-operation; and,
- Partnership.

Table 2 provides an overview of the plan.

<table>
<thead>
<tr>
<th>Table 2: Plan to Renew the Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Government Approach</td>
</tr>
<tr>
<td>- Develop a whole-of-government approach to the renewal of a nation-to-nation, Inuit-Crown, and government-to-government relationship with Indigenous Peoples;</td>
</tr>
<tr>
<td>- Dismantle old colonial structures while advancing rights recognition and greater self-determination;</td>
</tr>
<tr>
<td>- Create two new federal departments and dissolve INAC separating federal responsibilities for Indigenous Peoples.</td>
</tr>
<tr>
<td>- Implement permanent bilateral mechanisms with First Nation, Inuit and Métis national Indigenous partners;</td>
</tr>
<tr>
<td>• Identify each community’s distinct priorities; and,</td>
</tr>
<tr>
<td>• Aid Canada to work with Indigenous Peoples to develop solutions.</td>
</tr>
<tr>
<td>- Advance distinctions-based policy;</td>
</tr>
<tr>
<td>- Enable Indigenous Peoples to build capacity that supports implementation of their vision of self-determination;</td>
</tr>
<tr>
<td>- Improve capacity to consider and respond to the unique realities of Indigenous Peoples; and,</td>
</tr>
<tr>
<td>- Include Indigenous representatives in meaningful ways in Canada’s federal-provincial-territorial dialogues.</td>
</tr>
<tr>
<td>2. Reconciliation</td>
</tr>
<tr>
<td>- Continue necessary processes of truth-telling and healing;</td>
</tr>
</tbody>
</table>
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| 3. Recognition of Rights | - Work to support Indigenous Peoples in their work to rebuild and reconstitute their nations, advancing self-determination, and, for First Nations, facilitating the transition away from the *Indian Act* and toward self-government;  
- Work, on a nation-to-nation basis, with the Métis Nation to advance reconciliation and renew the relationship, based on cooperation, respect for rights, our international obligations, and a commitment to end the status quo;  
- Work to ensure that both in dispute resolution mechanisms and litigation Canada advances positions that are consistent with the resolution of past wrongs towards Indigenous Peoples, promoting co-operation over adversarial processes, and moving towards a recognition of rights approach;  
- Work in full partnership and consultation with First Nations, Inuit, and the Métis Nation to develop a recognition of rights framework and ensuring the Crown is fully executing its legal, constitutional, and international human rights obligations and commitments;  
- Undertake a national engagement process to create a Recognition and Implementation of Rights Framework;  
- Review laws and policies related to Indigenous Peoples based on the *Principles Respecting the Government of Canada’s relationship with Indigenous Peoples*; and,  
- Accelerate progress on existing rights and recognition tables to identify priorities for individual Indigenous communities. |
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<tbody>
<tr>
<td>4. Consultation &amp; Accommodation</td>
<td>- Review laws, policies, and operational practices to ensure that the Crown is fully executing its consultation and accommodation</td>
</tr>
</tbody>
</table>
# Failing to Renew the Relationship

|  | obligations, in accordance with its constitutional and international human rights obligations, including Aboriginal and Treaty rights;  
- Consultation of First Nations, Inuit, and other stakeholders, to improve essential physical infrastructure for Indigenous communities;  
- Amend environmental assessment legislation to enhance the consultation, engagement, and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects; and,  
- Support the capacity of Aboriginal Representative Organizations to engage with the Government. |
|---|---|
| 5. Treaties | - Increase the number of comprehensive modern treaties and new Self-Government Agreements in a manner that reflects a recognition of rights approach and reconciliation;  
- Consider means to clarify obligations and ensure the implementation of pre-Confederation, historic, and modern treaties and agreements, including updating elements of the treaty relationship to ensure consistency with a recognition of rights approach; and,  
- Replace the use of loans to fund Indigenous participation in the negotiation of modern treaties and fund participation with non-repayable contributions starting 2018-19:  
  - Engage with affected Indigenous groups on how best to address past and present negotiation loans, including forgiveness of loans. |
| 6. Fiscal Relationship | - Move towards a renewed economic and fiscal relationship that ensures nations have the revenue generation and fiscal capacity to govern effectively, and to provide programs and services to those for whom they are responsible;  
- Lift the 2% cap on annual funding increases and moves towards sufficient, predictable and sustained funding for First Nations communities;  
- Support First Nations communities in building internal fiscal and administrative capacity;  
- Review current federal government programs and funding that support First Nations governance;  
- Provide communities with sufficient resources to hire and retain the appropriate financial and administrative staff to support good governance, plan for the future, and advance their vision of self-determination;  
- Implement new fiscal policy reforms co-developed with self-governing Indigenous Peoples; |
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- Strengthen the First Nations Financial Management Board, the First Nations Finance Authority, and the First Nations Tax Commission; and,
- Work with First Nations on the on-reserve Income Assistance program:
  - To understand how to make the program more responsive; and,
  - To identify supports required to help individuals better transition from income assistance to employment and education.
- Support the First Nations Information Governance Centre’s design of a national data governance strategy:
  - Coordinate efforts to establish regional data governance centres;
  - Support the development and management of Indigenous data; and
  - Develop data governance and information management capacity among Indigenous governments, communities and organizations.

### 7. Service Delivery

- Primary focus is on issues most important to First Nations, the Métis Nation, and Inuit communities (housing, employment, health and mental health care, community safety and policing, child welfare, education, and access to clean drinking water);
- Ensure that the design, delivery and control of services are led by Indigenous Peoples for Indigenous Peoples:
  - Leverage the ingenuity and understanding of Indigenous Peoples as well as experts from the private sector, provincial, territorial, and municipal governments and international experts on service delivery;
  - Identify best models for delivering improved services to Indigenous Peoples; and,
  - Develop governance models that bring control and jurisdiction back to communities.
- Improve accountability to Indigenous Peoples for the quality of services delivered; and,
- Assess how Indigenous Peoples experience the delivery of government services on a day-to-day basis and identify ways to improve delivery that are holistic, community-based, and put the needs of the person first.

**Health:**
- Reduce the health inequities (gaps) between Indigenous Peoples and non-Indigenous Canadians;
- Create systemic change in how the federal government
<table>
<thead>
<tr>
<th>Failing to Renew the Relationship</th>
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</thead>
<tbody>
<tr>
<td>delivers health services to Indigenous Peoples;</td>
</tr>
<tr>
<td>• Ensure service delivery is patient-centred, focused on community wellness, links effectively to provincial and territorial health care systems, and it considers the connection between health care and the social determinants of health;</td>
</tr>
<tr>
<td>• Provide access to services;</td>
</tr>
<tr>
<td>• Repair, Improve, and construct on-reserve health facilities;</td>
</tr>
<tr>
<td>• Sustain access to critical medical care in isolated First Nations;</td>
</tr>
<tr>
<td>• Expand the Maternal Child Health Program;</td>
</tr>
<tr>
<td>• Enhance cultural addiction prevention and treatments services in First Nations;</td>
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<tr>
<td>• Expand governance models so health programs and services are developed, delivered, and controlled by First Nations for First Nations;</td>
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<tr>
<td>• Preserve access to Non-Insured Health Benefits Program;</td>
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<tr>
<td>• Respond to high rates of Tuberculosis in Inuit communities;</td>
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<tr>
<td>• Co-create a permanent Inuit Health Survey; and,</td>
</tr>
<tr>
<td>• Work with the Métis Nation to develop a health strategy.</td>
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</tbody>
</table>

Child Welfare and Health Care:

• Develop and implement an improved response to the provision of child welfare and health care under Jordan’s Principle;
• Implement the orders of the Canadian Human Rights Tribunal regarding Indigenous child welfare and health care;
• Focus on the best interests of the child;
• Focus on prevention, family preservation and well-being, and community wellness;
• Respond to immediate pressures to deliver health, child, and family services; and
• Make reforms to child and family services.

National Early Learning and Childcare Framework:

• Repair and renovate facilities used by the on-reserve Aboriginal Head Start Program and the Inuit Child Care Initiative;
• Consult provinces and territories and Indigenous Peoples on the Framework as a first step towards delivering affordable, high-quality, flexible and fully inclusive child care; and,
• Implement a distinct Indigenous framework as part of the National Early Learning and Childcare Framework that will take into consideration the unique needs of First Nations, Inuit, and Métis children.

Education:

• Construct, repair, and maintain schools on reserve;
Failing to Renew the Relationship

- Ensure First Nations children on reserve receive a quality primary and secondary education;
- Ensure access to post-secondary education;
- Respect the principle of First Nations control of First Nations education;
- Consult and partner with First Nations to transformation the current on reserve education system; and,
- Review all federal programs that support Indigenous students choosing to pursue post-secondary education.

Nutrition North:
- Consult northern communities to expand the program.

Domestic Violence:
- Ensure that no one is left without a place (shelter) to turn; and,
- Renovate and construct new shelters

Economic Development:
- Promote economic development and create jobs; and,
- Create new Indigenous skills and training employment training program.

Youth and Sports:
- Leverage investments in youth;
- Promote culturally relevant sports; and,
- Support the ‘Right to Play’ model.

Physical Infrastructure:
- Build new, repair, and retrofit housing;
- Eliminate all long-term boil water advisories by 2021; and,
- Support water and wastewater infrastructure.

Implement, expand on, or provide supports for Indigenous-related legislation:
- First Nation Land Management Act;
- Family Homes on Reserves and Matrimonial Interests or Rights Act; and,
- First Nations Fiscal Management Act.

Language and Culture:
- Co-develop an Indigenous Languages Act;
- Include language and culture in on-reserve primary and secondary programs;
- Enhance the Aboriginal Languages Initiative;
- Library and Archives Canada will digitize Indigenous language and cultural materials; and,
- Develop information technology to preserve oral histories.

Indigenous Justice Programs:
### Failing to Renew the Relationship

| | • Provide stable funding for community-based restorative justice programs;  
| | • Reduce the over-representation of Indigenous Peoples in the criminal justice and corrections systems; and,  
| | • Focus on reintegration of past offenders into their communities.  
| **Policing:** | • Address most immediate needs of Indigenous police forces; and,  
| | • Study ways to increase the effectiveness of the First Nations Policing Program.  
| **Fishing:** | • Expand the Pacific and Atlantic integrated commercial fisheries initiative; and,  
| | • Augment Indigenous collaborative management programming.  
| **Environmental Stewardship of Indigenous Lands:** | • Develop a pilot proposal for an Indigenous Guardian Program.  
| **Urban Indigenous Peoples:** | • Invest in Urban Indigenous Centres to provide support for urban-living Indigenous Peoples.  

### 8. Funding

- The federal government has assigned a total of $16.6 billion towards the plan to renew its relationship with Indigenous Peoples.  
  - Budget 2016, $8.4 billion;  
  - Budget 2017, $3.4 billion; and,  
  - Budget 2018, $4.8 billion.  
- These funds unfold for various aspects of the plan over 2, 5, or 10 years.

### 1.1 Analysis:


We have already detailed a number of aspects of the Crown’s current relationship and the Framework of Colonization. In that relationship, there are four fundamental precepts rooted in the Doctrine of Discovery:

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1. see section II, 6
Failing to Renew the Relationship

1. Crown-assumed sovereignty displaces Indigenous sovereignty;
2. Crown laws ignore Indigenous laws;
3. Crown rights and jurisdiction override Immemorial rights and Inherent Jurisdiction; and,

The success of the plan to renew the relationship can be predicted on the basis of the continued presence of these four precepts. If these four precepts are found in the plan’s guiding principles, the Doctrine of Discovery remains and the plan to renew the relationship will fail.

“Simply by removing the shadow of the Doctrine of Discovery, you find a rich tapestry of peoples who need to sit down to speak to each other as equals and build a new mechanism to co-operate with each other, to satisfy each other’s needs and aspirations in the modern world.”

The Government of Canada has advanced a number of strategies to fulfill, in part, the plan to renew the relationship. After a review of the plan’s guiding principles, we will look at a number of these strategies to understand their goals and/or their potential for success.

2. Guiding Principles:


“These Principles are a starting point to support efforts to end the denial of Indigenous rights that led to disempowerment and assimilationist policies and practices. They seek to turn the page in an often troubled relationship by advancing fundamental change whereby Indigenous peoples increasingly live in strong and healthy communities with thriving cultures. To achieve this change, it is recognized that Indigenous nations are self-determining, self-governing, increasingly self-sufficient, and rightfully aspire to no longer be marginalized, regulated, and administered under the Indian Act and similar instruments. The Government of Canada acknowledges that strong Indigenous cultural traditions and customs, including languages, are fundamental to rebuilding Indigenous nations. As part of this rebuilding, the diverse needs and experiences of Indigenous women and girls must be considered as part of this work, to ensure a future where non-discrimination, equality and justice are achieved. The rights of Indigenous peoples, wherever they live, shall be upheld.” [Emphasis Added]

Within the Principles, there are ten guiding principles rooted in section 35 of the Constitution Act (1982),\(^{47}\) guided by the UNDRIP (2007),\(^{169}\) and informed by the 1996 Report of the Royal Commission on Aboriginal Peoples (RCAP)\(^{170}\) and the TRC’s Calls to Action (2015).\(^{171}\) The Principles commit to good faith, the rule of law, democracy, equality, non-discrimination, and respect for human rights.

These Principles, and tenets that underlie them, form the basis of the Government of Canada’s entire plan to:

1. Renew its relationship with Indigenous Peoples;
Failing to Renew the Relationship

2. Support the rights of Indigenous Peoples; and,
3. Remove the Crown’s assimilation policies and practices.

Table 3 contains comments on the underlying tenets for the Principles.

<table>
<thead>
<tr>
<th>Table 3: Tenets Underlying the Principles - Comments</th>
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<tbody>
<tr>
<td><strong>1. Section 35:</strong></td>
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<tr>
<td>Section 35 is the root of the Principles:</td>
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</tbody>
</table>
| • Section 35 created Treaty Rights that replace Immemorial rights to land and resources:  
  ○ Treaties and Land Claims Agreements under section 35 are domestic agreements with no international recognition or nation-to-nation status;  
  ○ Treaties and land claims recognized under section 35 extinguish pre-existing Immemorial rights to Indigenous sovereignty and jurisdiction over land and resources.  
| • Section 35 created Aboriginal Rights that replace Immemorial rights to self-determination and governance:  
  ○ Aboriginal title, self-government, self-determination, consultation, hunting, fishing, and etc. are now Aboriginal rights under section 35.  
| • Section 35 created a three-group distinction of First Nation, Inuit, and Métis peoples replacing pre-existing Indigenous nations of ‘distinct peoples’:  
  ○ The three-group peoples distinction does not meet international definitions of ‘peoples’ and ‘Indigenous peoples’ disqualifying Indigenous Peoples in Canada from:  
  ▪ The international recognition of permanent sovereignty;  
  ▪ Eligibility for Inherent rights under the UNDRIP; and,  
  ▪ The international right to self-determination.  
| • Section 35 created a new class of Canadian ‘Aboriginal citizen’ with Treaty and Aboriginal rights to replace pre-existing ‘sovereign Indigenous citizenship’ with Immemorial rights and jurisdiction over lands and resources;  
| • Section 35 rights can be removed from the Constitution Act without the consent of Indigenous Peoples ending Treaty rights, Aboriginal rights, and the domestic |

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i see sections II, 2.3.2 and 2.3.3  
ii see sections II, 2.3.2 and 2.3.3  
iii see section II, 2.3.3  
iv see sections II, 2.3.2, 4.2.2.3 and III, 11.2  
v see section II, 2.3.4  
vi see section III, 4.2  
vii see section II, 2.3.2 and III, 11.1  
viii see sections II, 2.3.2 and III, 11.2
Failing to Renew the Relationship

recognition of Indigenous Peoples in Canada; and,

• Rights under section 35 are defined by the Canadian rule of law which excludes Indigenous law and Immemorial rights. Treaty and Aboriginal rights are ‘less-than’ Immemorial rights.

2. UNDRIP:
The UNDRIP is only used to ‘guide’ the Principles:

• International self-determination in the UNDRIP is limited by safeguard and repugnant clauses;
• Inherent rights in the UNDRIP are based only in the present generation and include redress for past wrongs. Whereas, Immemorial rights include past, present, and future generations;
• Inherent rights in the UNDRIP are less-than Immemorial rights, but are not based on the Doctrine of Discovery.

3. RCAP and TRC’s Calls to Action:
The RCAP and TRC reports are only used to ‘inform’ the Principles:

• The recommendations of both commissions call for the removal of the Doctrine of Discovery.

4. Good Faith:

• Aboriginal rights in section 35 can be infringed upon by the Crown;
• The Duty to consult allows the Crown to negotiate hard and does not require the Crown to come to an agreement with Indigenous Peoples;
• The Duty of the Crown to accommodate after consulting under section 35 does not require the Crown to accommodate Indigenous Peoples for the right being infringed upon; and,
• The Crown has a veto over the Inherent Jurisdiction of Indigenous Peoples for land and resource development.

5. Rule of Law:

i see section II, 2.3.4
ii see section I, 2
iii see section II, 2.3.6
iv see section II, 2.3.6
v see section II, 2.3.6
vi see section I, 1
vii see sections II, 5.2
viii see section II, 2.3.4
ix see section II, 5.2
x see section I, 2
Failing to Renew the Relationship

- The rule of law defines and protects:\[i\]
  - Crown rights and jurisdiction; and
  - Fiduciary, Treaty, and Aboriginal rights.
- The rule of law excludes Immemorial rights, Indigenous sovereignty, and Indigenous law; it does not recognize Inherent Jurisdictions;\[ii\] and,
- The rule of law is biased against Indigenous Peoples and retains the Crown’s colonial objectives as judges interpret the rights of Indigenous Peoples based on legislation, regulations, previous court decisions, and a constitution that are based on the Doctrine of Discovery.\[iii\]

6. Democracy:

- Repugnant clauses with democratic principles are used to disqualify Indigenous hereditary leadership in favour of eurocentric elected governance structures. A number of Indigenous communities and nations in Canada have a history of hereditary governance leadership. These peoples retain a sovereign right to self-determination using hereditary governance should they so choose;\[iv\] and,
- Section 35, with its Aboriginal and Treaty rights, is subject to removal from the Constitution Act by elected officials working in concert with public opinion\[63\]

7. Equality:

- Repugnant clauses with equality principles are used to disqualify Indigenous patriarchal or matriarchal leadership structures in favour of eurocentric non-gender based governance system. A number of Indigenous communities and nations in Canada have a history of matriarchal governance leadership. These peoples retain a sovereign right to self-determination using matriarchal governance should they so choose;\[v\] and,
- Equality has never existed in Canada for Indigenous Peoples:
  - Indigenous sovereignty, Immemorial rights, Indigenous law, and Inherent Jurisdiction were never recognized by the Crown and so are not equal to Crown sovereignty, rights, law and jurisdiction.\[vi\]

8. Non-discrimination:

- The Canadian Charter of Rights and Freedoms protects Aboriginal and Treaty rights created in section 35, but not Immemorial rights to Indigenous sovereignty, law, and

\[i\] see section I, 2
\[ii\] see section I, 2
\[iii\] see sections I, 2 and II, 2.3.4
\[iv\] see section II, 2.3.6
\[v\] see section II, 2.3.6
\[vi\] see section I, 2
Failing to Renew the Relationship

Inherent Jurisdictions:

• Human rights legislation in Canada does not include Immemorial rights. The rule of law does not, therefore, considered it discriminatory to violate Immemorial rights:
  ○ The *Constitution Act* discriminates against Indigenous Peoples by enabling the Crown to colonize sovereign Indigenous land, enact laws that ignore or infringe on Inherent Jurisdictions and Immemorial rights, take Indigenous children, force relocation, impose education, religion and wardship, commit genocide, remove the international recognition of Indigenous Peoples, and to continue assimilation using rights granted, defined, and controlled by the Crown.

• There is no legislation in Canada that prevents the Crown from discriminating against the sovereignty, Immemorial rights, laws, or Inherent Jurisdictions of Indigenous Peoples.

9. Respect for Human Rights:

• The UNDRIP maintains all doctrines, including the Doctrine of Discovery, that advocate superiority based on racial and cultural differences are racist, legally invalid, and socially unjust – discriminatory,

The Government of Canada, does not respect human rights of Indigenous Peoples in Canada as long as the Doctrine of Discovery remains in effect denying Immemorial rights.

The underlying tenants for the 10 principles retain the four fundamental precepts rooted in the Doctrine of Discovery – the doctrine has not been removed.

Table 4 contains the ten principles of the Principles with comments on each.

<table>
<thead>
<tr>
<th>Principle 1:</th>
<th>Comments:</th>
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<tbody>
<tr>
<td>All relations with Indigenous Peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.</td>
<td>The Crown’s recognition and implementation of self-determination and the right of self-government with Indigenous Peoples is firmly grounded in the Doctrine of Discovery and the</td>
</tr>
</tbody>
</table>

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i see section I, 2
ii see section I, 1
iii see section III, 1.1
Failing to Renew the Relationship

Framework of Colonization.

- The inherent rights to self-determination and self-government within Immemorial rights are called sovereignty;
- The right of Indigenous Peoples to self-determination is rooted in their internationally recognized permanent sovereignty as distinct peoples;\(^i\)
- Indigenous Peoples in Canada are not recognized internationally as distinct peoples\(^{ii}\) for two primary reasons:
  - ‘Divide and conquer’ policies using the Indian Act and forced relocation broke down Inherent Jurisdictions of pre-existing Indigenous nations into communities with imposed colonial governance systems;\(^{iii}\) and,
  - Section 35 created a three-group distinction (First Nation, Inuit, and Métis) of Aboriginal peoples that replaced groups of distinct Indigenous Peoples who qualified for international recognition.\(^{iv}\)
- The Government of Canada created an Indigenous rights regime under section 35 that works outside of the concept of self-determination to replace Immemorial and international rights:\(^v\)
  - Self-determination under international law creates new or changed institutions through processes that do not include Indigenous rights regimes outside of the international concept of self-determination.\(^{vi}\)
- There is no right to Indigenous self-determination under the rule of law in Canada that is comparable to the international or Immemorial rights of self-determination. Canada does have an Aboriginal right to self-government under its section 35 rights regime:\(^vii\)
  - The right to self-government under section 35 is an Aboriginal right, not an inherent right.\(^{viii}\) All Aboriginal rights under section 35 are less-than Immemorial rights;\(^ix\)
  - The international right to self-determination includes permanent sovereignty over Indigenous lands and resources. The Aboriginal right to self-government excludes all international and Immemorial rights to land and resources;\(^x\) and,
  - Self-Government Agreements under section 35 help to create a ‘new class’ of Aboriginal citizen whose rights are defined by Canada and its rule of law. This new class of Aboriginal citizen have their Immemorial rights to self-determination extinguished and replaced by Treaty and Aboriginal rights .\(^{xi}\)
- Basing all relations with Indigenous Peoples in Canada on the Crown-defined Aboriginal right of self-government, excludes Indigenous sovereignty to land and

\(^i\) see sections III, 11.1 and 11.2
\(^{ii}\) see section III, 11.1
\(^{iii}\) see section II, 4.2.1
\(^{iv}\) see sections II, 2.3.2 and III, 4.2, 11.2
\(^v\) see sections II, 2.3.2 and III, 11.2
\(^{vi}\) see section III, 11
\(^{vii}\) see section II, 4.2.2.3
\(^{viii}\) see sections II, 4.2.1 and 4.2.2.3
\(^{ix}\) see section II, 2.3.4
\(^x\) see section III, 11.2
\(^{xi}\) see sections II, 2.3.2 and III, 11.2
Failing to Renew the Relationship

resources. It also excludes international and Immemorial rights to self determination\(^1\).

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**Principle 2:**

Reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982.

**Comments:**

Reconciliation with Indigenous Peoples is firmly grounded in the Doctrine of Discovery and the Framework of Colonization.

- The rule of law defines the purpose of section 35 to be the reconciliation of pre-existing Indigenous societies with the assumed sovereignty of the Crown.\(^i\) However, the rule of law is biased against Indigenous Peoples:
  - The rule of law does not recognize Indigenous sovereignty and Immemorial rights, and does not include Indigenous law or Inherent Jurisdiction;\(^iii\)
  - Rights being reconciled by section 35 are Treaty and Aboriginal rights created by the Crown and defined by its rule of law;\(^iv\) and,
  - The Canadian rule of law unilaterally defines reconciliation, selects what rights will be recognized, and defines recognized rights to be reconciled. The entire process excludes community-based Immemorial rights-holders.

- Reconciliation of an Aboriginal right under section 35 is directed at pre-contact societies:\(^v\)
  - Immemorial rights include past, present, and future generations. Reconciliation under section 35 includes only the rights of past generations; and,
  - Immemorial rights include stewardship for vested rights of the land. Reconciliation under section 35 excludes vested land rights stewardship.

- Reconciliation under section 35 is not nation-to-nation when the sovereignty and rights of one nation are not recognized:
  - The Doctrine of Discovery allows for the recognition of pre-contact rights while empowering Crown assumed sovereignty to exclude Indigenous sovereignty and Immemorial rights for the present and future generations, and vested land rights, from reconciliation.\(^vi\)

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**Principle 3:**

The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous Peoples.

**Comments:**

\(^i\) see section III, 11.2  
\(^ii\) see section II, 5.2  
\(^iii\) see section I, 2  
\(^iv\) see sections II, 2.3.3 and 2.3.4  
\(^v\) see section II 5.2  
\(^vi\) see section III, 5.2

- The rule of law defined the necessity and duty of the Crown’s honour in its conduct with Indigenous Peoples:
  - The rule of law excludes Immemorial rights, Indigenous sovereignty, Indigenous law, and Inherent Jurisdiction and is therefore biased against Indigenous Peoples; \( \text{\textsuperscript{i}} \)
  - The Crown can act honourably under the rule of law without recognizing or respecting Indigenous sovereignty, Immemorial rights, law, or Inherent Jurisdiction:
    - It is honourable for the Crown to violate Immemorial rights and discriminate against Indigenous sovereignty. \( \text{\textsuperscript{ii}} \)
- The honour of the Crown allows it to:
  - Infringe upon section 35 Treaty and Aboriginal rights;
  - Negotiate hard against Indigenous Peoples;
  - Leave Indigenous Peoples without an agreement after negotiation; and,
  - Not accommodate Indigenous Peoples when the Crown infringes on an Aboriginal right, even though a duty to accommodate may exist.
- The rule of law allows for the Crown to have a veto over the Inherent Jurisdiction of traditional land and resources \( \text{\textsuperscript{iv}} \) when it provides honourable consultation \( \text{\textsuperscript{v}} \) under the duty to consult.

Principle 4:

Indigenous self-government is part of Canada’s evolving system of cooperative federalism and distinct orders of government.

Comments:

Indigenous self-government offered by the Crown is firmly grounded in the Doctrine of Discovery and Framework of Colonization. The ‘evolving system’ of cooperative federalism is a Crown-delegated jurisdiction that replaces the Inherent Jurisdiction of true Indigenous government grounded in Indigenous sovereignty.

- Self-determination under international law creates new or changed host-state government institutions through processes: \( \text{\textsuperscript{vi}} \)
  - Which allow Indigenous Peoples to freely pursue their economic, political, social, and cultural development through ongoing self-determination;
  - That do not include domestic Indigenous rights regimes outside of the international

\( \text{\textsuperscript{i}} \) see section I, 2  
\( \text{\textsuperscript{ii}} \) see Table 3  
\( \text{\textsuperscript{iii}} \) see section II, 5.2  
\( \text{\textsuperscript{iv}} \) see section I, 2  
\( \text{\textsuperscript{v}} \) see section II, 5.2  
\( \text{\textsuperscript{vi}} \) see section III, 11
Failing to Renew the Relationship

- The Government of Canada created an Indigenous rights regime under section 35 that excludes self-determination, replacing it with the Aboriginal right to self-government:
  - Aboriginal rights under section 35 do not recognize Immemorial rights to Indigenous sovereignty.

- Indigenous self-government in Canada is:
  - An Aboriginal right defined by, and subject to, the Canadian rule of law to the exclusion of Indigenous law;
  - A distinct government system created by the Crown through the authority of section 91(24) of the Constitution Act:
    - Crown-Delegated Jurisdictions are formed under the authority of section 91(24) and replace Inherent Jurisdictions for Indigenous institutions formed under the authority of Indigenous sovereignty.
  - Separated from Indigenous sovereignty to resources and therefore not sustainable.

Principle 5:

Treaties, agreements, and other constructive arrangements between Indigenous Peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.

Comments:

Treaties, agreements, and other constructive arrangements between Indigenous Peoples and the Crown are firmly grounded in the Doctrine of Discovery and Framework of Colonization. They were never intended to be acts of reconciliation.

- All of Canada’s treaties and Land Claim Agreements were made under the Doctrine of Discovery – a doctrine that does not respect Indigenous sovereignty, Indigenous law, Inherent Jurisdiction, or Immemorial rights:
  - The general purpose behind treaties is the surrender of Indigenous lands and resources, and the extinguishment of Aboriginal title.
  - Treaty interpretation is subject to the rule of law which is biased against Indigenous Peoples:
    - The rule of law protects and defines Crown rights to the exclusion of Immemorial rights, Indigenous sovereignty, Indigenous law, and Inherent

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i see sections II 2.3.2 and III, 11.2
ii see section II, 2.3.4
iii see sections II, 4.2.1 and 4.2.2.3
iv see section I, 2
v see sections II, 4.2, 4.2.1 and 4.2.2.3
vi see section III, 11.2
vii see sections II, 2.3.3 and 2.3.5
viii see section II, 2.3.3
Failing to Renew the Relationship

Jurisdiction.\(^i\)

- Treaties were negotiated ‘hard’ by the Crown from a position in which the Crown ‘controlled’ everything and gave as little benefit as possible to Indigenous Peoples;\(^{ii}\) and,
- Treaty content is wildly variable between Indigenous nations resulting in discrimination.\(^{iii}\)

- Constructive arrangements create Crown-Delegated Jurisdictions that enable the Government of Canada to obtain its objectives. Crown-Delegated Jurisdictions:
  - Are created through legislation, signed agreements, and funding contributions;
  - Function to replace the Inherent Jurisdiction of Indigenous sovereignty;\(^{iv}\) and,
  - Include First Nation elected governance systems and Indigenous partners such as Treaty, National, and Institution Partners that ‘replace’ community-based Immemorial rights holders as partners with the Crown.\(^v\)

- Other non-treaty agreements with Indigenous Peoples are based on Aboriginal rights, not Immemorial rights:
  - These agreements promote Crown rights while replacing Immemorial rights with Aboriginal rights.\(^vi\)

Principle 6:

Meaningful engagement with Indigenous Peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights on their lands, territories, and resources.

Comments:

The Crown’s delivery of either meaningful ‘engagement’ or meaningful ‘consultation’ are tools created and defined under the Doctrine of Discovery that do not include, Indigenous sovereignty, Immemorial rights, law, and Inherent Jurisdiction. These consultation instruments cannot obtain free, prior, and informed consent from Indigenous Peoples with the Doctrine of Discovery and Framework of Colonization in place.

- The Crown does not have a duty for the ‘meaningful engagement’ of Indigenous Peoples when proposing to take actions that impact Aboriginal rights connected to land, territory, and resources.\(^vii\)
  - A whole-of-government (WOG) approach is used with engagements, but is inappropriate.\(^viii\)

\(^i\) see section I, 2  
\(^{ii}\) see sections II, 2.3.3 and III, 9  
\(^{iii}\) see section II, 2.3.3  
\(^{iv}\) see section II, 4.2  
\(^v\) see sections II, 4.2.2 and 4.2.2.1 to 4.2.2.3  
\(^vi\) see Table 1  
\(^vii\) see section III, 5.1  
\(^viii\) see section III, 4.4
Failing to Renew the Relationship

- WOG approaches are used for policy reform within a solitary sovereign government. If reform is between two sovereign governments, formal consultation and negotiation of agreements must occur; and,
- If the Government of Canada recognizes Indigenous Peoples as engaging in ‘nation-to-nation’ policy reform work, joint policy-making and implementation must be done through the consultation and negotiation of bilateral agreements.
  - Engaged Indigenous partners and stakeholders are not community-based rights holders:
    - Groups engaged by the Crown are Crown-Delegated Jurisdictions that do not legally represent the sovereignty and Inherent Jurisdiction of Immemorial rights-holders; and,
    - Engaging partners and stakeholders ignores the rights of community-based Immemorial rights holders to directly engage in the economic, political, social, and cultural development realms of self-determination.
  - The engagement of partners and stakeholders on issues, events, and undertakings that may adversely affect Aboriginal and Treaty rights cannot legally substitute for the duty to consult. Policy, legislation, and regulation changes that may affect:
    - Indigenous claims to land must be brought to community rights-holders; and,
    - Fishing, hunting or other communal rights must be brought before rights-holders of the entire nation.
  - Public forum processes are used in engagements with Indigenous partners and stakeholders, but cannot substitute for meaningful consultation under the rule of law.

- The Crown does have a legal duty for ‘meaningful consultation’ when advancing its colonial interests in land over which Indigenous Peoples claim Aboriginal or Treaty rights that are protected under section 35:
  - Meaningful consultation is used by the Crown:
    - To discharge its legal duty to consult – as a ‘due process’;
    - To plan the exploitation of Indigenous lands;
    - To infringe on Aboriginal rights while pursuing objectives for Indigenous land and resources; and,
    - To accommodate Indigenous Peoples for the infringement on their rights.
  - However, meaningful consultation:
    - Does not recognize or consult Immemorial rights;
    - Does not recognize Indigenous sovereignty and Inherent Jurisdiction;
    - Does not commit the Crown to reach an agreement; and,

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i  see sections II, 4.2.2.1 to 4.2.2.3 and III, 4.3  
ii  see section III, 5.1  
iii  see section III, 5.1  
iv  see sections II, 5.2 and III, 5.2
Failing to Renew the Relationship

- Does not require the Crown to accommodate Indigenous Peoples even if a duty to accommodate is established.

**Principle 7:**

Respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown’s fiduciary obligations.

**Comments:**

Aboriginal rights, the right to infringe on Aboriginal rights, the justification for an infringement on Aboriginal rights, and the Crown’s fiduciary obligations are all firmly grounded in the Doctrine of Discovery and Framework of Colonization.

- The justification criteria that allows the Infringement of section 35 Aboriginal rights was defined by common law which also:
  - Defined Aboriginal rights that are infringed upon;
  - Defined the Crown’s right to infringe on Aboriginal rights; and,
  - Excludes the recognition of Indigenous law and Immemorial rights from consideration when defining the Aboriginal right, the right to infringe on the right, and the justification criteria for the infringement.
- The ability of the Crown to infringe on Aboriginal rights is based on the Crown’s right to develop land and resources to which Indigenous Peoples claim Aboriginal title:
  - The Doctrine of Discovery gave the Crown assumed sovereignty over Indigenous lands and resources removing Indigenous sovereignty. Authority from assumed sovereignty was placed into section 91(24) of the Constitution Act giving the Government of Canada control over ‘Indian’ people and lands. The doctrine left rights to use and occupy traditional territories. Those rights were translated into Aboriginal rights in section 35. It is these communal Aboriginal rights the Crown can infringe upon by using its own justification regime;
  - Aboriginal rights and Aboriginal title under 35 were created in a system based on the Doctrine of Discovery. So too was the Crown’s right to infringe upon Aboriginal rights and title; and,
  - The ability to infringe on Aboriginal rights is rooted in common law. Common law protects Crown sovereignty and rights while excluding Indigenous sovereignty, Immemorial rights, law, and Inherent Jurisdiction.
- When section 91(24) placed Indigenous land, resources, and peoples under the control of the federal government, it transferred a fiduciary duty from the British Crown to the
Failing to Renew the Relationship

Government of Canada:

- Fiduciary obligations:
  - Are triggered when an Indigenous interest is involved and the Crown is exercising control over Indigenous lands and resources;
  - Are also triggered when any Indigenous interest is involved and the Crown is exercising its discretionary authority;
  - Are a byproduct of assumed sovereignty;
  - Are defined by the Crown’s judicial system to the exclusion of Indigenous law and Immemorial rights; and,
  - Do not recognize Indigenous sovereignty and Inherent Jurisdiction over traditional territories.

Principle 8:

Reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.

Comments:

The Crown’s fiscal relationship with Indigenous Peoples is firmly grounded in the Doctrine of Discovery and Framework of Colonization.

- The Doctrine of Discovery, through Crown-assumed sovereignty and section 91(24) on the Constitution Act, allows for the unilateral exploitation of Indigenous lands and resources without appropriate recompense for Indigenous Peoples:
  - The Crown, and companies incorporated under its authority, benefit financially from Indigenous lands and resources;
  - Almost all resource-based revenue from Indigenous traditional territories is spirited away from Indigenous Peoples to the Crown and resource corporations; and,
  - Land and resources expropriated from Indigenous Peoples without recompense are the root cause of Indigenous poverty in Canada.

- Indigenous Peoples have an internationally recognized right to permanent sovereignty over land and resources within their traditional territories:
  - It is recognized that self-determination is not sustainable without sovereignty over land and resources;
  - It is also recognized that Indigenous Peoples must exercise their permanent sovereignty over land and resources to attain self-determination and preserve themselves as distinct peoples; and,
  - The Government of Canada does not recognize Indigenous Peoples internationally as ‘peoples’ entitled to international rights, including the rights to self
determination and permanent Indigenous sovereignty over land and resources.

Principle 9:

Reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.

Comments:

Reconciliation under section 35 is firmly grounded in the Doctrine of Discovery and Framework of Colonization. It currently provides part of the mechanism used to continue the colonization of Indigenous lands and resources.

• Reconciliation is only an ongoing process if the need for reconciliation is ongoing. There are two basic definitions of reconciliation:

  1. A casual definition – The restoration of friendship.\textsuperscript{174}
  2. A legal definition – The renewal of amicable relations between two parties who have been at enmity (antagonistic) or variance (disagreement).\textsuperscript{175}

• Reconciliation between the Crown and Indigenous Peoples should have both legal and casual aspects:

  ◦ The rule of law uses the legal definition to provide us with the legal aspect of reconciliation. That is, section 35 provides for the reconciliation of pre-existing Indigenous societies with the assumed sovereignty of the Crown when the Crown infringes on Aboriginal rights while advancing its objectives for Indigenous land and resources:\textsuperscript{i}

    ▪ Legal reconciliation does not recognize Immemorial rights and their root in past, present, and future generations. Present day and future Indigenous societies must also be reconciled to recognize and respect Immemorial rights;
    ▪ Legal reconciliation also does not recognize rights of the land and the Immemorial rights of Indigenous Peoples to land and resource stewardship; and,
    ▪ Limiting legal reconciliation to pre-existing societies is a tool that has been used to deny present day access to resources on traditional lands.\textsuperscript{27}

  ◦ Common sense uses the casual definition to indicate that a casual aspect of reconciliation also exists in which amicable relationships are maintained through dialogue.

• In the current litigious relationship between Indigenous Peoples and the Crown, it is clear casual reconciliation does not exist and that legal reconciliation fails to promote the casual aspect:

  ◦ This failure is rooted in the Crown’s current relationship with Indigenous Peoples in which colonization of Indigenous lands has not ever stopped progressing. An ongoing legal process of reconciliation will literally be required until all Indigenous

\textsuperscript{4} see section III, 11.1
\textsuperscript{i} see sections II, 5.2 and III, 5.2
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lands and resources are acquired by the Crown. In this relationship, there is no opportunity for the casual aspect of reconciliation to restore amicable relationships.

- In a new relationship, without the Doctrine of Discovery, the legal and casual aspects of reconciliation become the constitutive and ongoing aspects of self-determination:
  - The constitutive (legal) aspect reconciles Indigenous sovereignty and Immemorial rights with the Crown’s sovereignty and rights with a finite beginning and end; and,
  - The ongoing (casual) aspect maintains dialogue and adaptive support as relationships for economic, political, social, and cultural developments progress.

Principle 10:

A distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

Comments:


- The three-group distinction of First Nation, Inuit, and Métis peoples was created by the Crown without consultation of community-based Immemorial rights-holders. The three-group peoples approach:
  - Does not represent historical or modern group distinctions for Indigenous Peoples and nations;
  - Results in Indigenous policies that ignore policy and policy implementation-related to distinctions of Indigenous Peoples; and,
  - Scrambles the recognition of distinct Indigenous Peoples into three ethnic groups that are not recognized as peoples under international law, disqualifying Indigenous Peoples from International rights to self-determination and permanent sovereignty over traditional lands and resources.

- There are dozens of distinct Indigenous nations in Canada with distinct combinations of languages, cultures, Immemorial rights, and traditional governance systems:
  - The three-group distinction approach of First Nation, Inuit, and Métis peoples assimilates every one of those distinct Indigenous nations by excluding the recognition of their distinct Indigenous sovereignty, Immemorial rights, laws and Inherent Jurisdictions.

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i see section III, 11
ii see section III, 4.2
iii see sections II, 2.3.2 and III, 11.1, 11.2
iv see section III, 4.2
Failing to Renew the Relationship

The ten Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples form the base from which all Government of Canada’s strategies to renew its relationship with Indigenous Peoples will be created. These Principles retain the four precepts that are rooted in the Doctrine of Discovery. The Government of Canada has not removed the Doctrine of Discovery. In that regard, the Crown is basing its new relationship on the Framework of Colonization and will continue the colonization of Indigenous lands and the assimilation of Indigenous Peoples.

“An analysis of the “Ten Principles” reveals that we can expect very little structural change in the existing relationship. If they form the basis for future negotiations, the Principles are a potential threat to Indigenous rights and title.”

The rest of this report will discuss select topics within the Government of Canada’s plan to renew its relationship with Indigenous Peoples.

3. Working Group of Ministers:

A federal Working Group of Ministers was announced in February 2017 and tasked with the review of federal laws, polices, and practices. The review will be guided by the Principles.

The underlying goal of the Working Group of Ministers’ review is to ensure, “… rights of Indigenous Peoples will be recognized in all federal laws, policies, and operational practices that impact First Nations, Inuit, and Métis.” The review will also verify the Crown is:

1. Meeting its constitutional obligations toward Treaty and Aboriginal rights;
2. Adhering to international human rights standards – including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); and,
3. Supporting the Truth and Reconciliation Commission’s (TRC’s) Calls to Actions.

We have reviewed the Principles guiding the review and their underlying tenets. They retain the Doctrine of Discovery grounding the Crown’s ‘new’ relationship in continued colonization. In that regard, the sovereignty, Immemorial rights, laws, and Inherent Jurisdiction of Indigenous Peoples that are already ‘not recognized’ in Canadian constitutional law, legislative law, common law, government policies, or government practices before the review, will continue to be excluded after the review is completed. The successful completion of the review by Minister’s using the Principles however, will actually further entrench the Framework of Colonization into Canada facilitating the continued colonization and assimilation of Indigenous Peoples.

There is no constitutional obligation requiring the Crown to remove the Doctrine of Discovery and recognize Indigenous sovereignty, Immemorial rights, laws and Inherent Jurisdiction. In fact, with the assumed sovereignty of the Crown at stake, the Government of Canada may interpret it has an obligation to the Crown to retain the doctrine and ensure the Crown’s assumed sovereignty remains. However, this would bring the Government of Canada into a position of

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i see section III, 1.1
ii see section III, 2
iii see Table 4
iv see Table 3
v see Table 1
Failing to Renew the Relationship

violating the international right of Indigenous Peoples to self-determination\textsuperscript{vi} and it could open the door to imposed international remedies.\textsuperscript{ii}

If the Crown does remove the Doctrine of Discovery, the Working Group of Ministers will also need to include a review of the Constitution Act and court decisions to ensure constitutional and common law barriers to the rights of Indigenous Peoples are removed. The larger review would need the support of results from the meaningful consultation of community-based Indigenous rights-holders to define Immemorial rights. These definitions are needed to screen the rule of law, Indigenous policies, and operational practices.

4. Restructuring Government:

The Right Honourable Justin Trudeau, Prime Minister of Canada, indicated, “We need to shed the administrative structures and legislation that were conceived in another time for a different kind of relationship.”\textsuperscript{3}

\textbf{4.1 Dissolution of INAC:}

The 1996 Report of the Royal Commission on Aboriginal Peoples recommended the federal Department of Indigenous and Northern Affairs Canada (INAC) be dissolved and replaced by two new federal departments.\textsuperscript{178} The reason behind the recommendation was:

“INAC was founded on racist assumptions which bred policies of displacement and assimilation. Some tools INAC used have changed, others have not. Until founding attitudes are removed from the institution that is INAC by removing policies, legislation, regulation, services and programs bred from these attitudes, INAC is incapable of working in the best interest of Aboriginal Peoples and Canada.”\textsuperscript{179}

The dissolution of INAC will be staged creating two federal departments with complimentary objectives:

1. Crown-Indigenous Relations and Northern Affairs (CIRNA) will:\textsuperscript{4}
   - Engage Indigenous Peoples with self-government and self-determination agreements;
   - Coordinate the whole-of-government approach to Indigenous relations;
   - Guide work to create a new relationship with Indigenous Peoples;
   - Lead the process to determine how to best replace INAC; and,
   - Develop a framework to advance a recognition of rights approach.

2. Indigenous Services (ISC) will:\textsuperscript{161}
   - Deliver services to Indigenous Peoples previously delivered by other federal departments;
   - Work to improve the quality of services delivery to Indigenous Peoples;
   - Ensure a distinctions-based approach to delivery of services; and,
   - Develop services delivery to be increasingly delivered by Indigenous Peoples.

\textsuperscript{vi} see section III, 11.3
\textsuperscript{vii} see section III, 11.4
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as they move to self-government.

The dissolution of INAC, and the creation of CIRNA and ISC, is long overdue. INAC was literally created to advance the colonization of Indigenous lands and the assimilation of Indigenous Peoples. INAC has been the hand, in one form or another, used by the executive branch of the federal government to advance the Crown’s objectives over Indigenous lands and Peoples since shortly after confederation. However, INAC is not the root of colonizing authority in Canada, the Doctrine of Discovery is.1 If the Doctrine of Discovery remains, these two new departments, or some other executive branch function of the federal government, will provide the same colonizing function using the authority of section 91(24). Indigenous sovereignty, Immemorial rights, law and Inherent Jurisdiction need to be permanently included into the rule of law by the removal of the doctrine.

We have reviewed the Principlesii the Government of Canada is using to:

1. Renew its relationship with Indigenous Peoples;
2. Support the rights of Indigenous Peoples; and,
3. Remove the Crown’s assimilation policies and practices.

The Principles retain the Doctrine of Discovery, the Framework of Colonization, and their colonizing objectives.

If the Government of Canada removes the Doctrine of Discovery:

1. Indigenous sovereignty will replace fiduciary duties of section 91(24) and Immemorial rights will replace Treaty and Aboriginal rights in section 35 of the Constitution Act;
2. Immemorial rights will define Indigenous infrastructure and services;
3. Indigenous law will create Indigenous governments to replace the section 35 Aboriginal right of self-government;
4. Indigenous Inherent Jurisdictions will create Indigenous infrastructure and sustainably transform land and resource management into revenue streams that replace Crown-controlled funding, and,
5. The new relationship between the Government and Indigenous Peoples will be defined by the process of self-determination under international rights.

Most certainly, two new federal departments founded on the Principles will continue to advance a relationship of colonization and assimilation.

4.2 Distinction-Based Approach:

The three distinct groups of First Nation, Inuit, and Métis peoples are recognized by the Crown:

- Indians (First Nations) were recognized in 1867 in section 91(24) of the British North America Act (later known as the 1867 Constitution Act).
- Eskimos (Inuit) were recognized by the Supreme Court of Canada in 1939 when section 91(24) was extended to their lands and peoples.180

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1 see section II, 6
ii see section III, 2
Failing to Renew the Relationship

- Métis were recognized in section 35 of the Constitution Act in 1982. However, their rights were first recognized and affirmed by the Supreme Court of Canada in the 2003 Powell case.\(^{181}\)

When First Nation, Inuit, and Métis ‘peoples’ were placed into section 35 of the Constitution Act\(^ {47}\) it created a three-group distinction of Aboriginal peoples in Canada. The distinctions-based approach to federal policy creation and implementation only began to appear in April 2004 during roundtable discussions between the federal Liberal government in Canada and Indigenous leaders from the:

- Assembly of First Nations (AFN);
- Inuit Tapiriit Kanatami (ITK);
- Métis National Council (MNC)
- Congress of Aboriginal Peoples (CAP)
- Native Women’s Association of Canada (NWAC); and,
- Native Association of Friendship Centres (NAFC).

At that time, Indigenous leaders impressed upon the Right Honourable Paul Martin, Prime Minister of Canada, and key members of Cabinet the need to understand there were distinct differences between Indigenous Peoples. In that, a pan-Indigenous approach to Indigenous issues would not work.\(^ {182}\) First Nation, Inuit, and Métis distinctions were incorporated by the Government of Canada into subsequent roundtable discussions leading up to the Kelowna Accord.\(^ {183}\)

The three-group distinctions-based approach was formally adopted in the Kelowna Accord\(^ {184}\) in November 2005 as a federal Liberal government in Canada policy. Unfortunately, the federal Liberal government lost an election before the Kelowna Accord and its promises could be approved by parliament. Subsequent federal Conservative governments in Canada shelved the Kelowna Accord and its policies.

The distinctions-based approach was retained within the Liberal Party of Canada’s Indigenous policies.\(^ {185}\) After a return to power in 2015, the Liberal Government of Canada included the distinctions-based approach into its plan to renew Canada’s relationship with Indigenous Peoples.\(^ {i}\)

The distinctions-based approach, from the Indigenous perspective, was meant to establish a progressive collaborative approach respectful of Indigenous Peoples’ distinct and unique histories, cultures, traditions and relationships with federal, provincial, and territorial governments. However, since its inception in the Constitution Act, the distinctions-based approach has not progressed past the general three-group distinction of First Nation, Inuit, and Métis peoples.

The three-group distinction-based approach:

- Was created without consultation of community-based rights-holders;
- Does not represent historical or modern group distinctions for Indigenous Peoples and nations;

\(^{i}\) see Table 2
Failing to Renew the Relationship

- Results in Indigenous policies that ignore policy and policy implementation related to Indigenous group distinctions; and,
- Scrambles the recognition of distinct Indigenous Peoples into three ethnic groups that are not recognized as peoples under international law.

A true distinctions-based approach created without the Doctrine of Discovery would:

1. Allow for restructuring of the three-group distinctions-based approach to recognize sovereign Indigenous nations;
2. Allow the Inherent Jurisdiction of distinct Indigenous nations and Peoples to guide the renewal of their relationship with the Crown;
3. Be defined by the consultation of community-based Immemorial rights-holders; and,
4. Would ensure the recognition of distinct Indigenous Peoples in Canada as peoples entitled to the rights of self-determination and permanent indigenous sovereignty under international law.

4.3 Bilateral Mechanisms:

In Canada, the Doctrine of Discovery strips sovereignty from Indigenous Peoples. It empowers the Crown to replace Indigenous sovereignty, Immemorial rights, law, and Inherent Jurisdiction over land, resources, and peoples through the Framework of Colonization. As a result, the Government of Canada does not recognize Indigenous communities and their distinct nations as having legitimate political authority.

“One such modern variant, evident in the more complex politics of the last three decades and very much current today, is that Aboriginal peoples constitute an interest group, one among many in a pluralistic society. They, along with the labour movement, the agricultural lobby, or any other interest group are to be listened to respectfully, but their demands are subject to the political agenda and trade-offs of the day. They are not seen as having legitimate political authority, as being nations entitled to treatment as nations.”

In 1982, section 35 of the Constitution Act created three distinct political groupings of Indigenous Peoples, First Nation, Inuit, and Métis peoples. However, there were no Indigenous government structures to facilitate the three-group distinction.

The Oka Crisis, failure of the Meech Lake Accord, the Spicer commission, the failure of the Charlottetown Accord, and a growing chasm between the Government of Canada and Indigenous Peoples all indicated the federal government required a National Indigenous Government presence to work with.

The Royal Commission on Aboriginal Peoples (RCAP) was established in 1991. RCAP released its report and recommendations in 1996. Among its recommendations was the establishment of a national Indigenous parliament structure after extensive consultations were completed with Indigenous Peoples. The purpose of the Indigenous parliament would be to advise the House of Commons and the Senate on Indigenous issues – on policy.

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i see sections II, 2.3.2 and III, 11.1
ii see Table 1
iii see section III, 4.2
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Consultations for an Indigenous parliament did not occur.

During the 18 month process leading up to the 2005 Kelowna Accord, leaders of six Indigenous rights organizations engaged in negotiating policies with the Government of Canada. They are:

1. Assembly of First Nations (AFN);
2. Inuit Tapiriit Kanatami (ITK);
3. Métis National Council (MNC);
4. Congress of Aboriginal Peoples (CAP);
5. Native Women’s Association of Canada (NWAC); and,

Those negotiations, in part, resulted in bilateral agreements with five of the organizations. These agreements are referred to as bilateral accords and they committed parties to consultation on Indigenous policy. More specifically:

- AFN would work on recognizing and reconciling section 35 rights for First Nations;
- ITK would negotiate a Canada-Inuit Action Plan;
- MNC would examine the devolution of programs and services for Métis to the MNC;
- CAP would discuss how to enhance its involvement in the development of federal policies related to Métis, non-Status and off-reserve Status Indians; and,
- NWAC would review its involvement in the development of federal policies related to First Nations and Métis women.

Bilateral agreements of this nature are also used by the Government of Canada to enter into Self-Government Agreements with Indigenous Peoples. The AFN argued against the inclusion of CAP and NWAC, citing they were not governments. However, the AFN, ITK, and MNC were not Indigenous governments themselves. They were, and still remain, not-for-profit political organizations.

Indigenous governments have authority granted to them by the Inherent Jurisdiction of sovereign Indigenous rights-holders. However, bilateral accords gave these organizations funding and Crown-Delegated Jurisdiction. In combination with the three-group distinct of First Nation, Inuit, and Métis peoples created in section 35, the AFN, ITK, and MNC were raised to the level of quasi Indigenous governments by virtue of the authority in the Crown’s assumed sovereignty. INAC refers to these organizations as Indigenous partners or National Partners.

In late 2016, the Government of Canada announced it would create permanent bilateral mechanisms with AFN, ITK, and the MNC. In June 2017, a building in the National Capital Region was assigned to Indigenous Peoples so that the Government of Canada can work in ‘full partnership’ with AFN, ITK, and MNC representing First Nation, Inuit, and Métis peoples.

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i see section II, 4.2
ii see section III, 4.2
iii see sections II, 4.2.2 and 4.2.2.2
Failing to Renew the Relationship

The Crown has created a three-group distinction-based Indigenous national political structure and provided the physical infrastructure for it to be housed in the National Capital Region. It allows for:

1. Streamlined Crown consultation on Indigenous issues and rights; and,
2. Streamlined cooperative bureaucratic work towards Indigenous-related legislation and programs.

This Crown-made Indigenous national political structure is essentially a three-group distinction-based ‘National Indigenous Government’ to advise the Government of Canada on Indigenous Issues.\(^{198}\) The nature of the permanent bilateral mechanisms to create a National Indigenous Government has already begun to express itself with the ITK injecting itself into a $509.5 million federal Inuit funding stream to administer funds.\(^{199}\)

The National Indigenous Government was created under the Doctrine of Discovery and was therefore built on fatal flaws (Table 5).

<table>
<thead>
<tr>
<th>Table 5: National Indigenous Government Created by Permanent Bilateral Mechanisms – Flaws from the Doctrine of Discovery</th>
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</thead>
<tbody>
<tr>
<td>1. The Crown did not consult community-based rights-holders before creating a National Indigenous Government:</td>
</tr>
<tr>
<td>• The right to self-government, whether reflected as an Aboriginal right under section 35, an international right to self-determination, Inherent international right under the UNDRIP, or as an Immemorial right to sovereignty, was infringed upon;</td>
</tr>
<tr>
<td>• Fiduciary obligations(^{i}) and the duty to consult(^{ii}) require the Crown to consult if they take action that might infringe on a section 35 Aboriginal right, including the right to self-government; and,</td>
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<tr>
<td>• Indigenous community-based rights-holders have a right through self-determination(^{iii}) to select, in the manner of their choosing, who will represent them, how that person will represent them, and to create the government institution through which they will be represented.</td>
</tr>
<tr>
<td>2. The National Indigenous Government was delegated jurisdiction from the Crown’s assumed sovereignty:</td>
</tr>
<tr>
<td>• Crown-Delegated Jurisdictions(^{iv}) are a part of the Framework of Colonization(^{v}) meant to replace the Inherent Jurisdiction of Indigenous sovereignty;(^{vi})</td>
</tr>
<tr>
<td>• A National Indigenous Government must be created by, and delegated authority</td>
</tr>
</tbody>
</table>

\(^{i}\) see section II, 2.3.1  
\(^{ii}\) see section II, 5.2  
\(^{iii}\) see section III, 11  
\(^{iv}\) see section II, 4.2  
\(^{v}\) see Table 1  
\(^{vi}\) see section II, 4.3
Failing to Renew the Relationship

from, the Inherent Jurisdiction of sovereign Indigenous communities and nations;¹ and,

• The three-group National Indigenous Government replaces the Inherent Jurisdiction of internationally recognized distinct Indigenous national governments:
  ◦ The inclusion of a three-group distinction of Aboriginal peoples into section 35 created three ethnic groups who are not recognized internationally as distinct peoples or Indigenous Peoples, disqualifying them from international rights to self-determination and permanent sovereignty over lands and resources.²

3. The AFN, ITK, and MNC do not represent the rights of Indigenous Peoples in Canada and these organizations do not themselves hold rights:

• These organizations have not been given authority from community-based rights-holders to represent their Immemorial rights or Indigenous sovereignty.³ Without an in-depth consultation-derived investiture, the AFN, ITK, and MNC represent rights-based political not-for-profit corporations which are structured to resemble governments;
• These organizations have no authority to enter into agreements with the Crown on behalf of rights-holders to create policies that will affect, adversely or otherwise, the Immemorial rights of Indigenous communities and nations. Only community-based rights-holders and their specifically mandated legal representatives (their delegated Inherent Jurisdictions) can enter into agreements of this nature;⁴ and,
• The Crown must create treaties, agreements, legislation, and other instruments, such as permanent bilateral mechanisms, with community-based rights-holders and their Inherent Jurisdictions.

4. A National Indigenous Government should be accountable to rights-holders:

• Organizations are accountable to their funder and/or the authority that can terminate and modify their mandate. A National Indigenous Government should be funded by Indigenous rights-holders to ensure it is accountable to Indigenous sovereignty; and,
• The AFN, ITK, and MNC are in conflict of interest:
  ◦ If they fulfill their agreement with the Government of Canada and allow the federal government to consult them on Aboriginal, Inherent, or Immemorial rights, they ignore the right of community-based rights-holders to meaningful consultation;
  ◦ If they consult community-based rights-holders, or their Inherent Jurisdictions, on behalf of the federal government, they ignore the duty of the federal government to consult community-based rights-holders; and,
  ◦ If they do not consult directly with the federal government or with community-based rights-holders, they will not be able to fulfill their bilateral agreements.

¹ see section II, 4.1)
² see sections II, 2.3.2 and III, 4.2, 11.1, 11.2
³ see sections II, 4.2.1 and 4.2.2.2
⁴ see section II, 4.2.2.2

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5. The Crown must consult community-based rights-holders on Indigenous policy, legislation, and other Indigenous Issues:

- The Crown has a duty to consult community-based rights-holders on actions it considers that may adversely affect their rights;\(^i\)
- The Crown has fiduciary obligations to Indigenous Peoples when any Indigenous interest is involved and the Crown is exercising its discretionary authority,\(^ii\) including changing policies or legislation that may affect Indigenous interests; and,
- The consultation of Indigenous leaders associated with the AFN, ITK, and MNC will not fulfill the duty to consult rights-holders.

It is the nature of modern government to allocate its time to developing policy, implementing policy, and creating legislation. With permanent bilateral mechanisms, the AFN, ITK, and MNC are now fully partnered with the Government of Canada to develop Indigenous policy, implement policy, and create Indigenous-related legislation. These three organizations have become a permanent part of the federal government constituting a First Nation, Inuit, and Métis National Indigenous Government.

This three-group distinction-based National Indigenous Government is not accountable to Indigenous Peoples and has no Inherent Jurisdiction delegated to it by sovereign Indigenous communities and nations. It was created through the Crown’s assumed sovereignty which derives from the Doctrine of Discovery.

The members of the AFN appear to have recognized, at least in part, the jeopardy these permanent bilateral mechanisms have placed Indigenous sovereignty. In May 2018, the AFN Chiefs-in-Assembly resolved to reign in the AFN’s executive. Resolution 08-2018 from the Special Chiefs Assembly states that the Chiefs-in-Assembly:

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1. Declare that the Assembly of First Nations (AFN), as an advocacy body, and any regional organizations cannot negotiate any binding changes to Canada’s federal laws, policies and operational practices as part of the Recognition and Implementation of Indigenous Rights Framework (the Framework).
2. Call on Canada to work with First Nations before adopting and implementing any legislative or administrative measures that may affect First Nations in order to obtain their free, prior and informed consent.”\(^{200}\)
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Indigenous communities and nations need representation at the federal level. That representation needs to be free of the Doctrine of Discovery so that self-determination and its government institutions can be based on Indigenous sovereignty, Immemorial rights, law, and Inherent Jurisdiction. It would not be overly difficult to modify the National Indigenous Government to reflect Indigenous sovereignty, but it cannot be done if the Crown’s assumed sovereignty over the AFN, ITK, and MNC remains in place.

\(^i\) see section II, 5.2  
\(^ii\) see section II, 2.3.1
4.4 Whole-of-Government Approach:

The whole-of-government (WOG) approach is where government departments and other public service agencies work across portfolio boundaries to achieve a common goal for an integrated response to a particular issue. The success of the response is seen in its ability to achieve horizontal and vertical coordination in a seamless way between the engaged departments and agencies. Vertical coordination could be between different government ‘silos’ such as departments and horizontal coordination between policies within the same department. A WOG approach can be focused on policy development, program development, or service delivery.

The scope of a WOG initiative has three basic components:

1. Goals: - Policy-making or policy implementation are the general goals of a WOG Initiative.
2. Linkages: - Vertical and horizontal linkages need to be chosen and defined.
3. Targets: - The WOG initiative needs to be targeted at a group, locality, or policy sector.

There are a three basic perspectives for a WOG Initiative that can be coordinated towards a common goal:

1. Structural or Instrument Design:
   • The type of WOG initiative is about organization or reorganization of policy or policy implementation; and,
   • Structural and instrument reforms can be:
     ○ Hierarchical with a clear lead and subordinate authority structure; or,
     ○ Negotiative with multiple leaders from equal-ranked players – partners.

2. Cultural Compatibility:
   • This type of WOG initiative is about evolving and adapting (reforming) practices between closely integrated entities in response to internal and external pressure – including ‘best practices’.

3. Myth Promotion:
   • This type of WOG initiative is about promoting myths, symbols, or trends to prepare participants, the public, or media to accept an ‘unavoidable’ policy (structural) reform.

As one can see, a WOG approach is not a vague expression used by government bureaucracy, it is government management system with gears and mechanisms for creating reform. It even includes a propaganda (myth) promotion stream.

The plan to renew the relationship with Indigenous Peoples includes using WOG approaches for the renewal of a nation-to-nation, Inuit-Crown, and government-to-government relationship with Indigenous Peoples. This can be approached from one of three ways, or a combination of all three:

1. Intradepartmental;
2. Interdepartmental; or

CIRNA is coordinating Crown WOG initiatives to Indigenous relations. Every strategy the federal government has put forward, and will put forward, to change its relationship with Indigenous Peoples is a WOG Initiative. CIRNA is involved with a number of WOG initiatives, including:

1. Cultural and Aboriginal rights training for federal employees;
2. Upgrading the duty to consult;
3. Structuring new departments for CIRNA and ISC,
4. Restructuring of service delivery into ISC;
5. Implementing the Principles;
6. Review of federal laws, policies, and practices;
7. A recognition of rights framework;
8. Changing the fiscal relationship;
9. Creating permanent bilateral mechanisms;
10. Self-determination tables; and,
11. Etc.

All of these WOG initiatives will consult stakeholders and partners through engagement to develop and implement policy using the Principles discussed earlier\(^1\) as a foundation. Those Principles retain the Doctrine of Discovery and promote continued colonization and assimilation. By default, these WOG initiatives will also continue the colonization and assimilation of Indigenous Peoples.

Some of these WOG initiatives will be restricted to interdepartmental and intradepartmental work in the federal government. However, most WOG approaches will need both the Crown and Indigenous Peoples to develop policy, implement policy, and create/modify service delivery. These Crown-Indigenous WOG initiatives require consultation of Indigenous Peoples.

Unfortunately, WOG initiatives are about reform within ‘a’ government. By definition, WOG approaches cannot be extended over other nations and their governments. For example: The Crown cannot have a WOG initiative with Germany to create a policy on trade. The Government of Canada would need to consult with German authorities and negotiate an agreement with them. Likewise, the Crown cannot extend its WOG approach over Indigenous Peoples while at the same time recognizing Indigenous sovereignty, and therefore distinct Indigenous nations.

If Indigenous Peoples are received by the Government of Canada as sovereign governments, joint policy-making and policy implementation must be done through meaningful consultation and the negotiation of agreements with community-based Immemorial rights-holders for each nation – this is not happening. The Government of Canada is not renewing its relationship with Indigenous Peoples on a nation-to-nation, Inuit-Crown, and government-to-government basis. It is engaging Indigenous partners\(^{ii}\) as if sovereign Indigenous Peoples and community rights-holders do not exist.

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\(^{i}\) see section III, 2
\(^{ii}\) see sections II, 4.2.2.1 to 4.2.2.3, 4.3 and III, 4.3

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Failing to Renew the Relationship

We have established the Government of Canada’s plan to renew its relationship does not remove the Doctrine of Discovery. Indigenous sovereignty is therefore not recognized by Canada and a nation-to-nation relationship cannot exist. The WOG approach the Government of Canada is using consults Indigenous partners, including the new National Indigenous Government. These Treaty, National, and Institutional Partners were created through Crown-Delegated Jurisdiction. They do not have the Inherent Jurisdiction of Indigenous Peoples to legally represent Immemorial rights-holders. At best, the WOG approach with these Indigenous partners will result in a pseudo nation-to-nation relationship that maintains the status quo.

The Government of Canada’s whole-of-government approach to renewing its relationship with Indigenous Peoples is a bureaucratic policy reform mechanism. The WOG approach is being used by the federal government to create and review law, policy, operational practices, and services that affect Immemorial rights-holders. CIRNA’s WOG approach to renewing the relationship:

1. Does not recognize Indigenous sovereignty, Immemorial rights, law, or Inherent Jurisdiction;
2. Does not partner with Indigenous communities;
3. Ignores the consultation of Indigenous community-based Immemorial rights-holders;
4. Consults and partners with ‘Indigenous partners’ created and funded by the Crown who do not legally represent the sovereignty and Inherent Jurisdiction of Immemorial rights-holders; and,
5. Is incapable of recognizing or establishing a nation-to-nation, Inuit-to-Crown, or government-to-government relationship.

One of the most successful WOG initiatives undertaken by the federal government is the myth promotion of rights contained in section 35 of the Constitution Act. Treaty and Aboriginal rights contained in section 35 have been promoted as the Crown’s recognition of Indigenous Peoples and their rights. However, Treaty and Aboriginal rights under section 35 replace Indigenous sovereignty to land and Immemorial rights to self-determination creating an alternate rights regime and ethnic Aboriginal citizens with extinguished sovereignty over lands, resources, and peoples.

The new National Indigenous Government and other Indigenous partners clamour to help the Crown define section 35 rights and maintain their Crown funding. Indigenous communities and nations fight in Canadian courts to protect Treaty and Aboriginal rights believing they are protecting their Immemorial rights to land and self-determination. The myth promotion of Treaty and Aboriginal rights has been so successful that no one questioned the colonizing policy behind them or the rule of law that protects that policy. What will happen when Indigenous Peoples realize they have been exchanging their Indigenous Inherent Jurisdiction for Crown-Delegated Jurisdiction and assimilation?

4.5 Improving Capacity:

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i see section II, 4 and 4.2
ii see sections II, 2.3.2 to 2.3.5 and III, 11.2
Failing to Renew the Relationship

The Government of Canada has committed to improve the capacity of:

1. The federal government to consider and respond to the unique realities of Indigenous Peoples; and,

We will look at improving capacity in INAC and in Indigenous communities.

4.5.1 INAC Capacity:

INAC has not yet split into two departments, so we will look at INAC realizing the same will be true of the new departments, CIRNA and ISC. There are two basic activities towards improving capacity within INAC:

1. Employee Indigenous cultural and Aboriginal rights awareness training; and,
2. Indigenous recruitment and retention.

In regard to federal government employee Indigenous awareness training:

- The federal government has an exemplary record with incorporating best practices;
- Training will include all federal government employees who work directly or indirectly with Indigenous Peoples; and,
- The content of the training materials will be as good as reference materials they draw from for an understanding of culture and Aboriginal rights.

We will not spend time on indigenous awareness training except to say we have already seen that the Doctrine of Discovery and Framework of Colonization remain the foundation of Canada’s renewing relationship with Indigenous Peoples. In that, colonial objectives of acquiring Indigenous land and resources continue. Without the meaningful consultation of community-based rights-holders on Immemorial rights to create new reference materials, federal employee Indigenous cultural and Aboriginal rights training programs will continue to exclude training on Indigenous sovereignty, Immemorial rights, laws, and Inherent Jurisdiction.

In 1994, INAC created a fifty percent Aboriginal hiring strategy in which INAC committed to fill fifty percent of the department’s vacancies with Indigenous Peoples. Two years later, that commitment was placed into a Letter of Understanding with the Assembly of Manitoba Chiefs. The National Aboriginal Recruitment Strategy included:

- Targeting audiences in Indigenous communities and organizations to attract recruits;
- Undertaking proactive measures to qualify Indigenous candidates;
- Monitoring the placement and new Indigenous employees;
- Fostering retention of Indigenous staff; and,
- Promoting the advancement of Indigenous employees.

INAC went on to adopt an Indigenous Recruitment and Retention Framework in 2016 that focuses on:

i see section III, 2
Failing to Renew the Relationship

- Promoting Indigenous Hiring;
- Increasing Outreach Activities; and,
- Retaining Indigenous Employees.

In brief, programs involved in the Indigenous Recruitment and Retention Framework include:

1. Aboriginal Leadership Development Initiative (ALDI):
   - The ALDI provides resources needed to build leadership skills and prepare for new career opportunities within INAC.
2. Junior Aboriginal Leadership Development Initiative:
   - The Junior ALDI is currently being developed.
3. Deputy Minister’s Aboriginal Workforce Initiative II (DMAWI II):
   - The DMAWI II provides language training and guidance.
4. Committee for the Advancement of Native Employment (CANE):
   - CANE’s purpose is to examine, explore and recommend ways to increase the number of Indigenous persons employed within INAC; and,
   - The committee also seeks ways to retain Indigenous employees and improve the quality of their employment.

In 2008, we were involved with ‘back door’ discussions on the northern Food Mail Program review, now called Nutrition North. Those discussions centred on the creation of a sustainable northern country food harvest-based economy to support traditional lifestyles and preemptively intervene in arctic food shortages. A key feature of that discussion was the inability of exclusively non-native core INAC staff to embrace the need to respect and support traditional lifestyles and economies.

In contrast, recent discussions with core INAC staff indicated there are a number if core senior staff self-identifying as Indigenous:

- Who work closely with each other;
- Many of whom have recently arrived in their senior positions;
- Who are given ample opportunity to train and advance;
- Who are appropriately remunerated; and,
- Who are well resourced to accomplish tasks assigned to them.

Those same discussions revealed that self-identifying core staff in INAC did not understand the effects of the Doctrine of Discovery and did not have knowledge of the Framework of Colonization.¹

Table 6 contains seven policies advocated by senior self-identifying core INAC staff during discussions. Comments on these policies are included in the table.

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¹ see Table 1
### Failing to Renew the Relationship

#### Table 6: Policies Promoted by Self-Identifying INAC Senior Core Staff

1. **The ten Principles upon which the Government of Canada is founding its new relationship with Indigenous Peoples:**
   - Self-identifying INAC staff did not understand these Principles promote continued colonization and assimilation.\(^1\)

2. **The review of federal law, polices, and practices by the Working Group of Ministers:**
   - Self-identifying INAC staff did not understand the review will further entrench colonization into the rule of law unless Indigenous sovereignty, Immemorial rights, law, and Inherent Jurisdiction are recognized and included in the review.\(^ii\)

3. **The distinction-based approach and permanent bilateral mechanisms:**
   - Self-identifying INAC staff did not understand the three-group distinction-based approach and permanent bilateral agreements with AFN, ITK, and MNC create a Crown-delegated National Indigenous Government system that bypasses the sovereignty and Inherent Jurisdiction of Indigenous communities;\(^iii\) and,
   - Staff also did not understand the three-group distinction of Indigenous Peoples in section 35 disqualifies them from international rights to self-determination and permanent sovereignty over land and resources.\(^iv\)

4. **The whole-of-government (WOG) approach to renew a nation-to-nation, Inuit-Crown, and government-to-government relationship with Indigenous Peoples:**
   - Self-identifying INAC staff did not understand the WOG approach is a process that by definition excludes the sovereignty of Indigenous communities and their Immemorial rights-holders.\(^v\) Staff did not understand that a WOG approach with Indigenous Peoples in Canada is not nation-to-nation, Inuit-Crown, or government-to-government.

5. **Consultation of Indigenous partners:**
   - Self-identifying INAC staff did not understand Crown-delegated Jurisdictions and their assimilation-related effect when consulted in place of community-based Immemorial rights-holders and their Inherent Jurisdictions;\(^vi\) and,
   - Staff did not understand that engagement processes cannot suffice for consultation.\(^vii\)

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\(^1\) see section III, 2  
\(^ii\) see section III, 3  
\(^iii\) see sections II, 4.3 and III, 4.3  
\(^iv\) see sections III, 11.1 and 11.2  
\(^v\) see section III, 4.4  
\(^vi\) see sections II, 4.2.2, 4.2.2.1 to 4.2.2.3, 4.3  
\(^vii\) see section III, 5.1
Failing to Renew the Relationship

6. Section 35 Treaty and Aboriginal rights:
   - Self-identifying INAC staff did not understand it is a myth that section 35 rights protect Indigenous culture and Immemorial rights,\(^\text{viii}\) when in fact they replace Immemorial rights and remove Inherent Jurisdiction over traditional territories.\(^\text{ix}\)

7. Meaningful consultation of Aboriginal rights:
   - Self-identifying INAC staff did not understand meaningful consultation is a tool used to continue the colonization of Indigenous traditional territories when the process needs to infringe on recognized Crown-defined Aboriginal rights;\(^\text{x}\) and,
   - Staff did not understand the nature of Immemorial rights\(^\text{xi}\) or Indigenous expectations for meaningful consultation of Immemorial rights.\(^\text{xii}\)

One of two conclusions can be drawn from these discussions with senior core, self-identifying Indigenous INAC staff:

1. Senior core Indigenous staff do not consciously know they are working to advance the colonization and assimilation of their own peoples; or,
2. Self-Identification is too low a threshold in candidate selection to ensure “visible” Indigenous staff retain their core Indigenous culture.

The Government of Canada’s commitment to improve capacity in INAC through the recruitment and retention of self-identifying Indigenous employees into core senior staff positions is failing.

4.5.2 Community Capacity:

One of the recommendations of a 2017 report delivered to the Government of Canada on Indigenous Recruitment and Retention was:

> “However, further investments could be made in Indigenous education, training and employment given the fact that Government of Canada policies such as colonization, forced relocation, breaking of treaty obligations, residential schools designed to extinguish cultures and languages also resulted in physical, sexual and psychological abuse with intergeneration effects.”\(^\text{206}\)

This recommendation speaks to the issue of providing capacity in Indigenous communities. In Budget 2018,\(^\text{207}\) the federal government pledged to advance Indigenous community capacity to engage in self-determination and self-government. But, what does that mean?

\(^{\text{viii}}\) see section III, 4.4  
\(^{\text{ix}}\) see sections II, 2.3.2 to 2.3.5, III, 11.2  
\(^{\text{x}}\) see sections II, 5.2 and III, 5.2  
\(^{\text{xi}}\) see section II, 2  
\(^{\text{xii}}\) see section II, 5.1 and III, 5.2
Failing to Renew the Relationship

From 2016 to 2017, we were involved with a multi-community project on First Nation health and mental health for remote communities. One aspect of that work involved cataloguing existing health-related staff and their training needs. We discovered there was an almost complete lack of provincial and federal investment in training community staff for these remote First Nation communities. At the same time, we noted that leaving a remote community to obtain a higher education did not, in general, result in career-related employment upon return to the community. Two points can be made:

1. There is very little investment in the training of in-community Indigenous staff; and,

2. Mainstream education’s ability to provide in-community solutions is oversold – The truth is, when sons and daughters of Indigenous Peoples in remote communities are educated in the non-Indigenous system, they generally cannot find employment in their community upon their return.

Education and training have failed Indigenous Peoples living in small rural and remote communities. It fails to prepare community members to provide what the community needs for its well-being. It fails because the concept of development in Indigenous communities and its supporting education system are defined by non-Indigenous values, including using salaried employment as the goal of economic development. To increase capacity for self-determination and self-government in Indigenous communities, the Government of Canada must consult and then support community rights-holders on their culture and their culture-based choices.

Canada, under the Doctrine of Discovery, has set a path for ‘self-determination’ using section 35 rights. Unfortunately, section 35 rights exclude:

1. Indigenous Peoples’ Inherent Jurisdiction over land, resources, and peoples;
2. International rights to self-determination, including economic, political, social (including education), and cultural developments;
3. International rights to permanent sovereignty over lands and resources; and
4. International rights to Inherent rights contained within the UNDRIP that include rights to set their own education and economic development goals.


The Principles upon which Canada is founding its new relationship with Indigenous Peoples promote colonization and do not respect Immemorial rights. Using these Principles, Canada will continue to provide capacity-building to assimilate Indigenous Peoples to meet its colonizing objectives.

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i see sections II, 2.3.2 to 2.3.5
ii see sections III, 11.1, 11.2 and 11.3
iii see section III, 11.2
iv see sections II, 2.4.6 and III, 11.1, 11.2
v see section III, 2
Failing to Renew the Relationship

5. Consultation:

The Government of Canada approaches Indigenous consultation from two perspectives:

1. The engagement of Indigenous Peoples to advance policy, programs and legislation; and,
2. The discharge of its duty to consult to advance land and resource development through meaningful consultation.

5.1 Engagement:

Engagement activities derive from Canada’s whole-of-government approach\(^1\) to renew Indigenous relationships. Dialogue with engaged partners and stakeholders is used to develop Indigenous policies, programs, and legislation.\(^2\) Stakeholders include individuals, associations, organizations, and other levels of the federal government. Partners include Indigenous partners (Treaty, National, and Institution) plus provincial and territorial governments.

It is inappropriate to consider engagements equivalent to consultation when they are simple, informal processes. Further, engagement processes on Indigenous issues should not be confused with meaningful consultation and the duty to consult. Engagement processes include online surveys and feedback forms, face-to-face discussions, focus groups, and public forums. Current Indigenous engagements include:

- National engagement on the recognition of Indigenous rights;
- On-reserve infrastructure reform engagement;
- Safe Drinking Water for First Nations Act engagement;
- First Nations education transformation engagement; and,
- Indian Oil and Gas Regulations engagement.

There are several problems with the Government of Canada’s use of engagements to create policy, programs, and legislation for Indigenous Peoples as outlined in Table 7.

<table>
<thead>
<tr>
<th>Table 7: Indigenous Engagement flaws</th>
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<tbody>
<tr>
<td><strong>1. The use of the whole-of-government (WOG) approach is inappropriate:</strong> (^{ii})</td>
</tr>
<tr>
<td>- WOG initiatives are about reform within ‘a’ solitary government. Nation-to-nation reform is between two sovereign governments. Inter-nation reform requires consultation and negotiated bilateral agreements;</td>
</tr>
<tr>
<td>- By definition, the Crown cannot extend its WOG approach over Indigenous Peoples while at the same time recognizing them on a nation-to-nation, distinct nations basis. They would be, by definition, separate autonomous governments; and,</td>
</tr>
<tr>
<td>- If Indigenous Peoples are received as sovereign governments, joint policymaking and implementation would be done through the consultation and negotiation of</td>
</tr>
</tbody>
</table>

\(^{i}\) see section III, 4.4
\(^{ii}\) see section III, 4.4
Failing to Renew the Relationship

| bilaterial agreements with community-based Immemorial rights-holders for each Indigenous nation. |

2. Engaged partners and stakeholders are not community-based rights holders:
   - These groups are Crown-Delegated Jurisdictions who do not legally represent the sovereignty and Inherent Jurisdiction of Immemorial rights-holders; and,
   - Engaging partners and stakeholders ignores the need to consult Indigenous community-based rights-holders and their Inherent Jurisdiction of government in discussions that affect their rights to self-determination for economic, political, social, and cultural development.

3. The engagement of partners and stakeholders on policy, legislation, regulations, and programs that may adversely affect Aboriginal and Treaty rights cannot substitute as meaningful consultation:
   - Policy, legislation, and regulation changes that may affect Indigenous claims to land must be brought to community rights-holders for consultation; and,
   - Policy, legislation, and regulation changes that may affect communal rights to fish or hunt must be brought before the rights-holders of the entire nation.

4. Public forum processes used in engagements cannot substitute for meaningful consultation.

5.2 Meaningful Consultation:

In the past, the Crown did not consult Indigenous Peoples. The Crown’s duty to consult was established in court over a 20-30 year span following the 1982 inclusion of section 35 into the Constitution Act. Only after losing in court to Indigenous Peoples protecting rights to their land did the Crown acknowledge its duty to consult. The Government of Canada currently ascertains the duty to consult is triggered when the Crown engages in conduct that ‘may’ adversely affect potential or established section 35 Aboriginal and Treaty rights.

Canada’s current whole-of-government approach to meaningful consultation includes:

1. Consultation with Indigenous groups on a wide spectrum of activities;
2. Each federal government department is responsible for meeting consultation obligations arising within its mandate;
3. Consultations take place in a variety of fora including:
   a) Bilateral meetings with Indigenous groups or representative aggregates;

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i see sections II, 2.1, 4.2.1 and 4.2.2
ii see also sections II, 4.2.2.1 to 4.2.2.3
iii see also sections II, 4.3 and III, 4.3
iv see section II, 5.2
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b) Joint committees established through modern treaties;
c) Regional forums;
d) Multi-stakeholder processes; and
e) Regulatory review processes for resource development projects.

Meaningful consultation using the above whole-of-government approach provides no consultation to community-based rights-holders. Indigenous authority flows bottom-up from community rights-holders and final decision-making (the Inherent Jurisdiction for decisions) is not delegated to community leaders.¹ The Government of Canada’s whole-of-government approach to meaningful consultation fails to provide consultation to the decision-making Indigenous authority that holds all Fiduciary, Treaty, Aboriginal, Inherent, and Immemorial rights.²

The federal government’s activities to fulfill its duty to consult²¹⁶ and our comments are outlined in Table 8.

<table>
<thead>
<tr>
<th>Table 8: INAC (CIRNA) Duty to Consult Activities &amp; Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Training:</strong></td>
</tr>
<tr>
<td>INAC, and now CIRNA, supports federal departments and agencies on the duty to consult by providing training. Training includes:</td>
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<tr>
<td>- Case law for Aboriginal and Treaty rights;</td>
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<tr>
<td>- Identification of potential adverse effects;</td>
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<tr>
<td>- Assessing consultation requirements, strength of the claim, scope of consultation, extent of accommodation, and accommodation options;</td>
</tr>
<tr>
<td>- Elements of the meaningful consultation process and consultation agreements; and,</td>
</tr>
<tr>
<td>- Coordination of consultation processes and assessing their adequacy.</td>
</tr>
<tr>
<td><strong>Comments:</strong></td>
</tr>
<tr>
<td>- Training can only be as good as the information used to create training materials. All training materials are created using the Principles upon which the Crown’s new relationship with Indigenous People is based.³ Those Principles are grounded firmly in the Framework of Colonization⁴ and the Doctrine of Discovery. In that regard, training excludes Indigenous sovereignty, Immemorial rights, law and Inherent Jurisdiction while further entrenching the colonization and assimilation of Indigenous Peoples.</td>
</tr>
</tbody>
</table>

| 2. Guidelines: |

¹ see sections II, 2.1, 4.1 and 4.3
² see Diagram 1
³ see section III, 2
⁴ see Table 1
INAC, and now CIRNA, supports federal departments and agencies on the duty to consult by providing consultation and accommodation guidelines. The current guidelines were developed in 2011. An engagement process to update the guidelines was undertaken in 2015. The 2016 report of the engagement will be used to update consultation and accommodation guidelines.

Comments:

- The current 2011 federal guidelines are for consultation and accommodation of section 35 rights. Section 35 rights exclude Indigenous sovereignty, Immemorial rights, law, and Inherent Jurisdiction;
- Pending new guidelines for consultation and accommodation will not change the Government of Canada’s goals or objectives for meaningful consultation when they are based on the Principles for a new relationship that retain colonization’s mechanisms and goals; and,
- The development of new guidelines using a whole-of-government (WOG) approach to consult Indigenous partners in place of community-based rights-holders will not result in guidelines that include the goals and objectives of Sovereign Indigenous communities and nations.

3. Consultation Protocols:

The Government of Canada signs consultation protocols with Indigenous groups to create a process to follow when consulting on potential adverse impacts to Aboriginal or Treaty rights in planned land and resource developments. These Consultation protocols:

- Facilitate engagement;
- Promote relationship building;
- Clarify roles and responsibilities between governments and Indigenous communities; and,
- Provide a more efficient approach through which governments can consult Indigenous groups.

Comments:

- Consultation protocols do not consult rights, they consult on a specific land or resource project that may adversely affect a land-based Treaty or Aboriginal right;
- The Crown does not create consultation protocols with Indigenous Peoples to meaningful consult rights-holders on Fiduciary, Treaty, Aboriginal, Inherent, or Immemorial rights. The Government of Canada has no knowledge base from which to understand how to respect Immemorial rights in policy, legislation, regulations, and programs if rights holders are never consulted; and,
Failing to Renew the Relationship

- The creation of consultation protocols using the Principles for a new relationship\(^1\) will maintain the old relationship of colonization and assimilation.

4. Interdepartmental teams:

Interdepartmental consultation and accommodation teams meet regularly to discuss policy, operational issues, provide information, and coordinate consultation efforts.

Comments:

- Interdepartmental teams using the guiding Principles\(^2\) for a new relationship will continue to act in a manner that effects colonization and assimilation.

5. Memorandums of Understanding (MOUs):

INAC, and now CIRNA, assists in developing informal agreements, MOUs, between provincial or territorial governments and the Government of Canada.

Comments:

- There has been a vacuum in the leadership and law necessary to protect Indigenous Peoples from colonization and assimilation in Canada. As a result, the attitudes of provincial and territorial governments to Indigenous Peoples, rights, and consultation vary widely across Canada. Without the removal of the Doctrine of Discovery and Framework of Colonization, the Principles\(^3\) to found a new relationship will continue to perpetuate the problem.

Earlier, we discussed Crown and Indigenous understandings, goals, and objectives for meaningful consultation.\(^4\) These are summarized in Table 9.

<table>
<thead>
<tr>
<th>Table 9: Indigenous versus Crown Meaningful Consultation</th>
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<tr>
<td><strong>Indigenous Meaningful Consultation (IMC):</strong></td>
</tr>
<tr>
<td><strong>Goal:</strong> The bilateral discussion of rights and culture to establish a relationship for sharing the land based on the mutual recognition of sovereignty, rights, law, and jurisdiction.</td>
</tr>
<tr>
<td><strong>Objectives:</strong></td>
</tr>
<tr>
<td>1. The inclusion of traditional knowledge, Immemorial rights, and Indigenous law into the use of land in traditional territories;</td>
</tr>
<tr>
<td>2. The recognition of Indigenous sovereignty and Inherent Jurisdiction</td>
</tr>
</tbody>
</table>

\(^1\) see section III, 2  
\(^2\) see section III, 2  
\(^3\) see section III, 2  
\(^4\) see sections II, 5.1, and 5.2
## Understanding:

1. IMC is culture-based;
2. IMC is nation-to-nation, recognizing Indigenous sovereignty;
3. IMC recognizes Inherent Jurisdiction over community, Indigenous institutions, and traditional territory;
4. IMC recognizes Indigenous stewardship over traditional territory;
5. IMC consults Immemorial rights and Indigenous law;
6. IMC recognizes Immemorial rights as equal to Crown rights;
7. IMC includes the sovereign right to say, “no;” and,
8. IMC ensures Immemorial rights remain intact for past, present, and future generations.

### Crown Meaningful Consultation (CMC):

#### Goal:
The reconciliation of pre-existing Aboriginal societies with the assumed sovereignty of the Crown to access land and resources based on the recognition of section 35 Treaty and Aboriginal rights.

#### Objectives:

1. To discharge the Crown’s legal duty to consult;
2. To plan Indigenous land exploitation;
3. To justify the infringement of Aboriginal land-based rights while pursuing land and resource development objectives; and,
4. To accommodate Indigenous Peoples for infringement on Aboriginal rights.

#### Understanding:

1. CMC is the procedure or process for the Crown to discharge the legal duty to consult when advancing colonial interests in land over which Indigenous Peoples claim Aboriginal or Treaty rights.
2. The duty to consult:
   - Is the Crown’s commitment to a meaningful process only – not a commitment to agree;
   - Applies to settled and unsettled land claims;
   - Has a defined trigger that engages the Crown;
   - Must be assessed by the strength of support for the right and the impact of potential adverse effects of the intended action to determine the nature and scope of the CMC required; and,
Failing to Renew the Relationship

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<td></td>
<td>• Consults because section 35 Treaty and Aboriginal rights must be protected in the process of taking up land and resources for development, but these rights are not absolute and can be infringed upon through a justification process.</td>
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<tr>
<td>3.</td>
<td>CMC is part of a negotiation process to reach an agreement in regard to the Crown taking up of Indigenous lands:</td>
</tr>
<tr>
<td></td>
<td>• There is no duty to reach an agreement.</td>
</tr>
<tr>
<td>4.</td>
<td>CMC has both consultation and accommodation components:</td>
</tr>
<tr>
<td></td>
<td>• The Crown determines if there is a duty to accommodate; and,</td>
</tr>
<tr>
<td></td>
<td>• The Crown may not accommodate Indigenous Peoples even after a duty to accommodate is established.</td>
</tr>
<tr>
<td>5.</td>
<td>The fulfillment of the duty to consult is assessed after CMC by weighing the Crown’s offer of accommodation in regard to the potential impact of the infringement on the right under consultation.</td>
</tr>
</tbody>
</table>

Indigenous Peoples and the Government of Canada see meaningful consultation very differently. Under a colonizing relationship with Indigenous Peoples, the Crown’s meaningful consultation for the reconciliation of Aboriginal rights is actually a tool used to exploit land when colonizing objectives infringe on Aboriginal rights. The meaningful consultation tool was defined by common law to protect Crown rights to land and resources based on assumed sovereignty and the Doctrine of Discovery.

The Government of Canada plans to renew its relationship with Indigenous Peoples on a nation-to-nation, Inuit to Crown, and government-to-government relationship. This should realign meaningful consultation with Indigenous goals, objectives and understandings. However, the Principles set by the Government of Canada that form the foundation of the renewed relationship retain the Doctrine of Discovery and Canada’s Framework of Colonization. In that light, the Crown’s process of meaningful consultation will continue to advance the colonization and assimilation of Indigenous Peoples and lands.

6. Fiscal Relationship:

The Government of Canada has recognized that to advance reconciliation and facilitate ‘greater’ self-determination and self-government, a new fiscal relationship is needed. INAC, and then ISC, have worked with the AFN to work out a vision for that new relationship with First Nations. The work was done using a whole-of-government approach with AFN and INAC/ISC as co-leaders, three federal government technical working groups, and several regional engagements. In a December 2017 report, AFN and ISC agreed upon objectives for a new First Nations fiscal relationship.

Vision objectives and our comments are summarized in Table 10.

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i see section II, 5.2
ii see section III, 2
Failing to Renew the Relationship

Table 10: AFN-ISC New Fiscal Relationship Vision

**Vision 1:**
A new fiscal relationship should by design recognize and be responsive to First Nations’ right to self-determination – a recognition-of-rights approach.

Comments:
- The Crown does not recognize Indigenous sovereignty, Immemorial rights, law, or Inherent Jurisdiction. It therefore does not recognize the sovereign First Nation Immemorial right to self-determination;
- The Crown does not recognize Indigenous Peoples in Canada as ‘peoples’ under international law entitled to the international right of self-determination; and,
- The Crown does recognize self-determination as an Aboriginal right under section 35. It is self-government that is an Aboriginal right under section 35. Aboriginal rights under section 35 are part of the Framework of Colonization meant to replace both the international and the Immemorial rights of First Nations to self-determination. There is no Aboriginal right in Canada comparable to either the International or Immemorial rights to self-determination.

**Vision 2:**
A new fiscal relationship should strengthen First Nations’ exercise of their right to self-determination by supporting First Nations-led capacity enhancement.

Comments:
- First Nations have an international right to permanent sovereignty over land and natural resources that is not recognized by the Government of Canada. Sovereignty over land and resources is recognized by the United Nations as crucial to attaining self-determination; and,
- To support the exercise of self-determination, the Government of Canada must recognize First Nation sovereignty and Inherent Jurisdiction to land and resources so that resource-based revenue streams can finance sustainable self-determination.

**Vision 3:**
A new fiscal relationship should be a learning, evolving, and empowering relationship – a conscious break from rigid colonial structures - with whole-of-Government approaches that address the realities of all First Nations.

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i see sections I, 1, 2 and II, 2.3.2  
ii see section III, 11.1  
iii see section II, 4.2.2.3  
iv see Table 1  
v see section III, 11.2  
vi see section III, 11.2
Failing to Renew the Relationship

Comments:

• The whole-of-government approach is a bureaucratic policy reform mechanism which by definition must be undertaken within a single autonomous government. If the Crown recognizes First Nation sovereignty, it must use meaningful consultation and bilateral agreements to develop a new fiscal relationship with First Nations on a nation-to-nation basis;¹
• The use of a whole-of-government approach by the Government of Canada is actually a rigid colonial approach since it excludes Immemorial rights to sovereignty and the international right to processes leading to self-determination;² and,
• A true evolving and empowering relationship is by definition the ongoing aspect of international self-determination.³ However, the Government of Canada has unambiguously chosen to continue both the oppression of Indigenous Peoples and the denial of their right to self-determination.⁴

Vision 4:
A new fiscal relationship will ensure sufficient funding.

Comments:

• The old fiscal relationship is based on colonization and fails because:
  ◦ The Crown takes almost all revenue from land and resources for itself and its corporate citizens.⁵ The Crown can do this because it does not recognize First Nation sovereignty over land and resources;⁶ and,
  ◦ The Crown grants funding [not shared revenue] to First Nations based on Crown objectives and goals.⁷ Earmarked funding at insufficient levels coupled with accountability measures allows the Crown to maintain control over First Nations.

• Any new fiscal relationship that maintains colonization will result in an unchanged fiscal relationship, a relationship in which the Crown maintains control of revenue from First Nations lands and resources:
  ◦ We have already established the Government of Canada is basing its new relationship with First Nations on Principles⁸ that retain the Doctrine of Discovery and the Framework of Colonization. In that regard, the proposed new fiscal relationship will not change the relationship.

• A new fiscal relationship should be based on recognition of First Nation sovereignty and the need to share in resource-based and citizen-based revenue streams:
  ◦ Recognition of Indigenous sovereignty would involve the inclusion of Indigenous Inherent Jurisdiction in joint decision-making processes.

¹ see section III, 4.4
² see section III, 11
³ see section III, 11
⁴ see section III, 11.3
⁵ see sections I, 1 and II, 2.3.2, 2.3.5
⁶ see sections III, 6 and 8
⁷ see section III, 2
⁸ see section III, 2
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**Vision 5:**

A new fiscal relationship will empower First Nations to plan and invest based on their own priorities by ensuring greater predictability, flexibility, and autonomy of funding arrangements;

Comments:

- There is no issue with this statement other than the new relationship should be based on revenue sharing agreements and permanent First Nation sovereignty over land, natural resources, and citizens, not funding arrangements.

**Vision 6:**

A new fiscal relationship should be founded on a mutual accountability relationship whereby First Nations governments operating under the auspices of the *Indian Act* are primarily accountable to their own citizens, while the Government of Canada and First Nations governments hold one another mutually accountable for the commitments they make to one another and work together to achieve results for First Nations citizens.

Comments:

- There is no mutual accountability in the current relationship nor in a new relationship founded on Principles that still retain colonial objectives.\(^i\)
- Mutual accountability here means that both the Crown and First Nations will be accountable to the Crown’s rule of law which excludes First Nation sovereignty, Immemorial rights, law, and Inherent Jurisdiction. This is not appropriate:
  - If the Crown is not accountable to First Nation law, ‘mutual accountability’ is a myth – a whole-of-government myth approach – meant to placate a group into accepting financial reform policies. Where is the Government of Canada accountable for underfunding and withheld revenue streams?
  - Mutual accountability should be based on Indigenous self-determination and nation-to-nation dialogue using International and Indigenous laws in addition to the Canadian rule of law.

**Vision 7:**

A new fiscal relationship will underpin progress toward the elimination of socioeconomic gaps between First Nations citizens and other Canadians.

Comments:

- The socioeconomic gap will never close as long as the Crown-First Nation relationship remains one of colonization.\(^ii\) The basis of colonization is the Crown’s progressively ‘exploitation’ of First Nation land and resources without adequate compensation.\(^iii\) How

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\(^i\) see section III, 2
\(^ii\) see section III, 7
\(^iii\) see section III, 8
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can the socioeconomic gap close if it continues?

- We have already established that Principles upon which the new relationship between the Crown and Indigenous Peoples will be based maintain colonization.\(^1\) In that regard, the socioeconomic gap for remote and rural First Nation communities will not close with the new fiscal relationship proposed by AFN and ISC.

In over a decade of our discussions with remote and rural Indigenous community rights-holders, a clear picture emerged: Immemorial rights-holders were always willing to share their land and resources. However, under the Doctrine of Discovery, the Crown chose the exploitation of peoples and their land, not sharing. Indigenous Peoples still do not understand why the Crown believes its assumed sovereignty justifies short-sighted, greed-based colonizing policies and unilateral decision-making.

Indigenous rights-holders do not want government funding handouts. They want their share of revenue from respectful, sustainable land use and resource development. It is, after all, their traditional territory. A revenue stream of this nature will allow for true self-determination based on sovereignty, Immemorial rights, and Inherent Jurisdiction.

If the Government of Canada was truly committed to a new nation-to-nation, Inuit-Crown, and government-to-government relationship with Indigenous Peoples, a fiscal relationship would recognize:

1. Indigenous sovereignty, Immemorial rights, law, and Inherent Jurisdiction over land, resources, and peoples;
2. The need to build what was withheld; and,
3. The need to share revenue based on Indigenous sovereignty over land and resources.

At the time of writing, the Government of Ontario announced a revenue sharing agreement with three northern First Nation councils for mining and forestry revenues.\(^2\) Ontario will share a percentage of its stumpage fees, mining royalties, and mining taxes. The three councils comprise 41 communities whose traditional territories span 40 to 45 percent of land in Ontario. Mining royalties and taxes in all of Ontario accounted for $57 million of Ontario’s $141 billion total revenue in the 2016-17 fiscal year. Working with the percentages for sharing under the agreement, Ontario would share 0.0071 percent of its 2016-17 revenue to offset primary industries (farming, mining, forestry, and energy) accessing traditional territories comprising 40 to 45 percent of its land mass. At the same time, the gross revenue from these industries will be a number of magnitudes higher (100 to 1,000 times) than revenue offered to these First Nations, particularly when secondary and tertiary industries are included. What then does the amount of revenue in the sharing agreement represent?

In general, remote First Nation communities have two potential revenue sources: federal government funding or natural resource revenue from within traditional territories. The funding offered by the Ontario government to offset the harvest and extraction of natural resources over 40-45 percent of Ontario’s land mass amounts to 6 to 12 percent\(^2\) of each communities’ current, poverty level, budget. These communities cannot become economically sustainable at this level of compensation. By today’s standards, the amount of revenue in the sharing agreement is

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\(^1\) see section III, 2

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reminiscent of colonial trade in trinkets.

The new fiscal plan for a renewed relationship between Indigenous Peoples and the Government of Canada will continue to exploit Indigenous lands and resources without substantial benefit to the Imm membral rights-holders of those lands. Poverty and socioeconomic gaps will not improve substantially, nor will the fiscal plan support self-determination.

7. Service Gaps:

One result of colonizing policies is that infrastructure services and their programs were extended to Indigenous communities only when it served the Crown’s purpose. In general, Indigenous Peoples were constrained to accessing services and programs in non-Indigenous communities. The more north or isolated a community was, the less services and programs it had access to.

Indigenous communities continue to be disadvantaged with services and programs because of policies created by governments in Canada that think in terms of their own [the Crown’s] measures of success. These centralized colonial solutions save the expense of in-community infrastructure and promote the enfranchisement of Indigenous Peoples [the removal of all legal distinctions from Indigenous people] by forcing migration from second class conditions within Indigenous communities to non-Indigenous urban centres.

“At Confederation two paths were laid out: one for non-Aboriginal Canadians of full participation in the affairs of their communities, province and nation; and one for the people of the First Nations, separated from provincial and national life, and henceforth to exist in communities where their traditional governments were ignored, undermined and suppressed, and whose colonization was as profound as it would prove to be immutable over the ensuing decades.” [Emphasis added]

As a result, current gaps in health care, education, housing, nutrition, policing, safe drinking water, economies, justice, and etc. are reflections of infrastructure service and program levels available to Indigenous Peoples. Colonial ideas of solutions must no longer be imposed on Indigenous Peoples at the expense of their communities and culture. Indigenous communities know what they need for their communities to heal, be healthy, and to be affluent. The antithesis of that is assimilation.

An example of the policy to withhold, or provide inadequate, community infrastructure while promoting enfranchisement can be seen in a report from the Auditor General of Canada on the federal governments efforts to close the socioeconomic gap with the provision of education to First Nations, INAC, and now the Department of Indigenous Services Canada (ISC), provides education services to on-reserve First Nations communities. First Nations people living outside the reserve community are integrated into non-Indigenous provincial or territorial education systems. The Auditor General’s review of ISC’s handling of education data revealed a number of alarming details supporting the ‘two path’ conclusion mentioned above from the Report of the Royal Commission on Aboriginal Peoples. These include:

- Mischaracterizing results;
- Failing to report the gap in education between on-reserve First Nations people and other Canadians was growing wider;
- Under-reporting on-reserve First Nations high school student drop out rates by 10 to 29
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percentage points; and,

• Failing to use the data already in ISC’s possession to improve education programs for on-reserve First Nations people.

Resolving Indigenous issues in Canada is big business. Governments in Canada tend to throw money at Indigenous issues in attempts to make the problem go away. Most of those funds never reach Indigenous communities. They are expended by government departments, governance organizations, partners, stakeholders, service providers, and others that feed off the government’s Indigenous trough. Funds are also directed away from Indigenous communities because communities lack the infrastructure and human resource capacity to translate funding into action – an adverse dividend from the Framework of Colonization.

The Government of Canada has placed a substantial amount of new money from its 2015, 2016, and 2018 budgets, $16.6 billion, into a system in which Indigenous communities still do not have the infrastructure to receive funding and put it into action. The final resting place for the vast majority of those funds will be the same – somewhere outside of Indigenous communities. The likely result of all that spending will be that community-based Immemorial rights-holders remain in poverty with marginally better standards of living, if the relationship between Indigenous Peoples and the Crown does not change.

We believe Indigenous People should define for themselves what their new relationship will be, but it is safe to say it would be a form of nation-to-nation partnership grounded in self-determination. If the federal government wants to have a different outcome for its investment, it will need to change its relationship with Indigenous Peoples from colonization to one of self-determination, shared decision making, and shared resources. That partnership would need to include establishing culture-based in-community infrastructure built within Indigenous Inherent Jurisdictions that are founded upon Immemorial rights and Indigenous sovereignty.

A detailed review of the myriad of programs the Government of Canada is engaged in to reduce service and program gaps is beyond the scope of this report.

8. Funding:

We have discussed the Government of Canada’s objectives for a new fiscal relationship with First Nations. That new relationship will fail because of the Crown’s continued colonization and exploitation of Indigenous lands and resources empowered by Crown-assumed sovereignty and the Doctrine of Discovery.

It is an established fact that ‘peoples’ who cannot control their natural resource cannot sustain self-determination. The Government of Canada claims to recognize the right of Indigenous Peoples in Canada to self-determination, but yet does not recognize Indigenous sovereignty to natural resources. Without the recognition of sovereignty, Indigenous Peoples cannot obtain an appropriate level of financial return from their lands and resources to sustainably support their communities and citizens.

The Government of Canada provides funding to Indigenous communities under its fiduciary

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i see section III, 6
ii see section III, 11.2
duty. However, the amount reaching communities in revenue, goods, and services is insufficient to provide adequate programming or empower Indigenous nations to build their own economies and service-delivery infrastructures. This leaves Indigenous Peoples both impoverished and with gaps in service and program delivery. The further north or remote a community is, the more disadvantaged it becomes.

In recent discussions with senior staff at INAC, we were told that the Government of Canada’s Indigenous partners are well funded and core senior Indigenous INAC staff were well supported. Of course, this is in stark contrast to the shortfall in funding and program support we have seen from INAC within remote Indigenous communities.

It is impossible to discern with the information available to us how inadequate funding levels for Indigenous communities may be. What is apparent is that funding is burned up as it goes down to the bottom of the proverbial food chain to where recipient Indigenous rights-holders live. This is illustrative of the problematic top-down funding system used by INAC.

Indigenous Peoples in Canada should fund their own economies and infrastructures to get out from the bottom of the chain. Of course to do that, they need a revenue source. Community-based Immemorial rights-holders are not poor. Their wealth is in the land and natural resources they have stewarded since long before European colonists arrived. Indigenous Peoples can fund their own communities, infrastructure, and government systems through self-determination in partnership with Canada. However, to accomplish that, the Doctrine of Discovery and Framework of Colonization would need to be removed. At this point, the new relationship proposed by the Government of Canada retains the Doctrine of Discovery with its top-down funding structure.

9. Treaties:

INAC, and now CIRNA, is responsible for negotiating, implementing, and maintaining treaties on behalf of the Government of Canada and the Crown.

We have already discussed that treaties create ‘Treaty rights’ protected under section 35 of the Constitution Act. The purpose of treaties is the acquisition of Indigenous lands through the surrender of Aboriginal title – colonization. Aboriginal title derives from the Doctrine of Discovery and should not be confused with Indigenous Inherent Jurisdiction over land and peoples.

Aboriginal title is what remained after the Doctrine of Discovery striped away Indigenous sovereignty, Immemorial rights, law, and Inherent Jurisdiction leaving only Crown-defined Aboriginal rights to restricted land use and occupation. Aboriginal title is protected under section 35 as an Aboriginal right. Aboriginal rights under section 35 are used in the Framework

i see section II, 2.3.1
ii see section III, 7
iii see section II, 4.2.2
iv see section III, 4.5.1
v see section II, 2.3.3
vi see section II, 2.3.5
vii see section I, 1
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of Colonization by the Crown to replace Immemorial rights.\(^i\)

Treaty rights are a class of pencilled-in Aboriginal rights which are wildly inconsistent from one Indigenous nation to the next. They came into existence as the Crown negotiated hard with Indigenous Peoples leaving them with as little control and benefit as possible. The inconsistencies between Treaty rights of one Indigenous Peoples to the next is discriminatory.

Within the plan to renew the Crown’s relationship with Indigenous Peoples, the Government of Canada’s platform for treaties includes:

1. Increasing the number of comprehensive modern treaties and new Self-Government Agreements in a manner that reflects a recognition of rights approach and reconciliation;
2. Replacing the use of loans to fund Indigenous participation in the negotiation of modern treaties and fund participation with non-repayable contributions;
3. Engaging with affected Indigenous groups on how best to address past and present negotiation loans, including forgiveness of loans;
4. Considering means to clarify obligations and ensure the implementation of pre-confederation, historic, and modern treaties and agreements, including updating elements of the treaty relationship to ensure consistency with a recognition of rights approach; and,
5. Shortening the time it takes to reach new treaties and agreements, at a lower cost to all parties.

The recognition of rights approach the Government of Canada is using to negotiate, clarify, implement, and manage treaties under its new relationship continues the colonization of Indigenous lands and resources under the Doctrine of Discovery. It does so because the approach is based on Principles\(^{ii}\) that do not recognize Indigenous sovereignty, Immemorial rights, law, or Inherent Jurisdiction – Indigenous rights. These Principles recognize the alternate rights regime of sections 25 and 35 that usurps Immemorial and International rights.\(^{iii}\) Comprehensive modern treaties recognized under section 35 are not international, nation-to-nation instruments with Indigenous Peoples.\(^{iv}\) They are instruments for the surrender of land and rights, not instruments of reconciliation.\(^{v}\)

The lack of impetus to return treaty-making to an appropriate nation-to-nation status indicates the reluctance of the Government of Canada to change its perspective on its relationship with Indigenous Peoples.

The Crown is fundamentally flawed in its understanding of its rights to extend assumed sovereignty over Indigenous traditional territories through treaties. The Crown does not grant Indigenous Peoples a claim to Aboriginal title and Treaty rights when treaties are signed, Indigenous Peoples grant European settlers landed Immigrant rights to share the land. The sovereignty of Indigenous Peoples and their law, Inherent Jurisdiction, and Immemorial rights predate all claims the Crown can exert to land and resources in Canada.

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\(^i\) see Table 1
\(^{ii}\) see section III, 2
\(^{iii}\) see sections II, 2.3.2 and III, 11.2
\(^{iv}\) see section II, 2.3.3
\(^{v}\) see Table 4
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10. Rights Framework:

In 2018, the Right Honourable Justin Trudeau, Prime Minister of Canada, announced the Government of Canada would create a Recognition of Rights Framework (Framework) for Indigenous Peoples. The purpose of the Framework is to make the recognition and implementation of rights the basis for all relations between Indigenous Peoples and the federal government.

The Framework is purported to ensure the Government of Canada respects Treaty and Aboriginal rights recognized under section 35 of the Constitution Act through the provision of policies and mechanisms to exercise those rights. The Framework is supposed to meet the objectives of the UNDRIP. The Framework will include:

1. New legislation and policy to make the recognition and implementation of rights the basis of all federal Indigenous relations;
2. Measures to support rebuilding of Indigenous nations and governments; and,
3. Advancing self-determination and the inherent right to self-government.

The contents of the Framework will be determined in full partnership with First Nation, Inuit, and Métis Peoples through national engagement activities. Engagement results will guide what the framework will look like. The Government of Canada will engage:

- Indigenous partners (Treaty, National, and Institutional Partners);
- Provincial and territorial governments;
- Stakeholders (representatives from industry, employers, municipalities, academia, the legal community and civil service organizations); and,
- The general public.

Legislative and policy elements of the Framework may include:

1. Legislation to formalize the standard for recognition of section 35 rights as the basis for all government relations with Indigenous Peoples;
2. A new policy to replace the current Comprehensive Land Claims Policy and the Inherent Right to Self-Government Policy;
3. Reforming federal government policies and practices to support the implementation of treaties and Self-Government Agreements;
4. Mechanisms to support the rebuilding of Indigenous nations and governments;
5. Mechanisms to advance Indigenous self-determination and the inherent right of self-government;
6. Creating new dispute resolution approaches to address rights-related issues;
7. Tools to strengthen a culture of federal government accountability; and,
8. Legislation establishing the two new departments (CIRNA and ISC) that will replace INAC.

Table 11 contains problematic issues with the plan for the Framework.
Table 11: The Proposed Recognition of Rights Framework – Problematic Issues

1. Section 35 Rights:

The Framework will ensure respect for section 35 Treaty and Aboriginal rights.

Comments:

- The Framework will be based on the Principles which we have shown continue the colonization and assimilation of Indigenous Peoples;¹
- Section 35 excludes Indigenous sovereignty, Immemorial rights, law, and Inherent Jurisdiction,² so too will the Framework;
- Treaty and Aboriginal rights were created under the Doctrine of Discovery and are part of the Framework of Colonization.³ They function to destroy Indigenous sovereignty by replacing Immemorial rights with the alternate rights regime of Crown-defined section 35 Treaty and Aboriginal rights;⁴ and,
- The right to self-government⁵ in Canada is an Aboriginal right under section 35 that replaces Immemorial and international rights to self-determination⁶.

2. UNDRIP:

The Framework will meet the objectives of the UNDRIP.

Comments:

- The UNDRIP cannot displace the rule of law in Canada²⁴³ and can only inform on the interpretation of it. The UNDRIP’s objectives can only guide unless adopted by federal legislation:
  - If the UNDRIP is not brought into force in Canada, the Government of Canada will not include International Indigenous rights into its Framework; and
  - The Government of Canada does not recognizes Indigenous Peoples as ‘peoples’ guaranteed International rights to self-determination, permanent sovereignty over land and resources, and Inherent rights within the UNDRIP.⁷
- The UNDRIP is not entrenched in the Doctrine of Discovery so that the Government of Canada can legislate the inclusion of the Declaration and its Inherent rights into the rule of law in Canada without negatively impacting Indigenous community rights-holders:⁸
  - If the UNDRIP is brought into the rule of law in Canada, it does not bring with it a full spectrum of Immemorial rights.⁹ It only includes rights of the present

¹ see section III, 2
² see section II, 2.3.2
³ see Table 1
⁴ see sections II, 2.3.2 to 2.3.5
⁵ see section II, 4.2.1 and 4.2.2.3
⁶ see section III, 11.2
⁷ see section III, 11.1
⁸ see section III, 11.1
⁹ see section II, 2.3.6
ixo see section II, 2.3.6
The full spectrum of Immemorial rights includes, ‘Our Rights’ (past, present, and future generations) and ‘The Land’.\(^{\text{i}}\)

- The UNDRIP also limits the self-determination of Indigenous Peoples with article 46 safeguard and repugnant clauses.\(^{\text{ii}}\)

### 3. Engagement Process:

The contents of the Framework will be determined in full partnership with First Nation, Inuit, and Métis peoples through national engagement activities.

**Comments:**

- There are no ‘distinct peoples’ or Indigenous nations named First Nation, Inuit, and Métis peoples in Canada. This is a three-group distinction of Aboriginal peoples created within section 35 as part of the Framework of Colonization that replaces distinct Indigenous nations.\(^{\text{iii}}\)
  - The three-group distinction of First Nation, Inuit, and Métis peoples creates three ethnic minority groups who are not recognized under international law as distinct peoples or Indigenous Peoples;\(^{\text{iv}}\) and,
  - An engagement process using the three-group distinction approach does not recognize the sovereignty and Inherent Jurisdiction of Indigenous nations.\(^{\text{v}}\)

- The engagement process is part of a whole-of-government approach which by nature denies Indigenous Peoples recognition of nation-to-nation status and excludes community-based Immemorial rights-holders.\(^{\text{vi}}\)
  - If Indigenous Peoples are recognized as sovereign governments, the appropriate engagement on policy and implementation mechanisms is the consultation and negotiation of bilateral agreements with community-based Immemorial rights holders for each Indigenous nation in Canada;
  - The consultation of Indigenous partners and stakeholders denies community-based rights-holders their right to consultation on communal section 35 rights; and,
  - Indigenous partners and stakeholders consulted during engagement do not legally represent the sovereignty and Inherent Jurisdiction of Immemorial rights-holders.

- Public consultation processes used in engagement processes cannot legally fulfill the duty to consult.\(^{214}\)

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\(^{\text{i}}\) see section II, 2.1
\(^{\text{ii}}\) see section II, 2.3.6
\(^{\text{iii}}\) see section III, 4.2
\(^{\text{iv}}\) see also sections II, 2.3.2 and III, 11.1
\(^{\text{v}}\) see also section III, 5.1
\(^{\text{vi}}\) see sections III, 4.4 and 5.1

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that retain the Doctrine of discovery and goals of colonization and assimilation. Using these Principles, the Recognition of Rights Framework will create policy, legislation, and other mechanisms to entrench section 35 Treaty and Aboriginal rights into all aspects of Canadian society. Unfortunately, section 35 is part of the Framework of Colonization and section 35 rights replace Immemorial rights given to past, present, and future generations of Indigenous Peoples by the Creator. Section 35 rights assimilate Indigenous Peoples using Crown-granted rights that are less-than Immemorial rights and can be taken away without consent. As we indicated in section III, 4.4:

“The new National Indigenous Government and other Indigenous partners clamour to help the Crown define section 35 rights and maintain their Crown funding. Indigenous communities and nations fight in Canadian courts to protect Treaty and Aboriginal rights believing they are protecting their Immemorial rights to land and self-determination. The myth promotion of Treaty and Aboriginal rights has been so successful that no one questioned the colonizing policy behind them or the rule of law that protects that policy. What will happen when Indigenous Peoples realize they have been exchanging their Indigenous Inherent Jurisdiction for Crown-Delegated Jurisdiction and assimilation?”

11. Self-Determination:

“The new National Indigenous Government and other Indigenous partners clamour to help the Crown define section 35 rights and maintain their Crown funding. Indigenous communities and nations fight in Canadian courts to protect Treaty and Aboriginal rights believing they are protecting their Immemorial rights to land and self-determination. The myth promotion of Treaty and Aboriginal rights has been so successful that no one questioned the colonizing policy behind them or the rule of law that protects that policy. What will happen when Indigenous Peoples realize they have been exchanging their Indigenous Inherent Jurisdiction for Crown-Delegated Jurisdiction and assimilation?”

“The concept of self-determination was recognized following the first World War to validate the decolonization of the Austro-Hungarian, Russian, and Ottoman empires. It was formally acknowledged first in the 1945 Charter of the United Nations, articles 1.2 and 55. Self-determination was first recognized as a right in 1960 with the United Nations’ Declaration on the Granting of Independence to Colonial Countries and Peoples. The right to self-determination was further affirmed with its inclusion into the United Nations International Covenant on Civil and Political Rights and the International Covenant on economic, Social, and Political Rights. In 1970, the United Nations’ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation in Accordance with the Charter of the United Nations provided more definition to the right, broadening it to include people under racist regimes. In 1989, the United Nations’ International Labour Organization adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries. However, the convention did not use the term ‘self-determination’ even though it was the precursor instrument to the 2007 United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP). It was in the UNDRIP that the right to self-determination was first paired with the term ‘Indigenous Peoples.’

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

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\[i\] see section III, 2
\[ii\] see Table 1
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cultural development.”

Self-determination has three components:

1. Substance;
2. Remedies; and,
3. Sustainability.

Substance:

The substance of self-determination has two basic elements:

1. Constitutive aspect:
   • Self-determination entitles individuals and peoples to meaningful participation in processes leading to change in, or creation of, the governing institution over them;
   • Constitutive processes have core values of freedom and equality that produce government institutions in keeping with the interests of peoples seeking self-determination;
   • Self-determination has a requirement of participation such that the end result reflects the will of peoples to ‘freely determine their political status’ by virtue of the right to self-determination; and,
   • Treaties negotiated under duress, unfair bargaining conditions, or lack of mutual understanding are not sufficient to justify the extension of colonial rule or extinguish the right to self-determination.

2. Ongoing aspect:
   • Self-determination requires the governing institution created or changed by the meaningful participation process include individuals and groups allowing them to continually freely participate in its form, content, and functioning;
   • The ongoing process must have a government institution under which individuals and groups can make choices touching on all aspects of life on a continual basis;
   • The government institution must allow peoples to ‘freely pursue their economic, social, and cultural development’ by virtue of their right to self-determination;
   • Minority and Indigenous rights regimes outside of the concept of self-determination do not suffice to encompass cultural integrity. These regimes do not value the cultural freedom and equality of peoples exercising their right to self-determination and therefore cannot inclusively value their distinct ways of life as that culture extends into social, political, and economic realms. As cultural groupings are acknowledged and valued, their cultural persona and societal goals must be reflected in the governing institution for self-determination to prevail; and,
   • The fruit of self-determination is the ongoing condition of freedom and equality between government institutions and peoples that live under them.

Remedies:

Remedies are required when self-determination’s substance is violated. Violation of the constitutive element of self-determination in the context of colonization is predominantly historical, but the violation carries with it a link to an ongoing condition of oppression that
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denies self-determination. A remedy does not entail reversion to a pre-colonial status quo. It requires the creation of a new government institution that will implement self-determination allowing peoples to freely develop. Self-determination is deemed to be implemented with the:

- Emergence of peoples as a sovereign independent state;
- Free association of peoples with an independent state; or,
- Integration of peoples within an independent state on the basis of equality.

Decolonization remedies require change in the governing institution and therefore requires processes of the constitutive aspect of self-determination to arrive at the free will of peoples to determine their political status and an appropriate government institution arrangement. There are two basic types of remedies:

1. External remedies:
   - In most instances peoples express preference for independent statehood, but external remedies do not need to be the formation of a new state. They can be a free will association with an independent state and,
   - Secession is appropriate in a context where self-determination cannot be assured with any other remedy.

2. Internal remedies:
   - There are a plethora of potential internal remedies based on constitutive and ongoing aspects of self-determination;
   - Internal remedies do not negate the sovereignty of Indigenous Peoples within the host state. The host state must incorporate Indigenous Peoples’ permanent sovereignty over lands and natural resources into the remedy; and,
   - International law currently recognizes only the right to internal, not external, self-determination for Indigenous Peoples.

Sustainability:

Sustainability is required to maintain self-determination for all peoples, more so for Indigenous Peoples when applying internal remedies. The processes of sustainable Indigenous self-determination:

- Are based on the premise that Indigenous livelihoods, food security, community governance, relationships to traditional territories and resources, and spirituality can all be practised locally and regional today and with future generations;
- Are both community and inter-community-based to reestablish regional networks and alliances;
- Involve the ability to implement Indigenous laws in traditional territories and expand the scope of Indigenous self-determination;
- Start with regenerating individual and family responsibilities; and,
- Require that:
  1. Colonial strategies founded on host state economic dependency are discarded;
  2. The compartmentalization of current political and legal definitions of self-determination be rejected in favour of shared government and accountability mechanisms using social, economic, cultural and political factors;
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3. Self-determination sustains Indigenous livelihoods at the community level through the rebuilding of family, clan, and individual roles and responsibilities for traditional territories; and,

4. Indigenous Peoples use rebuilt sustainable local and regional economies to influence the global political economy.

We will take a moment to discuss two topics before assessing Canada’s plan for self-determination. They are peoples and sovereignty, as sovereignty relates to self-determination and resources.

11.1 Peoples:

The international right to self-determination applies to ‘peoples’. For many years, peoples with a right to self-determination were defined as:

- A population within an existing sovereign state only if classic conditions of colonization existed;
- The whole population within a generally accepted boundary of a pre-existing colonial state or territory; or,
- The population of a territorial community defined by ethnographic characteristics established through history and suppressed territorial sovereignty.

These definitions of peoples are overly simplistic and create a world of mutually exclusive peoples ignoring the relationships of their geopolitical regions with Indigenous Peoples.

With the UNDRIP in 2007, Indigenous Peoples formally received the international status of ‘peoples’ for self-determination. In its preamble, the UNDRIP states:

“Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,”

The United Nations currently holds that the International right to self-determination applies only to internal decolonization remedies for Indigenous Peoples. The unequal application of the right to self-determination speaks to the issue of ongoing systemic international discrimination and exploitation of Indigenous Peoples and their resources. That topic is beyond the scope of this report. However, working within the restricted realm of internal decolonization remedies, it should be noted that solidifying pre-existing Indigenous nations into distinct peoples and Indigenous networks – unravelling divide-and-conquer – will significantly strengthen the right of Indigenous Peoples to pursue international decolonization remedies.

The question at hand is, how does the Government of Canada define ‘peoples’ for Indigenous Peoples in Canada? We start with a quote from the Final Report of the Truth and Reconciliation Commission of Canada:

“Canada replaced existing forms of Aboriginal government with relatively powerless band councils whose decisions it could override and whose leaders it could depose. In the process, it dis-empowered Aboriginal women.

Canada denied the right to participate fully in Canadian political, economic, and
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social life to those Aboriginal people who refused to abandon their Aboriginal identity.

Canada outlawed Aboriginal spiritual practices, jailed Aboriginal spiritual leaders, and confiscated sacred objects.

And, Canada separated children from their parents, sending them to residential schools. This was done not to educate them, but primarily to break their link to their culture and identity.

These measures were part of a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will."255 [Emphasis Added]

If Canada’s domestic policy for over a century was to extinguish Indigenous Peoples as distinct peoples, what is its policy at the international level?

• In 1923, before the inclusion of section 35 into the Constitution Act, Chief Deskaheh, Speaker of the Six Nations Council, submitted a petition to the League of Nations through the Government of the Netherlands to challenge Canada’s progressing colonization into Iroquois territory. The United Kingdom and Canada were able to prevent a debate on the petition using a number of contentions, including that Six Nations were not “an organized and self-governing people so as to form a political unit apart from Canada,” It was successfully argued the Iroquois were integrated into the Canadian state as citizens;256 and,

• In 1990, after the 1982 inclusion of section 35 into the Constitution Act, the Government of Canada successfully argued before the United Nations Human Rights Commission that the Lubicon Lake Band were not peoples and could therefore not claim an international right to self-determination.257

The Government of Canada does not recognize the international right of Indigenous Peoples in Canada to self-determination for external or internal decolonization remedies. They do so by not recognizing Indigenous Peoples in Canada as ‘peoples’ under international law. The Government of Canada declared it would implement the UNDRIP which provides for the recognition of Indigenous Peoples as peoples entitled to the right of self-determination. However, unless the UNDRIP is brought into force through federal legislation, the Government of Canada is not bound by the UNDRIP or its declaration.

Where does the Government of Canada obtain its definition of ‘peoples’ now that it has adopted the descriptive term of ‘Indigenous Peoples’? The definition comes from section 35 of the Constitution Act where pre-existing Indigenous nations and peoples are defined into the three-group distinction of “First Nations, Inuit, and Métis peoples.”47 This three-group distinction approach internationally scrambles recognizable pre-existing distinct peoples into three ethnic groups (First Nations, Inuit, and Métis) that the Government of Canada can successfully argue no longer qualify internationally as peoples. These peoples are given Crown-granted Indigenous-related rights and Crown-Delegated Jurisdictions as an alternate rights regime¹ that:

• Is outside of the international concept of self-determination;
• Excludes Immemorial rights to sovereignty; and,
• Replaces self-determination and other rights accessible to internationally recognized

¹ see section III, 11.2
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Indigenous Peoples.

Until the Government of Canada removes the Doctrine of Discovery and recognizes Indigenous Peoples in Canada as peoples under Indigenous, domestic, and international law, colonization and assimilation will continue under the new relationship.

11.2 Sovereignty and Resources:

The right to self-determination is meaningless without permanent sovereignty over natural resources. Permanent sovereignty over natural resources for peoples and states was confirmed by the United Nations in 1962. The right to permanent sovereignty over natural resources was recognized to extend to Indigenous Peoples in 1974 and later affirmed in the UNDRIP.

The Government of Canada does not recognize the permanent sovereignty of Indigenous Peoples in Canada to land and resources. In that regard, the Crown owns all land and resources in Canada, not under third party ownership, with a fiduciary duty to Indigenous Peoples, as per the Doctrine of Discovery. Indigenous Peoples can claim the right to Aboriginal title and exercise Aboriginal rights granted to them by the Crown under section 35. However, the Government of Canada has a right to infringe on those section 35 Aboriginal rights and to veto Indigenous objections to land and resource development. Indigenous Peoples in Canada are impoverished and benefit minimally or not at all from the exploitation of their natural resources.

The Crown has maintained control over Indigenous lands and resources by blocking the international recognition of Indigenous Peoples in Canada as ‘peoples’ In effect, withholding both the international right to self-determination and the right to permanent sovereignty over natural resources. This was done by creating an alternate rights regime outside of the concept of self-development in place of Immemorial rights. The Government of Canada accomplished this using Crown-granted rights and Crown-Delegated Jurisdiction. Table 12 expands on the alternate rights regime.

Table 12: Canada’s Alternate Rights Regime for Indigenous Peoples.

<table>
<thead>
<tr>
<th>Crown-Granted Rights:</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Crown granted rights to Indigenous Peoples through the Constitution Act under section 35 that are protected by section 25. These two constructs created a new</td>
</tr>
</tbody>
</table>

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Aboriginal rights stream and a new class of Aboriginal citizen.

- The combination of section 25 and 35 rights created a new rights stream in Canada for Aboriginal peoples:
  - These new rights are Aboriginal and Treaty rights in section 35;
  - These rights are defined by the Canadian rule of law (court decisions, legislation, and the Constitution Act);
  - Section 25 set the new rights stream apart from rights for Canadian citizens which are located in the Canadian Charter of Rights and Freedoms within the Constitution Act; and,
  - Section 25 restricts the new rights stream to Aboriginal peoples defined in section 35.

- Section 35 created a new class of peoples in Canada called Aboriginal peoples comprised of three ethnic groups referred to as First Nation, Inuit, and Métis peoples:
  - This three-group distinction of Aboriginal peoples is guaranteed rights in the new rights stream that non-Aboriginal Canadian citizens are not entitled to. This transforms Aboriginal peoples in section 35 into a new class of Canadian citizen, Aboriginal citizens, that are entitled to section 35 rights. \(^{262}\)

- Aboriginal and Treaty rights are an ‘alternate’ rights stream for Indigenous Peoples replacing their Immemorial and international rights:
  - Indigenous Peoples are entitled to sovereignty and self-determination under their Immemorial rights and Indigenous law:\(^{i}\)
    - The Crown recognizes section 35 rights and Aboriginal law for Aboriginal citizens in Canada but excludes the Immemorial rights and Indigenous law of Indigenous Peoples from the rule of law.\(^{ii}\)
  - Indigenous Peoples are entitled to permanent sovereignty and self-determination under Inherent rights and international law:\(^{iii}\)
    - Aboriginal peoples defined in section 35 as a three-group distinction of Aboriginal peoples with the three ethnic groups of First Nation, Inuit, and Métis peoples are not recognized internationally as peoples. This disqualifies Indigenous Peoples in Canada from International rights accorded to internationally recognized Indigenous Peoples.\(^{iv}\)
  - The rights regime created with sections 25 and 35 create an alternate

---

i see sections II, 1.1, 2.1, 3.1 and 4.1
ii see sections I, 2 and II, 2.3.2 to 2.3.5
iii see section II, 2.3.6
iv see section III, 11.1
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stream of Aboriginal rights for Aboriginal citizens that is different from the rights of other Canadian citizens and conflicts with rights streams for Indigenous Peoples based on their Immemorial and International rights.

Crown-Delegated Jurisdictions:

The Crown delegates a portion of its section 91(24) authority over Indigenous lands, resources, and peoples into organizations to create cultural, social, political, and economic societal infrastructure for Indigenous Peoples. These Crown-Delegated Jurisdictions replace Indigenous Inherent Jurisdictions for the same infrastructure.

- These new governance, treaty, and service delivery organizations, with Crown funding and bilateral agreements, form an infrastructure for the alternate rights regime and Aboriginal citizens that is accountable to the Crown:
  - This alternate rights regime infrastructure replaces pre-existing, modern, and future Indigenous societal infrastructure that should develop through processes of self-determination and be accountable to Indigenous Peoples.
- Crown Delegated Jurisdictions have already been put in place to varying degrees for community government, treaty governance, political organizations, social institutions (education, child welfare, health, and etc.), and a New Nation Government.

The alternate rights regime of section 35 endangers the future of Indigenous Peoples by supporting the compartmentalization of a domestic iteration of self-determination. The compartmentalization is done by separating land and resources from the recognition of political autonomy. The Government of Canada does this currently using two types of bilateral agreements:

1. Land Claim Agreements:
   - These agreements require the surrender of sovereign rights to Indigenous land and natural resources for up to 98 percent of the traditional territory.
   - Land Claim Agreements are irrevocable agreements.

2. Self-Government Agreements:
   - Self-government jurisdiction is restricted to the 2-4% of land retained by the Indigenous community(s) from the Land Claim Agreement. Indigenous government autonomy is limited by and accountable to federal legislation and the Canadian rule of law.
   - Self-Government Agreements are not permanent agreements.

The combination of Land Claim and Self-Government Agreements with the support of the alternate rights regime, replaces international self-determination with Crown-defined self-
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government while extinguishing distinct peoples and residual sovereignty to land and resources.263 This perfect storm completes the colonization and assimilation of Indigenous Peoples in Canada. Whether the Government of Canada uses the alternate rights regime with existing treaties, or modern Land Claim - Self-Government Agreement couplets, the effect is the same, cultural genocide.

See table 13 expands on the perfect storm for extinguishing Indigenous sovereignty and self-determination in Canada.

<table>
<thead>
<tr>
<th>Table 13: Extinguishing Indigenous Sovereignty and Self-Determination in Canada</th>
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</thead>
<tbody>
<tr>
<td><strong>Land Claim Agreements:</strong></td>
</tr>
<tr>
<td>Land Claim Agreements permanently extinguish all sovereignty</td>
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<tr>
<td>to land and resources and detail what rights are granted to</td>
</tr>
<tr>
<td>Indigenous Peoples at the time of signing. These details</td>
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<tr>
<td>become Treaty rights under section 35:</td>
</tr>
<tr>
<td>• Land Claim Agreements are irrevocable instruments that</td>
</tr>
<tr>
<td>remove Indigenous Peoples’ access to the vast majority of</td>
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<tr>
<td>natural resources in their traditional territories;</td>
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<tr>
<td>• Land Clam Agreements (and treaties) are interpreted by the</td>
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<tr>
<td>rule of law which excludes Indigenous sovereignty, Immemorial</td>
</tr>
<tr>
<td>rights, law, and Inherent Jurisdiction.</td>
</tr>
<tr>
<td>• The United Nations recognizes that peoples and states are</td>
</tr>
<tr>
<td>not sustainable without the economic benefit of their natural</td>
</tr>
<tr>
<td>resources.264 265 Indigenous communities in Canada do not</td>
</tr>
<tr>
<td>have a future under land claims without revenue streams</td>
</tr>
<tr>
<td>from their natural resources,244 252 253 and,</td>
</tr>
<tr>
<td>• Land Claim Agreements create an unsustainable environment</td>
</tr>
<tr>
<td>for Indigenous self-determination and sovereignty.</td>
</tr>
<tr>
<td><strong>Self-Government Agreements:</strong></td>
</tr>
<tr>
<td>Self-Government Agreements replace the Inherent Jurisdiction</td>
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<tr>
<td>of Indigenous government under Indigenous law with a Crown-</td>
</tr>
<tr>
<td>Delegated Jurisdiction under Canadian law:</td>
</tr>
<tr>
<td>• These agreements are not signed by the Crown with</td>
</tr>
<tr>
<td>Indigenous Peoples without a Land Claim Agreement in place;</td>
</tr>
<tr>
<td>• Indigenous self-government in Canada is an Aboriginal right</td>
</tr>
<tr>
<td>defined by the rule of law to the exclusion of Immemorial</td>
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<tr>
<td>rights. As an Aboriginal right under section 35,iii it can</td>
</tr>
<tr>
<td>be modified or revoked by the Government of Canada;</td>
</tr>
<tr>
<td>• Indigenous governments created under section 35 self-</td>
</tr>
<tr>
<td>government are not</td>
</tr>
</tbody>
</table>

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1 see sections II, 2.3.2 and 2.3.3
2 ii see sections II, 4.2.1 and 4.2.2.3
3 iii see also sections II, 2.3.2 and 2.3.4
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recognized internationally; and,

- The negotiation of Self-Government Agreements does not allow meaningful processes to create government institutions toward Indigenous self-determination based on freedom and equality. Agreements that have land surrender as a precondition and allow for hard negotiation by the Crown do not reflect the free will of Indigenous Peoples to determine their political status by virtue of their sovereignty and right to self-determination.

Section 35 Treaty Rights:

Treaty rights under section 35 do not recognize residual Indigenous sovereignty for lands and resources:

- All Land Claim Agreements and treaties, existing and future, have Indigenous sovereignty to lands and resources extinguished as a default status under section 35;
- Treaty rights recognized in section 35 are derived from the Canadian rule of law’s interpretation of document-specific text. These definitions exclude all rights not pencilled into the text and therefore exclude the unwritten permanent Indigenous sovereignty to land, resources, and peoples;
- Treaty rights can be modified or repealed by the Government of Canada; and,
- Treaty rights are part of an alternate rights regime that is outside of the concept of self-determination that excludes the freedom and equality of Indigenous Peoples to extend their culture into social, political, and economic realms, including into land development and resource management.

Section 35 Aboriginal Rights:

Aboriginal rights under section 35 replace Immemorial rights:

- Section 35, coupled with section 25, create Aboriginal citizens with Aboriginal rights who are disqualified as ‘distinct peoples’ entitled to the right to self-determinations and permanent sovereignty over lands and resources under international law;
- Aboriginal rights are defined by the Canadian rule of law to ensure the protection of Crown rights and the exclusion of Immemorial rights;
- Aboriginal rights can be modified or repealed by the Government of Canada; and,
- Aboriginal rights are part of an alternate rights regime that excludes the freedom and equality of Indigenous Peoples to extend their culture into the social, political, and economic developments of self-determination.

iv see section II, 5.2
i see sections II, 2.3.2 and 2.3.3
ii see sections II, 2.3.2, 2.3.4
iii see also section III, 11.1
iv see section I, 2
11.3 Self-Determination in Canada:

The Crown colonized Indigenous Peoples in Canada under a policy of assimilation and genocide.

“For over a century, the central goals of Canada’s Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as “cultural genocide.”

Physical genocide is the mass killing of the members of a targeted group, and biological genocide is the destruction of the group’s reproductive capacity. Cultural genocide is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.

In its dealing with Aboriginal people, Canada did all these things.

Canada asserted control over Aboriginal land. In some locations, Canada negotiated Treaties with First Nations; in others, the land was simply occupied or seized. The negotiation of Treaties, while seemingly honourable and legal, was often marked by fraud and coercion, and Canada was, and remains, slow to implement their provisions and intent.” [Emphasis Added]

Canada clearly violated the constitutive element of Indigenous Peoples’ self-determination for over a century. The question becomes, is there an ongoing violation of self-determination that requires remediation? If so, it is representative of an ongoing oppressive condition that denies self-determination.

The Government of Canada initiated self-determination discussion tables with Indigenous Peoples in July 2015. INAC, and now CIRNA, claims 320 Indigenous communities are involved at 60 tables to advance the recognition of rights and their vision of self-determination. These discussions are purported to be community driven and able to respond to needs and interests of the three-group distinction of First Nation Inuit, and Métis. At the time of writing, a handful of cursory Memorandums of Understandings have been signed to facilitate non-binding discussions, most with Métis organizations.

In previous sections, we discussed both the old relationship of Canada with Indigenous Peoples and the continuing colonization and assimilation of Canada’s Indigenous Peoples under the ‘new’ relationship. The new relationship retains the Doctrine of Discovery, the Framework of Colonization, and their oppressive effects on Indigenous Peoples in Canada.

Table 14 contains twelve facets of the Government of Canada’s new relationship with
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Indigenous Peoples. These twelve facets are not an exhaustive list. However, they do unambiguously reveal the ongoing oppression of Indigenous Peoples in Canada and the continued denial of the freedom and equality needed for the self-determination of their cultural, social, political, and economic realms. In this regard, the Crown is not offering an internal remedy for self-determination at its self-determination discussion tables. It is offering a less provocative form of colonization and assimilation under the guise of self-government and an alternate rights regime.¹

<table>
<thead>
<tr>
<th>Table 14: Facets of the Government of Canada’s New Relationship with Indigenous Peoples</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The Crown’s assumed sovereignty replaces Immemorial and international rights-based Indigenous sovereignty to lands, resources, and peoples.</td>
</tr>
<tr>
<td>2. Aboriginal and Treaty rights under section 35 create an alternate rights regime that replaces Immemorial and international rights of Indigenous Peoples.</td>
</tr>
<tr>
<td>3. Section 35 rights, with the support of section 25, create Aboriginal citizens that are not recognized internationally as Indigenous Peoples by the United Nations and the Government of Canada. This disqualifies Indigenous Peoples in Canada from international rights to self-determination, permanent sovereignty over lands and resources, and for Inherent rights outlined in the UNDRIP.</td>
</tr>
<tr>
<td>4. Treaties rights under section 35 do not recognize Immemorial and international rights to permanent sovereignty over lands and resources. Both existing and future treaties and Land Claim Agreements recognized under section 35 extinguish Immemorial and international rights over land, resources, and peoples.</td>
</tr>
<tr>
<td>5. Crown-delegated Jurisdictions replace Inherent Jurisdictions for Indigenous government, land and resource management, and other societal institutions for cultural, social, political, and economic development. This replacement occurs for pre-existing, modern, and future Indigenous societal institutions.</td>
</tr>
<tr>
<td>6. Crown-controlled funding replaces Inherent Jurisdiction-related revenue streams from Indigenous land and natural resources creating an environment that cannot sustain self-determination.</td>
</tr>
<tr>
<td>7. Canada’s rule of law protects Crown rights and Crown-Delegated Jurisdictions while excluding Indigenous sovereignty, Immemorial rights, Indigenous law, and Inherent Jurisdiction. The Crown can violate Immemorial rights to cultural, social, and economic developments since they are not protected under the rule of law. The Crown has a veto over sovereign Indigenous decisions concerning Indigenous communities, lands, resources, and peoples.</td>
</tr>
<tr>
<td>8. Crown engagement and consultation processes consult Crown-Delegated Jurisdictions and exclude the consultation of Indigenous community-based Immemorial rights-</td>
</tr>
</tbody>
</table>

¹ see section III, 11.2
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9. The Crown’s duty to consult is part of a process that plans Indigenous land exploitation and allows for the infringement of Aboriginal land-based rights in the face of colonial land and resource development objectives. Meaningful consultation is a tool used to advance colonial interests.

10. The Crown can negotiate hard with Indigenous Peoples and has no duty to reach an agreement with them.


12. The distinctions-based approach of First Nation, Inuit, and Métis peoples replaces self-defined aggregates of peoples from pre-contact and modern Indigenous nations. These distinctions are not recognized by the United Nations to qualify as distinct peoples under international law. The distinctions-based approach erases the sovereignty and Inherent Jurisdictions of pre-existing, modern, and future Indigenous nations and Peoples in Canada.

Regardless of the Government of Canada’s views, Indigenous Peoples in Canada are still sovereign peoples. They have an international right to self-determination. More importantly, they have an Immemorial right to self-determination through their pre-existing sovereignty. The Government of Canada’s refusal to recognize Indigenous Peoples in Canada under international law does not in any way diminish from their right to permanent sovereignty over natural resources and self-determination. It does mean however, Indigenous Peoples should be more than skeptical when reviewing an offer of a new relationship presented to them at self-determination discussion tables or in land claim negotiations.

11.4 Remedies:

The ‘doctrine of state sovereignty’ is a limiting factor for international self-determination remedies. The state-centred doctrine:

- Limits the international system from intervening in matters within the domestic jurisdiction of any state; and,
- Upholds the status quo by protecting a state’s territorial integrity and political unity.

However, when self-determination is violated, the host state’s sovereignty can be countered by a required appropriate self-determination remedy.\(^\text{i}\)\(^{270,271}\)

The Government of Canada is continuing its colonization of Indigenous lands. It is engaged in the ongoing oppression of Indigenous Peoples and the denial of their international right to self-determination.\(^\text{i}\) An appropriate international remedy may be required.

\(^\text{i}\) see section III, 11.3
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The ‘doctrine of reversion’ in international law provides a recourse for the resurrection of Indigenous Peoples’ sovereign rights after having land and resources acquired by European states. The doctrine provides a path for Indigenous Peoples in Canada to assert their pre-existing sovereign rights to self-determination. Under this doctrine, the sovereign rights of Indigenous Peoples are dormant awaiting revival despite the presence of occupation.

“Similarly, current governments of Australia and North America could be seen as unlawful belligerent occupants who failed to obtain legitimate title to these countries. Any acknowledgement of Aboriginal sovereignty today would, therefore, only involve a reinstatement of the historical rights of the legitimate sovereigns. Further, as noted above, the Aboriginal occupants of these countries resisted the invasion of imperial and colonial forces. To a large extent, however, this resistance ultimately weakened and subsided. It is submitted that, in accordance with Monsieur Vattel's sentiments, this was no more than an acknowledgement of the strength of their foes. There was no voluntary submission to the "conquering" powers, nor an acknowledgement of the nation as the legitimate sovereign. Moreover, in varying degrees, these Aboriginal peoples have managed to survive the invasion of their countries and maintain their identity as separate nationalities. Thus, in light of Vattel's works, it appears the decimation of these Aboriginal peoples and the seizure of their lands would not prevent the reversion of their sovereign rights.

In light of the international law outlined in this article, it would appear feasible for Aboriginal peoples to have their original sovereignty recognized and for these people to exercise these rights at least concurrently with the present governmental authority. The hurdles the "occupying" governments put forward as preventing such claims are not insurmountable and the benefits of success are high. Depending on its form, the recognition of Aboriginal sovereignty could provide many benefits.”272 [Emphasis Added]

Indigenous Peoples in Canada are not without recourse regarding the denial of their sovereignty, Immemorial rights, and self-determination. However, the path and resolve for remedies, whether internal or external, must come from them. Those who believe in respect, honour, and integrity will provide the support.

Where does it begin? The initial movement forward will need to include:

1. Healing in and between families for cultural trauma caused by residential schools and intergenerational fallout;
2. Healing rifts between communities caused by divide and conquer;
3. Healing rifts between Indigenous and non-indigenous communities caused by disinformation, discrimination, and other assimilation policies;
4. Reconstituting distinct nations of peoples into pre-existing nations or in self-defined geoethnic aggregates;
5. Reclaiming international rights to self-determination, permanent sovereignty over land and resources, and Inherent rights in the UNDRIP;
6. Unravelling the Government of Canada’s delegated jurisdiction and alternate rights regime for Aboriginal citizens;
7. Reclaiming Indigenous sovereignty and Immemorial rights through meaningful consultation of community rights holders (elders, community members, youth, women, special councils, governance, and etc. as defined by peoples);
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8. Creating Inherent Jurisdictions based on Indigenous sovereignty and Immemorial rights; and,

9. Building, or restructuring, infrastructure within Inherent Jurisdictions to the benefit of Indigenous communities and nations.

No matter the path taken by Indigenous Peoples in Canada as they move forward to remedy their sovereignty and right to self-determination, the Government of Canada must renounce the Doctrine of Discovery and its Framework of Colonization.
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IV – Conclusion

Self-determination remedies require the creation of a new government institution, not a new relationship under the same institution. The Government of Canada is offering Indigenous Peoples a new relationship under the same institution with the same Framework of Colonization. The assimilation of Indigenous Peoples and the exploitation of their land and resources will continue.

At this point in history, it appears that Indigenous Peoples in Canada have no recourse for self-determination in a system designed and maintained to eradicate their sovereignty as distinct peoples. That is, unless the Crown is willing to remove the Doctrine of Discovery and Framework of Colonization from Canada. Can elected officials see the forest for the trees? If they do, they will need a consultation process for discourse directly with community-based rights-holders. Engagement process with partners and stakeholders will not meet the threshold of a bonafide self-determination discourse.

Crown-Delegated Jurisdictions of Chief and Council, Treaty Partners, National Partners, Institution Partners, and the new three-group distinction National Indigenous Government will need to be redefined by Indigenous rights-holders and structured to be accountable to them. There will also need to be joint decision-making bodies created within government institutions for joint decisions on health care, education, resources, and more. All of this will require a new form of meaningful consultation to hear and respect Immemorial rights.

There is teaching with the Anishinaabe in Treaty 3, “Bimiwinisisowin Omaa Akiing.” Roughly translated it means, “We are, or have, everything we need to be who we are.” Indigenous Peoples do not need permission from the Crown to take their place as sovereign peoples. They simply need to do it, “Pazaga’owin”. There are still enough elders carrying the wisdom of the Creator to share teachings on the old ways for them to be made new; to have the old ways of sovereignty, Immemorial rights, traditional laws, and Inherent Jurisdiction return in a modern context that can form the basis of a new relationship with the Crown.

It is this modern context of Indigenous sovereignty, Immemorial rights, law, and inherent Jurisdiction that Canada must reconcile with to create a new government institution upon which to base a new relationship. The fallacy seems to be that it is Indigenous Peoples that need a new government institution, when in fact it is Canada (Indigenous Peoples plus European colonists) that needs a new government institution.

It is time to stop expropriating land and resources at the cost of its peoples. There has always been enough to share in Canada. Justice and right actions should take the place of exploitation, assimilation, and oppression.
<table>
<thead>
<tr>
<th></th>
<th>Reference</th>
<th>Title</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>(2015) <a href="http://caid.ca/PMOINACMinMan2015.pdf">Minister of Indigenous and Northern Affairs Mandate Letter</a></td>
<td>Failing to Renew the Relationship</td>
</tr>
<tr>
<td>3</td>
<td>(2017) <a href="http://caid.ca/PMONewMin2017.pdf">New Ministers to Support the renewed Relationship with Indigenous Peoples</a></td>
<td>New Ministers to Support the renewed Relationship with Indigenous Peoples.</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>Christian Aboriginal Infrastructure Developments (CAID) is a not-for-profit, charitable organization that has worked towards the consultation and accommodation of missing rights-based Indigenous infrastructure in Canada for over a decade. During that time, CAID submitted a number of documents to federal and provincial governments concerning Indigenous infrastructure development, meaningful consultation, and the rights of Indigenous Peoples in Canada.</td>
</tr>
<tr>
<td>7</td>
<td>(2015) <a href="http://caid.ca/PMOINACMinMan2015.pdf">Minister of Indigenous and Northern Affairs Mandate Letter</a></td>
<td>“As Minister, you will be held accountable for our commitment to bring a different style of leadership to government. This will include: close collaboration with your colleagues; meaningful engagement with Opposition Members of Parliament, Parliamentary Committees and the public service; constructive dialogue with Canadians, civil society, and stakeholders, including business, organized labour, the broader public sector, and the not-for-profit and charitable sectors; and identifying ways to find solutions and avoid escalating conflicts unnecessarily.” [Emphasis Added]</td>
</tr>
<tr>
<td>9</td>
<td></td>
<td>St. Catherines Milling and Lumber Co. v. R., [1887] 13 SCR 577. <a href="http://caid.ca/StCatMilDec1887.pdf">http://caid.ca/StCatMilDec1887.pdf</a></td>
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</tbody>
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(1455) The Bull Romanus Pontifex (Nicholas V), January 8, 1455. 


Para. 9. “The papal bull Romanus Pontifex, issued in 1455, serves as a starting point to understand the Doctrine of Discovery, specifically, the historic efforts by Christian monarchies and States of Europe in the fifteenth and later centuries to assume and exert rights of conquest and dominance over non-Christian indigenous peoples in order to take over and profit from their lands and territories. The overall purpose of these efforts was to accumulate wealth by engaging in unlimited resource extraction, particularly mining, within the traditional territories of indigenous nations and peoples. The text of Romanus Pontifex is illustrative of the doctrine or right of discovery. Centuries of destruction and ethnocide resulted from the application of the Doctrine of Discovery and framework of dominance to indigenous peoples and to their lands, territories and resources.” [Emphasis added]

Para. 15. “Pope Nicholas authorized King Alfonso to assume and take control over non-Christian lands because the Holy See “had formerly … [for example, in the bull Dum diversas of 1452] granted among other things free and ample faculty to the aforesaid King Alfonso — to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and [the right] to convert them [those things] to his and their use and profit …”. This “faculty” granted by the Holy See to King Alfonso to “apply and appropriate to himself” the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods, is a papal licence for the forced taking of all indigenous lands and territories in the regions located, and to engage in unlimited resource extraction for the monarch’s “use and profit”. In this context, the secular meaning of “convert” is “to appropriate dishonestly or illegally that which belongs to another”. To make the forced appropriation seem “lawful” and “right”, Pope Nicholas declared that because the Apostolic See had previously issued the “faculty” to engage in such work, and because the king had thereby “secured the said faculty”, “the said King Alfonso … justly and lawfully has acquired and possessed, and doth possess, these islands, lands, harbours, and seas, and they do of right belong to … the said King Alfonso and his successors…”. ” [Emphasis Added]


“The Commission recommends that:

1.16.1 To begin the process, the federal, provincial and territorial governments, on behalf of the people of Canada, and national Aboriginal organizations, on behalf of the Aboriginal peoples of Canada, commit themselves to building a renewed relationship based on the principles of mutual recognition, mutual respect, sharing and mutual responsibility; these principles to form the ethical basis of relations between Aboriginal and non-Aboriginal societies in the future and to be enshrined in a new Royal Proclamation and its companion legislation (see Volume 2, Chapter 2).

1.16.2 Federal, provincial and territorial governments further the process of renewal by

(a) acknowledging that concepts such as terra nullius and the doctrine of discovery are factually, legally and morally wrong;

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(b) declaring that such concepts no longer form part of law making or policy development by Canadian governments;

(c) declaring that such concepts will not be the basis of arguments presented to the courts;

(d) committing themselves to renewal of the federation through consensual means to overcome the historical legacy of these concepts, which are impediments to Aboriginal people assuming their rightful place in the Canadian federation; and

(e) including a declaration to these ends in the new Royal Proclamation and its companion legislation.” [Emphasis Added]


“Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.” [Emphasis Added]


6. “The UN General Assembly has indicated that the continuation of colonialism is “a crime which constitutes a violation of the Charter of the United Nations ... and the principles of international law”. Colonial-era doctrine cannot continue to oppress and impoverish generations of indigenous peoples and to deny them jurisdiction to exercise their indigenous laws and legal orders.”


Para. 69. … “The doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1. The Aboriginal interest in land that burdens the Crown’s underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.” [Emphasis Added]


45. “We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius.

ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.” [Emphasis Added]


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“Canadians need to understand the difference between Indigenous law and Aboriginal law. Long before Europeans came to North America, Indigenous peoples, like all societies, had political systems and laws that governed behaviour within their own communities and their relationships with other nations. Indigenous law is diverse; each Indigenous nation across the country has its own laws and legal traditions. Aboriginal law is the body of law that exists within the Canadian legal system.”

[Emphasis Added]


“Unfortunately, Canadian courts were unable or unwilling to incorporate the perspective of Aboriginal peoples within existing British and Canadian land law. Thus, they simply adopted the 'discovery doctrine' discussed in earlier chapters, asserting that legal title and ultimate 'ownership' of Aboriginal lands in North America either became vested in the Crown at the moment of discovery by British explorers, or passed from the 'discovering' French king to the British Crown upon France's 1763 cession of its North American possessions to Great Britain. Under the discovery concept the newcomers thus became the 'owners' in terms of their own legal framework. The original Aboriginal inhabitants who had been living on the land from time immemorial were found to have no real property interest in the land at all; rather, they had a mere 'personal' and 'usufructuary' right that constituted a burden on the Crown's otherwise absolute title.” [Emphasis Added]


“Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: R. v. Sparrow, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982.” [Emphasis Added]


“More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” [Emphasis Added]


124 “… Given the cultural and historical context in which the treaties were signed, to interpret the right of access to resources for the purpose of engaging in traditional trading activities as a right to participate in the wholesale exploitation of natural resources would alter the terms of the treaty and wholly transform the rights it confirmed. Accordingly, trade in logs is not a right afforded to the Mi’kmaw under any of the treaties of 1760-61 because logging represents a fundamentally different use from that which would have been in the contemplation of the parties.”

125 “The right to trade and the right of access to resources for trade must bear some relation to the traditional use of resources in the lifestyle and economy of the Mi’kmaw people in 1760. I conclude that the evidence supports the Chief Justice’s conclusion that logging was not in the contemplation of the parties and was not the logical evolution of Mi’kmaw treaty rights.” [Emphasis Added]


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“The general principles governing justification laid down in Sparrow, and embellished by Gladstone, operate with respect to infringements of aboriginal title. In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. ... In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.” [Emphasis Added]


“Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown’s procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown’s fiduciary duty to the Aboriginal group.”


“But here, an accommodation that would not compromise the Minister’s statutory mandate was unavailable. As indicated, the Minister did make an effort to provide the Ktunaxa with accommodation to limit the impact on their religious freedom, but the Ktunaxa took the position that no permanent development in the area could be allowed. This placed the Minister in a difficult, if not impossible, position. He determined that if he granted the power of exclusion to the Ktunaxa, this would significantly hamper, if not prevent, him from fulfilling his statutory objectives: to administer Crown land and to dispose of it in the public interest. In the end, he found that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa a veto right over the construction of permanent structures on over fifty square kilometres of public land” [Emphasis Added]


“Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a “veto” over final Crown decisions (Haida, at para. 48). Rather, proper accommodation “stress[es] the need to balance competing societal interests with Aboriginal and treaty rights” (Haida, at para. 50).” [Emphasis Added]


45. “We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

   iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements. [Emphasis Added]


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“In this regard, I think it should be kept in mind that the scope of the jurisdiction any Aboriginal nation received from the Creator is a matter that is within the traditional knowledge of that nation’s people. The holders of this knowledge are the Elders or other members of the community who are recognized by the nation as the keepers or custodians of this knowledge. These are the people who would have to be consulted in order to understand the scope of the jurisdiction given by the Creator.” [Emphasis Added]


91. “It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —

(24). Indians, and Lands reserved for the Indians.” [Emphasis Added]


“Through the confirmation of the Indian Act of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests and transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interest really lie.” [Emphasis Added]


“Most of the services provided to communities throughout Canada are the responsibility of provincial and municipal governments, but this is not the case on reserves. Under the Constitution Act, 1867, the federal government has exclusive authority to legislate on matters pertaining to ‘Indians, and Lands reserved for Indians.” INAC has been the main federal organization exercising this authority. While the federal government has funded the delivery of many programs and services, it has not clearly defined the type and level of services it supports.” [Emphasis Added]


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“In the *Wewaykum* Decision (below), the Supreme Court attempted to provide some guidance regarding the circumstances in which fiduciary obligations may be present. More specifically, the court held that fiduciary obligations are present where there is a cognizable Aboriginal interest in relation to which the Crown is exercising discretionary authority.” [Emphasis Added]


35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.


25. “The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.”


“In light of the suggestion of Sparrow, supra, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.” [Emphasis Added]


“Unfortunately, in the contemporary rights discourse, “Indigeneity is legitimized and negotiated only as a set of state-derived individual rights aggregated into a community social context – a very different concept than that of collective rights pre-existing and independent of the state.” Framing of indigenous rights by states and global institutions persists as indigenous peoples confront the illusion of inclusion in global forums such as the UN Permanent Forum on Indigenous Issues.” [Emphasis Added]


“Perhaps more importantly, the international status of such treaties has been denied. ' Rather, they have been perceived as domestic "agreements between Crown and native subjects" in the case of Canadian agreements and "Crown and non-subjects" in the case of the Treaty of Waitangi.” [Emphasis Added]
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“Mere hard bargaining, however, will not offend an Aboriginal people’s right to be consulted.”


45. “We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

   iv. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.” [Emphasis Added]


“However, the duty to consult and accommodate, as discussed above, flows from the Crown’s assumption of sovereignty over lands and resources formerly held by the Aboriginal group.” [Emphasis Added]


“Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: R. v. Sparrow, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982. Section 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfill its promises” (Badger, supra, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to
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consult and, if appropriate, accommodate.” [Emphasis Added]

“Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.” [Emphasis Added]

“However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.” [Emphasis Added]

“The inadequacy of the provision for consultation with the aboriginal peoples highlights the major weakness of the constitutional entrenchment of their rights. Although now protected against infringement by Parliament or by as provincial legislature acting unilaterally, they can still be taken away at any time by a constitutional amendment authorized by resolutions of the Senate, the House of Commons, and the legislatures of two-thirds of the provinces having a combined population of at least fifty percent of the population of all the provinces. The consent of the aboriginal peoples is not required, and after the initial constitutional conference provided for in section 37 they would not even have to be consulted. Given the power the other participants have over their rights, the weakness of the bargaining position of the aboriginal peoples at the conference is obvious. Ultimately, therefore, the fate of their rights will depend on the level of public awareness of the legal and historical bases of those rights, and the degree to which the people of Canada expect their elected representatives to deal justly and fairly with the aboriginal peoples.” [Emphasis Added]

These sections of the Indian Act grant Aboriginal status and rights based on a person being “full-blood,” s.6(1)(f); “half-blood,” 6(2); and, “quarter blood,” 7(1)(b). Full- and half-blooded people are granted full status and rights whereas quarter bloods are granted rights but no status. Thus the Crown defines that only people with ½ blood or more are Aboriginal. These statutes provide a mechanism to extinguish Aboriginal people as a race in Canada while creating a new ‘Aboriginal’ ethnic minority without claims to traditional lands and resources.

“that Yukon First Nation and all persons eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada all their aboriginal claims, rights, titles and interests in and to Category A and Category B Settlement Land and waters therein, to the extent that those claims, rights, titles and interests are inconsistent or in conflict with any provision of a Settlement Agreement;” [Emphasis Added]

“However, the constitutional entrenchment of Aboriginal title and other Aboriginal and treaty rights in 1982 has meant that they are no longer subject to legislative extinguishment, even by Parliament.”
[Emphasis Added]


“In the *St. Catherine’s Milling* case, supra, the Privy Council held that the Indians had a “personal and usufructuary right” in the lands which they had traditionally occupied. Lord Watson said that “there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished” (at p. 55). He reiterated this idea, stating that the Crown “has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden” (at p. 58).”


“He held that the Crown acquired radical or underlying title to all the land in British Columbia at the time of sovereignty. However, this title was burdened by the “pre-existing legal right” of Aboriginal people based on their use and occupation of the land prior to European arrival.”


“Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,” [Emphasis Added]


“The UN Declaration does not create new or special rights for Indigenous peoples. Instead, the UN Declaration elaborated upon existing international human rights instruments and clarifies how those rights apply to Indigenous peoples given their ‘specific cultural, historical, social and economic circumstances.’” [Emphasis Added]


   Article 46

   1. “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the
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United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.” [Emphasis Added]

3. “The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.” [Emphasis Added]


“However, even at the level of preliminary, informal recognition of Indigenous peoples as “peoples” under international law, the right of self-determination is still expected to be internal in nature. This is primarily due to the international legal recognition of the sovereignty of states and respect for territorial boundaries; potential secession of Indigenous populations would seriously hinder the territorial integrity of states.” [Emphasis Added]


“The application of customary law is subject to “repugnancy” proviso, namely, a provision that customary law may not be applied if it is contrary to natural justice or public policy. … Repugnancy doctrine has not received favour of the natives and has been criticized for supplanting indigenous law in its land.” [Emphasis Added]


“The answer to this argument is that the Provinces took their interest in land subject to “any Interest other than that of the Province in the same” (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty.” [Emphasis Added]


“The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments….. However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.” [Emphasis Added]


“Based on Haida Nation and Rio Tinto, the Court of Appeal concluded that municipalities lack the authority to engage in the complex constitutional process to consult, as the Province had not expressly delegated such powers.”

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“The inherent jurisdiction of Aboriginal governments is jurisdiction arising from the existence of the Aboriginal nations in North America prior to the arrival of the Europeans. Aboriginal nations who are also Indian bands under the Indian Act exercise delegated jurisdiction as well, jurisdiction that has been conferred on them and their band councils by the provisions of that Act.” [Emphasis Added]


“However, many First Nations maintain that any form of delegated authority is inconsistent with an inherent right of self-government. Inuit have pursued self-government through public government arrangements in the north in conjunction with land claims, while the Métis have advanced various claims for land and self-government.” [Emphasis Added]


“The Parliament of Canada exercised its s.91(24) legislative authority over "Indians, and Lands reserved for the Indians" when it enacted the Indian Act in 1876. Through this Act and its predecessors, the Canadian government imposed the band governance system on First Nations. Although traditional forms of Aboriginal government were not abolished by the imposition of this system, there can be no doubt that the capacity of Aboriginal governments was impaired and the inherent right of self-government of at least some First Nations was infringed.” [Emphasis Added]


“The band governance system in the Indian Act was generally imposed on First Nations without their consent, in many, if not all, instances in violation of their inherent right of self-government. While they probably had no legal recourse against this prior to 1982, recognition of their Aboriginal and treaty rights by section 35(1) of the Constitution Act, 1982 changed this situation. As the inherent right of self-government is no doubt an Aboriginal right, it has enjoyed constitutional protection since 1982. This means that any infringements of it, including infringements that occurred prior to the enactment of section 35(1), are challengeable. If an infringement is shown, the burden is then on the Crown to prove it can be justified by showing a valid legislative objective and respect for the Crown's fiduciary obligations.” [Emphasis Added]


“The Government of Canada recognizes the inherent right of self-government as an existing right within section 35 of the Constitution Act, 1982.”
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“Our analysis reveals that the Rights Framework expresses a clear and coherent set of goals, which aim to suppress Indigenous self-determination within Canadian Confederation. These goals have been ordered into legislation and policy in a manner that guides First Nations towards a narrow model of “self-government” outside of the Indian Act. And remarkably, though labelled as new and transformational, the model reflects older and largely discredited approaches.”


“According to traditional constitutional interpretation prior to the recognition and affirmation of ‘existing aboriginal and treaty rights’ in the Constitution Act, 1982, all primary legislative powers were deemed to be vested either in Parliament or in provincial legislatures. The inclusion of existing aboriginal and treaty rights in the Constitution may have altered this situation. If, as many assert, the right to self-government exists as an aboriginal right, there could be a substantial re-ordering of powers. Indian governments may have implicit legislative powers that are now unrecognized.” [Emphasis Added]

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http://www2.gov.bc.ca/gov/content/family-social-supports/data-monitoring-quality-assurance/reporting-monitoring/accountability/delegated-aboriginal-agencies

“Through delegation agreements, the Provincial Director of Child Welfare (the Director) gives authority to Aboriginal agencies, and their employees, to undertake administration of all or parts of the Child, Family and Community Service Act. The amount of responsibility undertaken by each agency is the result of negotiations between the ministry and the Aboriginal community served by the agency, and the level of delegation provided by the Director.” [Emphasis Added]


“What is delegation?

The level of delegation that a DAA receives from MCFD dictates the range of services it is mandated to perform under the Child, Family and Community Service Act (CFCS Act), which of the Aboriginal Operational and Practice Standards and Indicators (AOPSI) and ministry standards it is required to follow, and which of these standards the agency will be audited against. There are three tiers of delegation that reflect the operational category of an agency:

• Category three (C3) allows for the provision of voluntary services as well as the recruitment and retention of residential resources (foster homes). This includes authority to provide support services for families, voluntary care agreements, special needs agreements and to establish residential resources for children in care.

• Category four (C4) includes all the legal authority in C3 plus additional responsibilities to carry out guardianship duties for children and youth in continuing custody. These include permanency planning, transitions out of care and managing Care Plans.

• Category six (C6) includes all the legal responsibilities of C3 and C4 plus full authority for child protection duties, including investigation of child abuse or neglect reports, placing children in care, obtaining court orders and developing safety plans.

• Adoption: To be able to perform adoptions work, agencies must be delegated under the B.C. Adoption Act (Sinha & Kozlowski, 2013, MCFD Delegation Matrix).” [Emphasis Added]


“Many First Nations argue that the duty to consult on issues affecting their treaties could not be satisfied by the educational panel or by national-level negotiations. These First Nations point out that they have never delegated their rights to consultation to the Assembly of First Nations. They believe that the duty to consult demands nation-to-nation consultation and negotiation. If the consultation process is going to be consolidated into larger groupings, the formal consent of each First Nation included in the consolidated group must be obtained. The duty to consult First Nation ‘A’ cannot be satisfied by consulting First Nation ‘B.’ … It should be obvious to everyone by now that a process of consultation and negotiation satisfactory to both government and First Nations needs to be worked out, not just for the sake of the Education Act but for all national and regional initiatives. … First Nations and the federal government need to work together to find a way to structure consultations and negotiations that would be both acceptable and practical within a realistic framework and cost.” [Emphasis Added]


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http://caid.ca/ModelInf091608.pdf


http://caid.ca/MeaConOve101609.pdf


http://caid.ca/HaidaDec010208.pdf

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“As such, the Crown must consult where its honour is engaged and its honour does not require a specific Aboriginal interest to trigger a fiduciary relationship for it to be so engaged. Another way of formulating this difference is that a specific infringement of an Aboriginal right is no longer necessary for the Government’s duty to consult to be engaged.”

http://caid.ca/HaidaDec010208.pdf

“However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation.” [Emphasis Added]

http://caid.ca/HaidaDec010208.pdf

“The Court’s seminal decision in Delgamuukw, supra, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation” on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.” [Emphasis Added]

http://caid.ca/HaidaDec010208.pdf

“But, when precisely does a duty to consult arise? The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it:”


“This test can be broken down into three elements: (1) the Crown’s knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.” [Emphasis Added]


“...can be triggered even where the Aboriginal interest is insufficiently specific to require that the Crown act in the Aboriginal group’s best interest (that is, as a fiduciary). In sum, where an Aboriginal group has no fiduciary protection, the honour of the Crown fills in to insure the Crown fulfills the section 35 goal of reconciliation of “the preexistence of aboriginal societies with the sovereignty of the Crown.” [Emphasis Added]

http://caid.ca/HaidaDec010208.pdf

“Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below.”


“The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in
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these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.” [Emphasis Added]


“In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.” [Emphasis Added]


“Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.” [Emphasis Added]


“If a prima facie interference is found, the analysis moves to the issue of justification. This test involves two steps. First, is there a valid legislative objective? … If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified.” [Emphasis Added]


“Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants’ inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty.” [Emphasis Added]


“Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement.” [Emphasis Added]


“It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.”

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“As a result of a consultation process, the Crown may determine that there is no duty to accommodate,”


“In assessing the adequacy of the Crown’s efforts to fulfill its duty to consult and accommodate, the court will usually look at the overall offer of accommodation made by the Crown and weigh it against the potential impact of the infringement on the asserted Aboriginal interests having regard to the strength of those asserted interests. The court will not normally focus on one aspect of the negotiations because the process of give and take requires giving in some areas and taking in other areas. It is the overall result which must be assessed.”


“Where the government has knowledge of an asserted Aboriginal right or title, it must consult the Aboriginal peoples on how exploitation of the land should proceed.” [Emphasis Added]


“Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable.” [Emphasis Added]


“When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong prima facie case exists for the claim, and the consequences of the government’s proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: “. . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation”.” [Emphasis Added]


145 (1920) Duncan Campbell Scott, deputy superintendent general of Indian affairs, testimony before the Special Committee of the House of Commons examining the Indian Act amendments of 1920, National Archives of Canada, Record Group 10, volume 6810, file 470-2-3, volume 7, pp. 55 (L-3) and 63 (N-3).


“Section 25 makes it clear that other rights contained in the Charter must not interfere with the rights of Aboriginal peoples. For example, where Aboriginal peoples are entitled to special benefits under treaties, other persons who do not enjoy those benefits cannot argue that they have been denied the right to be treated equally under section 15 of the Charter.”
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147 (1870) Rupert's Land and North-Western Territory Order. http://caid.ca/RupLanNorWesTerOrder1870.pdf

148 (1880) Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880. http://caid.ca/1880Order.pdf


81. “The limitation is prima facie unreasonable as it makes no accommodation for the Metis hunter. The Wildlife Act contains no reference to Metis people and makes no attempt to accommodate a constitutionally enshrined right. The Metis population is subject to the same regulations as others which means their hunting season is restricted, the quantity of food they can harvest is restricted without any consideration of their needs, and they must pay the same fees for hunting privileges. Metis people, like others, are properly subject to reasonable restrictions concerning safety and conservation, but the legislative regime has to reasonably accommodate their protected right. Here there is no attempt to do so which makes the regulations of the Wildlife Act concerning licensing to hunt unreasonable.” [Emphasis Added]

82. “For the same reasons I would find that the legislation imposes undue hardship and denies the Metis their preferred way of exercising the right to hunt.” [Emphasis Added]


2. “The defendant, Mr. Richard DeSautel is a member of the Lakes Tribe of the Colville Confederated Tribes (“CCT”) and lives on the Colville Indian Reserve in Washington State. On October 1, 2010, acting on the instructions of the Fish and Wildlife Director of the CCT to secure some ceremonial meat, Mr. DeSautel shot one cow-elk near Castlegar, British Columbia. After cutting, packing and storing the meat at a campsite near the Slocan River, Mr. DeSautel reported the hunt to British Columbia conservation officers. They arrived several days later and issued Mr. DeSautel an appearance notice.” [Emphasis Added]

3. “Mr. DeSautel now stands charged with hunting without a license contrary to s. 11(1) of the Wildlife Act, R.S.B.C. 1996, c. 488 and hunting big game while not being a resident contrary to s. 47(a) of the Act. In his defence, Mr. DeSautel maintains he was exercising his aboriginal right to hunt in the traditional territory of his Sinixt ancestors. That territory, in pre-contact times, extended north in the Kootenay region near Revelstoke and as far south in Washington State as Kettle Falls.” [Emphasis Added]


2. “In the Marshall case, Stephen Frederick Marshall and 34 other Mi’kmaq Indians were charged with cutting timber on Crown lands without authorization, contrary to s. 29 of the Crown Lands Act, R.S.N.S. 1989, c. 114, between November 1998 and March 1999. The logging took place in five counties on mainland Nova Scotia and three counties on Cape Breton Island, in the Province of Nova Scotia. The accused admitted all the elements of the offence, except lack of authorization.” [Emphasis Added]

3. “In the Bernard case, Joshua Bernard, a Mi’kmaq Indian, was charged with unlawful possession of 23 spruce logs he was hauling from the cutting site to the local saw mill in contravention of s. 67(1) (c) of the Crown Lands and Forests Act, S.N.B. 1980, c. C-38.1, as amended. Another member of the Miramichi Mi’kmaq community had cut the logs from Crown lands in the Sevogle area of the watershed region of the Northwest Miramichi River, in the Province of New Brunswick. Like the accused in Marshall, Bernard argued that as a Mi’kmaq, he was not required to obtain authorization

“In the Chippewas of Sarnia case it was also argued that statutes of limitation enacted by colonial assemblies in Canada prior to Confederation were continued as federal law by s.129 of the Constitution Act, 1867, to the extent that they related to matters under federal jurisdiction, which includes "Indians, and Lands reserved for the Indians". Campbell J. accepted that s.129 had the effect of continuing the relevant statutes of limitation, which had been enacted by the legislatures of Upper Canada and the Province of Canada in 1834 and 1859, but rejected the contention that these statutes applied to Indian lands.” [Emphasis Added]


“The responsibilities and duties of the public service do not lie in making policy decisions, nor in formulating decisions on the broad approach of government to its management of the public sector. Both of these areas are, and should be, the responsibility of elected Ministers. Public servants such as Deputy Ministers may offer advice to Ministers in these areas, but they do not make the decisions, nor do they bear the responsibility. Responsibility and power in these areas belong to Ministers, and their accountability for their use of their powers is political, on the floor of the House of Commons and, ultimately, to the people of Canada in general elections.” [Emphasis Added]

156 Personal note:

In 2016, we approached Health Canada, First Nation and Inuit Health Branch (FNIHB), for funding to create a First Nation-directed remote First Nation medical residency training stream. (The first of its kind.) We were told FNIHB did not have a mandate to fund medical residency training or physician services for First Nations. However, (1) Health Canada did provide medical residency funding for a non-Indigenous-directed medical residency training program; and, (2) FNIHB had not devolved the mandate to provide health care for First Nations given to it under section 91(24) of the Constitution Act. Saying there was no mandate to fund medical residencies for First Nations was akin to saying Health Canada would only non-Indigenous-related residency training.


“As articulated in Vriend v. Alberta, [1998] 1 SCR 493 at para. 69, “[i]t is easy to say that everyone who is just like “us” is entitled to equality […] it is more difficult to say that those who are “different” from us in some way should have the same equality rights that we enjoy”. In other words, true equality and the accommodation of differences, what is termed ‘substantive equality’, will frequently require the making of distinctions (see Andrews at pp. 168-169). That is, in some cases “discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public” (see Eldridge at para. 78).” [Emphasis Added]


“No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the Canadian Human Rights Act.” [Emphasis Added]

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“The Hawthorn Report paved the way for a new era in forced Aboriginal assimilation in Canada. Provincial and federal governments now provide funding to Aboriginal Peoples only if their request falls within government funding models. Funding models invariably provide funds for non-Aboriginal solutions to Aboriginal problems; problems that arose from the policy of forced assimilation. All funding for culture-based Aboriginal solutions to Aboriginal problems is denied because these solutions fall outside government program funding models. Canada is currently forcing the assimilation of Aboriginal Peoples by selectively funding only non-Aboriginal solutions for education, economic development, government, social welfare and more.” [Emphasis Added]


“Four false assumptions are starkly revealed by the policies examined in this part:

1. The first held Aboriginal people to be inherently inferior and incapable of governing themselves.
2. The second was that treaties and other agreements were, by and large, not covenants of trust and obligation but devices of statecraft, less expensive and more acceptable than armed conflict. Treaties were seen as a form of bureaucratic memorandum of understanding, to be acknowledged formally but ignored frequently. All four areas of policy or action ran roughshod over treaty obligations.
3. The third false assumption was that wardship was appropriate for Aboriginal peoples, so that actions deemed to be for their benefit could be taken without their consent or their involvement in design or implementation.
4. The fourth was that concepts of development, whether for the individual or the community, could be defined by non-Aboriginal values alone. This assumption held whether progress was seen as Aboriginal people being civilized and assimilated or, in later times, as resource development and environmental exploitation.

The fact that many of these notions are no longer formally acknowledged does not lessen their contemporary influence. As we will see, they still significantly underpin the institutions that drive and constrain the federal Aboriginal policy process.” [Emphasis Added]


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2.3.45 “The government of Canada present legislation to abolish the Department of Indian Affairs and Northern Development and to replace it by two new departments: a Department of Aboriginal Relations and a Department of Indian and Inuit Services.

2.3.47 The prime minister appoint a new minister of Indian and Inuit services to

• act under the fiscal and policy guidance of the minister of Aboriginal relations; and
• be responsible for delivery of the government’s remaining obligations to status Indians and reserve communities under the Indian Act as well as to Inuit.”


“Does the term ‘Indians,’ as used in head 24 of section 91 of the British North America Act 1867 include Eskimo inhabitants of the Province of Quebec?

The answer of the Court to the question was in the affirmative”


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“The Powley case affirmed that Métis are a distinct people that hold collective Aboriginal rights – “a full-fledged rights-bearing people”. The Powley decision was a watershed in relations among Aboriginal people and the Government of Canada. We recognize the truth of that decision, and are turning the corner, renewing the relationship. This decision has changed the nature of our relationship with Métis people. We are committed to continuing to work with the provinces, territories and Métis organizations to address the implications of this decision.” [Emphasis Added]


“Aboriginal leaders strongly emphasized that the GoC needs to understand and take into account that there are distinct differences among Aboriginal peoples. The need for meaningful involvement and specific focus on First Nations (on/off reserve), Inuit, Métis, and Aboriginal women, as distinct groups with unique situations was highlighted. A pan-Aboriginal approach that attempts to “aboriginalize” or blur these distinctions was strongly discouraged by the Aboriginal leaders and will be resisted.” [Emphasis Added]


“Each sectoral session provided that the majority of time be allocated to breakout groups where the participants were organized into the three distinct Aboriginal groupings: First Nations, Inuit, and Métis. There were approximately 64 participants in the First Nations breakout group; 29 participants in the Inuit breakout group; and 27 participants in the Métis breakout group.” [Emphasis Added]


“The following principles will guide how the parties will work together:

• Recognizing and respecting the diverse and unique history, traditions, cultures and rights of the Aboriginal peoples of Canada which include the Indian, Inuit and Métis peoples of Canada – by adopting a distinctions-based approach;” [Emphasis Added]


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2.3.51 “The federal government, following extensive consultations with Aboriginal peoples, establish an Aboriginal parliament whose main function is to provide advice to the House of Commons and the Senate on legislation and constitutional matters relating to Aboriginal peoples.” [Emphasis Added]


“While all Aboriginal participants sought inclusion and action on Aboriginal and treaty rights, AFN took the position that NWAC and CAP should not be at the table because they are not governments. NWAC and CAP had problems with the “distinctions-based” approach in which matters relating to non-Status Indians, urban Aboriginal residents, and Aboriginal women were categorized as “cross-cutting issues.” [Emphasis Added]


“Further, the fact that the AFN National Chief is the only Indigenous person to participate as an equal at Confederation-style nation-to-nation meetings makes the “new relationship” seem clearly bilateral between the Crown and the AFN. This is troubling considering the AFN has no inherent or delegated governing authority… But at present, it does seem as though the MOUs are the frameworks whereby priority-setting is done with the NIOs as the “Nation.” Does this mean that the federal government understands the AFN as a “nation”? Or does the reconstitution of nations process leave the Crown with no other choice with whom partner?” [Emphasis Added]


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“... further investments are needed—to support capacity-building in Indigenous communities ... to build the capacity of Indigenous governments ... to build capacity that supports implementation of their vision of self-determination.”


“5.17 Overall, we found that Indigenous Services Canada’s main measure of socio-economic well-being on reserves, the Community Well-Being index, was not comprehensive. While the index included Statistics Canada data on education, employment, income, and housing, it omitted several aspects of well-being that are also important to First Nations people—such as health, environment, language, and culture.

5.18 We also found that the Department did not adequately use the large amount of program data provided by First Nations, nor did it adequately use other available data and information. The Department also did not meaningfully engage with First Nations to satisfactorily measure and report on whether the lives of people on First Nations reserves were improving. For example, the Department did not adequately measure and report on the education gap. In fact, our calculations showed that this gap had widened in the past 15 years.

5.19 These findings matter because measuring and reporting on progress in closing socio-economic gaps would help everyone involved—including Parliament, First Nations, the federal government, other departments, and other partners—to understand whether their efforts to improve lives are working. If the gaps are not smaller in future years, this would mean that the federal approach needs to change.

5.34 Lack of meaningful engagement. Indigenous Services Canada did not work with First Nations to develop the Community Well-Being index, first published in 2004. Since then, we found that the Department has not revised the index to include language and culture or developed another comprehensive set of measures to assess First Nations well-being.

5.35 In July 2016, the Department engaged with First Nations and the Assembly of First Nations in a national forum to discuss criteria to measure First Nations students’ success. This work was targeted for completion by December 2017. We found that, in July 2017, the Chief’s Committee on Education directed First Nations representatives to stop working with Indigenous Services Canada. The Committee was concerned that federal processes did not allow enough time to develop measurement frameworks to reflect the diversity, autonomy, and authority of First Nations communities and education systems.

5.36 The federal government recognizes that engaging meaningfully with First Nations is essential to its mission of working together to make Canada a better place for Indigenous and northern peoples and communities. Given this mission, it is our view that greater efforts needed to be made to measure and report on the overall well-being of on-reserve First Nations people compared with that of other
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Canadians.

5.56 We found that Indigenous Services Canada did not adequately use data to improve education results. We found data the Department had collected that could have been used to improve education programs, but was not. For instance, the Department did not analyze First Nations students’ literacy levels to determine how they compared with those of other Canadians. Nor did it assess whether departmental support was achieving expected results, or how the support could be improved.

5.74 This finding matters because without access to education data and related analyses, First Nations communities cannot meaningfully engage with Indigenous Services Canada to improve education results or identify initiatives that would contribute to student success.

5.99 We concluded that Indigenous Services Canada did not satisfactorily measure or report on Canada’s progress in closing the socio-economic gaps between on-reserve First Nations people and other Canadians. We also concluded that the Department’s use of data to improve education programs was inadequate.” [Emphasis Added]

“6.1 Many Indigenous people face barriers to sustained employment, such as living in isolated communities and having low levels of education. They experience high unemployment rates and low average earnings, and often lack job stability. In 2007, the unemployment rate for Indigenous people was just under 11%. In comparison, it was just under 6% among non-Indigenous Canadians. By 2017, these unemployment rates had increased to just over 11% and just over 6%, respectively. Many Indigenous people need training and support to build the skills they need to find and keep jobs.

6.16 Overall, we found that Employment and Social Development Canada did not collect the data or define the performance indicators necessary to demonstrate whether the Aboriginal Skills and Employment Training Strategy and the Skills and Partnership Fund were meeting their common overall objective of increasing the number of Indigenous people who had sustainable and meaningful employment. This is despite the fact that the Department has been delivering programs to support Indigenous employment for almost 30 years.

6.17 We also found that the Department allocated funding to agreement holders under the Strategy primarily on the basis of data from 1996 that did not reflect the current needs of the populations served. Moreover, the Department did not reallocate funding to the individual agreement holders who had been more consistently successful in training clients and helping them get jobs.

6.19 We found that Employment and Social Development Canada could demonstrate that the Aboriginal Skills and Employment Training Strategy and the Skills and Partnership Fund had helped some clients find employment. However, we also found that the Department did not have information about the nature of those jobs (for example, whether they were part-time or full-time). It also did not measure how long clients stayed employed.

6.31 Reporting program results. Given the significant limitations in the Department’s implementation of the performance measurement strategies for the programs, the Department could not meaningfully report on their performance. Although the Department publicly reported employment results for most years for the Strategy and for three years for the Fund, the numbers it reported did not indicate whether clients had found sustainable employment.

6.33 We found that the Department did not use the data it collected from agreement holders to improve its programs as needed to help Indigenous people find sustainable and meaningful employment. Nor did the Department ensure that the data the agreement holders provided on whether clients found jobs after receiving services was complete, or confirm the accuracy of most of this data.

6.46 We found that Employment and Social Development Canada allocated funding to agreement holders under the Aboriginal Skills and Employment Training Strategy on the basis of 1996 population and socio-economic data that did not reflect the current needs of the populations served. Also, the Department had not updated the formula it used to allocate funding under the Strategy since the formula was established in 1999. We also found that the Department did not consider individual

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agreement holders’ past performances when it allocated funding, as a means of redistributing funds to
agreement holders that had demonstrated the capacity to achieve better results.

6.60 Overall, we found that Employment and Social Development Canada supported agreement
holders by providing them with guidance, information sessions, and administrative direction. It also
worked with agreement holders to reduce their administrative burden. However, the Department did
not provide agreement holders with sufficient labour market information to help them determine which
services they should provide to clients to help them prepare for and find available jobs.

6.97 We concluded that Employment and Social Development Canada’s management of the Aboriginal
Skills and Employment Training Strategy and the Skills and Partnership Fund was not sufficient to
demonstrate that these programs increased the number of Indigenous people getting jobs and staying
employed.” [Emphasis Added]


Volume 1, Recommendation 3:

“The main emphasis on economic development should be on education, vocational training and
techniques of mobility to enable Indians to take employment in wage and salaried jobs. Development
of locally available resources should be viewed as playing a secondary role…” [Emphasis Added]

211 Altman, J. C. Alleviating poverty in remote Indigenous Australia: The role of the hybrid economy.

212 (2018) Consultation and Engagement at Indigenous and Northern Affairs Canada, Indigenous and


“A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be
held by individual aboriginal persons; it is a collective right to land held by all members of an
aboriginal nation. Decisions with respect to that land are also made by that community. This is another
feature of aboriginal title which is sui generis and distinguishes it from normal property interests.”
[Emphasis Added]

214 Dene Tha’ First Nation v. British Columbia (Minister of Environment), [2006] FC 1354, 2008 FCA 20, at

104. “The Court also held that a public forum process is not a substitute for formal consultation. That
right to consultation takes priority over the rights of other users.” [Emphasis Added]

115. “Public consultation processes cannot be sufficient proxies for Aboriginal Consultation
responsibilities. As such, the Crown has clearly not fulfilled the content of its duty to consult.”
[Emphasis Added]

215 (2016) Gray, B., Building Relationships and Advancing Reconciliation through Meaningful Consultation:


http://caid.ca/CoDevNewFisRel2017.pdf

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220 Personal Note:
An average northern remote First Nation has an annual budget of $2-4 million depending on the size of the community [personal experience]. Forty percent of the 2016-17 Ontario mining royalties and taxes ($57 million x 0.40 = $22.8 million or 0.016 percent of Ontario total revenue in 2016-17) is available to be shared but only 44% of the province’s active mines are located in the area covered by the agreement ($22.8 Million x .44 = $10 million or 0.0071 percent of Ontario total revenue for 2016-17). The translates to ($10 million/41 = $244,000) $244,000 for each community or 6.1 to 12 percent of each community’s budget in 2016-17. Current funding levels in remote First Nations are know to be at poverty level, so 6 to 12 percent of poverty level budgets reflects about 3 to 6 percent of needed community budgets. Calculated dollar amounts represent estimates only.


“… the federal government took for itself the power to mould, unilaterally, every aspect of life on reserves and to create whatever infrastructure it deemed necessary to achieve the desired end – assimilation through enfranchisement and, as a consequence, the eventual disappearance of Indians as distinct peoples.” [Emphasis Added]


“… that concepts of development, whether for the individual or the community, could be defined by non-Aboriginal values alone. This assumption held whether progress was seen as Aboriginal people being civilized and assimilated or, in later times, as resource development and environmental exploitation.” [Emphasis Added]


Volume 1, Recommendation 22:

“Community development should be viewed as playing a distinctly secondary role for most Northern and isolated, small communities in relation to the more pressing needs for greater capital and technical aid and special training facilities.” [Emphasis Added]


“WHEREAS it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such Individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:” [Emphasis Added]


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16. Every such Indian shall, before the issue of the letters patent mentioned in the thirteenth section of this Act, declare to the Superintendent General of Indian Affairs, the name and surname by which he wishes to be enfranchised and thereafter known, and on his receiving such letters patent, in such name and surname, he shall be held to be also enfranchised, and he shall thereafter be known by such name and surname, and his wife and minor unmarried children, shall be held to be enfranchised; and from the date of such letters patent, the provisions of any Act or law making any distinction between the legal rights and liabilities of Indians and those of Her Majesty's other subjects shall cease to apply to any Indian, his wife or minor children as aforesaid, so declared to be enfranchised, who shall no longer be deemed Indians within the meaning of the laws relating to Indians, except in so far as their right to participate in the annuities and interest money and rents, of the tribe, band, or body of Indians to which they belonged is concerned; except that the twelfth, thirteenth, and fourteenth sections of the Act thirty-first Victoria, chapter forty-two, and the eleventh section of this Act, shall apply to such Indian, his wife and children. [Emphasis Added]
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was overstated, because students who dropped out in grades 9, 10, and 11 were excluded from the Department’s calculation. Using data only from a student’s final year of high school is inconsistent with how most provincial governments and the Council of Ministers of Education calculate graduation rates. For example, Manitoba divides the total number of graduates by the total number of students who were enrolled in Grade 9 four years earlier.

5.95 Using departmental data from the 2011–12 to the 2015–16 fiscal years, we calculated a graduation or completion rate that accounted for all students who dropped out in grades 9, 10, and 11 (Exhibit 5.4). We found that these rates were 10 to 29 percentage points lower than those reported by the Department. This means that the Department’s reported data showed, on average, that about one in two (46%) First Nations students graduated. However, our calculations showed that, on average, only about one in four (24%) students who started Grade 9 actually completed high school within 4 years. In our view, anyone relying on departmental information would not be fully informed. For example, the Department reported that graduation rates between the 2014–15 and 2015–16 fiscal years had improved—while we found that they had worsened.

5.97 Another example of inaccurate reporting was how the Department reported on the University and College Entrance Preparation Program results. In its 2014–15 Departmental Performance Report, the Department reported that, in the 2011–12 fiscal year, 1,017 students were in transition from a University and College Entrance Preparation Program to a post-secondary institution. We found, and the Department confirmed, that this was a mischaracterization of results. In fact, the number reported was simply the number of students funded, not the number of students accepted into post-secondary institutions.

5.99 We concluded that Indigenous Services Canada did not satisfactorily measure or report on Canada’s progress in closing the socio-economic gaps between on-reserve First Nations people and other Canadians. We also concluded that the Department’s use of data to improve education programs was inadequate.” [Emphasis Added]
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reserves, non-Aboriginal Canadians make up a much smaller 9% of the working population. However, they make a shocking 88% more than their First Nation colleagues. The data clearly shows that non-Aboriginal Canadians make more than their Aboriginal counterparts whether working on reserve, off reserve, or in urban, rural or remote communities.” [Emphasis Added]


“First Nations require drastic action in order to close the gaps and address increasing disparities. Relative incomes for this segment of the population have essentially stagnated since 2000, and the gap in labour force participation increased by almost 4 percentage points since 2006. The First Nation population is growing, but nothing else is growing in terms of capital, training, infrastructure, housing, etc. which brings on a whole set of additional problems.” [Emphasis Added]


103 “I agree with the NCC’s general premise that UNDRIP may be used to inform the interpretation of domestic law. As Justice L’Heureux Dubé stated in Baker, values reflected in international instruments, while not having the force of law, may be used to inform the contextual approach to statutory interpretation and judicial review (at paras 70-71). In Simon, Justice Scott, then of this Court, similarly concluded that while the Court will favour interpretations of the law embodying UNDRIP’s values, the instrument does not create substantive rights. When interpreting Canadian law there is a rebuttable presumption that Canadian legislation is enacted in conformity to Canada’s international obligations. Consequently, when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured.” [Emphasis Added]

104 “That said, in Hupacasath, Chief Justice Crampton of this Court stated that the question of whether the alleged duty to consult is owed must be determined solely by application of the test set out in Haida and Rio Tinto. I understand this to mean that UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult, which would include both whether the duty to consult is owed, and, the content of that duty.” [Emphasis Added]


1.2 “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;” [Emphasis Added]
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55 “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:”

a. Higher standards of living, full employment, and conditions of economic and social progress and development;

b. Solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and,

c. Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” [Emphasis Added]


2. "All 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.” [Emphasis Added]


Article 1:

1. “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.” [Emphasis Added]


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1. “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.” [Emphasis Added]

3. “The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.” [Emphasis Added]


1. “Solemnly proclaims the following principles:

… The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

a. To promote friendly relations and co-operation among States; and
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b. To bring a speedy end to colonialism, having due regard to the freely expressed will of
the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and
exploitation constitutes a violation of the principle, as well as a denial of fundamental human
rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for
and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration
with an independent State or the emergence into any other political status freely determined
by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred
to above in the elaboration of the present principle of their right to self-determination and
freedom and independence. In their actions against, and resistance to, such forcible action in
pursuit of the exercise of their right to self-determination, such peoples are entitled to seek
and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a
status separate and distinct from the territory of the State administering it; and such separate
and distinct status under the Charter shall exist until the people of the colony or Non-Self-
Governing Territory have exercised their right of self-determination in accordance with the
Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any
action which would dismember or impair, totally or in part, the territorial integrity or political
unity of sovereign and independent States conducting themselves in compliance with the
principle of equal rights and self-determination of peoples as described above and thus
possessed of a government representing the whole people belonging to the territory without
distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the
national unity and territorial integrity of any other State or country.” [Emphasis Added]


6. “The interest in the application of this principle to indigenous peoples follows from the similarity of their circumstances to the situation of the peoples to whom the principle was first applied. The principle of permanent sovereignty over natural resources in modern law arose from the struggle of colonized peoples to achieve political and economic self-determination after the Second World War. The principle is this: Peoples and nations must have the authority to manage and control their natural resources and in doing so to enjoy the benefits of their development and conservation. Since the early 1950s, the principle has been advocated as a means of securing for peoples emerging from colonial rule the economic benefits derived from the natural resources within their territories and to give newly independent States the legal authority to combat and redress the
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infringement of their economic sovereignty arising from oppressive and inequitable contracts and other arrangements orchestrated by other States and foreign companies. The principle was and continues to be an essential precondition to a people's realization of its right of self-determination and its right to development." [Emphasis Added]

8. “As a result, it has become clear that meaningful political and economic self-determination of indigenous peoples will never be possible without indigenous peoples’ having the legal authority to exercise control over their lands and territories. Moreover, these exchanges have led to a growing recognition that an appropriate balance can be reached between the interests of States and the interests of indigenous peoples in the promotion and protection of their rights to self-determination, to their lands, territories and resources, and to economic development.” [Emphasis Added]

10. “While the principle originally arose as merely a political claim by newly independent States and colonized peoples attempting to take control over their resources, and with it their economic and political destinies, in 1966 permanent sovereignty over natural resources became a general principle of international law when it was included in common article 1 of both International Covenants on Human Rights. Common article 1 provides in pertinent part:

“1. 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.

“2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”” [Emphasis Added]

17. “There is a growing and positive trend in international law and practice to extend the concept and principle of self-determination to peoples and groups within existing States. While understood to no longer include a right to secession or independence (except for a few situations or under certain exceptional conditions), nowadays the right to self-determination includes a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy and self-governance. In order to be meaningful, this modern concept of self-determination must logically and legally carry with it the essential right of permanent sovereignty over natural resources. The considerations that lie behind this observation must now be examined.” [Emphasis Added]

30. “Thus, we may conclude that the term “sovereignty” may be used in reference to indigenous peoples without in the least diminishing or contradicting the “sovereignty” of the State. The well-established use of the term in many areas of the world rules out any such implication.” [Emphasis Added]

32. “With an understanding of how the concept of sovereignty is applied to indigenous peoples, it becomes further apparent that, when examining their right of self-determination, the principle of permanent sovereignty over natural resources should also apply to indigenous peoples. There are a number of reasons for this. They include the following:

(a) Indigenous peoples are colonized peoples in the economic, political and historical sense;
(b) Indigenous peoples suffer from unfair and unequal economic arrangements typically suffered by other colonized peoples;
(c) The principle of permanent sovereignty over natural resources is necessary to level the economic and political playing field and to provide protection against unfair and oppressive economic arrangements;
(d) Indigenous peoples have a right to development and actively to participate in the realization of this right; sovereignty over their natural resources is an essential prerequisite for this; and
(e) The natural resources originally belonged to the indigenous peoples concerned and were not, in most situations, freely and fairly given up.” [Emphasis Added]

39. “To recapitulate, the developments during the past two decades in international law and human rights norms in particular demonstrate that there now exists a developed legal principle that
indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories. It remains to state if possible the content and scope of this right as well as its possible limitations.”

40. “Indigenous peoples’ permanent sovereignty over natural resources might properly be described as a collective right by virtue of which the State is obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources.” [Emphasis Added]

43. “There is not such agreement concerning subsurface resources despite the fact that several domestic and international cases have recognized such a right. Indeed, as noted above, in many countries, subsurface resources are declared by law to be the property of the State. Such legal regimes have a distinct and extremely adverse impact on indigenous peoples, because they purport to unilaterally deprive the indigenous peoples of the subsurface resources that they owned prior to colonial occupation and the creation of the present State. Other property owners in the State never owned such resources and thus were never deprived of them. Thus, the system of State ownership of subsurface resources is distinctly discriminatory in its operation as regards indigenous peoples. The result of these legal regimes is to transfer ownership of indigenous peoples’ resources to the State itself. Of course, in some situations, the ownership of the resources in question was transferred freely and lawfully by the indigenous people who held it. These situations do not concern us here. However, as a general matter it is clear that indigenous peoples were not participants in the process of adopting State constitutions and cannot be said to have consented to the transfer of their subsurface resources to the State. The exclusion of indigenous peoples from constitution-making has been noted by this Special Rapporteur in a previous work.” [Emphasis Added]

48. “Are there any qualifications or limitations on this right? Few if any rights are absolute. Limitations, if any, on this right of indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the State. For example, article 4 of the International Covenant on Civil and Political Rights provides for limitations on some rights only “in time of public emergency which threatens the life of the nation and which is officially proclaimed”. Few if any limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental of human rights: the rights to life, food, and shelter, the right to self-determination, and the right to exist as a people. The principal question is whether under any circumstances a State should exercise the State’s powers of eminent domain to take natural resources from an indigenous people for public use while providing fair and just compensation. Indigenous peoples’ representatives have argued in the working group on the draft United Nations declaration of the Commission on Human Rights that States should never compulsorily take indigenous lands or resources even with payment of compensation. States already have taken far too much of indigenous lands and resources, and, it is argued, States rarely or never have a truly urgent or compelling need to take indigenous lands or resources. States have not yet provided comments or suggestions for this paper that relate to this critical issue. As a result it may be premature to reach a conclusion on the question of States’ authority to compulsorily take indigenous resources with fair and just compensation.” [Emphasis Added]


“Based on an analysis of Deskaheh’s strategic interventions in Geneva, it is apparent that five major tactics were used to obstruct Deskaheh’s pursuit of self-determination. They included the following:
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1. The United Kingdom used major-power intervention and procedural appeals to block the Haudenosaunee claim from ever reaching the League of Nations General Assembly.

2. Canada claimed that this was not a global issue but “entirely of domestic concern.”

3. Canada asserted that this was not a matter of group/collective rights but a matter between “the Canadian Government and individuals owing it allegiance.”

4. Canada claimed that Haudenosaunee claims were not legitimate but were merely “calculated to embarrass this Government.”

5. Finally, Canada contended that Six Nations were not “an organized and self-governing people so as to form a political unit apart from Canada” but that they were integrated into the Canadian state as citizens.”


“Right of self-determination”

6.1 “The Government of Canada submits that the communication, as it pertains to the right of self-determination, is inadmissible for two reasons. First, the right of self-determination applies to a "people" and it is the position of the Government of Canada that the Lubicon Lake Band is not a people within the meaning of article 1 of the Covenant. If therefore submits that the communication is incompatible with the provisions of the Covenant and, as such, should be found inadmissible under article 3 of the Protocol. Secondly, communications under the Optional Protocol can only be made by individuals and must relate to the breach of a right conferred on individuals. The present communication, the State party argues, relates to a collective right and the author therefore lacks standing to bring a communication pursuant to articles I and 2 of the Optional Protocol.”

6.2 “As to the argument that the Lubicon Lake Band does not constitute a people for the purposes of article I of the Covenant and it therefore is not entitled to assert under the Protocol the right of self-determination, the Government of Canada points out that the Lubicon Lake Band comprises only one of 582 Indian bands in Canada and a small portion of a larger group of Cree Indians residing in northern Alberta. It is therefore the position of the Government of Canada that the Lubicon Lake Indians are not a "people" within the meaning of article 1 of the Covenant.”

7. “In a detailed reply, dated 8 July 1985, to the State party's submission, the author summarized his arguments as follows. The Government of Canada offers three principal allegations in its response. It alleges, first, that the Lubicon Lake Band has not exhausted domestic remedies. However, the Band has, in fact, exhausted these remedies to the extent that they offer any meaningful redress of its claims concerning the destruction of its means of livelihood. Secondly, the Government of Canada alleges that the concept of self-determination is not applicable to the Lubicon Lake Band. The Lubicon Lake Band is an indigenous people who have maintained their traditional economy and way of life and have occupied their traditional territory since time immemorial. At a minimum, the concept of self-determination should be held to be applicable to these people as it concerns the right of a people to their means of subsistence. Finally, the Government of Canada makes allegations concerning the identity and status of the communicant. The "communicant" is identified in the Band's original communication. The "victims" are the members of the Lubicon Lake Band, who are represented by their unanimously elected leader, Chief Bernard Ominayak.”

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13. “Despite these ongoing concerns, the right of permanent sovereignty over natural resources was recognized because it was understood early on that without it, the right of self-determination would be meaningless. In many ways, this point was confirmed by a 1955 report of the Secretary-General. In describing the debates surrounding the drafting of common article 1, he noted that while delegates made reference to the concerns stated above, it was also acknowledged that “the right of self-determination certainly included the simple and elementary principle that a nation or people should be master of its own natural wealth or resource”, and therefore the proposed language “was not intended to frighten off foreign investment by a threat of expropriation or confiscation; it was intended rather to warn against such foreign exploitation as might result in depriving the local population of its own means of subsistence” [Emphasis Added]


1. “The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”


Preamble

“Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,” [Emphasis Added]

“Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,” [Emphasis Added]

Article 8

2. “States shall provide effective mechanisms for prevention of, and redress for:

(b) Any action which has the aim or effect of dispossession of them of their lands, territories or resources.” [Emphasis Added]

Article 25

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.” [Emphasis Added]

Article 26

1. “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.” [Emphasis Added]

Article 27

“States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of
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indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.” [Emphasis Added]

Article 28
1. “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.” [Emphasis Added]

Article 29
1. “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programs for indigenous peoples for such conservation and protection, without discrimination.” [Emphasis Added]

Article 32
1. “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

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

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.” [Emphasis Added]

261 Personal Note:

Indigenous Peoples can be third party owners of land. Further, Land Claim Agreements have several classes of land and Treaty rights for those classes. One of those classes gives title to land and resource rights for 2-6% of the claimed traditional territory. However, this is not enough land and resources to sustain self-determination.


“… the dominance of the legal approach to self-determination has, over time, helped produce of a class of Aboriginal ‘citizens’ whose rights and identities have become defined solely in relation to the colonial state and its legal apparatus. Similarly, strategies that have sought self-determination via mainstream economic development have facilitated the creation of a new elite of Aboriginal capitalists whose thirst for profit has come to outweigh their ancestral obligations to the land and to others. And land claims processes, which are couched almost exclusively in the language of property, are now threatening to produce a new breed of Aboriginal property owner, whose territories, and thus whose very identities, risk becoming subject to expropriation and alienation.” [Emphasis Added]


“Over the past thirty years, indigenous self-determination claims have been framed by states and global organizations in four distinct ways that jeopardize the futures of indigenous communities.

First, the rights-based discourse has resulted in the compartmentalization of indigenous powers of self-determination by separating questions of homelands and natural resources from those of political/legal...
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recognition of a limited indigenous autonomy within the existing framework of the host state(s)...

Second, in several cases, the rights discourse has led states to deny the identities or very existence of indigenous peoples residing within their borders (or to reframe them as minority populations or other designations that carry less weight or accountability under international law)...

Third, the framing of rights as political/legal entitlements has deemphasized the cultural responsibilities and relationships that indigenous peoples have with their families and the natural world (homelands, plant life, animal life, etc.) that are critical for their well-being and the well-being of future generations...

Finally, the rights discourse has limited the applicability of decolonization and restoration frameworks for indigenous peoples by establishing ad hoc restrictions.” [Emphasis Added]


“Sovereignty precepts form a backdrop and potentially limiting factor for the elaboration of self-determination remedies within the international system. The limitations of the state-centered doctrine of sovereignty are essentially twofold. First, the doctrine limits the capacity of the international system to regulate matters within the spheres of authority asserted by states recognized by the international community. This limitation upon international competency is reflected in the U.N. Charter's admonition against intervention "in matters essentially within the domestic jurisdiction of any state. Second, sovereignty upholds a substantive preference for the status quo of political ordering through its corollaries protective of state territorial integrity and political unity. Where there is a trampling of self-determination, however, the presumption in favour of non-intervention, territorial integrity, or political unity of existing states may be offset to the extent required by an appropriate self-determination remedy.” [Emphasis Added]


“However, this does not mean that external self-determination should not be a right accorded to Indigenous peoples in appropriate circumstances, nor does it mean that the present author does not support such a right. Instead, as others have noted, the right of external self- determination may be a crucial component for some Indigenous groups, particularly those suffering from wrongful domination.
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oppression, and colonialism.” [Emphasis Added]